**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**DATE: 1 June 2000** **CASE NO. J3559/99**

In the matter between:

**SACCAWU & OTHERS** Applicants

and

**REA SEBETSA** Respondent

**JUDGMENT**

**WAGLAY, J:**

[1] Parties involved in labour relations need to be very sure that they are taking the correct action when engaged in the consultation process or when facing deadlock in a dispute. The alternative is a protractive labour dispute which serves the interest of neither party. This is such a case.

[2] The respondent is C Sebenza Labour Consultant CC which trades under the name and style of Rea Sebetsa. The respondent provides labour to business which require employees but at all times remain the employer of such employees.

[3] The second to ninth applicants were employees of the respondent and members of the first applicant. I shall refer to the first applicant as the union and the second to ninth applicants as the applicants for sake of convenience.

[4] During March 1999 the respondent provided a company known as OKK with about 350 employees, including the applicants, who were to be engaged as general workers. At the same time the applicant signed a contract of employment with the respondent dealing with their employment with OKK who was called the client. Clause 3 of the said contract of employment provides inter alia:

"The employee hereby agrees to work overtime at the request of the employer or the client. Working hours start at the time indicated by the employer or the client and at the employee's specific place of duty. The working hours, including overtime, Sunday time ... shall be determined by the employer or client. The employee agrees to work overtime as required."

[5] The employment of the applicants commenced in terms of this contract on 12 March 1999. On 10 May 1999 the applicants informed the respondent they had decided against working overtime until they had received a response from the respondent to their grievances. According to the applicants they had raised a grievance against the payment which they were receiving for overtime work as according to them other employees were granted some incentive scheme. The grievance, they say, was initially raised as early as February 1999 and repeated at least again on 5 May 1999. No response was received to the grievance.

[6] There is a dispute as to when respondent was to respond to the grievance but for the purposes hereof I do not consider this relevant. What is clear is not having received a response by 10 May applicants decided to refuse to work overtime as stated above. The respondent advised the applicants that their refusal to work overtime constituted a strike and unless they agreed to comply with the employment contract and work overtime they will be locked out.

[7] The applicants commenced with their refusal to work overtime on 10 May 1999 and the respondent locked them out as and from 11 May 1999.

[8] Firstly, with regard to the applicants refusal to work overtime, the applicants deny that this was the case in the founding papers but they admit in their reply that they did in fact refuse to work overtime as and from 10 May. Furthermore the applicants' allegation that they first raised their grievance in February 1999 is also startlingly false as applicants admit that the only commenced their employment in March 1999.

[9] It is common cause that the refusal by the applicants to work overtime constitutes a strike as defined by the Act and that the refusal to do so was for the purposes of remeding a grievance. Furthermore, it is common cause that the procedures required to be followed in Chapter 4 of the Act was not complied with.

[10] In response thereto the respondent locked out the said applicants. That it did so in terms of section 67(3)(d) of

the Act cannot be faulted. Said sub-section provides that an employee may lock out its employees in response to their taking part in a strike that does not conform with the provisions of Chapter 4.

[11] Applicants, by way of application, claim payment for the salary for the month of June 1999, this being part of the period that the respondent locked out the applicants. Having said earlier that the respondent is entitled to lock out the employees who participate in a strike that does not conform with Chapter 4 does not, however, mean that simply refusing employees the right to provide their services constitutes a lockout. A lockout is defined in the Act as follows:

"The exclusion by an employer of employees from the employer's work place for the purposes of compelling the employees to accept a demand in respect of any matter of mutual interest between the employee and employer, whether or not the employer breaches those employees' contracts of employment in the course of or for the purposes of that exclusion".

[12] Did the respondent compel applicants to accept a demand? I find that it did. That demand was that the applicant accept that it would not be given an incentive scheme. Although this was only articulated after the commencement of the lockout, it was in fact communicated before 1 June 1999, being the date which is relevant in the matter. The lockout therefore complied with the provisions of the Act.

[13] The first issue then that I need to determine is whether the respondent was entitled to refuse payment to an employee locked out and did the lockout at some later stage become unlawful and therefore applicants are entitled to payment of salary for the period of the said unlawful lockout.

[14] The first issue is a rather simple on. The Act, in terms of section 67(3) clearly provides that where the lockout is a protected one, and which I have already found, an employer is not obliged to remunerate the employee already locked out.

[15] The next issue is, having found that the lockout was protected, did the lockout at some stage prior to the acceptance of the respondent of the applicants' services on 20 June become unprotected? According to the applicants, if some sense is to be made of their application, the respondent was obliged to lift the lockout at least by 9 June 1999. On this day applicants' erstwhile attorneys in its letter to the respondent states that the applicants "hereby tender their services which includes overtime". To this the respondent responds by letter on

the same day stating inter alia:

"We are now informed that 'the said members hereby tender their services which includes working overtime'. When a copy of the communication from Honey and Partners Inc. was handed to the workers concerned said workers were asked whether they were now prepared to work the required overtime. They once again refused to do so. Quite clearly what Honey and Partners Inc has stated does not reflect what the workers concerned have stated.

In order to finalise this matter urgently get your alleged members to submit individually and in their own handwriting that they are now prepared to work the required overtime."

[16] This was confirmed by the respondent in their answering affidavit. In its founding papers and reply signed by D Lepo, the organiser of the union, applicants deny that the applicants refused to comply with the tender. However, none of the applicants have attested to any confirmatory affidavits in reply stating that what Lepo says is correct. Having regard to the obvious erroneous statements contained in Lepo's founding affidavit that the applicants had never refused to work overtime, thereafter to concede that they did in his replying affidavit cannot engender any confidence with regard to the correctness of the allegations made by Lepo.

[17] In the circumstances, and following upon the test set out in Plascon-Evans, I accept the version of the respondent. In any event, I do not consider the response (the request that the applicants sign to the effect that they are prepared to tender their services) as being unreasonable.

[18] Further correspondence followed between the parties but respondent insisted on refusing to end the lockout unless it was given a written undertaking by the applicants that they were prepared to work overtime as required in terms of the contracts of employment. This was not forthcoming.

[19] However, on 18 June 1999 the erstwhile attorneys of the applicants informed the respondent that they had consulted with the individual applicants and were in the position to confirm that the individual applicants were willing to tender their services unconditionally. This letter was received on Friday by the respondent. In respect of this letter the respondent no longer considered an individual undertaking from the applicants necessary and agreed that the applicants could return to work on Monday, 21 June 1999.

[20] In the light of what has been stated above, I am satisfied that the lockout by the respondent of the applicants was protected until that day, that is 20 June 1999. Under the circumstances respondent was entitled to refuse payment of remuneration to the applicants for that period. The applicants did not allege that they were not paid for the period 21 June 1999 and in the circumstances applicant is not entitled to payment for the salary as prayed.

[21] With regard to costs. This court is always reluctant to grant where there remain a continued relationship between the parties. However, in this matter the fact that the applicants were not totally truthful in their affidavits calls upon this court to show its displeasure at applicants' behaviour.

[22] I am therefore satisfied that this is a matter in which costs should be awarded. However, having regard to the correspondents and the application itself, I am satisfied that it was in fact the union which directed the action from the outset. I am therefore of the view that the costs order should be made against the union.

[23] In the result I make the following order:

1. The application is dismissed.
2. The first applicant is to pay the costs of the application.

WAGLAY, J
LABOUR COURT OF SOUTH AFRICA

: ADV D G GROBLER

: Weihman & Joubert Prokureurs

: ADV P R JAMMY

: Deneys Reitz

: 1 JUNE 2000

: *EX TEMPORE*