IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J2236/99

In the matter between:

CONSTRUCTION AND ALLIED WORKERS UNION

AND OTHERS Applicants

and

MODERN CONCRETE WORKS Respondent

JUDGMENT

MARCUS AJ:

[1] This is an urgent application for an order restraining the respondent from locking out some 19 workers represented by their union, the first applicant in this matter. The basis of the application is that the respondent has not complied with various requirements set out in section 64 of the Labour Relations Act 66 of 1995

("the Act").

[2] In the founding affidavit the following complaints are made:

(a) That the respondent has failed to make an application to the CCMA of its intention to lockout the workers in question.

(b) Subsequent to the above no certificate stating that the dispute remains unresolved was furnished.

(c) It is a requirement that the respondent give the applicant seven days notice of its intention to lockout the workers concerned.

[3] In argument before me Ms Ikaneng, who appears on behalf of the applicants, sought only to place reliance on the first of these grounds namely that the respondent has failed to refer the issue in dispute to the CCMA.

[4] The respondent's answer to this contention, and indeed its defence to the application as a whole, is encapsulated in paragraphs 7-9 of the answering affidavit in the following terms:

"7. On 26 May 1999 I received formal notification from first respondent of their intention to embark on industrial action ...

8. Notwithstanding the above, the employees informed me that they were embarking on a 'go slow' with statements being made to the effect that they would be embarking on a 'go slow' on Friday, 21 May 1999. It should be noted that

prior to any notification being received by the company, the employees had already embarked on a 'go slow'. At an earlier wage negotiation meeting a statement was made by the shop steward, James Bopapi, that unless employees were given an 18% wage increase they were going to close the company down.

9. As a result of the above I was left no alternative but to issue formal notification of my intention to lockout (hereto annexed

L3). This notification was faxed to the first applicant and placed on the company notice board in the presence of Mr Moses Venceslau. The second to further respondents tore down the notice from the notice board .."

[5] It is also appropriate that I refer to the notice of lockout which is dated 27 May 1999. It reads as follows:

"Notice of a Lockout

As a result of our meeting at the CCMA which failed to resolve the current dispute, we hereby give formal notification of our intention to lockout your members. You are further informed that we will make ourselves available for round table discussions in respect of the current dispute".

[6] The parties have been in dispute over what is described by the applicant as "wages and other substantive matters". These disputes have been referred to the CCMA. It appears from the reference by the Union to the CCMA that the Union is demanding an 18% wage increase, a bonus of four weeks and retrospective implementation of these demands to 1 March 1999. That dispute remains

unresolved.

[7] At issue for present purposes is the reason for the lockout. Mr Ledden - Ross who appears on behalf of the respondent, contends that the lockout is in consequence of the very issues which have been referred to the CCMA. I have difficulty with this contention. It appears from the relevant paragraphs of the respondent's affidavit that the lockout is in response to the go slow which has been embarked upon by the workers. I will revert to this matter in due course.

[8] An issue analogous to the present arose in Kgasago and Others v Meat Plus CC (1999) 20 ILJ 572 (LAC), the headnote of which accurately reflects the facts as follows:

"The trade union representing the appellants referred a dispute with the respondent employer to the CCMA for conciliation. The dispute concerned a demand for an increase in wages. The parties failed to settle the dispute and the union served a notice of its intention to call a strike in four days time. Before the notice expired, the employees engaged in an overtime ban. The employer instituted a lockout. It then withdrew the lockout and suspended its employees instead pending an investigation into the overtime ban. The employer then informed the union that the employees had been found guilty of refusing to work but that no disciplinary action would be taken if they returned to work. But that was on the day the workers commenced their strike, a complete cessation of work in terms of the notice. The employer responded by instituting another lockout in which it demanded that the employees accept its final wage offer and that

overtime be accepted as a condition of employment. The strike was subsequently called off and the employees tendered their services. The employer refused to accept their tender until they accepted the employer's demands. The trade union approached the Labour Court for a declarator that the lockout was unprotected and that they were entitled to be paid for the period that the employees tendered their services. The Labour Court found for the employer. On appeal the Labour Appeal Court found that the second lockout was in response to the complete cessation of work ÄÄ a protected strike. The employer's lockout had not been preceded by the requisite notice and had included a demand concerning overtime which had not been referred to the CCMA and conciliation in terms of section 64(1). The lockout was unprotected."

[9] The requirements for a protected lockout (and a protected strike) are set out in section 64 of the Act. Section 64(1) reads as follows:

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

(a) the issue in dispute has been referred to a council or to the commission as required by this 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 has elapsed since the referral was received by the council or the commission; and -

(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 ...

(c) in the case of the proposed lockout at least 48 hours notice of the commencement of the lockout in writing has been given to any trade union that is a party to the dispute, or if there is no 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 ..."

[10] Section 213 of the Act defines "issue in dispute" as follows:

"'Issue in dispute' in relation to a strike or lockout means the demand, the grievance or the dispute that forms the subject matter of the strike or lockout".

[11] The reason for the lockout is set out in the paragraphs quoted from the respondent's affidavit. It seems clear to me that the lockout is in response to the go slow. Mr Ledden - Ross, however, seeks to place particular emphasis on the last sentence of paragraph 8 and the first sentence of paragraph 9 of the answering affidavit. In essence he argues that I should read the relevant extracts from the affidavit as indicating that the lockout is in response to the statement made by the shop steward that unless the employees were given an 18% wage increase, they were going to close the company down. This is a narrow interpretation of the affidavit taken as a whole. It must be borne in mind that these are motion proceedings in which the affidavits comprise the pleadings and the evidence (See Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic

of South Africa and others 1999 (2) SA 279 (T) at 323G-325C). The interpretation urged upon me by Mr Ledden Ross is forced and ignores the structure of the relevant paragraphs read together.

[12] Ms Ikaneng also sought to argue that the notice of lockout itself was defective. I have already set out the terms of that notice. It may be observed that the notice of lockout simply refers in general terms to the "meeting at the CCMA which failed to resolve the current dispute" without giving any precise indication of which aspect of the dispute constitutes the reason for the lock out. This in itself militates somewhat against the interpretation urged upon me by Mr Ledden - Ross. Ms Ikaneng, however, says that the notice is defective for failing to specify when the lockout is intended to begin. In this regard there is again authority of analogical assistance in the case of Ceramic Industries Ltd t/a Betta Sanitaryware and Another v NCBAWU and Others (1997) 6 BLLR 697 (LAC). This case concerned inter alia the requirements of notice for purposes of a protected strike in terms of section 64(1)(b) of the Act. However, the provisions of the Act relating to the notice

requirements for a lockout are materially the same. The court summarised its conclusions at 702G-H as follows:

"The provisions of section 64(1)(b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose. That needs to be done within the constraints of the language

used in the section. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence".

These observations apply with equal force to the notice in the present matter. I should add that the Labour Appeal Court in this decision was influenced by the fact that the Constitution itself contains a guaranteed and constitutionally protected right to strike. There is no constitutionally protected right to lockout.

[13] In the circumstances I am of the view that the applicant has made out a case for the interdictory relief claimed. The applicants go further, however. They claim payment of wages for the period that they have been locked out. Ms Ikaneng in essence abandoned this relief on the basis that the founding affidavit contains no information whatsoever concerning the duration of the lockout or the wages allegedly lost by the applicants.

[14] In the circumstances I grant an order in the following terms:

1. Interdicting and restraining the respondent from locking out the second and further applicants.

2. Costs of this application.

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G J MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 7 JUNE 1999

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