THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 6/2020

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	**FIRST APPELLANT**
THE FURTHER DEFENDANTS AS SET OUT IN PLAINTIFFS' COMBINED SUMMONS AND THE ANNEXURES THERETO	**SECOND TO ONE HUNDRED AND SIXTY THIRD APPELLANT**

and

DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD	**FIRST RESPONDENT**
DUNLOP BELTING PRODUCTS (PTY) LTD	**SECOND RESPONDENT**
DUNLOP INDUSTRIAL HOSE (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *National Union of Metal Workers of South Africa and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (Case no 6/2020) [2020] ZASCA 161 (7 December 2020)

Coram: WALLIS, MOLEMELA, SCHIPPERS, DLODLO JJA and GOOSEN AJA

Heard: 13 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 7 December 2020.

Summary: Interpretation of statutes — whether s 11 of the Regulation of Gatherings Act 205 of 1963 applies to a picket authorised by a registered trade union pursuant to s 69 of the Labour Relations Act 66 of 1995 (LRA) —picket under the LRA is not a gathering - Regulations of Gatherings Act inapplicable – appeal upheld.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Van Zyl J, sitting as court of first instance).

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.
2. The order of the high court is set aside and replaced with the following order:

'1. An authorised picket in terms of s 69(1) of the Labour Relations Act 66 of 1965 is not a gathering to which s 11 of the Regulation of Gatherings Act 205 of 1993 is applicable.

2. The plaintiffs are ordered to pay the costs of the preparation and argument of the special case, such costs to include those consequent upon the employment of two counsel.'

JUDGMENT

Goosen AJA (Wallis, Molemela, Schippers and Dlodlo JJA concurring)

[1] Is a picket, organised by a trade union in furtherance of a protected strike, a 'gathering' to which the provisions of the Regulation of Gatherings Act, 205 of 1993 (the Gatherings Act) apply? That is the central question in this appeal. The Kwazulu-Natal Division of the High Court, Pietermaritzburg, Van Zyl J, held in the affirmative.

[2] The question came before the high court in the following circumstances. The first appellant is a registered trade union. Its members are employed by the respondents at their plants in Howick, KwaZulu-Natal. On 4 July 2012 the first appellant referred a labour dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA). The dispute remained unresolved and the CCMA duly issued a certificate of outcome to that effect. The first appellant accordingly gave notice of the intention of its members to embark upon strike action.

[3] In furtherance of the strike action, the first appellant authorised the holding of a picket outside the premises of the respondents at Induna Mill Road, Howick. On 22 August 2012, the picket allegedly became a violent demonstration in which damage to property resulted. That day, the Labour Court issued an order, at the instance of the respondents, restraining the appellants from engaging in unlawful acts. The order included a 'perimeter order' prohibiting the holding of a picket within 50 metres of the access road to the respondents' premises. Between 22 August and 27 September 2012, various acts of violence are alleged to have occurred, resulting in damage to property owned by the respondents and its employees.

[4] On 23 May 2013, the respondents issued summons against the appellants for damage to property and the costs of security services. The claims allegedly constituted 'riot damage' as contemplated in s 11 of the Gatherings Act. The appellants' defence, in sum, was this. The picket was one in furtherance of a protected strike, authorised in terms of s 69 of the Labour Relations Act, 66 of 1995 (the LRA). The Gatherings Act does not apply and

the claims, if any, are to be adjudicated by the Labour Court. In any event, s 67(2) of the LRA confers upon the appellants immunity from civil claims of the sort instituted.

[5] The parties agreed that the following legal questions be separately adjudicated by the high court upon agreed facts, namely whether:

a) The picket convened by the first appellant constituted a gathering to which the provisions of the Gatherings Act are applicable at all, and, if so
b) Whether the appellants are entitled to claim immunity from the civils claims in terms of the LRA?

[6] The hearing on the separated issues took place before Van Zyl J on 19 August 2015. Judgment was delivered on 13 September 2019. The high court answered the first question in the affirmative. It made no order in relation to the second question, holding that it was a matter to be determined by the trial court in due course. Leave to appeal to this court was granted on 18 December 2019.

The provisions of the LRA

[7] Chapter IV of the LRA regulates and gives effect to the right to strike guaranteed by s 23(2) of the Constitution. It provides in ss 64 to 66 for the types of disputes in respect of which strike action may be called; the procedures to be followed; and for secondary strike action. Section 67, in its relevant part, provides that:

‘(1) In this Chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out that complies with the provisions of this Chapter.

(2) A person does not commit a delict or a breach of contract by taking part in –

(a) a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

(3) to (5) …

(6) Civil legal proceedings may not be instituted against any person for –

(a) participating in a protected strike or protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or protected lock-out.

(7) …

(8) The provision of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.’

[8] Section 68, in its relevant part, provides further that:

‘(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction –

(a) To grant an interdict or order to restrain –

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

(ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to –

(i) whether –

(*aa*) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(*bb*) the strike or lock-out or conduct was premeditated;

(*cc*) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(*dd*) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.

[9] Section 69 deals with picketing. The section underwent significant amendment in 2014 and 2019 in relation to the establishment of picketing rules by agreement between parties to a labour dispute or by the CCMA where no such agreement can be achieved.[1] It is not necessary to deal with these provisions, which were inapplicable when the events in issue here occurred. In its relevant part, the section provides as follows.

'(1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating –

(*a*) in support of any protected strike; or

(*b*) in opposition to any lock-out.

(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held –

(*a*) in any place to which the public has access but outside the premises of an employer; or

(*b*) with the permission of the employer, inside the employer's premises.'

The provisions of the Gatherings Act

[10] Section 17 of the Constitution guarantees to everyone 'the right, peacefully and unarmed, to assemble, demonstrate, to picket and to present

[1] See the Labour Relations Amendment Acts 6 of 2014 and 8 of 2018. The latter introduced a number of provisions regarding the powers of the CCMA to determine picketing rules. Most significant, it introduced subsection (6A) which provides that the commissioner conciliating a dispute must determine picketing rules at the same time as issuing a certificate as contemplated by s 64 (1) (a), ie the certificate that would entitle a trade union to embark upon strike action.

petitions'. The Gatherings Act[2] gives expression to this constitutionally guaranteed right. It does so by providing a procedure for the convening of gatherings and demonstrations; the giving of notice of a gathering; requiring consultations and negotiations to ensure that the conduct of a gathering proceeds peaceably and that the rights of all parties are protected; and by providing for liability in certain circumstances.

[11] For present purposes, it is necessary to highlight certain defined terms which occur in the Gatherings Act.

[12] A 'demonstration' includes any 'demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action'. A 'gathering' means,

'any assembly, concourse or procession of more than 15 persons in or on any public road … or any public place or premises wholly or partly open to the air –

(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or (b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.'

[13] Chapter 1 deals with procedures for the convening of gatherings. The procedure involves the interaction of three key persons. Firstly, an organisation or a group of persons wishing to convene a gathering is required

[2] The Gatherings Act was assented to on 14 January 1994 at a time when the Interim Constitution (Act 104 of 1993) made provision for the right of assembly. It came into operation on 15 November 1996, after the adoption of the Constitution 1996.

to appoint a ‘convener’ and a deputy whose responsibility it is to give notice of the gathering and to represent the organisation of group in its interaction with public officials. Secondly, the local authority, in whose area a gathering is to be held, is required to appoint a ‘responsible officer’ and a deputy whose task it is to exercise the powers and discharge the duties of a responsible officer as defined by the Gatherings Act. Thirdly, the Commissioner of the South African Police is required to appoint and designate an ‘authorised member’ of the South African Police, whose task it is to represent the police in the course of any consultations or negotiations relating to the holding of a gathering or its conduct.

[14] Section 3 provides that the convener of a gathering shall give written notice of the intended gathering. Such notice is to be given to the responsible officer of the local authority concerned not later than seven days prior to the holding of the gathering.

[15] Subsection (3) sets out the requirements for the giving of proper notice of a gathering. It requires that:

'The notice referred to in subsection (1) shall contain at least the following information:

(*a*) The name, address and telephone and facsimile numbers, if any, of the convener and his deputy;

(*b*) the name of the organization or branch on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener;

(*c*) the purpose of the gathering;

(*d*) the time, duration and date of the gathering;

(*e*) the place where the gathering is to be held;

(*f*) the anticipated number of participants;

(*g*) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;

(*h*) in the case of a gathering in the form of a procession –

(i) the exact and complete route of the procession;

(ii) the time when and the place at which participants in the procession are to assemble, and the time when and the place from which the procession is to commence;

(iii) the time when and the place where the procession is to end and the participants are to disperse;

(iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;

(v) the number and types of vehicles, if any, which are to form part of the procession;

(*i*) if notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously;

(*j*) if a petition or other document is to be handed over to any person, the place where and the person to whom it is to be handed over.'

[16] The rest of the chapter deals with consultations and negotiations between the parties involved; the imposition of conditions to which the gathering may be subject; judicial proceedings relating to such conditions, and the prohibition of gatherings in certain circumstances.

[17] Chapter 4, which is relevant to the present matter, deals with civil and criminal liability which may arise from the convening of a gathering. Section 11 provides that:

'(1) If any riot damage occurs as a result of-

(*a*) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

(*b*) a demonstration, every person participating in such demonstration,

shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.

(2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such person or organization proves –

(*a*) that he or it did not permit or connive at the act or omission which caused the damage in question; and

(*b*) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

(*c*) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade any act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.

(3) For the purposes of –

(*a*) recourse against, or contribution by, any person who, or organization which, intentionally and unlawfully caused or contributed to the cause of any riot damage; or

(*b*) contribution by any person who, or organization which, is jointly liable for any riot damage by virtue of the provisions of subsection (1),

any person or organization held liable for such damage by virtue of the provisions of subsection (1) shall, notwithstanding the said provisions, be deemed to have been liable therefor in delict.

(4) The provisions of this section shall not affect in any way the right, under the common law or any other law, of a person or body to recover the full amount of damages arising from the negligence, intentional act or omission, or delict of whatever nature committed by or at the behest of any other person.

[18] The term ‘riot damage’ is defined to mean ‘any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of

any property, caused directly or indirectly by, and immediately before, during or after, the holding of gathering'.

The findings of the high court

[19] The high court found that the provisions of the LRA and the Gatherings Act are reconcilable and are not in conflict. It found that the participants in a protected strike and duly authorised picket would enjoy the protection afforded by s 67(2) for so long as they did not commit any act amounting to an offence. In the event that they did, then they would become liable to prosecution and to payment of delictual damages. In the event of a delictual claim, they would be entitled to raise the defences provided by s 11(2) of the Gatherings Act.

[20] In coming to this conclusion, the high court relied upon the judgment in *South African Transport and Allied Workers Union v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 74 (CC) (*SATAWU (CC)*) at para 56 where the majority held that:

'Section 11 (1) holds organisers of a gathering liable for riot damage subject to section 11(2), which provides a limited defence to a claim of this kind. The effect of these specific provisions, in the context of the Act as a whole, is to render holders of a gathering organised with peaceful intent liable for riot damage on a wider basis than is provided for under the law of delict. This is all the more so given the extremely wide definition of riot damage in the Act.'

[21] The high court found that the Constitutional Court did not consider that the provisions of s 11(1) of the Gatherings Act were irreconcilable with the provisions of the LRA.

[22] The high court's reliance upon *SATAWU* (*CC*) was misplaced. That matter is entirely distinguishable on the facts. In that matter, the trade union had, in the context of a protracted strike in the transport industry, convened a march in terms of the Gatherings Act. Notice of the intended procession had been given in terms of s 3 of the Gatherings Act; the route had been determined; marshals were appointed; and the trade union as convener had participated in discussions with the responsible authority in the local authority and the authorised member in the Police Service.

[23] On the day of the procession extensive damage was caused to several small and other businesses, allegedly by participants in the procession. Some of the persons affected thereby instituted action against the conveners of the march in terms of s 11 of the Gatherings Act. SATAWU pleaded, inter alia, that the words 'was not reasonably foreseeable' in s 11(2)(*b)* of the Gatherings Act limited the right to freedom of assembly and rendered the section constitutionally invalid. This issue was determined against SATAWU by the high court. The Supreme Court of Appeal in *South African Transport and Allied Workers Union v Garvas and Others* [2011] ZASCA 152; 2011 (6) SA 382 (SCA), dismissed the appeal. In the Constitutional Court the issue which fell to be decided was whether s 11(2) of the Gatherings Act unjustifiably limited the right of assembly guaranteed by the Constitution. The Constitutional Court was not concerned with the interplay between the Gatherings Act and the LRA, nor was it required to address the question whether there was a conflict between the two Acts. It was not dealing with the question whether a claim arising from riot damage lay against the organisers of a picket in the context of a protected strike.

[24] The high court's finding that the provisions of the LRA and the Gatherings Act are not in conflict was not premised upon an analysis and interpretation of the provisions of the respective Acts. Its reasoning proceeded on the basis that the 'immunity' provided by ss 67(2) and 67(6) must be read with s 67(8). This latter subsection provides that the 'immunity' does not apply in the event the conduct complained of, amounts to an offence. In such event the conduct would fall outside of the ambit of what is permitted by s 69 of the LRA. On this basis, it was found that liability would arise under s 11 of the Gatherings Act.

[25] The high court did not deal with s 68 of the LRA. Subsection (1)(*b*) of that section, as recorded above, provides that the Labour Court has exclusive jurisdiction to order the payment of just and equitable compensation for any loss attributable to conduct which does not comply with the provisions of the LRA.

The contentions of the parties

[26] Counsel for the appellants argued that the high court had not only misconstrued the effect of the arguments advanced before it regarding the protection afforded by s 67(2) of the LRA, it had erred in finding that the provisions of the LRA and the Gatherings Act were not in conflict.

[27] It was submitted that the appellants were not arguing for a blanket immunity from claims such as those pursued by the respondents. On the contrary, such claims would be cognisable in proceedings before the Labour Court on the basis of s 68(1)(*b*) which provides for an award of just and equitable compensation. It was argued that the LRA made provision for a

specialised regime to cater for the exercise of the right to strike and to engage in conduct in furtherance of such right. This includes the right to picket as a particular expression of the right of assembly. The LRA, so it was submitted, regulated the exercise of this right and provided remedies for the unlawful exercise of such right. The Gatherings Act, on the other hand, constitutes general legislation which has as its purpose the regulation of the right of assembly outside of the ambit of the exercise of that right in the context of strike action permitted by the LRA. Neither the definition of 'gathering' nor the procedural requirements for the convening of a gathering find any application in the context of a picket. In the circumstances s 11 does not apply in the event that a picket authorised in terms of the LRA gives rise to injury or damage to property.

[28] The respondents argued that the LRA, properly construed, does not deal comprehensively with circumstances such as those in the present case. Liability under s 11 of the Gatherings Act does not depend upon non-compliance with the procedural and other requirements for the convening of a gathering. Section 11 is a separate statutory provision which establishes liability upon the convener or organiser of a gathering in circumstances where riot damage ensues. The definition of a 'gathering' is sufficiently broad to encompass a picket authorised in terms of the LRA. It was submitted that the remedy provided by s 68(1)(*b*) is limited and does not encompass the ordinary delictual remedies available to an aggrieved party. On this basis it was submitted that s 11 provides an 'additional' or 'separate' remedy to those provided by the LRA.

The interpretation of the statutory provisions

[29] The essential purpose of the LRA is to give expression to the right of all employees to fair labour practices; to regulate the employment relationship in a manner that balances the rights and interests of the parties thereto; and to provide a purpose-built framework for bargaining, negotiation and dispute resolution.

[30] It is apposite to highlight what this court has held in relation to the purpose of the LRA in *Motor Industry Staff Association v Macun NO and Others* [2015] ZASCA 190; 2016 (5) SA 76 (SCA) at paras 18 – 20:

'The LRA was enacted, inter alia, to "change the law governing labour relations", to "give effect to section 23 of the Constitution", and to "promote and facilitate collective bargaining at the work place and sectorial level". As noted by Ngcobo J at paragraph 123 of *Chirwa* …, section 157(2) of the LRA, which deals with where the Labour Court and the High Court have concurrent jurisdiction, has to be construed in the light of the primary objectives of the LRA. The Constitutional Court has put it beyond doubt that the primary objective of that Act was to establish a comprehensive legislative framework regulating labour relations. An allied objective, expressly stated in the preamble to the LRA, was to "establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to *decide matters arising from the [LRA]*". …

In *Chirwa,* Ngcobo J indicated that in the light of what is set out above, section 157(2) has to be narrowly construed and that it should be confined to issues where a party relies directly on the provisions of the Bill of Rights.

The Constitutional Court, in *Gcaba*, considered the tensions that might arise in relation to the interpretation of section 157 of the LRA and related provisions. Van der Westhuizen J noted the principle that "legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of Constitutional rights" (para 55). Alongside that, however,

is the consideration that "the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law" (para 56). The following paragraph in *Gcaba* is significant:

". . . Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees." (Footnotes omitted.)

The approach to be followed, in summary, is as follows: The LRA is Legislation envisaged by the Constitution. In construing the provisions of the LRA, the two objectives referred to above must be kept in mind. Section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the high court. The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA.'

[31] Insofar as the interpretation of the provisions of the LRA and the Gatherings Act are concerned, two things flow from these dicta. The first concerns the, by now well-established, approach to the interpretative exercise set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), which requires that the purpose of the provisions and the context in which they occur guide a holistic interpretation which gives

effect to the operation of the legislation concerned. The second aspect requires that where the legislature provides specialised provisions to deal with a particular area of legal relations, they are to be applied in preference to general provisions which cover the same or similar relations (see *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC) at para 103).

[32] As an adjunct to this latter aspect is the principle, endorsed by this court in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and Others as Amici Curiae)* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) at para 102, that later legislative enactments which manifestly intend to regulate the whole subject matter are to be applied within their own sphere of operation to the exclusion of the earlier provisions. In this instance the LRA constitutes the later enactment.

[33] Turning first to the interpretative exercise. A 'picket' is not defined by the LRA. In its ordinary meaning, however, a 'picket' consists of a group of people who congregate or march outside a shop or factory to protest about something or to prevent other persons from entering. The term 'picket' is used, more often than not, in the context of strike action to indicate a 'barrier' brought about by the strike action. Its purpose is to further the objects of the strike action by encouraging those employees who have not joined the strike action to do so by withdrawing their labour. A 'picket-line' serves to discourage non-striking workers, suppliers and customers from entering the work premises. Picketing has been associated with trade union organisation and worker strikes since the earliest days of industrialisation. By its nature, a

picket serves to broaden the impact that the withdrawal of labour of striking workers has upon the employer. It does so by seeking to disrupt operations which would otherwise continue despite the strike.

[34] A picket is, accordingly, conduct to which employees may legitimately resort in order to further the objects of strike action. It is for this reason that the LRA seeks to regulate the exercise of the right to picket and to ensure that the interests of both parties to the dispute are balanced in the exercise of that right. This is now achieved by those provisions of s 69 which require the establishment of picketing rules.

[35] In order to lawfully engage in a picket, the picket must be authorised by a registered trade union in support of a protected strike. Its purpose must be peaceful and it must occur 'outside the premises of the employer' or, with permission, inside the premises of the employer. As long as its purpose is peaceful and it is conducted peacefully in support of or in furtherance of a protected strike, the trade union and the participants in the picket fall within the ambit of the provisions of the LRA and enjoy the protection afforded by ss 67(2) and (6) thereof.

[36] Such protection is, however, lost in the event that any act, constituting an offence, is committed in furtherance of a strike. Conduct which does not comply with the provisions of the Chapter regulating strike action, renders the party responsible for such conduct liable, in terms of s 68(1), to remedies which the Labour Court may impose.

[37] Having regard to the purpose of these provisions, read within their context, this must mean that conduct committed during the course of an otherwise lawfully convened picket which constitutes an offence, renders the person or persons or organisation responsible for such conduct liable to such orders as may be made pursuant to s 68 of the LRA.

[38] Counsel for the respondents conceded that the general provisions of the Gatherings Act do not, and cannot, apply to a picket authorised in terms of the LRA. Thus it was accepted that the notice provision in s 3 of the Gatherings Act can find no application to a picket; nor do the provisions which stipulate particular roles and responsibilities for 'responsible authorities' appointed by a local authority in whose area a picket is held. It is also not conceivable that a picket can be prohibited in terms of s 5 of the Gatherings Act in the light of the clear and unambiguous provisions of s 68(1)(*a*) of the LRA.

[39] Counsel argued however, that the use of the phrase 'despite any law regulating the right of assembly' in s 69(2) of the LRA excludes only the procedural requirements which otherwise apply to a gathering convened in terms of the Gatherings Act. The phrase, it was submitted, suggests that a picket is nevertheless to be regarded as a gathering within the broad definition of that term in the Gatherings Act. Counsel submitted that liability, in terms of s 11 of the Gatherings Act, is not contingent upon non-compliance with any of the provisions of that Act. It arises upon the occurrence of riot damage as a result of a gathering. Thus, it was argued, s 11 provides a remedy whether or not the gathering is one convened in terms of the Gatherings Act.

[40] In developing the argument counsel submitted that the remedy provided by s 68(1)(*b*) of the LRA, is a statutory one which is limited in its scope. It is therefore to be construed as a remedy provided in addition to the ordinary remedies available in delict or other statutory remedies for conduct giving rise to damage.

[41] The essential difficulty with this proposition is that it requires a finding that a picket, as a particular type of gathering or demonstration, while not otherwise regulated by the provisions of the Gatherings Act, nevertheless falls within the ambit of s 11 for purposes of liability for 'riot damage'. This would require that s 11 be abstracted from the Gatherings Act and construed as a wholly separate statutorily sanctioned cause of action available to a party suffering damage consequent upon a picket authorised in terms of the LRA. To hold thus would require that this court ignores both the detailed regulation of gatherings in terms of the Gatherings Act and the comprehensive regulation of conduct in furtherance of strike action by the LRA. It would also require that later legislative enactments specifically designed to deal with pickets and picketing within the context of a labour dispute do not supersede earlier legislative provisions enacted for a wholly different and more general purpose.

[42] There is, in my view, no basis for such a strained interpretation of the respective Acts. Whilst a picket linguistically may fall within the ambit of what constitutes a gathering, it remains a particular form of organised expression which is central to the exercise of the right to strike. The LRA recognises this by making detailed provision for the exercise of that right. It does so by providing for the establishment of picketing rules and for a

mechanism by which disputes relating to such rules may be resolved. It deals with picketing within the context of protected strikes and lock-outs and specifically provides for the consequences of conduct which does not comply with the LRA.

[43] The inclusion of the phrase 'despite any law regulating the right of assembly' is one introduced *ex abundanti cautela* to signify what the section already makes plain, namely, that the convening of a picket is regulated by the provisions of the LRA. Its inclusion does not suggest that a picket is, for purposes other than the organising thereof, to be regarded as a gathering to which the Gatherings Act applies. If that had been the intention, no doubt the section would have stated as much.

[44] The Gatherings Act is general legislation which gives effect to the constitutional right of assembly. It establishes a set of procedures which have as their purpose the balancing of the rights of parties affected by the exercise of the right of assembly. It provides protection for those parties and, in circumstances where riot damage occurs, provides a remedy as well as a set of defences. As was noted by the Constitutional Court in *SATAWU (CC)* at para 38:

'Gatherings, by their very nature, do not always lend themselves to easy management. They call for extraordinary measures to curb potential harm. The approach adopted by Parliament appears to be that, except in the limited circumstances defined, organisations must live with the consequences of their actions, with the result that harm triggered by their decision to organise a gathering would be placed at their doorsteps. This appears to be the broad objective sought to be achieved by Parliament through section 11. The common-law position was well known when section 11 was enacted. The limitations of a delictual claim for gatherings-related damage in meeting the policy objective gave rise to the need to enact

section 11 to make adequate provision for dealing with the gatherings-related challenges of our times.'

[45] It is equally true that the legislature was aware of the existence of the provisions of the Gatherings Act when it enacted the LRA and made specific provision for the convening of pickets and for recourse in the event that a picket or conduct in furtherance of strike action gives rise to loss.

[46] The LRA deals comprehensively with the subject matter of picketing as a form of demonstration in the context of strike action. Accordingly, s 11 of the Gatherings Act does not apply to claims for loss attributable to conduct committed during the course of a picket authorised in terms of the LRA. It follows that the question reserved for determination by the high court ought to have been answered in the negative. In the light of this it is unnecessary to consider the second question relating to the availability of the defences provided by s 67 of the LRA.

[47] Regrettably, it is necessary to deal with the fact that Van Zyl J took four years to deliver his judgment in this matter. The judgment provides no explanation for this extraordinary delay. We were informed by counsel that whereas the underlying labour dispute had long since been resolved, the consequences, in the form of the civil litigation, are self-evidently not. The prejudice caused by a delay of four years in determining an antecedent legal issue in the action, is manifest. How it can have taken the judge four years to decide this issue and to deliver his judgment defies understanding. If there was a reasonable explanation or excuse it ought to have been set out in the

judgment. It is, after all, on the basis of the judgments delivered by judges that they are held accountable for the administration of justice under their auspices.

[48] The absence of any explanation by the judge concerned suggests that there is none. A four-year delay in the delivery of a judgment constitutes an unconscionable dereliction of duty on the part of the judge. It is a matter which ought to enjoy the consideration of the Judge President of the Division concerned.

The order

[49] In the result I make the following order:

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel.
2. The order of the high court is set aside and replaced with the following order:

> '1. An authorised picket in terms of s 69(1) of the Labour Relations Act 66 of 1965 is not a gathering to which s 11 of the Regulation of Gatherings Act 205 of 1993 is applicable.
>
> 2. The plaintiffs are ordered to pay the costs of the preparation and argument of the special case, such costs to include those consequent upon the employment of two counsel.'

G. GOOSEN

ACTING JUDGE OF APPEAL

Appearances

For appellants:	M. Pillemer SC & P. Schumann
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