

ConCourt upholds labour courts' judgments on secondary strikes

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On 12 November 2021, the Constitutional Court (CC) held in favour of mining employers in a historic secondary strike judgment in *Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti and Others [2021]*. The Webber Wentzel employment team successfully represented several mining employers from the interdict stage at the Labour Court (LC) to the appeal stage at the Labour Appeal Court (LAC) and finally the CC.



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Background facts and LC and LAC history

The Association of Mineworkers and Construction Union (Amcu) and Sibanye-Stillwater (SSW) were involved in an ongoing wage dispute which resulted in Amcu members embarking on a protected strike at SSW gold operations for approximately six months. During February 2019, AMCU issued several mining houses with notices of an intention to embark on secondary strikes for seven days.

The affected secondary employers launched separate urgent applications in the LC to interdict the secondary strikes. The mining houses presented joint argument to the LC that the test on whether a secondary strike is protected must be applied per secondary employer. In so doing the LC must test whether the harm caused by a secondary strike at any individual mining house is proportional to the influence it will have on the primary employer. Amcu argued that the LC should not apply the proportionality test per individual secondary employer but rather determine whether the harm caused by an industry-wide secondary strike is proportional to the effect it will have on SSW. The LC held that the intended secondary strikes did not satisfy the reasonableness and proportionality requirements under section 66 of the LRA. The secondary strikes were declared to be disproportionate and unprotected.

Amcu lodged an appeal before the LAC. The LAC found that the primary strike had ceased and the dispute between the parties was therefore moot. No exceptional circumstances existed that warranted the attention of the LAC. The LAC held that the nature of the proportionality assessment had been pronounced upon previously and that no further judgment was required.

CC judgment

Amcu applied for leave to appeal to the CC.

The CC needed to answer the following main question: does section 66(2)(c) import the principle of proportionality in assessing the reasonableness and the substantive lawfulness of secondary strikes? The CC answered "yes" to this question. Section 66(2)(c) seeks to balance two competing aspects –

The impact of the secondary strikes on the secondary employers

The effect of the secondary strikes on the business of the primary employer

If the secondary strikes have no effect on the primary employer or if the effect is disproportionately harsh on the secondary employers, the secondary employers would be entitled to interdict the strike under section 66(3) of the LRA.

In this matter, the potential effect of the secondary strikes was disproportionately harsh on the secondary employers and therefore, the CC ultimately confirmed the LC judgment which held that AMCU did not meet the reasonableness and proportionality requirements under section 66 of the LRA.

The CC judgment confirms that this matter will be etched into the history of labour law in South Africa for the following reasons:

- This is the first time that the LC, LAC and CC had to consider a campaign of secondary strikes called for by a trade union across a particular industry.
- The LC (as confirmed by the CC) set an important precedent regarding such a campaign in holding that the reasonableness requirement was not met.
- The initial LC judgment avoided serious financial losses for the affected mining houses as well as the South African economy as a whole.
- The number of mining houses involved in this matter was also unique.

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