IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No:J3202/98

n the matter between

Roy Ntimane and Others Applicants

and

Agrinet t/a Vetsak (Pty) Ltd Respondent

JUDGMENT

LANDMAN J

1 This is the return day of a rule nisi issued at the instance of Mr Roy Ntimane and 86 others against their employer Agrinet t/a Vetsak (Pty) Ltd ("Agrinet"). The applicants seek a declaration that the lock-out in progress is not in compliance with the Labour Relations Act 66 of 1995, alternatively a final interdict on the employment of replacement labour.

2 When the annual wage negotiations between Agrinet and SACCAWU regarding the hourly paid employees, who are members of SACCAWU,

deadlocked, the employees engaged in a protected strike. Agrinet responded by instituting a lock-out. It is common cause that the lock-out was in response to the strike. The lock-out was instituted on 21 August 1998. Advance warning of the proposed lock-out was communicated to the union on 18 August 1998. Notification of the lock-out was communicated to the union by fax. The employees were given a notice on the same date. The letter to the union reads:

The company demands that the union and the employees accept the company's final offer as formulated on 16 July 1998 and that the employees abandon their demands and return to work. When the final offer in respect of wages expires, the exclusion continues in respect of the demand that the employees return to work and the union and employees abandon their demands.

3 The notice to the employees reads:

On 16 July 1998 a meeting took place at the CCMA between VETSAK-AGRINET and members of SACCAWU. During this meeting the employer's final wage offer was a 4% increase with effect from 1 July 1998 and a further increase of 4% with effect from 1 January 1999. An increase of 6% was also offered for the period 1 July 1999 until 30 June 2000.

This offer is only open for acceptance until 15:30 on Friday the 28th August 1998 when the offer expires.

From 15h30 on the 28th August 1998 onwards the above offer may only be accepted on condition that the increase is implemented with effect from the date of acceptance of the offer.

4 On 19 October 1998 the union conceded defeat and informed Agrinet in writing that it did not accept the counter demands but that it withdrew its demands and called off the strike. The employees were to return to work on 21 October 1998.

5 On the next day Agrinet informed the union that the lock-out would continue until such a time as the company's offer had been accepted by the union's members. A more detailed "lock-out notice" was attached. It stipulated that:

3. The union and its members have failed to accept the offer as formulated on 16 July 1998 and any increases accepted are only payable from the date of acceptance of the offer.

4. Please note that the lock-out will continue until such time as the company's final offer in respect of wages is accepted as formulated on 16 July 1998 payable from the date of acceptance thereof.

6 The union responded by saying that the company's offer was rejected and that the lock-out was now an offensive lock-out.

7 On 21 October Agrinet replied that:

The matter in dispute remains the wages and conditions of employment and the lock-out commenced after the commencement of the strike. The mere fact that the strike has been called off does not change the lock-out from a defensive lock-out to an offensive lock-out. The lock-out has been implemented as a response to the commencement of the strike. Under the circumstances the lock-out continues as a defensive lock-out.

8 The issues to be decided are crisp but not without difficulty. They are -

(a) Is Agrinet's lock-out in compliance with s 68 of the Labour Relations Act 66 of 1995?

(b) Alternatively, even if it is a protected lock-out, is Agrinet entitled to employ temporary labour for the duration of the lock-out?

9 The two issues are inter-related. If the issue in dispute is one that arose after the strike ceased then it is not a lock-out in response to a strike. No attempt was made to refer a new dispute to the CCMA and consequently the lock-out would be unprotected and Agrinet would not lawfully be entitled to employ replacement labour.

10 The lock-out was about securing: an abandonment of the employees' demands, the acceptance by the employees of a wage package (including the implementation date), and a period of a peace obligation. The lock-out commenced as a defensive lock-out (i.e. a lock-out in reaction to a strike demanding, at least, the withdrawal of the strike and its accompanying demands). The demand was adapted with the passage of time in response to the failure of the union and the employees to accept the offer by the date set by Agrinet. The offer of a retrospective implementation of the proposed wage increase was withdrawn. The wage offer still stood but, if accepted, the increase was to be prospective only. The demand that the employees accept Agrinet's offer remained unchanged in its essence. A chameleon remains a chameleon even when it changes to a different hue. The lock-out was not a new or fresh one. Rather it was the unbroken continuation of the action which the employer had embarked on in August 1998.

11 It follows that the lock-out was, and remains, a protected one. This brings me to the second question.

12 A strike is the workers' weapon to ensure, as Prof Roger Blanpain has so vividly expressed it, that collective bargaining does not become collective begging. The right to strike is enshrined in the Constitution of the Republic of South Africa of 1996 (See s23(2)(c)). On the other hand, employers also have a right to collective bargaining but they do not have a constitutional right to lock out their workers (See s23(5)). Instead, their right to lock-out stems from their property rights and their right to economic activity. See **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) at 795G-H:

In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out).

13 The workers' right to withhold labour during a strike is their primary weapon. However, in an unregulated situation employers have a common law right to utilise their property and freedom of contract rights and the right to engage in

economic activity, which means that employers may employ replacement labour for the duration of the strike or lock-out. It may be inconvenient to do so but the employer is entitled to go that route. Strikers are aware that the damage which they may do an employer (and the object of a strike is to cause and inflict economic disruption) will be reduced or even eliminated if the employer may replace the workforce which is on strike. The same applies if replacement labour is used during a lock-out.

14 These considerations exercised the minds of the negotiators of the new deal which has found expression in the Labour Relations Act of 1995. See D du Toit *et al* **The Labour Relations Act of 1995** 2nd edition at 30. The result is that the common law rights of employers, as well as their constitutional rights, especially the right to engage in economic activity and to enter into contracts of employment with replacement labour, have been restricted. The general rule is now that in the case of a lock-out the employer must sit it out. The employer may not employ replacement labour, including making use of the labour supplied by a temporary employment service. Other workers may without impediment refuse to do the work of a striking worker. See 187(1)(b) of the Labour Relations Act of 1995.

15 There is an exception to the general restriction on the employment of

replacement labour for the duration of a lock-out. Section 76 of the Labour Relations Act of 1995 provides that:

An employer may not take into employment any person...

(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**. (Emphasis supplied.)

16 At the outset it was mentioned that it was common cause between the parties that the lock-out was in response to the strike. This being so there could be no valid objection to Agrinet employing replacements. In the meantime the employees have abandoned their strike. Does this alter the situation? The union contends that it does. It is submitted that the lock-out is no longer in response to a strike and so the general rule applies and therefore Agrinet may not utilise replacement labour.

17 It is clear that the abandonment of the strike has no legal effect on the lock-out. Section 76 interferes with an employer's common law and constitutional rights, in the interests of levelling the playing fields in an economic battle between employees and their employer. It grants an exception to the ban on replacement labour in certain well-defined situations. The section does not provide

that it is rendered inapplicable when the strike in response to which the lock-out was instituted terminates. On the contrary, it seems, on a reasonable interpretation, that the nature of the lock-out as a defensive one, and the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases.

18 I am of the view that the employer's right to continue making use of replacement labour is counterbalanced by the right afforded by the Labour Relations Act of 1995 to registered trade unions to picket the employer's premises, *inter alia*, with the purpose of discouraging persons from accepting work.

19 In the premises the application must be dismissed. The parties still have a long row to hoe together. It would be invidious to make a cost order for this reason and because this point is *res nova*. The application is dismissed. There will be no order as to costs.

A A Landman

Judge of the Labour Court

SIGNED AND DATED THIS 1ST DAY OF NOVEMBER 1998

Date of hearing:	30 October 1998
Date of judgment:	1 November 1998
For the applicant:	Mr E Hlongwane of SACCAWU
For the respondent:	Adv F Barrie
Instructed by:	Hofmeyr Van Der Merwe Attorneys