REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J2976/2014

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ("NUMSA") OBO MEMBERS — **Applicant**

and

NATIONAL EMPLOYERS ASSOCIATION OF SOUTH AFRICA ("NEASA") — **First Respondent**

THE INDIVIDUAL EMPLOYERS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION — **Second and further Respondents**

Heard : 17 December 2014

Judgment : 23 December 2014

Summary: Lock out unlawful once the employee party unequivocally accepts the demands as set out in the Lockout Notice.

JUDGMENT

AC BASSON, J

[1] This was an urgent application to interdict an unlawful lockout currently being enforced by the first respondent, (the National Employers Association of South Africa) hereinafter referred to as ("NEASA") and its members who are identified in "Annexure "A" to the Notice of Motion and to require the respondents who have continued the lockout subsequent to their employees' acceptance of their demands, to make payment of all moneys which became owing to their employees during the course of the unlawful lockout within 5 days of this order.

[2] I am satisfied that the matter is urgent in light of my finding that the lockout of NUMSA members is unlawful. I am also satisfied that the prejudice suffered by NUMSA members as a result of the unlawful lockout will have severe negative consequences for the employees. I will now briefly turn to the merits of this application.

[3] It is common cause that negotiations under the auspices of the MEIBC regarding changes to the terms and conditions of employment in the Metal Industry commenced in May 2014. The parties deadlocked and on 25 June 2014 a certificate was issued stating that the dispute remained unresolved. On 26 June 2014 NUMSA gave notice of the commencement of a strike which was to commence on 1 July 2014. On 27 June 2014 NEASA gave notice of its intention to lockout all employees participating in the strike. The strike involved various unions and not only NUMSA. An agreement was reached on 29 July 2014. This agreement was between a majority of the parties as contemplated in clause 8(13) of the MEIBC constitution and had the effect of bringing to an end the dispute referred to the MEIBC on 30 May 2014. The

MEIBC has since taken steps to request the Minister of Labour to extend the agreement in terms of section 32 of the Labour Relations Act.[1]

[4] The strike notice issued on 27 June 2014 reads as follows:

> "NEASA has received notice in terms of section 64(1)(b) of the Labour Relations Act from NUMSA, MEWUSA, UASA and SEASA of their intention to commence strike action against our members as f the 1st of July 2014.
>
> Please take notice that NEASA hereby gives notice in terms of section 64(1)(b) of the Labour Relations Act of their intention to lock out all employees participating in the strike action.
>
> The lock out is in response to the strike action and will be effective from the date and time of commencement of the strike.
>
> The lock out will remain in place until the Unions have conceded to the following employer demands:
>
> 1. The Unions accept the 7% across the board increase which offer is made subject paragraphs 2 to 4 bellow;
> 2. A 50%reduction in the entry level wage for new entries in respect of grades F,G and H and grade 1 in respect of the 5 grade system;
> 3. The introduction of a completely new exemptions policy; and
> 4. The definition of shifts for purposes of leave enhancement pay to be amended to "shifts actually worked"."

[5] On 28 July 2014 NEASA gave notice to NUMSA members who are employed by NEASA members that they will not be allowed to return to work at the end of the strike and that they would be locked out. Although the strike was called off on 29 July 2014 some of NEASA members refused to allow their employees to return to work and the lockout in respect of these employees continued.

[6] On 4 December 2014 NUMSA issued correspondence to those employers who continued to engage in the lockout. In essence NUMSA and its members "unconditionally" accepted each of the demands as set out in the Notice of Intention to Lockout. The employers were further advised that NUMSA members will return to work on Tuesday 9 December 2014:

> "You are hereby advised that NUMSA and its members in your/your members' employ who are currently lock-out as a consequence of your NEASA's lock-out

[1] Act 66 of 2005.

> notice of the 27 June 2014 unconditionally accept each of your NEASA's demands as contained in the Notice of Intention to Lock-out, NUMSA members will return to work on Tuesday 9 December 2014 on the basis of the amended conditions of employment.
>
> You are required to confirm by no later than 12h00 on Monday 8 December 2014 that the return to work will be accepted failing which you are hereby given notice that NUMSA and its members will approach the court for an order interdicting the unlawful lock-out."

[7] The response received from some of the employers was that negotiations were done at national level and not on plant level. The attorney for NUMSA addressed a letter to NEASA advising that the ongoing lockout will be unlawful by reason of the fact that there is no longer an issue in dispute between NUMSA members and their employer. NEASA responded by saying that that –

> "Should NUMSA wish to settle the dispute with NEASA they should engage NEASA at a national level and enter into a formal settlement agreement in terms of which all NEASA employers are excluded from the SEIFSA agreement or any extensions thereof.
>
> We submit that the lock out is still lawful as per the order of the Labour Court …… and our members will continue to lock out until such time as the Minister extends the SEIFSA settlement agreement to non-parties."

[8] In essence it was the submission on behalf of NUMSA that NEASA sought to introduce demands for the settlement of the dispute in addition to those which have been accepted by the employees. It was further submitted that it does not form part of the demands that, should NUMSA wish to settle the dispute, they should reach a formal settlement agreement at national level and that in terms of this agreement NEASA members must be excluded from the SEIFSA agreement and any extension thereof.

[9] In essence it was the submission on behalf of NEASA that, despite the fact that the issues tabled for negotiation at the MEIBC did not form part of its lock out demands, various other issues must be agreed to by NUMSA and other unions before a settlement can be reached. It was also argued that all unions and not only NUMSA must accept the demands set out in the lockout notice

before the dispute will be regarded as settled. More in particular, it was submitted that, although NUMSA is stating that it is accepting unconditionally NEASA's demands, the fact that it is not accepting NEASA's demand that a new Main Agreement must be concluded on the terms asserted by NEASA, the continuation of the lockout remains lawful. According to NEASA the only question for this Court to determine is whether, as alleged by NEASA, the list of demands contained in the lockout notice were issues which NEASA required to be included in a new Main Agreement. This, so it was submitted, must factually be the case by reason of the fact that the previous Main Collective Agreement expired on 30 June 2013 and that negotiations commenced aimed at concluding a new Main Agreement. During the negotiations parties also tabled their proposals for the terms and conditions of employment that would apply to employees covered by the Main Agreement. The Court was then urged to interpret the lockout notice to mean that, in order to resolve the dispute the demands listed in the lockout notice must be included in the new Main Collective Agreement. It was also submitted that NEASA is not accepting the capitulation and until NUMSA is prepared to enter into a written agreement "it can safely be accepted that it has not truly acceded to NEASA's demands". The submissions on behalf of NEASA were also strongly disputed by NUMSA.

[10] In principle I am in agreement with NUMSA that once no further issues are in dispute between those employers and their employees the continued lockout by those employers will be unlawful and falls to be interdicted. On behalf of NUMSA it was submitted that, if regard is had to the lock-out notice, no further disputes exist between the employer and the employees since the employees have "unconditionally" accepted the demands as set out in the lockout notice. Ms Edmonds appearing on behalf of NUMSA also took strong exception to the fact that NEASA sought, in justification for the continued lock-out, to introduce various additional demands should NUMSA wish to settle the dispute.

[11] I am in agreement with Ms Edmonds that if regard is had to the lockout notice, the additional demands have not been part of the demands that formed the basis of a lawful lock-out.

[12] Before I consider whether the continued lockout is unlawful in this case, it is necessary to briefly recap what the purpose of a strike and lock-out notice is. This Court has on various occasions accepted that the purpose of such a strike notice "*is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation'*.[2] See also *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and Others*[3] where the LAC confirmed the purpose of a strike notice as being that it gives an employer an opportunity to reflect on whether or not to accede to the demand and if it decides not to do so to prepare for the strike;

> "[104] In the light of all the above it seems to me that the legal position is that the content of a strike notice is of critical importance in the determination of which employees or categories of employees acquire the right to commence a strike on the day given in a strike notice. The content of a strike notice is of critical importance for conveying to the employer concerned the information that s 64(1)(b) requires to be contained in a strike notice. The employer depends largely on the content of that notice for important decisions to make in relation to the proposed strike such as the decision whether he is going to accede to the union's demands or whether he will make a final offer of settlement of the dispute before the commencement of the strike so as to avoid the strike or whether he will make certain plans including arrangements to employ temporary replacement workers for the duration of the strike and, if

[2] See: *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2*) (1997) 18 ILJ 671 (LAC) at 676D-E. In Transportation Motor Spares v NUMSA and others (1999) 20 ILJ 690 (LC); para [32] of the judgment which states: *"Also, on the same assumption as referred to in the preceding paragraph, insofar as a s 64(1)(b) notice is meant to give the employer an opportunity to make whatever arrangements (including hiring replacement labour for the duration of the strike), such purpose would have been served by the single notice given prior to the commencement of the strike. I say this because, if the applicant wanted to make other arrangements for its business in the light of the proposed strike, it would have been able to make those arrangements between the time of the s 64(1)(b) notice and the day when the strike commenced."*

[3] (2009) 30 *ILJ* 1997 (LAC).

> so, how many and in which workplaces, in order to minimize the impact of the strike on his business."

[13] The same principle as set out by the LAC also applies to the lockout notice: Essentially the lockout notice affords the union and employees an opportunity to reflect on the dispute and also affords the option of acceding to the demands of the employer or to propose a counter-offer. In essence therefore, the lockout notice informs the union and its members what they must do in order for this dispute or deadlock to end. If regard is had to the lockout notice in the present case it is in my view clear that NEASA is conveying to the unions that once you accept the demands as set out in paragraphs 1 – 4 of the notice, the lock-out will come to an end. It is important to note that no riders are attached to these demands. It is not, for example, stated that you should resile from the agreement reached with SEIFSA nor is it stated as a precondition for settlement that any agreement reached should provide that NEASA employers are excluded from the Steel and Engineering Industries Federation of South Africa's (SEIFSA) agreement or from the extension thereof. Just as strikers (employees) may not shift the goal posts when they issue a strike notice, so may the employer not shift the goalposts once they have issued a lockout notice. See in this *regard FGWU and others v The Minister of Safety and Security and others*:[4]

> "[27] This submission overlooks the fact that would-be strikers must identify and declare the issue in dispute prior to setting in motion the procedure prescribed by section 64(1)(a). Once that issue has been identified and dealt with in conciliation, the would-be strikers can only strike over that issue. They cannot change the goal posts when they issue the notice in terms of section 64(1)(b). How the applicants understood and designated the issue in dispute when they referred the matter to conciliation is therefore of crucial importance."

[4] [1999] 4 BLLR 332 (LC).

[14] A similar approach was followed by the LAC in *Kgasago and others v Meat Plus CC*[5] where the court likewise held that an employer cannot lockout employees in respect of a demand which had not formed part of the original dispute. Such a dispute should have been referred to conciliation. The court also held that where employees abandon their strike and tender their services unconditionally they are entitled to be paid for the period the employer continued with the unprotected lock-out.

[15] I am further persuaded that the applicant has satisfied all the requirements for a final interdict: It has established a clear right to the relief sought; there is a reasonable apprehension of harm in that NUMSA members are precluded from resuming their duties and from earning a wage. I am further also persuaded that NUMSA has no other satisfactory remedy to bring to an end the unlawful lock-out.

~~[18]~~[16] In conclusion, I am satisfied that in light of the fact that NUMSA has unconditionally accepted NEASA's demands on behalf of its members, the continued lockout of NUMSA members is unlawful and unprotected. I am not persuaded on the papers that NEASA's demands support to envisage the conclusion of a new Main Collective Agreement upon agreement. If this was so NEASA should have included this demand in the lockout notice. This is, in any event, disputed by NUMSA. Furthermore, the demand that NUMSA resile from the settlement agreement is also not included in the list of demands contained in the Lockout Notice. Moreover, NUMSA and the other unions have reached a national agreement on terms and conditions of employment with SEIFSA. It was entitled to do so. Certainly NUMSA cannot be forced to resile from this agreement. Lastly, the demand that NUMSA is only entitled on behalf of its members to accede to the demands provided that all other unions have accepted the demands is certainly also not part of the Lock-out Notice. Moreover, NUMSA cannot capitulate on behalf of other unions and certainly NUMSA cannot be held hostage and its members continue to be locked out in

[5] [1999] 5 BLLR 424 (LAC).

circumstances where the other unions do not capitulate. Lastly, I am in agreement that NUMSA does not have to agree to any further conditions in order for the lockout to be lifted. Any new demands made by NEASA in an attempt to further the lockout render in my view the lockout unlawful and therefore unprotected. I am also not persuaded by the submission that until NUMSA agrees to enter into a written agreement it cannot be said that NUMSA has "truly acceded to NEASA's demands". I do not accept this submission particularly in light of the fact that NUMSA has capitulated unconditionally. Lastly and most importantly, once NUMSA has acceded unconditionally, which it in has fact done nationally, to the demands of NEASA, no dispute further exists between NUMSA and NEASA's members.

~~[19]~~[17] In conclusion: The lock-out by NEASA against members of NUMSA is unlawful and unprotected as from the date of NUMSA's unconditional capitulation to the demands as set out in the Lock-out Notice dated 28 July 2014. Accordingly I am of the view that NEASA members who are currently locking out the employees are obliged to pay the employees their wages for the period that they have tendered their services unconditionally. I can find no reason why costs should not follow the result.

Order

~~[20]~~[18] In the event the following order is made:

18.1 The lockout at the workplaces of the respondents listed in Annexure "A" to the Notice of Motion and at all of the other First Respondent's members currently engaged in the lockout is unlawful and unprotected.

18.2 The First Respondent and those respondents listed in Annexure "A" to the Notice of Motion and all of the other first respondent's members who are currently excluding the Applicant's members employed by the First Respondent's members in terms of a lockout notice issued by the First Respondent on 28 July 2014 are interdicted and restrained from continuing with the lock-out.

18.3 The Respondents listed in Annexure "A" are ordered to make payment to their employees of all moneys owing to them since the inception of the unlawful lockout on 9 December 2014 within five days of this order.

18.4 The First Respondent is ordered to pay the costs of this application.

AC Basson

Judge of the Labour Court of South Africa

Appearances

For the applicant: R. Edmonds of Ruth Edmonds Attorneys

For the respondent: Advocate AJ Freund SC Instructed by Anton Bakker Attorneys.