

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case No: JA11/00

In the matter between:

TECHNIKON SOUTH AFRICA

Appellant

and

**NATIONAL UNION OF TECHNIKON
EMPLOYEES OF SOUTH AFRICA**

Respondent

JUDGEMENT

ZONDO JP
Introduction

[1] This is an appeal against a judgment which was handed down by the Labour Court (per Pillay AJ) in an application which was brought by the respondent against the appellant. The dispute which was the subject of that application was, broadly speaking, whether or not the appellant was entitled to institute a lock-out against members of the respondent and other employees employed by it and whether it was entitled to employ temporary replacement labour during that lock-out. The

court a quo gave judgment in favour of the respondent holding that the appellant was not entitled to institute a lock-out against the respondent's members and other employees and that it was not entitled to employ temporary replacement labour during such lock-out. The appellant now appeals against that judgment. Before I can consider the appeal, it is necessary to briefly set out the facts of this matter.

The facts

[2] The appellant is a technikon. It has its head office in Gauteng. The respondent is a trade union which is registered as such in terms of the Labour Relations Act, 1995 (Act No 66 of 1995) ("**the Act**"). The respondent has members among employees of the appellant. At all times relevant to this matter it and another union, namely, the National Education, Health and Allied Workers Union, ("**NEHAWU**") jointly represented about 62% of the appellant's employees.

[3] About mid-January 2000 the appellant and the respondent reached a deadlock in their annual wage negotiations. A dispute then arose between the parties about wages and other terms and conditions of employment. On the 17th January the

respondent referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") for conciliation as required by s 64(1)(a) of the Act. Conciliation meetings which were subsequently held under the auspices of the CCMA failed to produce a settlement of the dispute. Accordingly, on the 3rd March 2000 the CCMA issued a certificate of outcome in respect of the conciliation. The certificate was to the effect that the dispute remained unresolved. The issuing of that certificate was in accordance with the provisions of s64(1)(a)(i) of the Act.

[4] On the 4th March the respondent informed all members of staff that it intended to call a strike after a meeting with union members. On the 7th March the appellant issued a memorandum to the staff "**regarding the strike situation**". In paragraph 3 of the memorandum the appellant set out various scenarios. These included an offensive lock-out as well as a defensive lock-out. In that memorandum the appellant described an offensive lock-out as "**an action that is initiated by the employer as soon as the certificate [of outcome] has been issued in an attempt to pressurise (sic) the union member to accept management's offer**".

It described a defensive lock-out as **“a retaliation by the employer to the union’s call for a strike in order to discourage the strike or to protect non-striking employees as well as property from the strikers”**.

[5] On the 8th March the appellant, on the one hand, and, the respondent and NEHAWU, on the other, concluded a picketing agreement. On the same day the respondent issued a strike notice to the appellant as required by the provisions of s 64(1) (b) of the Act. The notice was in these terms: **“We hereby give you notice of our intention to commence a full blown strike on Tuesday 14 March 2000 at 7:45 and Wednesday 15 March 2000 inclusive. From Thursday 16 March 2000 all strikers will be back at work. However, during the day union members will embark on the following industrial action:**

Picketing, go slow, work to rule”.

[6] Thereafter, but still on the 8th March, the appellant issued a

lock-out notice. The lock-out notice was headed: **“Notice of defensive lock-out”**. The second and third

paragraphs of that notice read thus:-

“We hereby give you notice of our intention to embark on a lock-out of your unions’ members from the time following the commencement of such strike as referred to above and **in response thereto as envisaged in sections 64(1)(c) and 76(1)(b) of the Labour Relations Act, 1995 (“the Act”).** Such lock-out shall continue until such time as the unions accept the Technikon Management’s last wage offer dated 13 January 2000.

In the event of such a lock-out the terms of the picketing agreement will not apply as all of your members will be excluded from entry to the Technikon premises. Your members and your representatives will however still be required to comply with the code of good practice relating to picketing in response to a lock-out read with the provisions of section 69 of the Act”.

[7] It appears that the appellant’s lock-out notice gave rise to some confusion. The respondent’s attorneys responded to it on

behalf of the respondent by a letter dated the 10th March. In that letter they suggested that the lock-out notice was defective because it contended that the lock-out was a defensive lock-out and yet it referred to s 64(1)(c) - which, the respondent's attorneys maintained, applied to offensive lock-outs only. They expressed the view that a defensive lock-out was only provided for in s 64(3)(d) of the Act which could only be invoked in response to an unprotected strike. They argued that, as the respondent's strike was a protected one, the appellant could not institute a lock-out in terms of s 64(3)(d) nor could the appellant employ temporary replacement labour in terms of s 76(1)(b). They sought an undertaking from the appellant that it would not proceed with its intended lock-out. They threatened that, if the appellant did not give them such undertaking, they would launch an urgent application for an interdict in the court a quo.

[8] The appellant replied to the letter of the 10th March from the respondent's attorneys by an undated letter. In that letter the appellant refused to give the undertaking required by the respondent's attorneys. It maintained that it was within its rights to seek to institute a lock-out and said it would oppose

any application to the Labour Court. In par 4 read with par 5.1. of the letter, the appellant said that its lock-out would not be of an **“offensive nature”** but would be a **“defensive lock-out”** and would be **“in response to”** the union’s strike. It also said that the purpose of the lock-out would be to **“force the members of the two unions to accept the Technikon Management’s last wage offer dated 13 January 2000”**. The management reserved its right **“to rely on the provisions of section 76(1)(b) of the Act regarding replacement labour”**. Subsequently, the respondent launched the application in the court a quo on an urgent basis which resulted in the judgment which is now appealed against.

The judgment of the court a quo and its reasons

[9] The court a quo found that the intended lock-out:-

- (a) was an offensive lock-out;
- (b) was not **“in response to”** the strike;
- (c) would be in breach of the picketing agreement ;
- (d) would not have been consistent with the picketing agreement if all the respondent’s members were excluded from the premises; and,
- (e) would have been permissible if the respondent’s

members had breached the picketing agreement.

[10] The Court a quo also made certain observations or findings which, in my view, informed its ultimate judgement.

These were that:-

(a) whether a lock-out was offensive or defensive was **“characterised by the primary purpose for which it is instituted;”**

(b) If the primary purpose of a lock-out was to compel the trade union and employees to meet the employer’s demand, then it was offensive;

(c) If the primary purpose of a lock-out was to protect the employer’s rights to property, person and economic activity, the lock-out was a defensive lock-out;

(d) if a strike were to be accompanied by intimidation or were to take the form of a **“work to rule”** or **“go-slow”** that disrupted the operations of the employer, the latter may resort to a lock-out to protect itself.

The Court a quo then made an order declaring the appellant’s lock-out notice invalid and interdicted the

appellants from locking-out the respondent's members and from employing temporary replacement labour.

The appeal

[11] Before us Mr Kennedy, who appeared for the appellant, submitted that there were two questions that the court a quo had to deal with. The one, he submitted, was whether or not the appellant was entitled to institute a lock-out. The second, he submitted, was whether the respondent would be entitled to employ temporary replacement labour during that lock-out. He submitted that, with regard to the first question, it was not necessary to categorise the lock-out either as an offensive or defensive lock-out. With regard to the second question, he submitted that the categorisation was necessary. He also submitted that the lock-out was in response to a strike as contemplated by s76(1)(b). Mr Kennedy also submitted that the court a quo erred in concluding that the lock-out would have been inconsistent with the picketing agreement.

[12] Mr Hennig, who appeared for the respondent, contested Mr Kennedy's submissions. He supported the judgment and findings of the court a quo. His central argument was that the lock-out which the appellant sought to institute was an offensive lock-out and not a defensive lock-out. He submitted

that the Act did not permit the employment of replacement labour during an offensive lock-out. He also submitted that the Act permitted a defensive lock-out only under s 64(3)(d) where it could only be resorted to by an employer in response to an unprotected strike.

[13] S 76(1)(b) of the Act precludes an employer from employing replacement labour during a lock-out to perform the work of locked-out employees unless the lock-out is in response to a strike. Mr Hennig finally submitted that s76(b) must be read so as to apply to a lock-out that is in response to an unprotected strike only and not also to one which is protected. He also submitted that the provisions of the picketing agreement precluded the appellant from instituting a lock-out. I propose to consider the question whether the appellant was precluded by the provisions of the picketing agreement from instituting a lock-out first and to thereafter consider the questions whether the lock-out was a protected one and whether the appellant was entitled to employ temporary replacement labour.

**WAS THE APPELLANT PRECLUDED BY THE
PICKETING AGREEMENT FROM INSTITUTING A LOCK-
OUT?**

[14] In considering whether the picketing agreement precluded

the institution of a lock-out, I think it is necessary to bear in mind what a lock-out is under the Act. The Act defines a lock-out in s213 as meaning:

“The exclusion by an employer of employees from the employer’s workplace for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees’ contracts of employment in the course of or for the purpose of that exclusion”.

[15] It is clear from the definition of a lock-out in the Act that a lock-out has three essential elements. They are that:

- (a) there must be an exclusion of employees by the employer from the employer’s workplace, and,
- (b) the purpose of the exclusion of employees from the workplace must be to compel them to accept the employer’s demand, and,
- (c) the demand must be in respect of any matter of mutual interest between employer and employee.

(That part of the lock-out definition that refers to a breach

of contracts of employment is not relevant for present purposes.)

[16] In the light of the above it goes without saying that, for a lock-out to exist, the exclusion of employees from the employer's workplace, must be for the authorised purpose. The authorised purpose is to compel the employees to accept the employer's demand in respect of a matter of mutual interest between employer and employee. This does not mean that there cannot be an exclusion of employees from premises for a purpose other than the purpose in the definition of a lock-out. An employer has a right at common law as owner or lawful occupier of premises to refuse employees entry into the workplace where the purpose of their coming into the workplace is not to perform their duties. Also if, after employees have entered the workplace, they refuse to work, the employer would be entitled to exclude them from the workplace.

[17] In this case the respondent's members were about to go on strike when the appellant decided to exclude them from the workplace as part of a lock-out. Contrary to the suggestion made by the court a quo, the strikers need not have committed acts of violence or misconduct or threatened the lives or safety of management or of non striking employees before the employer could exercise this right. Obviously the employer's case for excluding the strikers from the premises is stronger where this has occurred.

[18] Subject to the picketing agreement, the appellant could have excluded the respondent's members from the premises

without having to resort to a lock-out. However, it would appear that the employer's common law right has been qualified or amended by the provisions of s 69(2)(b) read with ss(3) of the Act. S 69(2)(b) requires that the employer's permission be obtained before picketing can be conducted on the employer's premises. Ss(3) provides that an employer may not unreasonably withhold its consent in this regard. The CCMA has power to overrule the employer should it find that the latter's refusal to give consent is unreasonable.

[19] The lock-out notice in this matter said that the exclusion from premises would continue until the employees had accepted the appellant's final wage offer. The respondent argued, and, the court a quo found, that that purpose rendered the lock-out notice ambiguous. I can find nothing ambiguous about a lock-out notice which says the exclusion from premises is for that purpose because every lock-out notice has to say exactly that as that is an element of a lock-out as defined in the Act.

[18] Whether or not the picketing agreement precluded the appellant from instituting a lock-out depends upon the construction of the provisions of the picketing agreement. In

this regard Mr Hennig, for the respondent, referred us to certain provisions of the picketing agreement in support of his submission. The provisions he referred us to are those of clauses 1,2, 2.7, 6.1, 6.2, 3.2, 4.1 and 4.2. In clause 2 of the picketing agreement the parties said they **“commit themselves to resolving any dispute relating to this agreement by following the dispute resolution procedures”** in clause 6. Clause 2.7. provides that **“employees not participating in the strike will not be prevented from working nor will their vehicle (sic) or visitors or students entering or leaving the employer premises be prevented from doing so”**. Clause 6 provides a dispute resolution procedure for disputes arising out of the picketing agreement.

[19] Clause 3.2 provides that **“striking employees not participating in a picket at any picketing point shall confine themselves to the garden area near the main entrance, between A and H Blocks of the [Appellant’s] premises”**. I think it can immediately be said that clause 3.2 cannot be said to preclude the appellant from instituting a lock-out because, quite clearly, it does not give the striking employees any right against the appellant. On the contrary it

places an obligation on them as against the appellant. It was also stated that, because clause 4.1 precluded intervention with striking employees in any manner, the institution of a lock-out by the appellant constituted such an intervention and was, therefore, not permissible. I do not think that this covers legal intervention. It must have been intended for an unlawful intervention.

[20] There is no express provision in the picketing agreement to the effect that the appellant would not institute a lock-out. It is true that there are provisions to the effect that the parties would not prevent non-striking employees from working or entering the premises. However, the agreement makes no reference to a situation where the purpose of this may be to compel the employees to accept the appellant's final offer on wages which would be the purpose if the exclusion from premises was part of a lock-out. I am, therefore, of the opinion that, at best for the respondents, those provisions would apply to an exclusion which is not part of a lock-out and would not apply to an exclusion resorted to as part of a lock-out. With regard to clauses 2 and 6, these do not apply because it is not the appellant's case that the respondents had acted in breach of the picketing agreement and that such breach entitled the appellant to institute the lock-out.

[21] The argument advanced by the respondents also raises the question whether, by being party to the picketing agreement, the appellant waived its right to institute a lock-out in this matter. The respondents submitted that the appellant waived its right in this regard. The appellant disputed the correctness of this submission and argued that, on the facts of this case, no waiver had been established. I agree, for the reasons that follow, that, on the facts of this case, it has not been established that the appellant waived its right to institute a lock-out.

[22] It must be borne in mind that a waiver is not lightly

inferred. The appellant's senior managers found copies of the first strike notice under their doors on the morning of the 8th March. On the same day the appellant responded to the strike notice with a memorandum. Among other things the appellant said in that memorandum that it would institute a lock-out in response to the strike if the respondent persisted with the strike action. Although the parties concluded a picketing agreement, the provisions of s 69(4),(5) and (6) of the Act, give the CCMA power to impose picketing rules on parties if they are unable to agree on rules by themselves. The picketing rules the CCMA could impose could include a rule permitting the strikers to picket on the appellant's premises if the appellant's refusal in this regard was unreasonable. The appellant did not have a right to deny the strikers the permission to picket on the premises where to do so would be unreasonable. In those circumstances it is understandable why the appellant may have opted to give its consent because failure to do so would in any event have led to the CCMA imposing this on it.

[23] I also cannot see why the appellant would have wanted to waive its right to lock-out without getting anything in return from the respondent. The parties were about to enter what

Conradie J would describe as a boxing ring (see **Metal & Electrical Workers union of SA v National Panasonic Co** (1991) 12 ILJ 533 (C) at 536E-G). If the appellant waived its right to lock-out, it would amount to an agreement by a boxer to have his hands tied behind his back for the duration of a boxing match which would give his opponent the opportunity to punch him as he pleased in the knowledge that he would not be able to throw punches of his own and to ward off punches. No boxer would ever do that. I do not think there can be any basis for saying that the appellant put itself in such a position when it concluded the picketing agreement. I therefore conclude that the appellant was not precluded by the picketing agreement from instituting the lock-out. The next question to consider is whether or not the lock-out was a protected lock-out and whether the appellant was entitled to employ temporary replacement labour during that lock-out.

Was the lock-out protected and was the appellant entitled to employ temporary replacement labour?

[24] Whether or not the lock-out in this case was a protected lock-out in terms of the Act is fundamental to the determination of this appeal. If the lock-out was not a protected one, the appeal must fail because then the appellant was not entitled to exclude the respondent's members from its premises nor was it

entitled to employ replacement labour. The respondent advanced two grounds in support of its submission that the lock-out was unprotected and that the employment of replacement labour would have been unlawful. The first one was that the lock-out notice was invalid for ambiguity. The second one was that the lock-out was an offensive lock-out and not a defensive lock-out. It argued that the appellant would only be entitled to employ replacement labour if the lock-out was a defensive lock-out. These two grounds require to be dealt with together.

[25] The Act does not anywhere refer to the terms: defensive lock-out and offensive lock-out. However, it does refer in s76(1)(b) to a lock-out that is” **in response to a strike**” and in s64(3)(d) to a lock-out in response to a strike that does not comply with the Act. These terms are used frequently in labour law parlance. However, care must be taken to ensure that pre-occupation with whether a lock-out is an

offensive or a defensive lock-out does not have the effect that the

focus is removed from where it should rightly be, namely, in the Act. In other words the true enquiry, which is whether the conduct complained of is permissible in terms of the Act, should never be lost sight of. I think that the court a quo may have fallen into this error.

[26] As indicated above Mr Kennedy submitted that categorisation of the lock-out as offensive or defensive was not

necessary for the determination of the question whether the lock-out was or was not protected but was necessary for the determination of the question whether the appellant was or was not entitled to employ temporary replacement labour. Subject to one qualification, I agree with this. The qualification is that, since the Act refers to a lock-out in response to a strike (see s 64(3)(d) and 76(b), it would be more advisable to use that terminology because there is a possibility that a defensive lock-out may not necessarily be synonymous with a lock-out in response to a strike.

[27] The respondent submitted that the lock-out notice was invalid because it was ambiguous. Its ambiguity was said to arise from the fact that its heading referred to it as a **“Notice of a defensive lock-out”** and yet the text stated that it was a notice in terms of s64(1)(c) which, so submitted the respondent, was only applicable to an offensive lock-out. It was also submitted that the fact that the notice was to the effect that the lock-out would continue until such time as the unions had accepted the appellant’s wage offer made the lock-out an offensive lock-out.

[28] In my judgment there is nothing confusing or ambiguous in the lock-out notice. Such confusion and ambiguity as there might be are not based on the notice but on the respondent’s erroneous understanding of the legal position. To say the lock-out notice in terms of s 64(1)(c) is only applicable to an offensive lock-out is erroneous. S 64(1) confers on an employer the recourse to a lock-out if certain requirements are met. It also confers on employees the right to strike if certain requirements are met. It makes no reference to an offensive lock-out nor does it make a reference to a defensive lock-out. The only situation in respect of which the Act contemplates that a lock-out may be instituted without the notice required by

s64(1)(c) is where s64(3)(d) applies. In all other situations a notice in terms of s64(1)(c) must be given before a lock-out can be instituted irrespective of the label such a lock-out is given.

[29] S 64 also does not say that once employees have given notice to strike or once they have begun with their strike before the employer can either give its notice to lock-out or can institute its lock-out, the employer can no longer exercise its recourse to lock-out under s64(1) even if all the requirements have been met. Equally, there is no provision to the effect that, if the employer has given the notice to lock-out first or has begun with its lock-out before the employees can begin with their strike or can give their notice to strike, the employees lose their right to strike. This, therefore, means that a lock-out may commence before, simultaneously with, or, after, a strike has commenced. It also means that a lock-out and a strike can run concurrently between the same parties. What this would mean in practice is that the strikers would be excluded from the premises of the employer. Since every lock-out notice must be a notice in terms of s64(1)(c), it follows that the reference to s64(1)(c) in the lock-out notice in this case could not have rendered the notice ambiguous.

[30] Another basis on which the respondent submitted that the lock-out provided for in s 64(1) was an offensive lock-out and not a defensive lock-out was that it believed that a defensive lock-out was only available to an employer under s64(3)(d). This, in turn, meant that it was only available if the employer was faced with an unprotected strike and that it was not available to the employer if the strike that the employer was faced with was a protected one.

[31] S64(3)(d) provides that the requirements of s64(1) do not apply to a strike or a lock-out if **“the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter.”** It was submitted that the provisions of s64(3)(d) must be read in conjunction with the provisions of s76(1)(b). S 76(1)(b) provides that an employer may not take into

employment any person” **for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike”**.

[32] It was submitted that we had to apply a purposive interpretation to s76(1)(b) and read the adjective **“unprotected”** into s76(1)(b) just before the word **“strike”** with the result that **“strike”** would become **“unprotected strike”**. It was submitted that we had to do this because, if the word **“strike”** in s76(1)(b) also included a protected strike, that would render the workers’ right to strike nugatory and would reduce collective bargaining to collective begging. Mr Hennig submitted that that would be because an employer could employ temporary replacement labour even when the strike to which it was responding was a protected strike which, so ran the submission, could never have been intended by the legislature.

[33] The respondent’s submission cannot be upheld. Employees have the right to strike and employers have a recourse to lock-out. In both cases the right to strike and the recourse to lock-out are subject to the limitations set out in s65. In other words, there is no right to strike where any one of the limitations in s65 applies. Accordingly, subject to the limitations to the recourse to lock-out in s65, an employer has recourse to lock-out which it may exercise when the requirements of s64(1) have been complied with or even when

they have not been complied with if any one of the exemptions in s64(3) applies. That is the legal position in terms of the Act.

[34] It has not been argued that any of the limitations to the recourse to lock-out in s65 applies to this case nor has it been argued that any of the exemptions in s64(3) applies. The question that arises therefore is: Had the requirements of s64(1) been met when the appellant sought to institute the lock-out? The challenge to the legality of the lock-out was only based in turn on the challenge of the validity of the lock-out notice. I have already found that that challenge could not be upheld. In those circumstances I hold that the requirements of s64(1) were met. The consequence of this finding is that the appellant was entitled to institute the lock-out.

[35] I have already stated that there is no statutory basis for the suggestion that the lock-out contemplated under s64(1) is only an offensive lock-out. S 64(1) contemplates any lock-out. Mr Hennig referred to s64(3)(d). S 64(3)(d) says nothing more in the case of a lock-out than that an employer may institute a lock-out without complying with the requirements of s64(1) if the lock-out is in response to an unprotected strike. The policy behind this is that, if employees subject an employer to an unprotected strike (i.e. one which does not conform with the provisions of chapter IV), the employer may also respond with a lock-out without having to first comply with the requirements of s64(1) because, in that case, the employer has to act urgently in self-defence, as it were. If the employer had to first comply with the requirements of s 64(1) before it could respond with a lock-out to an unprotected strike, that would take too long. By the time the requirements of s64(1) were met, the lock-out could no longer be effective. That is if the employer's business would still be there as the strike would have been going on for quite some time.

[36] An employer is only entitled to resort to a lock-out under s64(3)(d) where that is in response to an unprotected strike. Although it is clear that a s64(3)(d) lock-out is a shield with which an employer can defend itself and is not a spear with which to attack, and, may, therefore, be referred to as a defensive lock-out, it does not follow that that is the only situation in which a defensive lock-out is available to an employer under the Act. As I have already said, s64(1) permits both offensive and defensive lock-outs whereas s64(3)(d) only contemplates a defensive lock-out and, even then, only if the

strike to which the lock-out is a response is an unprotected strike. Whereas the lock-out in s64(3)(d) can only be used if there is an unprotected strike, an employer is entitled to institute a lock-out under s64(1) even if the strike resorted to by the employees is a protected one. The respondent's argument that an employer has no right to institute a lock-out in response to a protected strike is devoid of any merit.

[37] As stated above, it was also argued on behalf of the respondent that the appellant would not be entitled to employ temporary replacement labour during the lock-out which the appellant was planning to initiate. The basis advanced for this argument was that the only situation in which an employer has a right to employ replacement labour is when it institutes a lock-out in response to an unprotected strike. This was based on linking the provisions of s76(1)(b) and those of s64(3)(d). It is true that an employer has a right to employ temporary replacement labour when there is a lock-out in response to a strike. It is not true that that is limited to a situation where the strike is unprotected and is not open to an employer when the strike is protected.

[38] The submission by Mr Hennig that we should resort to purposive interpretation in reading s76(1)(b) has no basis. The mere fact that the ordinary meaning of a word in a statute does not suit one's case is no justification to then seek to avoid the ordinary meaning of that word. That provides no justifiable basis to invoke purposive interpretation. Mr Hennig was not able to point out any ambiguity in s67(1)(b) nor was he able to suggest any absurdity that would result if the word "**strike**" was read as meaning any strike - protected or unprotected.

[39] It seems warranted that I should repeat what I said two years ago in the Labour Court about purposive interpretation. In

Transportation Motor Spares v National Union of Metal Workers of SA & Others (1999) 20 ILJ 690 (LC) at 699B I said:- **“While purposive interpretation has much to its credit, nevertheless, it must be adopted in appropriate cases. Purposive interpretation is no licence to ignore the language used in the statute which is the subject of interpretation”**. There is, accordingly no justification for reading into s76(1)(b) a word which is not there.

[40] The rationale behind s76(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 (i.e. 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.

[41] 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 and 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.

[42] The next question which requires decision is whether the lock-out was in response to a strike as contemplated in s76(1)(b). This is important for the question whether or not the appellant was entitled to employ replacement labour during the lock-out. I think it is as clear as day light in this case that the appellant's lock-out was in response to the strike which the respondent's members had begun with. The strike notice fixed the date on which the strike would commence. The lock-out notice said the lock-out would begin when the strike began.

[43] In the light of all the above I am satisfied that the court a quo erred in finding that the appellant was not entitled to institute the lock-out it sought to institute and to employ temporary replacement labour it sought to employ during such lock-out. Accordingly the appeal must succeed. Although the respondent had throughout sought that costs should follow the result, during argument Mr Hennig sought to change this stance and submitted that there should be no order as to costs. I have considered his request. It is without any justification. Mr Kennedy submitted that on appeal costs should follow the result. He indicated that he was not pressing for costs in the court a quo. I think on appeal the successful party is entitled to its costs.

[44] In the premises I make the following order:-

1. The appeal succeeds with costs.
2. The order of the court a quo is set aside and the following order is substituted for it:-

“(a) The application is dismissed.

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

R. M. M ZONDO
Judge President

I agree

M. M. JOFFE
Acting Judge of Appeal

I agree

J. TRAVERSO
Acting Judge of Appeal

For the appellant: Adv. Paul Kennedy
Instructed by: Brink Cohen Le Roux and Roodt Inc

For the respondent: Mr Hennig
Instructed by: J.B. Hugo & Cronje

Date of hearing: 19th September 2000

Date of Judgement: 9th November 2000