Employment Law

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Scab Labour - Yes or no?

On 18 April 2023, the Constitutional Court (CC) handed down a unanimous judgment in *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd* (CCT 105/22) [2023] ZACC 11 (Trenstar) relating to the use of replacement labour during a lock-out.

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The CC focused on the interpretation of the phrase "*in response to a strike*" in the context of the employer's limited right of utilising replacement labour during a lock-out, as contemplated by section 76(1)(b) of the Labour Relations Act 66 of 1995 (LRA).

Facts

In the matter leading up to the CC judgment, there was a wage dispute between Trenstar and the National Union of Metalworkers of South Africa (NUMSA) relating to NUMSA's demand for the payment of a once-off gratuity to employees. After conciliation failed, NUMSA gave Trenstar notice that its members would embark on a strike on 26 October 2020, and indicated that the strike would take the form of a total withdrawal of labour. The strike commenced on 26 October 2020 and continued for several weeks.

On 20 November 2020, NUMSA notified Trenstar that it was suspending the strike at close of business that day. However, NUMSA did not call off the strike, and the dispute between the parties remained in place.

On the same day, and shortly after receipt of this notification, Trenstar gave 48-hours' notice to NUMSA of its intention to lock-out its members with effect from 23 November 2020, with the view to bringing in replacement labour. Trenstar's view was that any lock-out in response to the strike would entitle it to bring in replacement labour, as per section 76(1)(b) of the LRA.

Law

In terms of section 76 of the LRA, an employer may not use replacement labour to continue or maintain production during a protected strike if the whole or part of the employer's service has been designated as a maintenance service, or if a lock-out is not in response to a strike.

Section 213 of the LRA defines "*strike*" and "*lock-out*", the pertinent sections of which are:

- "'*strike*' *means the partial or complete concerted refusal to work, or the retardation or obstruction of work …*"

Scab Labour - Yes or no? CONTINUED

- *"'lock-out' means the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand ..."*

Decision

NUMSA approached the Labour Court on an urgent basis to interdict Trenstar from using replacement labour during the lock-out. NUMSA did not challenge the lawfulness of the lock-out but alleged that it was not in response to a strike because, by the time the lock-out began, the strike action had ended. The lock-out was thus "*offensive*," and not in response to a strike.

In the court *a quo*, the Labour Court found in favour of Trenstar, as it could not accept that the mere suspension of a strike disqualified the use of replacement labour.

The Labour Court granted leave to appeal to the Labour Appeal Court, but that court dismissed the appeal on the basis that, because the strike and lock-out had both ended, the matter was moot.

The CC, however, disagreed with the Labour Court's judgment. Its decision was based on the principle that once employees tender their services, as is the case in a suspension of a strike, such conduct does not fall under the definition of a strike because there is no longer a withdrawal of labour.

To put it in the court's words: *"a demand unaccompanied by a concerted withdrawal of labour is not a 'strike'"*.

The court found further that a "*strike*" ends when there is no longer a concerted withdrawal of labour.

Flowing from this, the court therefore found that during the period of suspension, there was no strike as defined, only an unconditional right to strike. Thus, any lock-out implemented during this time would not be "*in response to a **strike**.*" (emphasis added).

Hence, the CC found that employers cannot bring in replacement labour in the context of a lock-out during a suspended strike.

Key takeaways

First, the court expressly did not make a final determination as to whether a union should give a fresh notice of a strike upon resuming a suspended strike. While the court left this question open, historic case law suggests that it is generally not a requirement to issue a new notice once a strike is resumed (in this regard, see *South African Transport and Allied Workers Union v Moloto N.O* [2012] ZACC 19).

Second, the court also did not deal with the scenario where a lock-out notice was given, for example, at the commencement of a strike, and in response to that strike, and therefore whether this entitled the employer to bring in replacement labour. However, it is likely that even under those circumstances, the employer would not be permitted to bring in replacement labour.

Third, it must be noted that replacement labour is often difficult for employers to utilise for the

Scab Labour - Yes or no? CONTINUED

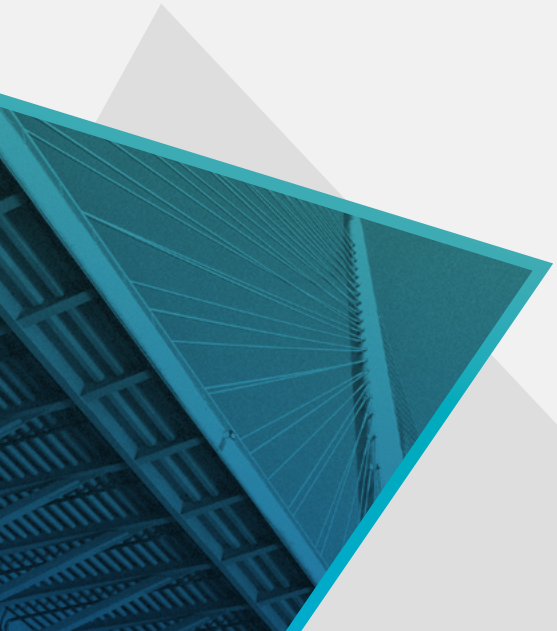
simple reason that long induction processes and safety are often at play, in particular in the mining industry. On top of that, the technical skills required in certain roles is generally an obstacle in bringing in replacement labour.

It is further noted that, given the current large scale of retrenchments, there may be a bigger pool of retrenchees readily available in the market, whose skills an employer can utilise on short notice. Learnerships are also often a useful tool in mitigating the risk and practical obstacles involved when making use of replacement labour.

An interesting scenario moving forward would be if unions consider implementing intermittent strike action, whereby they take their members out on strike for one or two days per week to allow their members an opportunity to earn some income during a strike. This strategy will pose a challenge to an employer trying to manage replacement labour, but it will equally pose a challenge to unions who may experience difficulty taking their members back out on strike once they have resumed employment.

Lastly, it is important to note that the prohibition of replacement labour, and the impact of this judgment, does not stop an employer from locking out its employees until their demands are waived – it simply prohibits the employer from utilising replacement labour in certain circumstances.

Hugo Pienaar, Asma Cachalia and Lara Sneddon



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