VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 10 MARCH 2000 CASE NO. J853/00

In the matter between:

NATIONAL UNION OF MINEWORKERS AND OTHERS Applicants

and

VIA DORO MANUFACTURING LTD Respondent

JUDGMENT

PILLAY, AJ:

[1] The facts of this matter were that the respondent was unable to pay workers at the end of January 2000 as was the practice. The applicant's members withheld their services once they were paid. They were paid on 4 February 2000.

[2] However, on 2 February 2000 the respondent instituted a lockout which remained in place until 28 February. Whilst the lockout was operative, the respondent gave notice on 18 February of its intention to retrench workers for operational reasons. According to the respondent the workers had been laid off. The applicant regarded the lay off as tantamount to a dismissal as its members were not working and were not getting paid. Mr Cassim, who appeared for the respondent, was emphatic that the members had not been

dismissed.

[3] This application was originally aimed at securing an interdict against the lockout and certain ancillary relief. As the lockout had been lifted the applicant now seeks an order for restraining the respondent from dismissing, alternatively laying off the applicants and certain other relief.

[4] The first question is whether the withholding of the labour by the second and further applicants amounted to a strike. Clearly the answer must be a firm "no." [Vide Coin Security (Pty) Ltd v The Guards and Allied Workers Union (1980) 4 SA 234 at 239; also at Wallis, Labour and Employment Law at page 14.] The members were entitled to withhold their services for as long as the respondent was unable to perform its part of the contract. The withholding of the services was one of several remedies available to the second and further applicants.

[5] The respondent relied on section 32(3) of the Basic Conditions of Employment Act which states that an employer must pay remuneration not later than seven days after the completion of the period for which remuneration is payable. This section must be read with the contract of employment. It does not preclude employees from being paid on the last working day of each month in order to prevent them from withholding their labour if they are not paid in accordance with their contract. It merely gives the employees an additional remedy if they are not paid within seven days after the remuneration becomes payable. Having established that there was no strike, it follows that there was no basis for the lockout.

[6] The lockout was also not defensive. The respondent implemented it with the demand that certain preconditions must be met before the second and further applicants return to work. The preconditions which were contained in a letter required the applicants to agree to new terms of their employment. In particular the second and further applicants were expected to accept that they would be dismissed if they did not meet production targets and acknowledge that they might be retrenched.

[7] Furthermore, the lockout continued long after the members were remunerated. Consequently the issue of the tender of services is immaterial, whether there is a dispute of fact about the tender of services is equally irrelevant. As it happens the members did tender their services against payment of their remuneration.

[8] Mr Cassim submitted that as there was a dispute of fact about the tender of services, then the court should accept the respondent's version and refuse the application. The respondent's version is not that they did not tender services but that they did not do so on its terms.

[9] I find, therefore, that the lockout was unlawful.

[10] The additional dimension to the matter is that the respondent instituted proceedings in terms of section 189 of the Act. Section 67(5) does not preclude an employer from dismissing for operational reasons employees who participate in a protected strike. The subsection is silent about dismissals for operational reasons during a protected lockout. If it were the intention of the legislature to give employers the weapon of retrenchment additional to a lockout, it would have said so expressly. On a retrenchment during a protected strike when the employees maintain a modicum of control in that they can call off the strike. They will be disproportionately disadvantaged if the double-barrelled weapon of a lockout retrenchment were available to the employer. Nothing stops the respondent from proceeding with the retrenchment after the lockout. [Vide SACWU and Others v Afrox Ltd (1998) 2 BLLR at 172E-G.]

[11] The applicants are at a disadvantage. They cannot engage with the employer meaningfully. The consultations cannot be in good faith if the applicants lack the wherewithal to even meet to discuss with the first applicant and the respondent about their possible retrenchment. Being laid off may also result in their retrenchments being a fait accompli.

[12] The respondent had pinned the consultation period to conclude by 9 March 2000. The applicants have not engaged with the respondents meaningfully about the retrenchments to date. The possibility of their

impending retrenchments makes the applicant urgent. The respondent also regards the retrenchments as urgent as would appear from its letter dated 28 February 2000.

[13] In the circumstances I grant an order in terms of paragraph 1 to 6 of the amended order prayed.

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PILLAY AJ
LABOUR COURT OF SOUTH AFRICA

: MR P M MTSHAULANANA

: Attorney Maserumule

: MR P BAM

: Roodt and Wessels

: 10 MARCH 2000