THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case Number: J1951/15

In the matter between:

SACCAWU **Applicant**

and

SUN INTERNATIONAL **Respondent**

Date heard: September 29 2015

Delivered: 6 October 2015

Summary: Application to interdict the use of replacement labour after the end of a protected strike and during the continuation of a protected lock-out; interpretation of section 74(1)(b) of the LRA; the judgment in *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd* (1999) 20 ILJ 896 (LC) not followed.

JUDGMENT

RABKIN-NAICKER J

[1] This matter came before me as an urgent application and exercise my discretion to treat it as such. The applicant union initially sought a rule *nisi* but indicated that it would instead seek final relief and referred the court to its founding affidavit containing the averment that it has established a clear right to the declaratory and interdictory orders contained in the Notice of Motion. These are as follows:

> "Declaring that the Respondent's unlimited duration lock-out is not meant to counteract the effect of the strike action by the Applicant's members and is, therefore, not in response thereto as envisaged by the latter part of the provisions of s 76(1)(b) of the Labour Relations Act, No 66 of 1995 as amended; and
>
> Interdicting and Restraining the Respondent forthwith from taking into its employment any person for the purpose of performing the work of any employee who is locked out by virtue of a lock-out issued by the Respondent on 22 September 2015."

[2] The factual matrix giving rise to this application is not in dispute. The union embarked on a limited duration protected strike and issued a notice in terms of Section 64 of the LRA on 21 September 2015. The notice informed the respondent that the strike would start on 25 September 2015. Further, it stated that the employees would return to their work stations from 05H45 on 28 September 2015. Their demands for wage increases, minimum working hours and housing subsidy are contained in the notice.

[3] On 22 September 2015, the Respondent issued a notice the heading of which reads as follows:

> "NOTIFICATION OF THE COMMENCEMENT OF A LOCKOUT IN TERMS OF SECTION 64(1)(c) READ WITH SECTION 76(1)(b) LABOUR RELATIONS ACT, 66 OF 1995, AS AMENDED (the LRA)"

[4] For our purposes the salient part of the Lock-out Notice reads as follows:

> "4 the lockout will commence after the members of SACCAWU have embarked on their strike and, for the purposes of this notification, the commencement of such lockout will be on 25 September 2015 at 0800;

5 in terms of the lockout, Sun International will exclude its employees who are members of SACCWU from its various workplaces for the purposes of compelling such employees to accept Sun International's final offer, regarding changes in wages and/or terms and conditions of employment as set out ,in full, in Annexure A attached to this writing; and

6 the lockout will continue until such time as Sun International's aforesaid final offer has been accepted and during this period such employees will not be entitled to any remuneration or benefits."

[5] The crisp issue for determination in this matter is whether in terms of section 74(1)(b) of the LRA, an employer may continue to use replacement labour after a strike has ended. The union concedes that the lock-out in *casu* is protected. However, it submits that an employer's right to use replacement labour must be "in response to a strike" and once a strike has ended, section 76(1)(b) of the LRA no longer applies.

[6] Section 76 of the LRA provides a follows:

"76 Replacement labour

(1) An employer may not take into employment any person-

(a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or

(b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

(2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor."

[7] The respondent, in lengthy heads of argument, has submitted that on a proper interpretation of section 76(1)(b), taking into account the interpretation clause contained in the LRA, that it is entitled to use replacement labour in a context in which the employer reacts to a strike by means of a protected lock-out, even after the end of such strike. It would be anomalous it submits, that an employer is entitled to meet a union's "attack" (in the form of strike action) by way of a

"counter-attack" (in the form of a lock-out), but with its right to an effective counter-attack being limited by a factor of the attacker's choosing – the duration of the hostilities.

[8] The respondent thus argues that its right to employ replacement labour occurs at the stage that the employer acts in reply to a strike and endures until the protected lock out ceases. It relies on **Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd (1999) 20 ILJ 896 (LC),** a matter on all fours with this one, in which Landman J (as he then was) had this to say:

> '[16] At the outset it was mentioned that it was common cause between the parties that the lock-out was in response to the strike. This being so there could be no valid objection to Agrinet employing replacements. In the meantime the employees have abandoned their strike. Does this alter the situation? The union contends that it does. It is submitted that the lock-out is no longer in response to a strike and so the general rule applies and therefore Agrinet may not utilize replacement labour.
>
> [17] It is clear that the abandonment of the strike has no legal effect on the lock-out. Section 76 interferes with an employer's common-law and constitutional rights, in the interests of levelling the playing fields in an economic battle between employees and their employer. It grants an exception to the ban on replacement labour in certain well-defined situations. The section does not provide that it is rendered inapplicable when the strike in response to which the lock-out was instituted terminates. On the contrary, it seems, on a reasonable interpretation, that the nature of the lock-out as a defensive one, and the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases.
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> [18] I am of the view that the employer's right to continue making use of the replacement labour is counterbalanced by the right afforded by the Labour Relations Act 1995 to registered trade unions to picket the employer's premises, inter alia, with the purpose of discouraging persons from accepting work.'

[9] The applicant union has referred the court to the matter of **National Union of Technikon Employees v Technikon SA (2000) 21 ILJ 1645 (LC)** in which Pillay AJ (as she then was) stated *obiter* in reference to section 74(1)(b) that:

> **'**[9] A literal interpretation of the words, 'in response to' means that whenever an employer wishes to employ replacement labour, it can only qualify to do so if its lock-out is at that stage in response to a strike. If the strike ends then so must the employment of replacement labour. (my emphasis)
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> [10] A literal interpretation is incomplete. It does not address the employment of replacement labour in the context of the entire Act.
>
> [11] However, ss 64(1) and 76 must be read with s 5 and one of the primary objectives of the Act, namely to promote orderly collective bargaining (s 1(c) (i) and (d) (i)). They must also be interpreted in the context of the constitutional right to strike and the right of trade unions and employers to engage in collective bargaining (s 23(5) of the Constitution (Act 108 of 1996)). Employees have a constitutional right to strike. Employers merely have recourse to a lock-out. The distinction is substantive and not merely semantic. Furthermore, it signals a clear intention of the legislature not to treat strikes and lock-outs symmetrically….
>
> [12] Furthermore, s 76(1)(b) cannot be available in an offensive lock-out if there is to be substantive parity in collective bargaining. It would have untenable results if it were allowed. An employer could then make any demand, lock-out its workforce and employ replacement labour. It is conceivable that an employer may prefer to run its operations under such conditions. The employees will be disproportionately disadvantaged. The right to picket peacefully is, with respect, not an adequate countervailing right. To this extent I disagree, with respect, with my brother Landman J in *Ntimane & others v Agrinet t/a Vetsak (Pty) Ltd* (1999) 20 ILJ 896 (LC) at 900I-J. If recourse to replacement labour were available to an employer during an offensive lock-out, then collective bargaining will degenerate to collective begging."

[10] The above judgment was overturned on appeal in **Technikon SA v National Union of Technikon Employees**[1], and the applicant drew the court's attention to the following paragraphs of that judgment per Zondo JP (as he then was) to support its case:

> "[42] The rationale behind s 76(1)(b) is that if an employer decides to institute a lock-out as the aggressor in the fight between itself and employees or a union, it may not employ temporary replacement labour. That is to discourage the resort by employers to lock-outs. The rationale is to try and let employers resort to lock-outs only in those circumstances where they will be prepared to do without replacement labour (ie when they are the aggressors) or where they are forced to in self-defence in the sense that the lock-out is 'in response to' a strike by the union and the employees - in other words, where the union and the employees are the aggressors.
>
> [43] The policy is one that also says to unions and employees: Do not lightly resort to a strike when a dispute has arisen because, in the absence of a strike, the employer may not employ replacement labour even if it institutes a lock-out but, if you strike, the employer will be able to employ replacement labour - with or without a lock-out. The sum total of all this is that the policy is to encourage parties to disputes to try to reach agreement on their disputes and a strike or lock-out should be the last resort, when all reasonable attempts to reach agreement have failed. (my emphasis)

[11] The LAC was not called upon to deal directly with the issue before me. In the result, I must decide whether I agree with the decision in **Agrinet** that a "reasonable interpretation" of section 76(1)(b) is that where the nature of the lock-out is a defensive one, the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases.

[12] In interpreting section 76(1)(b), I note that the proper approach to the interpretation of statutes was recently repeated by the Supreme Court of Appeal in **Natal Joint**

[1] (2001) 22 ILJ 427 (LAC)

Municipal Pension Fund v Endumeni Municipality.[2] Wallis JA, writing for the court, explained:

> '[18] . . . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation;….The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

Evaluation

[13] Subsection (1)(b) of Section 74 of the LRA is one of the exceptions to the prohibition of the use of replacement labour by an employer in terms of the provision. No replacement labour can be used by an employer where it initiates a lock-out in terms of the LRA, but the exception provides that it may do so *"in response to a strike"*. The plain meaning of *'in response to'* is *'in reply or reaction to"*[3]. However, for our purposes it is necessary to determine whether the phrase should be read to mean 'whether the strike has ceased or not." Or as Landman J

[2] 2012 (4) SA 593 (SCA)
[3] The New Shorter Oxford Dictionary, Volume 2 , 1993

put it, whether given the nature of the lock-out as a defensive one, the 'concomitant right' to employ replacement labour, accrues at the stage the defensive lock-out is implemented, and endures until the lock-out ceases. The question to answer is whether the exception to the prohibition in section 74(1)(b) is instead to be given the restrictive interpretation the applicant seeks.

[14] The interpretation clause contained in the LRA reads as follows:

> "3 Interpretation of this Act
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> Any person applying this Act must interpret its provisions-
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> (a) to give effect to its primary objects;
>
> (b) in compliance with the Constitution; and
>
> (c) in compliance with the public international law obligations of the Republic."

[15] The primary objects of the LRA are contained in section 1 as follows:

> '1 Purpose of this Act
>
> The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote-
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the workplace; and
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> (iv) the effective resolution of labour disputes.'

[16] It is important when taking into account the imperative laid out by the above sections of the LRA to give effect to the Constitution (and section 23 thereof in particular), to remind ourselves of what was said in to the **Certification** judgment[4] where the Constitutional Court stated:

> 'A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.'[5] (my emphasis)

[17] The constitutionally protected right to strike is not equivalent to the statutory right to lock-out as provided by the LRA. This principle must be borne in mind in approaching the interpretation of section 76(1)(b). The interpretation of that provision should not lend itself to a limitation of the right to strike, bearing in mind that there are no internal limitations of that right in the Constitution[6]. In addition, I

[4] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 1996 (4) SA 744 (CC)
[5] At paragraph 66
[6] *Satawu and Others v Moloto & Others and Another NNO* 2012 (6) SA 249 (CC) at paragraph 44

take cognisance of the ILO Committee of Experts' considerations in reference to the Convention of the Right to Organise and Collective Bargaining Convention (no 98) of 1949 which are reported as follows:

> "The Committee considers that if the right to strike is to be effectively guaranteed, workers who participate in a lawful strike should be able to return to work once the strike has ended and the fact of making their return to work subject to certain time limits or the consent of the employer is an obstacle to the effective exercise of this right"[7]

[18] In **SATAWU and Others** (supra), the Constitutional Court stated:

> '[44] The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning. '

[19] Given all of the above, I have decided not to follow the **Agrinet** judgment. I find that the interpretation to be accorded to section 74(1)(b) of the LRA is that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased. The requisites for a final interdict are settled law[8]. The applicant must establish a clear right; an injury committed or reasonably apprehended; and the absence of protection by any other ordinary remedy.

[20] Given my interpretation of section 74(1)(b) the applicant has established a clear right to the interdictory relief it seeks. On the basis of that analysis, I have found that the applicants' constitutional right to strike is being infringed as a result. Given that I have found that the stance taken by the respondent is in contravention of the provisions of LRA and is in violation of a constitutional right, I do not find that a satisfactory alternative remedy exists for what would in effect

[7] General Survey on the fundamental conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, Report of Experts ILO Conference 101 Session, 2012, at paragraph161

[8] *Setlogelo v Setlogelo* 1914 AD 221 at 227

be a claim for constitutional damages. Taking into account my analysis above, a declarator is not warranted since it would not serve any purpose.

[21] Both parties asked for costs should they be successful in the application. In all the circumstances I make the following order:

Order

1. The respondent is interdicted forthwith from utilising replacement labour for the purpose of performing the work of any employees who are locked out by virtue of the lock-out declared by the Respondent on 22 September 2015."

2. The respondent is to pay the costs of this application.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: D.Z. Kela instructed by Nduumiso Voyi Inc

Respondent: D.R. B Van Zyl instructed by Van Zyl Rudd Inc