CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/15

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA Applicant

and

PUTCO LIMITED Respondent

Neutral citation:	*Transport and Allied Workers Union of South Africa v PUTCO Limited* [2016] ZACC 7
Coram:	Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J, Nugent AJ and Zondo J
Judgment:	Khampepe J (unanimous)
Heard on:	10 November 2015
Decided on:	8 March 2016
Summary:	Definition of lock-out — trade union not party to bargaining council — demand — referral of dispute for conciliation Section 64 of the Labour Relations Act — majoritarianism— collective bargaining — section 23 of the Constitution

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ORDER

On appeal from the Labour Appeal Court of South Africa (hearing an appeal from the Labour Court, Johannesburg):

1. Condonation is granted.
2. Leave to file supplementary written submissions is refused.
3. Leave to file a supplementary affidavit is refused.
4. Leave to appeal is granted.
5. The appeal succeeds.
6. The order of the Labour Appeal Court of South Africa is set aside and replaced with the following:

   "The appeal is dismissed with costs."
7. The respondent is ordered to pay the applicant's costs in this Court including the costs of two counsel, where applicable.

JUDGMENT

KHAMPEPE J (Moseneke DCJ, Cameron J, Madlanga J, Van der Westhuizen J, Nugent AJ, Jafta J, Nkabinde J and Zondo J concurring)

Introduction

[1] The central question in this case is whether the Labour Relations Act[1] (LRA) permits an employer to exclude from its workplaces, by way of a purported lock-out, members of a trade union that were not a party to a bargaining council where a dispute arose and was subsequently referred for conciliation.

[2] This is an application for leave to appeal against a decision of the Labour Appeal Court of South Africa (Labour Appeal Court) which found that the

[1] 66 of 1995.

purported lock-out of the applicant's members was lawful despite the fact that the trade union was not a member of the bargaining council where the dispute arose.

Parties

[3] The applicant is the Transport and Allied Workers Union of South Africa (TAWUSA), a trade union duly registered in terms of the LRA. Its members comprise 26 per cent of the employees of the respondent, PUTCO Limited (PUTCO); a passenger bus operator duly incorporated in terms of the company laws of the Republic of South Africa.

Background

[4] On 30 July 2002, PUTCO and TAWUSA entered into a recognition agreement in terms of the LRA (recognition agreement). This agreement remained in force at all material times. Clause 9 of the recognition agreement stipulates that "[t]he parties recognise that the minimum terms and remuneration and conditions of employment in the industry are negotiated and regulated by the South African Road Passenger Bargaining Council."

[5] The South African Road Passenger Bargaining Council (Bargaining Council) has jurisdiction over collective bargaining on conditions of employment in the bus passenger industry. PUTCO was party to the Bargaining Council as a member of the Commuter Bus Employers' Organisation. The other employers' organisation at the Council is the South African Bus Employers' Organisation. TAWUSA, the South African Transport and Allied Workers Union (SATAWU) and the Transport Omnibus Workers' Union (TOWU) were employee representatives at the Bargaining Council.

[6] In April 2012, a collective agreement on wages and other conditions of employment was concluded between the parties present at the Bargaining Council (2012 collective agreement). TAWUSA, a member of the Bargaining Council at the time, did not sign the 2012 collective agreement. It is common cause that on

19 June 2012 the Minister of Labour extended the 2012 collective agreement to all other employees and employers in the industry pursuant to section 32(2) of the LRA (the 2012 extension). The 2012 collective agreement was initially extended from 9 July 2012 to 31 March 2013, and then further extended to 31 July 2013. Accordingly, the 2012 collective agreement continued to apply to TAWUSA and its members until 31 July 2013 through the extension of the collective agreement by the Minister in terms of section 32 of the LRA.[2]

[7] In August 2012, TAWUSA terminated its membership with the Bargaining Council. Then, in February 2013, TAWUSA attempted to have its membership reinstated. It addressed a letter to the Bargaining Council to this effect. On 14 February 2013, the Bargaining Council notified TAWUSA that its Central Committee would consider TAWUSA's application for the reinstatement of its membership at a meeting to be held on 17 April 2013.

[8] On 17 April 2013, industry wage negotiations for 2013 having gridlocked at the Bargaining Council, SATAWU and TOWU notified employers that their members would be embarking on a strike. On 18 April 2013, before the strike commenced, TAWUSA advised PUTCO that its members would not take part in the strike. The strike subsequently commenced on 19 April 2013.

[9] On 19 April 2013, PUTCO addressed a notice to the Bargaining Council, TAWUSA and non-unionised employees, notifying them that it intended to lock out all of its employees on Sunday, 21 April 2013 at 09h00 (lock-out notice). The lock-out notice read:

> "In response to the strike notice issued, the Company hereby gives 48 hours' notice of its intention to lock-out all employees in the bargaining unit from all of PUTCO Limited's workplaces in support of the employer wage proposals in the wage negotiations in the [Bargaining Council]."

[2] On section 32 extensions, see [53] to [56] below.

[10] On that day, TAWUSA's general secretary, Mr Mankge, telephoned Mr Malherbe, PUTCO's senior executive for corporate services, to inquire about the applicability of the lock-out to TAWUSA members. In a follow up email to Mr Mankge, Mr Malherbe confirmed that the lock-out notice was a response to the strike notices issued by SATAWU and TOWU, the trade unions representing their members at the Bargaining Council. In response to Mr Malherbe, Mr Mankge stated that TAWUSA was not a member of the Bargaining Council and was not, therefore, a party to the dispute that resulted in the lock-out. He further noted that "in the circumstances [TAWUSA] members are not on strike". In a separate letter, Mr Mankge posited that TAWUSA members would "report for duty as normal and expect [PUTCO] to ensure their safety" and that TAWUSA "intends to engage with the Employers Organisation represented at the Bargaining Council to better the conditions of . . . [its] members in the bus passenger industry". He asserted that TAWUSA's members would "not sign any new conditions which [PUTCO] seek[s] to impose by way of unlawful lock-out", but that TAWUSA was "readily available to meet with [PUTCO] at short notice to discuss [the] improvement of [TAWUSA] members' conditions of employment".

[11] Mr Malherbe responded to Mr Mankge's email, contending that the lock-out notice complied with the LRA and that "per the [Bargaining Council] Constitution and the [Bargaining Council] Main Agreement which is extended to non-members no employer shall be compelled to negotiate at any other level".

[12] On the same day, the Bargaining Council sent a letter to TAWUSA notifying it that the Council's Central Committee had considered its request of February 2013. The Central Committee invited TAWUSA to apply for membership in terms of the requirements set out in the Bargaining Council's constitution.

[13] On 21 April 2013, PUTCO purported to institute a lock-out which it claimed applied to all PUTCO employees, including TAWUSA members.

[14] Other than the events already described, which are common cause, there are factual disputes between the parties pertaining to whether some TAWUSA members, despite its general secretary's assurances, were, in fact, on strike.[3]

Litigation history

Labour Court

[15] Aggrieved by the purported lock-out instituted by PUTCO, TAWUSA launched an urgent application in the Labour Court.[4] It sought an interdict to prevent PUTCO from maintaining the lock-out.

[16] The Labour Court held in favour of TAWUSA. It found that "a lock-out must be directed to employees with a demand [from the employer]"[5] – since no demand was made to it by PUTCO, it could not be locked out. It further reasoned that section 64(1)(c) of the LRA required trade unions to be given notice only if they were a party to a dispute.[6] As it was common cause that TAWUSA was not a member of the Bargaining Council, and thus not a party to the dispute, it could not be locked out. The Labour Court granted an interim order halting the lock-out insofar as it related to TAWUSA's members and awarded costs.

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[3] PUTCO contends that after the strike notice had been issued, on the day before the start of the strike, two of TAWUSA's shop stewards informed Mr Guimuraes, PUTCO's General Manager at the Comuta Business Unit in Soweto, that TAWUSA's head office had notified them that they must support the strike for monetary reasons. Moreover, TAWUSA shop stewards informed Mr Bernin, the Operations Manager of PUTCO's Lekoa bus operations, that they would participate in the strike for safety reasons. This is disputed by TAWUSA. PUTCO also contends that when the strike commenced, 60 TAWUSA members employed by PUTCO and working out of PUTCO's Ipelegeng operations did not show up for work. TAWUSA disputes this and states that its members turned up and were turned away by PUTCO.

[4] *Transport & Allied Workers Union of South Africa on behalf of Members v Algoa Bus Company (Pty) Ltd & Another* [2013] ZALCJHB 187; (2013) 34 ILJ 2949 (LC) (Labour Court judgment). TAWUSA initially brought two separate applications against Algoa Bus Company (Pty) Limited and PUTCO. Given the similarity in the applications, they were heard together by the Labour Court. The Labour Court found in TAWUSA's favour. However, only PUTCO appealed its decision. Algoa played no further part in the ensuing litigation.

[5] Labour Court judgment id at para 13.

[6] Id at paras 15-6.

Labour Appeal Court

[17] PUTCO successfully took the matter on appeal to the Labour Appeal Court.[7] That Court held that there was a demand made to TAWUSA that it had expressly rejected.[8] The Court found that TAWUSA was a party to the dispute by virtue of the interest that it had in the outcome of the negotiations at the Bargaining Council and the benefits it stood to reap from the collective agreement reached there.[9] The Court noted that it was a minority union and the will of the majority union would prevail during the negotiations; this was "in sync with the general scheme of the [LRA]".[10]

[18] The Labour Appeal Court traversed the rationale behind strikes and lock-outs. It noted that TAWUSA members could have joined the strike without notice at any time. By parity of reasoning, lock-outs could equally be instituted against minority trade unions that were not party to the Bargaining Council. To hold otherwise "would blunt the employer's weapon".[11]

[19] The Labour Appeal Court concluded that the lock-out was lawful and upheld the appeal with costs.[12]

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[7] *Putco (Pty) Limited v Transport & Allied Workers Union of South Africa & Another* [2015] ZALAC 14; (2015) 36 ILJ 2048 (LAC) (Labour Appeal Court judgment).

[8] Id at para 67. The wording of the notice here differs slightly from the wording quoted by the Labour Court. See id at para 8 and compare with Labour Court judgment above n 4 at para 27. The Labour Appeal Court quoted the notice as follows:

> "Subject: Notice of Intention to lock-out all members in the bargaining unit
>
> In response to the strike notice issued, the Company hereby gives 48 hours' notice of its intention to lock-out all employees in the bargaining unit from all of PUTCO's workplaces in support of the employer wage proposals in the wage negotiations in the [Bargaining Council]."

[9] Labour Appeal Court judgment above n 7 at paras 62 and 71.

[10] Id at para 50.

[11] Id at para 66.

[12] The Labour Appeal Court's order reads as follows:

> "1) The appeal succeeds.
>
> 2) The order of the court a *quo*, in respect of PUTCO Limited, is set aside and replaced with the following:
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> 'The application is dismissed with costs.'

In this Court

TAWUSA's submissions

[20] TAWUSA maintains that section 64(1)(c) envisages locking out a party who has an interest in a dispute, or who is directly affected by it. It contends that section 64(1) does not authorise a lock-out against a trade union and its members who are not party to the dispute that has given rise to the lock-out. It further submits that the section 213 definition of lock-out does not assist PUTCO: the definition of lock-out stipulates what a lock-out is, whereas section 64 contemplates when an employer may have *recourse* to a lock-out.

[21] TAWUSA emphasises that a lock-out is defined as the exclusion from the workplace by an employer of its employees for the purpose of compelling these employees to accept a demand. There can be no dispute if there is no demand. Furthermore, the demand that the employer requires employees to accede to must have been made to the employees who are being locked out. On the facts of the case, there could not have been a demand made to TAWUSA as it was not a member of the bargaining council where the dispute arose.

[22] It further argues that lock-outs against minority unions are "secondary lock-outs", which are not permitted by the LRA. Even if secondary lock-outs were permitted, a lock-out must be related to a collective bargaining purpose. If the minority union is not a part of a bargaining council, then this purpose is not served. TAWUSA contends that the constitutional right of employees to strike cannot be equated to an employer's statutory entitlement to lock out employees.

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3) The first respondent is ordered to pay the costs of the appeal, such costs to include those consequent upon the employment of two counsel."

PUTCO's submissions

[23] PUTCO argues that TAWUSA confounds the interpretation of the procedural requirement for a lock-out with the definition of a lock-out in section 213. Given that section 64(1) provides that notice to a bargaining council is deemed as notice to all unions operating within its jurisdiction, TAWUSA was effectively a party to the dispute.

[24] PUTCO further argues that there was a dispute between itself and TAWUSA. It relies on the manner in which Mr Mankge responded to the lock-out notice.[13] Following the lock-out notice, TAWUSA advised PUTCO that its members refused to agree to the wage offer. It also sought to negotiate separately at plant level with PUTCO and other employer organisations that were part of the Bargaining Council. PUTCO argued that it had made a demand to TAWUSA inasmuch as it expected TAWUSA's members to accept the proposal made to the other unions at the Bargaining Council. Moreover, TAWUSA's members had a direct and material interest in the dispute, and could accordingly be compelled to accept PUTCO's demands.

Condonation

[25] PUTCO was late in filing its written submissions. The delay was minimal; the submissions were filed only one day late. PUTCO explains that the submissions had been faxed to TAWUSA and its attorneys on the due date, but had not been delivered by hand. Subsequently, the Registrar of this Court declined to accept the filing of the written submissions because they had not been served on TAWUSA by hand. The error was rectified and the documents were filed on the following court day. TAWUSA suffered no prejudice because its attorneys received the written submissions on the due date. It does not oppose the application for condonation. Given the minimal delay and the plausibility of the explanation proffered, I am satisfied that condonation should be granted.

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[13] See [10] above.

Leave to file supplementary written submissions and supplementary affidavit

[26] A week before the hearing, TAWUSA, without leave from this Court, filed supplementary written submissions. TAWUSA asserted that PUTCO indicated that it intended to refer to particular government gazettes in oral argument. The gazettes in question recorded certain wage-related collective agreements concluded at the Bargaining Council. This, according to TAWUSA, necessitated a response. It accordingly filed supplementary submissions in anticipation of the submissions to be made by PUTCO. Prompted by these submissions, PUTCO, a day before the hearing, filed a supplementary affidavit. It attached the relevant gazettes.

[27] These submissions and the supplementary affidavit cannot be admitted. The parties' actions disregard this Court's Rules.[14] Filing documents only a few days before the hearing without attempting to seek leave of the Court is not a practice we countenance in any form. There were no exceptional circumstances that warranted the late filing of these documents. These documents are, in any event, unhelpful in the determination of the matter at hand. Accordingly, the supplementary submissions filed by TAWUSA and the affidavit filed by PUTCO are not admitted.

Leave to appeal

[28] This matter triggers this Court's jurisdiction. It raises a constitutional issue,[15] specifically in respect of the rights in section 23(1) and (5) of the Constitution, to which the LRA was enacted to give effect.[16] This matter also raises an arguable point

[14] These actions are not contemplated by Rule 19 or Rule 20.

[15] It is by now trite law that the interpretation of the LRA always raises a constitutional issue. See *National Union of Metal Workers of SA v Intervalve (Pty) Ltd and Others* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) at para 25 and *National Education Health & Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 14.

[16] Section 23 of the Constitution provides:

> "(1) Everyone has the right to fair labour practices.
>
> . . .
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective

of law of general public importance which ought to be considered by this Court. Our interpretation of sections 64(1) and 213 of the LRA will have an impact beyond the parties before us.

[29] TAWUSA has prospects of success, especially given the existence of divergent Labour Court opinions regarding the interpretation of sections 64(1) and 213.[17] Moreover, this matter raises novel questions of law that this Court has yet to definitively pronounce on. It is in the interests of justice to grant leave to appeal.

Issue

[30] The central issue is whether section 64(1) read with section 213 of the LRA permits an employer to lock out members of a trade union that is not a party to a bargaining council where a particular dispute has arisen and has been referred for conciliation.

Lock-outs in terms of the LRA

[31] A lock-out is one of the tools that the LRA provides to an employer in order to resolve disputes between an employer and employees. Section 213 of the LRA defines a lock-out as—

> "the exclusion by an employer of *employees* from the employer's workplace, for the purpose of compelling the *employees* to accept a demand in respect of any matter of mutual interest between employer and *employee*, whether or not the employer breaches those *employees'* contracts of employment in the course of or for the purpose of that exclusion".

[32] The purpose of a lock-out in terms of section 213 is to compel employees whose trade union is party to certain negotiations to accede to an employer's demand.

> bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[17] Compare *UTATU SARHWHU and Others v Autopax Passenger Services (Soc) Ltd and Another* [2013] ZALCJHB 223; (2014) 35 ILJ 1425 (LC) (*UTATU*) and the Labour Court judgment above n 4.

Its object is to end a stalemate reached as a result of an impasse in negotiations between employer and employee in respect of matters of "mutual interest". A resolution of a dispute can be reached only between adversaries. As a matter of logic, then, there must be a dispute between an employer and employees or their trade union before a lock-out is instituted. Accordingly, any exclusion of employees from an employer's workplace that is not preceded by a demand in respect of a disputed matter of mutual interest does not qualify as a lock-out in terms of section 213 of the LRA.

[33] In the present matter, PUTCO's lock-out notice was made "in support of the employer wage proposals in the wage negotiations in the [Bargaining Council]".[18] In oral argument, it was contended on PUTCO's behalf that the lock-out notice given to TAWUSA constituted a demand in respect of a matter of mutual interest. It was further contended that Mr Mankge's assertion that TAWUSA members would "not sign any new conditions which [PUTCO] seek[s] to impose by way of unlawful lock-out"[19] constituted a rejection of PUTCO's demand and that PUTCO was accordingly entitled to lock out TAWUSA members. These submissions raise two questions:

(a) Was there a matter of mutual interest between the parties?

(b) Did PUTCO's lock-out notice constitute a demand for the purposes of section 213 of the LRA?

Was there a matter of mutual interest between the parties?

[34] In accordance with section 213, an employer cannot lock out employees in respect of any issue, but only in connection with those issues that are of interest to both employer and employees. In the present case, there are matters of mutual interest relating to wages and other conditions of employment. In particular, the outcome of ongoing negotiations at the Bargaining Council was of interest to both PUTCO and TAWUSA, as the conclusion of a collective agreement would have implications for

[18] See [9] above where the lock-out notice is quoted in full.

[19] See [10] above.

both parties. However, that both parties had an interest in the Bargaining Council's activities does not end the inquiry. A lock-out can be lawful only if it is pursuant to a demand.

Did PUTCO's lock-out notice constitute a demand for the purposes of section 213 of the LRA?

[35] The LRA requires an employer to make a perspicuous demand to employees before resorting to locking them out.[20] After all, the purpose of a lock-out is to compel employees to accept the employer's demands. For this reason, and because of the circumstances outlined below, PUTCO's assertion that its lock-out notice constituted a demand is flawed. The recognition agreement required that negotiations in respect of wages and other conditions of employment be undertaken at the Bargaining Council.[21] A corollary to this is that demands in respect of wages and other conditions of employment could only be made at the Bargaining Council. PUTCO's lock-out notice acknowledged this requirement: it was made "in support of the employer wage proposals in the wage negotiations [at the Bargaining Council]".[22] The notice could not, therefore, have constituted a demand.

[36] Moreover, to accept PUTCO's construction would be to put the carriage before the horse. A lock-out notice cannot constitute both a notice and a demand at the same time. The LRA clearly distinguishes between a notice and a demand and does not use the two interchangeably. The purpose of a lock-out notice is to *inform* a union and its members of an impending lock-out. In other words, recourse to a lawful lock-out must already be available. An employer is not entitled to resort to a lock-out if it has not yet made a demand to those employees who are to be excluded from the employer's workplaces.

[20] See section 213 of the LRA. See also Grogan *Collective Labour Law* 2ed (Juta and Company (Pty) Limited, Cape Town 2014) at 410.

[21] See [4] above.

[22] See [9] above.

[37] On this point, the Labour Appeal Court held:

> "The employer may, as part of its strategy to put pressure on its employees to accept its demand, decide to lock out all employees in order to achieve a systematic consecutive group or individual capitulation. As the one group capitulates and accepts the employer's demand; pressure would be put on the other group/s or individuals to do the same. The more employees as individuals or a group accept the demand the less effective the strike might become thereby forcing the remaining employees to accept the employer's demand. Striking workers will not receive a salary during the strike. Union funds would be drained whilst those employees who have decided to accept the demand would be able to work and receive their salaries. The lock-out would exert economic pressure on the union to accept the employer's demand."[23]

[38] TAWUSA is not party to the Bargaining Council. Its ability to put pressure on the other trade unions at the Bargaining Council to accept the demand made by an employer organisation is accordingly nought. There can be no lock-out unless there is an underlying disagreement. Therefore, as TAWUSA was not party to the dispute, they cannot be locked out in terms of the LRA. In light of this interpretation, the Labour Appeal Court's finding that TAWUSA's lock-out would achieve "systematic, consecutive group or individual capitulation"[24] is misconceived.

[39] I accept that a demand was made in the form of employer wage proposals at the Bargaining Council. This demand was made by the employers' organisation, which includes PUTCO, to trade unions who were members of the Bargaining Council. It is common cause that TAWUSA was not a member. It follows that no demand was made to TAWUSA, nor was it in a position to accede to the demands PUTCO had made to the trade unions that were present at the Bargaining Council.

[40] Section 213 makes it apparent that the LRA does not permit a lock-out without a demand being directed at employees. But, as has been shown above, no demand

[23] Labour Appeal Court judgment above n 7 at para 64.

[24] Id.

was made to the members of TAWUSA as they were not party the Bargaining Council. The purported lock-out of TAWUSA members accordingly fell outside the scope of the definition of a lock-out in section 213. It amounted to an unlawful exclusion of TAWUSA members from PUTCO's workplaces not contemplated by the LRA. In light of this finding, TAWUSA's application must succeed. However, even if this Court were to accept that section 213 of the LRA had been complied with, PUTCO's purported lock-out must still fail for want of compliance with section 64(1) of the LRA.

Section 64(1) of the LRA

[41] Beyond the dictates of section 213, the circumstances under which an employer may resort to a lock-out are further refined in section 64(1) of the LRA. Section 64(1) envisions a multi-staged process. It states under which circumstances industrial action may take place; that is, when employees may exercise their right to strike as well as when an employer may have recourse to a lock-out.

[42] Section 64(1)(a) of the LRA provides:

> "(1) Every *employee* has the right to strike and every employer has recourse to *lock-out* if—
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> (a) the *issue in dispute* has been referred to a *council* or to the Commission as required by *this Act*, and—
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> (i) a certificate stating that the *dispute* remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission."

[43] The LRA defines "issue in dispute" in relation to a strike or lock-out as "the demand, the grievance, or the *dispute* that forms the subject matter of the *strike* or *lock-out*".[25]

[25] See section 213 of the LRA.

[44] Section 64(1)(c), the section on which the parties most heavily rely, describes the notice requirements that must be met before a lock-out can take place. It provides:

> "(1) Every *employee* has the right to *strike* and every employer has recourse to *lock-out* if—
>
> . . .
>
> (c) in the case of a proposed *lock-out*, at least 48 hours' notice of the commencement of the lockout, in writing, has been given to any *trade union* that is a party to the *dispute*, or, if there is no such *trade union*, to the *employees*, unless the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*."

[45] The dictates of section 64(1)(a) are clear. No industrial action can be undertaken until there has been an attempt at conciliation.[26] This provision also makes pertinent that an "issue in dispute" arises prior to a matter being referred for conciliation. Only once a dispute has arisen can it be referred to a bargaining council for conciliation. Moreover, industrial action can only be taken in the event that an attempt at conciliation fails, either because a certificate by the bargaining council states that the issue in dispute remains unresolved, or because a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the bargaining council. Referral to conciliation is not merely a perfunctory procedural step that has to be complied with in order to obtain a licence to lock out or to embark on a strike. The object of section 64(1)(a) is to bring together the parties at the negotiations, and encourage them to seek solutions to issues of mutual concern, thereby reinforcing a collective bargaining culture.

[46] This Court has previously recognised that the right to "collective bargaining between the employer and . . . [employees] is key to a fair industrial relations

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[26] See *Kgasago & Others v Meat Plus CC* (1999) 20 ILJ 572 (LAC); [1999] 5 BLLR 424 (LAC); *NASECGWU v Donco Investments (Pty) Ltd* [2009] ZALC 114; (2010) 31 ILJ 977 (LC).

environment".[27] The LRA is concerned with the power imbalance between the employer and employees. It sanctions the use of power by employers and employees, but only as a last resort, and only after the issue in dispute between the parties has been referred for conciliation. Collective bargaining therefore implies that each employer-party and employee-party has the right to exercise economic power against the other once the issue in dispute has been referred for conciliation, and only if that process fails in one of the manners described above.[28]

[47] The referral process mandated by the LRA did take place. The issue in dispute arose at the Bargaining Council and it was there that the conciliation efforts occurred and were unsuccessful.[29] However, this process did not involve TAWUSA because it was not a party to the Bargaining Council.

[48] The Labour Appeal Court found that TAWUSA was a party to the dispute because it stood to benefit from the dispute's resolution at the Bargaining Council.[30] It also found that TAWUSA was a party to the dispute because it would be bound by the collective agreement and would thus "reap the benefits of the wage negotiations should the majority union's demand[s] be accepted".[31] That Court found that TAWUSA had an interest in the Bargaining Council negotiations and was accordingly "represented by the majority unions, based on the majoritarian principle and the Constitution of the [Bargaining Council]".[32] PUTCO submits that this finding is correct and that TAWUSA was "effectively" a party to the dispute.

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[27] *NUMSA v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) (*Bader Bop*) at para 13. See also section 23(1) of the Constitution which guarantees the right to fair labour practices and 23(5) which guarantees the right to engage in collective bargaining.

[28] See [45] above.

[29] A certificate was issued by the Bargaining Council to the effect that the dispute remained unresolved as envisioned by section 64(1)(a)(i) of the LRA.

[30] Labour Appeal Court judgment above n 7 at para 71.

[31] Id at para 62.

[32] Id at para 71.

[49] I do not agree. TAWUSA was not a party to the dispute for the simple reason that it was not a party to the Bargaining Council when this particular dispute arose. Antecedent to any industrial action is the referral process envisioned by section 64(1)(a) of the LRA. What bears emphasis is that the parties involved in the dispute remain the same throughout the referral process, including during the impasse in negotiations and the resultant industrial action. The parties to the issue in dispute do not change midway through the resolution process. As Conradie J observed in *Metal and Electrical Workers Union of SA*, once parties resort to industrial action they put on boxing gloves to deliver blows against each other.[33] From the commencement of the match until the final bell has rung, there are only two boxers in the ring. There are, of course, spectators to a boxing match, but only those parties that have declared an intention to fight enter the fray. A blow cannot be dealt to a spectator simply because he or she has an interest in the outcome of the match.

[50] It is difficult to conceive of a situation where a trade union is a party to the dispute by virtue of its interest before a matter has been referred for conciliation, and then becomes a non-party during the conciliation, only to become a party again when the dispute remains unresolved and industrial action is contemplated and/or undertaken. Thus, on a proper interpretation of section 64(1), the "employees" referred to in section 64(1)(c) are employees who were party to the dispute that was referred for conciliation in terms of section 64(1)(a). Notice under section 64(1)(c) can be given only to employees who were party to a bargaining council where the dispute arose and was referred for conciliation.

[51] Contrary to the Labour Appeal Court's finding, TAWUSA's interest in the dispute at the Bargaining Council amounts to a mere hope or expectation (*spes*); its interest in the negotiations was confined to a hope that a favourable collective agreement would eventually be forthcoming. The Labour Appeal Court's conclusion

[33] *Metal and Electrical Workers Union of SA v National Panasonic Co* 1991 (2) SA 527 (C); (1991) 12 ILJ 533 (C) at 536.

that TAWUSA was a party to the dispute because of its interest in the negotiations is accordingly untenable.[34]

Findings of the Labour Appeal Court and PUTCO's further submissions

[52] I have concluded that TAWUSA was not a party to the dispute. It remains necessary, however, to consider further arguments in favour of PUTCO's position, including that:

(a) Section 32 of the LRA and the Bargaining Council constitution renders TAWUSA a party to the dispute for the purposes of a lock-out.

(b) The Labour Appeal Court correctly relied on the principle of majoritarianism to hold that the lock-out applied to TAWUSA members.

(c) It is already settled that non-striking employees that are not party to the dispute are entitled to strike.[35] The Labour Appeal Court was correct when, by comparable reasoning, it came to a similar conclusion concerning lock-outs.

(d) The Labour Appeal Court judgment promotes collective bargaining in a manner befitting of the objects of the LRA.

Extensions by the Minister in terms of section 32 of the LRA

[53] PUTCO argues that because collective agreements are ordinarily extended by the Minister in terms of section 32, and TAWUSA stands to benefit from any collective agreement so extended, it is consequently a party to the dispute.[36] This submission is not correct for at least two reasons.

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[34] See [17] above.

[35] See, for example, *SATAWU and Others v Moloto and Another NNO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (*Moloto*) at para 61; *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* [1998] ZALAC 27; (1999) 20 ILJ 321 (LAC) at para 27; *Chamber of Mines v AMCU* [2014] ZALCJHB 13; (2014) 35 ILJ 1243 (LC) at para 70; *Plastic Convertors Association of SA v Association of Electric Cable Manufacturers of SA and Others* [2011] ZALCJHB 59; (2011) 32 ILJ 3007 (LC) at para 23.

[36] Section 32 of the LRA, in relevant part, states:

> "(1) A *bargaining council* may ask the *Minister* in writing to extend a *collective agreement* concluded in the *bargaining council* to any non-parties to the *collective agreement* that are within its *registered scope* and are identified in the request, if at a meeting of the *bargaining council*—

[54] First, section 32 applies only once a collective agreement is concluded. As stated earlier, section 64(1) envisages a referral process before lock-outs and strikes can be resorted to. Put differently, industrial action must be preceded by an attempt at conciliation of the issue in dispute. It is important to stress that during this process, while there is a prior collective agreement that may be extended, as was the case here, no new collective agreement has been concluded. Indeed, the very purpose of a lock-out is to force the parties to conclude a collective agreement. It is only after a collective agreement has been reached that section 32, which empowers the Minister to extend this agreement to the entire bargaining unit, is triggered. The Minister thus cannot simply extend a collective agreement: consensus must first be reached at the bargaining council. She may only extend the collective agreement if the majority of the members of trade unions at the bargaining council consider it propitious to do so. Before a collective agreement is concluded, and an extension permitted, TAWUSA could not have been party to the dispute on the mere possibility that, in the foreseeable future, the collective agreement concluded may be extended to it.

[55] Second, one must be mindful that a section 32 extension is not a foregone conclusion once a collective agreement has been concluded. In order to extend the collective agreement, the Minister must be satisfied that certain conditions set out in that provision have been met. Section 32, titled "[e]xtension of collective agreements concluded in bargaining council", provides that the Minister may extend a collective agreement to non-parties of the bargaining council only at its request. This can happen only if, at a meeting of a bargaining council, "one or more registered trade

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(a) one or more registered *trade unions* whose members constitute the majority of the members of the *trade unions* that are party to the *bargaining council* vote in favour of the extension; and

(b) one or more registered *employers' organisations*, whose members employ the majority of the *employees* employed by the members of the *employers' organisations* that are party to the *bargaining council*, vote in favour of the extension.

(2) Within 60 days of receiving the request, the *Minister* must extend the *collective agreement*, as requested, by publishing a notice in the *Government Gazette* declaring that, from a specified date and for a specified period, the *collective agreement* will be binding on the non-parties specified in the notice."

unions whose members constitute [a] majority" and "one or more registered employer organisations, whose members employ the majority of the employees", vote for the extension.[37] The LRA also recognises that there may be instances where extending the collective agreement to non-parties is unfair and provides for certain exemptions.[38]

[56] The very notion of an "extension" is telling. Collective agreements can only be extended to non-parties of a bargaining council. These parties may have an interest in the negotiations that occur within the bargaining council, and even a hope or an expectation that a collective agreement may be extended to them. It does not, however, make them party to a dispute to which, by definition, they cannot be a party. Thus, that a collective agreement concluded at the Bargaining Council *could* be extended to TAWUSA does not make TAWUSA a party to the dispute at the Bargaining Council.

Bargaining Council constitution

[57] PUTCO relied on the provisions of the Bargaining Council constitution to suggest that TAWUSA would be bound by the collective agreement concluded at the Bargaining Council, and that it was therefore permitted to lock out TAWUSA

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[37] Id.

[38] Section 32(3) of the LRA provides:

> "A *collective agreement* may not be extended in terms of subsection (2) unless the *Minister* is satisfied that—
>
> . . .
>
> (dA) the *bargaining council* has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the *collective agreement* and is able to decide an application for an exemption within 30 days;
>
> (e) provision is made in the *collective agreement* for an independent body to hear and decide, as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against—
>
> (i) the *bargaining council's* refusal of a non-party's application for exemption from the provisions of the *collective agreement*; or
>
> (ii) the withdrawal of such an exemption by the *bargaining council*;
>
> (f) the *collective agreement* contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of *this Act*."

members. This proposition was accepted by the Labour Appeal Court. In my view, that finding is incorrect.

[58] Clause 2.2 of the Bargaining Council constitution reads:

> "2.2 This Constitution and all agreements concluded under the auspices of [the Bargaining Council] shall apply and be binding on:
>
> 2.2.1 Employers' Organisations and Trade Unions that are party to [the Bargaining Council], as well as members of these Parties.
>
> 2.2.2 *All eligible Employees in the employ of members of the above Employers' Organisations regardless of any Union affiliation.*" (Emphasis added.)

[59] The lawfulness of this provision is questionable. The LRA, in general, and section 30 of the LRA dealing with the constitution of bargaining councils in particular, does not empower a bargaining council to conclude collective agreements that bind non-parties. Otherwise, section 32 of the LRA, which empowers the Minister to extend the application of collective agreements to the entire industry including to non-parties, would be rendered ineffective.

[60] Moreover, a fundamental tenet of labour law is that employees may be represented through their trade union. Employers and employees, more often than not, have divergent interests when negotiating, and conflict is predictable. The LRA foresees this conflict of interests and facilitates the participation of both employer parties and trade unions in the forums it creates to negotiate issues of mutual interest.[39] To bind an employee by virtue of their employer's representation at a bargaining council seems untenable in this context.

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[39] The LRA provides for conciliation to take place either at a bargaining council, or at the Commission for Conciliation, Mediation and Arbitration (CCMA). Section 30(1)(a) discusses the appointment of parties to a bargaining council and requires a bargaining council constitution to ensure—

> "the appointment of representatives of the parties to the *bargaining council*, of whom half must be appointed by the *trade unions* that are party to the *bargaining council* and the other half by the *employers' organisations* that are party to the *bargaining council*, and the appointment of alternates to the representatives."

Majoritarianism

[61] In essence, the principle of majoritarianism states that the will of the majority prevails over that of the minority.[40] This is reflected throughout the LRA.[41] In *Kem-Lin Fashions*, Zondo JP underscored that majoritarianism was the consequence of a conscious policy choice made by the Legislature when formulating the LRA.[42]

[62] Majoritarianism is not, however, applicable in the present case. It finds no relevance in the interpretation of sections 213 and 64(1). As important as this principle may be, it cannot bring a dispute into existence. It cannot be said that, because a dispute arises between majority representatives of a sector at a bargaining council, all employers and employees have a dispute with one another. The principle governs the interaction between constituent employees. To hold otherwise would be to endorse a perversion of the principle.

[63] It is worth emphasising that the principle finds application *after* a collective agreement has been concluded: this much is evident from the provisions of section 32. A collective agreement is extended only at the behest of the majority after the collective agreement process has run its course. If it were a foregone conclusion that a collective agreement, which might be prospectively concluded, would be applicable to an entire sector, then it would defeat the purpose of an extension.

See also sections 27, 28, and 30 of the LRA discussing the formation of a bargaining council. The LRA as a whole requires trade union representation in a number of situations; including when forming workplace forums, when determining organisational rights and in cases where there is a dispute between employers and employees.

[40] *Kem-Lin Fashions CC v Brunton and Another* [2000] ZALAC 25; (2001) 22 ILJ 109 (LAC) (*Kem-Lin Fashions*) at para 19.

[41] The LRA affords majority trade unions a number of benefits. See, for example, section 14(1) (the right to appoint trade union representatives); section 16 (the right to information); section 18 (the right to establish thresholds of representativeness); section 26(2) (conclusion of agency shop and closed shop agreements); and sections 80 and 81 (establishment of workplace forums and choice of members from its elected representatives to serve on the trade union forum) See further section 23(1)(d), which allows the extension of collective agreements to employees that are not members of a majority trade union.

[42] *Kem-Lin Fashions* above n 40.

[64] If this Court were to confirm the judgment of the Labour Appeal Court, the following would be applicable to trade unions that are not parties to a bargaining council:

(a) They would, after the fact, be deemed a party to negotiations in which they have had no say, but only for the purpose of lock-outs; and

(b) In the event that a collective agreement were to be concluded, they would revert to being non-parties again and therefore unable to sign that collective agreement.[43]

[65] On this basis, it is evident to me that reliance on majoritarianism in the present instance would lead to a situation where the parties to the original dispute do not remain the same throughout the dispute resolution process. This is undesirable and out of step with the objects of the LRA.

[66] While majoritarianism is an important underlying principle of the LRA, it finds no application to strikes and lock-outs under sections 213 and 64(1). Majoritarianism cannot be relied upon to extend a dispute within a bargaining council to a party that is not a member of that council. To the extent that the Labour Appeal Court concluded otherwise, it erred.

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[43] Section 31 of the LRA provides:

> "Subject to the provisions of section 32 and the constitution of the *bargaining council*, a *collective agreement* concluded in a *bargaining council* binds—
>
> (a) the parties to the *bargaining council* who are also parties to the *collective agreement*;
>
> (b) each party to the *collective agreement* and the members of every other party to the *collective agreement* in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
>
> (c) the members of a registered *trade union* that is a party to the *collective agreement* and the employers who are members of a registered *employers' organisation* that is such a party, if the *collective agreement* regulates—
>
> (i) terms and conditions of employment; or
>
> (ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers."

Parity of reasoning contention

[67] Our decision in *Moloto* to permit employees who did not issue a strike notice to embark upon a strike follows the deliberate scheme and design of the Constitution and the LRA.[44] The same cannot, however, be said to apply to the recourse to lock-out. As Professor John Grogan points out, employers have recourse to a number of "weapons" to end a dispute:

> "Under the common law, employers could exercise power against employees through a range of 'weapons' such as dismissal, employment of alternative or replacement labour, unilateral implementation of new terms and conditions of employment, and the exclusion of employees from the workplace."[45]

Striking is one of the few powerful tools in the hands of employees. Not permitting employers to lock-out all employees, but only those whom the employer has attempted to conciliate with under section 64(1), does not blunt the weapon of the employer. Instead, it promotes the fair and orderly resolution of labour disputes. Given that the Constitution and the LRA do not accord the right to strike and recourse to lock-out similar status, one cannot equate the two. Hence my view that the Labour Appeal Court's conclusion was flawed.[46]

[68] Moreover, the facts before us are distinct from those in *Moloto*. In that case, the employer was disadvantaged to the extent that it could not determine which employees would join the strike. The majority held that this encumbrance could effectively be remedied by the issuing of a single strike notice.[47] To this end, it concluded:

> "Provided that the strike notice sets out the issue over which the employees will go on strike with reasonable clarity, these cases show that orderly collective bargaining and

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[44] *Moloto*, above n 35 at para 43.

[45] Grogan above n 20 at 408.

[46] See [51] above.

[47] *Moloto* above n 35 at para 88.

> the right to strike, in its proper sense as a counter-balance to the greater social and economic power of employers, has been considered to be well served by the acceptance of a single strike notice."[48] (Footnotes omitted.)

By contrast, in the present matter, Mr Mankge informed PUTCO that TAWUSA members did not intend to go on strike.[49] A finding that employers may not lock out members of a trade union that is not a party to a bargaining council where a dispute arose and was referred for conciliation is, in addition, in line with the need to counter-balance the greater social and economic powers of employers, as pointed out in *Moloto*. On the one hand, the ability to strike is the principal manner by which employees can put pressure on an employer to capitulate to demands. A lock-out, on the other hand, is only one of the options at an employer's disposal. It is for this reason that the LRA distinguishes between the *right* to strike and the *recourse* to lock-out.

[69] For similar reasons, PUTCO's reliance on *Tiger Wheels*[50] – a case on which PUTCO staked its claim – is flawed. Apart from the primary importance of the right to strike discussed above, *Tiger Wheels* dealt with different issues. These related to whether the fact that an employer against whom a strike was effected did not receive notice, rendered the strike unlawful; and whether employees waived their right to strike when the strike did not commence on the day stated on the strike notice. Unlike *Tiger Wheels*, the case before us only deals with the question of who can lawfully be locked out.[51] These differences are significant.

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[48] Id at para 90.

[49] See [10] above.

[50] *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of South Africa and Others* [1998] ZALC 86; (1999) 20 ILJ 677 (LC) (*Tiger Wheels*).

[51] The Labour Appeal Court also relied on *UTATU* above n 17 in coming to its conclusion. That case, however, is distinguishable from the facts before us because the relevant union in that case was part of a bargaining council.

Orderly collective bargaining and the LRA

[70] Our Constitution enshrines the right to collective bargaining between employers and employees, recognising that it is central to achieving fair industrial relations.[52] The LRA gives effect to this right. One of the LRA's primary objects is "to provide a framework within which *employees* and their *trade unions*, employers and *employer organisations* can . . . collectively bargain to determine wages, . . . promote orderly collective bargaining . . . [and come to] effective resolution of labour disputes".[53] The recourse to lock-out is an important element of this collective bargaining system.

[71] The LRA does not permit the lock-out of employees who are not party to a dispute. That said, I am cognisant of the fact that some employers may be put in an invidious position by the finding that they cannot lock out members of a trade union who are not a party to a bargaining council where a dispute has arisen and been referred for conciliation. TAWUSA members may stand to benefit from collective agreements concluded at the Bargaining Council through an extension of a collective agreement by the Minister under section 32 of the LRA, yet PUTCO cannot lock them out of its workplaces. Moreover, an employer in PUTCO's position may be compelled to run their operations for the benefit of a small group of non-striking employees who are not members of the Bargaining Council. This may even entail keeping only a certain number of PUTCO's services running, or opting for a complete shutdown. Either way, it will have to pay its employees who tender services. Employers will also be faced with the unenviable challenge of distinguishing those employees whom they are entitled to lock out from those who must be allowed to continue to work.

[72] While I am wary of these difficulties, the wording of sections 213 and 64(1) cannot be ignored. It may be in the interest of the employer to encourage employees

[52] See section 23(1) of the Constitution which guarantees the right to "fair labour practices" and section 23(5) which guarantees "the right to engage in collective bargaining". See also *Bader Bop* above n 27 at para 13.

[53] Section 1 of the LRA.

or their trade union to be part of the bargaining council. In the event that this is not achieved, employers will bear these consequences.

Oral evidence

[73] Should this matter be remitted to the Labour Court? The Labour Appeal Court concluded that the factual disputes were incapable of resolution on the papers. Both parties asserted that, in the event that this Court finds favourably for TAWUSA, the matter should be remitted to the Labour Court for the hearing of oral evidence in order to determine whether certain members of TAWUSA were, in fact, on strike. The dispute between the parties was whether the lock-out was unlawful. That dispute has been resolved in this judgment. There is no further issue that needs to be remitted.

Costs

[74] TAWUSA has been successful in this Court. There was no suggestion by PUTCO that costs should not follow the result.

Order

[75] The following order is made:

1. Condonation is granted.
2. Leave to file supplementary written submissions is refused.
3. Leave to file a supplementary affidavit is refused.
4. Leave to appeal is granted.
5. The appeal succeeds.
6. The order of the Labour Appeal Court of South Africa is set aside and replaced with the following:

   "The appeal is dismissed with costs."
7. The respondent is ordered to pay the applicant's costs in this Court, including the costs of two counsel, where applicable.

For the Applicant:	F R Memani and H Mokhine instructed by Lennon Moleele and Partners
For the Respondent:	A Myburgh SC, T Ngcukaitobi and J Raizon instructed by Bowman Gilfillan Incorporated