IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case no: D 595-20

Reportable

In the matter between:

NUMSA obo Members **Applicant**

and

TRENSTAR (PTY) LTD **Respondent**

Application heard: 24 November 2020 (via Zoom)

Delivered: 30 November 2020.

Summary: Application to interdict the use of replacement labour i.t.o. section 76 (1) (b) of the Labour Relations Act, 1995 in circumstances where a strike has been suspended. Held that the trigger for the lawful use of replacement labour is not the existence of a current withdrawal of labour constituting a strike but rather the existence of a lawful lockout in response to a strike, whether that strike is current or suspended.

JUDGMENT

WHITCHER J

[1] The applicant seeks an order interdicting the respondent from engaging replacement labour during the course of its lockout on the contention that the lockout is not in response to a strike.

[2] The substance of the matter concerns one crisp question, namely the interpretation of section 76(1)(b) of the Labour Relations Act, 1995 ("LRA"). Section 76 (1) (b) of the LRA provides:

> '[a]n employer may not take into employment any person for the purposes of performing the work of any employee who is locked out, unless the lock-out is in response to a strike'. (my emphasis)

[3] On 26 October 2020 the applicant's members commenced strike action against the respondent ("the strike") in pursuit of a demand for a once-off taxable gratuity payment of R7500.00 per member ("the demand").

[4] The respondent unsuccessfully attempted to interdict the strike.

[5] The strike ran for approximately a month until the applicant notified the respondent on 20 November 2020 at 13h35 of its intention to suspend the strike, to which the respondent almost immediately responded by serving a lockout notice.

[6] In its notice, the applicant stated that the strike action would be suspended with effect from the close of business on Friday, 20 November 2020, and that its members would return to work at 7am on Monday, 23 November 2020.

[7] The applicant further stated that the suspension of the strike should not be construed as a withdrawal of the demand which had given rise to the strike.

[8] Shortly thereafter (on the same day), the respondent advised the applicant that its members will be locked out from 7am on Monday 23 November 2020. The lock-out notice contains a demand: that the applicant's members drop and waive their demand.

[9] What the applicant takes issue with is the respondent's statement in the notice, that the lockout is in response to the applicants' strike action and so it intends to use replacement labour during the lock-out.

[10] What follows is a brief summary of the submissions made in the affidavits and oral argument.[1]

The applicant's submissions

[11] An employer may use temporary replacement labour whilst implementing a defensive lockout in response to a protected strike but only for as long as the strike subsists.[2]

[12] Attempts to distinguish and rely on a distinction between a 'suspended' and 'terminated' strike does not assist the respondent. The fact of the matter is that the strike has ceased and the employees tendered their services.

[13] If the employees wish to resume the strike they must give 48 hours' notice. This is in accordance with the important purpose of a strike notice, as contemplated by section 64.[3]

[14] It is clear from the sequences of events that the lockout is in fact an offensive one and the respondent is the 'aggressor'. The lockout notice was issued almost immediately after the applicant's notice of its members intention to return to work and the sole purpose of the lockout is to achieve the respondent's own end, namely to compel the applicant's members to accept the respondent's demand, which is that the applicant's members drop their demand.

[15] The continued use of replacement labour by the respondent has an extremely prejudicial effect upon the applicant's members, as it will effectively allow the respondent to continue to lock out them in perpetuity (or until such time as they are forced to acquiesce to the respondent's demand to withdraw their demand) with no negative consequences whatsoever for the respondent. Such a situation creates a massive disparity in bargaining power between the respondent on the one hand and the applicant and its members on the other, and is patently in conflict with the purposes and objectives (particularly in the context of collective bargaining) of the LRA. For as long as the lock out

[1] There are no written heads of argument.
[2] *SACCAWU v Sun International* (J1951/15) [2015] ZALCJHB 341.
[3] The applicant did not mention this case, but it seems that, contrary to Labour Court decisions and consistent with the purpose of a strike notice, a strike notice would be required. See: SATAWU and others v Moloto NO and Another 2012 (6) SA 249(C). Bu the matter in this case does not turn on this as will be seen.

continues, the applicant's members will be unable to work and will be without an income, notwithstanding the fact that they are no longer on strike and have tendered their services to the respondent.

Respondent's submissions

[16] The lockout is in response to a strike and the applicants cannot simply seek to avoid the matter being in "response to a strike' by arguing that they have suspended the strike.

[17] The holding in *NASAW v Kings Hire CC* J2290/19 applies in this matter:

> [46] Because the underlying issue in dispute still remained unresolved and with the respondent having implemented the lockout, the respondent was entitled not to accept the employees' tender of services. It is insufficient for NASAW to simply suspend the strike and hold it in abeyance, to secure the uplifting of the lockout and the return of the employees to work. The reason for this is that for so long as the underlying issue in dispute remains unresolved, NASAW and the employees can at any time resume the strike. In Transportation Motor Spares v NUMSA and Others (199) 20 ILJ 690 (LC), the Court said:
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> '…the employer is entitled at the stage of the proposed return to work on the part of the strikers to lock them out until the dispute over which they had gone out on strike has been resolved. It is therefore up to the employer to enquire from the strikers when they seek to return to work what the basis is for their return to work and to decide whether he will allow them to resume their duties or not and if he will, then on what terms they will be so allowed.
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> [47] I was informed, even when this matter was argued in Court, that the underlying dispute had still not been resolved. It is only once this dispute is settled, or the demand for a 13th cheque abandoned by ZASAW, that the lockout is uplifted and the employees can demand their return to work. The employees are consequently not entitled to be paid, until this happens.

[18] Accordingly, in these circumstances where the lockout notice is given while the strike is still underway and where the applicant has now suspended the strike, it can never be the case that a union defeats the lockout simply by suspending the strike. The underlying dispute remains very much alive and the applicant

can go out on strike at any time without giving notice. In these circumstances the lockout is in response to the strike.

[19] Section 76 of the LRA does not refer to a strike that is continuous, it talks about a strike. The industrial action or power play on the part of the applicants has not come to an end. It has merely been suspended, with the dispute remaining unresolved and a possible resumption of the strike hanging between the parties.

[20] If the applicant's argument would be accepted, no lockout in response to a strike could be successful as every time employees are given notice of lockout in response to a strike, a union could defeat this by simply issuing a notice of suspension of the strike, which can be resumed at any time.

[21] The suspension of the strike and the commencement of the lockout notice would have been seamless in that the first time that the applicants would have been locked out would have been at 7am on the day they would have first reported for duty after the strike was suspended.

Analysis and findings

[22] The essential task in this case is to interpret section 76 1 (b) of the LRA so as to determine under what factual and legal preconditions replacement labour may lawfully be used, specifically when a strike has been suspended.

[23] As indicated, section 76 (1) (b) provides that an employer may not take into employment any person for the purposes of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.(my emphasis)

[24] The respondent has focussed its argument on demonstrating that a lawful lock-out is in operation. If regard is had to the case law, including the decision in *NASAW v Kings Hire*, the answer is clear. Until the underlying dispute is resolved, a lockout in response to a strike is perfectly lawful. *In casu,* the applicants have not accepted the employer's demand nor unilaterally abandoned the demands that informed their original industrial action. I am thus satisfied that the lockout is lawful. Further, I am satisfied that the lockout is not an offensive one. The demand made by the respondent on the employees is

that they abandon the demand they were pressing in industrial action. The respondent's demand is thus in response to a strike, even though this strike is now suspended.

[25] Having said that, the question in this matter does not concern the lawfulness of the lockout. It is whether replacement labour may be used when the employees are no longer engaging in actual strike action. It is not disputed by the respondent that the applicants have tendered their services again even though they have not abandoned their demand or acquiesced to the employer's counter-demand. While the applicants may resume the strike at any time,[4] the current state of play is that the strike is over because the employees are once again tendering their services. As I understand the applicant's position, what this means is that any lock-out at the instance of the employer must be without replacement labour.

[26] A glance at the definition of the word 'strike' in the LRA, confirms that the strike has terminated, even if temporarily. With the employees tendering their services, there is no longer a partial or complete concerted refusal to work. But what is the effect of the absence of strike action on the respondent's right to engage replacement labour? A close perusal of the section regulating replacement labour in the LRA, reveals that the word 'strike' is not semantically unfettered in section 76 (1) (b). Replacement labour is permitted in a '**lockout…in response to** a strike' (emphasis added). What this strongly suggests to me is that the operative legal precondition for the use of replacement labour is not a strike but a lockout. Not any lockout, however, but a particular kind of lockout: one that is in response to a strike.

[27] In my view the word 'strike' in section 76 (1) (b) functions simply to qualify and identify the kind of lockout during which replacement labour may be used. This is a lock-out in response to a strike. It cannot be that the mere suspension of a strike which has attracted the counter-measure of a lockout by an employer disqualifies the use of replacement labour. I agree with the respondent that such a reading will render section 76 (1) (b) effectively nugatory in the context of tactical collective bargaining. It will lead to an insensible or unbusinesslike

[4] Arguably with notice.

result, undermining the clear purpose of the section. The purpose of section 76 (1) (b) is clearly to permit employers to use replacement labour when a union has initiated a strike and a lawful lockout has been instituted in response to that industrial action. Properly interpreted, section 76 (1) (b) provides that the trigger for the lawful use of replacement labour is the lockout of those employees whose labour is to be replaced, not the existence of a continuing refusal to work by those employees. That the strike, in the form of a refusal to work, may have ended shortly before the lockout commenced, such as occurred *in casu*, is not determinative. The question a court should ask is whether a lawful lock-out in response to a strike is in operation. If so, replacement labour is permitted. Once the lockout ends, either as a matter of fact (if the employer so decides) or law (a lockout cannot persist after the employees have capitulated), the right to use replacement labour ends too.

[28] I am alive to the fact that this finding will weaken the applicants' bargaining position considerably. However, this is no more so than the drafters of the LRA did when originally permitting employers the use of the replacement labour after a union had called a strike and upon an employer making use of the counter-measure of a lockout.

[29] I thus find that the applicants have not made out a case for the relief sought. The application however does not warrant an adverse cost order. The issue in this case was novel.

Order

The application is dismissed with no order as to costs.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: DWD Aldworth, instructed by Brett Purdon Attorneys

RESPONDENT: Glen Kirby-Hirst from MacGregor Erasmus Attorneys