



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J2836/2012

In the matter between:

BAKKAVOR SOUTH AFRICA (PTY) LTD

t/a SPRING VALLEY FOODS

Applicant

and

LABOUR EQUITY GENERAL WORKERS

UNION OF SOUTH AFRICA (LEWUSA)

First Respondent

THE EMPLOYEES LISTED IN ANNEXURE "A"

Second to Further Respondents

Heard: 23 November 2012

Delivered: 14 May 2013

Summary: Issue whether applicant's application for a punitive costs order against the respondents should be granted pursuant to this court issuing an interim order interdicting the respondents from committing acts of violence, intimidation and damage to property.

Protected strike, the union had given the employer the requisite 48 hours section 64(1)(a) statutory notice. Before the strike commenced the employer gave the

union a copy of the proposed picketing rules and requested the union to agree to them. But a representative of the union acknowledged receipt thereof as these were subject to further negotiations between the parties before there could be final agreement between the parties.

On the first, fourth, fifth and sixth day before and after interim order obtained and served on respondents, there were serious incidents of violence, threats of violence, serious damage to property by the picketing respondents – on buses transporting applicant's employees, employees of a temporary employment agency, vehicle belonging to applicant's engineer. The road leading to applicant's factory blocked by respondents using burning tyres, concrete drain pipes, overturned temporary toilets, a burning telephone pole put across the road. Police pelted with stones, forced to fire off a few rounds of rubber bullets.

Court cannot overlook serious acts of violence because the strike has become settled, the picketing rules agreed, costs order would deter poor employees from approaching the court. The applicant was unjustly compelled to launch the urgent application due to the conduct of the respondents. A punitive cost order granted to mark the court's disapproval.

JUDGMENT

KUMALO, AJ

Introduction

- [1] This is the return date of the rule *nisi* issued by Boqwana AJ on the 23 October 2012. On the return date, 23 November 2012, the rule *nisi* was discharged and the applicant sought an order for costs against the respondents.
- [2] The terms of the rule *nisi* were as follows:

'1 The terms of this order shall operate with immediate effect as interim order pending the return date on 23 November 2012, by agreement that:

- 1.1 The Second to Further Respondents are interdicted from participating in any unlawful conduct at the Applicant's premises pending the outcome of a referral by the applicant in terms of which the Commission for Conciliation, Mediation and Arbitration ("the CCMA") is required to establish picketing rules in terms of section 69(5) of the LRA
- 1.2 Interdicting and restraining the Second to Further Respondents from in any way interfering with, or obstructing, the normal operation of the applicant, including, but not limited to access and egress to the applicant's premises and/or interfering with any other aspect of the applicant's business at Jordan Valley Bapsfontein.
- 1.3 Restraining the Second to Further Respondents from intimidating, threatening or interfering with any employee of the Applicant, including any employee of a temporary employment service contracted by the applicant, who wishes to tender his services.
- 1.4 Restraining the Second to Further Respondents from intimidating, threatening or interfering with any supplier of the Applicant who wishes to comply with its contractual obligations to the Applicant.
- 1.5 Directing that the First Respondent ensures that the Second to Further Respondents comply with the picketing agreement "NW2" to the founding affidavit, pending the outcome of the referral by the Applicant in terms of which the Commission for Conciliation, Mediation and Arbitration "the CCMA") is required to establish picketing rules in terms of section 69(5) of the LRA.
- 1.6 The Second to Further Respondents are to picket only in the demarcated area, as marked "X".

- 1.7 The South African Police Services is to give effect to the terms of this order.
- 1.8 The service of this order is to be effected by the person nominated by the Applicant as follows:
- 1.8.1 Upon the first respondent's Head Office at 57 Aphthil Avenue, Kitchener Building, 1st Floor, 10b, Benoni, via facisimile;
- 1.8.2 Upon the Second to Further Respondents by the terms being read by a person nominated by the Applicant to so many of them as are present at the premises at the time and displaying a copy of the order in a conspicuous position at the entrance to the applicant's premises, provided that if any of the Second to Further Respondents request a copy of the order, the applicant shall make such copy available to him or her. The shop stewards are to read the order to the Second to Further Respondents.
- 1.9 The costs of this application are reserved for the return day.'

Background

- [2] The business of the applicant is located in rural farmland in Bapsfontein, Gauteng Province. On its premises, the applicant has facilities to receive, prepare, package and distribute the pre-packaged fruit salad to Woolworths and Marks and Spencer in the UK.
- [3] The approach road to the applicant's premises is a gravel/sand road which is off a tarred regional road. The entrance to the premises is through one main entrance controlled by a boom gate, operated by applicant's personnel. The area around the applicant's premises is rural farmland on which are private vegetable farms.

Collective bargaining relationship

- [4] The Food and Allied Workers Union ('FAWU') had organised and represented the employees of the applicant for a number of years. A Recognition Agreement had been concluded between the applicant and FAWU in about 2001. In addition to the conclusion of the Recognition Agreement, an Agency Shop Agreement was also concluded in favour of FAWU.
- [5] However, around May 2010, the applicant received correspondence from the Labour Equity General Workers Union of South Africa ("LEWUSA"), a Union registered in accordance with the LRA, 66 of 1995, with its principal place of business at 57 Aphil Avenue, Kitchener Building, 1st Floor, Room 10b, Benoni.
- [6] LEWUSA indicated that it sought to exercise certain organisational rights within the workplace. No verification process had been conducted at that time. That only began on or about September 2010.
- [7] Pursuant to the verification process, it was established that FAWU had lost its majority status, and, subsequent thereto, the Agency Shop and Recognition Agreements were cancelled.
- [8] On 4 April 2011, a Recognition Agreement was concluded with LEWUSA. The current dispute revolves around wage negotiations.
- [9] The Second to Further Respondents are employees of the applicant and members of LEWUSA. A list of the individual members is found in annexure "A".

Material background facts pertinent to the urgent interdict application

- [10] It is common cause between the parties that wage negotiations had commenced at the beginning of October and collapsed on the 15 October 2012 as the applicant was unable to agree to the wage demands of the respondents.

- [11] On the 16 October 2012, the Union gave the applicant the 48 hours section 64(1)(b) statutory notice in terms of the LRA of its intention to embark on strike action from 17h00 on Thursday 18 October 2012.
- [12] On the same date, ie 16 October, the applicant/employer handed to Mr Joshua Mokoena a copy of the proposed picketing rules and requested the first respondent to agree thereto as contained in the agreement. Mr Mokoena only acknowledged receipt thereof as these were, he correctly contends, subject to negotiations between the parties before there could be final agreement.
- [13] So when the strike began, on Thursday 18 October 2012, it was a protected strike in terms of section 67(1) of the LRA.
- [14] The applicant, in his founding affidavit, enumerates certain incidents of violence, threats of violence and intimidation directed at non-striking employees, employees of a temporary employment service, damage to property and objects like rocks, telephone poles, portable toilets. These incidents were captured on closed circuit video camera and also on hand held video camera. The footage and photographs developed were annexures to the founding affidavit.
- [15] On Friday 19 October 2012, at about 05h20, the applicant's Human Resources Manager, Ms Melanie Parsons, was requested by Juan Herholdt, the Engineering Manager of the applicant, to contact the local police station at Welbekend, as the individual respondents had placed logs and branches across the road prohibiting access to the applicant's premises.
- [16] At about 05h30, Parsons was informed by the labour broker that their taxis had been prohibited from approaching the premises for the purpose of bringing replacement labour on site.
- [17] At about 06h00, a bus with replacement workers arrived on the neighbouring farm's road to bring replacement labour and was attacked by the individual respondents. The applicant's security company, Juan Herholdt and Parsons managed to arrange to arrange a safe passage of the replacement onto the

applicant's premises. At this time, there were no marshals or shop stewards present. When Parsons contacted Lucky Suzuki of the first respondent and requested his assistance, he failed to provide any support.

- [18] At about 07h00, members of the South African Police Services arrived at the applicant's premises and a number of the respondents threw stones at them.
- [19] After the police arrived the applicant's general manager Black was escorted onto the premises. In response, thereto the respondents lit a tyre and barricaded the entrance with a concrete drain pipe with the result that about 150 staff members were unable to gain access to the site until the public order police arrived and escorted them onto the premises.
- [20] Mr Wilkes arrived at the entrance at about 10h00 and was escorted by the public order police onto the premises. Whilst being escorted onto the premises, the respondents became more violent which necessitated the police to fire off a few rounds of rubber bullets. It was after then that vehicles could enter and exit the applicant's premises.
- [21] Throughout this time, the respondents refused to stay in the demarcated zone and the police did not force them back into it as they were of the view that that would exacerbate the situation. So much for applicant's version of the events that occurred on Friday 19 October 2012.
- [22] It is common cause that on Saturday 20 and Sunday 21, the Second to Further Respondents did not picket at the applicant's premises at all that week-end. On Saturday, the factory was open between 07h00 and 18h00 and on Sunday between 06h00 and 18h00.

Alleged unlawful conduct on 22 October 2012

- [23] On Monday 22 October 2012, some of the respondents arrived at the entrance to applicant's premises at 06h00 and began "toy toying", brandishing sticks and singing battle songs. About half an hour later, buses carrying some of the striking

workers also arrived. They blocked the entrance to applicant's premises by setting alight a telephone pole. The removal of the telephone pole by the respondents has resulted in the fixed line connection to the applicant's premises being damaged.

- [24] The police at Welbekend Police Station were called by applicant's Engineering Manager, Juan Herholdt. Public order police arrived but were unable to ensure the safe passage of replacement labour and of several of the applicant's administration staff. As a result, production could not commence on Monday 22 October 2012 and at 14h00, the applicant's premises were closed due to the inability of the police to ensure the safety of the applicant's employees.
- [25] Various discussions were held with the police and the latter advised Black to obtain a court order interdicting the striking respondents from blockading the premises as the police could not intervene without a court order.
- [26] At about 15h40 on Monday 22 October 2012, a letter was addressed to the Station Commander, Mr Nkambula of Welbekend by the applicant's attorneys informing him that the police have an obligation to assist the applicant to maintain law and order at their premises where picketing by striking employees was accompanied by acts of criminality; that the police did not need a court interdict before acting. A judgment of this court in which La Grange J had said: "The police do not need a court order to intervene when faced with conduct which is *prima facie* criminal in nature, simply because that conduct takes place in the context of industrial action". Paragraph 17 *SA Post Office Ltd v TAS Appointment and Management Services CC and Others* [2012] 6 BLLR 621 (LC) was attached to the letter.
- [27] In his answering affidavit deposed to by Mr Jan Mathe, an organiser of the First Respondent, he states that on the Friday 19 October 2012 when the employer sent in replacement labour, it also sent in a private security company whose officers started brandishing teasers, guns and dogs. The employees carried sticks to protect or defend themselves.

- [28] The respondent also states that he viewed the video footage and he did not see any acts of violence by the picketing workers and that, in any event, the video recorder could not film events that were happening at the entrance to the applicant's premises as the road curves before the entrance and therefore it is impossible to see beyond that curve or bend. Therefore their description of the events that occurred was at best circumstantial and should be treated with circumspection.
- [29] Furthermore, the first respondent did engage in court with the applicant on the 23 October 2012 to settle the terms of the interim order that was made an order of court. But there had been no need for the applicant to have rushed to court when it could have requested the CCMA to help conclude and settle the terms of the picket rules. The respondents were at all times willing to go that route. But on the 19 October 2012 Mokoena could not sign the agreement on the picket rules without consulting his members hence he signed only acknowledgement of receipt of a copy of those rules. Sukazi had prior Union commitments which he had to attend.
- [30] In all the circumstances, therefore, it was an abuse of the court processes for the applicant to approach this court for an interdict and ask for costs.
- [31] The applicant's main contention is that it was forced to apply for an interdict against the respondents because of the violence, intimidation of non-striking employees, obstruction of the entrance in and out of their premises by the respondents.
- [32] In terms of section 64(1)(ii):
- '(1) Every employee has the right to strike and every employer has recourse to lock-out if -
 - (b) in the case of a proposed strike, at least 48 hours' notice was given of the commencement of the strike, in writing, has been given to the employer...'

- [32] The first respondent had given the employer the requisite statutory notice. Accordingly, the Second to Further Respondents had complied with the statutory requirement. The strike was therefore legal and protected in terms of the Act.
- [33] The issue for the court to resolve is whether the applicant is entitled to its costs for applying for an interdict when the cause of the strike was settled by the parties under the auspices of a CCMA commissioner, and a settlement agreement was signed by the parties on the 24 October 2012 and the employees agreed to return to work on Monday 29 October 2012.
- [34] In terms of costs section 162 states: “(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness. (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account – (b) the conduct of the parties – (i) in proceeding with or defending the matter before the Court; and (ii) during the proceedings before the Court.”
- [35] The issue of costs in a comparative situation to the present case was considered by Van Niekerk J in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others*.¹ In that case the employees were engaged in a protected strike.

[4] In the founding papers, the applicant averred that the individual respondents were acting in breach of the picketing agreement by engaging in a variety of criminal acts,” he described the said acts and continued: “The applicant’s attempts to resolve the issue of strike related violence by agreement with first respondent failed – an undertaking given by the first respondent at the applicant’s request proved to be worthless. Ultimately, intervention by the SAPS was necessary, but even this did not deter the individual respondents.

[5] During this period, the applicant took a number of steps to protect its interests... the applicant advised the union on several occasions that both

¹ (2012) 33 ILJ 998 (LC) at paras 4-8.

the union and individual respondents were in material breach of the agreement. On 20 October 2011 the applicant referred a dispute to the CCMA in which it sought a determination that the union and the individual respondents comply with the picketing agreement. A conciliation hearing was convened for 27 October 2011. At the hearing, the union and the individual respondents did not dispute the evidence of the breaches of the agreement, but instead accused the applicant of 'provoking' them, and demanded that video surveillance cease. The CCMA was unable to resolve the dispute, and the matter was referred to this court.

- [6] On 9 November 2011 the applicant filed a supplementary affidavit in these proceedings, with photographs and video footage of the damage caused by the individual respondents. On 11 November 2011, the parties concluded an agreement in terms of which a return to work was agreed. On 29 November 2011, the applicant's attorneys wrote to the respondent's attorneys to enquire whether the respondents would tender the costs of these proceedings.
- [7] The respondents' main complaint on the return day, it appears, is that they did not receive the founding papers, since the second respondent was in East London and the respondent's attorney not in his office (5 November was a Saturday). On this basis, the respondents contend that they were not in a position to defend the proceedings, and should not be held liable for the costs. Secondly, the respondents contend that they are individuals earning a relatively low income, and cannot therefore be ordered to pay the applicant's costs. Thirdly, the respondents contend that the respondents' conduct is no longer in dispute, and that they cannot therefore be held liable for costs. Finally, on the return date, Mr Levin, who appeared for the respondents, submitted that the existence of a collective bargaining relationship between the parties militated against any order for costs.
- [8] Section 162 of the LRA entitles this court to make an order according to the requirements of the law and fairness. This is a broad discretion, and one that must be exercised judicially. In my view, for the reasons that

follow, none of the submissions on behalf of the respondent have merit, and there is no basis, having regard to the law and fairness, why the respondents should not be liable for the applicant's costs.'

[36] The Learned Judge considered that none of the reasons advanced by the respondents had any merit. They had been served with the notice of motion and made aware of the date and time the urgent application would be moved and Motha had been advised to arrange for other union officials to attend court. After the rule nisi was issued copies of the rule nisi were delivered to those members who were assembled outside Montecasino. Attempts to hand over copies of the order to them was thwarted and it was not denied that individual respondents present tore up the copies of the order.

[37] The Learned Judge continued and stated that:

'The fact that the individual respondents are workers earning a relatively low income is of no consequence. They have not denied participating in the unlawful conduct alleged by the applicant, and they must bear the consequences of their actions. The fact that they have since the date of the order returned to work is neither here or there. The issue is not that there was an agreed return to work – the issue is whether the respondents' conduct necessitated an application to this court and whether it is fair, having regard to all of the circumstances (including the respondents' conduct prior to the return to work), to order them to bear the applicant's costs. The existence of a continued collective bargaining relationship between the parties and the potential prejudice to that relationship that any order for costs might present is similarly irrelevant in this instance... while the parties will necessarily have to pick up the pieces of a relationship that has been compromised on account of the respondents' conduct, I fail to appreciate how the existence of a collective bargaining relationship or its future course militates against any award of costs... in my view any order for costs will have a salutary effect and serve to emphasize to the individual respondents that the right to engage in collective bargaining is not a licence to engage in collective brutality

and for the union and its officials, that responsibility for the collective requires individual actions.²

[38] In a similar vein to the respondents' contentions in *Tsogo Sun's* case above, the first and second respondents contend that there is no basis for the applicant to seek a costs order against the respondents as the dispute between the parties has now been settled. The agreement on the picket rules was signed on the 24 October 2012, there has been no further allegations of acts of violence, intimidation or damage to applicant's property; the respondents agreed to resume work on the 29 October 2012. Therefore, the matters that the applicant complained of and brought an urgent interdict application for are now academic and the application for costs is an abuse of the court's processes and wastage of time and resources of the court and the defendants; its intention being to cripple LEWUSA.

[39] But it is my view that the respondents are missing Judge Van Niekerk's identification of the real issue *in casu*, namely that '[t]he issue is not that there was an agreed return to work - the issue is whether the respondents' conduct necessitated an application to this court and whether it is fair, having regard to all the circumstances (including the respondents' conduct prior to the return to work), to order them to bear the applicant's costs.'

[40] In their answering affidavit, what the respondents seem to deny is the degree of violence during the strike. At para 155 page 192 of the answering affidavit, Motha states: 'It is once again denied that the strike was as violent as made out. While there were incidents no major incidents took place.' That begs the question why would the applicant have approached this court for minor incidents of violence? Why would the police have called the public order police on both the 19 and 22 November 2012 to control the situation if the incidents were minor?

[41] I am satisfied that the applicant was compelled by both the serious acts of violence perpetrated by the picketing respondents and the abject failure of the

² Id at para 11.

union to control and/or stop its members from breaking the law. I can only echo the words of Van Niekerk J in the *Tsogo Sun* case, *supra*, that:

‘This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court’s mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.’³

- [42] In deciding whether to make an order for the payment of costs, I have to bear in mind that I have a discretion to be exercised judicially and also the injunction of section 162(1) of the LRA that such order has to be ‘...according to the requirements of the law and fairness.’ I also have to bear in mind such other relevant considerations as courts have enunciated in cases, eg, the making of costs orders may well discourage parties, particularly individual employees, from approaching this court and the court should thus give consideration to avoiding such orders, especially where a genuine dispute exists and the approach to the court was not unreasonable. The conduct of the parties is relevant to the making of a costs order.
- [43] Taking into consideration all the above-mentioned factors, the violent conduct of the respondents, their repetitive defiance of the police orders renders their special circumstances irrelevant. The court must take into account the interests that lie beyond the direct interests of the parties to the dispute.
- [44] I am of the view that this court should mark its disapproval and condemnation of the violent behaviour of the picketing employees and of the first respondent’s abject failure to stop it by a punitive costs order.

- [45] Accordingly, I make the following order:

³ Ibid at para 14

1. The first and second to further respondents are to pay the applicant's costs of these proceedings on a scale as between attorney and client, jointly and severally the one paying the other to be absolved.

Kumalo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: I.I. Mahomed of Eversheds Attorneys

For the Respondent: A Goldberg of Goldberg Attorneys

LABOUR COURT