IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NO: J1149/09

In the matter between:

NASECGWU	**1ST APPLICANT**
S SELEKE AND 16 OTHERS	**2ND TO 17TH APPLICANTS**

And

DONCO INVESTMENTS (PTY) LTD	**RESPONDENT**

JUDGMENT

AC BASSON, J

[1] The issue before the Court is crisp. Is the lock-out currently in place unlawful as a result of non-compliance with section 64(1)(c) of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA")? The Applicants are seeking an order declaring the lock-out of the 2nd to 17th Applicants (hereinafter collectively referred to as "the Applicants") an unlawful lock-out and an order interdicting the Respondent from continuing

with the lock-out. The Applicants are also seeking an order that the Applicants be paid equitable compensation in an amount equal to the remuneration that they would have received was it not for the lock-out.

[2] The 2nd to 17th Applicants (hereinafter referred to as "the Applicants") are employed by the Respondent at its KFC Business, Wolmaransstad. It is common cause that the Applicants embarked on a protected strike on 30 March 2009 after a dispute regarding the unilateral change of conditions of employment by the Respondent by taking away their meal benefit was unsuccessfully referred to conciliation. It is clear from a letter dated 30 March 2009 that the Respondent did not consider reintroducing staff meals in order to solve the dispute.

[3] It is further common cause that the Applicants decided to end the strike and to report for duty on 15 April 2009 in response whereto the Respondent locked the Applicants out. It appears from the papers that the First Applicant (hereinafter referred to as "the union") informed the Respondent on 14 April 2009 that the Applicants decided to end the strike and to resume their duties at the Respondent on 15 April 2009. Upon their arrival, the Respondent advised the Applicants that they should return on 16 April 2009 as there was no roster prepared.

Lock-out

[4] On 16 April 2009, when the Applicants reported for work, they were prohibited from resuming their duties and were advised that they were locked-out. On 16 April at 16H44 the union received a "notice of lock-out"

in terms of which the union was informed that the Applicants were locked out as from 07H00 16 April 2009. Although this letter is dated 15 April 2009 it appears that the union only received it on the 16th of April 2009. Effectively therefore the union was advised (on 16 April 2009) that their members have been locked-out as from 7H00 that morning.

[5] It further appears from the notice that the Respondent was of the view that it was not required to give 48 hours' advanced notice of the lock-out and that it would be sufficient to tender two days' payment to the Applicants in lieu of the notice period required in terms of section 64(1)(c) of the LRA. The union advised the Respondent that the lock-out did not comply with section 64(1)(c) of the LRA. The Respondent responded by reiterating that the lock-out is not unlawful and that the Applicants "will remain locked out until the dispute between the parties had been resolved". The salient part of the Respondent's lock-out notice reads as follows:

> *"We refer to your letter dated 11 April 2009 as received by the company on 14 April 2009 in which you have indicated that the matter in case nr NW5615-08 remains unresolved.*
>
> ***Notice is hereby given that your members will be locked out as from 07H00 on 16 April 2009*** *in light of the fact that the dispute between the parties has not been resolved. Once all of your members have accepted the change to the terms and conditions regarding a staff meal, which is the subject of this dispute, your members may resume their normal duties.*

Your members will not be required to tender their services during the notice period of the lockout. However, your members will be remunerated for the period of two days in lieu of the notice as required in terms of section 64(1)(c) of the Labour Relations Act 66 of 1995 as amended. *Please take further notice that your members will not be allowed on the company premises for the duration of the lockout."*[1]

[6] It is also common cause that the Applicants have proposed a staff meal allowance and that it was rejected. According to the Respondent it refused to accept this proposal as the payment in lieu of a meal was excessive.

Issue to be decided

[7] Is the lock-out lawful? In terms of section 64(1) of the Labour Relations Act 66 of 1995 every employee has the right to strike and every employer the right to recourse to a lock-out. This section reads as follows:

"(1) Every employee has the right to strike and every employer has recourse to lock-out if -

(a) the issue in dispute has been referred to a council or to the Commission as required by the Act, and -

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute,

[1] My emphasis.

has elapsed since the referral was received by the council or the Commission; and after that -

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless -

(i) 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

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers or

(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 not 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..."

[8] Conradie J in *Metal & Electrical Workers Union of SA v National Panasonic Co* (1991) 12 ILJ 533 (C) aptly refers to the power struggle between employers and employees in the workplace as a boxing match.[2]

[2] At 536: *"A strike or lock-out is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The court is*

Once parties resort to industrial action they are given boxing gloves to engage in a boxing match with the aim of inflicting as much pain on the other as possible. The sole aim of this contest is to bring the other party to submission by exerting as much economic power on the other as possible. Conradie J also correctly points out that there are rules to be observed and that this Court, who acts as a referee in labour disputes, will as a rule not intervene and will only do so in limited circumstances. The precondition for entering the boxing arena is compliance with the procedural requirements as set out in section 64(1) of the LRA. Where one of the parties has not complied with the procedural requirements their action will be unlawful and this Court as referee will intervene. This is exactly what the Applicants in this case are asking the Court to do. The Applicant are arguing that the lock-out is illegal as the lock-out notice issued to them did not comply with section 64(1)(c) of the LRA.

[9] It appears from a reading of section 64(1)(c) of the LRA that the legal or procedural requirements for a legal lock-out and a strike are virtually identical. Firstly, the dispute must be referred to conciliation. Secondly, once conciliation has failed and the certificate of non-resolution has been issued (or after the lapse of the 30-day period), the employer must give

the referee. It does not intervene simply because one of the opponents is being hurt - that is the idea of the contest. The referee may intervene if one of them is struck a blow below the belt, but he would be astounded while the bout is in progress to receive a complaint that something had gone wrong with the weigh-in. Parties to an industrial contest take time and trouble to shape up for the fight. There are all kinds of things which they are expected to do before they are permitted to enter the ring. Some of these things may be done carelessly or maybe not at all; but if the opponent has not taken the point before he has entered the ring, I do not think that he should lightly be permitted to do so once the blows have started landing".

the trade union concerned (or the individual employees if there is not a trade union) 48 hours' notice of the intention to institute a lock-out. These procedures need not be followed where the lock-out is in response to an unprotected strike. A distinction is sometimes drawn between an offensive and a defensive lock-out. Although the Court in *Technikon SA v National Union of Tecknikon Employees of SA* (2001) 22 ILJ 427 (LAC) cautions against the use of this terminology, it is clear from this judgment that a lock-out may only be instituted with notice as contemplated by section 64(1)(c) of the LRA irrespective of the label such a lock-out is given.[3]

What are the requirements for the notice?

[10] Before turning to the specific requirements of a strike or lock-out notice, it must be stressed that the requirement of giving prior notice of a strike or a lock-out is not merely a perfunctory procedural step that an employer or a union should merely mechanically comply with in order to acquire the license to lock-out or to embark on a strike. It is patently clear from a long line of cases (and recently again confirmed by the Labour Appeal Court) that the strike notice has a very specific purpose and that it is in light of

[3] See *Technikon SA v National Union of Tecknikon Employees of SA* (2001) 22 ILJ 427 (LAC) where the Court stated the following: *"[30] In my judgment there is nothing confusing or ambiguous in the lock-out notice. Such confusion and ambiguity as there might be are not based on the notice but on the respondent's erroneous understanding of the legal position. To say the lock-out notice in terms of s 64(1)(c) is only applicable to an offensive lock-out is erroneous. Section 64(1) confers on an employer the recourse to a lock-out if certain requirements are met. It also confers on employees the right to strike if certain requirements are met. It makes no reference to an offensive lock-out nor does it make a reference to a defensive lock-out. The only situation in respect of which the Act contemplates that a lock-out may be instituted without the notice required by s 64(1)(c) is where s 64(3)(d) applies. In all other situations a notice in terms of s 64(1)(c) must be given before a lock-out can be instituted irrespective of the label such a lock-out is given."*

that purpose that every strike and lock-out notice must be considered. This is in line with the approach followed by this (and other Courts) in terms of which the effect, ambit and content of a legislative provision should be understood and interpreted bearing in mind the constitutional as well as the statutory context of such a provision. I do not intend for purposes of this brief judgment to give a detailed exposition of the constitutional and statutory framework against which provisions of the LRA should be interpreted. Suffice to point out that in interpreting a provision of the LRA, this Court should be mindful of the primary objects of the LRA as set out in section 1. This section states that the purpose of the LRA is "to advance economic development, social justice, labour peace and democratisation of the workplace". This the LRA seeks to achieve by fulfilling the primary objects of the LRA which are the following:

> *"(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;*
>
> *(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;*
>
> *(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can -*
>
> > *(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
> >
> > *(ii) formulate industrial policy; and*

(d) to promote -

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."

[11] It is further clear from section 3 of the LRA that this Court, in interpreting any provision of the LRA, must give effect to the primary objects of the LRA. Two of the objects listed here are of particular importance to this matter. The first is that the LRA seeks to promote collective bargaining and the second is that the LRA seeks to promote the effective resolution of labour disputes. It is against this background that the lock-out notice in the present case will be considered in order to decide whether or not it complied with the provisions of section 64(1)(c) of the LRA. Before turning to this point, it is necessary to refer to two passages from *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2009) 30 *ILJ* 1997 (LAC) which, in my view, succinctly summarises the approach that this Court must follow in interpreting a section of the LRA. The first is by Khampepe ADJP in the *Equity Aviation*-judgment (supra) where she sets out the framework against which sections of the LRA should be interpreted as follows:

"[154] The primary objects of the Act are: to give effect to and regulate fundamental rights; to give effect to International Labour

Organization obligations; to provide a framework for and to promote orderly collective bargaining; to promote employee participation in decision making at the workplace and to promote the effective resolution of labour disputes. The overriding purpose of the Act is to advance economic development, social justice, labour peace and the democratization of the workplace. It is trite that the right to strike is an extension of the bargaining process.

[155] Section 3 of the Act contains a further interpretive injunction. It provides that the Act must be interpreted to give effect to its primary objects (National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC)). ***There is a wealth of judicial authority in which the purpose of s 64(1)'s procedural requirements has been succinctly and authoritatively decided. These decisions clearly demonstrate that the procedural purpose of this section is to compel the parties to attempt to resolve the dispute through negotiations before resorting to industrial action***[4] *……. The academic writers, Helen Seady and Clive Thompson in 'Labour Relations Act 66 of 1995: Strikes and Lock-Outs' (Part AA of Thompson & Benjamin SA Labour Law vol 1) are also of the view that:*

[4] My emphasis.

'Conciliation is not intended as just another perfunctory step on the way to winning the licence for action. It is the process sponsored by the Act to promote the adjustment of competing interests and industrial peace."

[12] The second is by Davis JA where he states the following with reference to the interpretative approach followed by Zondo JP in the minority judgment in the *Equity Aviation*- judgment:

"[184] Zondo JP contends that in order to interpret the Act one must -

'always give [effect to] the primary objects of the LRA [and to always give an interpretation] that will also be in compliance with the Constitution and with the public international law obligations of the Republic.... Accordingly, before you settle on a particular interpretation of any provision of the LRA,.. [it] requires you to stand back and ask yourself the questions: Does this interpretation give affect to any one or more of the primary objects of the LRA? Is this interpretation in compliance with the Constitution? Is this interpretation in compliance with the public international law obligations of the Republic?' (See para 40.)

In my view, this approach needs some refinement. Interpretation must always begin with the words employed in the statute. Indeed the very purpose of the traditional rules of statutory interpretation

was to attempt to control the context of the words which were so employed by the legislature. The golden rule of interpretation, for example, attempted to restrict meaning to the 'ordinary meaning' of the words employed in the provision and authorized a departure under very strict circumstances. Further, this aim was pursued by restricting the sources of meaning, that is to restrict the range of resources which the interpreter could access so as to gain meaning to the context of the words so employed; that is, the long title, the preamble and the headings were regarded as permissible aids to construction but then only in the case of ambiguity. In this way, courts attempted to attain closure of the text by producing a result which reflected only one statutory message.

[185] With the advent of constitutional democracy, the responsibility of the statutory interpreter became more complex. A broader contextual approach was mandated. Context had to include core constitutional values, the historical background of the statute, its purpose mediated through the aims of the Constitution as well as the relevant social, political and economic context and, where necessary, international law. But this approach does not mean that the words of the statute can be ignored. The judicial interpreter commences with the text and then seeks to engage in a dialogue with various contextual pointers, both pro and anti, the initial conclusion at which she arrives."

[13] It is in light of this interpretative context that the strike and lock-out notice must be examined. I have already pointed out that the issuing of a strike and lock-out notice in which 48 hours' notice must be given to the other party is not merely a procedural step that must be mechanically adhered to. The Courts have, on various occasions interpreted what should be contained in the notice and what the purpose of the notice is. It is 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*'. (*Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2*)(1997) 18 ILJ 671 (LAC) at 676D-E).[5] See also *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2009) 30 *ILJ* 1997 (LAC) where the LAC gave a brief exposition of the historical background to the statutory requirement for a strike and lock-out notice. I do not intend to refer in detail to the court's exposition of this history. Suffice to point out that the LAC in this judgment again confirmed the purpose of a strike notice and that is that it gives an employer an opportunity to reflect on whether or not to accede to the demand and if it

[5] In Transportation Motor Spares v NUMSA & 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."*

decides not to do so to prepare for the strike. See in this regard *Equity Aviation*-supra at paragraph [104]:

> *"[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*[6] *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 so, how many and in which workplaces, in order to minimize the impact of the strike on his business."*

[14] The same principle also applies to the lock-out notice. Essentially it affords the union and employees an opportunity to reflect on the dispute and the

[6] In respect of whether or not the strike notice must inform the employer who will take part in the strike the court was split. Zondo JP was of the view that the strike notice must inform the employer for example that only members of the union will commence striking or those only employees of a particular branch or city or province will embark on strike notice (see in particular paragraph [105] of the judgment. Khampepe ADJP and Davis JA are of the view that an employer is not entitled to the identifies of the parties to the dispute (see paragraph [161]0.

option of acceding to the demands of the employer or to propose a counter offer. It also affords the strikers an opportunity to reflect on whether or not they, in the face of an impeding lock-out, wish to accept the risks associated with no-work-no-pay. In short, the mandatory notice period offers the union an opportunity to reflect on their preferred course of action in the boxing match. I will return to this point hereinbelow.

[15] In some decisions the Courts have decided that the strike notice must be fairly specific and must, for example, indicate the time of the commencement of the strike (see *Ceramic Industries Ltd t/a Betta Sanitary ware & Another v NCBAWU & Others* [1997] 6 BLLR 697 (LAC) at 702 and *Fidelity Guards Holdings (Pty) Ltd v PTWU & Others* [1997] 9 BLLR 1125 (LAC) at 1133 – 1134 (obiter); *County Fair Foods v Hotel Liquor Catering Commercial & Allied Workers Union & Others* [2006] 5 BLLR 478 at paragraph [44]). Although the strike notice must indicate when the strike is to commence, the employees are not obliged to commence with their strike at the time indicated in the notice (see *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & Others* [1999] 1 BLLR 66 (LC) at par 34 – 42). Where the strikers suspend their strike, (after the initial proper strike notice), the strikers may again commence with the strike at a later stage (see *Transportation Motor Spares v NUMSA & Others* [1999] 1 BLLR 78 (LC). In circumstances where strikers have given insufficient time to the employer in the first notice and then issue another, the time given in the two notices is taken

cumulatively. See *SA Clothing & Textile Workers Union v Stuttafords Department Stores Ltd* (1999) 20 *ILJ* 2692 (LC) and *Transportation Motor Spares v NUMSA* (1999) 20 ILJ 690 (LC). In both of these cases with reference to section 64(1)(c) of the Act which requires an employer to provide at least 48 hours' notice in writing of its intention to embark on a lock-out before having recourse to a lock-out, the Courts concluded that where there are two notices, the cumulative effect of the two notices must be taken into account. In both of these cases the Court accepted that ultimately the employer had given more than 48 hours' notice of the commencement of the lock-out and therefore the union and or employees had sufficient time to reflect on their position.

[16] What, however, stands out from all of these cases is the fact that it is the purpose of the strike or lock-out notice to give the employer or the union and employees an opportunity to reflect on the proposed action and their response thereto. The reason for allowing the parties this opportunity is obvious: Once a lock-out is instituted, the employer does not have to remunerate the locked-out employees. Likewise, once the employees embark on strike action because the employer does not wish to accede to their demands, the principle of no-work-no-pay will apply. The economical consequences of any decision taken during the 48 hour notice period are therefore important to both parties. The possibility of settling the dispute either by making a counter proposal which may eventually settle the dispute or acceding to a demand in order to avert the strike or even

abandoning the strike or lock-out, is of equal importance. It is therefore, in my view, clear that the legislature had intended to afford parties an opportunity to reflect on the consequences of the lock-out or strike notice. Section 64(1)(c) read in its proper context and read against at least two of the primary objects of the LRA which is to promote collective bargaining and to promote the effective resolution of labour disputes, must be interpreted to mean that the 48 hours notice serves as an opportunity to parties to reflect on the consequences of the strike or lock-out notice. Any other reading of this section will, in my view, undermine the primary objects of the LRA as set out in section 1 of the LRA.

[17] From the aforegoing it should thus be clear that the strike and lock-out notice, properly viewed in the legislative and constitutional framework within which it operates, can never be viewed as a mechanical step. Applied to the present set of facts I am of the view that it could therefore never have been the intention of the legislature to allow employers simply to pay employees two days' salary in lieu of the 48 hours' notice required for a lock-out notice in terms of section 64(1)(c) of the LRA.

[18] In light of the aforegoing I am of the view that the lock-out notice did not comply with the provisions of section 64(1)(c) of the LRA. The lock-out is therefore unlawful. There is therefore no reason why the Respondent should not be interdicted from continuing with the lock-out and pay the 2nd to 17th Applicants their remuneration that they would have received was it

not for the unlawful lock-out. I can also see no reason why costs should not follow the result.

[19] In the event the following order is made:

1. The lock-out instituted by the Respondent on 16 April 2009 constitutes an unlawful lock-out.
2. The Respondent is interdicted from continuing with the lock-out.
3. The Respondent is ordered to pay the 2nd to 17th Applicants their remuneration that they would have received was it not for the lock-out.
4. The Respondent is ordered to pay the costs.

AC BASSON, J

20 November 2009

Date of proceedings: **6 November 2009**

Date of judgment: **20 November 2009**

For the Applicants: **GF Kristen of Kirsten & Van Niekerk Attorneys.**

For the Respondents: **MA Verster of CEASAR Employers Organisation**