LAC/CIV/A/01/2015

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:

NATIONAL UNION OF COMMERCE, CATERING AND ALLIED WORKERS **APPELLANT**

AND

LESOTHO SUN (PTY) LTD **RESPONDENT**

JUDGEMENT

CORAM	:	The Hon. Acting Justice K.L. Moahloli
ASSESSORS	:	Mr. R. Mothepu Mrs. M. Thakalekoala
Date of hearing	:	8th June 2015
Date of Judgement	:	26th June 2015

SUMMARY

ANNOTATIONS

Cases:

East Rand Gold & Uranium Co. Ltd V National Union of Mineworkers, (1989) 10 ILJ 683 (LAC)

Metro Bus (Pty)) Ltd v SAMWU

SACCAWU v Garden Route Chalets (Pty) Ltd, (1997) 3 BLLR 325 (CCMA)

SACCAWU V Shakoane

Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union, (2001) 22 ILJ 414 (LAC)

Technikon SA v National Union of Technikon Employees of SA, (2001) 22 ILJ 427 (LAC)

Roy Ntimane v Agrinet t/a Vetsak (Pty) Ltd

Statutes:

Labour Code Act No. 24 of 1992

Labour Code (Codes of Good Practice) Notice 2003 [GN No. 4 of 2003]

Moahloli AJ (the assessors concurring)

BACKGROUND

[1] On 24 December 2014 the National Union of Commerce, Catering and Allied Workers ("the Union" or "NUCCAW") lodged an urgent application with the Labour Court, for an order in the following terms:

> "(a) Directing that rules as to normal mode of service be dispensed with due to the urgency of this matter.

(b) Temporarily directing the Respondent to allow Applicant's Members who are locked-out to enter the workplace and perform their normal duties pending finalisation hereof.

(c) Directing Respondent to stop forcing or enticing applicant's members to sign any document in relation to the wages negotiation dispute.

(d) Directing Respondent to stop and or refrain from negotiating or consulting with the Applicant's members in relation to any matter that fall within the scope of NAP1 herein.

(e) Directing that Prayers (a), (b) and (c) operate with immediate effect as an interim Court order pending finalisation of this matter.

(f) Costs of this Application.

(g) Further and/or alternative relief."

[2] Lesotho Sun (Pty) Ltd ("the Respondent" or "the Company") opposed the application. On 11 February 2015 the Labour Court disposed of the matter in the following manner:-

"DETERMINATION

On the basis of the above analysis, the Court comes to the following conclusion:-

(i) That the lockout can subsist even if a strike has been called off. In the circumstances, respondent's lockout if found to be lawful;

(ii) Parties are urged to go back to the negotiating table with a view to resolving the current impasse on terms set out by the employer as envisaged by ***Clause 37 (3) of the Labour Code (Codes of Good Practice) Notice, 2003*** and do so with as much fairness as possible to both parties;

(iii) The application is therefore dismissed;

(iv) There is no order as to costs."

[3] The union then appealed to this Court, on the grounds that:

"(1) The Acting President of the Labour Court erred and or (sic) misdirected her-self (sic) by failing to decide whether or not Respondent was bargaining in bad faith.

(2) The Acting President erred and or (sic) misdirected her-self (sic) by holding that clause 1.7 of picketing rules is vague therefore it does not mean parties have agreed that strike and lock out "will run concurrently…" therefore the lock out in this case does not depend on the strike."

The union reserved the right to file further grounds of appeal upon the availability of the record, <u>but never did</u>. Instead it purported to raise two additional grounds of appeal for the first time in its heads of argument and oral submissions. This cannot be countenanced.

SURVEY AND ANALYSIS OF THE ARGUMENTS

Bargaining in bad faith:

[4] Under this head NUCCAW in essence contended that the Labour Court had erred by not addressing the union's prayers for (i) a declarator that after the negotiations had become deadlocked the company had negotiated in bad faith by going behind the union's back and requiring employees who wished to return to work to sign form "NAP8". And (ii) for an interdict of such conduct.

[5] For convenience the contents of form "NAP8" are set out in full below:

"

Lesotho Sun Hotel

[Address]

Date:

ACCEPTANCE CONSTITUTING A FULL AND FINAL SETTLEMENT OF THE DISPUTE

1. I, …….…… (EMPLOYEE NAME), WITH THE FOLLOWING EMPLOYEE NUMBER ……., FREELY AND VOLUNTRILY, AND WITHOUT ANY UNDUE INFLUENCE HEREBY DO NOT WANT TO TAKE PART IN THE STRIKE OR LOCK-OUT.

2. I FURTHER AGREE ON MY CRRENT TERMS AND CONDITIONS OF EMPLOYEMENT AND THAT I SHALL ACCEPT THE FINAL SETTLEMENT OF THE DISPUTE IN IT ENTIRETY.

3. I, WITH FULL KNOWLEDGE OF MY RIGHTS, HEREBY WAIVE SUCH RIGHTS TO CHALLENGE THE VAILIDITY OF THIS ACCEPTANCE IN ANY COURT OF LAW, INCLUDING THE DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION BASED ON, BUT NOT LIMITED TO, FAIRNESS, DELICT, CONTRACT, STATUTORY ENACTMENT OR OTHERWISE.

4. AFTER SIGNING THIS LETTER, SHOULD I BE SEEN PARTAKING IN THE INDUSTRIAL ACTION, THIS SHALL BE TREATED AS GROSS MISCONDUCT.

……. ……
SIGNATURE DATE

……
NAME IN PRINTED BLOCK LETTERS

AS WITNESS:

1. ……. ……..……..
SIGNATURE FULL NAMES IN BLOCK LETTERS ”

[6] The union argued that it was clear from paragraphs 15 and 16 of its Originating Application, read with prayers (c) and (d) thereof, that it was seeking the declarator and interdict referred to in paragraph [4] above. The said paragraphs and prayers read as follows:

> -15-
>
> “It is during this unlawful lock-out that Respondent started forcing Applicant’s members to sign forms herein attached if they wanted access to the workplace. Such form is marked ‘NAP8’.
>
> -16-
>
> I aver that the respondent’s conduct of going behind the Applicant’s members (sic) to entice them to sign agreement is contrary to negotiating in good faith and therefore unlawful.”
>
> “WHEREFORE an application will be made before this Honourable Court … for an order in the following terms:
>
> (a) …
>
> (b) …
>
> (c) Directing Respondent to stop forcing or enticing Applicant’s members to sign any document in relation to the wage negotiation dispute.

(d) Directing Respondent to stop and or (sic) refrain from negotiating or consulting with the Applicant's members in relating to any matter that fall within the scope of NAP1 herein."

The union argued that the Company's conduct is regarded as bad faith negotiation and prohibited by clause 27 (3) (b) (viii) of the Code of Good Practice: Collective Bargaining[1].

[7] In answer, the Company contended that the union never asked the Labour Court to declare that the Company was negotiating in bad faith. It merely asked for prayers (c) and (d). Therefore the union could not at appeal stage ask for a relief it did not pray for in its papers before the Labour Court.

[8] Secondly the Company argued that it never forced employees to sign "NAP8". It gave them "a choice to either accept or refuse or consult their union[2]."

[9] After considering the parties' submissions I am convinced that even though the learned Acting President referred tangentially to 'bargaining in bad faith' in her judgment, she did not make any substantive ruling on prayers (c) and (d) of Applicant's Originating Application. Further, that the issue of interdicting bad faith bargaining is not being raised for the first time.

[10] In order to determine whether "NAP8" constituted bad faith negotiation, I will examine it against best practices enunciated in the CGP, as well as the relevant case law.

[1] Found in the Labour Code (Codes of Good Practice) Notice 2003 ("the CGP")
[2] Page 89 -90 (para11-13) of the record.

Status of the CGP: Strikes and Lock-outs

This Code is intended to provide practical guidance on strikes and lock-outs. It should be followed and may be departed from only if there is good reason for doing so [clause 36 (2)]. It must be taken into account in any proceedings by conciliators, arbitrators and judges [clause 36 (1)].

[11] Clause 27 (3) (b) (viii) of the CGP provides that "bargaining in bad faith may be inferred from the following conduct: …. by-passing the trade union. For example by implementing decisions before negotiations have been exhausted or making offers directly to the employees before deadlock has been reached. An employer may make an offer that was rejected by the union in the negotiations directly to its employees but only after deadlock. The offer may not be more favourable than the employer's final offer in the negotiations." [my emphasis]. It is clear from the above that the employer is allowed to present the last offer it made before deadlock to the disputing employees, but only after an impasse has been reached.

[12] This best practice was applied in the case of **East Rand Gold & Uranium Co. Ltd V National Union of Mineworkers**, where the court held that where the parties have reached an impasse (i.e. deadlock or breakdown in negotiations) the employer is allowed to unilaterally implement the final offer it put to the union during the course of negotiations.[3] The employer may do so by addressing a written offer to all employees to pay them the latest wage offer, and benefits[4] If the employer's offer is accepted, "a binding agreement will came into operation and the offeror will, by his acceptance of the offer, waive his right to engage in industrial action aimed

[3] At page 698 J
[4] At page 699 B-C

at increasing or improving the wages or terms and conditions of employment."[5] The Court labelled these principles as "the rights and duties in fairness of an employer on reaching an impasse in wage negotiations"[6]

[13] In the present case can "NAP8" be regarded as the type of unilateral implementation of the Company's final offer condoned above? I have read this document several times but have failed to understand it as much, especially in view of point 2 thereof. Point 2 states that the signatory "further agree on [her] current terms and conditions of employment and that [she] shall accept the final settlement of the dispute in its entirety." What does this mean, as there is no final settlement that I am aware of? What exactly would the signatory be binding herself to? NAP8 seems to commit its signatories to a settlement whose terms are not clear on the face of the document. Is this good faith bargaining? It does not seem so to me. It is not the type of offer envisaged in paragraphs 11 and 12 above.

Lawfulness of the lock-out without a strike

[14] The union's second ground of appeal is essentially that the court *a quo* erred in refusing to accept that according to clause 1.7 of the Picketing Rules the parties agreed that the strike and lock-out must co-exist and run concurrently. Therefore when the union withdrew its notice of intention to strike, the Company's right to lock-out also fell away. The said clause 1.7 provides that "strike and lock-out the employees shall run concurrently as agreed by both parties."

[5] At page 699 E
[6] At page 698 C-D

[15] Jurisdiction

Before dealing with this ground of appeal I wish to briefly consider Respondent's jurisdictional objection that the court *a quo* did not have jurisdiction to interpret clause 1.7, as section 226 (2) (b) (ii) of the Labour Code provides that a dispute concerning the application or interpretation of a collective agreement shall be resolved by arbitration. I do not agree. The Labour Court may interpret provisions of collective agreements when determination of their meaning is incidental to disputes falling within its jurisdiction.[7] *In casu* the substantive dispute referred to the Labour Court was not the interpretation or application of the Picketing Rules. This was just incidental.

[16] NUCCAW contended that section 4 (a) of the Labour Code Act permitted the parties to vary the substitutive provisions of the Code relating to strikes and lockouts by agreement. Hence they had included clause 1.7 in their Picketing Rules. The union said that clause is not ambiguous or vague. It simply means that the parties have agreed that if there is no strike there will be no lock-out. Therefore this Court must find that the Company's lock-out was irregular and invalid because it contravened clause 1.7

[17] Section 4 (a) reads as follows:-

"4. Principles used in interpretation and administration of Code

The following principles shall be used in the interpretation and administration of the Code:-

[7] See Metro Bus (Pty)) Ltd v SAMWU

(a) the standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then become the minimum standards legally applicable to those workers for the duration of the agreement;

[18] In my judgment this section merely says that when interpreting the Labour Code it must be remembered that the employment standards contained in the Code are minimum standards which may be bettered by mutual consent. This is the position in most common law jurisdictions. And 'minimum employment standards' customarily refers to minimal working conditions such as weekly rest, ordinary hours of work and overtime, paid vacation, public holidays, education leave, sick leave [see Part VIII of the Labour Code], minimum age of employment, employment of women, children and young persons, maternity leave, night work etc. [see Part IX of the Labour Code]. It is wrong to read this provision a *carte blanche* for parties to opt out of the other substantive provisions of the Code or to vary the general scheme of the Code.

[19] Further, I do not think that an instrument such as Picketing Rules can be used to achieve an end which is beyond the purpose of such instrument. The purpose of picketing rules is to regulate picketing during strikes and lock-outs. They are intended to address matters listed in clause 44 (1) (a) – (f) of the Code of Good Practice: Picketing.

[20] I am not convinced that the purpose of clause 1.7 was to forbid recourse to a lock-out where there was no strike, as the union avers. In my opinion clause 1.7 merely recorded what the factual situation on the ground was on the date of the conclusion of these Rules. Namely, that the strike and the

lock-out were expected to run concurrently as both parties had given their requisite notices of intention to commence industrial action. It cannot be true that they did not anticipate one to run without the other because the two processes were in any case not scheduled to commence on the same day.

[21] Furthermore, clause 1.7 cannot be regarded as indicative of the parties' waiver of their right to strike or lock-out. It is trite law that for an action to be accepted as constituting waiver or abandonment of one's rights, it requires clear and unequivocal intention.[8]

[22] Lastly, I do not agree with Appellant's interpretation of clause 1.7 because of the general rule that a collective agreement cannot override statutory provisions unless the relevant statute expressly provide for this. Hence in **SACCAWU V Shakoane** (at para 15-16) Zondo JP, while agreeing that the Labour Relations Act of South Africa gives primacy to collective agreements in certain areas, held that in the absence of a provision to this effect "it was reasonable to infer that the legislature did not intended that provisions of collective agreements would prevail over those of the Act." Similarly in **SACCAWU v Garden Route Chalets** (at page 329) it was held that had the legislature intended collective agreements generally to override statutory rights, presumably it would have said so.

In the result I am of the view that Appellant's arguments on the effect and interpretation of clause 1.7 cannot be sustained.

<u>Is the lock-out irregular and unlawful?</u>

[8] Technikon SA v National Union of Technikon Employees of SA at 434 J [24]

[23] For our present purposes the Labour Code defines a lock-out as "an act of an employer done … in furtherance of a trade dispute, with intent to compel or induce employees to agree to terms of employment or comply with any demands made upon them by such … employer"[9]

[24] Before an employer can resort to a lock-out it must follow the procedure for settlement of disputes of interest set out in section 225 of the Code.

[25] Then such employer may institute a lock-out, which will only be lawful if the requirements of section 230 are met. Section 229 sets out similar requirements for a lawful strike. These procedural requirements are laid out very clearly and succinctly in clause 39 of the Code of Good Practice: Strikes and Lock-outs.

[26] Thus our Labour Code requires a party who wishes to institute a lawful strike or lock-out to go through stringent steps. And once these requirements have been complied with the Code protects the strike or lock-out and, generally speaking, protects the parties thereto against any judicial interference or claims. The policy is that the court should stay away from the collective bargaining arena and should not be available for assistance to any one of the parties who may seek the assistance of a court when it feels the pinch.[10]

[27] *In casu* an examination of the facts shows that the employer has followed the legal requirements for a valid lock-out to the letter. In the circumstances there is absolutely no legal justification for this Court to jump into the collective bargaining arena. Like the parties, we are bound

---

[9] Section 3 Terms defined

[10] Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union

by the rules of combat set out in the Labour Code and the Code of Good Practice: Strikes and Lock-outs.

[28] The union also tried to argue that the employer was precluded from instituting the lock-out because the union had withdrawn its notice to commence a strike before the employer began the lock-out, and the union's members had in fact never commenced striking. I do not find it necessary ascertain the true factual position. This argument does not assist the union because, as it was held in the leading case of **Technikon SA v National Union of Technikon Employees of SA**, "a lock-out may commence before, simultaneously with, or after, a strike has commenced."[11]

[29] The South African Labour Court came to a similar decision in the case of **Roy Ntimane v Agrinet t/a Vetsak (Pty) Ltd**. It held that "it is clear that the abandonment of the strike has no effect on the lock-out." [12][The rights acquired by the employer (e.g. the right to employ replacement labour) endure until the lock-out ceases]. These cases are applicable in this appeal.

[30] In the result, the appeal succeeds on the first ground, but fails on the second. However it would be invidious to make a cost order in view of the fact that the employees have been without earnings for a long period and the parties still have a long row to hoe together.

Order:

1. Respondent is found to have bargained in bad faith by presenting form NAP8 to its employees for signature.

[11] At page 437B

2. Respondent is consequently ordered to desist from any such conduct which may constitute bad faith bargaining.

3. The lock-out is found to be neither irregular not unlawful.

4. No order is made as to costs.

……
KL MOAHLOLI AJ
JUDGE OF THE LABOUR APPEAL COURT

For Appellant Adv. PA. 'Nono

For Respondent Adv. T Mphaka