

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. J 793-2010

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Respondent

M F NDLELA & 10,252 OTHERS

Second to 10235rd Respondents

JUDGMENT

LAGRANGE J:

Introduction

[1] The applicant municipality seeks the confirmation of a rule *nisi*, which was handed down by agreement with the respondent union on 15 April 2010. The rule read:

"1. A rule *nisi* is hereby and is herewith issued, calling upon the Respondents to show cause on 21 May 2010 at 10:00 hours, why a final order should not be granted in the following terms: -

1.1 interdicting and restraining:

1.1.1 the second and further respondents from marching to the

applicants premises.

1.1.2 of those of the respondents who are employed in an essential service from engaging in any form of strike action and instructing them to return to work

1.1.3 the second and further respondents from assaulting, threatening to assault or harm, intimidating other employees of the applicant, ratepayers or members of the public using the applicants premises.

1.1.4 the second and further respondents from damaging threatening to damage the applicant's premises, blockading the points of access to an egress from the applicant's premises, interfering with the access or access control to any of the applicants premises, interfering with proper working of any of the applicant's property or property under the applicant's control, including water valves, pumps, electricity switches.

1.1.5 in any way assaulting, intimidating or threatening private contractors employed by the applicant to discharge any function in behalf of the applicant or any member of the public or residents seeking to attend at any of the applicant offices.

1.2 The first respondent to instruct its members to desist from:

1.2.1 assaulting, threatening to assault or harm, intimidating other employees of the applicant, ratepayers or members of the public using the applicants premises.

1.2.2 damaging, threatening to damage the applicants premises, blockading the point of access to an egress from the applicants premises, interfering with the access or access control to any of the applicants premises, interfering with proper working of any other applicants property or property under the applicant's control, including water valves, pumps, electricity switches.

1.2.3 assaulting, intimidating or threatening private contractors employed by the applicant to discharge any function on behalf of the applicant or any member of the public or residents seeking to attend at any of the applicant's offices."

Background

- [2] At the time the interdict was brought there was a national dispute between SALGA and SAMWU over a number of workplace issues. The demands pursued by the union concerned demands over the alleged waste of public money used in the payment of lawyers to conduct disciplinary proceedings (under the slogan “no to lawyers – yes to justice”) and over the delays in the implementation of a national system of job evaluation and wage curves for determining remuneration in the municipal sector.
- [3] A separate application under case number J757/10 had been launched by SALGA to have the industrial action claimed by SAMWU pursuant to the dispute declared unlawful. By the time the matter was heard on the return day it was common cause that the strike was a protected one.
- [4] This application was intended to be quite distinct from the one sought by SALGA. The objects of the application as described by the municipality were threefold: to prevent the applicant's 10,235 members from gathering in any public place in contravention of the Regulation of Gatherings Act, 205 of 1993 ("the Gatherings Act"); to restrain essential service workers from engaging in any form of strike action, and to prevent the individual respondents from participating in various acts of misconduct committed in the course of strike action.
- [5] Essentially the thrust of the applicant’s attack was to prevent essential service workers from participating in it at all, and to try and ensure that the conduct of those who might lawfully be on strike did not go beyond the bounds of non-violent and non-destructive strike protest activity.

The conduct of strikers

- [6] On the account of events set out in the founding affidavit, which was the basis of which the interim interdict was granted, a significant number of essential service workers did participate in the strike unlawfully and the conduct of strikers went far beyond the bounds of acceptable strike protest activity.
- [7] In the Benoni area the applicant had hired a private security company to protect its buildings and assets according to the applicant and the rest striking members gathered

near the Civic Centre and began smashing vehicles belonging to the members of the public, throwing stones and other objects at the civic buildings. A fight broke out between strikers and the security company staff. Non-strikers were assaulted and were forcibly removed from their workstations. The strikers shut the offices by closing the role of doors and locking the doors with their own padlocks locking some employees in the building. Two of the first respondent's shop stewards in Benoni were alleged to have organised the marches through the streets of Benoni and to have instigated the mayhem.

- [8] Other strikers were alleged to have entered an electricity substation on 13 April and damaged circuit breakers thereby cutting off electricity to the whole of Benoni.
- [9] In the Germiston area strikers tampered with a valve disrupting water supply to the Civic Centre and Eastern Gauteng Services Council building. When another team of employees was deployed to reopen it they were accosted by strikers and told that if the Acting Executive Director of Infrastructure Services attempted to have the valve reopened they would murder him. The strikers closed the valve again. As in other areas, the applicant alleged that strikers travelled in large groups overturning the contents of rubbish bins in the street. Once again the applicant identified certain shop stewards of the first respondent as being directly involved in the unlawful activity.
- [10] On 12 April 2010, a march on the Springs Civic Centre resulted in damage to street furniture and the up-ending of rubbish bins onto the streets. The following day, water and electricity supplies to the Civic Centre were cut off. Two individuals were identified as March organisers and instigators of the misconduct. In Tembisa the electricity supply to the Civic offices was cut off on 12 April 2010 and a shop steward of the first respondent, Mr Z Nkisa, allegedly stabbed a shop steward of another union because he had refused to strike.
- [11] Work teams of the Water Services North-East District were unable to perform their functions, either because members were on strike or because of intimidation. A number of incidents occurred in which: sewage was diverted onto the street in Springs; a water meter was damaged in Nigel causing water to flow into the streets and reducing the flow of water to residential properties; circuit breakers were switched off in Benoni after locks on the circuit breakers were broken, and the electricity supply in Springs and

Alberton was disrupted, causing traffic lights not to operate, amongst other things.

- [12] As a result of the strike action the Water Services, South-Western District was unable to provide basic water and sewage services and pump stations were affected causing sewage to flow back into the yards of residents.
- [13] In the founding affidavit, a number of employees working in electricity distribution, water supply and distribution, emergency services and policing units who were engaged in unlawful strike action were identified. Likewise, a handful of persons allegedly involved in leading marches and instigating unlawful conduct were identified by name.
- [14] The founding affidavit was served on 15 April 2010, with a number of confirmatory affidavits from various managers attached. A further supplementary affidavit was filed concerning strike action by members of the Metropolitan Police Department, though no specific employees in this department were identified as participants in unlawful strike action. The answering affidavit was deposed to on 29 April 2010, nearly 2 weeks later.
- [15] In the main, the answering affidavit does not shed much clarity on the events described in the founding affidavit, other than to baldly deny that the events occurred. None of the individuals who are correctly identified in the founding affidavit do anything more than deny their involvement in the unlawful activities described in the founding affidavit. None of them present an alternative version of what they were actually doing on the days in question.
- [16] In the replying affidavit, the applicant provides additional detail about what it alleges took place after the interim order was granted on 15 April 2010 in order to make the point that the interdict did not have the effect of curbing the unlawful activities. The replying affidavit was filed a month later on 15 May 2010. Although condonation for the late submission of this affidavit was granted, the difficulty this affidavit presents is that new evidence is introduced in reply, which might better have been introduced by way of a supplementary affidavit filed before the respondents filed an answering affidavit. Be that as it may, at the time the replying affidavit was being prepared it was still necessary for the applicant to address the answering affidavit, which might have been unnecessary if the respondents had simply consented to a final rule at that stage, leaving perhaps only the question of costs unresolved.

[17] In relation to the above, it should perhaps be mentioned that the following municipal services have been designated as essential services in terms of notice number 1216 in government Gazette number 18276 of 12 September 1997:

- Municipal services in policing;
- Municipal health;
- Municipal security;
- the supply and distribution of water;
- the generation, transmission and distribution of power;
- firefighting;
- the payment of social pensions one month after they fall due;
- the maintenance and operation of waterborne sanitation services;
- the maintenance and operation of sewage purification works;
- the collection of refuse of an organic nature;
- the collection and disposal of refuse to disposal site, and
- the collection of refuse left uncollected for 14 days or longer, including domestic refuse on public roads and the spaces.

Analysis

[18] It is not unusual, though not frequent, that by the time the return day arrives the industrial action which gave rise to the initial interim order is over. By the time the matter came before this court on 21 May 2010 this was the case. The national strike in the course of which the unlawful conduct above took place was over. If it had not been, and had the conduct in question been continuing or there was a reasonable prospect it would resume on the evidence available, then the value of confirming the prohibitory order would have been obvious. It is less obvious when the conduct complained of has ended as well as the industrial action which gave rise to it.

[19] Sometimes, even though the conduct complained of has ended there will be a dispute over whether or not the industrial action itself was unlawful or not. In such instances it may still be important for the parties to have a final determination of this issue as this could, for example, impact on whether or not disciplinary action might validly be taken against those who participated in the action, or affect whether or not compensation for losses incurred might be obtained. In such instances, a final pronouncement by the

court on the lawfulness of the action will be important.

[20] In a case like this, it is less obvious. The applicant does not seek any declaratory relief, but rather seeks an interdict which amounts to a general injunction to workers not to engage in unlawful misconduct, which is not linked to any concurrent industrial action. Unlike typical injunctions of this nature, it is not time bound by the duration of the industrial action. In this case the context in which the actions occurred was a protected national strike. However the form of relief sought is of indefinite duration and in principle would be equally enforceable in industrial action occurring two years hence, without any need to give notice of the applicant's intention to obtain a court order on that occasion.

[21] If the interim order was confirmed, that would not make it any easier, in this case, for the applicant to take disciplinary steps against the alleged perpetrators of misconduct which it was able to identify. The applicant did not need an interim order before it could institute disciplinary measures against employees in essential services who had embarked on strike action or against lawfully striking employees who committed misconduct while participating in strike action.

[22] Mr Pauw SC, representing the applicant together with Mr Hulley, cited a number of cases in which the final orders relating to industrial action have been granted.

[23] In **Woolworths (Pty) Ltd v SACCAWU & Others (2006) 27 ILJ 1234 (LC)**, Revelas J said:

“[5] The Labour Court has always been, and probably always will be, sympathetic to employers in a situation where violence has erupted during a strike. It is against such behaviour that the court would readily grant interdicts. However, there should be some limitation to the granting of such interdicts in situations where the respondents are not properly identified. The court should always take into account what attempts have been made to identify persons against whom it issues such orders. It is not always possible to do so, and that per se would not be an impediment to obtain an interdict. That would depend on the facts of each case.

[6] The respondents have, through their counsel in court, stated that there would be no problem with giving an undertaking that there will be no intimidation

and incitement, however, that does not mean that I should make an order against them when one does not know which employees were involved in the actions complained of.

[7] *Even if just a few names were put forward, I would have been in a position to grant such an interdict, in the knowledge that the order is directed against at least some specific individuals who have been shown to behave in a way consistent with the allegations in the founding affidavit. To grant a 'blanket' court order, covering a whole range of the applicant's stores and employees without any attempt to identify persons, I believe would be wrong."*¹

[24] The applicant correctly points out that in this instance it did identify various individual participants in the unlawful conduct who were either striking in essential services or committing other unlawful conduct during the course of an otherwise lawful strike. If this application had been heard at the time that the strike was still in progress, I would have accepted that the applicant had laid a reasonable basis for concluding that there was a risk of ongoing harm at least until the strike was over and that it had sufficiently identified specific individuals to justify a final order against them.

[25] Another case cited by the applicant, in which a rule was confirmed on the return day, was the case of ***Libanon Gold Mining Co Ltd & others v National Union of Mine Workers & another* (1985) 6 ILJ 180 (W)**. In that matter, a *rule nisi* prohibiting a full-time organiser of the union from organising or instigating illegal strike action at the applicant company's goldmines was confirmed on the return day some months later. The court accepted that the applicant had established that a reasonable apprehension of injury existed as a result of the conduct of the second respondent, and confirmed the rule against the organiser on this basis.² However, the rule against the union was not confirmed because the factual basis for a similar finding in respect of the union had not been established. Although it is not entirely clear from the facts as set out in that judgement, it would seem that the court made the final order notwithstanding the absence of continuing apprehension of the prospect of an unlawful strike by the time the matter was argued on the return day. This certainly lends support to the applicant's

¹ At 1236

² at 185 D-G.

argument, as an example of an instance where a court has granted a final order despite the absence of an ongoing threat of harm. It must also be said however that it does not appear the court was asked to consider the purpose of granting such an order several months after what appears to have been a strike planned for one day.

- [26] In ***Castel NO v Metal & Allied Workers Union 1987 (4) SA 795 (A)***, a case also cited by the applicant, the Appellate Division, as it then was, upheld an appeal against a decision of the Durban Local Division of the High Court that court had set aside a decision of a magistrate to refuse a union commission to hold its annual general meeting at an open-air venue. Under the provisions of a notice issued under section 46 (3) of the Internal Security act 74 of 1982, all open-air meetings were prohibited unless expressly authorised by the Minister of police or the relevant magistrate. In that case, the court *a quo* also refused leave to appeal against its decision on the basis that the matter had become totally academic because the meeting had already been held. Hefer JA, writing the judgment of the appeal court strongly criticised this approach:

“Before I turn to the appeal itself I wish to deal briefly with the refusal of the application for leave to appeal by the Court a quo. The learned Judge refused leave to appeal for no other reason than that the matter had become 'totally academic, the meeting having been held'. This approach is patently wrong. The fact that the meeting had already been held and that the effect of the order could accordingly no longer be undone did not bring about that the matter had become academic.

Pronouncements to the effect that a Court of appeal will not enquire into matters which are of intellectual or academic interest only (cf African Guarantee and Indemnity Co Ltd v Van Schalkwyk and Others 1956 (1) SA 326 (A) at 329) are not to be misconstrued. As appears from the judgment of this Court in J Lendlease Finance (Pty) Ltd v Corporation De Mercadeo Agricola and Others 1976 (4) SA 464 (A) at 486H, they all deal with the situation where the issue presented for decision to the Court of first instance was at that stage of abstract or intellectual interest only'. When the urgent application was presented to the Court a quo in the instant case there was 'a very real, live issue' (as Corbett JA fittingly described it in the Lendlease case) and what happened subsequently was of no importance. Leave to appeal ought not to have been refused merely because the meeting had already been held by the time that the application for leave was heard.”³

- [27] The applicant seems to suggest that since it was a live issue in this case at the time the interim interdict was granted whether or not the conduct of the respondents should be prohibited, by parity of reasoning, on the return day this court should be as willing to

³ At 804H-805C

confirm the order as the appeal court was in *Castel* to set aside the judgement of the court *a quo* in that instance. However, in the *Castel* matter, the live issue was whether or not the magistrate had lawfully refused permission to hold the meeting or not. In this instance the live issue at the time concerned whether or not at the time the applicant was entitled to the prohibitory relief which it sought. But if the rule is confirmed in this instance it is not merely reaffirming whether or not the applicant was indeed entitled to their relief at the time when it was a live issue: it also will have the prospective effect of imposing a court order barring such conduct on all future occasions when it cannot be said on any reasonable basis that such possible future events were live issues at that time the matter was argued on the return day. In the case just cited, the effect of the court order dismissing the application to set aside the magistrate decision had no prospective effect, whatever the significance of its declaratory importance may have been.

- [28] In the case of ***Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others (1999) 20 ILJ 392 (LC)***, the court was asked to confirm an interim order, amongst other things restraining unlawful conduct by striking employees for an indefinite period. Brassey, AJ held:

“The fourth prayer I consider improper is an open-ended one, that is, one that binds the respondents for a period whose duration is indefinite and potentially unlimited. As I have said, an interdict can be granted only to restrain misconduct that is likely to occur in the future. The period during which this is likely to happen is a question of fact, but it will rarely, if ever, be indefinite. It will normally last for no longer than the motive for wrongdoing remains alive - typically, within this context, the duration of the strike plus the time it thereafter takes for life to return to normal. The unlimited operation of a sword of Damocles, to which I referred above, is more than simply undesirable, it is legally wrong.”⁴

- [29] In the result, the court in that case confirmed the rule, but limited it to a period for one month after the strike. In that case it appears that the strike had not ended when the final order was granted.

- [30] The learned author, Prest C B, SC, writes also:

“The purpose of litigation is to arrive at an effective judgment or order a court is not wont to give an order whereby no particular end is achieved. Where an applicant has

⁴ At 396H-J

been granted a rule nisi , and all things have been done which the rule required to be done and there seems to be little point in making the rule absolute, the more obvious order is for the rule to be discharged.”⁵

[31] I have similar concerns to those voiced in the *Polyoak* decision about the effect of the relief sought in this matter, and for that reason I decline to confirm the order. I must emphasise however, that had the strike action been unresolved by the return day, I would not have hesitated to confirm the rule for a reasonable duration.

Costs

[32] The applicant contends that the respondents opposition to the relief was unreasonable in the extreme. As applicants counsel put it in their heads of argument, “*(i)n so far as the essential service employees are concerned there is simply no defence...The unlawful conduct by other members , and the vague nature with which these allegations are dealt with in the answering affidavit, shows a cynical disregard for the law.*”

[33] I accept that by the time this matter came before me, the strike was over, but it is apparent that the conduct of strikers was still a live issue at the time the answering affidavit was filed and at least during the time the applicant was preparing its replying affidavit. By the time the matter came before me, the situation might have changed. In the circumstances even though the applicant has not succeeded in the final relief it sought, I believe it would be appropriate that it should not be mulcted in costs for the unnecessary effort that had to be expended in preparing its replying affidavit. There is also no reason why it should not recover its costs associated with the interim order.

Order

[34] In the light of the above, an order is made in the following terms:

[34.1] the rule *nisi* issued on 15 April 2010 is discharged;

[34.2] the first respondent must pay the applicant’s costs of applying for the interim relief awarded on 15 April 2010, and the costs of preparing its replying affidavit, including the costs of two counsel.

⁵ *The Law & Practice of Interdicts*, Juta, 1996, at p 333

[34.3] the applicant must pay the first respondent's costs of preparation and argument for the hearing on the return day.



**ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT**

Date of hearing : 21 May 2010

Date of judgment: 18 February 2011

Appearances:

For the Applicant: P Pauw, SC assisted by G Hulley instructed by Du Plessis, De Heus & Van Wyk

For the Respondents: W R Mokhare instructed by M R Phala Attorneys