

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

**Case Number:
J1030/00**

In the matter between

NATIONAL UNION OF TECHNIKON EMPLOYEES
Applicant

and

TECHNICON SOUTH AFRICA
Respondent

JUDGMENT

PILLAY AJ

1. Whether a lockout is offensive or defensive is characterised by the primary purpose for which it is used. If the primary purpose is to compel the trade union and employees to meet the employer's demand then it is offensive.
2. The primary purpose of a defensive lockout is to protect the employer's rights to property, personnel and economic activity. Consequently, if the strike were to be accompanied by intimidation or were to take the form of a "work-to-rule" or "go-slow" that disrupts the operations of the employer, the latter can resort to a lockout to protect itself.
3. Once a certificate is issued to the effect that the dispute remains unresolved, either party, or both, may give notice to strike or lockout. Section 64(1) provides:-

“

- (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 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*

Nothing in Section 64(1) precludes an employer from giving notice of a lockout before, simultaneously with or after a trade union has given notice of a strike and vice versa.

4. If the employer wishes to compel compliance with its own demand, then it will have to give notice in terms of Section 64(1)(c). A lockout is defensive if the strike is not protected. Section 64(3)(d) provides:-

“(d) 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; or”

5. However, if the lockout were to persist after the strike ended, then for the purpose of compelling compliance with the employers demand, the lockout would be offensive.
6. A lockout in response to a protected strike will also be defensive. Although the primary purpose of a defensive lockout is to protect the employers rights to property, personnel and economic activity, the underlying objective is that the employees accede to its demand, will exist(?) as a counter to the employees demand.

Section 76 provides:-

“Replacement labour

(1) An employer may not take into employment any person-

(a)

(b) *for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.*

7. The recourse to replacement labour is added on to a defensive and not an offensive lockout. This is an additional instrument to protect the employer, and is available only in the case of a defensive lockout.

8. On the facts of this case, it is common cause that the Applicant issued a valid notice to strike in the following 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*

9. The Respondent gave notice of its intention to lockout which reads as follows:-

"We have now received a proper strike notice from yourselves in which you indicate that your unions' members will commence with a full blown strike on Tuesday 14 March 2000 at 7:45.

We hereby give 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 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."

10. The Respondent's notice is qualified by paragraphs 30.1 and 30.2 of its answering affidavit which provided as follows:-

"30.1 At not time has the respondent attempted to frustrate he applicants right to strike. To the contrary, the respondent recognises that the applicant and its members have the right to embark on lawful and protected strike action, which includes lawful picketing rights. It is however recorded that the respondent may also exercise its valid rights in response thereto. In this regard I repeat that the respondent has committed itself to discussing with the unions representatives the application of the picketing agreement on 13 March at 12h00.

30.2 The respondent has no intent to breach the picketing agreement in any material respect relating tho the union's intended full-blown strike on 14 and 15 March 2000, except insofar as its provisions are irreconcilable with a contemporaneous lock-out. The respondent is of the view that the picketing agreement does not apply to a partial strike as envisaged by the unions for 16 March 2000 or thereafter and will accordingly apply its full rights in respect of a lock-out from 16 March 2000 and thereafter."

11. The clauses of the picketing agreement material to the application are as follows:-

"2.5 Employees, be they Union members or management representatives,

will not participate in any acts of violence and/or intimidation;

...

2.7 Employees not participating in the strike will not be prevented from working nor will their vehicles nor visitors nor students entering or leaving the employer premises be prevented from doing so;

2.8 Entrances or exits to the employer's premises will not be blocked off by any of the parties, other than for normal security reasons as currently in place, and as such, delivery and receiving processes shall not be obstructed;

2.9 No offices, corridors, passages, elevators, rooms nor the canteen at the employer's premises will be occupied by striking/picketing employees, with the exception of the provisions of 3.6.2

...

3.2 Striking employees not participating in a picket at any picketing point shall confine themselves to the garden area near the main entrance, between A & H Blocks of the Technikon's premises.

3.3 Picketers and/or supporters may not move beyond security access points during the course of the picket or thereafter during the strike.

...

4.1 Provided that the conduct of striking employees is in accordance with this Agreement, management shall not interfere or intervene with them in any manner, subject to point 4.2 hereunder."

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12. The respondent's lock-out notice read with paragraphs 30.1 and 30.2 characterises the lock-out as an offensive and not a defensive lockout. The notice professes to be for a defensive lock-out. However, I find that this is in fact not the case because the lock-out is being instituted with a notice in terms of Section 64(1)(c) and against the demand that the unions accept its last wage

offer. The purpose of the lock-out is not to protect the Respondents property, personnel or economic activity. The notice clearly states that the picketing agreement which provided certain protections for the Respondent would not apply and that all members, not just strikers, would be excluded.

13. There was no need for a defensive lock-out as the picketing agreement would have met the Respondents concerns, it being a document freely negotiated that very day by the parties.
14. The defensive lock-out would have become necessary if the Applicant breached the agreement. The Applicant's notice clearly suggests that it intends to breach the agreement from 16 March 2000. Mr Hattig, for the Applicant, conceded that the "work-to-rule" and "go-slow" are forms of strike. They were such forms of individual action that would result in breaches of the agreement. The strikers will not confine themselves to the demarcated areas as set out in the agreement. The Respondent would be entirely within its rights to resort to a lock-out without notice in terms of Section 64(3)(d) in those circumstances.
15. Another reason why the lockout is offensive is that the notice does not distinguish between striking and non-striking members of the union as might be expected if it were a defensive lock-out. Furthermore, Mr Olivier, for the Respondent, confirmed that the lock-out would be effected immediately after the strike commenced on the morning of 14 March 2000 and not on 16 March 2000 when the form of strike would change to that of a "go-slow" and a work-to-rule". This too supports my conclusion. That the lock-out is offensive and not defensive.
16. The Respondent would be entirely within its rights to _____ an offensive lock-out but for the fact that it compromised this right to some extent in the agreement. If it interpreted an offensive lock-out it had to do so _____
17. The Respondent makes it clear at 30.2 that it intends to breach the agreement insofar as it is inconsistent with its right to institute an offensive lock-out. By excluding all the members of the Applicant from the premises it will not be

exercising its right to institute an offensive lock-out consistent with the agreement.

18. Seemingly the Respondent believes that a fresh picketing agreement had to ensue as a result of its notice. From this it can be inferred that it was an offensive lockout.
19. The benefit for the Respondent in saying that the lock-out is in response to the strike is that it hopes that it would then qualify in terms of Section 76(1)(b) to employ replacement labour. Although the Respondent says that ____ in response to the strike, after all the facts are considered it would appear that this assertion is a facade. The Respondent clearly sought to initiate a lockout independent of the strike, a lock-out that would be supported by its own picketing rules.
20. Even if I am wrong in concluding that this is a facade, the Respondent would still not qualify to employ replacement labour.
21. A literal interpretation of the words, “in response to” ____ mean that whenever the employer wishes to have replacement labour, it can only qualify to do so if its lockout is at that stage in response to a strike. If the strike ends then so does the right of the employer to replacement labour. If this was not so then Section 76(1)(b) would result in any lock-out, defensive or offensive, attracting the right to employ replacement labour. Such an interpretation would have untenable results. An employer can make any demand, lock-out its workforce, employ replacement labour. It is conceivable that an employer may prefer to run its operations under such conditions. The employees will be disproportionately disadvantaged. The right to picket peacefully is, with respect, not an adequate _____ right. To this extent I disagree, with respect, with my brother Landman, J in **Ntimane and others v Agrinet t/a Vetsak (Pty) Ltd** 1999 20 ILJ 896 at 900I-J:
22. Alternatively to the afore-going a purposive approach should be pursued in interpreting Section 76(1)(b). In that case the words “in response to” should

mean “in defence of”. Such an approach would result in the right to replacement labour being exercised only when the lock-out is defensive. The purposive approach should be preferred as a literal interpretation would lead to every lock-out _____ the right to replacement labour merely because it is labelled as a “in response to” strike.

23. I accordingly summarise my findings as follows:-

25.1 The Respondent's notice dated 8 March 2000 read with paragraphs 30.1 and 30.2 of its answering affidavit was:-

25.1.1 to implement an offensive lock-out;

25.1.2 in breach of the agreement;.

25.4 The lock-out that the Respondent intended to effect on 14 March 2000 was not in response is to strike.

The offensive lock-out would not be consistent with the agreement if all the Applicants's members were excluded from the premises.

25.2 The Respondent is entitled to lock-out the Applicant's members if they breach the agreement.

25.3 The Applicant and its members will be in breach the agreement if the strike takes the form of “go-slows” and “work-to-rule.”

25.5 The Respondent may not employ replacement labour unless it institutes a defensive lock-out.

25.6 The Respondent may institute an offensive lock-out provided it implements it in a way that is consistent with the agreement.

24. Du Toit *et al*, in **The Labour Relations Act of 1995**, traces the development of the replacement labour provisions. The unions wanted the right to lock-out to be restricted to defensive lock-outs which they should be allowed to challenge in Court on the grounds of equity (at page 29). However no agreement was reached (pg32).

25. Du Toit *et al* also take the view that Section 64(1) read with Section 5 limits the range of permissible employer responses to a protected strike considerably. However the employers weapons include:-

- “1. *Institute a defensive lock-out (but not a secondary lock-out);*
2. *Employ temporary replacement labour;*
3. *Withhold remuneration for the duration of the strike;*
4. *If the circumstances warrant it, dismiss (or perhaps even suspend) its employees on the grounds of operation requirements.”*

(at page 195)

28. Du Toit *et al* also make the point that the recourse as opposed to a right to a lock-out is not merely semantic. One of the consequences of the distinction is the following:-

“Second, recognition of a right to lock-out would have made it impossible to prohibit replacement labour during a lock-out. The trade union representatives in NEDLAC attempted to secure a ban on replacement labour both during a strike and a lock-out, but in the end the Act reflects a compromise: it allows replacement labour during a strike and a defensive lock-out, but prohibits it during an offensive lock-out. [s76(1)(b)]”

(at page 196)

29. I accordingly make the following order:

1. The times and requirements provided for in Rule 7 are dispensed with and the matter is permitted to be heard as one of urgency as provided for in Rule 8.

29. The Respondent's notice of its intention to lockout is declared invalid and consequently the Respondent is interdicted from locking out the Applicant's members.

30. There is no order as to costs.
29. Having heard representations from the Respondent leave to appeal to the Labour Appeal Court is granted.

D PILLAY A J

Acting Judge of the Labour Court

DATE OF HEARING: 13 MARCH 2000

DATE OF JUDGMENT:

For the Applicant: J.B. Hugo and Cronje

For the Respondent: Brink Cohen Le Roux and Roodt Inc