IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case No: J 3895/01

In the matter between:

Applicant
SOUTH AFRICA

and

1st Respondent
CONSTITUTIONAL DEVELOPMENT

2nd Respondent
OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

3rd Respondent
AND ADMINISTRATION

4th Respondent
OF PUBLIC SERVICE AND ADMINISTRATION

JUDGMENT

Landman J:

1. The State Attorneys and Assistant State Attorneys have been unhappy with their salaries for some time. They are paid less than other professionals in the Department of Justice and, of course, much less than attorneys in private practice. At least 138 of the 240 State Attorneys (including assistants and possibly candidate attorneys) are on strike. Their union alleges that the strike is a protected one. It is not in dispute that they have the right to

strike. The Minister of Justice and Constitutional Development and the other respondents dispute that the strike is a protected one. The Department of Justice has given notice that disciplinary steps will be taken against those on strike. A rule nisi was issued. This is the anticipated return day.

2. State Attorneys, as is the case with all public service employees, have their conditions of service determined by the Minister of Public Service and Administration, in part, through collective bargaining with recognised trade unions.

3. The Public Service Association (the PSA) and other trade unions that are party to the Public Service Co-Ordinating Bargaining Council (the CBC) negotiate salaries and other terms and conditions of employment around April of each year. These negotiations are preceded by the submissions by trade unions of their demands in respect of salaries and other terms and conditions of employment. The collective agreement that results from such negotiations is implemented with effect from 1 July of the year in respect of which the parties are negotiating.

4. On 24 February 2000 the PSA addressed a letter to the secretary of the General Public Service Sectoral Bargaining Council (SBC). The dispute was referred to the SBC and not to the CBC, as it allegedly related to a sector specific issue, in this case, the State Attorneys employed in the Department of Justice, and did not involve other sectors within the public service.

5. At the SBC it was agreed that the parties would enter into bilateral discussions concerning the demands of the State Attorneys. A number of meetings were held between the PSA and the employer (the latter being represented by the Department of Justice and Constitutional Development, the Treasury as well as by the Department of Public Service and Administration (the DPSA)). Despite these endeavours, no agreement was arrived at concerning the demands of the State Attorneys.

6. Meanwhile, at the CBC finality was achieved in respect of the annual wage negotiations. Resolution 7/2000, a collective agreement, was signed on 28 September 2000 by the State and the PSA as well as by certain other public sector unions.

7. Resolution 7/2000 regulates, inter alia, the salary increases for all public servants for the financial year 2000/2001. This financial year runs from 1 April 2000 to 31 March 2001. The resolution provides:

> "1. Objectives
>
> ...
>
> 1.3 To provide for the annual wage increase for public service employees for the 2000/2001 financial year.
>
> 2.1 This agreement applies to the employer and employees:
>
> a) who are employed by the State; and
>
> b) who fall within the registered scope of the PSCBC.
>
> 12.1 The annual wage increase for the 2000/2001 financial year shall be an average of 6.5% of which 0.5% shall be paid on a sliding scale according to Annexure B."

8. On 9 October 2000 the PSA proposed that the dispute concerning the State Attorneys be referred to arbitration. This proposal became the subject of discussion within the Departmental Bargaining Council of the Department of Justice. The DG: Justice agreed on 20 August 2001 to refer the salary dispute to arbitration. This agreement, however, contained the proviso that the agreement of the DPSA also had to be obtained. The DPSA did not agree to arbitration.

9. On 16 November 2000 the PSA referred a dispute concerning the State Attorneys to the SBC for conciliation. At the conciliation meeting, which was held at the SBC, the State objected to this forum and maintained that the dispute should be referred to the CBC. Accordingly, and by agreement, the same dispute was then referred by the PSA to the CBC.

10. A conciliation meeting took place at the CBC on 9 April 2001. The parties were unable to resolve the dispute and a certificate was issued confirming that the dispute remains unresolved.

11. Thereafter the parties again discussed the possibility of the State Attorneys' dispute being referred to arbitration. Nothing came of it.

12. On 8 August 2001, the PSA addressed a letter to the DG: Justice giving notice in terms of section 64(1)(d) of the Labour Relations Act 66 of 1995 (the LRA) that the State Attorneys, who are members of the PSA, would embark on strike action with effect from 3 September 2001.

13. Prior to the commencement of the strike, the DG: Justice distributed a circular dated 29 August 2001 throughout the Department. Paragraph 2 of this circular reads as follows:

"These industrial actions are protected under the Labour Relations Act, 1995, meaning that persons who participate in these actions do not commit a delict or a breach of contract nor can they be subjected to any disciplinary action by the employer. However, those individuals who misconduct themselves during this action, are liable to disciplinary action, despite the protection afforded by the Act."

14. On 3 September 2001 the majority of State Attorneys who are members of the PSA commenced with strike action.

15. Certain of the State Attorneys currently on strike are defined as part of the Senior Management of the Department of Justice. On 4 September 2000, certain of these State Attorneys received a letter from the DG: Justice alleging, inter alia, that they were obliged to follow an alternative dispute settlement procedure. The PSA requested the DG: Justice to withdraw this letter. He declined to do so.

16. On 5 September 2001, the DG: Justice addressed a letter to all State Attorneys, as well as to the PSA. The letter stated:

"The Department of Justice and Constitutional Development believes that the current strike action pursued by

the State Attorneys is unlawful. The Public Servants Association is a signatory to Resolution 7/2000 of the PSCBC that addressed the issues in dispute. Therefore, the State Attorneys cannot strike over a matter in which an agreement was concluded and implemented.

We hereby instruct you to return to work on 7 September 2001 at 8:00.

The failure to comply with this instruction will result in disciplinary action being taken against you. This may include dismissal."

17. On 6 September the PSA's attorneys of record wrote to the DG: Justice demanding that the letter of 5 September 2001 be withdrawn. The letter was not withdrawn. On 8 September the PSA applied for a rule nisi and an interim interdict. This relief was granted by my sister Revelas J.

Authority

18. The respondents challenged the right of the deponents to the PSA's affidavits to initiate these proceedings. But, after additional affidavits had been filed, it seems to me, the authority to launch the application was no longer an issue.

Urgency

19. The urgency of the application was contested on the return day. This matter was decided when the rule nisi was issued. It cannot be revisited. The situation contemplated in rule 6(12)(c) of the Rules of the High Court does not arise here.

The nature of the relief

20. The PSA seeks a declaration and a final interdict. To obtain the interdict, it must show, on the facts as they appear from the papers, that:

- it has a clear right;

- the respondent has threatened to interfere with that right; and

- it has no alternative remedy.

21. All three requirements must be met before an interdict can be granted. See *Prest: The Law and Practice of Interdicts*, Juta (1996) 43.

22. In so far as factual issues (as opposed to legal issues) are involved, final relief may be granted if, on the facts stated by the applicant which are not denied by the respondent, as well as the facts stated by the respondent, the granting of the relief is justified. See **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E to 635C and **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd** 1982 (1) SA 398 (A) at 430H to 431A.

23. In **Soffiantini v Mould** 1956 (4) SA 150 (E) at 154E-H it was held;

> *"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.*
> *It is necessary to make* [sic] *a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue on affidavit merely because it may be difficult to do so. Justice can*

be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

See also: **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1165.

A protected strike?

24. The respondents submit that the PSA does not have a clear right to the relief. They raise several reasons why they allege the strike is unprotected.

Senior Managers

25. It is the respondents' contention that the State Attorneys who comprise the corps of "Senior Managers" are not entitled to participate in the strike. This is based broadly on the averment that these attorneys have been taken out of the bargaining unit and that their salaries are regulated by "Ministerial Determinations". It is unnecessary to consider whether or not this is so. Because, even if the contention is correct, it does not preclude these attorneys from joining their colleagues in participating in a protected strike. See **Afrox Ltd v SA Chemical Workers Union and Others (1)** (1997) 18 ILJ 399 (LC) at 403I to 404A and **Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd** (1999) 20 ILJ 321 (LAC) at 32I to 330A. Therefore, if the strike by the other attorneys is protected so are the actions of the State Attorneys at senior managerial level.

Demand compromised?

26. Mr Maserumule (assisted by Mr Khumalo), who appeared for the respondents, submitted that the State Attorneys are engaged in a strike because they allege that the respondents have refused to meet their demand for a 50% salary increase. This demand was made in February 2000. Shortly thereafter, the PSA made a new demand in respect of salary increases to all its members, including the striking employees. The second demand superceded the first demand for a 50% salary increase. After negotiations, that followed the submission of the second demand, the PSA accepted the State's offer of 6.5% which forms part of a collective agreement concluded for the year 2000-2001. This offer was implemented in respect of all PSA's members, including the striking employees. The PSA did not, after the conclusion of the collective agreement, submit a fresh demand for a 50% salary increase for State Attorneys. There is not, he contended, an outstanding demand that can give rise to a dispute capable of being the subject matter of a strike, let alone a protected one.

27. Mr Maserumule advanced his contention by pointing out that the PSA has been party to negotiations and a collective agreement, where it acted on behalf of all its members, including the State Attorneys. It cannot accept an offer from the respondents, and then reserve on the side, a demand that it did not pursue during the salary negotiations. And pull out such a demand out of the hat, during the currency of a collective agreement, and refer it for conciliation so that it can call out its members on strike. The PSA had an election to be made: to reject the offer of 6.5% in respect of the State Attorneys and pursue its demand of 50% to finality, or to compromise and accept the lower offer of 6.5%. The PSA opted for the latter and it cannot now revive what is in

fact a “dead” dispute. The strike is accordingly not protected, the demand having been compromised and settled in terms of a collective agreement.

28. The basis on which these submissions have been made rests on the assumption that the demand made by the PSA on behalf of the State Attorneys for a 50% salary increase was superceded by a new demand, and the 50% demand was compromised, abandoned or settled. I approach this aspect mindful that the onus of showing a clear right rests on the PSA. Therefore it must show that the demand or grievance is still current. To do this the PSA must show that the demand has not superceded by a new demand, compromised, abandoned or settled.

29. In its founding affidavit the PSA alleges:

“7.2 Within the public service, certain specific sectors, such as health, education and safety and security, have in the past negotiated additional salary increases for their specific sectors, notwithstanding the conclusion of the annual agreement referred to above (hereinafter referred to as the "Annual Agreement"). For instance in 2000, the Safety and Security Sectoral Bargaining Council concluded an agreement in terms of which employees within that sector received additional salary increases, over and above the increases contained in the Annual Agreement. This is precisely what the State Attorneys were endeavouring to achieve for themselves in order to address the disparities reflected in Annexure `LG1".

30. The respondents neither admit nor deny that these side negotiations take place. They simply do not deal with this paragraph. If I assume in favour of the respondents that they deny it, it would be bald denial. I accept that the practice is followed.

31. In addition it is apparent that the demand was for a 50% rise in the base of the State Attorneys' salaries. It was not coupled to any annual wage agreement for any particular financial year. The demand was that the salary gap, that had developed, be bridged on a once-off basis. The demand was first made at the end of the 1999/2000 financial year. It was made in a forum which could not address annual wage increases for state employees generally. It subsisted after the 2000/2001 negotiations regarding annual wage increases had been settled in the CBC and it still subsists. It is common cause that the issue in dispute did not form part of the negotiations in the CBC regarding the 2000/2001 annual wage negotiations.

32. The PSA's demand relating to State Attorneys is separate and discrete from the demand for an annual increase for all State employees. The State Attorneys want their base increased ***and*** they want an annual increase as do other state employees. This leads me to the conclusion that Resolution 7/2000 did not extinguish the demand for a 50% rise in the base of the State Attorneys' salaries.

33. Save for the alleged new demand there are no other facts which show that the PSA abandoned the demand for a 50% increase in the base level. Resolution 7/2000 does not deal with the this demand. It does not regulate it as was alleged in the DG: Justice's letter of 7 September 2001. See **Rex v Beerman and another** 1947 (2) SA 1028 (C). What would the officious bystander have heard had she asked the signatories of the resolution: "But what about the State Attorneys' demand for a 50% rise?" The answer, in the light of what I have quoted above, would have been: "We are not dealing with that now". I am satisfied that the demand has not been compromised, settled or abandoned.

No new demand submitted?

34. It was submitted that, although the collective agreement, Resolution 7/2000 may well have expired on 30 June 2001, the PSA has not, after such expiry, submitted any demands relating to a 50% wage increase for State Attorneys, separate from the demand for an 11% salary increase made in respect of all its members. There cannot, therefore, be a strike in support of a 50% salary increase, when such demand was not submitted to the respondents and referred to the CBC for conciliation. Accordingly, Mr Maserumule submits that the strike is not protected.

35. The answer is that the demand for a 50% rise in the base of the salaries was tabled and has not been withdrawn. It has been kept alive. As late as 9 April 2001 discussions were held concerning the possibility of a submission of the dispute to arbitration. There was no need to table the matter again. The respondents have stated that their willingness to entertain the demand was a gesture of good faith. It was not an invitation to unions to re-open issues for negotiations which have already been settled. This contention is inconsistent with the notion that the matter has been settled. But it can be accepted that there will be occasions where the State would, as averred in para 17.13 of the founding affidavit, agree to discuss salaries where the demand concerning these salaries had been previously rejected. It may be that when the discussions were commenced it "was not coupled with any agreement by the state to waive the terms of the applicable agreement." I have already indicated the extent of the Resolution. In any event it is for the State to make it clear that it does not waive its rights when it enters into these negotiations; not the other way around.

A demand for a 11% increase

36. The next contention is that the PSA has submitted a demand for an 11% salary increase for all its members (including the striking State Attorneys) and so there is no separate demand for a 50% salary increase for State Attorneys. This demand has not been acceded to by the respondents. The parties have deadlocked and the dispute was referred to the CBC on 29 August 2001 for conciliation. Conciliation has not taken place and the 30-day period referred to in section 64(1) of the LRA has not yet expired. There cannot, therefore at this stage, be a protected strike in support of this demand. The strike by the State Attorneys, if in support of the 11% salary increase, is

unprotected for non-compliance with the provisions of section 64(1).

37. I have dealt above with the PSA's demands regarding the salaries of State Attorneys. This strike is not about an annual increment.

Has the right to strike become stale?

38. The respondents submit, that if it is found that the PSA's members can engage in strike in respect of the February 2000 demand for a 50% increase, this right has become stale by reason of the effluxion of time. The following factors are relied upon:

(a) the demand was submitted to the respondents in February 2000;

(b) the PSA only referred a dispute to the CBC on 2 February 2001, after the collective agreement settling the wage dispute for 2000-2001 had been concluded;

(c) the CBC issued a certificate of outcome on 9 April 2001, whilst the collective agreement of 2000-2001 was current and valid; and

(d) notice of strike action was given on 8 August 2001.

39. Mr Maserumule, building on this, submitted that the strike commenced 19 months after the demand was submitted and almost six months after the certificate of outcome had been issued. This meant that the right had become stale. He referred to **Western Platinum Limited v National Union of Mineworkers & Others** (2000) 21 ILJ 2502 (LC). At 2512D-E Waglay J observed that:

"I do not believe that employees should simply refer a dispute in terms of section 64(1)(a) and having obtained a certificate of non-resolution of the dispute or after the expiry of 30 days from the date of referral make reference to the dispute after six months and thereafter again hibernate for a period of two months at a time and then decide to take action, particularly where the dispute it seeks to resolve is of a limited duration."

40. This was said by my brother Waglay J after concluding that the strike notice had become stale by reason of the union's unreasonable delay and his conclusion that the union did not have a serious intention to strike. (See 2912A-D of the judgment.)

41. Mr Maserumule submitted that the facts in this case closely resemble those in the passage above. The PSA and its members have waited for 19 months before embarking on strike action, without any explanation being offered for such a delay. The PSA had accepted a lower salary increase. Its members, who are now striking, accepted the increase and enjoyed the benefit of the increased salaries and the PSA still waited for six months after the certificate was issued before issuing a section 64(1)(b) notice.

42. It is submitted that the certificate relied upon to embark on the present strike action, as well as the right itself, have become stale through effluxion of time and the PSA and its members may not rely on it for purposes of their strike.

43. There appears to be some uncertainty on what jurisprudential basis a right to strike can become stale or lapse. The following possibilities suggest themselves:

) **The strikers have waived their right to strike**

In **Vermeulen's Executrix v Moolman** 1911 AD 384, a case dealing with water rights, Innes J (as he then was) had the following to say:

"And the well-known principle applies that an intention to waive rights of any kind is never presumed. There must therefore be clear evidence not only of the owner's knowledge but of his inaction for a sufficient time and under effective circumstances." At 409.

Innes CJ also had this to say in **Mutual Life Insurance Co of New York v Ingle** 1910 TS 540 at 550:

"After all, waiver is the renunciation of a right. When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it, and the right is gone. ***When the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes.*** *But a mere mental resolve, not so evidenced, and not communicated to the other party, but discovered by him afterwards, seems to me... to have no effect upon the legal position of the person making the resolve."* (Emphasis supplied.)

The strikers may have abandoned the right to strike

In **Image Enterprises CC v Eastman Kodak Co and others** 1989 (1) SA 479 at 484A-E, a trade mark case, MacArthur J said:

"Proceeding along those lines, I turn to the question of whether the instant marks have

been abandoned. The authorities on this point are quite clear. It is essentially a matter of intention and all the facts in the case must be taken into account. Mouson & Co v Boehm (1884) 26 ChD 398 at 406; Kerly's Law of Trade Marks 12th ed at 184; Venkateswaran The Law of Trade and Merchandise Marks at 424 and 660.

It is also apparent that non-use by itself cannot be equated to abandonment, but on the other hand a lengthy period of non-user may well provide such support to the claim that the mark has been abandoned. See the comments of Byrne J in Harts T M 19 RPC 569 at 573-4.

Merely keeping the mark on the register is not enough because, whilst it may show an intention to keep it alive, 'the intention with which abandonment is concerned is that of using the marks in connection with particular goods'. Dastous v Matthews-Wells Co Ltd (1949) Fox's Canadian Patent Cases 1 at 15 per Rand J."

See too **Cape Coast Exploration Ltd v Scholtz and another** 1933 AD 56. Wessels CJ said at 65:

"If, however, the owner of the certificate wishes to renounce his privilege or his rights, is there anything in the Act or in the common law which prevents him from doing so? There is certainly nothing in the Act, and by the common law there is nothing to prevent the owner of a statutory right or privilege from renouncing or abandoning such right or privilege to which he is entitled. If therefore an owner or discoverer asks to have his certificate withdrawn he is at liberty to do so, and if the State acting through the Mines Department acquiesces in this withdrawal, and the discoverer comes to know of this, the privilege is renounced and ceases to exist."

The right to strike may have prescribed by the mere passage of time

Our common and now our statutory law permits, for good and sound policy reasons, a right to be barred by the lapse of time unless it is positively asserted in a court. A strike will not prescribe in terms of the Prescription Act 68 of 1969 because the right does not comply with the requirements of a debt as contemplated in s 11 of the Act. It does not appear that the mere lapse of time, even an unreasonable period of time, on its own, will lead to a lapsing of the right to strike. The time period will be an important consideration as regards other bars on the right to strike.

The right to strike has lapsed through the expiry of time coupled with prejudice to the other side (laches)

The English doctrine of laches has not found fertile soil in South Africa. See **Wolgroeiers Afslaers v Munisipaliteit van Kaapstad** 1978 (1) 13 (A). But the doctrine has informed our law relating to the condonation of a late application for review, involving an unreasonable delay, by insisting that an unreasonable delay alone is insufficient. It must give rise to some prejudice. See the observation of Muller JA in the **Wolgroeiers** case at 27 C-E:

*"In **Zuurbekom Ltd v Union Corporation Ltd,** 1947 (1) SA 514 (AA) op bl 533-535, het Tindall, AR, die Engelse leerstelling van "laches" bespreek en die geleerde Regter het beslis dat dit nie 'n deel van ons reg is nie. Halsbury, Laws of England, 3de uitg. Band 14, bl 641, omskryf genoemde leerstelling soos volg (para 1181):*

'The defence of laches. A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the Statutes of

Limitation, vigilantibus et non dormientibus lex succurrit. A court of equity refuses its aid to stale demands, where the plaintiff has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his laches...' "

And at 27F-H:

"Onmiddellik daarna (in para 1182) bespreek die geleerde skrywers "The nature of laches" en word, in daardie verband, gesê:

'*In determining whether there has been such delay as to amount to laches the chief points to consider are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. . . It is unjust to give the plaintiff a remedy where he has by his own conduct done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect he has, though not waiving a remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted.'*

Ek verwys na die bostaande omskrywing van wat verstaan word onder die leerstelling van "laches" in die Engelse reg om te toon dat by die toepassing van daardie leerstelling die kwessie van benadeling wel in oorweging kom."

48. **(e) Estoppel**

The issue was considered Appellate Division in **Chamber of Mines of South Africa v National Union of Mineworkers and others** 1987 (1) SA 668 (A). Hoexter JA remarked at 690J-691A that he saw no reason for concluding that the principle of estoppel by election or waiver, based as it is on considerations of elementary fairness, should be regarded as a trespasser in the legal field of labour relations. The judge referred to **Angehrn**

and Piel v Federal Storage Co 1908 TS 761 and Spencer Bower **Estoppel by Representation** (1923) para 244-245. The essence of the doctrine is that if a person has an election the person is allowed a reasonable time within which to make that election and must make an election. The person may change his or her mind about the election but not if an injustice is done to another.

49. In **Free State Consolidated Gold Mines (Operations) Ltd operating as "President Brand Mines" v National Union of Mineworkers and others** 1988 (2) SA 425 (O) at 429 the court commented on **Chamber of Mines of South Africa v National Union of Mineworkers and others** 1987 (1) SA 668 (A) at 690B-C. Bester J held that:

"While the remarks of Hoexter JA lend support to the contention that a right to strike acquired in terms of s 65 must be exercised within a reasonable time, the premise that a right must be asserted within a reasonable time after its acquisition does not warrant the conclusion that the failure to do so results ipso iure in its loss. This latter point emerges clearly from the judgment of Hefer JA in Mahabeer v Sharma NO and Another 1985 (3) SA 729 (A) at 736E-I."

'... Depending on the circumstances, such a failure may, eg, justify an inference that the right was waived or, stated differently, that the party entitled to cancel has elected not to do so (cf Pienaar v Fortuin 1977 (4) SA (T) 428G; Becker v Sunnypine Park (Pty) Ltd 1982 (1) SA 958 (W) at 946-5; Smit v Hoffman en 'n Ander 1977 (4) SA 610 (O) at 616G-H), or it may open the door to some other defence. In such cases the lapse of an unreasonably long time forms part of the material which is taken into account in order to decide whether the party entitled to cancel should or should not be permitted to assert his right. But per se it cannot bring about the loss of the right. (Cf Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 325F-G.)'"

50. In **Chemical Workers Industrial Union v Reckitt Household Products** (1992) 13 ILJ 622 (IC) at 628 Botha AM followed the judgment of Hoexter JA and asked the question whether the union had changed its mind and elected not to strike after it acquired the right to strike. The union, said Botha AM, had to be allowed a reasonable time within which to make the election.

51. Brassey **Employment and Labour Law** Vol 3 para A4:11 (original) says that the cases decided in terms of the Labour Relations Act of 1956: "are too distant and uncertain in effect to be relied upon with confidence and are best left to moulder away." Brassey offers the following test:

"The second problem is to determine the status of a strike that starts after the designated time or of strikers who join it too late. The problems, when closely analysed, ultimately collapse into one: to enjoy protection, must a striker begin participating in the strike at the moment appointed in the notice? The answer seems to be 'no'. The suggested test is that the conduct of the striker, to be protected, should be sufficiently closely connected to the strike contemplated in the notice to be considered an element of it. This may be uncomfortably imprecise, but greater precision on a matter of this nature is probably impossible."

52. The Labour Court has also considered the point. In **Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metal Workers of SA** [1999] 1 BLLR 66 (LC) it was stated at para 39 that it was highly unlikely that the legislature would have intended that the failure to commence a strike on the day given in the strike notice should by itself result in the loss of the right to strike. See also Du Toit **Labour Relations Law** 3rd edition 237. This is, in my view, correctly reflects our law.

53. Zondo J (as he then was) went on to observe at paragraph 41:

"At any rate, even if it were to be assumed that a delay in the exercise of the right to strike can by itself result in the loss of such a right, then at least the delay would, in my view, have to be an unreasonable delay. It cannot be said that a delay of three or so days, as was the case in this matter, is an unreasonable delay. If the position is that the delay must be considered as one of a number of factors so as to arrive at the conclusion whether or not the employees have waived their right to strike, in this case there are no other facts which must be taken into account together with the delay."

54. Waglay J in **Western Platinum Limited v National Union of Mineworkers & Others** took the view that he should apply the decision of Bester J in the **Free State Consolidated Gold Mines** case. He concluded at para 44 that:

Taking all of the above into consideration I am not satisfied that the notice given by the respondent in terms of s 64(1)(b) was given within a reasonable time and as such the certificate upon which the notice was based had become stale by effluxion of time."

55. If Waglay J meant to say that it was permissible to rely merely on the effluxion of time then I would respectfully disagree with him.

56. I am of the opinion that the doctrine of laches could be a suitable instrument for judging whether a right to strike is still alive. I say this because it requires an unreasonable period of time which causes prejudice to the employer. It also accords in some way with the approach of the Appellate Division in the **Chamber of Mines** case. It is also broadly compatible with the approach to late application to review reviewable decisions save that the possibility of condonation does not arise in the case of a lapsed strike.

57. However, in view of the authorities, the doctrine of laches cannot be adopted. An employer who believes that the right to strike has lapsed is therefore required to rely on waiver, estoppel or or abandonment.

58. The LRA does not provide for a limitation of the right to strike by estoppel, waiver or abandonment. This raises the question whether the right can be limited in terms of s 36 of the Constitution of the Republic of South Africa of 1996. The constitutional exercise has been outlined by the Labour Appeal Court in **Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd** (1999) 20 ILJ 321 (LAC). It was held:

"19. The Constitution expressly enshrines the right to strike. In terms of s 23(2)(c), every worker has the right 'to strike'. That right, though expressed in unlimited terms, is subject to curtailment provided the restriction complies with s 36, which permits limitation 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors', a number of which are expressly set out. (Compare *S v*

Makwanyane & another 1995 (3) SA 391 (CC) at 436E-F para [104]; *S v Williams & others* 1995 (3) SA 632 (CC) at 650 paras [58]-[60]; and *S v Bhulwana* 1996 (1) SA 388 (CC) at 395H para [18].)

20. The starting-point where a constitutional right is given without express limitation, as Kentridge AJ stated in *Attorney-General v Moagi* 1982 (2) Botswana LR 124 at 184, in a statement he repeated on behalf of a unanimous Constitutional Court in *S v Zuma & others* 1995 (2) SA 642 (CC) at 651I para [15], is that '[c]onstitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them'. Kentridge AJ had in mind cutting constitutional rights down 'so as to bring them into line with the common law', but in my view his remarks suggest a general caution when seeking to read implicit limitations into constitutional rights. Nevertheless, the constitutional right to strike may need to be given specific content in circumstances where it is contended that limitations on its exercise are unconstitutional, though that is not in issue here.

59. The waiver, estoppel or abandonment of a right to strike is not a true limitation on the right to strike as is the obligation to deliver a strike notice etc. In accordance with the freedoms enjoyed by persons in terms of the Constitution and the common law a person may, in most circumstances, abandon or waive a right. A union or would be striker is not subject to any external limitation. Abandonment and waiver are self-limiting. The same applies to estoppel. Should a court find that a right to strike has been waived, estopped or abandoned the finding is declaratory and not constitutive. If, however, a waiver etc is a limitation, the limitation complies, in my opinion, with s 36 of the Constitution.

60. This brings me to the question. Has the PSA waived its right to strike? Is it estopped from asserting its right?

Has it abandoned the right? There has been no communication by the PSA to the respondents that it waives its right to strike on the demands of the State Attorneys. There has been no overt act which would tend to show that the PSA has waived or renounced its rights.

61. Has the PSA delayed unreasonably? If so, has this caused prejudice to the respondents? The demand was submitted to the respondents in February 2000. The PSA referred a dispute to the CBC on 2 February 2001. The CBC issued a certificate of outcome on 9 April 2001. Arbitration was proposed on 24 April 2001. The notice of intended strike action was given on 8 August 2001.

62. Is it an unreasonable delay? In the context of the civil service it is well known that matters move slowly. It may be inferred that an organisation which serves public servants may too be a little slow in getting off the mark. I am of the opinion that the PSA has not waived its right to strike. It had not made an election to strike or not to strike. It is not estopped from striking. For these reasons too I am satisfied that the PSA did not abandon its right.

63. Although it appears unnecessary to deal with it there appears to be no prejudice to the respondents save for the inconvenience that normally flows from a strike.

Strike notice defective?

64. The respondents have submitted that the strike notice is defective. It is contended that, properly interpreted, section 64(1)(d) of the LRA requires:

(a) the demand that forms the subject matter of the strike to be set out in the notice so that it can be determined whether the strike is in respect of a dispute that can be the subject matter of a protected strike;

(b) the notice of commencement of strike to state the nature of the action to be embarked upon, i.e whether it is a total refusal to work, a partial strike, overtime ban or work to rule;

(c) the notice must specify the intended duration of the strike, so that appropriate arrangements can be made in respect of the work of the striking employees.

65. The notice issued by the PSA does not comply with any of the above requirements. This is common cause. The respondents submit that they have been unable to properly plan for the strike as a result of the deficiencies identified above, coupled with the uncertainties of what form the strike is meant to take.

66. In **Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)** (1997) 18 ILJ 671 (LAC) at 677A-D, Froneman DJP stated:

"*In summary: The provisions of s 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 s 64(1)(b) were not complied with. The proposed strike would thus have been unlawful and should, accordingly, have been interdicted.*"

67. Here too there is no constitutional challenge to section 64(1) of the LRA. The respondents' complaint about the strike notice can be answered as follows:

The demand or the grievance need not be set out in the strike notice. This would be a mere formality because at the stage that the strike notice is issued it will have been preceded by-

(i) negotiations during which the issue between the parties will have been throughly explored and positions will have been taken;

(ii) the statutory referral notice or privately agreed process will have set out the demand. If the notice fails to specify the grievance, assuming that the employer is unaware of it, the employer could address an interrogatory to the strikers or their agent; and

(iii) the conciliation meeting or series of meetings would have created an opportunity to explore the nature and ambit of the demand.

There is no warrant for importing into the strike notice the particulars for which the respondents contend.

The right to strike permits the employees to engage in the action encompassed in the definition of a strike in section 213 of the LRA. There is no warrant for implying an obligation on the strikers to disclose their strategies and tactics. The employer must be prepared to meet any action or combination of actions which constitute strike action. There is in any event no obligation on the strikers to follow any one course of action. Even if they agree to certain action the agreement cannot be enforced. See section 67 of the LRA. They can change tack at will as the situation develops.

70. The employer does not need this information because the employer is not without a remedy. The employer is entitled to lock the employees out or to refuse to remunerate the employees for failing to make a proper tender of their services or to remunerate them on a quantum meruit basis. I assume, without deciding, that the State can instruct an outside attorney to litigate.

The LRA does not compel strikers to put a limit on the duration of their strike, or if they should do so, it does not compel them to disclose this information. It is inherent in the nature of a strike that it is a power play where new economic forces determine which party will yield, either by capitulating or making an acceptable offer. It is this uncertainty about the duration of the strike which adds to the effectiveness of the strike and the goal of collective bargaining. In any event it is not beyond the capacity of an employer to make "appropriate arrangements" in respect of the work usually done by the striking employees so far as the law allows this. Knowing the duration of the strike will not authorise the employer to make any kind of arrangement which the employer could not otherwise make.

Alternative legal remedy and discretion

72. Mr Maserumule makes the valid point that the PSA is also required to show that, in the event that the respondents carry out their stated intention to dismiss the striking employees who are its members, it will not have an

alternative legal remedy to obtain redress for its dismissed members.

73. It is submitted that the PSA has not even pleaded that it does not have such a remedy. Rather, the PSA does have a satisfactory alternative remedy. In the event that its members are disciplined and dismissed, the Labour Court has the necessary jurisdiction and power to order full redress, that will include reinstatement and compensation. It follows that on its papers, the PSA has not made out a case and is therefore not entitled to any relief. As Prest, has stated at 46:

"*A final interdict is a drastic remedy and (probably for that reason) in the court's discretion. The court will not, in general, grant an interdict when the applicant can obtain redress in some other form of ordinary relief. An applicant for a permanent interdict must allege and establish, on a balance of probability, that he has no alternative legal remedy."*

74. Mr Maserumule also submitted that an interdict being a discretionary remedy, the court should refuse to make the order sought, in the exercise of its discretion. There will be no real or potential prejudice to the PSA and its members. The respondents have offered the striking employees a hearing, at which they will have an opportunity, with the assistance of the PSA, to make representations why they should not be dismissed. It is not a foregone conclusion at this stage that dismissals will necessarily follow for all or any of the striking employees. The respondents may be persuaded, by the representations to be made, not to dismiss them. To make a declarator and issue an interdict at this stage would clearly be inappropriate and the court is requested to exercise its discretion against granting a final interdict.

75. I do not think that there is any merit in the respondents' contention. State Attorneys, like any other strikers, are entitled to fair labour practices and to the right not to be dismissed for participating in a protected strike. Section 67(4) of the LRA reads:

"An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike."

76. The protection against dismissal is not the only protection to which protected strikers are entitled. If a purposive approach is adopted to the right to strike, the prohibition on dismissing protected strikers and the prohibition on the victimisation of an employee for exercising a statutory right, it is clear that disciplinary sanctions falling short of dismissal will also be illegitimate.

77. It is true that if the employees are dismissed or victimised the Labour Court could grant some relief (subject to the limitations on its powers in terms of the LRA) after a trial. Depending on the circumstances of the case, the passage of time and the congestion of the rolls "full redress" may not be possible.

78. I am convinced by my experience in this court that there is utility in preempting the invasion of a right rather than attempting to redress the wrong after it has been committed. It cannot be applied in all circumstances eg, where the bona fides of retrenchment are concerned. This approach also has the benefit that the matter can be disposed of quickly, provide certainty and eliminate, in this case, the possibility of 138 individual cases of alleged unfair dismissal being tried in this court.

Appropriateness of the relief sought

79. It is further submitted that what the PSA really wants, is legal advice from the court. It does not trust the legal advice that it has been given and wants somebody else, in the form of the Labour Court, to confirm the correctness of such advice. It pleads that its members are afraid of dismissal, that they are taking part in strike action for the first time and therefore need an assurance from this court that "*it is okay to take part in the strike."*

80. It is submitted that such advice unnecessarily interferes with the balance of power and shift the scales in favour of the PSA and its striking members. It is not the court's duty to give advice to protagonists during industrial action. Its role is that of a referee, ensuring that the disputants "play the game according to the rules." Its adjudicative role only kicks in after one of the parties has gained an unfair advantage by breaking the rules. Threatening employees with dismissal, based on the legal advice that the respondents have obtained regarding the legality of the strike, is a lawful weapon that the respondents are entitled to use. Interference by the court is not warranted.

81. It does not lie in the mouth of the respondents who have retreated from the acknowledgment of the State Attorneys' action as a protected strike to complain when, in order to safeguard their rights, the State Attorneys seek a declaratory order that the strike is a protected one. Cf **Metal and Electrical Workers Union of SA v**

National Panasonic CC 1991 (2) SA 527 (C).

82. This strike is a protected one. It is not lawful for the respondents to threaten employees with dismissal in accordance with legal advice.

Costs

83. The representatives were tacitly agreed that costs should follow the result. This seems to me to be the correct approach in this matter. I do not intend granting the costs incurred on Saturday 8 September 2001. Although the matter was found to be urgent it was not so urgent that the time periods should have been constricted as they were.

Order

84. In the result the rule nisi was confirmed on 19 September in the following terms:

1.1. The strike in which the applicant's members are currently engaged in, is a protected strike in terms of section 64 of the Labour Relations Act 66 of 1995.

1.2. The respondents are interdicted from dismissing or taking disciplinary action against the applicant's members in respect of their participation in the strike.

2. The respondents are ordered to pay the applicant's costs save for the costs incurred on 8 September 2001.

Signed and dated at BRAAMFONTEIN this 25th day of September 2001.

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A A Landman

Judge of the Labour Court of South Africa

11 September 2001

: 25 September 2001

For the applicant: Adv F G Barrie instructed by Sampson Okes Higgins Inc.

nts: Mr Maserumule of Maserumule Inc.