

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J900/06

In the matter between:

AUTOPAX PASSENGERS SERVICES (PTY) LTD

Applicant

and

SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION

Respondent

JUDGMENT

FRANCIS J

1. This is an application to consider who is liable for the costs reserved on 5 June 2006 after the applicant had postponed its urgent application to declare a secondary strike as unprotected that the respondent had intended to embark upon with effect on 2 June 2006.
2. The application was opposed by the respondent.
3. It is common cause that the respondent gave the applicant notice of its intention to embark upon a secondary strike on 24 May 2006. The strike was scheduled to take place on 2 June 2006. On 1 June 2006 the applicant attempted to fax a letter to the respondent requesting, *inter alia*, on what specific grounds the respondent contended that the secondary strike action against the applicant was reasonable etc. The applicant's attorney was unable to fax a copy of the letter to the respondent. Upon making telephonic enquiries they were furnished with the email address of the respondent and a copy of the

letter dated 1 June 2006 was sent by email to the respondent on 1 June 2006.

4. The applicant stated in its founding affidavit that it did not receive a response to its email of 1 June 2006. It was only on the morning of 2 June 2006 that it established in the Press that the respondent had decided to temporarily suspend the secondary strike pending an assessment of its position in view of a number of applications brought against the respondent to declare the secondary strike as an unprotected strike. It stated that it believed that the respondent may continue with the secondary strike at any point in time as the respondent had not advised the applicant that it withdrew the notice of the proposed secondary strike.
5. The applicant proceeded with the application on 5 June 2006. The matter was adjourned *sine die* and costs were reserved. On 3 November 2006 the applicant without leave of this Court, filed a supplementary affidavit. The respondent filed an opposing affidavit on 1 October 2007.
6. The applicant has in its supplementary affidavit placed new facts before this Court that clearly shows that there was no basis for the applicant to have proceeded with the application on 5 June 2006. It is clear from the supplementary affidavit that the applicant knew on 2 June 2006 before it had served the application on the respondent that the respondent had withdrawn its secondary strike notice. It appears also that two telephonic conversations had taken place on 2 June 2006 between the respondent represented by Robert Mokgalabone and by HS Coetzee, the applicant's attorney that was not referred to in the founding affidavit. The applicant had been informed in the first telephonic

discussion that the respondent had decided to cancel any secondary strike action against the applicant. Coetzee informed Mokgalabone that the urgent application had been prepared and was set down for 5 June 2006 at 14h00. The respondent sent the applicant a facsimile dated 2 June 2006 that it had withdrawn the notice of the secondary strike and that it was not necessary for the applicant to proceed with the urgent application.

7. In the applicant's letter dated 2 June 2006 the applicant states in paragraph four that the respondent's notice of withdrawal of the notice of the secondary strike came after the application had been prepared and when it was about to be served upon their offices. It stated the following in paragraph six of its letter:

“The matter is set down for Monday 5 June 2006 at 14:00. In view of the contents of the your telefax of today our client cannot ask for interim relief. We are instructed to apply for the matter to be postponed to a date in September 2006 to enable the union to file papers if necessary and for the matter to be argued in respects of costs. We intend to ask court to set the matter down for 5 September 2006 for an argument about costs”.

8. It is unclear why all the facts contained in the supplementary affidavit were not disclosed in the applicant's founding affidavit. This is disturbing. It appears to have been an attempt to mislead the court that was going to hear the matter on 5 June 2006. The urgent application was initially going to be heard on 2 June 2006 at 14h00. This was confirmed in the applicant's email to the respondent. The secondary strike was due to commence on 2 June 2006. No reasons were given why the applicant did not proceed

with the application on 2 June 2006. No cogent reasons could be given why the applicant proceeded with the application after the secondary notice to strike was withdrawn. The danger that may have existed was no longer there and there was no need to proceed with the application. The notice of withdrawal of the strike notice was faxed to the applicant before the urgent application was served on the respondent. The withdrawal of the secondary strike was clearly unconditional.

9. There is no legal basis why the respondent is liable for the costs of the matter reserved on 5 June 2006. The applicant should have withdrawn the urgent application.
10. The application for costs stands to be dismissed.
11. Both parties sought costs against the other although the parties have an ongoing relationship. There is no reason why costs should not follow the result. Since the application that was postponed on 5 June 2006 was unopposed, there should be no order as to costs.
11. In the circumstances I make the following order:
 - 11.1 The application for costs is dismissed with costs.
 - 11.2 There is no order as to costs in respect of the application postponed on 5 June 2006.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : M LENNOX INSTRUCTED BY HOFMEYER
HERBSTEIN & GIHWALA INC

FOR THE RESPONDENT : ATTORNEY M M BALOYI

DATE OF HEARING : 31 JULY 2008

DATE OF JUDGMENT : 5 AUGUST 2008