



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

CASE NO: J1134/14

In the matter between:

**ASSOCIATION OF MINeworkERS
AND CONSTRUCTION UNION**

Applicant

and

**LONMIN PLATINUM (COMPRISING
EASTERN PLATINUM LTD AND
WESTERN PLATINUM LTD)**

First Respondent

**IMPALA PLATINUM LIMITED (ON
BEHALF OF ITS RUSTENBURG
OPERATIONS)**

Second Respondent

**AMPLATS AMERICAN PLATINUM
LTD**

Third Respondent

Heard: 30 May 2014

Delivered: 2 June 2014

Summary: (Urgent interdict – SMS communications of offers from employers to striking employees – lack of urgency).

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an urgent application launched on a 13 May 2014 by The Association of Mineworkers and Construction Union (“AMCU”) against three platinum mining companies, Lonmin Platinum (comprising Eastern Platinum Ltd and Western Platinum Ltd) (‘Lonmin’), Impala Platinum Ltd (‘Implats’) and Anglo American Platinum Ltd (‘Amplats’). The union and its members are engaged in a protracted protected wage strike at the mining companies, which has been going on for approximately 4 months since it began on or about 23 January this year.
- [2] The application was originally set down for hearing on 20 May 2014, it was postponed *sine die* by agreement between the parties to allow the Labour Court an opportunity to settle the wage dispute. The application was re-enrolled for a hearing on 30 May 2014. By that date, as a result of discussions between the union and the first respondent, Lonmin, the two parties have agreed to postpone the application indefinitely, with costs being reserved. The first respondent has undertaken, pending the application against it being re-enrolled, not to convey wage offers by Short Message Service (‘SMS’) to the union members it employs for direct acceptance. Thus, for all intents and purposes this application only concerns urgent relief sought against Implats and Amplats.
- [3] The relief sought by the applicants in the form of interim relief pending the outcome of two distinct types of dispute the union has declared with both respondents. The first dispute concerns a claim under sections 4 and 5 read with section 9 of the LRA and the second concerns the alleged breach of provisions of the relevant collective agreements between the union and the respondents.
- [4] The relevant dispute mechanisms in AMCU’s collective agreements with the three respondent’s were invoked by AMCU a few days prior to

launching the application, and AMCU referred disputes under s 9 of the LRA a day or two later.

- [5] Although wider ranging relief was set out in the notice of motion, at that hearing of the application, the union abandoned relief sought under prayer 2.1.4 of its notice of motion, and confined itself to seeking interim relief under prayer 2.1.2, 2.1.3 and 2.2 of the notice of motion in the following terms:

" 2.1.2 Interdicting and restraining [Implats] from conducting a survey which requires the applicant's members to indicate directly to that whether they wish to return to work (which by necessary implication entails an acceptance of the second respondent's latest wage offer);

2.1.3 Interdicting and restraining the [Amplats] from making direct wage offers to the applicant's members requiring them to accept such wage offers and further interdicting and restraining [Amplats] from inciting, inducing or assisting any of the applicant's members to resign from the applicant and/or to breach the Constitutional provisions of the applicant's constitution in particular clause 7.4 thereof; ...

...

2.2 compelling the respondent to address all wage offers which require acceptance to [AMCU] and not its members "

- [6] Even though, it might have made sense to deal with the merits of the matter as if it were an application for final relief, the employer parties insisted, as they were entitled to, that the question of the urgency of the application had to be addressed. In any event, AMCU is only seeking interim relief pending the outcome of other disputes it has initiated, which are mentioned below. The question of urgency therefore remains a live issue between the parties, and accordingly needs to be determined before any consideration can be given to whether or not the AMCU has satisfied other requirements for obtaining interim relief.

Urgency

- [7] In order to deal with the question of urgency, it is necessary to look at the chronology of communications between the two respondents and striking employees prior to the application being launched on 13 May 2014. Although there are some similarities, it is necessary to set out what transpired at the respective firms because each company was driving its own communication strategy.

Implats communications

- [8] Implats communicated on an ongoing and regular basis with its employees by means of regular SMS messages even from shortly before the commencement of the strike. Most of these communications took the form of so-called "Strike Updates". Essentially, these messages contained a varying mix of elements. Most of them were simply bulletins about the progress of the negotiations and exhortations by Implats management to strikers to comply with the interdict against strike violence obtained on 24 January 2014 or to comply with picketing rules. Interspersed among these terse bulletins was the occasional cheerful missive such as a Mother's Day greeting to all "Impala Mom's" or a message conveying Easter greetings.
- [9] In some messages, management repeated its views about what it characterised as the 'unrealistic' demands of AMCU. In messages sent on 13 February, 12 March, 3 April, 25 April, 5 May and 13 May 2014 the company urged strikers to persuade the union to accept the employer's current offer or asked strikers in general terms to agree to the offer. For example, a message which combines both elements was one on 1 April 2014 which read:

"IMPLATS :-) Management calls for visionary leadership from AMCU. Accept Management's offer and end the strike."

- [10] Apart from these SMS messages, Implats also communicated by means of printed Strike Briefs, one page in length, which were distributed via e-mail, on the company intranet and to employees' residences. Strike Brief 16.14 issued on 24 February 2014 reads:

"SUBJECT: IMPALA'S OFFER REMAINS UNCHANGED

AMCU is not willing to move from their original basic wage demand of R12,500 and the company simply cannot afford to meet this demand. Impala has offered the best wage increase we possibly can in these difficult times. The wage offer that Impala has put on the table is significantly above the rate of inflation, it is fair and reasonable. We will increase the minimum monthly guaranteed wages by 26% over three years.

Submitting to AMCU's demands would more than double Impala's current wage bill. This would mean that Impala would have to look at restructuring and shaft closures. Prolonged strike action will take the mine many months to recover and become profitable again.

Terence Goodlace, CEO of Implats says: 'We are disappointed that we have not made progress on the platinum industry wage negotiations. We are committed to engaging further with AMCU and are determined to finding a solution that will allow better wages and benefits for employees, preserve jobs and ensure the survival of our business.'

AMCU refuses to accept the economic circumstances the company is facing and is not focusing on making sure you keep your job.

Impala is not able to offer any more money and will be forced to make the above-mentioned adjustments if the strike continues. Please look at everything carefully and see that Impala's offer is fair and good. Stand up and accept Impala's offer to end the strike, save jobs and protect your future."

- [11] There were also two communications of a distinctly different character which involved what Implats characterised as 'surveys'. The first survey took place on 17 and 18 February 2014. The survey, which employees had a choice not to participate in, was an automated telephonic survey. The survey was initiated by a phone call announcing an important and urgent message from the company. Once the recipient of the call had

elected to listen to the message in the language of their choice, the script of the automatic call went as follows:

"Impala Platinum is committed to helping employees during the strike.

Please answer the following question for us and we're sure you that this will remain confidential. No one will know your response

1. Would you like to come back to work?

- *If your answer is YES please press 1*
- *if your answer is NO please press 2*

If employee selects 1:

Impala thanks you for your support and commitment to your job. We would like to confirm that this information will not be given to anyone. We will keep sending messages with updates to let you know what happens during the strike. Thank you

If employee selects 2:

Thank you-if the reason you do not want to come back to work because you are afraid of violence and intimidation please press 1.

If the reason you do not want to come back to work is because you support AMCU and their demands please press 2.

If employee selects 1:

Impala Platinum is committed to providing safe working conditions for all staff and resolving all the current problems that we are experiencing. We would like to confirm that this information will not be given to anyone. We will keep sending messages with updates to let you know what happens during the strike. Thank you

If employee selects 2:

The strike is damaging to both the company and employees. Prolonged strike action would be to shaft is closing in people losing their jobs. AMCU's demands are unaffordable and

unrealistic and we encourage you to accept the company's fair wage offer.

If the employee does not make selection

Impala Platinum is committed to providing safe working conditions for all our staff and resolving all the current problems that we are experiencing."

- [12] The second automated telephonic survey was conducted on 28 March 2014. The script for the survey was virtually identical to the previous one except that the message to those who indicated they did not want to come back to work because they still supported AMCU's demands was that the employer was not going to budge on its last stated offer, so prolonging the strike would not change the position. The results of the survey were conveyed in Strike Brief number 25.14, namely that approximately 86% of the 7668 employees who responded to the survey wanted to return to work. The bulletin ended trying to persuade strikers to agree to the company's current offer as follows:

"Employees need to influence union leaders to accept the company's current wage offer which is fair, signed a wage agreement and end the strike so that the Impala team can go back to work."

- [13] On 24 April 2014, SMS messages were sent out conveying the current revised offer from the platinum firms. On 29 April the union advised the companies that it was continuing consultations with its members concerning the offer and was seeking a fresh mandate from them. It requested the employers not to communicate the offer directly to employees but the companies would not accede to this request. In a joint statement released on 30 April, the three companies responded thus:

"AMCU has requested the producers did not communicate the offer directly to employees. The companies cannot accede to this request. The producers have a responsibility to ensure that employees, including AMCU members are fully apprised of the latest offer and options open to them. The producers' preference is for a negotiated settlement with AMCU and they urge

employees to provide a mandate to the union to accept the offer. The companies have also put in place, or are putting in place, mechanisms for employees to accept the offer individually.

...

The producers advise further that:

- Communication with employees has begun through both targeted and mass communication. It is not all employees are immediately contactable around operations, this communication needs to reach labour sending areas around South Africa and neighbouring countries.*
- The companies look forward to positive feedback, in respect of the offer, from AMCU.*
- The companies will not be releasing detailed information on communications initiatives, and progress made in contacting employees or detailed attendance numbers. This is being done to reduce the risk of intimidation and violence. Updates will be provided to the market at a critical junctures."*

[14] Following a further meeting on 5 May 2014 in which the union reiterated its intention to continue with the strike, a further joint statement was issued lamenting what the companies characterised as AMCU's failure to suggest a solution to the strike. The update stated amongst other things:

"The companies will continue their direct approaches to employees:

- Lonmin has asked employees to indicate their intention to accept the settlement offer by SMS by 8 May 2014. A provisional return to work date of 14 May 2014 has been planned, and would be dependent on the responses received.*
- Implats continues to communicate with employees to gauge their response to the offer, and would advise progress in due course.*

- *Amplats has made the offer available to its employees and has already seen the commencement in the uptake thereof.*

None of the companies have set final acceptance dates; nor have they presented ultimatums to employees.

Regrettably the companies have received feedback from large number of employees that while there would prefer to accept off and returned to work, many are fearful of doing so due to the threats to their personal safety."

[15] Four days later on 8 and 9 May, Implats conducted the most recent automated telephonic survey. According to Implats's answering affidavit, the motivation for the survey was that Implats claimed that a large number of employees had sought information about when the strike would end and when they could return to work; reports had been received that anchor was not communicating the wage offer properly to members; shareholders were putting pressure on management to establish information in order to make plans to resume operations if the event the strike came to an end (the shafts having been closed since February), and a board meeting was scheduled in which management needed to be able to report on the state of affairs including the attitudes of employees. The company said the survey was conducted by an independent firm and the results of the survey could not be traced back to the individual participants.

[16] On the same day the survey commenced, the following article which appears to be a mixture of reportage and commentary appeared on the eNCA news website: which reads:

"Striking Implats Miners to Vote on Wage Offer by SMS

JOHANNESBURG-Impala Platinum, the world's second-largest producer of the metal said on Thursday it would ask its striking so that it can employees to vote by text message this week on its latest wage offer and whether they wanted to return to work.

Spokesman Johan Theron said the vote would be conducted on Thursday or Friday and in would involve striking miners who had indicated their willingness to take part.

The 15-week stoppage has also hurt rival producers Amplats-American Platinum and Lomin, hitting 40% of global production of the precious metal used for emissions-capping catalytic converters in automobiles.

Implats' move is the latest attempt by the three producers to undermine the Association of Mineworkers and Construction Union (AMCU) by taking a wage offer directly to miners after talks collapsed two weeks ago.

Implats said last week that two-thirds of its striking workers had already indicated by text message and phone calls that they want to return but it was now asking for a formal vote on the offer."

[17] The pertinent portion of the automated script in this survey reads:

"Impala would like to once again asked employees how they feel about the company's new offer and whether you want to return to work.

Please answer the following two questions for us and we assure you that this will remain confidential. No one will know your response.

The current wage of fish will ensure that the minimum cash remuneration (comprising the basic rate + holiday leave allowance + accommodation advanced) for entry level underground employees will rise to R12,500 over five years; and R11,500 for entry-level surface employees.

Question 1 *do you think the current wage offer is fair?*

- *If your answer is YES please press 1*
- *if your answer is NO please press 2*

If the employee selects 1:

Impala thanks you for your response. We would like to confirm that this information will not be given to anyone. We are committed to working to find an affordable solution to ending the

strike. We will keep sending messages with updates to let you know when the strike ends and when you can return to work. Impala thanks you for your support and your commitment to your job.

If the employee selects 2:

Impala thanks you for your response. The AMCU demand of R12,500 basic rate in four years remains unaffordable and will result in shaft closures and job losses with disastrous consequences for employees, communities and the company.

We ask the AMCU leaders to consider the economic realities facing our business and to work with us to reach a compromise that will get employees back to work and save jobs. Impala would like to appeal to all employees to accept the settlement offer so that we can return to work.

Question 2 Would you like to come back to work?

- If your answer is YES please press 1
- if your answer is NO please press 2

If the employee selects 1:

Impala thanks you for your support and your commitment to your job. We would like to confirm that this information will not be given to anyone. We would like to thank all non-striking employees who are affected by force leave decision for their commitment, sacrifice and understanding at this very crucial time in the industry. We will keep sending messages with updates to let you know when the strike ends when you can return to work. Thank you.

If the employee selects 2:

Thank You- If the reason you do not want to come back to work is because you are afraid of violence and intimidation, please press one.

If the reason you do not want to come back to work is because you support AMCU and their demands, press two.

If the employee selects 1:

Impala Platinum is committed to providing safe working conditions for all staff. You are aware of the devastating impact of the strike and we want to find a solution as soon as possible. We would like to confirm that this information will not be given to anyone. We will keep sending messages with updates to let you know when the strike ends and when you can return to work. Thank you.

If the employee selects 2:

AMCU's demands are unaffordable and unrealistic and we encourage you to accept the company's current fair wage offer. There are rumours that the longer the strike continues the more chance there is the company will change to offer. Please note that this is not true-our offer will not change. By giving in to AMCU's demands it will mean that you, the employees will face job losses with disastrous consequences for employees, communities and the company.

If the employee does not make a selection:

Impala Platinum is aware of the devastating impact of the strike on employees, their families, the mine and the communities and we are committed to finding a solution as soon as possible. We ask the AMCU leaders to consider the economic realities facing our business and to work with us to reach a compromise that will get employees back to work and save jobs. Impala would like to appeal to all employees to accept the current fair wage offer so that we can return to work."

- [18] Implats claims that 10397 employees participated in the survey and 67% of those surveyed considered the wage offer fair and a further 85% of the 8214 employees who answered the second question wanted to return to work.

Amplats Platinum

[19] The approach adopted by Amplats from early on in the strike was to appeal directly to strikers to return to work and receive the wage increase it was offering. So, for example, on 11 February 2014 Amplats sent two SMS messages to employees, which read:

"Striking employees will lose their increased backpay unless they accept the company's offer. The backpay is R 4,244 to R10, 718, depending on your level. Your income losses also impact your family. Make the right decision for you and your family- Accept the wage increase offer and end the strike!"

"Accept the wage increase offer and you will get R 606 to R 1,531 under more, depending on your level. You will also get R 4,244 to R10,718 in backpay, depending on your level. Make the right decision for you and your family- Accept the offer and end the strike!"

[20] On 2 April 2014, the company sent the following SMS to employees:

"The company can't afford to meet the unions wage demand.' No work, No pay!' If you continue striking, you will lose April's wage too. You may even lose your job when unprofitable shots close down. Return to work and start earning your new higher wage."

[21] In the same vein, it sent the following SMS to employees on 14 April 2014:

"If you return to work, you will qualify for back pay and start earning your new higher wage. You can then take care of your family again and pay off your debts."

[22] Further SMS's on 25 April 2014 invited strikers to go to their TEBA office to get their "personal wage offer" and reiterated that if strikers returned to work they would start earning the higher wage and backpay for the period from 1 July 2013 until the commencement of the strike.

[23] Like Implats, Amplats also distributed leaflets it called 'news flashes' which were distributed in picketing areas and other areas where they could easily be accessed by employees such as the entrance and exit gates of the mines. In addition, mine security personnel distributed copies of the

news flashes in surrounding villages. Like the issuing of SMS messages, as early as 5 February 2014, Implats issued a newsflash which stated:

"Employees will be updated on further developments. In the meantime all employees are encouraged to do the right thing and report for duty for the best interest of the company and their families."

On the following two days, Implats sent these SMS messages to the strikers:

"Choose the wise solution- Accept a wage increase offer, end strike and return to work. Get your wages back, with back pay and increases."

"Today is the 16th day since the AMCU strike action began. We urge all employees to return to work so that you can start earning wages again and be able to support your families. A long strike will result in bigger increases, but it does cause huge production losses for the company and wage losses for employees."

Do the right thing for yourself and your family-accept the wage increase offer and end strike."

[24] Similar messages continued to be issued throughout March, all of which conveyed the same suggestion: accept the company's wage offer and return to work. Unlike the more carefully couched messages of Implats, it is difficult to read these messages as anything other than a direct invitation to employees to abandon their strike and report for work on the terms offered by the company. Although the messages also referred to the union's demands, they clearly were intended to appeal directly to individual workers and did not suggest that the only way to accept the company's offer was to persuade their union to do so.

[25] On 24 April 2014, Implats issued a newsflash setting out the implications of its latest revised offer which, amongst other things, would achieve the R12,500 monthly wage demanded by AMCU by July 2017. The newsflash also stated:

"We are now at a point where we are left with no choice but to make direct offers to employees as an attempt to end stalemate and finally bring workers back to work so they can start earning for their families again.

We will be communicating with employees over the next few days to give them further details about how they can accept the offer.

We are also organising meetings over the long weekend to keep details of the wage offer and encourage a return to work.

Employees to return to work now to start earning their new, higher wage will also receive back pay dated from 1 July 2013 until the start of the strike, as 'no work, no pay' applied during the strike.

It is time to 'get back to work and get money back in your pockets', so that employees can take care of their families again. "

[26] The union was also provided with a copy of the memorandum Amplats intended to distribute to members.

[27] The union also alleged that on 11 May 2014, a member was approached at home by two members of Amplats's security personnel and presented with a form to sign to indicate her willingness to return to work. She says that no explanation about the content of the form was given to her. Amplats denies any knowledge of the incident or that such conduct by its security personnel is authorised. The founding affidavit does not state whether the member signed the form, retained the form or handed it back, but the form was not annexed to the founding affidavit. This vaguely described incident is the only one of its kind mentioned by the applicant.

Persuading union members to resign

[28] The applicant also alleges that *"...it appears that the striking members who have accepted the wage offer made directly by [Amplats] have been requested by [Amplats] to cancel their membership with the applicant."* In support of this claim, cancellation of union membership forms signed by AMCU members were attached to the founding affidavit. Amplats does not dispute making such forms available but denies asking the employees to resign from the union. Even though it concedes that the *pro forma*

cancellation document refers to a resignation with immediate effect, Implats claims that the 30 day notice period for membership resignations required by AMCU's Constitution is given effect to in practice.

- [29] Apart from disputing the applicant's contentions, Implats in any event undertook in its answering affidavit "not to incite or induce AMCU members to resign their membership with AMCU", which it claims disposes of the need for any urgent relief on this issue.

Evaluation

The case for urgency relating to Implats

- [30] As far as Implats is concerned, the union identifies two events which justified it launching its application only in mid-May. Firstly, it contends that the telephonic survey of 8 and 9 May constituted a disguised direct offer to union members to disassociate from the union and accept the offer. As the AMCU is the collective bargaining representative of the members, the company had no right to approach them directly. Secondly, AMCU argues that the survey must be seen in the context of the article appearing on the ENCA website that was published at the same time. In the founding affidavit of the applicant the allegation is set out as follows:

"Hence, from 8 May 2014, and subsequent to the announcement by Implats' Theron, the nature of the SMS communication from Implats to striking employees changed. As appears from the SMS messages below [a reference to the SMS is announcing the telephonic survey on 8 May 2014], Implats was now attempting to elicit a response directly from striking employees with regard to acceptance of the latest wage offer, thus circumventing the applicant, undermining the Applicant's recognised role as collective bargaining agent, undermining the recognition agreements and constitutional and statutory rights referred to above and inducing the workers to terminate their membership with the Applicant."

- [31] Impala, by contrast, maintains that there is a distinction between making the wage offer directly to its employees and asking them to vote on

whether or not they thought it was fair and if they wanted to return to work, which it says the telephonic survey was intended to gauge. It further strongly denies any attempt to induce strikers to terminate their membership with the union. It would appear that the latter allegation is a speculative one on the part of the union, rather than one supported by evidence. Where the company had referred to union membership in the SMS messages, it had emphasised the employee's freedom to choose their union, in which the company played no part.

[32] In relation to the survey, it is noteworthy that if an employee participating in the survey indicated that they thought the wage offer was fair, the automated response which followed did not invite the employee to act in accordance with their view and report back directly to the company to accept the offer. Another important factor to note, is that, according to Implats, the results of the survey was anonymous. In consequence, an employee who rated the wage offer as fair could not be identified. All that the survey could reveal is the percentage of those surveyed who thought the offer was fair.

[33] The automated response which followed a negative answer to the same question criticised the union leadership's alleged failure to consider the economic realities of the business and made a general appeal to "all employees to accept the settlement offer so that we can return to work." This statement addressed to someone who rejected the offer as fair, can hardly be construed as a direct invitation to that employee to accept the settlement offer as an individual. It is not markedly dissimilar from appeals made in two earlier SMS messages which read:

"Implats :-) Management the calls for visionary leadership from AMCU. Accept management's offer and end the strike. 1 April 2014 04:00 pm

Implats :-) Thank you for taking part in a recent survey. 86% of our employees said that they want to return to work and don't support the strike. R 12500 Basic over four years is unaffordable. AMCU need to review their demands and signed a wage agreement so that you can all return to work. 3rd April 2014 12:47 pm"

- [34] Further, when wage talks deadlocked on 25 April 2014, the following SMS message was sent to employees:

*"Implats :-) Management the calls for visionary leadership from AMCU. Accept management's offer and end the strike. **25 April 2014 11:09 pm**"*

Even after the second telephonic survey, this was the SMS message dealing with the first part of the survey:

*"Implats :-) thank you for participating in our survey. The first question asked if you feel the current wage offer is fair. 65% agreed that the current offer is fair. We urge you to communicate to AMCU that you are happy with offer so that this wage dispute can be resolved. **13 May 2014 04:10 pm**"*

- [35] Considering the tenor of communications from an early stage in the strike, I do not believe that there has been a fundamental shift in Implats's approach that would justify an argument that recent communications justify an application for urgent interim relief at this stage. Since early on in the strike, the thrust of the communications to employees has been for them to pressurise AMCU to revise the demands or to accept the employers' offer. In short, quite apart from the fact that Implats appears to have been careful to emphasise the collective nature of a resolution to the dispute, there is nothing in its approach immediately before the interdict was launched that makes the nature of its communications and exhortations to striking workers distinctly different from what went before. Accordingly I am satisfied that the applicant has not established changed circumstances which warranted bringing this application now rather than, say, at the beginning of April.

- [36] The further alternative argument of the union is that notwithstanding its failure to act earlier, the relief should be granted in any event because it would be unconscionable to allow Implats to continue acting unlawfully pending the outcome of the various disputes which have been referred for determination. Assuming for the moment that it would be unlawful for Implats to invite striking employees to individually accept its latest offer, I am not persuaded that the survey conducted on 8 and 9 May 2014 can be

interpreted as a direct offer to each participant in the survey to personally accept the employer's latest proposal and to return to work on the basis of that acceptance.

- [37] No doubt the dissemination of results of the survey attacks the credibility of a claim by the union that its membership is 100% in favour both of continuing the strike and rejecting the employers' proposal, but that is another issue and in substance is little different from the union attacking the credibility of the employers' claims that the union's demands are unaffordable.

The case for urgency relating to Amplats

- [38] On the matter of the claim that Amplats is inducing the resignation of AMCU members, the only facts which emerge from the affidavits is that Amplats does indeed provide Union membership cancellation forms to employees on request and that the 30 day notice period is implanted in practice despite the wording of the form. It should be mentioned that the form is a generic cancellation form in the sense that the name of the union from which the employee is resigning has to be written on the form. There was no confirmatory affidavit from any AMCU member to support the claim that Amplats was requesting them to resign. Whilst denying it is guilty of such interference with its employees' right to freedom of association, Amplats has in any event given an undertaking as referred to above.
- [39] In the absence of cogent evidence supporting the union's claim and given the undertaking, this matter does not warrant the court making any order in this regard.
- [40] On the issue of the Amplats offer to employees to accept its latest proposals and return to work, such offers, which are open ended in the sense that they do not require employees to accept the offer within a certain time, have been made since early on exhortations to workers were not couched in collective terms urging strikers to mandate AMCU to accept the offer.
- [41] Amplats could hardly have been surprised if striking employee had presented themselves for duty, and had shown the text of SMS messages

sent out by it during February, March or April to security personnel at mine entrances as proof they had come to take up the offer contained in one of those messages. The messages were clearly asking strikers to exercise a personal choice to abandon the strike and return to work on the terms offered by the company at that particular time. What the offers did not do was to require acceptance of the offer on pain of suffering some penalty if acceptance was not forthcoming, nor was any additional positive inducement mentioned as a 'sweetener' to accept the offer. Hence, the offensive conduct complained of relates only to the making of direct offers to employees of the same offer that the mines had presented to AMCU.

[42] The statement of intent by Amplats on 24 April that it had reached the point it would make direct offers to employees in truth did not herald a new approach on its part: it has been doing this all along. It is difficult to see as a matter of principle how such a measure could further infringe any of AMCU's rights as the collective bargaining agent of its members, than Amplats already has, assuming for the moment it does amount to an infringement. The more plausible explanation for trying to have the matter dealt with as urgent after failing to address it for so long, might be that it reflects a more practical concern of the union, that after being on strike for so long, its members might be more susceptible to such offers than they were previously. However, in its papers the union portrays its members as united behind AMCU in their determination to pursue the strike. Paradoxically, this suggests that the offers made by Amplats to date have had little effect on its members' resolve and therefore pose no real harm to its negotiating capabilities or stature as a collective bargaining representative.

[43] *Mr Bhoda*, who appeared for the applicant, argued that even if AMCU had not acted earlier on such a matter, that was no reason not to entertain the application for interim relief on an urgent basis. This argument, alluded to above, is that where there is an ongoing infringement of rights which cannot be adequately remedied by obtaining subsequent relief in due course, urgent relief can be granted. In this regard he rightly pointed out a court would be reluctant to refuse an interdict against strike violence simply because an employer had not acted immediately it became aware

of such conduct. However, interdicts in such matters are typically concerned with threats to personal safety or preventing criminal acts in relation to property, where the need for immediate intervention by the court is as pressing as the need for police to intervene in such circumstances. By comparison, a right to prevent an employer inviting employees to accept the same offer it is presenting to the union it negotiates with, in my view is not of the same order as a right to be protected against criminal action, in the sense that it self-evidently justifies interim relief despite delays in invoking it.

- [44] Consequently, I am not persuaded that the union has satisfactorily explained the length of time it has taken to challenge this perceived infringement.

Costs

- [45] The case is one of some complexity and involves consideration of contested rights which have not enjoyed much judicial consideration since the heyday of the duty to bargain under the pre-1995 labour dispensation. Accordingly, it is matter warranting two counsel in my opinion. There is no reason in the circumstances not to make a cost award given that the duration and intensity of the strike as well as the social and economic upheaval it has involved are likely to have a far greater effect on the relations between the parties than an order of costs.

Order

- [46] The application against the Second and Third respondents is struck off the roll for lack of urgency with costs including the costs of two counsel where applicable.
- [47] The application against the first respondent is postponed *sine die* and the issue of costs is reserved as between the applicant and the first respondent.

R LAGRANGE, J Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: F Bhoda assisted by V September instructed by
Larry Dave Attorneys

SECOND RESPONDENT: G Fourie instructed by Edward Nathan
Sonnebergs

THIRD RESPONDENT: AT Myburgh, SC assisted by M J Engelbrecht
instructed by Edward Nathan Sonnebergs