Employment Law

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SOUTH AFRICA

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EMPLOYMENT LAW ALERT

Lock-out legitimised: The legality of lock-outs in negotiating employee benefits

In the recent case of *South African Commercial Catering and Allied Workers Union (SACCAWU) obo Members v Phala N.O and Others* [2025] 2 BLLR 176 (LAC) the Labour Appeal Court (LAC) confirmed that a lock-out initiated by an employer during negotiations with employees over a new contract is lawful if it relates to disputes over benefits that have not yet been agreed upon or acquired. Such issues fall under the scope of mutual interest rather than rights disputes and may be resolved through industrial action.

Facts

A group of Woolworths employees were retrenched in 2012, prompting them to file an unfair retrenchment dispute in the Labour Court. The matter eventually made its way to the Constitutional Court, where the employees were found to have been unfairly retrenched and their reinstatement was ordered. The reinstatement was subject to negotiations for a new flexi-time employment contract, which had already been agreed to by other employees. The employees sought to maintain benefits from their previous full-time employment contracts, including their previous medical aid scheme and a retirement age extension from 60 to 63.

Woolworths, however, insisted that these benefits could not be reinstated under the new flexi-time contract, especially with the rest of the workforce already having moved to a different medical aid scheme.

Following at least two years of failed negotiations, in December 2020 Woolworths issued a lock-out notice under section 64(1) of the Labour Relations Act 66 of 1995 (LRA) arguing that the negotiation process had reached an impasse, necessitating a lock-out. This involved a refusal to allow the reinstated employees to return to work under the pre-existing full-time contract terms; instead insisting on the new terms under the flexi-time contract. This effectively halted the employees' return to work until an agreement could be reached.

Aggrieved by the lock-out, the employees referred an unfair labour practice dispute to the Commission of Conciliation Mediation and Arbitration (CCMA). Woolworths challenged the CCMA's jurisdiction to entertain the dispute in that it was not, in fact, an unfair labour practice dispute but was rather a mutual interest dispute. This argument was dismissed by the CCMA and taken on review by Woolworths, where the Labour Court reasoned that the dispute did not satisfy the definition of an unfair labour practice as set out in section 186(2)(a) of the LRA. In other words, the dispute did not concern the provision of benefits.

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The outcome was taken on appeal. The LAC was tasked with determining whether the employees' claims for reinstating benefits under their pre-existing full-time contracts constituted an unfair labour practice under section 186(2)(a) of the LRA. The employees argued that Woolworths' refusal to provide these benefits amounted to an unfair labour practice. Woolworths, on the other hand, contended that the dispute was one of mutual interest and should be resolved through collective bargaining and industrial action. The court also had to address whether the employer's lock-out notice was lawful, given the ongoing negotiations over the flexi-time contracts.

The LAC found the following:

- The dispute was one of mutual interest and not an unfair labour practice dispute as the employees' claims were not deemed acquired rights, but rather demands for inclusion in the flexi-time contracts, making them subject to ongoing negotiation.
- Woolworths' lock-out was lawful as it followed failed negotiations over the flexi-time contracts.

Key takeaways

The LAC's finding reaffirms an employer's right to negotiate new terms and conditions, especially when dealing with changes to employment contracts, and emphasises the importance of resolving such disputes through collective bargaining.

Employers are legally entitled to issue lock-out notices if negotiations fail and disputes over terms of employment – such as benefits – arise, especially if these disputes fall within the realm of mutual interest and not acquired rights. However, employers must engage in good faith negotiations with employees regarding changes to contracts and benefits. Employers should be proactive in addressing disputes before they escalate and in considering the practical implications of reinstating benefits, ensure that all decisions are made in good faith and within legal boundaries.

Phetheni Nkuna and Thato Makoaba

EMPLOYMENT LAW ALERT

Does the dismissal of an employee affect a restraint of trade?

In the recent decision of *Backsports (Pty) Ltd v Motlhanke and Another* [2025] ZALCJHB 68 (18 February 2025), the Labour Court stated that a restraint of trade could not be enforced by a former employer where the employee was dismissed for misconduct. In other words, a dismissal results in a former employer forfeiting the right to enforce the restraint.

The focus of this article is on this aspect of the judgment (and not the enquiry by the court on the other questions which need to be considered for the enforceability of a restraint of trade – which relate to the existence of the restraint of trade and its reasonableness).

Facts before the Labour Court

Backsports is a company that renders broadcasting, advertising, social media and production services. Until his dismissal for misconduct, Motlhanke had been employed by Backsports as a senior stream lead. Motlhanke's dismissal took place less than 10 months into his employment.

Backsports sought to enforce its restraint agreement against Motlhanke after it became aware of his involvement with another company, O Media Visuals.

The restraint of trade contained in the contract of employment, read as follows: "*You undertake to the company and to each of the group companies that whilst you are employed by the company and for a period of 12 months from the termination date, you will not, whether directly or indirectly...*".

Shortly after Motlhanke's dismissal, Backsports received information from various sources that he was acting in breach of his restraint agreement. This information included the alleged solicitation of Backsports' employees, Motlhanke allegedly approaching Backsports' clients and Motlhanke allegedly threatening to sabotage Backsports' business. Based on the information it received, Backsports instructed its attorneys to issue a "*warning letter*" to Motlhanke regarding the alleged breach of his restraint agreement. Motlhanke denied that he had breached his restraint agreement and contended that Backsports merely sought to bar him from using his skills and expertise, which he already possessed, to deny him the right to make a living, as well him from competing with it, even after it had dismissed him from its employment.

The Labour Court's decision

Ultimately, the Labour Court concluded that it would be unreasonable to restrain Motlhanke in circumstances where Backsports had failed to prove that he had access to confidential information and that he had used his trade connections to his advantage, or that of his new employer, thereby prejudicing Backsports. Despite this finding, the court went on to deal with the circumstances of Motlhanke's departure from Backsports and the effect of this on the enforceability of the restraint.

Does the dismissal of an employee affect a restraint of trade?

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The court held that because Motlhanke did not voluntarily leave his employment, it would "*be an injustice and unjustified limitation of an individual's right to enforce a restraint agreement against him when his ex-employer dismissed him*". The court went on to state that Backsports, having dismissed Motlhanke, expected him to "*starve*" by interdicting and restraining him from earning a living and from his occupation and trade.

Continuing with this line of thought, the court held that: "*[Motlhanke] was permanently employed for a period of less than 10 months at the time of dismissal. This is a short period and it would be unreasonable to restrain [him] for 12 months from the date of his dismissal. In my view, the fact that [Motlhanke] was dismissed has disentitled [Backsports] from enforcing the restraint agreement. In other words, [Backsports] waived its right to enforce the restraint when [Motlhanke] left because of dismissal.*"

Therefore, the Labour Court concluded that the dismissal of an employee deprives the former employer of the right to enforce a restraint agreement against that employee.

In addition, the court granted costs against Backsports because it held that the application to enforce the restraint agreement had not been brought in good faith and had less to do with Backsports' protectable proprietary interests than with making Motlhanke "*suffer*".

After the judgment, Backsports sought leave to appeal the Labour Court's decision; however, its application for leave to appeal was dismissed. The leave to appeal was not based on the passing comments of the court on the effect of the dismissal on the enforceability of the restraint of trade.

Conclusion

The question of the enforceability of a restraint where an employee has been dismissed is not new. A well-known case is the 1996 Appellate Division decision of *Reeves & Another v Marfield Insurance Brokers CC & Another* 1996 (3) SA 766 (A), where the court found that the phrase "*for any reason whatsoever*" (which is wording often found in a restraint of trade) is to be given a restricted meaning to exclude any wrongful termination of the contract of employment by the employer. The court in *Reeves* cited with approval earlier authority that identical or similar phrases are wide enough to include the unlawful termination of a contract of employment by an employer. The Labour Court in *Backsports* did not explain on what basis it was able to depart from *Reeves* nor did it explain what was distinguishable from *Reeves*.

This question will no doubt be raised again in disputed restraints as it now another avenue upon which employees may seek an escape from their restraint obligations.

Does the dismissal of an employee affect a restraint of trade?

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Key takeaways

Restraints of trade serve a useful and legitimate business purpose. Enforcement is always a matter of fact. Where the restraint wording is out of sync with its purpose, the restraint will not be enforced. Too often the wording of a restraint is clumsy and is the product of cut-and-paste solutions. The proper formulation of a restriction is critically important and should be properly linked to the business' purpose.

Most restraints provide that they operate after termination of employment, "*for any reason whatsoever*". A court would enforce this (Backsports aside), even if there was a wrongful termination by the employer, assuming a case exists for its enforceability on the other factors. On the other hand, where a restraint provision specifically excludes its operation on termination of employment due to an unfair dismissal, the restraint would not be enforceable, as that was the choice of the parties. This has been the prevailing law.

To leave no room for debate, employers should ensure that their agreements provide that a restraint of trade will remain in place regardless of the reason for the termination. This is likely going to be a lively issue for some time to come, unless it is resolved in the near future by other dissenting judgments or better still an appeal court.

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