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Non-striking employees not to be locked out: limitations of the employer's right to lock out

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Transport and Allied Workers Union of South Africa v PUTCO Limited [2016] ZACC

On 8 March 2016, in the case of *Transport and Allied Workers Union of South Africa v PUTCO Limited [2016] ZACC 7*, the Constitutional Court pronounced that an employer may not impose an offensive lock-out in respect of members of a union who are not party to a bargaining council, in which a dispute has arisen and where other union members have embarked on a strike. The case dealt with the rights of an employer in terms of section 64(1) of the Labour Relations Act ("LRA"), which affords an employer the right to lock-out employees where there is a dispute of mutual interest between the parties. Generally, if the members of a union have not embarked on strike action and the employer elects to locks out its employees, this is termed an offensive lock-out. A lock-out in response to a strike which is being held in relation to an existing dispute is considered a defensive lock-out. Despite a number of decisions in lower courts, the right to lock out has now been comprehensively dealt with by the highest court in the land, and this judgement has settled two conflicting judgments handed down by the Labour Court and the Labour Appeal Court ("LAC") on the same matter.

BACKGROUND

The Transport and Allied Workers Union of South Africa ("TAWUSA") whose members were employed by PUTCO, appealed to the Constitutional Court, subsequent to a decision by the LAC that PUTCO was entitled to lock-out TAWUSA members. This was subsequent to an interdict that had been granted by the Labour Court in favour of TAWUSA, preventing PUTCO from persisting with a lock-out against employees who were members of TAWUSA. The dispute existed in relation to the employer wage proposals made at the bargaining council, to the trade unions members of the bargaining council. TAWUSA was not a member of the bargaining council. However, TAWUSA would become subject to the outcome of the industry wage negotiations in the bargaining council, by virtue of the extension of the collective agreement concluded at the bargaining council to non-parties.

Having rejected the PUTCO wage proposal, the South African Transport and Allied Workers Union ("SATAWU") and the Transport & Omnibus Workers Union ("TOWU"), declared their intention to engage in a strike. TAWUSA, on the other hand, indicated that it would not engage in any strike action. In response to the declaration by SATAWU and TOWU, PUTCO delivered a notice to the three trade unions, including TAWUSA, informing them of its intention to implement an offensive lock-out of all the employees in the bargaining unit. TAWUSA contended that PUTCO could not lock out its members as they did not intend on joining the strike and sought an interdict, which was granted by the Labour Court.

On appeal, the LAC reasoned that TAWUSA was a party to the dispute, even if not a member of the bargaining council, as it stood to benefit from the resolution of the dispute between PUTCO, SATAWU and TOWU. Further, it was held that TAWUSA had an interest in the negotiations as it was represented by the majority unions (SATAWU and TOWU) on the basis of the majoritarian principle. As such, it was held to be fair that PUTCO lock out TAWUSA members in order to have TAWUSA also exerting pressure on the striking unions to concede to PUTCO's demands.

CONSTITUTIONAL COURT DECISION

The Constitutional Court disagreed with the conclusion of the LAC and, in upholding TAWUSA's appeal, considered that if the purpose of a lock-out in terms of section 213 of the LRA is to compel employees to accept the employer's demands, then an employer must make a demand to employees before locking them out. Section 213 of the LRA provides a definition for a lockout, stating that it constitutes the exclusion by an employer of employees, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between the parties.

In this case, the PUTCO/TAWUSA recognition agreement required that negotiations in respect of wages and other conditions of employment be undertaken at the bargaining council; the Constitutional Court found that the consequence of this was that demands in respect of these issues could only be made at the bargaining council. Therefore, given that TAWUSA was not a member of the bargaining council, the Constitutional Court

reasoned that no demand had been made to it. Further, TAWUSA was not in a position to accede to the demands that PUTCO had made to the trade unions that were members of the bargaining council. Accordingly, the lock-out of TAWUSA fell outside the scope of section 213 of the LRA and constituted an unlawful exclusion of the TAWUSA members from PUTCO's workplaces.

The Constitutional Court also enquired into the lawfulness of the lock-out, finding that even if section 213 had been complied with in respect of the requirement for a demand, the lock-out would still be unlawful as PUTCO had failed to comply with section 64(1) of the LRA. Section 64(1) of the LRA requires that a lock-out by an employer must be in relation to an issue in dispute that has been referred for conciliation to either, a bargaining council or the Commission for Conciliation, Mediation and Arbitration ("CCMA") and which has not been resolved. The referral to conciliation is therefore a requirement that must be complied with before a lock-out can be implemented. Although conciliation had been embarked upon by PUTCO, this was in relation to SATAWU and TOWU, and the process had not involved TAWUSA. Accordingly, the Constitutional Court found that the LAC's decision that TAWUSA was a party to the negotiations was untenable as TAWUSA's interest in the dispute at the bargaining council amounted to a mere hope that a favourable collective agreement would be concluded – this did not make TAWUSA a party to the dispute.

The argument made by PUTCO that the Minister of Labour ("Minister") ordinarily extended collective agreements to non-parties in terms of section 32 of the LRA, and that accordingly, TAWUSA stood to benefit from the outcome of the negotiations around the collective agreement was dismissed on two grounds. Firstly, the Constitutional Court held that the Minister was only empowered to extend a collective agreement once it had been concluded. The collective agreement could only be concluded through the prescribed process, which included an attempt at conciliation and for which the purpose of the lock-out was to compel the trade union/s to accept the employer's demands. Secondly, the extension of the collective agreement to non-parties was not a foregone conclusion as any such extension would be subject to a request by the bargaining council after a voting process and various exemptions could also be applicable in terms of section 32(3) of the LRA. Consequently, TAWUSA could not have be considered a party to the dispute merely because there was a possibility that the collective agreement could be extended to it.

EFFECTS OF THE JUDGEMENT

The Constitutional Court's judgment appears to have placed a significant limitation on the employer's right to embark on an offensive lock-out. Employers will need to ensure that all trade unions and employees to whom it issues a lock-out notice, are indeed party to the mutual interest dispute. Where there has been no demand, there can be no dispute and no lock-out. Merely having an interest in the outcome of a process, does not equate to a dispute.

The findings of the Constitutional Court are definitive and will provide the framework for assessing the employer's right to lock-out employees going forward. The most immediate consequence being that unless the employer can and has extended its demand to its entire workforce, the employer may be precluded from locking out its entire workforce. In the circumstances where not all the employees are on strike, the employer will be forced to run a portion of its operations for the workforce that is tendering its services. This may not be commercially practical or possible for the employer which in turn could ultimately curtail any benefit which may be gained by a lock-out.

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