IN THE LABOUR COURT OF SOUTH AFRICA REPORTABLE

(HELD AT CAPE TOWN)

CASE NO: C552/2000

DATE: 3-8-2000

In the matter between:

N U C C A W U Applicant

and

TRANSNET LIMITED t/a PORTNET Respondent

J U D G M E N T

WAGLAY, J:

1. The applicant in this matter, a trade union, has come to this Court as a matter of urgency to interdict the respondent from continuing with what it alleges is a lock-out of its members, all of whom are listed in an Annexure to applicant's papers, on the grounds that the said lock-out is unlawful.

2. The background to this matter, as evidenced by the papers filed of record, is the following:

1. The applicant's members referred to in this matter on or about 1993 or 1994 signed an agreement with the respondent headed "casual employment agreement" in terms whereof the said members were offered employment on a casual basis.

2. The terms of the agreement were, inter alia, that:

(a) the duration of employment will run on a day-to-day basis as required by

the employer at a maximum of three days per week;

(b) the members shall not be entitled to any of the privileges of a permanent employee of the employer as described by Regulations;

(c) the agreement may be terminated by the employer without any notice or any payment in lieu of notice in the case of gross misconduct or dishonesty on the part of the employee.

3. The agreement also set out normal hours that the members were required to keep on the day on which they were required to work as well as the amount he or she would be paid for the day and the rate of pay for overtime work, as also how the overtime would be calculated.

4. These members, with others who also signed similar contracts as referred to above, first formed a pool of workforce from which respondent would, on a daily basis, select persons to render services, depending on respondent's needs for that particular day.

5. Although the pool consisted of some 2 000 workers, respondent, on average, employed between 50 to 70 from amongst them, and none for a period in excess of three days per week.

6. The procedure that applied was that the members would report to a particular office known as "the TIS office", which office is advised by the various of respondent's business units, as to the number of employees it requires for that particular day. The office would then engage the requisite number from amongst those in the pool who would report to that office for work for that particular day.

7. There is no obligation upon the members to report to the TIS office everyday, or at all. Likewise there is no obligation upon the respondent to give a particular person in the pool preference or to offer to a particular person in the pool employment for a particular

day.

8. The persons in the pool are further not paid a salary at the end of the day on which they were employed, but at the end of any given week and from such pay the statutory deductions that is PAYE and UIF are deducted.

9. The respondent also employs a permanent workforce numbering about 2 000.

10. Although the applicant members referred to herein, together with other persons formed a pool, the respondent is free to employ on a casual basis persons who are not part of the pool.

11. Some time during April or May of this year the respondent drew a new memorandum of agreement which it intended concluding with the applicant's members, as also those casual employees who formed part of the pool referred to above.

12. The applicant objected to this agreement, alleging that if agreed to it would change

the present status of the members viz-á-viz the respondent.

13. Unlike the previous agreement headed "casual employment agreement" which consisted of some three pages, the new contract comprised 12 pages. The contract was vastly different from the previous agreement in that while the basis of employment remained the same, the previous agreement was not limited in terms of time, whereas the new contract offered to engage the services of the applicant's members only for a period of three months. The new contract also no longer limited the number of days in a week to be worked to three, but that members would be employed for the full week "Mondays to Sundays", if needed. Furthermore, the hours of work as set out in the previous agreement would no longer apply and the respondent was free to determine on an ad hoc basis what the hours of work would be.

14. Since applicant objected to the new agreement, the respondent on 17 July

2000, issued the following memorandum to its TIS office:

"The Port of Cape Town has recently updated the contract which casuals/temps signed to be employed at Portnet. This update was necessitated by the need for these contracts to be brought in line with the Basic Conditions of Employment Act, No. 75 of 1997. I am led to believe that some temps have refused to sign this new contract which is surprising as it contains terms and conditions which are more favourable than the previous contract. Portnet is hereby serving notice that temps who have not signed the new contract by 21 July 2000 will not be eligible for employment at Portnet in any capacity."

The date of 21 July was extended to 24 July 2000.

15. On 24 July 2000 when applicant's members reported to the TIS office to be allocated work, if such work was available, they were advised that unless they signed the new agreement they would not be considered for any employment with the respondent. Applicant's members refused to sign the new agreement and were consequently not considered for and continue not to be considered for any employment, notwithstanding employment being available on a day-to-day basis.

3.Based on the above the applicant contends that the action of the respondent in not considering its members for employment, as it had done in the past, constitutes a lock-out and since respondent has failed to comply with the provisions of section 64 of the Labour Relations Act (hereinafter "the Act') such lock-out is unlawful.

4. The Act defines "lock-out' as:

"The exclusion by an employer of employees from the employer's workplace for the purposes of compelling the employees to accept a demand in

respect of any matter of mutual interest between the employer and employee, whether or not the employer breaches those employees contracts of employment in the course, or for the purposes of that exclusion."

5. The first issue that needs to be decided, however, is are the applicant's members employees as contemplated by the Act? The Act defines "employee" to mean:

"Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in the carrying on or conducting the business of an employer."

The same definition is accorded to the employee in the Basic Conditions of Employment Act, No. 75 of 1997.

6.As stated earlier in the instant matter do applicants qualify to be employees as defined? The right that applicant's members have in terms of the agreement they concluded with the respondent is that they be considered for work that may be available on a day-to-day basis. The fact that they would be considered for day-to-day employment is as a result of them being part of a pool of people, a pool created by the respondent, and being part of the pool they were thus entitled to be considered for the day-to-day employment. In effect what we have is that applicant's members constituted a special class of employees; a class of employees who were not guaranteed that they would be employed but had the right to be considered for employment on a day-to-day basis, if respondent had a need for them. The fact that the respondent records in its affidavit that when there is a need to employ extra staff for its day-to-day requirements, it would employ from the pool it created, satisfies me that the applicant's members do fall within the

definition of employee as provided for in the Act. I come to the conclusion because I believe that the definition of "employee" in the Act is wide enough to include persons who are retained on the books of an employer to render services, albeit on an ad hoc basis.

7. The respondent, however, relying on the arbitration award handed down by the Commission for Conciliation, Mediation and Arbitration (CCMA) in the matter of Mavata v Afrox Home Help Care 1998 19 ILJ 931 CCMA, argued that applicant's members were in a position no different to the applicant in that matter and as such, applicant's members were in fact casual employees. The label of "casual", however, does not detract from the fact that the person remains an employee. Furthermore, I am not satisfied that simply because one is a casual worker, which is defined by the Chambers 20th Century Dictionary to mean "employed for a short time or without fixed employment" does not mean that such employee is not afforded any protection by the Act. In the matter of Mavata, the Commissioner was faced with a dismissal dispute and, quite correctly, the Commissioner found that the applicant, because of her status of casual employee, had no employment or future employment beyond the date currently worked by her, this did not mean that she was not an employee for purposes of the Act.

8. Moving then to the issue of whether or not the refusal by the respondent to consider applicant's members for employment that may arise constitute a lock-out. In this respect, respondent argued that a lock-out presupposes that an employee has a right to be at work and the employer an obligation to afford such employee work and remuneration. Firstly, there is no dispute that applicant's members were excluded from being considered for any day-to-day employment until such time as they signed

the new contract drawn by the respondent. Further, as I have said, the applicant's

members constitute a special class of employees in that they had no guarantee that they would be employed for at least three days in a week, or occasionally or at all. Their right was limited to be considered for the day-to-day employment. As such, if there was no work available or had one employee been chosen in preference to another from within the pool of employees, such excluded employee had no right to either demand employment or challenge the respondent's right to choose any other employee from amongst its pool of employees. However, the denial of this right to be considered for employment on a day-to-day basis on the grounds that applicant's members comply with the demand made by the respondent that they sign the new terms and conditions of employment is, I believe, sufficient to satisfy the definition as provided for by the Act as constituting a lock-out.

89. Respondent's submission as recorded earlier, although of some merit, is rather narrow. I do not see why the lock-out should only presuppose that an employee has a right to work and an employer an obligation to afford such employee work and remuneration. I believe that the definition of a lock-out is also sufficiently wide to include the denial of a right that an employee may have to be considered for employment.

10. Respondent's further submission that since it was not obliged to offer any employment to any specific person from the pool of employees, and because it was entitled to engage other casual employees on terms wholly different from those applying to existing casual employees and to give work to such other employees to the exclusion of those in the pool, it had the right only to engage those persons who assented to the terms and

conditions contained in the new agreement. This argument I have difficulty in accepting. While respondent could quite correctly require those who have not entered into any agreement with it to agree to the terms and conditions it proposes before it can offer them employment, where there already is an agreement in place, it is not open to respondent to unilaterally change such agreement. The fact that applicant's members were not entitled to employment beyond the day employed does not mean that there is no employment relationship between the parties. This relationship exists by virtue of the agreement concluded between the parties. To suggest, as respondent does, that it is entitled to impose such conditions as it deems expedient, notwithstanding an agreement, is clearly not correct.

11. In the circumstances I am satisfied that the action of respondent constituted a lock-out and since there is no dispute about the fact that the procedure as set out in section 64 was not followed, the lock-out is, at the very least, unprocedural and therefore liable to be interdicted.

12. The respondent's further argument is that this matter is not urgent and because the applicant has failed to refer the matter to conciliation before petitioning this Court, the relief prayed for should be declined. While it is correct that the applicant has not specifically stated why this matter is urgent, it is obvious that the matter is an urgent one. The applicant's members suffer prejudice which cannot be addressed adequately, or at all, when the matter is heard in due course. This is so because by not being considered for employment, the members who may have obtained day-to-day employment, are not being so employed. They cannot come to this Court at some future date and allege that they would

have been employed, because it did not have such a right. Nor can they allege that they, with any certainty, would have been employed, having regard to the fact that the pool from which respondent selected employees to work on a particular day comprised persons in addition to applicant's members and thus there is no guarantee that they would have been selected for employment.

13. With regard to applicant's failure to refer the matter to conciliation, while this Court will not entertain a matter which is not referred to conciliation, when it comes to matters such as the present this Court has a discretion as there is nothing in the Act with regard to disputes of this nature that require that the matter first be referred to conciliation before it can be referred to this Court.

14. Due to the fact that I am satisfied that this is an urgent matter I am not prepared to refuse relief simply because the matter was not referred to conciliation.

15. With regard to costs I am satisfied that this is a matter in which costs should follow the result. In the circumstances I make the following order:

1. Respondent is interdicted from locking out the applicant's members referred to in Annexure JD1 to its founding papers.
2. Respondent is ordered to pay the costs of this application.

_____

WAGLAY, J