

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Cape Town

**Case No: CA
2/00**

In the matter between:

STUTTAFORDS DEPARTMENT STORES LTD

Appellant

and

SOUTHERN AFRICAN CLOTHING AND TEXTILE

WORKERS UNION

Respondent

JUDGEMENT

ZONDO JP
Introduction

[1] The appellant appeals against part of a judgment given by the Labour Court (per G. O. van Niekerk AJ) in a dispute between itself and the respondent. The dispute between the parties was about whether or not a lock-out which the appellant had subjected the

respondent's members employed by itself to was a protected one and, whether, in so far as the appellant

may have taken temporary replacement labour into its employment during that lock-out, such conduct on its part had been lawful. In this regard the respondent sought a declarator that the lock-out was not protected and an award of compensation to its members who had been locked-out.

[2] The Court a quo found the lock-out to have been protected but found that the appellant's employment of temporary replacement labour to perform the work of the locked-out employees was unlawful and awarded certain compensation to the respondent's members. This appeal is against that order. Some of the respondent's members who were awarded compensation were from a store of the appellant which is operated from the Musgrave Centre in Durban. The appellant does not appeal against the order of compensation made by the court a quo in favour of those members of the respondent who were based in that store.

The facts

[3] The appellant is a well known department store which operates a number of stores in various parts of the country. Some of its stores are at the Victoria and Alfred Waterfront in Cape Town ("**the Waterfront store**"), at the Tyger Valley Shopping Centre in Bellville ("**the Tygerberg store**"), at the Cavendish Square Shopping Centre in Cape Town ("**the Cavendish store**") and at the Musgrave Centre in Durban ("**the Musgrave Store**"). The respondent is a well known

trade union which is mainly involved in the clothing and textile industry. The respondent is recognised by the appellant as the collective bargaining agent of its members who are employed by the appellant in the stores mentioned above,.

[4] In May 1998 the parties started their annual wage negotiations. When the parties could not reach agreement, a dispute arose. The dispute was referred to the Commission for Conciliation, Mediation and Arbitration (**“the CCMA”**) for conciliation. Conciliation failed to produce an agreement. The thirty days period calculated from the date of the referral of the dispute to the CCMA expired on the 6th August 1998.

[5] On the 17th August the appellant gave notice to lock-out the respondent's members. This was in terms of s64(1)(c) of the Labour Relations Act, 1995 (Act No 66 of 1995) (**“the Act”**). The notice was later extended in order to ensure that it was not for a shorter period than the 48 hours required by s64(1)(c). The purpose of the lock-out intended by the appellant was to compel the respondent and its members employed by the appellant to accept the appellant's final wage offer. On the 20th August the appellant instituted a lock-out against the

respondent's members in the stores referred to earlier in this judgment. In accordance with the definition of a lock-out in s213 of the Act, that the respondent's members were locked - out means that the appellant excluded them from their respective work places for the purpose of compelling them to accept its final offer on wages and other terms and conditions of employment.

[6] The respondent alleged that the appellant employed temporary replacement labour. Part of the alleged temporary replacement labour was drawn from a pool of casual employees that the appellant had kept over a long period. Those casual employees worked from time to time for the appellant. Apparently none of the casual employees worked for longer than three days in any week. There were also students as well as fixed term contract employees who performed some duties at the store during the period of the lock-out or part thereof. On the 28th August the respondent's members started a protected strike to compel the appellant to agree to the union's wage demands. The lock-out was only lifted on the 9th September 1998 when agreement was reached between the parties on the wage dispute.

[7] The respondent brought an application in the court a quo for an order declaring the lock-out unprotected and awarding compensation in favour of its members. In par 13 of the founding affidavit, the respondent made the following allegations:

“13. The lock-out and the conduct in furtherance of the lock-out is (sic) unlawful because:

3.1 the notice required by section 64(1)(b) was defective; and

3.2 the taking into employment of persons to perform work of employees who were locked out is in contravention of section 76”.

[8] In paragraphs 14 and 15 the respondent went on and alleged:

“14 The lock-out and the conduct in furtherance of the lock-out, namely, the use of replacement labour, is (sic) by virtue of the above contraventions, unprotected.

15 As a result of the unlawful conduct of the respondent, the employees who were locked-out on 20 August 1998 have lost wages from the commencement of the lock-out to 28 August 1998 when the strike called by the

applicant commenced”.

[9] In par 16 of the founding affidavit the respondent, **“on behalf of employees locked-out”**, prayed for (a) a declarator that the lock-out was not a protected lock-out, and (b) an order **“requiring [the appellant] to compensate every employee locked-out by [the appellant]** (for an amount which was to be calculated on the formula : Employees Monthly salary + 26 x 8, interest and costs).

[10] In terms of the pre-trial minute the court a quo was required to decide:

(a) **“whether the respondent has contravened section 76 of the LRA, and if so, whether the respondent should forfeit the protection afforded a lock-out in terms of the LRA”** and

(b) **“whether applicant’s members are entitled to compensation and, if so, the amount of compensation that would be just and equitable in the circumstances having regard to all the facts”**.

[11] According to par 74 of the judgment of the court a quo, the attorney, who appeared for the respondent, informed the court a quo that he was confining the relief sought by the respondent to just and equitable compensation in terms of section 68(1)(b) of the Act. Sec 76(1)(b) of the Act provides that an employer **“may not take into employment any person-**

(a) . . .

(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”.**

The judgment of the court a quo

[12] The court a quo considered whether the notice to lock-out was defective in that it did not comply with sec 64(1)(c) - which would have rendered the lock-out unprotected. It concluded that the lock-out notice was valid, that the provisions of s64 had been complied with and that the lock-out was lawful (i.e. protected). It considered that, having been locked-out for eight days, the concerned employees had lost eight days’ wages. The court a quo said that the employees **“would have been hard hit by the loss of eight days’ wages”**. In the end the court a quo made an order against the appellant for the payment of an amount of R 70 000,00 to the respondent. It referred to this amount as compensation for the employees.

The Appeal

[13] Prior to the hearing of argument on appeal three features

of s 68(1) caught the attention of the court. These were that:-

(a) the heading of the section was: **Strike or lock-out not in compliance with this Act** - which suggested that the section dealt with matters relating to strikes and lock-outs which did not comply with the Act, namely, unprotected strikes and lock-outs;

(b) the opening part of ss(1) reads: **“In the case of a strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this chapter, ...”** (Underlining supplied); this seemed to suggest that the exclusive jurisdiction which s68(1)(a) and (b) appeared to confer on the Labour Court only applied to cases of unprotected strikes and lock-outs and conduct in contemplation or furtherance of such strikes and lock-outs.

(c) par (b) of ss(1) refers to **“loss attributable to the strike or lock-out ...”** which appeared to suggest that the compensation which the Labour Court is given exclusive jurisdiction by par (b) of ss(1) to order was limited to compensation for loss attributable to strikes and lock-outs as opposed to loss attributable to conduct in contemplation of or in furtherance of strikes and lock-outs.

[14] In the light of the above it appeared to the Court that the court a quo might well have lacked jurisdiction to entertain the respondent's claim for compensation once it had found that the lock-out was a protected one. The Court asked Counsel, who appeared for the appellant, and, the attorney, who appeared for the respondent, to address it on whether the court a quo had had jurisdiction to entertain the respondent's claim once it had

found the lock-out to have been a protected one.

[15] Both Mr Cassim, who, together with Mr Kirk-Cohen, appeared for the appellant, and, Mr Cheadle, who appeared for the respondent, presented argument on the point raised by the Court. With regard to the merits Mr Cassim indicated that he stood by his heads of argument and did not present oral argument. Mr Cheadle presented oral argument on the merits of the matter as well. Subsequent to the hearing, the respondent sought leave to submit supplementary written argument on the point raised by the Court. This request was granted. The appellant was also given an opportunity to respond to the respondent's written argument. In due course both parties submitted their respective supplementary argument.

[16] In granting the parties the opportunity to deliver supplementary argument, the court drew the parties' attention to further provisions of the Act which appeared to be relevant to the point raised by the Court. The provisions were those of s67(2),(3),(4),(5),(6),(9) and (10) of the Act. Ss(1) may also be relevant. It is convenient to quote these provisions: With the heading, they read thus:.

“67 strike or lock-out in compliance with this Act.

(1) In this Chapter, ‘protected strike’ means a strike that complies with the provisions of this Chapter and ‘protected lock-out’ means a lock-out that complies with the provisions of this Chapter.

(2) A person does not commit a delict or a breach of contract by taking part in -

(a) a protected strike or a protected lock-out;
or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

(3) Despite subsection(2), an employer is not obliged to remunerate an employee for service that the employee does not render during a protected strike or a protected lock-out, however -

(a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and

(b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court.

(4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.

(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the

employee's conduct during the strike, or for a reason based on the employer's operational requirements.

(6) Civil legal proceedings may not be instituted against any person for -

(a) participating in a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

(7)

(8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.

(9) Any act in contemplation or in furtherance of a protected strike or a protected lock-out that is a contravention of the Basic Conditions of Employment Act or the Wage Act does not constitute an offence.” (It should be noted that the heading to s67 is: **Strike or lock-out in compliance with this Act)**

[17] Mr Cassim submitted that the prima facie view expressed

by the Court that the court a quo did not have jurisdiction to entertain the respondent's claim once it had found the lock-out to have been a protected one was correct and that, for that reason, this Court should uphold the appeal and set aside the order of the court a quo. Mr Cheadle contended that the court a quo had had the necessary jurisdiction and made certain submissions in this regard.

[18] As the respondent's case was presented in the court a quo on the basis that it was a claim for compensation in terms of s 68(1)(b), it is necessary to quote the provisions of s68(1) in full. S68(1) provides as follows:-

“68 Strike or lock-out not in compliance with this Act

(I) In the case of a strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this chapter, the Labour Court has exclusive jurisdiction-

(a) to grant an interdict or order to restrain-

(I) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

(ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out,

having regard to-

(I) whether-

**(aa) attempts were made to
comply with the provisions of this
Chapter and the extent of those
attempts;**

**(bb) the strike or lock-out was premeditated;
(cc) the strike or lock-out was in response to unjustified
conduct by another party to the dispute; and
(dd) there was compliance with an order granted in
terms of paragraph (a);**

**(ii) the interest of orderly collective
bargaining;**

**(iii) the duration of the strike or lock-out; and
(iv) the financial position of the
employer, trade union or employees
respectively”.**

[19] Ss (2) and (3) are not relevant for present purposes. S68(4) makes the provisions of ss(2) and (3) inapplicable to an employer or employee who is engaged in an essential service or a maintenance service. Ss 5 provides:” **Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal.**

In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account”.

[20] During the hearing Mr Cheadle submitted that a contravention of s76(1)(b) rendered an otherwise protected lock-out unprotected and that, therefore, a claim for compensation under s68(1)(b) would be available to employees subjected to such a lock-out. However, in his written argument submitted after the hearing, Mr Cheadle indicated that he was no longer persisting in this line of argument. He conceded, quite wisely in my view, that the employment of temporary replacement labour in contravention of s76(1)(b) by an employer in the course of a protected lock-out did not affect the legality of such a lock-out.

[21] In his supplementary written argument submitted after the hearing, Mr Cheadle presented his argument under three headings in regard to the jurisdictional point raised by the Court. These were that:-

(A) the provisions of s68, properly construed, gave the Labour Court jurisdiction to order compensation in the case of a contravention of s76 by an employer;

(B) alternatively to (A) above, the Labour Court had jurisdiction to order compensation or damages under the provisions of s157(1) read with s158(1)(a)(v) and (vi).

(C) the Labour Court had power to make a declaratory order and **“to this extent at least”**, the court a quo had had jurisdiction to make the order that he said it had made in paragraph 76.1 of the judgment.

Does s68 give the Labour Court jurisdiction to award compensation in the case of a contravention of sec 76?

[22] Mr Cheadle submitted that the provisions of s68(1)(b) are capable of being read in two ways. He submitted that the one way is that the jurisdiction of the Labour Court to award compensation is limited to compensation for loss attributable to unprotected strikes and lock-outs and does not include compensation for loss attributable to unlawful conduct in contemplation of or in furtherance of a strike or lock-out whether protected or not. The other way of reading s68(1)(b), submitted Mr Cheadle, was to say that the **“loss attributable to a strike or lock-out”** in s68(1)(b) is a reference to a yardstick for determining compensation rather than a limit on jurisdiction. He submitted that the correct construction of s68(1)(b) was the latter construction.

[23] Mr Cheadle submitted that, in a case such as the present one, the compensation claimed is for loss attributable to the lock-out and not loss independently attributable to the conduct in furtherance of the lock-out itself. This submission can simply not be correct. It is contrary to the very purpose of strikes and lock-outs. If it were true, it would undermine the very essence of strikes and lock-outs and the process of collective bargaining.

[24] The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the workers' demands than have his business harmed further by the strike. The essence of a lock-out is that the employer denies the locked-out employees the opportunity to earn their wages, thereby causing financial harm to the locked-out employees, in the hope that, after a certain point, there would be so much financial harm or pain on the employees that they would consider that they would rather agree to the employer's demands than continue to be subjected to the lock-out and lose more wages.

[25] The Act seeks to make collective bargaining the preferred means for the resolution of disputes. However, it seeks to promote conciliation of disputes before there can be a resort to strikes and lock-outs. The Act seeks to provide extensive immunity to an employer who resorts to a protected lock-out and unions and employees who resort to a protected strike. The protection is not limited to the strike or lock-out itself but is also extended to conduct in contemplation or in furtherance of such a (protected) strike or lock-out, hence the provisions of s67(2), (4), (6), (8) and (9) which have already been quoted above.

[26] The Act requires a party which wishes to resort to a protected strike or lock-out to take much trouble. However, once the requirements of the Act for such strike or lock-out to be protected have been complied with, the Act protects that lock-out or strike and, generally speaking, protects the party responsible for it, too, against any judicial interference. The policy is that courts should stay away from the collective bargaining arena so that they cannot intervene when one of the parties feels the pinch. When one of the parties cannot bear the pain in the fight, it can do one of three things:

(I) it can conclude a compromise agreement with the other party in settlement of the dispute and ensure its survival;

(ii) it can capitulate and accede to the other party's demands;
(iii) it can continue with the fight and risk destruction or annihilation.

Such a party cannot be allowed to seek the intervention of the courts to escape the consequences of a protected lock-out or strike.

[27] In inflicting economic harm on its adversary, a party to collective bargaining is not limited to a strike or lock-out. In addition to a strike or lock-out, such a party is entitled to resort to conduct in contemplation or in furtherance of a strike or lock-out. Provided such conduct does not constitute a criminal offence, such conduct is protected and the party responsible for it is also protected. (See s 67(2), (3), (4), (5), (6), (8) and (9)). This means that such conduct cannot provide a cause of action nor can the party have civil proceedings instituted against the other party for such conduct.

[28] In this case there can be no doubt that the loss that the respondent's members suffered for which compensation was sought in the court a quo was the loss of wages suffered during the lock-out for the period 20th up to the 28th August 1998. The allegations in the founding affidavit reveal this quite clearly. Also the respondent's claim does not extend into the period after its members had embarked on their strike. If the loss was not that of wages, then I cannot see why the

respondent's claim for compensation would have been limited to the period upto when the respondent's members began with their strike. If the claim was for wages, the claim could not cover that period because the workers were not tendering their services once they had embarked on the strike.

[29] In so far as the respondent may try to give the claim the label of a claim for compensation as opposed to a claim for lost wages, it cannot, in my view, change the true character of its claim by giving it a wrong label. This case must be determined simply on the basis that the respondent's true claim is a claim for lost wages. I do not say that lost wages cannot fall within the ambit of s68(1)(b). What I do say is that the fact that the claim is in fact a claim for lost wages is singularly important where the loss occurred during a protected lock-out because, when employees are subjected to a protected lock-out, they are supposed to suffer a loss of wages anyway.

[30] As I have already indicated above, Mr Cheadle submitted that the respondent's claim is one for compensation for loss not attributable to the appellant's conduct in furtherance of the lock-out but for loss attributable to the lock-out itself. The question that this submission raises in the context of this matter is: Does the Labour Court have jurisdiction in terms of s68(1)(b) to entertain a claim for compensation for lost wages suffered by employees during a protected lock-out when such loss is attributable to such protected lock-out?

[31] In my judgement the submission is fatal to the respondent's claim. The Labour Court does not have jurisdiction under s68(1)(b) to entertain a claim for compensation for loss attributable to a protected lock-out suffered by employees subjected to a protected lock-out. S68(1)(b) confers exclusive jurisdiction on the Labour Court to award **"just and equitable**

compensation for any loss attributable to the strike or lock-out ...” The reference to a lock-out in s68(1)(b) is a reference to an unprotected lock-out. This is so because the use of the article **“the”** just before the words **“strike or lock-out”** is an indication that the strike or lock-out referred to is the one already referred to before. The strike or lock-out which has been referred to prior to s68(1)(b) is the one referred to at the opening part of ss(1) of s68. There it is stated: **“In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter ...”** Par (6) of ss(1) is part of the first sentence of s68(1). Furthermore, the heading to s68 refers to **“strike or lock-out not in compliance with this Act.”**

[32] The heading to s67, the section preceding the section in question, reads: **“Strike or lock-out in compliance with this Act.”** In other words the one section has a heading which refers to strikes and lock-outs which comply with the Act whereas the other one has a heading referring to strikes and lock-outs which do not comply with the Act - in other words protected and unprotected strikes and lock-outs.

[33] I have referred to the headings to the two sections because I am of the view that they are part of the material from which assistance can be derived in interpreting s68(1)(b). A contrasting of the headings to these two sections reveals that the legislature must have chosen the two headings deliberately. The legislature must have had a reason for such a choice. In my view the reason was to have two separate sections spelling out the effects or consequences of, on the one hand, protected strikes and lock-outs and conduct in contemplation or in furtherance of such strikes and lock-outs and, on the other, unprotected strikes and lock-outs and conduct in contemplation or in furtherance of such strikes and lock-outs.

[34] S67 sets out in great detail the effects, implications and consequences of protected strikes and lock-outs as well as of conduct in contemplation or in furtherance of such strikes and lock-outs. A reading of s68 reveals the same in respect of unprotected strikes and lock-outs and, to a rather limited extent, conduct in contemplation or in furtherance of such strikes and lock-outs.

[35] The scheme of chapter iv also reinforces the view I have expressed above about s67 and s68. I say this because one starts in s 67 and s68 which deal with the right to strike and the recourse to lock-out. Ss(1) thereof sets out the procedure to be followed before the right to strike or the recourse to lock-out can be exercised. Then there is ss(3) which spells out situations when compliance with the procedure set out in ss(1) is excused. There is then s65 which sets out limitations to the right to strike and the recourse to lock-out. Thereafter there are then, apart from s66 which deals with secondary strikes, sections 67 and 68 dealing with the effects, implications and consequences of protected strikes and lock-outs and unprotected strikes and

lock-outs respectively. Also whereas the opening part of s68(1) refers, as I have already indicated, to a strike or lock-out that does not comply with the Act, the first part of s67(1) opens with a notice that the term **“protected lock-out”** means a strike or lock-out that complies with the provisions of the Chapter on strikes and lock-outs.

[36] Various individual provisions of s67 reinforce me in my view that the Labour Court has no jurisdiction under s 68 (1)(b) to order compensation for loss attributable to a protected lock-out. The effect of s67(2)(a) is that, when an employer institutes a lock-out against employees, it does not commit a delict nor does it commit a breach of contract. The rationale behind s67(2) is to deny employees any possible cause of action against the employer arising out of the employers conduct in subjecting them to a protected lock-out.

[37] S67(3) provides in part that an employer” **is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out ...”** This provision makes it clear that an employee who has lost wages as a result of a protected lock-out has no cause of action against the employer. In the light of this it is understandable that the Act should not provide the Labour Court with jurisdiction to entertain such a claim. There is also s67(6). It provides: **“Civil legal proceedings may not be instituted against any person for -**

(a) participating in a protected strike or lock-

out, or

(b)

[38] In my judgement the provisions of s67(6) precludes the institution of civil proceedings by employees or their agents against their employer for having instituted a protected lock-out against them. This means that they can neither bring interdict proceedings nor can they bring a claim for compensation for loss attributable to, or arising from, a protected lock-out. In my view the legislature could not have used clearer language to oust the jurisdiction of courts in this regard.

[39] The ousting of the jurisdiction of courts in respect of matters such as the matter before us is not an innovation of the new Act. Sec 79(1) of the Labour Relations Act, 1956 (Act No 28 of 1956)(**“the old Act”**) had provisions which were more or less to the same effect as the present provisions of s67(6) of the Act.

[40] When the Act was published in Bill form in 1995, it was accompanied by an explanatory memorandum in which the drafters of the then Bill explained the thinking behind the main features of the Bill. The explanatory memorandum appears in (1995) 16 ILJ 278 - 336. At 306 the drafters wrote: **“An employer cannot take any other legal action against employees or a trade union for their participation in a strike. Likewise employees cannot sue their employer**

for wages during a lock-out in conformity with the draft Bill. Provision is specifically made that the employer is not obliged to remunerate an employee during a protected lock-out.”

[41] The last paragraph of the explanatory memorandum at 306 had the heading: Consequence of non-compliance. In that paragraph the drafters had this to say: **“Strikes and lock-outs that are not in conformity with the draft Bill attract various sanctions. The Labour Court has jurisdiction to interdict such strikes and to award compensation for any loss attributable to such strikes or lock-outs. In view of the very harsh consequences arising out of our law of delict, damages awards for strikes or lock-outs not in conformity with the draft Bill are tempered by a range of factors, namely, whether attempts were made to act in conformity with the provisions ...”** I think the content of this passage in the explanatory memorandum relates to sec 68 as it was in the Bill. It does not appear that any material changes were effected to the particular provisions of the Bill before it became the Act. I think the explanatory memorandum also reinforces the view I take on this issue.

[42] Another submission made by Mr Cheadle is that the court a quo had jurisdiction to issue a declarator that the appellant had employed replacement labour in contravention of s 76(1) (b) of the Act. He conceded that there was no consequential relief that could flow from such a declarator if the court a quo did not have jurisdiction to award the compensation sought by the respondent.

[43] The only declarator that the respondent sought in the court a quo was one to the effect that the appellant's lock-out was unprotected. It never sought a declarator that the employment of replacement labour was unlawful. The court a quo never made such a declarator and no cross-appeal has been noted by the respondent against the failure of the court a quo to make such a declaratory order. In any event the issuing of a declarator is discretionary. I can see no basis why we should make such an order in this case.

[44] In the light of all the above I come to the conclusion that the court a quo did not have jurisdiction to entertain the claim for compensation by the respondent for loss attributable to the protected lock-out which the appellant instituted against the respondent's members. This finding goes to the heart of Mr Cheadle's entire argument which was based on the premise that the loss for which compensation was sought was attributable to the protected lock-out. The finding that the court a quo had no jurisdiction to entertain a claim for compensation for such loss makes it unnecessary for me to deal with other arguments presented by Mr Cheadle as they were all based on the claim being one of compensation for loss attributable to a protected lock-out. This finding also means that even under s158 (1) the court a quo could not have had jurisdiction to entertain the respondent's claim once it had found that the lock-out was a protected one.

[45] There are three observations I wish to make on the judgment of the court a quo. The first one is that the court a quo does not appear to have considered what the effect of its finding that the lock-out was a protected lock-out was in law on the respondent's claim. The second is that it does not appear to have considered the submission which was made on behalf of the respondent before it (see par 11 of the court a quo's judgment) that the employment of replacement labour by the appellant in contravention of s76(1)(b) rendered the lock-out

unprotected.

[46] The third is that the court a quo does not appear to have considered whether there was any causal connection between whatever loss the respondent's members may have suffered and the employment of temporary replacement labour by the appellant in the light of the fact that during the period when the replacement labour was employed, the appellant was entitled, through the use of a protected lock-out, to deny the respondent's members an opportunity to work and earn wages. It seems that, despite its correct finding that the lock-out was protected, once the court a quo had found that the appellant had employed temporary replacement labour to perform the work of the locked-out employees it assumed, erroneously I think, that that would entitle the employees to compensation.

[47] In the premises the appeal must succeed. Mr Cassim sought that we should also set aside the order made by the court a quo in respect of the Musgrave Store which the appellant had not appealed against. In my judgement we cannot do so as that matter is not before us. It is true that the respondent may have difficulties in enforcing the order of the court a quo once this judgement has been handed down. However, that is a bridge which the respondent is entitled to cross when it comes to it and not earlier.

[48] With regard to costs, Mr Cassim, very fairly, submitted that on appeal each party should pay its own costs. In the premisses the order I make is that:-

1. The appeal is upheld and each party is to pay its own costs of the appeal.
2. Subject to 3 below, the order of the court a quo is set aside.
3. The orders in (2) above and (4) below do not apply to the order of the court a quo in so far as it relates to the Musgrave Store of the appellant and to employees employed in that store.

4. The order of the Court a quo is replaced with the following order:

“(a) The applicant’s application for an order declaring the lock-out instituted by the respondent on the 20th August 1998, and, awarding compensation to the applicant, is dismissed

(b) there is to be no order as to costs.”

RMM Zondo
Judge President

I agree
M.T.R. Mogoeng
Judge of Appeal

I agree

J. Traverso
Acting Judge of Appeal.

Date of Judgment: 2 November 2000