



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no: J 566/20

In the matter between:

**THE ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

First Applicant

**THE AMCU MEMBERS AS PER
ANNEXURE "A"**

Second to further Applicants

and

SAFETY AND SECURITY SECTORAL

VUNENE MINING (PTY) LTD

Respondent

Heard: 25 June 2020, via ZOOM

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 07 July 2020.

JUDGMENT

Mabaso AJ

Introduction

- [1] The Applicant approached this court on an urgent basis seeking a declaratory order in that: the lockout implemented by the Respondent constitutes an unprotected lockout and is unlawful. That the Respondent be interdicted and restrained from any conduct in furtherance of a lockout, and prohibiting or restricting any employee from tendering their services to it, ask for compensation for alleged loss due to the lockout, being salaries from 01 June 2020.
- [2] The principal issue herein is whether or not the lock-out executed by the Respondent against the First Applicant's members, is not in compliance with the Labour Relations Act 66 of 1995 (the LRA).¹ The piggy-backer issue is whether the First Applicant has the necessary authority to represent all employees herein.² At the beginning of the oral submissions, via zoom, counsel for the Applicants made certain concessions which are briefly dealt with in this judgment.
- [3] The First Applicant is the Association of Mineworkers and Construction Union (AMCU), a trade union, and the Second to further Applicants are employees (collectively referred hereinafter as the Employees) of the Vunene Mining (Pty) Ltd (the Employer).

Who is before this court?

- [4] The deponent to the founding affidavit is Mr Philippus Daniel Marias (Mr Marias) employed by AMCU as its head of legal.³ He avers that AMCU is authorised to represent all the Employees, as they are members of AMCU.⁴

¹ Section 68(1) of the LRA.

² List attached to the supporting affidavit. P 5 to 8. The total

³ Page 10, founding affidavit.

⁴ Founding affidavit, para 2 & 5.2

- [5] It is common cause that AMCU is a majority union at the Employer. The Employer in the answering affidavit avers *inter alia* that AMCU members embarked on an unprotected strike on both 21 and 22 May 2020, which was accompanied by violence.⁵ The Employer contacted AMCU representatives who in turn conducted a mass meeting with its members. Despite these engagements, AMCU members refused to resume their duties, and they breached the Covid-19 lock-down regulations, therefore, endangered the health of others. In retaliation, the Employer locked out the striking employees. The notice of lockout was also sent to AMCU's regional office.
- [6] AMCU contends that it is duly authorised to act on behalf of the Employees. Whereas the Employer denies this submission and challenges AMCU to produce proof that all employees in annexure "A" are its members, further contends that "there is no evidence that all the individuals ...are aware that AMCU is litigating these proceedings in their names,"⁶ and submits that some of the Employees are not members of AMCU or have not been locked out. The Employer has not stated as to which Employees are not locked out. In response, AMCU says it represents 142 members herein and is authorised to act on their behalf.
- [7] Since AMCU concedes⁷ that it represents only 142 out of 223 on the list, therefore, under this rubric, the focus is about those employees and will be referred hereinafter as "AMCU members."
- [8] Section 200 of the LRA allows a trade union to act in any dispute to which any of its members is a party or on behalf such member(s), or in the interest of any of its members.
- [9] In *Elliot International (Pty) Ltd v Veloo and another* [2014] 10 BLLR 955 (LAC), the Labour Appeal Court faced with a question, of section 200 of the

⁵ Answering affidavit, p 101

⁶ Ibid, p 107

⁷ in paragraph 60.1 of the replying affidavit

LRA, wherein a voluntary severance settlement was negotiated and concluded on behalf of the union's members. The LAC held that,

"However, it seems to me logical and common sense that in a proposed voluntary retrenchment scenario a settlement proposal negotiated by a trade union may bind the employee members only if such members have agreed to the settlement proposal and specifically mandated the union to accept the proposal on their behalf. In the present instance, the respondents did not sign the retrenchment agreement, and it is clear to me that they never gave any mandate to the union to accept the agreement on their behalf."

- [10] Before Elliot's judgment, the same court in *NUM v Hernic Exploration (Pty) Ltd* [2003] 4 BLLR 319 (LAC) adjudicated on a matter involving same section 200, emanating from a dismissal dispute. The court held as follows, about the role of a trade union in litigation:

*"In fact the respondent's contention is even weaker in relation to the appellant's referral of the dispute to the Labour Court because at paragraph 1 of the appellant's statement of claim, the appellant stated that it was acting **on its own behalf and on behalf of its members dismissed by the respondent on 31 December 1998**". The fact that the appellant did not furnish the names of the dismissed employees did not affect the jurisdiction either of the CCMA or the Labour Court."*⁸

⁸ See also para 44 where it was held thus: *Apart from section 200(1) another reason why the Respondent's contention cannot be sustained lies in the primary function of a trade union. The primary function of a trade union is to act as the representative of its members. Without that capacity it is doubtful whether a trade union can survive. The ordinary meaning of the concept of representing somebody is that you act in that person's place and stead. If that is correct a trade union must be able to act in the place and stead of its members. Strictly speaking it cannot act in the place and stead of its members if its members also occupy the same place and stead. That must mean that in most cases it is when its members are not applicants that a union finds it necessary to act in their place and stead by being the applicant in such proceedings itself. In fact, where union members are cited as applicants, there is little, if any, need for the union to be cited as an applicant as well, especially in dismissal cases because the union does not usually seek any relief for itself in such proceedings and there is also little need, if any, for the union members to be joined as applicants as well where the union is already an applicant and is acting either on behalf of its members or in the interest of its members. See section 200(1) of the Act. That is why in the General Industries Workers Union case (supra) Goldstein J dismissed the appeal in regard to an application to join the employees, when their union was already an applicant in the proceedings and was acting for the benefit of its members*

- [11] In *Manyela*⁹, this court by Sutherland AJ held as follows regarding a union acting on behalf of its members,

“...Where a union “acts on behalf of” members, it does not “become” the agent of those members, because its pre-existing representative relationship already constitutes the foundation for that status and power. In my view, the union’s role under this rubric is akin to that of a curator ad litem in civil proceedings; that is to say, the union is the party in the proceedings. Philosophically, the union constitutes the institutional embodiment of the several members involved in the dispute...”

- [12] Each matter has to be decided based on its facts and circumstances. *In casu*, it is common cause that since the beginning of the unprotected strike, the Employer had been communicating with AMCU on behalf of its members. Even the letter that the Employer contends that it is a lock-out notice was sent to AMCU's offices. It is not denied that even AMCU members are facing the lock-out as the Employer submitted that they were on strike.

- [13] Furthermore, after being challenged that there is no evidence that all the Employees are members of AMCU. In the replying affidavit, Ms Myeni avers that at the time of launching the application, AMCU had 142 members herein. Mr Marias, in paragraph 5.2 of the founding affidavit, stated that AMCU is authorised to act on behalf of its members. Further, in terms of the notice of motion, AMCU is seeking a declaratory order on behalf of its members herein.

- [14] Reading the papers, clearly, AMCU is acting on behalf of its members, and this court has taken into account that AMCU has clarified the number of Employees that it represents. I do not understand as to what evidence the Employer expected AMCU to produce, because it is common cause that

⁹ *Manyele & others v Maizecor (Pty) Ltd & another* [2002] 10 BLLR 972 (LC)

some of the Applicants are AMCU's members and AMCU in terms of the provisions of section 200 of the LRA, has the right to bring this type of an application on behalf of its members.

[15] Based on the above, this court concludes that AMCU was not required to produce proof that it is litigating on behalf of its 142 members herein.

[16] However, for those Employees, whose names appear in annexure "A", who are not members of AMCU, it had not been mandated to represent them because they have not delivered confirmatory affidavits in support of the application.

[17] In paragraph 24 of the replying affidavit, AMCU introduces names of employees which it says they joined it following delivery of the founding papers in this matter. Since there is no joinder application, those employees are not accepted as parties in this matter.

Cardinal Controversy: Is the lock-out both unprotected and unlawful?

[18] There was a wage agreement between the parties which *inter alia* directed them to approach the CCMA in case of any dispute. On 06 December 2019, the Employer sent a communiqué to its employees, advising them that it was not be able to pay the 13th cheque as it had been the norm in the previous years. At the end of December 2019, the employees were paid 40% of the 13th cheque. In February 2020, the Employer communicated its proposal that the balance will be paid in full by the end of May 2020, and an agreement was reached, as per the suggestion of the Employer.

[19] On 21 May 2020, the Employer communicated that it would not be able to pay the balance to its employees, due to what it termed severe economic

hardship. It is common cause that this caused controversy as some employees were not satisfied with this explanation. The founding affidavit states that, as a result, “[t]he General Manager was escorted from the premises by some of the employees”. The Employer submits that the General Manager was also attacked and violence erupted.

- [20] On 22 May 2020, all the employees of the Employer were issued with a notice (lock-out notice) which *inter alia* detailed the incident mentioned above. The Employer further avers that AMCU members refused to return to work and intimidated those who wanted to work. This is denied by AMCU. The lock-out notice further provides that the General Manager was attacked and,

“forcefully led outside the premises...where he was then unceremoniously told not to come back without the money...In order to safeguard mine employees including management and other officials all operations, excluding that is required for the maintenance of critical infrastructure and safety critical services, will be suspended with immediate effect and until further notice...In effect [the Employer] will enter a forced care and maintenance period...”¹⁰

- [21] Clearly, this excerpt shows that the employees of the Employer were being restricted from the premises. I interpose and state that the Employer had wanted to deliver a supplementary affidavit in an endeavour to show that AMCU and the Employees were aware that a lockout notice was issued on 22 May 2020. Initially AMCU denied this; however, following arguments and subsequent concessions, I ruled that the supplementary affidavit was not accepted, as it was clear that the lock-out date (22 May 2020) was apparent from this notice.

¹⁰ Annexure “F”, p 82.

[22] Section 213 of the LRA defines lock-out as follows:

“means 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.”

[23] In this matter, the applicable subsection is ss 64(3)(d) of the LRA, which provides that in response to employees taking part in a strike that does not conform with the provisions of Chapter IV, an employer may issue a lock-out notice. The difference between the *in casu* subsection and ss 64(1) lock-out is the procedure that must be followed.¹¹ In ss 64(3)(d) lock-out an employer is expected to act swiftly if employees are on an unprotected strike and the

¹¹ 64. Right to strike and recourse to lock-out.—(1) Every employee has the right to strike, and every Employer has recourse to lockout if—

- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and—
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that—
- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the Employer, unless—
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (ii) the Employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
- (c) in the case of a proposed lockout, at least 48 hours' notice of the commencement of the lockout, 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 have been given to that council; or
- (d) in the case of a proposed strike or lockout where the State is the Employer, at least seven days' notice of the commencement of the strike or lockout has been given to the parties contemplated in paragraphs (b) and (c).

notice is not always expected to be in writing. As the LAC in *Technikon South Africa v National Union of Technikon Employees of South Africa*¹² said:

*"If the Employer had to first comply with the requirements of s 64(1) before it could respond with a lockout to an unprotected strike, that would take too long. By the time the requirements of s64(1) were met, the lockout 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."*¹³

[24] Under the circumstances, this court concludes that the lock-out notice was not required to be issued in terms of ss 64(1) of the LRA, because it was issued in response to an unprotected strike as anticipated by ss 64(3) (d) of the LRA.

[25] Be that as it may, the requirements as provided in the definition above, para 22, still has to be met for one to be in a position to claim lawfulness, *in casu*, the principal contested requirement is "a demand". The Constitutional Court in *Transport and Allied Workers Union of South Africa v Putco Ltd*¹⁴ held that,

*"Accordingly, **any** exclusion of employees from an employer's workplace **that is not preceded by demand** in respect of a disputed matter of mutual interest does not qualify as a lockout in terms of section 213 of the LRA."*¹⁵

[26] I must reiterate that both the founding and replying affidavits, on behalf of the AMCU, deponents therein are officials of AMCU. Whereas, the deponent to the answering affidavit, on behalf of Respondent is its Group Chief Executive Officer (Mr Letlaka). Ms Promise Myeni (Ms Myeni) who signed the replying affidavit does not claim to be an employee of the Employer nor suggests that she was present when Mr Letlaka circulated a lock-out notice to employees

¹² (JA11/00) [2000] ZALAC 24

¹³ Ibid, par 35.

¹⁴ 2016 (7) BCLR 858 (CC)

¹⁵ Ibid, para 33. Own emphasis.

informing them that the Employer was forced to suspend operations and to enter a forced care and maintenance period.¹⁶

[27] I have also taken into account that Ms Myeni in the answering affidavit had denied being part of a meeting held on 28 May 2020, a date after the lock-out, during argument it was conceded that she was part of that meeting. Moreover, the shopstewards who delivered a confirmatory affidavit denied that this meeting was held. I conclude that in respect of whether or not there was a demand, I will have to follow what the Employer is saying because Ms Myeni and the shopstewards were not candid with this court.

[28] Furthermore, according to the Employer, on 25 May 2020 three days following the lock-out notice, the Employer through Mr Letlaka circulated a second notice to its employees wherein it stated that due to the response to unprotected strike and violence that a decision had been taken, which partly reads thus:

“In response to the unlawful and unprotected strike and violent conduct, on 22 May 2020, the Company took the decision to issue a notice disallow all its employees’ access to the mine. This was in direct response to mitigate any further unlawful activities at the instance of those striking employees.

*Accordingly, the Company will not be in the position to resume its operations until the safety of managers, all employees, service providers and property of the mine can be ensured and guaranteed.*¹⁷

The principle of no work, no pay will continue to be applied.”

¹⁶ Para 33, replying affidavit.

¹⁷ Own emphasis.

The problem with the second notice is that employees had already been locked out, as this happened on 22 May 2020 as Mr Letlaka's version in paragraph 35 of the answering affidavit.

[27] Mr Letlaka, in paragraph 34 of the answering affidavit, says it was carefully explained to AMCU's representatives when they were served with a lock-out notice. Still, he does not state that there was a demand made, because when it comes to a lock-out issued in terms of subsection 64(3)(d), in my view, a demand might be made orally before a lock-out, if there was a demand he would have stated as such. As he has done with the notice issued on 25 May 2020.

[28] It is clear that the lock-out notice, as issued on 22 May 2020 by the Employer was in response to an unprotected strike. The answering affidavit does not suggest that there was a demand. I say this because there is no indication that the employees were ordered to do something or refrain from doing something. Instead, they were told that they were suspended until further notice as the Employer entered into a forced care and maintenance period. I, therefore, conclude that the exclusion of the AMCU members was an exclusion which does not meet the definition of lock-out in terms of the LRA.

Prayer for compensation

[29] In order to decide a just and equitable compensation, this court has to take into account *inter alia* whether there was compliance with an order granted by this court, and the financial position of the employer, trade union or employees respectively. In the papers, the Employer states that its financial position is not good. Therefore, this court will require evidence relating to financial position of the Employer before it decides what is just and equitable.

Urgency

[30] The LC in *Maqubela v SA Graduates Development Association and Others*¹⁸ held thus:

*“Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshoana AJ aptly put it in *Vermaak v Taung Local Municipality*:*

‘The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.’

[31] The Applicants are challenging an on-going lock-out and one of the prayers is to restrain the Employer from participating in a lock-out or in furtherance of a lock-out, and they explain that they do not have an alternative recourse. After considering the nature of the application and the affidavits, specifically paras 16.1 to 26.6, I was satisfied that the Applicants showed the requirements of urgency as stated in the preceding paragraph.

Order

[32] In the circumstances, the following order is made:

1. The matter is heard on urgent basis.

¹⁸ (2014) 35 ILJ 2479 (LC)

2. It is declared that those individuals, whose names appear in annexure A of the notice of motion and were not members of the First Applicant by 19 June 2020, are not applicants or represented by the First Applicant in these proceedings.
3. It is declared that the First Applicant is acting on behalf of 142 employees, whose names appear in annexure A of the notice of motion and were its members by 19 June 2020.
4. The lock-out implemented by the Respondent, on the First Applicant's members, as per the order 3 above, is both unlawful and unprotected.
5. The Respondent is interdicted from participating in a lock-out or any conduct in contemplation or furtherance of the lockout notice issued on 22 May 2020.
6. The Respondent is interdicted from prohibiting or restraining the First Applicant's members from tendering their services to it.
7. The Respondent is directed to file an affidavit within 30 days of this order, explaining its financial position for the period of November 2019 and the date of this order. Thereafter, First Applicant and its members employed by the Respondent may deliver an affidavit, within 10 days thereafter, in response to the Respondent's affidavit.
8. No order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv Cook

Instructed by: Larry Dave Incorporated Attorneys

For the Respondent: Adv Mooki SC

Instructed by: Malatji & Co Inc

LABOUR COURT