

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J1874/12

In the matter between:

METAL AND ENGINEERING WORKERS

UNION SA

First applicant

FRED LOUW & OTHERS

(named in annexure "A" hereto)

**Second to Further
applicants**

and

BEARING INTERNATIONAL A DIVISION OF

HUDACO TRADING (PTY) LTD

Respondent

Heard : 27 July 2012

Delivered : 27 July 2012

Summary: Urgent application for an order to declare a lock-out unlawful. Application dismissed with costs. Lock-out constitutes a defensive lock-out in terms of the Labour Relations Act, 66 of 1995.

JUDGMENT

AC BASSON J

[1] The applicants (Metal and Electrical Workers' Union – 'MEWUSA' on behalf of the individuals named in Annexure 'A' to the Notice of Motion – hereinafter referred to as 'the individual applicants') brought an urgent application seeking the following orders:

- (i) An order interdicting the respondent (Bearings International – A division of Hudaco Trading (Pty) Ltd) from continuing with the lock-out imposed on 12 July 2012 and to permit the individual applicants to resume their duties.
- (ii) An order declaring that the lock-out is not in compliance with Chapter 4 of the Labour Relations Act¹ ('the LRA').
- (iii) An order that the respondent is liable in respect of the payment of wages for those employees locked out from 12 July 2012 until the date the lock-out is uplifted.

[2] The Court dismissed the application with costs. Here are the written reasons for the order.

Brief exposition of the relevant factsThe applicants' version

[3] According to the applicants' papers, negotiations commenced with them regarding matters of mutual interest. According to the applicants, these negotiations did in fact commence but ended in a deadlock on 5 July 2012.

[4] The dispute was referred to the CCMA for conciliation on or about 11 July 2012 but before the matter could be resolved the respondent issued a notice of a lock-out and served it on the individual applicants on 12 July 2012. According to the applicants they were informed that they would remain locked out until such time that they accept the respondent's final demands.

The respondent's version

¹ Act 66 of 1995.

- [5] The respondent paints a very different picture. According to the respondent it engaged with MEWUSA in negotiations concerning substantive terms and conditions of employment on 19 June 2012. These negotiations deadlocked on 28 June 2012. As from 27 June 2012 the respondent experienced conduct by the individual respondents retarding or obstructing the normal flow of work.
- [6] The respondent is a distributor of bearings and power transmission products and supplies a complete range of various imported and local products through more than 50 wholly owned branch outlets. The respondent operates a 24 hour hot-line service countrywide and an after-hours support. On time delivery is extremely important and incorrect picking and/or sending of stock to branches undermines the very fabric of the respondent's business. The respondent explained that it operates in a highly competitive industry and that clients can easily obtain replacement products from competitors.
- [7] The respondent's warehouse space consists of 6 500 square meters of storage space and is packed up to 12 meters high. The respondent stocks approximately 170 000 line items.
- [8] During the time that the individual applicants embarked on a retardation or obstruction of work, the respondent became aware that stock items were being misplaced and not returned to the correct bin locations or placed in incorrect bin locations making the locating of stock difficult if not impossible. These incidents of incorrect picking and sending of incorrect stock to various branches commenced after 26 June 2012 and increased significantly with the advent of the individual applicants' unhappiness with the respondent's final wage offer. In support of these allegations, the respondent annexed to its answering papers numerous e-mails from branches complaining of either incorrect picking or the sending of incorrect stock. In addition to these incidents of obstruction of work and sending of incorrect stock to branches, the workflow of the individual applicants in respect of inter-branch transferrals dropped significantly from 450 - 550 per day to as low as 235 by 5 July 2012.

[9] On 6 July 2010 the respondent held a meeting with shopsteward regarding the go-slow and the apparent drop in workflow in respect of inter-branch transfers. The respondent raised the following issues with the shopstewards: Incorrect stock being sent to branches; empty boxes being sent to branches; boxes being sent without documentation; forklifts not being recharged and staff standing around loitering. According to the respondent, Mr Buthelezi (a shopsteward) replied that the business would not run as usual as long as people were unhappy. A copy of the minutes of this meeting is attached to the respondent's answering affidavit. At this juncture I must point out that the applicants' papers do not even refer to this meeting nor to the apparent efforts made by the respondent to resolve the matter.

[10] In addition to these discussions with shopstewards, the respondent also sought the assistance of the union to intervene urgently to resolve the apparent retardation of work by the individual applicants. MEWUSA did not respond to the fax sent to them. After this fax was sent to MEWUSA, the respondent again experienced further problems with incorrect orders being sent to branches. The respondent attaches numerous e-mails from disgruntled customers complaining about these incorrect orders. On 4 July 2012, for example, the individual applicants sent an empty sealed box to the Durban branch.

[11] The respondent further points out that the skeleton staff picking rate over a period of two hours achieved half of the numbers achieved by 45 of the individual applicants in a full day shift which consisted of 7 1/2 hours.

[12] In the replying affidavit, the applicants reply to these allegations by merely denying that the individual applicants engaged in a retardation of the workflow and that they have caused any loss of business to the respondent.

[13] A lock-out notice was indeed issued by the respondent on 12 July 2012. In the notice the respondent points out that the individual applicants were participating in illegal industrial action in the form of a go-slow, retardation and obstruction of work that does not comply with the provisions of the LRA. The respondent accordingly gave notice to the

individual applicants in terms of section 64(3)(d) of the LRA that they remain locked out 'until such time as you accept the final demands/ final wages and conditions of employment offers tabled by the company...'

Evaluation of the merits

[14]A party who approaches this Court on an urgent basis must explicitly set out the circumstances which render the matter urgent. In addition thereto the applicant must set out the reasons why the applicant claims it will not be able to obtain substantial redress at a hearing in due course.

[15]The applicants firstly ask for a declarator on an urgent basis that the lock-out is illegal and secondly for an interdict against the respondent to uplift the unlawful lock-out and to permit the applicants to return to work. As will be pointed out, I am not persuaded that the applicants have made out a case for relief on the papers: Firstly, the applicants have not persuaded this Court that, even if the lock-out was unprotected, they are unable to recover by way of normal action in due course any wages owed to them. Secondly, the applicants have also not persuaded this Court that they do not have an alternative remedy available at their disposal. There exists no reason why the applicants cannot approach this Court in the normal course and claim any wages that were deducted as a result of the lock-out. I am furthermore not persuaded that the applicants will suffer irreparable harm if the order is not granted. The applicants argue that the 'unlawful lock-out' is 'an evil' and that it undermines collective bargaining 'in that it weakens the financial muscles (i/e MEWUSA's stop order facilities and individual Applicants' wages)' during the lock-out. The lock-out does not infringe upon MEWUSA's right to receive union subscriptions during the lock-out and as long as remuneration is due to MEWUSA, subscriptions will be paid from the wages to MEWUSA. In respect of wages, if the lock-out was protected (although I am of the view that the lock-out is protected), the wages could be recovered by normal action in due course. In respect of the balance of convenience, I am not persuaded that the applicants have made out a case why the balance favours them particularly in light of the fact that the evidence overwhelmingly shows that the individual

applicants have been engaging in acts of sabotaging the operations of the respondent. Lastly, in respect of an alternative remedy, as already pointed out, MEWUSA could sue for damages suffered if stop orders are not paid over. The individual applicants could further sue for payment of their wages should the lock-out be declared unlawful.

[16] I have, however, notwithstanding my concerns regarding the urgency of this application, nonetheless decided to deal with the merits of this application particularly in light of the fact that I am of the view that the individual applicants are engaged in acts of sabotage against the respondent.

[17] I am not persuaded that the applicants have made out a clear right for the relief sought: In this regard I am not persuaded that the applicants did not participate in an unprotected strike. I am persuaded by the overwhelming evidence attached to the respondent's papers that the evidence supports the conclusion that the individual applicants were in fact engaged in a concerted retardation of work in the workplace and that their actions are severely disrupting the normal operations of the respondent. In arriving at this conclusion I was mindful of the approach as set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.² In motion proceedings where the applicant seeks final relief (as in this case),

² The Court held at 634 as follows: 'It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhotso v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case *supra* at 924A).'

disputes of fact to the extent that they do exist, must be decided in favour of the respondent. Applied to the present dispute: If those facts disclose that the respondent instituted a defensive lock-out, the applicant must fail. The court in *Plascon Evans* further pointed out that only where the respondent puts forward denials that are not credible or puts forward palpably implausible versions, will the court reject it out of hand without recourse to oral evidence. A respondent's version therefore ought only to be rejected in motion proceedings if it is fictitious or so farfetched and clearly untenable that it can confidently be said on the papers alone that it is demonstrably and clearly unworthy of credence. On the papers before this Court this is clearly not the case. The respondent put up detailed facts in its answering affidavit detailing numerous incidents of incorrect picking and sending of incorrect stock including empty boxes to branches. In addition thereto, the respondent has put up detailed evidence confirming a reduced rate of picking. Moreover, the respondent has put up credible evidence demonstrating efforts to engage MEWUSA to diffuse the situation. In contrast hereto, the applicants merely put up bald and unsubstantiated denials of the incidences of sabotage detailed by the respondent in the answering affidavit. Applying the principles set out in *Plascon Evans*, I am of the view that the version put up by the applicants that there was no unprotected industrial action giving rise to the lock-out, must be rejected.

[18]For the reasons set out above, I am of the view that the application should fail. In respect of costs I have decided, despite the fact that there is an ongoing relationship between the employer and MEWUSA, to award costs against MEWUSA. I have taken note of the fact that the go-slow has had a particular disruptive effect on the business of the respondent and I have taken note of the fact that it is clear from the papers that there were efforts made by the respondent to engage with MEWUSA in an attempt to end the very obvious problems in the workplace in respect of the normal flow of work.

[19]In the event the following order is made:

19.1. The application is dismissed.

- 19.2. The applicants are ordered to pay the respondent's costs jointly and severally, the one paying the other to be absolved.

AC BASSON J
Judge of the Labour Court
28 December 2012

APPEARANCES:

For the applicants : Mr Baloyi of MM Baloyi Attorneys

For the respondent : Mr St Elmo Wilken of Mervyn Taback Inc

LABOUR COURT

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