



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO J 1742/13

In the matter between:

**MURRAY & ROBERTS PROJECTS, A DIVISION OF
MURRAY & ROBERTS LIMITED**

APPLICANT

and

**METAL AND ELECTRICAL WORKERS
UNION OF SOUTH AFRICA
BUILDING CONSTRUCTION AND ALLIED
WORKERS UNION
CHEMICAL, ENERGY, PAPER, PRINTING
WOOD AND ALLIED WORKERS UNION
THE NATIONAL UNION OF METAL
WORKERS OF SOUTH AFRICA**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

NATIONAL UNION OF MINEWORKERS

5TH RESPONDENT

UNITED ASSOCIATION OF SOUTH AFRICA

THE UNION

6TH RESPONDENT

REUBEN MOJELA AND 1751 INDIVIDUALS

7TH TO FURTHER

EMPLOYEES LISTED IN ANNEXURE “SGA”

RESPONDENTS

and also

CASE NO: J1745/13

In the matter between:

ACTOM (PTY) LTD

APPLICANT

and

THE NATIONAL UNION OF METAL

WORKERS OF SOUTH AFRICA

1ST RESPONDENT

UNITED ASSOCIATION OF SOUTH AFRICA

2ND RESPONDENT

DIKELEDI SALOME AND THE 656 INDIVIDUALS

EMPLOYEES LISTED IN ANNEXURE “FS1”

3RD TO FURTHER

TO THE AFFIDAVIT

RESPONDENTS

Application heard: 17 October 2013

Judgment delivered: 17 January 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] On 8 August 2013, the court (per Malindi AJ) granted orders to the effect that in case number J 1742/13, six unions cited as the first to sixth respondents respectively and named individual respondents, and in J 1745/13 two unions cited as the first and second respondents respectively and named respondents, be interdicted from embarking on or participating in unprotected industrial action and from committing acts of violence, intimidation damage to property and the like. This is the return date in respect of both orders. The confirmation of the rule granted in each case was opposed by the fourth respondent in case number J 1742/13 and the first respondent in case number J 1745/13, the National Union of Metal Workers of South Africa (the union) . Both matters concern the same material issues, and the parties agreed that they should be heard simultaneously.
- [2] To the extent that the interim relief granted on 8 August 2013 concerned acts of violence and specifically a restraint against the committing of acts of violence by any of the respondents, the union does not oppose the confirmation that part of the rule. What is in issue is that part of the rule concerning what the applicants claim to be an unprotected strike and the participation of the union's members in that strike. The union denies that there was a strike by its members, and opposes confirmation of the rule to this extent and also any liability for the costs of the proceedings.
- [3] In each instance, the founding affidavit filed by each of the applicants sets out the salient facts in some detail. The applications concerned particularly what was averred to be a refusal by the individual respondents in each case to work on 1 and 2 August 2013, in support of a demand relating to a commuting allowance in respect of local employees, as well as safety concerns. The applicants further aver that none of the procedures established either by the applicable Project Labour Agreement (PLA) or the Labour Relations Act had been invoked prior to the refusal to work. Ultimatums to return to work were issued on to August 2013 and ignored, as were efforts by the applicant to seek undertakings from individual

respondents said they would tender their services and work in accordance with their contracts of employment.

- [4] In matter number J 1742/13, the founding affidavit canvasses in some detail a refusal by the individual respondents to return to work on 24 July 2013 and Friday 2 August 2013. The issue in dispute in this case would appear to relate to a grievance concerning deductions from remuneration for the purposes of PAYE. It would appear to be common cause that no procedures were followed prior to the refusal to work. The applicant specifically avers that on 23 July 2013 the union presented a feedback session to its members on site regarding the progress of the negotiation of what was referred to as a partnership agreement and more specifically, an increased travel allowance for non-local employees and a commuting allowance for local employees. After this feedback session, approximately 100 employees refused to return to work. During the course of subsequent discussions between the management and shop stewards, the terms of payment of a commuting allowance were discussed and it was agreed that the applicant would request an urgent Partnership Forum meeting to discuss the issue since it was not a contractor-specific item. A Mr Ramalata of the union requested a shop stewards meeting on 24 July 2013. On that morning, industrial action involving the employees of other contractors on site occurred, accompanied by acts of violence. Various measures were thereafter adopted to contain the violence and to resolve the issues giving rise to it. In this regard, the applicant avers specifically that on 2 August 2013, a further illegal work stoppage occurred at its site. A meeting with the union shop stewards failed to take place since so the shop stewards refused to participate in any meeting at which representatives of other unions were not present. The following stated at clause 7.32 of the founding affidavit:

‘The Fourth Respondent’s shop stewards stated to the Applicant’s management this time in the form of an undisguised threatened that if the Eighth to Further Respondent’s demands are not met, they would rampage on site again.’

- [5] The demands at that stage were that the applicant should make good the effects of increased PAYE deductions and that the management should address employees regarding the opening of the site, which had been closed pending discussions in the Leadership Partnership Forum. During the course of the day, the deponent to the founding affidavit states that at least three ultimatums were issued to the striking workers and their employees, and that none of the employees return to the workplaces. As in case number J1745/13, on 5 August 2013, undertakings were sought from the unions that members would tender services in accordance with a contract of employment, and no undertakings were provided.
- [6] In both cases, the union filed an answering affidavit. The answering affidavit comprises a page in which the national legal officer responsible for union members employed by the applicant states the following:
- ‘5. I deny that NUMSA members are on strike at the applicant’s or have any demands. In so far as demands were ever made, these have been and/or unconditionally withdrawn and some members have been and/or unconditionally tendering their services.
6. The applicant is aware of this and was aware of it at the time of launching the application.
7. In the circumstances, I deny that there was any need for the application to be launched or that there is any basis for the order is sought.’
- [7] In both cases, the applicants filed replying affidavits in which the deponent’s confirmed personally having seen several union shop stewards and ordinary members actively taking part in the strike in the sense that they were actively encouraging the strike and others to join it. The deponent stated further that attempts to engage with the union shop stewards on site were met with an aggressive response. Further, evidence was given that video footage of the

events described in the founding affidavit was viewed in terms of which it was clear that many of the union's members had participated in the strike.

- [8] The replying affidavit in case number J1745/13 replying affidavit notes, with obvious justification, the nature of the answering affidavit and cites an inability by the deponent to respond in any meaningful way to what it contends amounts to a failure to raise any bona fide disputes of fact. The applicant does observe however that given the history of industrial action at Medupi, that the averment that the majority of workers would embark on a strike while members of only one union would watch with disinterest is "positively bizarre".
- [9] The function of the court on the return day of a rule nisi is to confirm or discharge the rule. If there is a genuine dispute on a question of fact, the court may hear oral evidence or refer the parties to trial. In the present instance, the court has before it in the answering affidavits only a terse denial that the union's members are on strike, or that they have made any demands of their employer. As recorded above, that statement is qualified by averments to the effect that if any demands were ever made, they have been or are unconditionally withdrawn.
- [10] It is a well- established rule of motion proceedings that in the face of a genuine dispute of fact that is material to the relief sought, the application cannot succeed, and the matter ought to be referred for the hearing of oral evidence. However, this rule is subject to qualification, most notably that expressed by Corbett CJ in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* where it was held that the granting of relief ought not to be impeded where no real, genuine or bona fides dispute of fact is raised on the papers, or where the allegations or denials concerned are 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'. As Cameron JA observed in *South African Veterinary Council and another v Szymanski* 2003 (4) SA 42 (SCA), practice may sometimes be robust, and often rightly so, in applying the category of 'far-fetched or clearly untenable' denials.

[11] In the present instance, the applicants in both instances have set out in some detail the circumstances giving rise to the dispute between it and the union and employees cited as respondents. Specific evidence has been provided in relation to participation in what clearly amounts to a strike by individual members of the union. In the circumstances, a more comprehensive response was called for from the union and the bare denial that forms the subject of the answering affidavit in each case is patently untenable. In particular, it is not disputed that at least three ultimatums were issued to striking employees after the commencement of the unpredicted strike. Had the union's members not been on strike, it seems obvious that the union would have said so at the time. In the replying affidavit filed under case number J 1742/13, there are three statements attached, being affidavits deposed to by members of the union who, by their own admission, took an active part in the strike. These affidavits, the content of which is not been denied, must be assessed in conjunction with an affidavit deposed to by the applicant's IR coordinator who states that he personally saw several union shop stewards and ordinary union members taking active part in the strike in the sense that they were not only on strike, but actively encouraging others to participate in it.

[12] The union filed a supplementary affidavit on the day of the hearing, deposed to by its instructing attorney. The affidavit reiterates that the union's members had tendered to return to work but that they had been precluded from doing so on account of the applicant's failure to provide transport to Medupi, as it was obliged to do. The affidavit also discloses what, for present purposes, appears to be the real issue between the parties. The affidavit states:

14. In the normal course, when an urgent application for an interdict has been granted and the return date is extended for a period of months, the intention behind this is to allow matters to return to normal and for eth rule to be discharged upon the return date.

15. The respondent believed that this was the way in which the applicant intended to conduct matters and was surprised to receive the Replying Affidavit

on 10 October which did not deal with the current situation at all or give any reason why a final order was necessary.

16. For this reason, Edmonds addressed a letter to the applicant's attorneys on 15 October 2013 requesting confirmation that the rule would be discharged with no order as to cost...

17. On the same day, the applicant's attorneys indicated that they would proceed with the matter.'

[13] What this discloses, assuming the content of these paragraphs to be correct, is a stratagem where employers faced with unprotected strike action (accompanied or otherwise by acts of violence) seek interim orders with a view only to the restoration of normality, and on the basis of an understanding with the relevant respondents that once normality is restored in the workplace, the rule will be discharged with no order as to costs. In other words, the role of this court is reduced to the purely instrumental. This is not to say that parties to litigation of the present sort do not use the right of recourse to the courts to advance their interests and to their tactical advantage – of course they do. But the court should be wary that its credibility is not undermined by being drawn into what amounts to an elaborate game.

[14] In the present instance, the union cries foul because it believes that the applicants have broken a rule of the game by seeking to have a rule nisi confirmed, with costs, after the restoration of industrial peace. But it is not the function of this court to act as a referee in a game that the parties may have elected to play. The only issue before the court is whether, on the papers, the union has shown cause why the applicant is not entitled to a final order. Events that transpire subsequent to the granting of a rule nisi will ordinarily have little bearing on this enquiry. In my view, for the reasons that are recorded above, the rule nisi granted on 8 August 2013 should be made absolute.

[15] Insofar as costs are concerned, this court has a broad discretion in terms of section 162 of the LRA to make orders for costs on the basis of the requirements

of the law and fairness. The court has traditionally not made orders for costs in matters where the parties are engaged in a collective bargaining relationship, and where an order for costs might potentially prejudice that relationship. On the other hand, in the present instance, the unprotected strike in which the union's members engaged was wholly unjustifiable. I make no judgment in this context in relation to the wanton acts of violence that are evident from the papers before the court; the applicants have not averred that the union's members are directly responsible for these and subsequent investigation will no doubt identified at least some of the perpetrators. On balance, I am persuaded that a sound collective bargaining relationship between the parties is in their interests and in the broader national interest and that an order for costs made at this stage may well serve to prejudice any goodwill that might currently exist. For those reasons, I intend to make no order as to costs.

I make the following order:

1. The rule nisi issued on 8 August 2013 is confirmed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Appearances

For the applicant: Adv H van der Merwe instructed by Fluxmans Inc.

For the fourth respondent in J 1742/13 and the first respondent

in J 1745/13: Ms R Edmonds, Ruth Edmonds Attorneys