Furthermore, when considering the application lodged in terms of section 7(6) of the RCMA, the court may allow further amendments to the terms of the proposed contract or grant such order subject to any condition it may deem just (s 7(7)(b)(i), (ii) RCMA). The court may also "refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract" (s 7(7)(b)(iii) RCMA). Where the application is refused, the husband cannot contract a further valid customary marriage. A further customary marriage contracted without compliance with these provisions is null and void *ab initio*.

7 Conclusion

The judgment in *MM v MN* is a wake-up call to all husbands married by customary rites who wish to contract more than one marriage. It also serves as an eye-opener to all would-be second, third, etcetera, prospective wives. Such prospective wives should ensure that they are aware or made aware of the marital status of their prospective husbands. The prospective husbands should also be aware that although they may have the capacity to contract further customary marriages, their capacity is limited. Something more than the normal requirements for the validity of a customary marriage has to be complied with, namely, the lodging of an application and granting of the order in terms of section 7(6) of the RCMA. Without this, the resultant customary marriage is null and void irrespective of the fact that the parties thereto might have lived together as "husband and wife" for a number of years.

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Longfellow v BOE Trust Ltd NO (13591/2008) [2010] ZAWCHC 117 *Mabika v Mabika* [2011] ZAGPJHC 109 *Taylor v Taylor* [2011] ZAECPEHC 48

Requirements in terms of section 2(3) of the Wills Act 7 of 1953: Some comments on judgments in recent case law

1 Introduction

Every year, section 2(3) of the Wills Act produces its eagerly anticipated share of applications for condonation of non-compliance with the formalities for a valid will. Section 2(3) reads as follows:

> If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).

For the court to condone a will that is formally defective, three requirements must be satisfied: (a) There must be a document; (b) that has been drafted or executed by a person who has died since the drafting or execution thereof; (c) with the intention that the document must be that person's will. Despite valuable guidelines presented by the Supreme Court of Appeal (*Bekker v Naude* 2003 5 SA 173 (SCA); *Van Wetten v Bosch* 2004 1 SA 348 (SCA); *De Reszke v Maras* 2006 2 SA 277 (SCA); *Smith v Parsons* [2010] 4 All SA 74 (SCA); *Van der Merwe v Meester van die Hooggeregshof* [2010] ZASCA 99), recent case law indicates that there is uncertainty in the application of section 2(3), especially with regard to the "intention" requirement. In three recent cases, the courts addressed the question whether (three) different kinds of documents were intended by the respective deceased to be their last wills. The case of *Longfellow,* involved a so-called "CNA precedent" (completed by someone other than the deceased); *Mabika,* pertained to an "Application (form)" for the drafting of a will, while *Taylor,* dealt with a document referred to as a "wish list". This contribution discusses these and other aspects pertaining to section 2(3).

2 *Longfellow v BOE Trust Ltd*

2 1 Facts

The applicant (second husband) married the deceased (wife) in 1995. No children were born from the marriage. However, prior to her marriage to the applicant, the deceased was married to the second respondent (first husband). They had two children (parr 1-5). In 1989, while married to her first husband, the deceased executed a will in which she left her entire estate to him. The deceased was diagnosed with brain cancer in April 2007. She underwent surgery, during which surgeons removed most of the tumour, but in August 2007, the deceased suffered a stroke and was again diagnosed with cancer of the brain. The testatrix was discharged and sent home, since there was nothing that could be done for her. The applicant realised she was dying and set in motion the circumstances that led to the drafting of the CNA precedent. He started to enquire what to do to have a will drawn up. Attempts to get help from Standard Bank failed. In his affidavit the applicant stated (par 10):

> I then decided to buy a will from CNA. The same day I bought one. I said to the Testator that I had a will. At the time, it was blank. I said that I was going to fill it in to reflect that I would inherit the state, that I would be the executor, that the Old Mutual policy would be shared equally by the Third and Fourth Respondents and that she would revoke all previous wills. The Testator agreed to this. The testator could not write ... She stated that I should read it [the will] to her. I did so and she confirmed it was fine ...

The applicant had arranged for employees of Standard Bank to witness the draft document. On 7 September 2007, two employees of Standard Bank arrived at the couple's home in order to witness the draft document as arranged with the applicant. These employees informed the applicant that he would not be able to inherit in terms of a will that he had drafted and left without formalising the draft document. The deceased died on 21 September 2007 without signing the draft document. The applicant discovered the 1989 will, referred to above, amongst the deceased's belongings. As mentioned, the second respondent was the sole heir in terms of the 1989 will (parr 6-9).

Two persons, namely the deceased's nurse (Wilks) and the deceased's colleague (Nel), were present when the applicant completed the draft document. Their version(s) of the conversation(s) between applicant and respondent differ slightly from each other and that of the applicant (For a discussion of these differences see parr 11-18). Furthermore, the applicant mentioned that it was the deceased's wish for him to give a 25% share to each of her children, should the house be sold upon the death of applicant (par 19). This was not reflected in the draft document. The deceased also requested the applicant to look after her daughter (the 3rd respondent). He refused outright, because of severe tension and an apparent bad relationship between them. He was also only willing to look after her grandson, provided he was not accompanied by his mother. The applicant sought an order in terms of section 2(3), as well as section 4A(1), of the Wills Act (that he be declared competent to receive benefits despite the fact that he drafted the document).

2 2 Judgment

The court was not, on a balance of probabilities, satisfied that the deceased intended the document to be her last will. This was so in view of the circumstances that led the applicant to start his enquiries, in order to ascertain how he could have the deceased's will drawn up. He never stated that the deceased requested him to make any enquiry (par 24). Due to his poor relationship with third respondent (deceased's daughter), the court could not accept that the deceased would expect the applicant, after he had inherited her half share of immovable property, to leave a 25% share thereof to the third respondent. The court concluded as follows (parr 28-29):

> The draft document reflects, in my view, the applicant's will and not the deceased's. He says as much in his founding papers.
>
> '*I* then realised that the Testator was dying, … *I* started to enquire … *I* … decided to buy a will from CNA… *I* said *I* was going to fill it in to reflect that *I* would inherit the estate, …' (Own emphasis)

2 3 Discussion

2 3 1 "Drafted or executed by a person who has died since the drafting or execution thereof" (Second Requirement in Terms of Section 2(3))

The second requirement in section 2(3), besides there having to be a "document", is that the document should have been "drafted or executed by a person who has died since the drafting or execution thereof". Strangely enough, nothing is said in the judgment by the court about this requirement and whether it was met. The court only addressed the third requirement, namely, the intention for the document to be a will. In casu, the document was not drafted by the deceased. The CNA precedent of a will was filled in and completed by the applicant. In *Bekker v Naude* 2003 5 SA 173 (SCA), the Supreme Court of Appeal drew a distinction between a document that the testator "drafted" himself and one that he "had caused to be drafted" by someone else (in view of s 2A Wills Act). According to the court, there must have been a "personal" relationship between the testator (deceased) and the document, in the sense that he/she had drafted it personally (par 20). This interpretation, according to the court (par 16) provides and guarantees a degree of reliability, because it requires personal conduct by the deceased. It also reduces the chances of fraud and false statements, which the testator could not contest after his death. It was, however, *obiter* found that if a person *dictates* a document, it is as good as if a person has drafted the document personally (par 8). In *Longfellow*, the deceased did not personally write, type or dictate the content herself. The applicant completed the blank spaces. He told her he was going to fill it in to reflect that he would inherit the estate, that he would be the executor, that an Old Mutual Policy would be shared by the daughters and that she (testatrix) would revoke all previous wills. The document was read back to her and she agreed to its contents. This action can not be construed in a way to indicate that the deceased dictated her will to the drafter. The case could have been decided on this point alone, without debating the third "intention" requirement. Furthermore, reconciling oneself with a document and approving of its content, is not sufficient to comply with the requirement of "personal drafting" (*Bekker v Naude* 2003 5 SA 173 (SCA); contra earlier *Back v The Master* [1996] 2 ALL SA 161 (C)).

2 3 2 "Intended to be his/her will": Interaction Between the Intention to Make a Will (section 2(3)) , Mental Capacity to Make a Will (s 4) and Free Testamentary Expression

As mentioned above, the third requirement should have been addressed only once the first two requirements had been met. Let's, however, assume for a moment that personal drafting was not required by the courts. Courts (see *Harlow v Becker* 1998 4 SA 639 (D)) and authors (see Jamneck "Artikel 2(3) van die Wet op Testamente: 'n Praktiese probleem by litigasie 2008 *PER* 90) have indicated the importance of differentiating between the intention to make a will, to which section 2(3) refers (*Harlow* 645J) and the mental capacity to make a will in terms of section 4.

Section 2(3) requires that the person who has executed or drafted the document, must have intended it to be his/her will. However, in terms of both common law and the Wills Act, the mental capacity to make a valid will embraces more than a mere intention on the part of the testator for the document to be a will (*Harlow* 643F-G, 644A-C, 647B-C).

The onus rests on the party who seeks an order in terms of section 2(3), to satisfy the court that the person who drafted or executed the document intended it to be his will (*Harlow* 647C-D). On discharge of that duty, the party who contests the validity of a will, on the ground of the person who made it not having the requisite testamentary capacity, then bears the onus of proving the absence of such testamentary capacity. The same situation (sequence) applies, if it is alleged that the testator lacked the necessary free testamentary expression required (*Jamneck* 2008 *PER* 90). Any impairment of the testators' freedom of expression at the time of making a will may (also) result in the will being invalid. (In *Thirion v Die Meester* 2001 4 SA 1078 (T) the court had to devote attention to the interaction between an application in terms of section 2(3) and an application of the annulment of the will on the ground of undue influence.)

In *Longfellow,* one finds the interesting outcome that the court decided that the document reflected the applicant's (husband's) will and not that of the deceased and that she therefore did not intend it to be her will. Such a statement is normally associated with "undue influence", resulting in the impairment of the free testamentary expression of the testator. In the well-known case of *Spies v Smith* 1957 (1) SA 539 (A), undue influence (in testamentary context) was defined as:

> … it thus appears that a last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated by reason of their effect to the exercise of coercion or fraud to make a bequest which he would not otherwise have made and which therefore expresses another person's will rather than his own, in such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition ["wilsonderskuiwing"] and the will is thus not upheld.

With regard to *Longfellow* under discussion, one must guard against the possible impression that "undue influence", or a "displacement of intention", can form the basis for a finding that the intention requirement in section 2(3) was not met. The court could have decided that it was not satisfied, on a balance of probabilities, that she intended the document to be her will, due to the fact that the applicant refused to take care of the 3rd respondent and her son. Under those circumstances she would perhaps have changed her mind and left her share to her children. By doing that she would have ensured that the children were taken care of. In addition, she only passed away two weeks later. If she was adamant that the document should be her will, she could have obtained legal advice on how to have the document signed on her behalf. She had an earlier will (1989) and certainly realised that certain requirements needed to be complied with, including her signing the document. She never again discussed the "unsatisfactory position" that

she would probably die without a will, with either her husband, nurse, colleague or children. She probably realised that her first will of 1989 would be her last will and testament and that her first husband, who was the sole beneficiary, would see to it that her daughter and grandson were taken care of.

The difficulties that faced the court in *Longfellow* in deciding on the intention requirement (even though it was not even necessary) (ironically) illustrate precisely why the Supreme Court of Appeal in *Bekker,* stated that the requirement of "personal drafting" reduces the chances of fraud, false statements, the possibility that the document does not reflect the intention of the testator, or, for that matter, undue influence. This, to a large extent, indicates that, despite criticism, the Court in *Bekker*, was correct in insisting on personal drafting as a requirement for an order in terms of section 2(3).

2 3 3 "Undue influence"

The court, *ex abundanti cautela*, stated (par 29): "*Even if I am wrong*, in the circumstances of this matter, the applicant *unduly influenced* the deceased" (own emphasis).

The court, however, did not even refer to *Spies,* neither for the definition of undue influence, nor for the factors the courts generally consider in determining whether there was undue influence or not. For its statement above, the court gave the following reasons (par 29):

> (1) Wilks had administered morphine to the deceased because she was in so much pain; (2) the deceased knew she was terminally ill; (3) the applicant had already refused the request to look after the third respondent/grandson; and (4) the applicant indicated to the deceased that he 'was going to fill it in to reflect that [he] would inherit the estate'.

It is debatable whether these factors constitute a finding of undue influence. The couple were (seemingly) happily married for twelve years. The deceased acknowledged that the applicant had put "so much into their house". There were two witnesses present. Two weeks lapsed between the completion of the CNA precedent and the death of the deceased. The applicant did not insist on her signing the CNA precedent. He refused at the outset to take care of her daughter. He didn't make inheriting her share a precondition for taking care of the third respondent or her child. She (deceased) had ample opportunity to change her mind and to discuss it with the nurse/colleague, which she did not do. The mere fact that there was a special relationship (husband/wife) is not sufficient indication of undue influence. The applicant called in independent help in the form of Standard Bank. Only when they did not respond, did he buy a CNA precedent. To now suggest "undue influence" on the applicant's part, seems somewhat harsh, unfair (towards a seemingly loving husband) and inconsistent with what is normally regarded as constituting undue influence.

3 *Mabika v Mabika*

3 1 Facts

In *Mabika,* the applicants, *inter alia,* sought an order for certain documents *executed (s*ee discussion below) by the deceased to be declared her will for purposes of the Administration of Estates Act 66 of 1965. Secondly, they sought an order for the first respondent to forfeit his share of the house (the deceased and first respondent were married in community of property). For purposes of this discussion, one needs to provide a detailed exposition of the surrounding circumstances (background) and other facts in order to understand and analyse the judgment. (The court, inter alia, stated in par 15: "Under these circumstances it will be greatly unjust not to accept Annexure 'SM2' as the deceased's final will").

The deceased and the first respondent (the respondent) married in community of property on 15 October 1997. At the time, the first and the second applicants had already been born. The respondent is not their biological father, although he adopted them as his children, and allowed them to use his surname (par 1). During 1998, the deceased, through her employer, Metrorail, purchased immovable property over which a mortgage bond was registered in favour of ABSA Bank. The immovable property was registered in the names of the deceased and the respondent by virtue of their marriage in community of property. The deceased was liable for the monthly bond repayments which were deducted from her salary (par 2). The respondent was unemployed from 2006, which apparently led to the breakdown of his marriage relationship with the deceased. The respondent left the common home, pursuant to an assault perpetrated on the deceased and never returned. During December 2006, the deceased obtained an interim protection order in terms of section 5(2) of the Domestic Violence Act 116 of 1998 against the respondent. The respondent was interdicted from assaulting the deceased. The deceased was intent on dissolving the marriage, but was threatened with death by the respondent (par 3). During 2007, the deceased was hospitalised (for approximately one year), as a result of continuous assaults on her by the first respondent. She suffered from a brain tumour and bipolar depression. After the nursing staff had summoned the respondent and told him of the deceased's condition, he enquired from the hospital staff whether the deceased was not dead yet (par 4). The deceased was again hospitalised during November 2010. At all times of her hospitalisation, the respondent showed no interest in her health and well-being or that of the applicants. He did not visit the deceased in hospital and instead wished for her demise (par 5). He violated a maintenance order obtained by the deceased against him for her family and he stayed elsewhere with various girlfriends. In December 2010, he telephoned his son, the third applicant, and informed him that he had a new lover, to whom he was getting married. This was at a time when the deceased was terminally ill. The deceased, after the admission to hospital on 16 December 2010, remained hospitalised until her death on 24 January 2011.

Prior to her death, during September 2010, whilst not in hospital, the deceased approached her bankers, First National Bank (FNB), where she "executed" Annexure "SM2", an instruction to draft her will. The document, on an FNB logo, consists of some five pages. It is entitled, "Application for the Drafting of a Will". The deceased supplied all her personal details, financial position and marital status. Under the heading "Children" the deceased inserted the names of all four applicants. Under the column "Special Needs", the deceased wrote, "Miss Sindisiwe Mabika ID Number 850918 0837 08 2 will be the children's guardian if I pass away". Again under the heading, "Guardians", the deceased inserted the name of Miss Sindisiwe Mabika and her identity number. The deceased proceeded to appoint FNB Trust Services as trustees. On page 4 of Annexure "SM2", and under the heading "Terms and Conditions", the following printed words appear:

> First National Bank Trust Services and Firstrand Bank Holding Ltd (the 'Company') will endeavour to prepare the 'Last Will and Testament' compatible with the client's instructions as indicated on this application form.

Paragraph 1 under the "Terms and Conditions", stated that the application was completed, based on information provided by the client. Paragraph 5 thereof provided that: "The Will is only valid once the completed document has been signed in terms of s (2)(a)(i) of the Wills Act of 1953, as amended." The deceased inserted her full names and identity number and also signed the "Terms and Conditions" on page 4. On the last page, page 5, the deceased completed and signed a debit order in favour of FNB, in respect of the fee payable for the drafting of the will. The debit order, the amount, the bank and branch, the account holder and the date (1/9/2010), were completed by the deceased in her own handwriting. On a document entitled "Client Information", Annexure "SM4", the deceased completed the information therein required. At the end of the document, and in the handwriting of the deceased, appears the following note:

> If I pass away my child Miss Sindisiwe Mabika will arrange for my burial, I want the children to own the property and not to be sold as a family property. The other policies and investments to be shared equally 24 percent each.

The deceased was interviewed by FNB Financial Planner, Mr Mkatshwa, who attached his confirmatory affidavits to the founding papers. He confirmed that at the time of the interview, the deceased fully comprehended the nature and effect of her actions, was capable of understanding the nature and extent of her properties and liabilities, and was capable of forming the requisite intention of bequeathing each of the shares granted to the individual beneficiaries. After the interview, the arrangement with Mkatshwa was that the deceased would return to the bank to sign the will. However, in the meantime the deceased became sick, underwent chemotherapy, and was hospitalised (par 11). She apparently died before any draft "will" was drawn up by FNB in accordance with the instructions.

The legal question the court had to answer, was whether it was satisfied that Annexure "SM2" (strangely enough nothing is said about Annexure "SM4") executed by the deceased was intended to be her will (par 14). The court, *inter alia,* referred to the cases of *Ex parte Maurice* 1995 (2) SA 713 (C) and *Van Wetten v Bosch* 2004 (1) SA 348 (SCA). Both dealt with "instructions to draft a will", but under different surrounding circumstances. The court, especially, referred to *Van Wetten* (par 16) where the court (in *Van Wetten*) concluded as follows:

> In my view, however, the real question to be addressed at this stage is not what the document means, but whether the deceased intended it to be his will at all. That enquiry of necessity entails an examination of the document itself and also of the document in the context of the surrounding circumstances.

3 2 Judgment

The court (*in casu*) decided as follows (par 15):

(a) The deceased clearly intended the document to be her final will, but did not survive to sign it. This is so despite the fact that the document is styled 'Application for the Drafting of a Will'. It contained full personal details, which the deceased intended to appear in her will.

(b) The deceased and the respondent, due to his cruelty towards her, were estranged. They were on the verge of a divorce, but for her illness and eventual death. They had not lived together since 2006. The deceased clearly intended to disinherit the irresponsible and unemployed respondent from her estate. She took him to the maintenance court in order to compel him to comply with his fatherly responsibilities. She even obtained an interim protection order to put an end to the persistent assaults on her. She was also very afraid of the respondent. That is why she never ventured to mention the word 'divorce' to him. Under these circumstances, it will be greatly unjust not to accept Annexure 'SM2' as the deceased's final will, and the first respondent will unfairly benefit from her estate when it is clear that such was not her intention (par 15).

(c) The decision that the respondent should forfeit his share of the immovable property, although drastic in nature, was justified in the circumstances of this matter.

3 3 Discussion

3 3 1 "Intended to be his will"

One immediately wonders why the bank did not prepare a draft will in the period 1 September 2010, to the date of death on 24 January 2011 and arrange for formal execution by the deceased. There is also no indication whether the deceased made any enquiries in this regard during this period. The cases of *Maurice* and *Van Wetten,* involved letters by the testators containing instructions with regard to the devolution of their estates. In *Maurice,* the court found that the testator must have intended the (specific) disputed document itself to be his will. The court can thus not condone a document "which simply expressed the testator's wishes, for the distribution of his estate" as a will (par 15). (See also *Letsekga v The Master* 1995 4 SA 731 (W); *Anderson and Wagner v The*

Master 1996 3 SA 779 (C); *Smith v Parsons* [2010] ZASCA 39). In *Van Wetten,* the court accepted this principle laid down in *Maurice,* but found that the disputed document (also a letter) was indeed intended to be the testator's final will, based on the facts and surrounding circumstances (parr 16, 19). The mere fact that the document was in the form of a letter, did not mean that it could not be a will.

However, in the case of *Mabika*, the court, had to decide for the first time whether an "Application For the Drafting of a Will", (in accordance with which FNB would have prepared a "Last Will and Testament" compatible with the client's instructions) was intended to be a will (p 14 of Annexure "SM2"). Can this document, "SM2", be said to have been intended by the testator as her *final will*, or did she only intend it to be the *instructions* for drafting a final will? What is to be made of the earlier statement in *Ramlal v Ramdhani's Estate* 2002 (2) SA 643 (N), to the effect that testators are notoriously fickle and that the possibility always exists that their wishes may change in the interval between the giving of instructions and the final approval of what has been drafted? (646D-647F). Does the fact that it can be said to be "greatly unjust" – if Annexure "SM2" was not condoned – have any role to play? The question in terms of section 2(3) to be answered though, was whether the "instructions" were intended to be her *final will*.

In the ongoing debate whether "constitutional values enshrined in the Constitution and notions such as "fairness, justice and reasonableness" (imported in the notion of "public policy"), can be applied to contract law and possible other spheres of private law, the Supreme Court of Appeal recently in *Potgieter v Potgieter* [2011] ZASCA 181, confirmed the view of the court in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA). Although abstract values such as reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations (see also *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC)). In *Potgieter* the court also emphatically stated (par 34): "It follows, in my view, that the supposed principle of contract law perceived by the court a quo *cannot be extended to other parts of the [private] law*" (own emphasis).

The court in *Potgieter* (par 34) submitted that the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as "reasonable" and "fair", is essentially that it will give rise to intolerable legal uncertainty. Reasonable people, including judges, may often differ on what is "equitable" and "fair". The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. The criterion will thus no longer be the law, but the judge (*Preller v Jordaan* 1956 1 SA 483 (A) 500). Furthermore, with reference to Harms DP, in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 486 (SCA), the court in *Potgieter*, agreed that a constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary, or subject to value judgments, may be

destructive of the rule of law (par 36). Based on the discussion above, it is doubtful whether the court in *Mabika* could, based on the circumstances, find it to be "greatly unjust" not to accept the document as her last will, as well as the fact that her husband will now "unfairly" benefit, when it is clear that such was not her intention. It is not clear from the judgment where these notions come from. In *Maurice* the court emphasised that the court will not condone a document which simply expressed the testator's wishes for the distribution of his estate (716J). This is, unfortunately, not dealt with by the court in *Mabika*.

3 3 2 "Document drafted or executed by a person who has since died": Difference Between "drafted" and "executed"

Another question that can be asked was whether Annexure "SM2" was indeed "executed" by the testatrix as was indicated by the court (par 14). With reference to *Van der Merwe v Master of the High Court* [2011] All SA 298 (SCA) par 16, the court remarked that the lack of a signature has never been held to be a complete bar to a document being declared to be a will in terms of s 2(3) (par 13). Under such circumstances, however, one would then be working with a document "drafted" by a person who has since died. It seems the court, *in casu,* regarded the document as a (partially) executed document, because it was completed in her own handwriting (par 13). A ("partial") execution in terms of s 2(3) (for the purposes of distinguishing it from "drafting"), should mean that the process of compliance with the formal requirements in section 2(1)(a) has been embarked upon. Should the document *in casu* not have been described as a document "drafted" by the testatrix, rather than one "executed" by her? (De Waal & Schoeman-Malan *Law of Succession* (2008) 73).

3 3 3 Forfeiture of Respondent's Share

With regard to the issue of the forfeiture of the respondent's share, the court only said that "although drastic in nature, [it] will be justified in the circumstances of this matter." No authority, however, is provided for this statement (par 15). In *Leeb v Leeb* [1991] 2 All SA 88 (N), it was decided that the court could declare the murderer's benefit from the joint estate forfeit on the basis of considerations of public policy. Since the respondent *in casu* was not the "murderer" of the deceased, the forfeiture order by the court can be seen as a new development, which will undoubtedly form the subject of further interesting academic debate. (This case note is, however, more concerned with the intention requirement in s 2(3) and will not pursue this aspect any further).

4 *Taylor v Taylor*

4 1 Facts

In *Taylor*, the applicants applied for a certain document referred to as a "wish list", to be accepted as an amendment to a last will and testament. The key question in this application was whether or not the deceased, when he drafted the "wish list", intended it to be an amendment of his existing will as contemplated by s 2(3) of the Wills Act. In determining

whether or not the deceased had such intent at the time he drafted this document, the court, with reference to *Van Wetten v Bosch* 2004 (1) SA 348 (SCA) parr 15-16, indicated that the court is not bound to apply the established principles of documentary interpretation, but to examine the content of the document itself and the document in the context of the surrounding circumstances which prevailed when it was executed (par 6).

The deceased died on 24 October 2006. Approximately one year before his death, he became aware that he was suffering from terminal lung cancer and this knowledge spurred him to undertake certain estate planning exercises. Seven months prior to his death, on 23 March 2006, he executed a last will in terms of which he bequeathed his fixed properties to his children (applicants), and his personal effects and residue to the first respondent (wife). On 6 September 2006, the deceased drafted a so-called "wish list", with regard to the distribution of some of the movable assets and the use of the fixed property after his death. It was signed by him and dated.

4 2 Judgment

The court concluded that, when analysing the document itself, the relevant surrounding and background circumstances of which the court was aware should be taken into account (par 12). While some of the pertinent facts are mentioned here, this brief discussion does not lend itself to a detailed discussion of all the facts. The facts, background and surrounding circumstances were decisive to the final outcome, with regard to the deceased's "intention". The following facts were emphasised (par 12): The deceased knew he had cancer one year before his death; he went on to regulate his affairs as best he could and he conducted an estate planning exercise; he executed a will; and on 6 September 2006 he executed the "wish list" at a time he was contemplating his death. With these facts in mind, the court examined the language of the document itself (par 13). The two bold headings referred to "my wishes" regarding, in the first instance, the fixed property and, in the second instance, his personal effects and the residue of his estate. Throughout the document are statements such as "it is my wish"; "the two flats can be rented"; "It is suggested that". When dealing with the cash, shares or overseas investment, the deceased changed the language slightly by stating that these items "should be divided among my three children." However, this sentence (also) came under the general heading "My wishes regarding my personal effects and the residue of my estate"; and in the court's view was therefore to be governed thereby. Shortly thereafter the deceased stated "in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process." The court, in view of this, stated as follows (par 15):

> *... the language employed by the deceased in this document does not demonstrate an intention on the part of the deceased to amend his last will and testament.* On the contrary, what it would appear to indicate is that the deceased intended that his last will and testament should stand but that it

> was his desire, notwithstanding the bequests made therein, that his family should stand together when it came to the administration of the estate and the distribution of the assets and that they should be distributed equitably amongst all the parties involved. In this regard, it seems to me, he had faith in both his children (first to third applicants) and his wife, (first respondent) to, notwithstanding the bequests made in his will, distribute his personal effects and the residue of his estate fairly and equitably and in accordance with his wishes as expressed in the wish list which was executed subsequent to his will. In addition, the words quoted above "in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process.", by no means evince an intention on the part of the deceased to amend the will and tend rather to support the view that he trusted his family with the task of distribution (own emphasis).

The following circumstances and facts were highlighted by the court (parr 19-21): The deceased realised he had to regulate his affairs; he knew formalities were required for a will to be valid, he intended for the parties to work together; although his death was imminent he still had sufficient time to have the document formally executed. The case differs from *Smith v Parsons* 2010 (4) SA 378 (SCA) and *Van Wetten,* where the respective deceased either committed, or contemplated suicide. These were compelling factors in favour of them intending it to be a will or an amendment (par 20). The application was, accordingly, dismissed.

4 3 Discussion

An interesting aspect is that both the applicants (children), as well as respondent (wife), could potentially have benefitted, and on the other hand, have lost full claim to some of the assets, through the granting of the section 2(3) order. According to the "wish list", it was the deceased's wish that although the house was bequeathed to the children, the wife should have been allowed to continue living in the house (this was not mentioned in the will). However, if the application was granted, she would have lost her full claim to the personal effects (as was stated in the will). An aspect the court, in my opinion, failed to address, was the sentence: "My personal effects and the residue of my estate have been bequeathed to my wife *for the sake of simplicity"* (own emphasis). What did the deceased mean/intend with this phase? Can it not be argued that he indeed intended the "wish list" to be read as "supplement" to the will? In other words, he didn't want to deal with the exact detail of how he wanted each and every single movable asset to be distributed in his will (but rather through a "wish list")? Such an argument does not seem to be valid. If he wanted the list to be read with the will, he would have referred to the list in his will. It was, furthermore, only prepared some six months after the will. The format, structure, content and unambiguous wording of the document is also indicative of his intention. In *Taylor,* the deceased did not indicate that he wanted the document to be seen as an amendment, supplement or replacement of his existing will. This also supports the court's argument (par 15).

5 Conclusion

The intention requirement in section 2(3) has occasioned a number of conflicting judgments to date. There seems to be no agreement on precisely where the emphasis should be placed with regard to the testator's intention. In *Ex parte Maurice* 1995 2 SA 713 (C)), the court found, for example, that the disputed document itself must have been intended by the testator to be his will. The court can thus not condone a document "which simply expressed the testator's wishes for the distribution of his estate" as a will. A similar approach was followed in *Anderson and Wagner NNO v The Master* 1996 3 SA 779 (C) (see also *Letsekga v The Master* 1995 4 SA 731 (W)). In *Smith v Parsons* and *Van Wetten v Bosch,* the court found that the respective deceased had the intention of committing suicide, or contemplating suicide, when they drafted the respective documents concerned. This was a compelling factor in favour of them intending such documents to be, in the one instance, a final will, and in the other, an amendment of an earlier will.

Even though the eventual outcome in *Longfellow* is supported, the case should have been decided on the second requirement being absent. The document was not drafted or executed by a person who has since died. In view of *Maurice, Anderson and Wagner, Letsekga* and *Van Wetten,* it is suggested that *Mabika* was wrongly decided. The document itself was intended to be instructions for the drafting of a will. It was not intended to be her last will as required by section 2(3) and supported by the mentioned cases. Even though it was envisaged (see Keightley "Law of Succession" 2003 *Annual Survey of SA Law*) that the law in this regard (intention requirement) would continue to develop on a case-by-case basis, dependent on the facts and circumstances, rather than on settled principles, the well established and by now generally accepted principles set down by the courts above, should not lightly be discarded. The judgment in *Taylor*, on the other hand, contains a recognition of the abovementioned principles, while the court convincingly (on the facts), concluded that the document was not intended to be an amendment. This is in line with established principles laid down in *Letsekga* and *Anderson/Wagner* cases. The judgment in *Taylor* is supported.

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Equity Aviation v SATAWU (478/09) [2011] ZASCA 232 (30 November 2011)

The issue of separate strike notices where employees are not members of a trade union

1 Introduction

Recently the question whether employees who are not members of a trade union may strike "lawfully" where they have not given (separate) notice to strike to their employer in terms of section 64(1)(b) of the Labour Relations Act 66 of 1995 (the LRA) was considered by the Supreme Court of Appeal. The court held a different view from the majority of the Labour Appeal Court. Since the preferred interpretation of section 64(1)(b) has been described by some as resulting in a *prima facie* limitation of the right to strike the judgment merits discussion (the judgment has also been referred to the Constitutional Court).

2 Requirements for a Protected Strike

The LRA regulates the fundamental right of workers to strike (as found in s 23(2)(c) LRA) in more detail. In chapter IV of the LRA the procedural and substantive requirements for a protected strike are set out. As far as procedural requirements are concerned two conditions are relevant: first the issue in dispute must have been referred for conciliation. Section 64(1) requires that the dispute must have been referred to either a bargaining or statutory council or to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate must be issued that the dispute remains unresolved, or 30 days must have lapsed since referral. Secondly, the employer must be given at least 48 hours' notice of the intended strike – in the case of the public service 7 days (see s 64(1)(c) LRA). If a notice to commence a strike does not specify the exact time and date of commencement, it will be defective. A strike can be suspended and it is not necessary to give a new notice for the resumption of a protected strike. There are some instances when these procedures are inapplicable. For example, where a lock-out is in reaction to a strike or lock-out which does not conform to the LRA, or where (in the case of a strike) the strike is in reaction to the unilateral change to conditions of service (s 64(3), (4) LRA). It is no longer a requirement that a ballot be held first before employees may make use of the strike mechanism (s 67(7) LRA). Although a ballot is not required before employees may make use of the strike weapon, the LRA does stipulate that the constitution of a union must provide for a ballot to be held, and that a member may not be disciplined or his/her membership terminated for non-participation in a strike, unless a ballot was held and the majority of the voting members voted in favour of the strike (see s 95(5)(p), (q) LRA).

It is evident that parties remain to some extent free to contract out of (a) the right to strike and recourse to the lock-out (see s 65(1)(a) LRA);

(b) the procedures to be followed before they can embark upon industrial action (see s 64(3)(a), (b) LRA). However, this leaves the question whether a strike can be protected when complying with the procedural requirements of the LRA but not with the more stringent requirements of a collective agreement. Many recognition agreements provide that should the parties deadlock during wage negotiations they will hold a number of "cooling off" meetings and, if no agreement can be reached at these meetings, the parties will then refer the dispute to mediation before resorting to industrial action. In *County Fair Foods (Pty) Ltd v FAWU* 2001 5 BLLR 494 (LAC) the issue before the Labour Appeal Court was this: If a recognition agreement provides for a specific pre-strike procedure but the union chooses to deviate from the agreed procedure and to follow the procedures laid down in the LRA instead, is the strike unprotected? The court answered this question with a firm negative. It reasoned that section 65(1)(a) of the LRA, which prohibits strikes if the employees are "bound by an agreement that prohibits a strike or lock-out in respect of the issue in dispute", applies only to agreements that prohibit strikes over specific "substantive" issues. In other words, the agreement will prevail over the LRA only if the parties agree that they will not strike over certain kinds of disputes. The court stated that if section 65(1)(a) was to be extended to *procedural* requirements laid down in collective agreements the phrase "in respect of the issue in dispute" would be rendered meaningless (par 13).

Although the Constitutional Court did not finally hold thus, the LRA does not recognise a so-called duty to bargain that can be enforced in a court of law. O'Regan J noted in an *obiter dictum* that a justiciable duty may present difficulties to all concerned (see Van Niekerk *et al Law@work* (2012) 372 regarding *SANDU v Minister of Defence* 2006 11 BLLR 1043 (SCA)) in the *SANDU* case (par 55):

> [I]t should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, Courts may be drawn into a range of controversial industrial relations issues.

In *NEWU v Leonard Dingler (Pty) Ltd* 2011 7 BLLR 706 (LC) the Labour Court expressly held that an employer is not obliged to bargain with a union. Parties therefore remain free to make use of industrial action in order to enforce their demands in this regard (that is in respect of, for example, a refusal to recognise a trade union or to agree to the establishment of a bargaining council, the withdrawal of recognition of a collective bargaining agent, resignation from a bargaining council, and disputes about appropriate bargaining units, bargaining levels, or bargaining subjects). However, the LRA does impose a procedural constraint in the event of such a dispute: a party may only give notice of industrial action once an advisory arbitration award has been obtained (see s 64(2) LRA).

For completeness sake, one should add that there can only be a protected strike if the strike is not prohibited by section 65 of the LRA. In addition, there must be an issue in dispute. In *City of Johannesburg*

Metropolitan Municipality v SAMWU 2011 7 BLLR 663 (LC) the point was raised that before a union can fulfil any procedural requirements there must be an issue in dispute (which issue must be a matter of mutual interest) to be referred to conciliation. The court cautioned against the view that requires terms such as "demands" and "deadlocks" as used under the Labour Relations Act 28 of 1956 (see par 12). The court cited the categorisation of the Labour Appeal Court (per Zondo JP) in *TSI Holdings (Pty) Ltd v NUMSA* 2006 *ILJ* 1483 (LAC) par 27: "[There are] three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute". The court however stated (par 12) that:

> [t]here are no bright lights between these categories. Sometimes the word 'demand' is used in a generic sense to refer to all three categories of strikes; sometimes it is used to refer to demands for higher wages. But these are not statutorily sanctioned requirements. The LRA refers only to a 'grievance' or a 'dispute'. There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council.

Furthermore, the definition of "dispute" in section 213 of the LRA also includes "an alleged dispute". The court thus stated (par 14) that for "the purposes of the definition of a strike, therefore, all that need be established as an objective fact is the allegation of a dispute, not its existence."

In cases where there is an express demand, the Labour Court held in *FGWU v The Minister of Safety & Security* 1999 4 BLLR 332 (LC) that the "issue in dispute" may be identified by asking what the addressee of the demand is actually expected to do in order to bring the dispute to an end.

3 The Facts in the Equity Aviation Case

The facts are summarised in the judgment of the Supreme Court of Appeal (refer to par 4-9).

Equity Aviation Services (Pty) Ltd (Equity) is an aviation logistics company providing services on the ramps and runways of South African airports. The South African Transport and Allied Workers Union (SATAWU) at the time of the dispute was the majority union for Equity Aviation's employees (725 out of some 1157 employees were members of the union). The respondents other than SATAWU were employees not belonging to the majority union. The union referred a wage dispute to the CCMA on 13 November 2003. A month later, after unsuccessful conciliation the CCMA issued a certificate declaring that the dispute remained unresolved on 15 December 2003. The union then issued a strike notice to the employer on the same day. The strike notice informed the employer that: "We intend to embark on strike action on 18 December 2003 at 08h00." The union members proceeded to strike for some four months, which strike was considered protected as it complied with section 64(1)(b) of the LRA. However, other employees who were not members of the union also participated in the strike and the employer considered such participation as unprotected as these non-union employees had not given separate notice of their intention to

strike. These employees were dismissed on 19 November 2004 for unauthorised absenteeism during the strike. The non-union dismissed employees referred a dispute about the fairness of their dismissal to the CCMA. (The Supreme Court of Appeal used the term "lawfulness" instead of "fairness".) In order for the Labour Court to decide whether the employees' dismissals were automatically unfair in terms of s 187(1)(a) of the LRA the court had to decide whether the dismissed respondents were required to be members of the union in order to participate in the strike without fear of dismissal. Almost two years after their dismissal, on 15 June 2006, the court found that the dismissed employees actually were members of the union at the time of the strike "but that in any event, they were not required to be members in order to participate lawfully". Their dismissals were thus held to be automatically unfair. Equity Aviation was ordered to reinstate them with back pay. Leave to appeal was granted, which appeal was heard on 18 June 2008 (two years after the court *a quo's* judgment). The Labour Appeal Court handed down its judgment on 14 May 2009. That court unanimously held that the dismissed employees were not members of the union at the relevant time and that the strike notice of the union did not refer to the dismissed employees. However, the court members differed regarding the impact of such fact. The majority held that the dismissed employees had not been required to refer a separate dispute to conciliation. Furthermore, Khampepe ADJP, noting that section 64(1) is silent on *who* must refer a dispute to the Commission and on *who* must give the notice to strike, held that the section had to be interpreted in the light of the purpose of the LRA as a whole and the purpose of the section itself. She also found that to require the dismissed employees to issue separate strike notices would be "too technical and constitute an absurdity which the legislature could not have contemplated" (par 174). Another interpretation would limit participation in strike action without justification and, according to this interpretation the judge added that in terms of section 64(1)(b) an employer is entitled to notice of the commencement of a strike but not to be informed about the identity of the strikers (par 175). The court's conclusion was therefore that the dismissed employees' participation in the strike action was not unprotected (par 175).

The issue to consider on further appeal was formulated as follow by the Supreme Court of Appeal (par 3):

> At issue is whether, where a union has given the requisite notice on behalf of its members, and has embarked on a strike, other employees who are not members of that union need also to give notice in order for their strike action to be lawful. Khampepe ADJP and Davis JA in the Labour Appeal Court held not. Zondo JP held that a separate notice must be given by the non-union members in order for their strike to be protected. This appeal lies with the special leave of this court.

4 The Right to Strike

As indicated earlier the right of workers to strike is a fundamental right in South Africa. This and other provisions underline the significance of the right to strike. The preamble to the LRA states that the aim of the LRA

is to change the law governing labour relations and, *inter alia*, "to promote and facilitate collective bargaining". As many modern statutes do today, the LRA boasts with both purpose (s 1) and interpretation (s 3) provisions. Section 1(c) of the LRA notes that two of its purposes are "to provide a framework within which employees and their trade unions and employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest" and "to promote orderly collective bargaining" (s 1(d)).

In addition, section 67(2) of the LRA states that:

> [a] person does not commit a delict or a breach of contract by taking part in a protected strike or a protected lock-out or in any conduct in contemplation or in furtherance of a protected strike or protected lock-out.

The Constitutional Court has on more than one occasion acknowledged the importance of this right to workers and unions and, ultimately, for successful collective bargaining. In *Re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) the court held that the inclusion of the right to strike in the Constitution (but not the right to lock out for employers) does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers (par 65). In fact, while workers must act collectively and ultimately depend on the right to strike to further their interests and achieve desired outcomes, employers as the stronger party in the employment relationship have other social and economic means to further their interests. It should perhaps be mentioned that the LRA does not generally prohibit the use of replacement labour during industrial action (refer to s 76).

In *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC) the court considered the right of a minority trade union to strike in support of a demand that the employer recognise the union's shop stewards. The court, in accordance with section 39(1) of the Constitution, recognised the importance of the right to strike and preferred an interpretation that would not unduly limit the right to strike which was also more in accordance with interpretations of Conventions 87 and 98 by the International Labour Organisation supervisory bodies.

5 The Strike Notice

Although the Labour Relations Act 28 of 1956 did not provide for a strike or lockout notice the courts, in a number of cases, did require unions to give the employer prior notification of strike action. The industrial court in 1987 (*MAWU v BTR Sarmcol* 1987 *ILJ* 815 (IC) 836g) and in 1988 (*BAWU v Palm Beach Hotel* 1988 *ILJ* 1016 (IC) 1023g) stated that the failure to give notice was unfair. In fact in the *BAWU* case the industrial court (1023g) held that the failure to give notice was a serious failure. The respondent in this case was a hotel and had an obligation to its guests. The Labour Appeal Court created by section 17 of the 1956-Act as well as the then Appellate Division of the Supreme Court followed this approach. The National Manpower Commission (established in 1990) then

recommended that a written notice be given before the commencement of a lawful strike (see Technical Committee of the National Manpower Commission "Proposals for the Consolidation of the Labour Relations Act" (1990) 11 *ILJ* 285 297).

Traditionally the aspects raised with regard to strike notices related to the content thereof – whether it specified the commencement and the scope of the proposed industrial action sufficiently. In 1997 the Labour Appeal Court considered the requirements for a valid strike notice (*Fidelity Guards Holdings (Pty) Ltd v PTWU* 1997 9 BLLR 1125 (LAC)). Myburgh JP held the notice "'that we give you 48 hours notice of the workers' intent to embark on strike action. The strike will not commence before the expiry of the 48 hours notification' … might have been defective in that it had not given a specific time for the commencement of the proposed strike" (1132). Froneman DJP also considered the notice and made some additional remarks (with which Myburgh JP agreed). The discussion starts with the prior judgment of the Labour Appeal Court in *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction and Allied Workers Union* 1997 6 BLLR 697 (LAC) 702:

> The provisions of section 64(1)(b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose. That needs to be done within the constraints of the language used in the section. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. In the present case the notice is defective for that reason. The provisions of section 64(1)(b) were not complied with.

Froneman DJP continued to state that in the *Ceramic Industries* case non-compliance with section 64(1)(b) was expressly linked to the non-fulfilment of the purpose of the section. That purpose was identified as providing advance warning to an employer of a proposed strike so that the employer may prepare for what will follow.

Recently, in *Transnet Ltd v SATAWU* 2011 11 BLLR 1123 (LC)) the Labour Court considered whether a notice was deficient and the resultant strike therefore unprotected. In this case the union demanded that the applicant abandon changes to its workers' shift roster and the discipline of a manager for "incompatibility" or incompetence. After the relevant bargaining council certified the dispute unresolved the union gave notice of its intention to call its members out on strike.

The court (par 12) also cited the case of *Ceramic Industries* (701-702):

> In determining whether there has been compliance with section 64(1)(b) of the Act an interpretation must be sought, as stated earlier, which best gives effect to the broader purpose of the Act and the specific purpose of the section itself. Section 64(1)(a) sets out the first requirement to be met before embarking on a protected strike viz an attempted conciliation of the issue in

> dispute before collective action is taken. Section 64(1)(b) sets out the next requirement: notice of the proposed strike to the employer. Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation. By their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) assists in that orderly process. A failure to give proper warning of the impending strike may undermine that orderliness. This might, in turn, frustrate labour peace and economic development, other important purposes of the Act (section 1). Compliance with the provisions of the section is thus called for.

The court held that warning employers of a proposed strike may have at least two consequences for the employer (par 12; see also the *Ceramic Industries* case 701-702): "The employer may either decide to prevent the intended power play by giving in to the employee demands, or, may take other steps to protect the business when the strike starts."

In casu the notice was deficient for the second reason – the employer did not know when, after 48 hours, the proposed strike will commence. The notice also did not specify at which depot it would occur. The court continued by clearly indicating that the language and purpose of section 64(1)(b) require that a *specific time* for the commencement of the proposed strike be set out in the written notice. According to the court the legislature was "anxious" that attention be paid to the "commencement" of the strike (par 12; see also the *Ceramic Industries* case 701-702):

> The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase 'at least' should also be expressed in an exact manner. The manner in which the time of the commencement of the strike is expressed may, however, differ depending on the nature of the employer's business. Strikes can occur which involve the whole workforce and others which merely involve one or more shifts. In a shift system notice of the exact time of the proposed strike in respect of particular shifts may be necessary.

In addition, the court held that the fact that the applicant could infer from the facts and the circumstances the extent of the strike did not remedy the defect in the strike notice (par 14).

In *Public Servants Association of South Africa v Minister of Justice and Constitutional Development* 2001 11 BLLR 1250 (LC) par 68 the court held that the grievance need not be set out in the strike notice as the notice will have been preceded by negotiations and at conciliation meetings opportunities would have been created to explore the nature and ambit of the demand. In *SAA (Pty) Ltd v SATAWU* 2010 *JOL* 24947 (LC) the court differed from the above judgment. The court stated that the employer must be in a position to know with some degree of precision which demands a union and its members intend to pursue through strike action and what is required to meet those demands (see par 27). Although this may *prima facie* appear to introduce a further limitation on the right to strike as the court goes further than the *Public Servants Association* case, this approach relates to the purpose of the strike notice

as mentioned in the *Ceramic Industries* case, namely to enable the employer to decide whether its interest are best served by resisting the union's demands or acceding to them. In *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metal Workers of South Africa* 2012 1 BLLR 10 (LAC) the court had to consider whether a change to a demand not made during the conciliation process, but during the course of the protected strike, renders the strike unprotected (see par 46). The court found that the demand for the 13th cheque did not render the protected strike unprotected. The strike will only lose its protected status if the employees used the protected strike as leverage to achieve objects in respect of which no strike action could be taken (par 52). It appears from the *Edelweiss* case that a party may bring a proposal to the table, after the commencement of the strike, if the purpose of the proposal is an attempt to resolve the dispute that gave rise to the strike. One may ask whether the *Edelweiss* case allows the employer to know with a degree of precision which demand the union will pursue, if such demands are not mentioned in the strike notice.

The recent dispute regarding the strike notice in the *Equity Aviation* case dealt with another aspect – that is, who is covered under a strike notice. In other words, where a strike notice is given to an employer (which notice is not deficient in any way) a further question, namely whether such notice covers all the employees who are proposing to embark on the proposed strike, should be answered. In the *Equity Aviation* case the court refused to view the requirement of a notice as a limitation of a right. The court stated that it (the strike notice) "is a procedural requirement for the *exercise* of the right to embark on strike action" (par 26). Therefore, the court stated, requiring all employees to serve such a notice does not impinge on their rights.

The appellant argued that the majority judgments of the Labour Appeal Court did not have proper regard of the purpose of section 64(1)(b), namely advance warning for the employer and that to allow employees to strike, who had not given notice of their intention to strike, would lead to disorderly strike action (par 11). The argument was made that if an employer does not know how many employees will embark on the strike (par 20):

> It would thus not be able to make an informed decision as to whether to accede to the employees' demands; would be prevented from taking adequate steps to protect its business; could not make informed decisions on pre-strike regulatory decisions; and would be precluded from implementing adequate health and safety measures.

This reasoning is in line with the fourfold purpose of the strike notice as formulated by Seady and Thompson ("Strikes and Lockouts" in *South African Labour Law* (eds Thompson & Benjamin) (loose leaf) Vol 1 AA part 1 314 *et seq*): first, serving as a warning to the employer that "words are about to escalate into deeds"; second, promoting orderly industrial action; third, limitation of damages; and fourth advancing health and safety considerations.

The Supreme Court of Appeal added a fifth purpose, namely to protect employees (par 15). The court stated that if employees issue a strike notice in proper terms they are protected under the LRA and their conduct is lawful. The court thus held that it is in all parties' interests that a strike notice is given by or on behalf of *all* those who intend to strike.

The Supreme Court of Appeal concluded by preferring the minority judgment of Zondo JP's interpretation of section 64(1)(b), namely that those employees who do not belong to the union giving the strike notice must "in order lawfully to embark on strike action, give notice that they too intend to strike. They may do so through a representative or personally, provided that their notice alerts the employer to the extent of the strike … and allows it to make the necessary arrangements" (par 28).

The court was of the opinion (in agreement with Zondo JP) that another interpretation would not only promote disorderly collective bargaining but would also "usher in an era of chaotic collective bargaining in our labour dispute resolution system" (par 28).

6 Evaluation

At first glance the procedural requirements found in section 64 seem uncomplicated and simple. However our courts have been called upon to engage with the content of this section on numerous occasions, indicating that the legislature could be more prescriptive in terms of the requirements for a valid strike notice.

A distinction is made by Zondo JP in respect of the purposes of section 64(1)(a) and section 64(1)(b). The purpose of section 64(1)(a) is to provide parties with the opportunity to resolve their dispute through conciliation or mediation. During this cooling-off period parties can reflect and determine how to resolve the dispute.

If one accepts that the purpose of section 64(1)(b) is to give an employer advance warning of the proposed strike to enable the employer to prepare for the power play that may follow, then prior knowledge of the number of employees that will partake in the strike is of some importance as it would be much easier for an employer to prepare for the industrial action if it knows how many employees will be involved. As stated by the Supreme Court of Appeal (par 15), a strike notice given in proper terms by all those who intend to strike is also beneficial to the employees as they may then be protected under the LRA.

One of the reasons given for a notice of strike action in the *Ceramic Industries* case 1997 6 BLLR 697 (LAC) was to enable the employer to decide whether to prevent strike action by giving into the union's demands. Notifying the employer of the exact number of employees intending to strike may influence the employer's decision whether to accede to the union's demands. If more employees are taking part in the strike, the employer might be under greater pressure to accede to the union's demands, thereby averting the strike. This will be beneficial for both employers and employees. This illustrates how information about the number of employees planning to take part in the strike can influence

the power play that will follow. The judgments by Zondo JP and the Supreme Court of Appeal, underwrite the approach followed in the *Ceramic Industries* case. In both the *Equity Aviation* case and the *Ceramic Industries* case (and in the minority judgment of Zondo JP in the Labour Appeal Court) it was highlighted that section 64(1)(b) gives expression to one of the primary objects of the LRA, namely to promote orderly collective bargaining. The Supreme Court of Appeal adopted the approach followed by Zondo JP that requiring all employees to give notice is not a limitation of their rights and this requirement does not need to be read into the section. In fact the requirement that all employees must serve notice is a logical interpretation of section 64(1)(b). The Supreme Court of Appeal in this case made it clear that the purpose of this section is to give an employer advance warning of the proposed strike, enabling the employer to make informed decisions. The different purposes of section 64(1)(a) and section 64(1)(b) lead to the different interpretations of the sections. The employees dismissed by the appellant in this case were not required to issue a separate referral of the same dispute in terms of section 64(1)(a), however in terms of section 64(1)(b) they were required to inform the employer of their intention to embark on strike action.

The right to strike should not be limited unduly, in fact this right should be limited as little as possible (see *eg S v Zuma* 1995 2 SA 642 (CC); *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* 1990 *ILJ* 321 (LAC); *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC); *Business South Africa v The Congress of South African Trade Unions* 1997 6 BLLR 681 (LAC) (in particular the minority judgment of Nicolson JA)). The question posed by the case under discussion is whether the requirement of notice by non-union members is a limitation of a right. If one accepts that the requirement of a notice is a procedural hurdle employees must overcome to exercise the right to strike, then this requirement cannot be viewed as a real limitation of a right. The court in the current matter also found it unnecessary to read this requirement into section 64(1)(b) and found it to be a logical interpretation of the section; warning the employer of the power play and enabling the employer to make informed decisions. This procedural requirement should ensure orderly collective bargaining and thereby promote an important purpose of the LRA. Internationally, procedural restrictions on the right to strike are permissible, however these restrictions may not place substantial limitations on the right to strike (Ben-Israel "The Scope and Extent of the Right to Strike" in *International Labour Standards: The Case of Freedom to Strike* (ed Ben-Israel) (1988) part III). Procedural requirements must be reasonable. According to the Supreme Court of Appeal informing the employer of the number of employees that will partake in the strike can be construed as reasonable and does not impose a serious limitation on workers' right to strike.

Any commentary on this judgment would in earlier years probably have ended at this juncture. However, since the LRA has to be interpreted in light of the Constitution and South Africa's international obligations,

and since orderly collective bargaining is but one of the primary objects of the LRA, there remains a small measure of discomfort. The import of section 64(1)(b) has been interpreted primarily having regard to the purpose of a strike notice (set out earlier in this contribution), which has been formulated by the Labour Appeal Court and the Supreme Court of Appeal. According to the Supreme Court of Appeal the purpose of a strike notice is to assist and protect not only employers but also employees. No doubt SATAWU and its members remain unconvinced and may advance the view that where the express wording of a provision does not limit the right to strike a court should be very hesitant to find that an additional hurdle (whether of a substantive or procedural nature) exists. Employees may very well argue that several requirements now have to be met in order to embark on a protected strike (notice of the exact commencement of the strike, the extent of the strike, the formulation of the demands/issues in dispute with some degree of precision, and information about the identity of the employees planning to strike). These requirements coupled with the general, albeit not unlimited right to make use of replacement labour, may very well impact on the effectiveness of planned industrial action. After all is said and done the Constitutional Court has recognised that workers must act collectively and ultimately depend on the right to strike to further their interests and achieve desired outcomes. The matter is forthcoming in the Constitutional Court – *South African Transport and Allied Workers Union and Others v Moloto* CCT128/11 – so that we may expect finality on this issue once and for all.

A matter of concern is the time this case took to reach the Supreme Court of Appeal. Seven years had lapsed from the referral of the dismissal dispute to the CCMA until the case was heard in the Supreme Court of Appeal. This delay in our dispute resolution system does not support the purpose of the LRA, namely the effective resolution of labour disputes.

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