Strikes

Primary, secondary or sympathy?

Anton Roskam *and* ***Peter Mahlangu*** *discuss the labels primary, secondary and sympathy strikes and their impact on interpreting the Labour Relations Act*

Labels are always dangerous. They are especially so if they are derived from loose industrial relations talk and used to interpret the Labour Relations Act (LRA). For example, although the broad policy distinction between 'disputes of right' and 'disputes of interest' informs the way in which the right to strike is limited in section 65 of the LRA, the Act does not use these words anywhere.

Another example is the different kinds of strikes. In loose industrial relations language there are four kinds of strikes: primary strikes, sympathy strikes, secondary strikes and socioeconomic strikes.

A 'primary' strike is one in which the strikers have a material interest in the outcome of the dispute. They are, for example, seeking a change in their own terms and conditions of employment. A 'sympathy' strike is one in which the strikers are striking in support of their colleagues' demands. They are, for example, not striking to increase their own wages but to put pressure on the

employer to increase the wages of their fellow colleagues. A 'secondary' strike is a particular kind of sympathy strike. Here strikers strike in support of the demands of their colleagues employed by a different employer.

The LRA refers only to the words secondary strike in section 66. (Section 77 deals with protest action in relation to socioeconomic issues, which is

essentially a socioeconomic strike. We will not deal with this strike here.) Therefore, although the terms primary, sympathy and secondary are popular in the industrial relations community, the LRA in large part avoids mentioning them.

Are these labels useful in interpreting the LRA? We believe not. In fact they only serve to confuse the process of interpreting the LRA. Three cases, *Afrox Ltd v SACWU & Others* (1) (1997) 18 *ILJ* 399 (LC), *CWIU v Plascon Decorative Inland* (Pty) Ltd (1999) 20 *ILJ* 321 (LAC) and *SACTWU v Free State & Northern Cape Clothing Manufacturers' Association* [2002] 1 *BLLR* 27 (LAC), demonstrate this.

In our view, the confusion in interpreting the LRA stems from crude attempts to align the industrial relations labels with the various sections of the LRA. In terms of this approach section 64 refers to primary strikes, section 66 to secondary strikes and section 77 to socioeconomic strikes, but no section refers to sympathy strikes. Therefore, it is argued, one should read implicit limitations into the right to strike.

The *Afrox* case

In the *Afrox* case the employees at Afrox's Pretoria West branch embarked on a protected strike relating to a change to staggered shifts. The union called on its members employed by Afrox at its other branches to go on what it labelled a 'secondary' strike in support of their colleagues' demands at the Pretoria West branch. Afrox, arguing that the proposed 'secondary' strike was unprotected since there was only one employer involved, approached the Labour Court for an interdict.

The court held that the strike was not a secondary strike as contemplated in section 66 of the LRA because there was only one employer. However, the court also held that the mere fact that the union labelled the strike 'secondary' had no legal effect on its true character. In the court's view, the LRA did not require that before employees can go on a protected strike, they should have been the ones who referred the dispute to conciliation. All that section 64 required was that the dispute must have been referred to conciliation, which the Pretoria branch employees had done. Accordingly, the strike in the other branches of Afrox was a protected 'primary' strike in terms of section 64 of the LRA, and the interdict was declined.

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Employees in the other branches would not have been affected or even benefited by a change to the shift patterns in the Pretoria branch. Clearly, in common industrial relations language, the strikers at the other branches were involved in a sympathy strike. Their strike was, however, protected as it complied with section 64 of the LRA.

The *Plascon Decorative* case

In this case Plascon's employees within the bargaining unit embarked on a protected strike after Plascon refused to accede to their demands relating to wages and other terms and conditions of employment. When the strike commenced, employees outside the bargaining unit also downed tools. Plascon responded by issuing notices of disciplinary action against the non-bargaining unit employees on the basis that, since none of them was a party to the dispute or had any material interest in its outcome, they were guilty of misconduct.

The union approached the Labour Court for an urgent interdict to restrain Plascon from disciplining its members outside the bargaining unit and a declarator to the effect that the strike by all its members employed by Plascon was protected. The matter was heard by the Labour Appeal Court (LAC) sitting as a court of first instance. In its founding papers, the union contended that all its members employed by Plascon had the right to embark on strike action in support of the demands of their colleagues in the bargaining unit.

In the court's view, the issue was whether the right to strike as embodied in the LRA contained the limitation for which Plascon contended, namely that only those employees of an employer who are directly affected by the strike demand may embark on a protected strike. The court started, by endorsing the view expressed by Kentridge AJ in *S v Zuma & Others* 1995 (2) SA 642 (CC), that 'constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them'.

After analysing the relationship between sections 64 and 66, the court approved the *Afrox* decision and concluded that employees employed by the same employer who are not directly affected by the strike demand must, if they are capable of striking at all, fall within the terms of section 64. Any other approach, the court said, would result in 'the most telling anomaly…that no statutory protection would be afforded employees who strike in support of demands by co-employees, while secondary strikers supporting a demand by employees employed by an entirely different employer may receive

such protection'. (p 328-329) The court declared that the strike embarked upon by all employees employed by Plascon complied with the provisions of Chapter IV of the Act.

Again, using the common industrial relations labels, the workers outside the bargaining unit who were striking in support of their colleagues' demands, were involved in a sympathy strike. But their strike was declared protected in terms of section 64 of the LRA.

The *Sactwu* case

When one would have thought that the issue had been finally laid to rest, it once again reared its ugly head. In the Sactwu case a company called Jaff & Co has a manufacturing facility in Kimberley, which falls under the jurisdiction of the Free State and Northern Cape Bargaining Council. Its head office in Johannesburg falls within the jurisdiction of the Northern Areas (Gauteng) Bargaining Council. Another company, Newclo (Pty) Ltd is in a similar position with its manufacturing plant being in the Free State and its head office in Johannesburg.

The five bargaining councils in the clothing industry negotiate terms and conditions of employment through an informal National Bargaining Forum. Once agreement is reached at this level, all the five regional councils adopt it as their main agreement. Agreement could not be reached in the 2001-2002 negotiations, and the five councils followed their dispute resolution procedures. A stalemate remained in the Northern Areas, which covers Johannesburg, and the employees, including those employed at the head offices of both Newclo and Jaff & Co, embarked on a protected strike.

The union sent a notice of 'secondary' strike action to Newclo and Jaff & Co in Kimberley and Kroonstad respectively in support of their members' demands in the Northern Areas. The two companies then sought an urgent interdict from the labour court on the basis that the intended strike by employees in Kimberley and Kroonstad would be unprotected.

Acting Judge Jammy granted the interdict. According to him, the intended strike was not a secondary strike since only one employer was involved. Neither was it a primary strike, because there was no dispute in Kimberley and Kroonstad. He held that in any event, the employees were obliged to follow the strike procedures contained in the constitution of their bargaining council (ie the Free State and Northern Cape) and this had not been done.

On an urgent appeal before the LAC, the decision of the Labour Court was reversed. Zondo JP delivered the judgement of the LAC. The other judges agreed with his views. The LAC held that 'the dispute which the intended strike sought to bring to an end had already been referred to the bargaining council with the requisite jurisdiction for conciliation and such attempts had failed. After all the statutory requirements had been complied with, a protected strike had been embarked upon. The dispute could not be referred to conciliation for the second time'. The court also said that the fact that the employees belonged to a different bargaining council was immaterial.

The *Sactwu* decision affirmed both the *Afrox* and *Plascon* Decorative decisions by clearly spelling out that what matters is not whether all the strikers are directly affected by the strike demand or whether they have any material interest in its outcome, but whether the provisions of the LRA have been complied with.

As Halton Cheadle notes in *Current Labour Law* 2001, the Labour Court's confusion in the *Sactwu* case arises from the use of the terminology of primary and secondary strikes, which blinded the court from an analysis of the provisions of the LRA.

The LRA distinguishes between two kinds of strikes – section 64 and section 66 strikes. It therefore does not assist to ask whether the strike is in support of a primary strike or not. The real question is whether the strike is in compliance with the LRA.

Section 64(1) provides every employee with the right to strike if the dispute with that employer or its association has been referred to the CCMA or the bargaining council with jurisdiction and the required notice has been given. It does not matter whether the employees are in the same bargaining unit or not, part of the same bargaining council, whether they will or will not benefit from any settlement of the strike. All that matters is whether the requirements of section 64 have been met. (See Halton Cheadle, in *Current Labour Law* 2001 at p 77.)

If one must label the strike primary or sympathy, then it is very important to note that section 64 is not limited to primary strikes, but also regulates sympathy strikes. It may also regulate certain kinds of secondary strikes that are not covered by section 66 of the LRA.

The *Sactwu* decision will go a long way in entrenching the right of workers to strike, regardless of their interest in the strike dispute. As the LAC said in *Plascon Decorative*, '… there is no justification for importing into LRA, without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express.' (at p 329)

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