Reasonable secondary strikes

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Introduction

Section 66(1) of the Labour Relations Act, 66 of 1995 (LRA) defines a secondary strike as -

“a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.”

In other words a secondary strike is a strike in which the employees of one employer (the secondary employer) express their support for the striking workers of another employer (the primary employer) in circumstances where they have no material interest in the issue giving rise to the primary strike and do not bear the consequences, or enjoy the benefits, of the outcome of the primary strike.

In terms of s 66 of the LRA a secondary strike will acquire protected status (ie protection against dismissal, interdicts and delictual claims), if the following procedural and substantive requirements have been met –

- the primary strike must be a protected strike;
- the employees taking part in the secondary strike must give at least 7 days notice of the intended strike action to the secondary employer; and,
- and the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

The first two requirements are relatively simple to satisfy and require an uncomplicated factual enquiry. It is the third requirement of "reasonableness" set out in s 66(2)(c) of the LRA that is most often the subject of litigation in the Labour Courts as secondary
employers seek to interdict secondary strike action on the basis that the strike action has little or no impact on the business of the primary employer.

Whilst our courts have made it clear that the reasonableness or otherwise of an "ordinary" strike has no bearing on the question whether it will be protected or not, in contrast, the reasonableness of a secondary strike is a key factor in determining its legitimacy or protected status. The policy purpose underlying this unique criterion is simply to protect the secondary employer in circumstances in which its business is suffering financial harm as a result of the action of its own striking employees, who are supporting other striking workers in their own dispute with a different employer.

Expressed colloquially, the necessity of satisfying the criterion of “reasonableness” offers some protection to the secondary employer who argues “why are my workers striking when it’s not their dispute and why should I suffer harm when the dispute doesn’t concern me, but a different employer?”

Regrettably for that employer, if employees or their representatives can show on a balance of probability that the secondary strike may have a possible indirect or direct effect on the business of the primary employer (and provided that the other statutory requirements have been satisfied) then the secondary strike will be protected and the secondary employer will have to endure the secondary strike. Conversely, if no possible direct or indirect effect is shown, then it is likely that the secondary strike will be regarded as unprotected and may be interdicted by the Labour Court.

The quality “reasonableness” imparts ideas of “rationality”, “fairness” and “sensibleness”. It is an inevitably imprecise quality and calls for value judgments to be made on a case by case basis. The extent to which the Labour Court has attempted to determine which facts satisfy the reasonableness requirement is the subject of this contribution. The key cases will be considered in historical sequence and thereafter some
of the general principles which arise from them in order determine the threshold of legitimacy of secondary strikes will be discussed.

**The key cases**

The first of these decisions was that of the Labour Appeal Court in **Sealy of SA (Pty) Ltd & Others v Paper Printing Wood & Allied Workers Union** (1997) 18 ILJ 392 (LAC). The facts were briefly as follows: The employees of the primary employer, Mondi Paper, embarked on a primary strike. The union concerned, the Paper, Pulp, Wood and Allied Workers Union (PPWAWU) then gave notice of its intention to institute a secondary strike at five other employers, namely Sealy of SA (Pty) Ltd, Impulse Designs, Softex Mattress (Pty) Ltd, Peach and Hatton Heritage (Pty) Ltd and Edblo Africa. These employers then sought an interdict from the Labour Court preventing PPWAWU and its members from encouraging or participating in this strike, largely on the basis of non-compliance with s 66(2)(c).

Basson J found that the relationship between Mondi Paper and four of the secondary employers (Sealy of SA, Impulse Designs, Peach and Hatton Heritage and Edblo Africa) was “tenuous” as the secondary employers did not operate in the same sector as Mondi (pulp and paper manufacturing) and although the secondary and primary employers had Anglo American as a common shareholder the extent of that shareholding amongst those secondary employers was less than 1%. Basson J therefore granted the interdict preventing the employees of these employers from embarking on secondary action. He declined to grant the interdict against the striking employees at Softex Mattress as Softex Mattress purchased paper from Mondi Paper (and some of its other plants) and the Court was satisfied that the nexus between Mondi and this particular secondary employer was reasonable and had a possible impact on Mondi’s business to influence the outcome of the primary strike.

Two years later, in 1999, the Labour Court considered the status of a secondary strike in **Samancor Ltd & Another v National Union of Metalworkers of SA** (1999) 20 ILJ 2941 (LC). In this case two companies, Samancor and Manganese Metal sought a final
interdict against their workers embarking on a secondary strike in support of striking
workers at Columbus Steel.

Landman J declined to grant the interdict in favour of Samancor’s chrome alloy divisions
as Samancor provided 80% of the chrome required by Columbus Steel, a key mineral in
the production of stainless steel by Columbus Steel. Furthermore the business
relationship between Samancor (as the secondary employer) and Columbus (the primary
employer) was strengthened by a joint venture in which Samancor was a partner with
Columbus Stainless Steel. Landman J granted an interdict in favour of Manganese Metal
as that secondary employer did not play a significant role in the provision of chrome. In
confirming the order drafted by the parties the Court was mindful of the fact that
Manganese Metal was a wholly owned subsidiary of Samancor but commented that that
relationship

“merely establishes a nexus between it and Columbus. But a mere nexus which
does not have an effect on the primary employer’s business is insufficient to
permit a secondary strike.” (At par 29)

Landman J’s judgment is important in another respect and that is its consideration of the
effect of the secondary strike on the business of the secondary employer. As will be seen,
this was to be a contested theme in later cases, namely whether s 66(2)(c) required an
investigation into the "proportionality" of the secondary strike – ie whether the effect of
the strike on the secondary employer was at all relevant in determining its
reasonableness. He made the point that the damage suffered by the secondary employers
(for example loss of production estimated at 4 200 tons per day amounting to a loss of
revenue of R3.5 million per day) could not be ignored, but that it was unnecessary to
weigh up that damage against the effect of the strike on the primary employer’s business.
He said –

“It seems to me that s 66(2)(c) requires me to concentrate on the nature and
extent of the strike, that is the withholding of labour, its timing and other
ramifications in relation to the effects which it may have on the business of
Columbus.”(At par 31)
The third of these decisions is that of the Labour Court (in 2001) in Billiton Aluminium SA Ltd v NUMSA [2002] 1 BLLR 38 (LC) The facts were as follows: Workers at Billiton Aluminium went on strike in support of striking workers at Samancor. Pillay J, noting that the secondary employer and the primary employer were connected indirectly through a common owner BHP Billiton and that all three entities could be subject to market sentiment, found that that nexus was sufficient to satisfy the reasonableness criterion.

She set that threshold arguably low and commented –

“whatever the nature and extent of the secondary strike, it has to be reasonable in relation to the ‘possible’ effect on the primary employer. The standard of reasonableness is somewhat anti-climactically whittled down to a mere possibility. It is further widened by permitting the effect to be either direct or indirect.” (At paras 6 -8)

The Court rejected the proportionality test with respect to the effect on the secondary employer as it would, as argued by Pillay J, pose a limitation on the right to strike. Thus the cost of the risk of the secondary strike to Billiton Aluminium - if the strike resulted in the shut down and recommissioning of just one smelter (as the smelter operated continuously) was reported to be R700 million – was not considered in her decision making process.

A year later Pillay J considered another secondary strike dispute in Hextex & Others v SA Clothing & Textile Workers Union & Others (2002) 23 LJ 2267 (LC). The secondary employers in this case, namely Hextex, Romatex and Berg River sought to interdict their workers from engaging in strike action in support of workers striking at Team Puma (the primary employer). Pillay J found a nexus between the primary and secondary employers, in the form of Berg River which provided less than 1% of the yarn required by Team Puma and on the basis that Hextex and Romatex could place pressure
on Berg River to influence Team Puma. The nexus between the secondary and primary employers in this case was, it is submitted, extremely remote and not even reasonably explained by Pillay J’s own analysis of the words “possible direct or indirect effect” in s 66(2)(c) of the LRA. Having considered various dictionary definitions of the word “possible” she arrived at the view that those words mean “likely or capable of existing...”. It is submitted that the Court’s view that the economic relationship between the primary and secondary employers in this case was capable of meeting the standard set in that threshold (ie “likely or capable of existing”) was debatable in the extreme.

Pillay J also reaffirmed her view that “the effect of the strike on the secondary employer is not a consideration” and went further -

“I doubt s 66(2)(c) invokes a proportionality test either as regards the effect of the secondary strike on the secondary employer, the primary employer or the secondary and primary employers relative to each other. If a secondary strike has a devastating effect on the secondary employer but only a marginal, but nevertheless, possible effect on the primary employer’s business, the secondary strike would not be a contravention of subsection (2).” (At par 36)

In 2007, this time in the public sector, the Labour Court considered the dispute in SALGA v SAMWU [2008] 1 BLLR 66 (LC). In this case SALGA approached the Labour Court to interdict an impending one day secondary strike of local government employees intent on striking in support of public sector workers engaged in a national primary strike against their employers in the provincial and national tiers of government. Van Niekerk AJ dismissed the application on the basis that a nexus had been established between the primary and secondary employers which could have an impact on the resolution of the primary strike. In this regard he drew attention to the co-operative structure of government and the provision of services by all three tiers. He concluded –

“Given the integrated, co-ordinated and co-operative structure of government as a whole, it is entirely possible that the withdrawal of municipal services will have, at least, an indirect if not a direct effect on the business of those higher levels of
Government engaged in the primary strike, and will, thus, place pressure on them in the national bargaining process currently underway.” (At par 21)

Contrary to the decisions in *Hextex* and *Billiton Aluminium* he also argued that the reasonableness criterion had to be considered with respect to both the impact on the primary employer as well as on the secondary employer. He said –

“…the use of the words ‘reasonable in relation to’ ... clearly import a proportionality assessment...In short, whether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike’s impact on the secondary employer and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is, in essence, an enquiry into the extent of the pressure that is placed on the primary employer.” (At par 16)

**Analysis of criteria considered by the courts in determining the limits of legitimacy**

A consideration of the above judgments indicates that the following three variables impacting on the legitimacy of the secondary strike may be distilled:

- a supplier/purchaser relationship between the employers;
- a common shareholding or ownership shared by both employers; and
- co-operative arrangements between the employers.

The Courts seem to be at odds about whether or not there is a further variable, namely the effect of the secondary strike on the secondary employer’s business. Each variable will be discussed below.

A supplier/purchaser relationship between the employers
In the *Sealy* decision Basson J dismissed an application to interdict the secondary strike of employees at Softex Mattress because Softex Mattress (secondary employer) purchased paper from Mondi (primary employer). (Regrettably the judgment does not specify how much paper was purchased) Similarly, Landman J in *Samancor* dismissed an application to interdict the secondary strike of employees at Samancor’s chrome alloy divisions as Samancor provided Columbus with 80% of its chrome requirements. The quantum of the supply of the product (80%) justified Landman’s decision. Pillay J too refused to interdict striking secondary workers in *Hextex* as Berg River provided 1% supply of its yarn to Team Puma (primary employer). Furthermore Pillay J refused to interdict the strike at two other factories on the strength that those employers could influence Berg River to influence Team Puma to settle the primary strike. With respect I am of the view that the relationship between the secondary employers and the primary employer in *Hextex* does not justify Pillay J’s decision to protect that secondary strike in that the “possible direct or indirect effect” on the primary employer would be negligible. It would seem then that even a minor trading relationship will satisfy the reasonable criterion in s 66(2)(c) of the LRA and the secondary strike will be regarded as protected.

Common shareholding and ownership

In *Billiton Aluminium* Pillay J considered the fact that BHP Billiton was a common owner of the secondary and primary employer and that that nexus was sufficient to satisfy the reasonableness criterion. However, the Court in *Samancor* cautioned that the mere fact that there is a nexus with respect to shareholding does not in itself satisfy the reasonableness criterion. (In that case although Manganese Metal, a secondary employer, was wholly owned by Samancor, the primary employer, that fact alone did not satisfy the reasonableness criterion as it did not have an effect on Samancor’s business). In some cases the courts have considered the size of the shareholding. When it transpired in *Sealy* that the majority of secondary employers and the primary employers shared a common shareholder in Anglo American, but that Anglo’s shareholding was less than 1% of the total secondary employer’s shareholding, the Court granted an interdict to stop the
secondary strike – presumably because the Court was of the view that the reasonableness criterion had not been met.

Co-operative arrangements between employers

The Court has been persuaded that legally enforceable co-operative arrangements such as joint ventures between employers or their subsidiaries (such as the joint venture between Samancor and Columbus Stainless Steel in Samancor v Numsa) could influence the reasonableness of a secondary strike because secondary strike action could give rise to a possible effect on the business of the primary employer. The force of the co-operative principle was keenly considered in the SALGA matter. The Court drew attention to the constitutional requirement that municipalities participate in national and provincial development programmes, and that National Government support and strengthen the capacity of municipalities to perform their functions.

The proportionality test, weighing up the harm against the secondary employer vis a vis the primary employer

The court decisions on whether or not the reasonableness criterion requires a consideration of the harm inflicted on the business of the secondary employer are at odds with one another. On the one side of the debate is Pillay J. Her view as expressed in the Billiton Aluminium and Hextex decisions is that such harm is irrelevant to a consideration of s 66(2)(c) on the basis that such a consideration would undermine the right to strike. She further argues that, on a plain language interpretation of the words of that section, only the effect on the primary employer is to be taken into account. The other side of the debate is represented by van Niekerk, AJ in SALGA who argues that –

“an assessment of the nature and extent of the secondary strike clearly contemplates that its impact on the business of the secondary employer is a fundamental factor, and that an assessment of that impact is required.” (At par 14)
Landman J, hovers somewhere in between saying –

“It do not think it necessary to weigh up the damage inflicted (on the secondary employer)...but of course I do not ignore it.” (At par 31)

In my respectful view a consideration of the damage to the secondary employer would accord with notions of fairness, reasonableness and proportionality, qualities which underlie s 66(2)(c). However, I agree with Pillay J that the words quite expressly refer to the effect on the primary employer, and that if the legislature’s intent was to accommodate the interests of secondary employers, such an intent has not found its way into the language of that section.

**Conclusion**

Secondary strikes, more so than primary strikes, highlight the tension between the interests of employees vis-a-vis the interests of employers. Whilst secondary employees want to support their striking colleagues/comrades, secondary employers bear the financial brunt of strike action which has nothing or little to do with their business. The Labour Court, in assessing the legitimacy of secondary strikes, plays an important role in considering the impact of the strike action on the business of the primary employer, (usually through trading relations or common shareholding or co-operative arrangements between the secondary and primary employers), and the extent to which the secondary strike action may possibly influence collective bargaining taking place between primary employees and their employers. Where to draw the line on reasonableness will continue to be debated in the Labour Court, particularly in circumstances in which there is no consensus on whether or not the impact on the business of the secondary employ is a consideration in the determination of the legitimacy of secondary strikes.