

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case Number: J 1297/99

In the matter between

PAPER, PRINTING, WOOD

First Applicant

Second and Further Applicants

and

Respondent

JUDGMENT

WAGLAY A J

1. The Applicants have come before this Court as a matter of urgency seeking the following relief:
 - 1.1. Declaring that the actions of the Respondent which commenced on 19 March 1999 alternatively 29 March 1999 constitutes a lock - out which is not in compliance with the provisions of Chapter IV of the Labour Relations Act 66 of 1995;
 - 1.2. Interdicting the Respondent from participating in the lock - out or any conduct in furtherance of the lock - out;

1.3. Alternatively to paragraph 1.2 above, directing the Respondent to pay the Second to further Applicants their remuneration for the duration of the lock out;

1.4. Directing the Respondent to pay the costs of this application;

1.5. Granting further and or alternative relief.

2. The background to this matter can be briefly set out as follows:

2.1. In and during 1997 the First Applicant representing the second to further Applicants entered into an agreement relating to wages and terms and conditions of employment for 1997.

2.2. In early 1998 the parties entered into negotiations with regard to wages and terms and conditions of employment and it was agreed that the terms and conditions would remain unaltered. They further agreed to an increase in wages which would be reconsidered in the second half of the year. In respect of this reconsideration the Respondent called upon the First Applicant to attend a meeting in and during August 1998 which meeting the First Applicant failed to attend but which meeting nevertheless proceeded with the Second to further Applicants representatives.

2.3. On 16 November 1998 the First Applicant by letter headed "WAGE

NEGOTIATIONS FOR 1998 - 1999" (sic) called upon the Respondent to negotiate wages for the Second to further Applicants. This letter contained the proposed increase in wages which the First Applicant sought for it's members and also stated:

“ All other matters status shall remain ...”

- 2.4. The negotiations failed to resolve the matter and on 11 December 1998 the First Applicant referred the dispute to the CCMA for conciliation. The referral form recorded that the dispute was “about the failure of the Respondent to offer a reasonable wage increase. The company is offering 30c (thirty cents) while the aspiration is for at least R1.40" (changes made to grammar)
- 2.5. Conciliation was held on 19 January 1999 and the dispute remained unresolved. On 25 January 1999 the First Applicant gave notice in terms of s 64(1) (a) (i) and (b) of its intention to strike. The Second to further Applicants embarked upon the strike on 27 January 1999.
- 2.6. On 2 February 1999 the Respondent obtained a rule nisi which was finalised on 9 February 1999 restraining the Second to further Applicants from engaging in various acts of misconduct. Respondent also obtained an order for the applicant herein to pay the costs of the application.

- 2.7. After obtaining the interdict referred to above and on 19 February 1999 a meeting was held between the First Applicant and its representatives and the Respondent. The minutes of the meeting as prepared by the Respondent records five issues that were discussed viz
- (i) wage disputes between the parties
 - (ii) conduct of the strikers during the strike action/ criminal charges
 - (iii) urgent application and cost order
 - (iv) bonuses and long term service award
 - (v) attendance of shop stewards to PPWAWU congress.
- 2.8. On wages the First Applicant proposed that Respondent offer a better increase than it did at the CCMA during conciliation. The Respondent expressed its commitment to pay the wages offered at the CCMA “ but on condition that such an increase will be effective from the date of the ending of the strike action”.
- 2.9. On the issue of “urgent application and cost order” the Respondent stated that it was a “pre- condition to a possible settlement that the strikers must authorise the company to recover such costs from the salaries of the striking employees because the company keeps the strikers collectively responsible for the costs”.
- 2.10. On “bonuses and long term service award” the Respondent stated that because of the strike action no bonuses would be paid to the striking workers this year. It

also stated that it wished to re - negotiate the long term service award with the First Applicant in future.

2.11. The First Applicant's notes as annexed to Respondent's minutes and marked "C2" to its papers record the following:

(i) Bonus and long term service award to remain as in the past.

(ii) Wages as discussed on 19/01/99 to be effective as and from return to work

(iii) ...

(iv) ...

(v) ...

(No mention is made about the urgent application and the cost order)

2.12. As no agreement was concluded at the above meeting a further meeting was held on 9 March 1999. The Applicants allege that at this meeting the dispute was resolved in "principle" and the Respondent states that the dispute was finally resolved and it was required to draft the agreement for signature by the parties.

2.13. On 12 March 1999 Respondent forwarded its draft to the First Applicant and on 13 March 1999 the First Applicant forwarded its draft to the Respondent. Suffice it to say that the two drafts effectively only had two of the many issues contained in this agreement in common - the one relating to the proposed wage increase and

the date on which it would come into effect and the fact that the long term service award would be re - negotiated.

- 2.14. On 15 March 1999 the Respondent by letter to the First applicant expressed its “astonishment” to the draft submitted by the First Applicant and stated:

“ in the light of your proposed wage agreement, the parties must accept that the dispute is still in existence ...”

and gave notice to the First Applicant that unless it signs the draft agreement forwarded to the First Applicant on the 12 March it would commence with a lock - out and hire replacement labour as provided for in s 76 (1) (b) of the Act.

- 2.15. On the 16 March 1999 the First Applicant and Respondent met to discuss the drafts. The Respondent affected certain changes to its original draft and forwarded same to the First Applicant. This draft agreement contained inter alia the following clauses:

“2. That the employees will not qualify for any year - end bonuses this financial year and will only receive bonuses [for special performance], in terms of a system to be developed by the [different role players]

“4. The terms and conditions of employment between the parties is regulated by

the Act on Basic Conditions of Employment Act, Act 75 of 1997, as amended.

[All other benefits which may be in existence falls away and shall be re - negotiated at the next yearly negotiations on substantive issues.]

“5. That the Union agree to pay all the costs of the company in obtaining the court order at the Labour Court; this court order attached hereto as annexure “B” ordering the Respondents to pay the company’s costs. [The union agree that the account in respect of the court order must be taxed by the taxing master. The Union undertake to pay the taxed costs within 7 (seven) days after receiving the account. In the event of the Union not paying the full costs within 7 (seven) days of the signing of this agreement, then the employees by virtue of the signature of their representative Union, authorises the company to subtract from their salaries, provident fund etc, such costs. All monies to be paid into the trust account of the company’s attorneys, Dewald Myburgh.”]

2.16. The parties met again on 17 March 1999. At this meeting the First Applicant sought to amend the latest draft by deleting the words bracketed above and adding the word “company and the union” at the end of paragraph “2”.

2.17. On the same day Respondent by letter to the First Applicant informed the First Applicant that the draft agreement without the amendments sought by the First Applicant was its final offer. It further gave the First Applicant notice in terms of

s 64 (1) (c) of its intention to commence a lock - out as a response to its members strike action as provided for in s 76 (1) (b).

2.18. The lock - out commenced on 19 March 1999 in response to which the First Applicant called for a meeting with the Respondent. The Respondent refused to meet the First Applicant adding that no purpose would be served by such meeting as it had already made its final offer.

2.19. On the 25 March 1999 the First Applicant by letter informed the Respondent that it accepted the offer made by the Respondent at the conciliation and tendered the services of the Second to further Applicants as and from 29 March 1999.

2.20. The Respondent's reaction thereto was that the lock - out would continue and Second to further Applicants would not be allowed to return to work unless the draft agreement of 16 March 1999 was signed by the First Applicant.

2.21. On the 29 March 1999 the Second to further Applicants tendered their services but the Respondent refused to accept such tender.

3. Against the above background the issue I am required to determine is whether the lock - out embarked upon by the Respondent is in accordance with the provisions of the Act.

4. S. 64 of the Act provides that:

“(1) every employee has a right to strike and every employer has recourse to lock - out if -

(a) the issue in dispute has been referred to a council or to the commission as required by the Act, and –

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) ... and after that –

(b) ...

(c) in the case of a proposed lock - out, at least 48 hours notice of the commencement of the lock - out, in writing, has been given to any trade union that is 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; or

(d) ...

5. The Respondent argues that the First Applicant referred the dispute to the Commission and a certificate of non - resolution of the matter was issued. The Second and further Applicants then embarked upon a lawful strike. Further negotiations failed to resolve the dispute and once its final offer was rejected it, as it was entitled to do, embarked upon a lock - out in terms of s 65 (1) (c) of the Act.

6. The Applicants deny that the lock - out complies with the provisions of s 65 (1) (c) on the basis that the only issue referred to conciliation was about the dispute on wages which has now been resolved and not any substantive terms and conditions of employment which the Respondent seeks to compel Applicants to accept, the rejection of which has led to the lock - out.
7. Applicants referral form to the CCMA read together with its proposals to commence negotiations on wages clearly indicate that the only issue in dispute was about wages. Respondent does not dispute this. Approximately a month after the commencement of the strike and after the Respondent had obtained an interdict against the Applicants a meeting was held between the parties. The minutes of this meeting as prepared by the Respondent for the first time raised certain demands from the Respondent to resolve the dispute (see paragraph 2.7 to 2.11 above)
8. Respondent in reply to Applicant's allegation that wage dispute was settled on 25 March 1999 on the terms proposed by the Respondent at the CCMA on 19 January 1999 states that the offer the Respondent made at the CCMA was no longer open for acceptance as, at the meeting of 19 February it placed certain terms and conditions on the offer " ... as gevolg van verliese gely gedurende die staking ..."
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9. In the circumstances the only issue in dispute prior to and at the conciliation stage

was a dispute about the increase in wages. This of course does not resolve the matter.

10. Quite clearly if the negotiations continue after the conciliation it is very likely that compromises may need to be affected by both parties in order to arrive at a mutually acceptable settlement. When dealing with an issue relating to wages it is almost inevitable that such compromise may relate to altering some of the terms and conditions of employment. When these negotiations are conducted at a time when the employees are participating in strike action then the scene is set for power - play. But does this power play not require any rules ?
11. The only rule that the Act proposes is that the power - play must relate to the issue in dispute, and that before the power - play can be embarked upon the issue in dispute must be referred to conciliation.
12. In this matter as stated earlier the issue in dispute was a demand for an increase in wages. However in dealing with this issue Respondent thought it appropriate once the strike commenced and it obtained an interdict against the Applicants, to include security for costs of the interdict, which I must mention was totally unnecessary as it already had a costs order to that effect, and to change the terms and conditions of employment of the Second to further Applicants. At the meeting held on 19 February it only sought to withdraw the bonuses payable to the

Applicant for the current year and to have First Applicant agree to re - negotiate the long term service award. In the next meeting in addition to the above Respondent sought to withdraw almost all of the benefits to which Second to further Applicants were entitled to in terms of the 1997 agreement. This withdrawal of the benefits did not translate into any improved offer from the Respondent to the Applicants.

13. In fact the Respondent has never revised the offer it made to the Applicant at the CCMA on 19 January 1999 but as time went by added further conditions to the offer. The conditions as stated earlier sought to change the terms and conditions of employment of the Second to further Applicants.
14. What is not in dispute is that the terms and conditions of employment was in fact settled. In its letter calling upon Respondent to negotiate an increase in wages Applicant stated that the terms and conditions as applicable remain unaltered. Respondent has never disagreed thereto. In fact Respondent accepted this and the only issue it entered into negotiations about was the wages.
15. For the Respondent to claim that as a consequence of the strike action it has to place conditions on the offer it previously made is to in fact allow the Respondent

carte blanche to make any demands whatsoever for the striking workers to accept or risk facing a lock - out with the added security to the Respondent to employ replacement labour.

16. If such action is to be allowed it would negate the right to strike as provided for by the Act. I do not believe that it was the intention of the Legislature when it provided the Respondent recourse to lock - out striking workers, that Respondent was entitled to make such demands of the workers as it believed expedient.
17. The conditions or demands made by the Respondent in order to resolve the issue in dispute must be related and linked to the issue in dispute. It may be appropriate for the Respondent to state that in order to increase its offer the Applicants make certain compromises on the terms and conditions of employment. This however is not what the Respondent did. It simply makes a bold allegation that the strike action by the Applicants has caused it loss and it therefore seeks to alter the terms and conditions of the Second to further Applicants employment. It never seeks to explain that the alterations have become necessary because of the Applicants demands and it could not do so because it never entertained reviewing its offer it made prior to the Applicants embarking upon the strike.
18. Once the conditions or demands made by the Respondent related to the alteration of the terms and conditions of employment it in fact moved away from the dispute

as was referred to the CCMA. The fact that the Applicants entertained such proposals cannot be seen as an acceptance by the Applicants that the conditions placed or demands made by the Respondents to its offer continued to relate to the dispute about wages.

19. After a certificate is issued by the CCMA to the effect that the dispute remains unresolved and the employee party embarks upon a strike action, the employer party can only have recourse to a lock - out if there is no resolution of the matter. The employee party cannot make new demands other than that which was referred to conciliation nor can the employer party place further conditions to its proposals other than that which it proposed at the conciliation. Either party may however reduce their demands and offers or withdraw it. The parties may also seek to compromise on other issues in order to arrive at resolving the dispute but cannot on the pretext of resolving the issue in dispute make demands or place conditions which do not seek to justify any relation to the issue in dispute.
20. In the circumstances I am satisfied that once the Respondent demanded of the Applicant to agree to the proposals contained in paragraphs 2, 4 and 5 of its draft of 16 March 1999 it sought for applicants to agree to issues that were unrelated to the issue in dispute as referred to the CCMA for conciliation.
21. Respondent's lock - out therefore does not comply with s 64 (1) (c) of the Act as

its lock - out is based on issues that were not referred to conciliation as required by s 64 (1) of the Act.

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22. Finally I am also satisfied that this matter was urgent and justified the employment of two attorneys by the Applicant

23. In the result it is ordered that:

23.1. the actions of the Respondent which commenced on 19 March 1999 constitute a lock - out which is not in compliance with the provisions of chapter IV of the Act.

23.2. the Respondent is interdicted from continuing with the lock - out or any conduct in furtherance of the lock - out.

23.3. Respondent is to pay the costs of this application which costs include the costs of two attorneys.

B WAGLAY

Acting Judge of the Labour Court

SIGNED AND DATED THIS 19th DAY OF April 1999

DATE OF HEARING: 16 April 1999

DATE OF JUDGMENT: 19 April 1999

For the Applicant: Mr G J Doble of CHEADLE THOMPSON AND
HAYSOM

For the Respondent: Advocate Haycock instructed DEWALD
MYBURGH

ATTORNEYS