IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C 121/99

DATE:

18-3-1999

In the matter between:

CHEMICAL ENERGY PAPER PRINTING WOOD & ALLIED WORKERS UNION — Applicant

and

NATIONAL MAGAZINE PRINTERS — Respondent

JUDGMENT

BASSON, J:

[1] This is an application for urgent relief in the form of an interdict as well as a declarator. The following relief is prayed for:

1. Declaring the lock-out by the respondent to be in contravention of section 64(1)(a) of the Labour Relations Act, 66 of 1995 ("the Act").
2. Interdicting the respondent from employing replacement labour in terms of section 67(1)(b) of the Act.
3. Restraining the respondent from conducting the furtherance of a lock-out in terms of section 68(1) of the Act.
4. Directing the respondent to permit members to resume work immediately.

[2] The “members” referred to here, are the members of the applicant in the present matter, the Chemical Energy Paper Printing Wood and Allied Workers Union (“the union”) who are employees of the respondent (National Magazine Printers), who went out on a strike on 27 January 1999.

[3] In retaliation or in defence to the strike, the respondent (National Magazine Printers or “the company”) declared a lock-out in terms of the Act.

[4] The background to this matter is important and can briefly be summarized as follows.

[5] There is a substantive agreement between the union and the respondent, in terms of which terms and conditions of employment are negotiated on a yearly basis, and in terms of which wage negotiations take place.

[6] The papers at paragraphs 13.3.3.1 to 13.3.3.3 (at page 130) set out the procedure for the said negotiations:

"13.3.3.1. The negotiating committee shall negotiate in good faith and conclude a substantive agreement not more than once each year.

13.3.3.2. These negotiations concerning salaries, wages and conditions of employment shall commence not later than the end of October of each year.

13.3.3.3. Negotiations may be initiated by either party, advising the other party in writing of the issues for negotiation, not later than 15 October of each year"(emphasis supplied).

[7] Although in recent years the so-called substantive agreement was only changed marginally ("weinig verander" - in terms of the respondent’s case set out at page 113 of the papers at paragraph 6.2) it is clear that these negotiations also concerned changes to the substantive agreement between the parties. This much is clear where respondent states: "Die partye het egter jaarliks die onderhandelinge

as 'n geheel hanteer en die substantiewe ooreenkoms en loonaanhangsel saam geteken."

[8] On 20 October 1998, in terms of the above provisions of the substantive agreement between the parties, a proposal was sent by the union to the respondent-company (this proposal is attached at page 43 of the papers as Annexure KJ2). Paragraph 1 of this Annexure reads as follows:

"1. The company shall agree to review the whole substantive agreement, that shall commence on a day agreed between the parties not later than the middle of January 1999.

2. The company shall pay all employees according to task rates" (emphasis supplied).

[9] The rest of the said proposal concerned wage demands. This appears to be in accordance with the procedure followed in the previous years.

[10] The company then responded with its wage proposals (attached at page 44 of the papers).

[11] It is, however, clear that the proposals of the company also dealt with substantive issues such as the work week, the shift overlap, long-service leave, job grading system, the leave cycle, the negotiating cycle, shift allowances, overtime, maternity leave, and family responsibility leave. These items, the company said needed to be reformulated in terms of new legislation (which was a reference to the new Basic Conditions of Employment Act, 75 of 1997 - “the BCEA”). The company’s proposal then also then dealt with issues such as sick leave, public holidays, and the like.

[12] It was also the evidence of the respondent (as it appears from the papers and this was not placed in dispute), that a proposed draft was sent to the union on the proposed new substantive agreement, dealing with the above issues.

[13] Certainly at this stage, the issues which were put up for negotiation between the parties were broader than what can be termed mere wage issues. These proposals clearly included the substantive agreement proposals as per the substantive agreement.

[14] The first meeting then took place between the parties on 28 October 1998. The very first item that was addressed (at page 60 of Annexure KJ4) was -

"The company shall agree to renew the whole substantive agreement which shall commence on a date agreed between the parties not later than the middle of January 1999".

And further: "(The union) ...

Vra dat substantiewe items van items wat 'n direkte uitwerking op lone het in 'n aparte vergadering bespreek en onderhandel word. Die maatskappy sê al die items moet as 'n pakket onderhandel word.".

[15] It is clear from this statement that management took the view that the wage negotiations were part of a package of negotiations on the substantive agreement.

[16] As it also appears from the papers, the union took a different stance - it wished to separate these two disputes, at least on the basis that it would be discussed at separate meetings.

[17] The rest of this meeting then dealt with, primarily, the wage demands of the union.

[18] The next important meeting took place on 4 November 1998, (minutes attached as Annexure KJ5 to the papers, at pages 62 **et seq**).

[19] It appears from these minutes that the union's reaction to the company's proposals

set out in the document above, such as work week, long service leave, job grading system, holidays and shifts, were discussed in some detail. This meeting then ended with a mandate given by the union.

[20] Again, it is clear from these minutes that the issues which were discussed were broader than the mere wage issue.

[21] A further important meeting took place between the parties on 11 November 1998. These minutes read as follows (page 131, Annexure WEW2):

"Mnr Wager (of the company) meld dat volgens sy berekeninge, 'n totale verhoging van 15,87 geëis word deur die unie algeheel. Die maatskappy verhoog sy aanbod na 4% plus die 1% verhoging op 1 Oktober 1998. In ruil hiervoor wil hy 'n toegewing hê rondom die werksweek, skof oorvleueling, provident fund."

[22] Again, it is clear that the wage demands are coupled by the company to the substantive issues, such as the work week and shifts. Also, (from page 32):

"Mnr Wager sê dat die unie onbuigsaam is omdat onderhandeling nie eensydig kan plaasvind nie. Hy sê ook verder dat die reël wat in die eerste vergadering (of 28 October 1998) ooreengekom is naamlik indien daar nie oor <u>al die kwessies</u> ooreengekom word nie, slegs 'n

gedeelte, sal daar geen ooreenkoms wees nie. <u>Alles of niks</u> nou in werking tree" (emphasis supplied).

[23] A dispute meeting was then arranged for 18 November 1998.

[24] It appears that at this meeting the issue of wages was discussed. The meeting that was proposed initially as a separate meeting about the BCEA on 19 November 1998 was then cancelled.

[25] The respondent's version of the meeting of 18 November 1998 is set out as follows (at page 120 of the papers at paragraph 13.3):

"Ek het hierby aangemerk “WEW3" 'n afskrif van die notule van die eerste dispuut vergadering wat op 18 November 1998 gehou is. Ek persoonlik was nie teenwoordig by hierdie vergadering nie, en wat ek hier ten opsigte van daardie vergadering sê, is aan my oorgedra deur mnr M Grobbelaar, wie se bevestigende eedsverklaring ook hierby aangeheg word. In hierdie eerste dispuutsvergadering is die voorgestelde veranderinge van die substantiewe ooreenkoms inderdaad nie genoem nie, behalwe om die vergadering wat oorspronklik vir 19 November 1998 belê is, te kanselleer.

Ek doen eerbiedig aan die hand dat dit uit die aard van die saak gekanselleer was omdat ons by die afloop van die vergadering van 11 November 1998, duidelik oor alle aspekte in dispuut was."

[26] It accordingly appears that not only the wage issue was on the table during these negotiations, but that it was coupled to the issue of the substantive agreement and the negotiations thereupon both at the meeting of 11 November 1998, and at the meeting of 18 November 1998, which followed from that meeting.

[27] In my view, the cancellation of the meeting of 19 November 1998 (which was to discuss the influence of the BCEA), was cancelled, on the probabilities, because of the fact that (as the respondent says) the parties were now in dispute in regard to both the wages and the substantive issues.

[28] The dispute was referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) after the internal proceedings could not resolve the matter, by the applicants, in terms of the referral forum (Annexure KJ7 at page 74 of the papers).

[29] The dispute was merely described as a dispute about wages (at page 75).

[30] Before this happened, there was another meeting held between the parties (the

third meeting in terms of the internal procedure) on 7th December 1998, where clearly, also the wage issue was discussed. At page 136, Annexure WEW4 at pages 135 and further of the papers, it is said that -

"Mnr Van As meld dat daar ook gekyk moet word na die maatskappy voorstelle, gekyk moet word."

[31] This is further elaborated upon in the respondent's version (at page 121 at paragraph 13.5):

"Dit blyk uit die tweede bladsy van die notule van die derde vergadering gehou op 7 Desember 1998, Aanhangsel WEW4, dat mnr Van As meld dat daar ook gekyk moet word na die maatskappy voorstelle. Mnr Van As het in der waarheid pertinent gemeld dat daar buiten die paar items wat tot op daardie stadium bespreek is, 'n hele verskeidenheid van voorstelle op die tafel is, en onderhandel moet word"(emphasis supplied).

[32] It is not denied by the applicants that this had happened (at page 170 of the papers).

[33] After the dispute was referred by the union to the CCMA on 7 December 1998 where the dispute was referred to as a wage dispute (*supra)*, the crucial conciliation meeting took place under the auspices of the CCMA on 15 December 1998.

[34] Although the notes made by the union representative (Annexure KJ8, attached at page 81 of the papers) only make mention of the wage dispute - and it appears that the bulk of the time was concerned with this issue - it is important to note that the so-called "openingsrede" which was given by the company at this meeting, (attached as Annexure WEW6 at page 140 and further of the papers) reads as follows:

"In kort het die onderhandelingsproses reeds in Oktober 1998 begin. Dit was

bestuur se oogmerk om die bestaande substantiewe ooreenkoms in terms van die gewysigde wetgewing te hersien."

Also at page 141 of this document:

"Om op te som, die maatskappy bied tans die volgende aan:

- 6,25% algemene verhoging
- verlaging van parkeergelde vanaf R25,00 tot R20,00 per maand.
- Verhoging in die subsidie van taxi's teen 6,9%.
- Voorwaardelik gekoppel aan die voorstelle ter wysiging van die substantiewe ooreenkoms om dit in lyn met die gewysigde wetgewing te bring" (emphasis supplied).

[35] This meeting is also discussed as follows in the respondent's answering affidavit at page 122, paragraph 15.2:

"Ek ontken ten sterkste dat die voorstelle in my oorspronklike brief van 21 Oktober 1998 nie by hierdie vergadering genoem is nie. Ek het namens die respondent by hierdie vergadering gepraat en die respondent se standpunt baie duidelik gestel. Ek het dit in der waarheid belangrik genoeg geag om my openingsrede op skrif te stel en by die versoeningsvergadering te lees. Ek het 'n afskrif van die bladsye waar ek verwys na die substantiewe ooreenkoms, hierby aangemerk WEW6.

15.3 - "Ek ontken dus dat slegs loon en loonverwante aangeleenthede bespreek is. Dit mag so wees dat mnr Jacobs se notas, Aanhangsel KJ8, slegs na hierdie items verwys, maar dit doen geen afbreuk aan die feit dat dit slegs 'n deel vorm van die totale dispuut nie" (emphasis supplied).

[36] It is accordingly clear from the respondent's version as well as from the documents referred to, that the negotiations on wages and possible agreement thereon was conditional upon negotiations over the substantive agreement to bring it in line with the BCEA. It is also clear that this dispute is the dispute that was conciliated at this meeting of the CCMA.

[37] It is possible that a dispute can consist of a demand by one party and a point blank refusal by another to comply with it. However, the most common form of dispute is one where there are bilateral or multi-lateral demands by the parties involved which are unable to be reconciled. I refer in this regard to **MTE Limited v Ngubani & Others** 1992 13 (ILJ) 910 LAC at 920H-I. In my view, the dispute in the present matter is such dispute.

[38] I am accordingly satisfied that the dispute that was referred to the CCMA related to the inability of the parties to agree on wages as well as on the issue of the substantive agreement.

[39] The strike notice refers to at KJ9B at page 86 of the papers, to -

"We hereby give you 48 hours notice of our intention to embark on industrial action with regard to the wage dispute, dated 25 January 1999."

[40] It appears that this was the second strike notice. A letter by the senior general manager of the company refers to the fact that the union has informed the company on 20th January 1999 at 14:40 in writing of the intention to embark on industrial action on 22nd January 1999 (Annexure KJ9 at page 82 of the papers).

[41] This document is also important for the following reasons. It contains a paragraph where management gives notice of a lock-out in reaction to the union's decision to embark on industrial action:

"Further, the intention to lock out CEPPWA members, is to dissuade said members to accept the following offer from management -

- A general increase of 7,5% with effect from date of agreement.
- No prescribed minimum wage per job grade.
- The acceptance of the substantive agreement as proposed by management" (emphasis supplied).

[42] It is clear that in giving this lock-out notice management was still referring to the dispute in its broad terms.

[43] It is to be noted, however, that this notice was withdrawn (KJ9A at page 84 of the papers). It is unclear why the notice was withdrawn, but it would appear to pertain to the fact that the requirements of section 64(1)(b) of the Act were not complied with in that the time when the industrial action would commence was not stipulated in the said notice.

[44] There is no indication that the union did not receive both the first lock-out notice as well as the withdrawal notice. The lock-out notice which replaced the withdrawn lock-out notice (Annexure WEW7 at page 142 of the papers) does not refer to the dispute in such clear terms. It refers to issues such as -

"Bestuur wil hiermee bevestig dat sodanige uitsluiting in die eerste instansie in reaksie op die vakbond se staking is. Die defensiewe uitsluiting sal geld tot die industriële aksie deur die vakbond beëindig word.

Uiteraard wil bestuur ook CEPPWA oortuig om tot 'n ooreenkoms ten opsigte van die dispuut te bereik."

[45] Several meetings took place between the parties during the duration of the strike. One of these meetings is minuted at Annexure WEW8 (at page 144 and further of the papers). This meeting also appears to deal with substantive issues, as was proposed by management in its initial proposal, as early as 4 February 1998.

[46] Other meetings took place in March 1998. One meeting took place under the auspices of the CCMA. It appears to be common cause that the company again reiterated its stance on the fact that the agreement on wage proposals was conditional upon the fact of negotiations in regard to the substantive agreement.

[47] This is a further indication of the fact that the dispute was not narrowed-down in the manner for which the applicant contended to the mere issue of a wage dispute, but that it was always a dispute which consisted of the conditional requirement of negotiations on the whole of the substantive agreement.

[48] It would therefore also appear that the acceptance by the union of the company's latest proposal during March 1999 was not unconditional, and was not an acceptance that could give rise to the wage agreement in the true sense of the word, as it was clearly intention of the respondent, which intention the union was aware of, that such wage agreement was always conditional upon the fact that there would be negotiations on the substantive issues of the agreement.

[49] These issues, had, of course, not been dealt with in great detail during the said negotiations. One of the reasons for this is the fact that the dispute was referred by the union to the dispute resolution procedures at an early stage.

[50] The applicant, even today, cannot persuade me that there was "an unconditional return to work" offer being made, in the sense that the wage dispute, as part and parcel of the dispute which gave rise to the strike, had been settled. It would appear that the union members intended to go back to work, but this was conditional upon the fact that such wage agreement had been reached and was to be implemented.

[51] Accordingly, the lock-out was not an unprotected lock-out. Proper notice of the lock-out was given in terms of the Act. This was never disputed. Moreover, the dispute which gave rise to the strike, as well as the defensive lock-out, is a dispute that was referred to conciliation as is required in terms of the Act.

[52] The relief prayed for by the applicant in the form of a declarator must accordingly be denied as the lock-out by the respondent was clearly not in contravention of section 64(1)(a) of the Act.

[53] In the same vein, the relief in the form of an order restraining the respondent from conducting the furtherance of such lock-out in terms of section 68(1) of the Act must also be denied, as well as the relief in the form of an order directing the respondent to permit the members of the union to resume work immediately.

[54] The respondent can also not be interdicted from employing replacement labour, in terms of section 67(1)(b) of the Act. It appears from the facts before the Court, that the lock-out *in casu* remains a defensive lock-out, on the basis of a dispute which has not been settled between the parties.

[56] In the event, I make the following order: The application is dismissed with costs.

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BASSON, J

Adv L.J. Bozalek

Jan Theron Attorneys

: Mr H.C. Nieuwoudt from

ers & Sons Attorneys

8 March 1999

Ex tempore