THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 2290 / 19

In the matter between:

NATIONAL ASSOCIATION OF SOUTH AFRICAN

WORKERS obo MEMBERS **Applicant**

and

KINGS HIRE CC **Respondent**

Heard: **26 November 2019**

Delivered: **29 November 2019**

Summary: Application for interdict – principles considered – applicant failing to satisfy requirements of clear right – no case for relief made out – application dismissed

Urgency – principles considered – applicant failed to satisfy requirements for urgency – appropriate in this instance to dismiss application for want of urgency

Lock-out – purpose of lock out considered – underlying dispute between the parties concerning a 13th cheque remain unresolved – employer entitled to lock out employees until such dispute resolved – issue must be resolved by way of collective bargaining and not by intervention through the Court
Lock-out – section 64(1)(c) – purpose of notice provisions considered – unresolved dispute already reached impasse and failure to settle in the CCMA – strike notice already given – employer entitled to give lock out notice – proper lock out notice given

Lock-out – time limit in section 64(1)(c) considered – cumulative effect of notices considered – overall compliance with section 64(1)(c) found to exist

Costs – principles considered – no costs order justified

JUDGMENT

SNYMAN, AJ

Introduction

[1] The application brought by the applicant has some novelty to it, and it is a great pity it was not brought sooner, as the substantial delays that crept in as a result of the applicants doing nothing for far too long caused their case untold harm. I will deal with this issue in more detail later in this judgment. A further issue that has been brought to the forefront in this application is answering the question as to what extent this Court should become involved in an ongoing process of collective bargaining where the underlying issue in dispute remains unresolved.

[2] The proceedings before this Court is also not without some controversy. The application initially came before Whitcher J on 21 November 2019. In terms of the order recorded by the learned Judge on the Court file on 21 November 2019, and pursuant to which a typed order was also placed in the Court file, the learned Judge simply postponed the matter to 26 November 2019 to be heard my me. When the matter then came before me, I indicated to Mr Marweshe, representing the applicant, that he was first required to address me on urgency. He then indicated that Whitcher J had already ordered on 21 November 2019 that the matter be heard as one of urgency. Mr Crause, representing the respondent, did not share this view, stating no such decision had been made. I indicated to Mr Marweshe that I could only go on what is indicated on the Court file, and there was no trace of such an order being made by Whitcher J. I then indicated to Mr Marweshe that I still required him to address me on urgency, which I would still decide, and it was up to him to decide if he wanted to do so or not.

[3] Even though Mr Marweshe elected not to address me on urgency, I indicated to him that I would nonetheless consider the merits of the matter, and that he could then argue the matter on this basis, which he did. Fortunately, and the course the argument on the merits, the issue of urgency was also addressed, in that it had a direct impact on the merits of the case as well. In the end, and as far as I am concerned, the entire matter in all its aspects was fully ventilated.

[4] What the applicants were seeking in this application is final relief. Because of this, the applicants must satisfy three essential requirements, being: (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[1] The application is opposed by the respondent not only on the merits thereof, but also on the basis of a lack of urgency.

[5] I will now commence deciding this matter, starting with a summary of the proper factual matrix upon which this matter must be decided. For the sake of convenience, I will refer to the applicant union in this judgment as 'NASAW', and its applicant members as 'the employees'.

Relevant facts

[6] Fortunately, and in this case, most of the essential factual matrix is either undisputed, or common cause.

[7] This matter arose from a mutual interest dispute between NASAW and the employees on the one hand, and the respondent on the other, concerning the payment of a 13th cheque to the employees. The employees were all employed as general workers. The respondent was unwilling to agree to pay the employees a 13th cheque. When this dispute could not be resolved, NASAW referred a mutual interest dispute to the CCMA for conciliation, on 3 July 2019.

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20; Telkom (supra) at para 6; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) para 2; *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* (2013) 34 ILJ 3314 (LC) para 7.

[8] The dispute was unsuccessfully conciliated at the CCMA on 19 July 2019. The matter was then set down again in the CCMA for the purposes of establishing picketing rules for the strike to follow, on 30 July 2019. The parties could not agree on picketing rules, and on 5 August 2019, the CCMA then issued picketing rules in terms of section 69(5) of the Labour Relations Act (LRA).[2] The CCMA also issued a certificate of failure to settle as contemplated by section 64(1)(a) of the LRA, on 6 August 2019, which then opened the way for NASAW and the employees to embark upon protected strike action.

[9] NASAW met with the employees on 29 August 2019, and obtained their mandate to commence with strike action. On the same day, NASAW then gave the respondent notice as contemplated by section 64(1)(b) of the LRA, of commencement of strike action. The notice reflected that the strike was due to commence on 2 September 2019. The issue in dispute forming the subject matter of the strike concerned the payment of the 13th cheque to the employees.

[10] What the respondent next did was to approach the High Court under case number 65617 / 2019 and obtained an interim interdict against NASAW and its members on 30 August 2019, prohibiting unlawful interference with the respondent's business and intimidation of the respondent's personnel, and creating a perimeter of 500 metres around the respondent's premises. Why the respondent approached the High Court, and why the High Court even entertained the matter is unclear. Be that as it may, this interim order had nothing to with interdicting the proposed strike. The return date for the interim order was 20 September 2019.

[11] It would seem that this High Court Order prompted NASAW to suspend the proposed strike. After being served with the Order on 30 August 2019, NASAW sent a letter to the respondent on 31 August 2019, indicating that the intended strike would be '*placed in abeyance*' until the finalization of the High Court case. Presumably, what was meant by this, is pending the return date of 20 September 2019. There was no indication in the papers as to what happened on the return date.

[2] Act 66 of 1995 (as amended).

[12] What is common cause is that on 2 September 2019, being the day the strike was supposed to start, the employees were not allowed to report for work. The reason given by the respondent for this is that the employees had been locked out in response to the strike notice, as the underlying dispute still remained unresolved.

[13] Upon being informed by the employees of this lock-out implemented by the respondent, NASAW sent a letter to the respondent on 3 September 2019, indicating that because the employees would not be proceeding with the strike as a result of the High Court order, there was no 'necessity' to implement a lock-out.

[14] It is then that the respondent sent notice to NASAW regarding the implementation of a lock-out. The notice was sent to NASAW on 3 September 2019, clearly in response to the letter from NASAW on the same date, as mentioned above. In this lock-out notice, the respondent specifically refers to the unresolved underlying dispute, in respect of which the CCMA had issued a certificate of failure to settle, as being the basis for the lock-out. It was stated that this lock-out would commence on 5 September 2019.

[15] On 4 September 2019, NASAW answered to this lock-out notice received by it on 3 September 2019. It *inter alia* complained that the employees were locked out as from 2 September 2019, despite not commencing strike action. It also took issue with the fact that when the lock-out notice was given to it on 3 September 2019, which notice indicated the lock-out would commence on 5 September 2019, whilst the lock-out was already in effect. It was finally indicated that the employees would continue to report for duty, and it was requested that the respondent allow them to return to work.

[16] The respondent's representatives, Du Plessis Labour Law Practitioners, answered on 5 September 2019. They indicated that the lock-out was called to start on 5 September 2019 in 'direct response' to a dispute of mutual interest. It was indicated that the respondent remained willing to negotiate the dispute. There was no response from NASAW to this letter. Nothing happened after that, until the end of September 2019, with the employees remaining locked out.

[17] The next relevant event in the chronology took place on 30 September 2019, when the employees were not paid their salaries for the month of September. On 30 September 2019, the attorneys for NASAW at the time, Risenga Attorneys, wrote to the respondent's attorneys (there has been earlier correspondence between the sets of attorneys on an issue of organizational rights). In this letter, it was said that there was no legal basis for the lock-out, and it was demanded that the respondent immediately 'desist' from locking out the employees. It was also demanded that the salaries of the employees be paid and the lock-out be uplifted on or before 2 October 2019, or the Labour Court will be approached seeking urgent relief.

[18] Needless to say, the respondent did not comply with the demand. However no urgent application followed. In fact, nothing happened for the entire month of October, despite the lock-out remaining in place and the salaries remaining unpaid. The employees were also not paid their salaries for October 2019, as a result of the lock-out.

[19] Only on 18 November 2019, some three weeks later, the current urgent application by NASAW was then brought, on four days prior notice, with the matter being set down for 22 November 2019. There is no explanation for this further delay.

Urgency

[20] Urgent applications are governed by the provisions of Rule 8 of the Labour Court Rules. In *Jiba v Minister: Department of Justice and Constitutional Development and Others*[3] the Court applied Rule 8 as follows:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[3] (2010) 31 ILJ 112 (LC) at para 18.

[21] Another important consideration to be applied when deciding whether a matter is urgent, is the determination of whether an applicant would not be afforded substantial redress in due course, and the duty is on the applicant to provide proper reasons in support of such a case.[4] As succinctly described by the Court in *Maqubela v SA Graduates Development Association and Others*[5]:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. …'

[22] In the case of an applicant seeking final relief on an urgent basis, the Court must be even more circumspect when deciding whether or not urgency has been established.[6] In *Tshwaedi v Greater Louis Trichardt Transitional Council*[7] the Court said:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. …'

[23] The Court must also further consider the interests of the respondent party, and in particular, the prejudice the respondent may suffer if the matter is urgently disposed of. In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[8] the Court held as follows:

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[4] *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) at para 17; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6.

[5] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) at para 11.

[6] *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at para 28.

[7] [2000] 4 BLLR 469 (LC) at para 11.

[8] (2016) 37 ILJ 2840 (LC) at para 26. See also *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) SA 108 (C) at 113D-114C.

> 'But it is not just about the applicant. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.'

[24] Finally, urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[9] As the Court said in *Northam Platinum supra*[10]:

> '… the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. …'

[25] Applying all the above considerations to the application *in casu*, I am sorry to say that NASAW has dismally failed to establish that this matter is urgent. There are a number of reasons for this. First and foremost, not only was this application not brought at the earliest available opportunity, but NASAW has completely procrastinated where it came to the pursuit of the matter. As far back as 4 September 2019, NASAW complained that the lock-out was not lawful, for the same reasons forming the basis of the current application. When the respondent answered on 5 September 2019 that it disagreed, and would persist with the lock-out, NASAW did nothing. This was the appropriate time to have brought the application to Court, but it did not happen.

[26] Therefore, the lock-out remained in effect right up to the end of September 2019, without intervention being sought from this Court. What spurred NASAW into action was when the employees were not paid on 30 September 2019. However, even this action was severely lacking. On 30 September 2019, the attorneys for NASAW demanded that the lock-out be lifted and the salaries of the employees be paid, and gave a deadline of 2 October 2019 to comply, coupled with a specific threat that if this deadline is not complied with, an

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[9] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50.

[10] Id at para 26. See also *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 ILJ 1692 (LC) at para 18.

urgent application would follow. The deadline came and went, was not complied with, and yet again nothing happened. This is incompatible with any case of urgency.[11]

[27] For the entire month of October 2019, NASAW still did nothing to pursue the matter. There is no explanation presented for this failure. The employees were not paid at the end of October 2019 and even this was not sufficient to cause NASAW to approach this Court. Only approximately a further three weeks later, again with no explanation for this further delay, the current application is brought as one of urgency.

[28] Thus, in my view, whatever urgency existed dissipated by the end of September 2019 when the employees were not paid, the lock-out persisted, the attorneys for NASAW threatened urgent legal action, and nothing was done. By the end of October 2019 when the same pattern followed, the urgency that was already dead was then buried. This is simply nothing urgent about the current application.

[29] NASAW approached this matter on the basis of simply accepting this matter was urgent, because of its case that the lock-out was unlawful. In other words, the mere existence of an unlawful lock-out was urgency in itself. This approach is misguided and misconceived. Even if it may be so that the lock-out is unlawful, the requirements of urgency must still be satisfied. The delay in bringing this application must still be explained. The fact is that there was no change in the basis of the application between the beginning of September 2019 when the lock-out was implemented, and 18 November 2019, when this application was finally brought.[12] There is zero explanation for a delay of some two and half months, and the only action taken in this entire period is one letter on 30 September 2019.[13] NASAW only has itself to blame for these failures, and the predicament it has placed its members in as a result.

[30] I am also of the view that NASAW can obtain relief for the employees of its own accord, and in the ordinary course. First, and as will be discussed further below, all its needs to do to get the employees back at work is to abandon the

[11] See *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC) at para 30.
[12] Bumatech (*supra*) at para 28.
[13] Compare *Ntombela* (*supra*) at para 34.

demand for a 13th cheque. Next, and insofar as NASAW wishes to claim the unpaid salaries of the employees which was not paid as a result of the lock-out, it could have simply instituted a claim on the ordinary course based on breach of the employment contracts of the employees. Because the only basis for the non-payment of the employees is the lock-out, once it is shown that the lock-out is not lawful, the employees would be entitled to the payment of their salaries. That I consider to be substantial redress in due course.

[31] Considering also the interests of the respondent, and because the underlying issue in dispute is still unresolved, it has implemented a lock-out as part of the collective bargaining process to resolve this impasse, and this has persisted for more than two months. This surely must have conveyed to the respondent that the current process would not be challenged, and that the issue would be resolved in the ordinary course of the collective bargaining process which, described as simply as possible, means that he who folds first, loses. To interfere with this now, after so long, is unduly prejudicial to the respondent and its right to participate in the collective bargaining to the full extent allowed by the LRA.

[32] Therefore, the applicants have failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied. There has been an excessive delay without any explanation for it. The current alleged urgency is nothing else but a matter of self-created urgency. Exceptional circumstances justifying urgent intervention have not been shown to exist. For all these reasons as set out above, the application falls to be struck from the roll, or dismissed. The Court in *February v Envirochem CC and Another*[14] accepted that urgency was not established, but the Court nonetheless proceeded to dismiss the matter. For the reasons to follow, I believe that this is a similar situation where the matter must be finally disposed of, and dismissed, and not just struck from the roll.

<u>The merits</u>

[14] (2013) 34 ILJ 135 (LC) at para 17. See also *Bumatech (supra*) at para 33; *Bethape v Public Servants Association and Others* [2016] ZALCJHB 573 (9 September 2016) at para 53; *Ntombela* (*supra*) at para 37.

[33] The application is founded on the contention that the lock-out implemented by the respondent is unlawful. In essence, there are two reasons for this contention. The first is that NASAW, despite giving the strike notice as contemplated by section 64(1)(b), suspended the strike before it started, which meant a lock-out was not permitted as there was no strike. The second is that the respondent's lock-out notice in terms of section 64(1)(c) of 3 September 2019, implementing the lock-out as from 5 September 2019, was irregular, because the lock-out had already been effected on 2 September 2019.

[34] I will first deal with the issue whether the respondent was entitled to lock out the employees, even though the strike was, as NASAW said, held in '*abeyance*'. In answering this question, a number of factual considerations are critical. First, there clearly existed an issue in dispute between the parties, namely the payment of a 13th cheque to the employees, which the respondent was unwilling to agree to. Second, this issue in dispute was referred to the CCMA where it was unsuccessfully conciliated and a certificate of failure to settle was issued. Third, NASAW issued a notice of commencement of strike action to the respondent, which notice was never withdrawn. Fourth, the respondent issued its lock-out notice in response to this strike notice. And finally, the underlying issue in dispute was never resolved.

[35] In the context of the above core factual considerations, certain principles must be identified. In this regard, it is prudent to first have regard to the definition of a lockout in section 213 of the LRA, which reads:

> '… the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion'

[36] It is thus clear that a lock-out is firstly an exclusion of the employees from the workplace. But an exclusion to what end? In *Transport and Allied Workers Union of SA v Putco Ltd*[15] it was held as follows in this regard:

[15] (2016) 37 ILJ 1091 (CC) at para 32.

> 'The purpose of a lock-out in terms of s 213 is to compel employees whose trade union is party to certain negotiations to accede to an employer's demand. Its object is to end a stalemate reached as a result of an impasse in negotiations between employer and employee in respect of matters of 'mutual interest'. A resolution of a dispute can be reached only between adversaries. As a matter of logic, then, there must be a dispute between an employer and employees or their trade union before a lock-out is instituted. Accordingly, any exclusion of employees from an employer's workplace that is not preceded by a demand in respect of a disputed matter of mutual interest does not qualify as a lockout in terms of s 213 of the LRA.'

[37] It follows that there must thus be a demand by the employer which was not acceptable to the union and the employees.[16] It is however important to appreciate that the lock-out notice itself does not constitute the demand by the employer, but is simply a notification of the industrial action to be implemented by the employer as a result of a demand that already exists. This is evident from the following *dictum* in *Putco supra*:[17]

> 'The LRA clearly distinguishes between a notice and a demand and does not use the two interchangeably. The purpose of a lock-out notice is to inform a union and its members of an impending lock-out. In other words, recourse to a lawful lock-out must already be available. An employer is not entitled to resort to a lock-out if it has not yet made a demand to those employees who are to be excluded from the employer's workplaces.'

[38] The issue of what constitutes a demand in the context of a lock-out was further elaborated on by the Court in *United Transport and Allied Trade Union/SA Railways and Harbours Union and Others v Autopax Passenger Services (SOC) Ltd and Another*[18] as follows:

> 'In addressing this issue, the pertinent question to be answered is what, in the context of collective bargaining, constitutes a 'demand'. The starting point in this enquiry is the definitions section in the LRA, which defines a 'dispute' as 'a dispute includes an alleged dispute', and 'issue in dispute' as 'in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms

[16] *Putco* (*supra*) at para 34.
[17] Id at para 36.
[18] (2014) 35 *ILJ* 1425 (LC) at para 60. See also the authorities referred to in para 61 of the judgment.

> the subject matter of the strike or lock-out'. What is clear from these definitions is that to use the word 'demand' in the context of the sole subject-matter of a lock-out is not really correct. The definition provides for both a 'demand' and a 'dispute' as being susceptible to forming the subject-matter of a lock-out. The problem that arises in respect of this issue is that 'demand' and 'dispute' are often regarded as synonyms, when they are not.'

[39] It therefore follows that where a trade union tabled a demand relating to conditions of employment with an employer, and that dispute is referred to conciliation but remains unresolved, a lock-out may be implemented by an employer as part and parcel of the collective bargaining process to resolve the impasse, irrespective of whether a strike starts or not.[19] As said in *Putco supra*:[20]

> '… Collective bargaining therefore implies that each employer party and employee party has the right to exercise economic power against the other once the issue in dispute has been referred for conciliation, and only if that process fails in one of the manners described above.'

The following *dictum* from the judgment in *Autopax supra*[21] is also apposite:

> 'The right of trade unions and employees to strike and the right of employers to implement a lock-out are not an end in themselves but a means to an end and exist specifically in the context of the process of collective bargaining. That end is the resolution of the impasse which exists in the collective bargaining process at the time when these mechanisms are invoked.'

[40] It is therefore not required that the strike must actually start before a lock-out can be implemented. As said in *Technikon SA v National Union of Technikon Employees of SA*[22]:

> 'S 64 also does not say that once employees have given notice to strike or once they have begun with their strike before the employer can either give its

[19] *Putco* (*supra*) at para 45; *Autopax* (*supra*) at para 42; *Technikon SA v National Union of Technikon Employees of SA* (2001) 22 ILJ 427 (LAC) at par 16.
[20] Id at para 46.
[21] Id at para 40.
[22] (2001) 22 ILJ 427 (LAC) at par 29.

> notice to lock-out or can institute its lock-out, the employer can no longer exercise its recourse to lock-out under s64(1) even if all the requirements have been met. Equally, there is no provision to the effect that, if the employer has given the notice to lock-out first or has begun with its lock-out before the employees can begin with their strike or can give their notice to strike, the employees lose their right to strike. This, therefore, means that a lock-out may commence before, simultaneously with, or, after, a strike has commenced. It also means that a lock-out and a strike can run concurrently between the same parties. What this would mean in practice is that the strikers would be excluded from the premises of the employer.'

[41] Applying the facts *in casu* to the aforesaid legal principles, the issue in dispute concerning the 13th cheque tabled by NASAW, which the respondent was unwilling to agree to, and which was referred to conciliation but remained unresolved, constitutes a demand that would legitimately form the subject matter of the lock-out implemented by the respondent. The strike notice of NASAW, and the following lock-out notice by the respondent, are simply two sides of the same underlying dispute and part of the same collective bargaining process, aimed at finally resolving the issue in dispute of the 13th cheque. Their respective purposes are thus identical.[23] The argument that because NASAW decided to hold the strike in 'abeyance' after giving the strike notice, but before it actually started, it meant that the respondent could not pursue a lock-out, is thus without any substance.

[42] What remains is the notice requirement for the lawful lock-out. Once again, the strike notice provisions are virtually the same as those relating to lock outs. In this regard, section 64(1)(c) reads:

> 'Every employee has the right to strike and every employer has recourse to lock-out if — ...
>
> *(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 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.'

[23] *Autopax* (*supra*) at para 44.

[43] As to the requirements of the notice itself, the only express requirement in section 64(1)(c) itself is 48 hours' prior notice to the trade and/or the employees concerned. In *SA Transport and Allied Workers Union and Others v Moloto NO and Another*[24] it was held that the only certainty required to be reflected in a strike notice is when the strike will start. In my view, this equally applies to a lock-out notice. There is however the proviso that if there a trade union, the lock out notice only has to be given to the trade union and not to the employees.[25] As held in *Autopax supra*:[26]

> 'The simple issue is whether the basis of the above reasoning can equally apply to a lock-out implemented by an employer. I can see no reason why not. A lock-out fulfils the same purpose in and is part and parcel of the same process of collective bargaining. It is also clear from the passages quoted above that the court in *Moloto* accepted that the provisions relating to lock-outs should equally not be restrictively interpreted. The fact is that s 64(1)*(a)* as a point of departure applies to both strikes and lock-outs. It contemplates one issue in dispute and as such, one notice that applies to all parties that are affected by the issue in dispute. …'

[44] Also, the employer has to identify the issue in dispute in its lock-out notice with sufficient particularly so as to inform the other parties of what the issue in dispute and position of the employer is, so that such parties would know what they need to do to resolve the same and thus prevent being locked-out.[27]

[45] On the undisputed facts *in casu*, the respondent did give NASAW notice on 3 September 2019 that it would implement the lock-out effective 5 September 2019. This clearly complies with the requirement of 48 hours' prior notice of the lock out to NASAW. Also, the notice specifically identified the issue in dispute forming the subject matter of the lock-out as being the same dispute for which the certificate of failure to settle was issued. No further detail is required in the notice. In the course of this 48 hours' lockout notice period given to NASAW, it had the opportunity to reflect on its position and that of the

[24] (2012) 33 ILJ 2549 (CC) at para 86.
[25] *Moloto* (*supra*) at para 87.
[26] Id at para 46.
[27] *Autopax* (*supra*) at para 65.

employees, and decide whether or not to abandon their demand forming the subject matter of the unresolved issue in dispute, knowing that once the lock-out is implemented they would be excluded from the workplace and not be paid until the dispute is finally resolved. In *Nasecgwu and Others v Donco Investments (Pty) Ltd*[28] the Court held as follows:

> '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 economic 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 abandon 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 are to promote collective bargaining and to promote the effective resolution of labour disputes, must be interpreted to mean that the 48-hour notice serves as an opportunity to parties to reflect on the consequences of the strike or lock-out notice.'

[46] Because the underlying issue in dispute still remained unresolved, and with the respondent having implemented the lock-out, the respondent was entitled not to accept the employees' tender of services. It is insufficient for NASAW to simply suspend the strike, or hold it in abeyance, to secure the uplifting of the lock-out and the return of the employees to work. The reason for this is that for as long as the underlying issue in dispute remains unresolved, NASAW and

[28] (2010) 31 ILJ 977 (LC) at para 16. See also *National Union of Metalworkers of SA on behalf of Members v National Employers' Association of SA and Others (2)* (2015) 36 ILJ 753 (LC) at para 13.

the employees can at any time resume the strike. In *Transportation Motor Spares v National Union of Metalworkers of SA and Others*[29] the Court said:

> '… the employer is entitled at the stage of the proposed return to work on the part of the strikers to lock them out until the dispute over which they had gone out on strike has been resolved. It is therefore up to the employer to enquire from the strikers when they seek to return to work what the basis is for their return to work and to decide whether he will allow them to resume their duties or not and if he will, then on what terms they will be so allowed.'

[47] I was informed, even when this matter was argued in Court, that the underlying dispute had still not been resolved. It is only once this dispute is settled, or the demand for a 13th cheque abandoned by NASAW, that the lock-out is uplifted and the employees can demand their return to work. The employees are consequently not be entitled to be paid, until this happens.[30]

[48] It does not matter, for the purposes of deciding whether the lock-out was lawful, if the employees were already excluded from the premises as from 2 September 2019. At best for them, they would be entitled to claim payment of their salaries for the period between 2 and 5 September 2019. However, and after 5 September 2019, there was clearly a proper and lawful lock-out that had been implemented, and the employees are not entitled to payment for as long as this endures.

[49] In conclusion therefore, it is my view that NASAW had failed to make out a case that the lock-out implemented by the respondent as from 5 September 2019 was unlawful. I am satisfied that there existed an underlying issue in dispute between the parties that remained unresolved, and this issue in dispute had been referred to conciliation and a certificate of failure to settle was issued. The lock-out notice itself was issued in response to the strike notice, and itself complied with all the procedural requirements under section 64(1)(c).

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[29] (1999) 20 ILJ 690 (LC) at para 18. See also *National Union of Metalworkers of SA on behalf of Members v National Employers' Association of SA and Others (1)* (2015) 36 ILJ 743 (LC) at para 28; *Bumatech* (*supra*) at paras 9 – 10.

[30] *Autopax* (*supra*) at para 58; *S A Commercial Catering and Allied Workers Union and Others v Rea Sebetsa* (2000) 21 *ILJ* 1850 (LC) at para 20.

[50] It is now squarely in the hands of NASAW and the employees to have the lock-out uplifted. All they need do is to abandon their demand for a 13th cheque, which will resolve the underlying issue in dispute, and remove the cause for the lock-out. In such circumstances, the respondent would have to allow the employees to immediately return to work.

[51] For the aforesaid reasons, the applicants have failed to demonstrate a clear right to the relief sought. For this reason as well, the applicants' application must fail, and falls to be dismissed.

Costs

[52] This then only leaves the issue of costs. The parties have an ongoing relationship. I do not believe the applicants were unreasonable in pursing this matter. The application did raise some novel legal issues. In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[31] it was held that the rule that costs follow the result does not apply in employment disputes, and that a costs order should not be made unless fairness and equity dictates it. Therefore, and even though the applicants were not successful, I do not believe that a costs order would be appropriate. Exercising the wide discretion I have in terms of section 162(1) of the LRA, I believe that this is a case where fairness dictates that no order as to costs be made.

[53] In the premises, I make the following order:

Order

1. The applicants' application is dismissed.

2. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court of South Africa

[31] (2018) 39 ILJ 523 (CC) at para 24.

Appearances:

For the Applicants:	Mr Marweshe of Marweshe Attorneys
For the Respondent:	Advocate J Crouse
Instructed by:	Henk Klopper Attorneys