

	DEPARTMENT OF JUSTICE	
	JUDICIAL OFFICE	
	(1) REPORTABLE: YES/NO.	
	(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
	(3) REVISED.	
	03.05.2013	
	DATE	SIGNATURE

REPUBLIC OF SOUTH AFRICA**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****JUDGMENT**

Reportable

Of interest to other judges

Case no. J835/13 and J 837/13

In the matter between:

**TRANSPORT AND ALLIED
WORKERS UNION OF SOUTH
AFRICA obo MEMBERS**

Applicant

and

**ALGOA BUS COMPANY (PTY) LTD
AND PUTCO LIMITED**

Respondents

Heard: 25 April 2013

Delivered: 3 May 2013

Summary: Bus companies issued a notice to lockout in response to a national strike notice by two other unions against members of a trade union that did not issue a strike notice and not party to the Bargaining Council. The court to answer the question whether a lockout can be effected to non-strikers or not? The court concluded that on the facts and

the LRA, the question is to be answered in the negative. Accordingly, the interdict issued.

JUDGMENT

MOSHOANA, AJ

Introduction

- [1] This judgment deals with two applications brought by the applicant on behalf of its member against Algoa Bus Company (Pty) Ltd on the one hand and Putco Limited on the other. The two matters were argued together. In both matters, the applicant seeks an interdict against a lockout instituted by the two companies.

Background facts

- [2] Exposition of the detailed facts is not particularly necessary given the abstract legal question to be addressed in this judgment. In both matters the strike engaged in by SATAWU and TOWU members bears reference. For the purposes of this judgment I will set out the facts in respect of each from the date of lockout notices.
- [3] In Algoa Bus matter, on 17 April 2013, the bus company issued a Notice of Lockout and directed it to the applicant. The Notice was in response to a notice to strike issued by SATAWU and TOWU. The strike was to commence on 19 April 2013. The lockout directed to the applicants before me was to commence on 19 April 2013 as well. The notice stated the intention to lockout all 'affected employees'. On 17 April 2013 the branch organizer of the applicant advised that the applicant's members will not strike and any lockout against them will be unlawful.
- [4] On 19 April 2013, the applicant's General Secretary addressed a letter to the bus companies including Algoa, wherein it was stated that the applicant's members were not on strike and they tender their services. On the papers Algoa disputes receipt of the letter. It alleges instead an appearance that the applicant's members were on strike. The applicants

in turn dispute this. Aggrieved by the lockout, the applicant launched this application on 22 April 2013.

- [5] In Putco matter, on 18 April 2013, the General Secretary informed one Meshack Ramela-IR Executive that the applicant's members will not partake in the strike called by SATAWU and TOWU and will report for duty as normal. He suggested a meeting where they will table their issues. There appears to be no response to this letter.
- [6] On 19 April 2013, the applicant issued a similar letter to the one to Algoa referred to above. On the same day, the company issued an intention to lockout all employees in the bargaining unit. It is unclear which letter came first. However Malherbe responded to the applicant's letter and retorted that the lockout is compliant and the General Secretary should desist from misleading members. Aggrieved by the notice the applicant launched this application on 23 April 2013. In response to the application, the company alleged that shop stewards advised that the national strike were to be supported as it was about money and that for safety reasons the strike will be supported. The applicant disputes this and alleged that workers were made to sign documents and in some instances members were turned back.
- [7] Both applications were heard on 25 April 2013. The issue whether the matters are urgent became common cause.

Evaluation

- [8] These matters raise a very unique and interesting question, which have not in the past received judicial attention or scrutiny as it were. Crisply put, the question is whether an employer faced with a strike called by one or two unions can lawfully lockout all its employees inclusive of those not on strike, having not been called to strike by the union they belong to. Regard being had to the background facts set out above this matter raises such a question.

- [9] I am loath to entertain the debate around defensive and offensive lockout. To my mind a lockout is one if it meets the definition requirements. I do not propose to do no better than what Zondo JP (as he then was) said in the matter of *Technikon SA v NUTESA*¹, when he said: '...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.'
- [10] I understand the learned judge to be redirecting any judge dealing with a lockout to seek guidance from the Act-the LRA and nothing else. In other words one looks at the conduct and ask if that conduct is permissible in terms of the LRA. The labeling of that conduct is of no moment.
- [11] As a starting point, I direct my attention to the definition clause of the LRA-section 213. By definition, a lockout is 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 purposes of that exclusion. At first blush, it is apparent that the definition does not refer to striking employees or employees about to strike. Such non-reference may lead one to a conclusion that a lockout may be directed to non-striking employees as well. However to my mind that conclusion will be at odds with other parts of the definition. In the definition reference is made to 'those employees'. This to me suggests specifics, otherwise the definition should have stated in plain language, 'the employees'.
- [12] Of course the question is who are those employees? The answer to my mind lies in the phrase-'matter of mutual interest between employer and employee'. That phrase suggests that the employees contemplated are

¹ 2001) 22 ILJ 427 (LAC).para.27.

those that have a matter of mutual interest with the employer. A further answer lay in the phrase-'for the purposes of compelling the employees to accept a demand'. This presupposes that the employees should have refused to accept a demand of the employer. Logic dictates that one cannot compel somebody who is not resisting or one who does not present a counter-demand.

[13] I therefore conclude that a lockout must be directed to employees with a demand. Much as one can accept that a lockout is recourse and not a right like a strike, a lockout falls within the terrain of power play. A power play cannot be imported in a situation where there is no flexing of muscles. Like in a definition of a strike, strikers must have a demand.

[14] It does appear to me that a further important consideration is that a lockout must have a purpose. Firstly, an employer must have a demand directed to those employees. When employing a lockout, the purpose should be to compel those employees to accept a demand. Logic dictates that it is foolhardy for an employer to compel employees who do not resist. Put differently exclusion of employees without any purpose is not a lockout as defined and is bound to be unlawful in terms of the LRA.

[15] The second place to look is section 64. In terms of the section a lockout arises in two instances. The first instance is in subsection 1 (c). The second instance is in subsection 3 (d). Subsection 1 (c) provides that in the case of a proposed lockout, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must be given to that council.

[16] It is clear from the above provisions that the trade union to be given a notice of the proposed lockout is one that is a party to the dispute. Axiomatically, if a trade union is not party to the dispute, it ought not to be notified of the proposed lockout. Equally, it serves no purpose to give notice to employees who are not party to the dispute.

- [17] To me the provisions of this subsection are clear. It ought to be borne in mind that the notice contains a proposition and not an act. As they say forewarned is forearmed. If you forewarn somebody who will not arm it is a futile exercise. The fact that the notice is to be directed to a party to a dispute speaks volumes. It presupposes that an employer cannot warn a party who is not in dispute, accordingly cannot direct a lockout to employees who are not party to the dispute. This subsection reads very well with the definition clause dealt with earlier.
- [18] Subsection 3 (d) provides that if the employer locks out its employees in response to a strike that does not conform to the provisions of the chapter there is no need to comply with for instance a notice requirement. Other than to set out procedural aspects, the subsection provides a useful guide to the question facing the court. An employee who is on strike has a demand. It then becomes appropriate to direct a counter-demand to such an employee. This provision buttresses the point that employees with no demand cannot be visited with a counter demand.
- [19] In the light of the above survey, much as I found Myburgh's arguments attractive, I am not persuaded that there is any basis in the LRA to allow lockout to be directed to all employees. During argument it became apparent to me that Myburgh appreciated the difficulties in his case. He attempted to persuade me to accept that the demand against the applicant is for them to accept the wage offer in order to compel as it were members of the striking unions to accept the employer's wage offer. This appears to me to be too fanciful a demand. I agree with Memani that the employers have not shown even on their papers what demand they wished the applicant and its members to accept and the purpose the lock-out will achieve in so far as the applicant and its members are concerned.
- [20] Before I consider in detail each of Myburg's submissions, I wish to deal with the issue of alleged dispute of fact. It is alleged in the Putco' papers that some shop stewards expressed an intention to support the strike

because it is about money on the direction of the Head Office This was vehemently denied by the said shop stewards. The question is, does this create a genuine dispute of fact that if not resolvable on the papers the applicant must fail applying the *Plascon Evans* rule. I doubt that this dispute is not capable of resolution on the papers. On the strength of the recent Constitutional Court authority, there was no need for the employees to have issued a separate notice to be on a protected strike.

[21] On the papers before me parties pleaded as follows on the issue. Regarding the Algoa bus matter the respondents testified that because there was no reporting for duty or tendering of services the applicant's members appear to be supporting and or endorsing the strike action embarked upon by the trade unions who are parties to SAPBAC. In reply, the applicants testified that one Dyanti reported for work and found the gates locked which conduct is consistent with the respondent's intention to prevent them from working. To the extent that this poses a real dispute of fact, I deal with it by considering the objective facts. On 17 April 2013, the company issued a notice headed "Notice of Lockout". In that notice the company informed the applicant thus: - 'In response to this notice (strike notice issued by SATAWU and TOWU), the company intends to lockout all affected employees from the company premises...'

[22] It is not clear to me what the company meant by affected employees. However it is crystal clear that the applicant's members were included as affected employees. Two days thereafter on 19 April 2013, the applicant's General Secretary responded to the strike notice and made it unequivocally clear that the applicant's members are not currently on strike, that the lockout is unlawful and the company is not entitled to impose a lockout. Most importantly he recorded 'our members will continue to tender services as usual and will not sign any new conditions which you seek to impose by way of unlawful lockout'.

[23] The company failed to respond to this letter. To my mind this suggest non-acceptance of a tender of services. Instead the company's witness disavows any knowledge of the letter.

- [24] It is common cause that the applicant did not issue a strike notice on behalf of its members. The fact that the lockout notice intended to prevent the applicant's members from performing duties is beyond clear to me. I am unable to comprehend any argument to suggest a strike when an employer takes a positive step to prevent employees from performing duties. So two days before 19 April 2013, the company had resolved not to allow the applicant's members to perform their duties. It seems to me that the notice was directed to the applicant in error. Instead of owning up to that error, the company attempts a contrived argument that the collective agreement may be extended to non-parties. I agree with Memani that regard being had to the requirements to be met in terms section 32 it is truly leaving matters to chance.
- [25] Having prevented the applicant's members, it is truly opportunistic for the company to speculate as it now does that the members support the strike. In my mind the issue is resolvable on the papers. I therefore conclude that on the objective facts discussed above, it is clear that the applicant's members were not on strike.
- [26] Therefore, in respect of Algoa, the respondent is left with one argument, which is one of piggybacking as it were. I shall deal with the argument later.
- [27] I now turn to the Putco matter. Factual allegations in this matter are that on 19 April 2013, Putco issued a notice headed: 'Notice of intention to lockout all employees in the bargaining unit. It is unclear to me whether at the time of the notice, Putco had already received the similar letter by the General Secretary in the Algoa matter. Nonetheless nothing much turns on this. The notice stated: - 'In response to the strike notice issued the company hereby gives 48 hours notice of its intention to lockout all employees in the bargaining unit from all Putco Limited's workplace in support of the employer wage proposals in the wage negotiations in South African Road Passenger Bargaining Council'.
- [28] A day before the Notice of intention, the General Secretary of the applicant on 18 April 2013 advised Putco that all of the applicant's

members would not partake in any purported action of alleged strike. Common cause in this case is that Putco did receive the letter of 19 April 2013 from the General Secretary. In response thereto, Danie Malherbe retorted that the lockout is lawful and urged the General Secretary not to mislead their members. It seems that Malherbe was advised that the main agreement, which extended to non-members compelled Putco to negotiate at a particular level. As to what that has to do with the tender of services I am baffled. However what I can safely conclude is that the tender for services was rejected.

[29] The scenario painted above obtained before this application was begotten. In the answering papers, the following case, which is completely at odds with the scenario painted above, developed. An allegation emerged that the shop stewards have stated in unequivocal terms that they support the strike. The company went to the extent of alleging that the applicant has joined the strike and they are not tendering service. This allegation remains bare as it is not supported by any conduct that reasonably demonstrates that the members joined the strike.

[30] In an attempt to dress the allegation, Putco testified that one Guimaraes was informed by Qasha and Pungwayo that the applicant's head office informed them that they must support the strike as it was about money. This allegation is vehemently denied as being untrue. Guimaraes does not tell me that what happened after being informed of the support of the strike. Myburgh argued that being informed was sufficient to trigger a lockout notice. In a strike situation, the strike notice ought to be clear and unequivocal. In *PSA v Minister of Justice and Constitutional Development and others*², it was held that a strike notice must contain amongst others the demand that forms the subject matter of the strike. The purpose thereof is to determine whether the strike is in respect of a dispute that can be the subject matter of a protected strike. This

² [2001] 22 ILJ 2303 (LC).

requirement applies with equal force in respect of a lockout notice³. The fact that the so-called strike notice issued by shop stewards contradicts the written communication speaks volumes with regard to the equivocalness of the alleged notice.

[31] If I were to accept that that was a strike notice, which I do not, I must also accept that it serves as a second notice to the one issued by SATAWU and TOWU already. It is not contended by Putco that that was some form of a secondary strike within the contemplation of section 66 of the LRA. I must assume that if it is contended to be it was unprotected as it were. Within the contemplation of section 64 (3) (d), it was not necessary then for Putco to issue a lockout notice, since it would have been responding to a non-conforming strike.

[32] At Ipeleng and Lekoa Transport Trusts it is alleged that shop stewards informed that they would participate in a strike for safety reasons. I am not sure whether this seeks to elevate safety reasons as a demand. Otherwise if it means that employees' life and limb is threatened, then it cannot be a strike notice to my mind. A further allegation is made that on 19 April 2013 not a single driver reported for work and have not reported at Ipeleng. If they did not fearing for their lives, it cannot be said that they are or were on strike. However what remains clear is that Putco rejected the tender of services on 19 April 2013. The allegations were seriously contested. Owing to the lockout notice I must accept without hesitation the applicant's version that Guimaraes requested them to sign declarations. I also should accept the version that Berning turned employees away. I am acutely aware that this evidence was tendered in reply. Authorities are abounding that a party cannot make out its case in reply. However as Memani submitted there was nothing that prevented the respondents to file further affidavits with the leave of the court. Besides, to my mind the applicants are not making a case but are responding to a case made by the respondent that they were on strike in

³ See Construction & Allied Workers Union & others v Modern Concrete Works [1999] 10 BLLR 1020 (LC) regarding a defective lockout notice.

an attempt to legitimize its lockout. I therefore conclude that there is no genuine dispute of fact that is incapable of resolution on the papers.

[33] In any event, the respondent on this point bears the onus to show that the applicant's members were on strike. It is a positive fact that the respondent must prove in order to avert an allegation of unlawful lockout. On the *Plascon* rule, the issue ought to be decided in the applicant's favour. I do not agree with Memani that this issue ought to be referred to oral evidence. I therefore reject an allegation of strike in this case too. That leaves the piggyback argument in this matter too.

[34] I shall now turn to the submissions of Myburgh, which as I have said above are well articulated and attractive. However, Memani's submissions found persuasion in me. A general observation to be made upfront is that a lockout must always be accompanied by an express demand. See *Sappi Fine Papers (Pty) Ltd v Pienaar NO and Others*⁴. To qualify as a demand, the locked out employees must be informed of the actions expected of them if the lockout is to be lifted. Lack of demand by the employer renders the exclusion not to be a lockout. See *SACCAWU and Others v 3M SA (Pty) Ltd*⁵.

[35] In the Algoa lockout, the demand is acceptance of the offer made by the employer in respect of wages and conditions of employment. Similarly, the Putco lockout demands acceptance of its wage offer made at the Bargaining Council. Superficially, the notices comply. What remains opaque in respect of the applicant's members is what actions are expected of them if the lockout were to be lifted. Memani argued that whether the respondents remain with the old wage or increase it they would oblige. Therefore, there is no basis to suggest that the demand is directed at the right people. Myburgh argued that, what the applicants should do is not to seek an interdict but to accept the offer. Question is how does one accept an offer not made to one. The principles applicable to the law of contract find application here. A person is said to make an offer when he puts a proposal with the intention that by its mere

⁴ (1994) 15 ILJ 137 (LAC).

⁵ (2000) 21 ILJ 1657 (LC).

acceptance, without more, a contract should be formed. See *Wasmuth v Jacobs*⁶. This offer was made at the Bargaining Council, where the applicant is not a member. I therefore do not accept the submission by Myburgh, that the appropriate thing to have been done was to accept the wage offer.

[36] In the Algoa matter, Myburgh sought to address the question facing this court from a convenient point that the applicant's members could have joined the strike. Of course in this matter such a hypothetical question is unnecessary owing to a clear and unequivocal statement from the General Secretary. From an abstract point of view perhaps that hypothetical question assists. He submitted that the applicant's members have a material interest in the demands of SATAWU and TOWU. It is true that it has been authoritatively decided that the applicant members may piggyback off the referral made by the other unions. See in this regard *SATAWU v Moloto NO* ⁷. There the Constitutional Court was more concerned with a proper interpretation of section 64(1) (b) of the LRA. It is apparent from the judgment that what found persuasion and particular emphasis was that a strike is a right of an employee. Quiet to the contrary lockout is recourse.

[37] Myburgh found persuasion in Creamer's article published in the (1998) 19 ILJ 1. Creamer holds a view that what he terms Defensive Lockout extends to non-strikers. I have already mentioned above that I am not to be found wanting between defensive and offensive lockout debate. Sadly I do not share the view that a lockout can extend to non-strikers. In an attempt to address an aptly put question-what is to be achieved to lockout non-strikers? He relied on the decision of *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA and Others*⁸. He implored the court to draw an analogy to the situation that obtained in *Tiger Wheels and Plastic Convertors Association of SA v AECMSA and Others*⁹. The

⁶ [1987] 3 SA 629 (W).

⁷ [2012] 12 BLLR 1193 (CC).

⁸ [1999] 1 BLLR 66 (LC).

⁹ [2011] 11 BLLR 1095 (LC).

material difference to my mind is that of a strike being a right and lockout a recourse. In *Tiger Wheels* the court made reference to section 66 (1) to bring a party who cannot settle a dispute in the fold. The LRA does not have provisions for a secondary lockout. In *Plastic Convertors* the issue was one of material interest in the demands have.. In a lockout situation, an express demand required more often than not is acceptance of an offer made. Even if I were to employ parity reasoning as implored by Myburgh I do not think that one must compare apples with bananas as it were. I have to compare apples with apples.

[38] It may well be so that in truth, the applicant's members have a material interest in the demand, the fact that they chose not to overtly express that interest should count for something. The submission is oblivious of the very purpose of a lockout-to compel employees to accept an offer. The primary purpose of a lockout is to compel acceptance of a specific offer. To suggest a flaccid interpretation of the definition will be dangerous and elevates a lockout to something that the legislature did not intend it to be.

[39] On the issue of relief, he submitted that since the court cannot compel a company to open its doors to the applicant's members, the applicants are not entitled to the relief sought. He suggested that an appropriate relief not sought is one of ordering failure to pay to be unlawful. On the relief issue the answer lays in section 68(1) (a) (i)(ii). The prayer sought by the applicants is consonant with the provisions of the section on any reading thereof.

[40] Sadly, much as I am attracted by the submissions at a conceptual level, I am not persuaded that the conduct is one the LRA countenance. Accordingly I reject the submissions entirely.

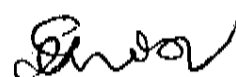
[41] Turning to the Putco matter, in addition is a submission that since the shop stewards advised management that the applicant would be supporting the strike and actually did so, he sought reliance from the *Technikon SA* judgment-where the court correctly in my view held that a lockout could be instituted even if the strike is protected. In casu, it

appears that the advise of the shop stewards are at odds with the written position of the applicant. I have already accepted on the facts that the applicant's members were not on strike. On the strength of that factual finding, this argument is a non-starter. The last argument raised is that of common law right to refuse entry to the premises. To my mind if this court finds that the actions of the respondents are unlawful, the finding I am making, it does not avail to the applicant to raise a common law right. Employees have a constitutional right to fair labour practices entrenched in section 23 of the Constitution. Section 39(2) of the Constitution enjoins every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. If I were to limit this right in the name of a common law right, I will act contrary to the letter and spirit of section 39(2).

- [42] Having rejected all the submissions of the respondents, I see no basis in law why I should not afford the applicant the relief sought. On the issue of costs I agree with both counsel's submission that costs should follow the results.

Order

- [43] In the results I make the following order:
- [44] Both matters are heard as one of urgency.
- [45] The respondents, Algoa Bus Company and Putco Limited are hereby interdicted and restrained from continuing to lockout the applicant's members in their employ.
- [46] The respondents to pay the costs of the applicant in both matters.



Moshwana, AJ,

APPEARANCES:

FOR THE APPLICANT:

in both matters Adv F R Memani

Instructed by Medupi Lehong Inc,
Johannesburg

FOR THE RESPONDENTS:

In Algoa matter Adv A Myburgh SC with him
Adv A Snider and in Putco matter Adv A
Myburgh with him Adv T Ngcukaitobi

Instructed in Algoa matter by Chris Baker and
Associates, Port Elizabeth and in Putco
matter, by Bowman Gilfillan Inc, Sandton.