



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 272/15

In the matter between:

ROOIPOORT DEVELOPMENTS (PTY) LTD

Applicant

And

ASSOCIATION OF MINEWORKERS

AND CONSTRUCTION UNION

First Respondent

INDIVIDUAL RESPONDENTS FOR THE FIRST

RESPONDENT WHOSE

NAMES APPEAR ON ANNEXURE A

Second and Further Respondent

Heard: 18 February 2015

Delivered: 24 February 2015

Summary: The applicant's obligation to refrain from violating the second respondent's right to picket during a protected strike does not require the applicant to afford the individual respondents more rights than they had before the commencement of picketing, in order to galvanize the strike and result in the diminution of the applicant's ability to pursue its operations during a protected strike.

JUDGMENT

LALLIE J

Introduction

[1] The applicant launched this urgent application for order in the

- “2 Declaring that the second and further respondents have no right to make use of the sleeping facilities on the Applicant’s premises, for the duration of the strike and lockout.
- 3 Ordering the Second and further Respondents to vacate the sleeping facilities on the Applicant’s premises immediately.
- 4 Authorising the South African Police Services to enforce the Order in players 3, 6, 7.1, and 7.2.
- 5 In the alternative to players 2 to 4:
 - 5.1 Pending the outcome of a review application, to be instituted within seven days of this Order, issue an Interim Order, with immediate effect, in terms of players 2 to 4 above.
- 6 Interdicting and restraining the First and Second and Further Respondents from engaging in unlawful conduct during the course of the strike action including any conduct in furtherance of:
 - 6.1 Blocking entrance to and exit from the Applicant’s premises;
 - 6.2 Interfering with traffic of persons entering or exiting the premises;
 - 6.3 Engaging in any acts of intimidation or violence;
 - 6.4 Carrying weapons or dangerous objects while on the Applicant’s premises;
- 7 Ordering the respondents:

- 7.1 To remove the barricades and desist from blocking access or egress to the applicant's premises;
 - 7.2 To desist from caring and/or using weapons during the picket; and
 - 7.3 to comply with the terms of the Picketing Rules relating to the conduct of the picket.
- 8 Ordering the First Respondent to take all reasonable steps to manage the conduct of the picket; Ordering that the costs of this application be paid by the respondents in the event of its opposition to the granting of relief set out in the notice of motion".

Paragraph 9 provides for service of the order the applicant is seeking. This application is opposed by the first respondent.

- [2] The applicant operates a diamond mine in the Northern Cape. It engaged in wage negotiations with the first respondent (AMCU), a trade union representing the second to further respondents. The parties were unable to reach an agreement and the wage negotiations deadlocked. On 9 February 2015, AMCU issued the applicant with a 48-hour strike notice to which the applicant promptly responded by issuing a lock out notice effective from the commencement of the strike. The strike commenced on 11 February 2015. However, before its commencement the CCMA determined picketing rules in two rulings dated 3 November 2014 and 18 December 2014. For purposes of this application, the second and further respondents are engaged in a protected strike. The main issues in this application deal with the occupation of the sleeping facilities on the applicant's premises by the second and further respondents who will be referred to this judgement as striking workers or picketers.
- [3] I will firstly consider the issue of the occupation of the applicant's sleeping facilities by the striking workers. It is common cause that the applicant conducts its operations on a continual 24 hour basis. Employees work on an "8/4" shift system in terms of which employees are divided into three teams. Each team works on an 8 days on and 4 days off basis. Each shift lasts for 12 hours, from 06h00 to 18h00 (day shift) and from 18h00 to 06h00 (night shift).

Employees have a one hour lunch break during each shift. In the 12 hour period between shifts, during their active duty cycle, employees are entitled to make use of the sleeping facilities situated on its premises (the sleeping facilities).

- [4] There is serious contention regarding the right of the striking workers to use the sleeping facilities outside their active duty cycle. The applicant submitted that the sleeping facilities consist of prefabricated huts each with 8 beds, with a total of approximately 80 beds. Employees are not obliged to make use the sleeping facilities as employees residing at Schmidtsdrift, which is about 10 kilometres from the applicant's premises are transported to and from work by bus between shifts while on active duty. The applicant therefore contended that the sleeping facilities are used temporarily only while employees are rostered to work their 8 day on shift, that is, during the active duty cycle. Employees therefore are not entitled to use the sleeping facilities when they are not working. This lack of entitlement to the sleeping facilities by employees who are not on active duty is the applicant's basis for submitting that the 60 striking workers who are presently occupying the sleeping facilities should be ordered to vacate them.
- [5] The first respondent insisted that the striking workers are entitled to use the sleeping facilities because although each hut has 8 beds only 4 are occupied in the twelve hour period between each shift. The same 4 employees occupied the same 4 beds in the twelve hour period between shifts. The beds are available to specific employees and are not occupied during the 4 off days. Each employee has his own designated bed which is not used by other employees and retains the key to the hut, leaving his personal belongings in the hut even during off days. The first respondent denied that employees are not allowed access to the sleeping facilities on off days and submitted that employees who are ill, injured in those who elected not to go home during off days stayed in their huts. They further submitted that the right to the sleeping facilities was confirmed in the picketing rules. Any insistence for them to vacate the sleeping facilities during the protected strike would force the striking workers to go home. Some homes are as further as 280 kilometres

from the workplace. They would consequently not be present to utilise their right to strike, picket and allied rights, thus frustrating or even defeating the objectives of the right to strike.

- [6] It was argued on behalf of the first respondent that this court lacks jurisdiction to grant an order evicting the striking workers from the sleeping facilities. This argument is based on section 67 (2) of the Labour Relations Act 66 of 1995 (the LRA) which provides that an employee does not commit a delict or breach of contract by participating in a protected strike or any conduct in contemplation thereof. Participating in picketing which required the striking workers to continue using the sleeping facilities formed part of their participation in a protected strike. Evicting the striking workers, so went the argument, falls outside the realm of section 157 of the LRA. The applicant argued that this court has, in terms of section 158 (1) and (j) of the LRA power to interdict conduct committed during a strike, including conduct in breach of picketing rules. In this regard it sought to rely on *Vodacom (Pty) Limited v Communication Workers Union and Others*¹. The fundamental difference between the versions of the parties is that the applicant alleges that the striking workers have no right to the sleeping facilities during their protected strike and lockout while the respondents hold a different view.
- [7] It is common cause that the use of the sleeping facilities by the striking workers forms part of their terms and conditions of employment. In terms of section 77 (3) of the Basic Conditions of Employment Act 75 of 1997 this court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. I am therefore of the view that this court has the necessary jurisdiction to determine the issue of the eviction of the striking workers because it is an issue concerning the striking workers' contracts of employment. It also falls within the purview of section 158 of the LRA.
- [8] There is a material dispute of fact in respect of the striking workers right to use the sleeping facilities when they are not on active duty. As the applicant is

¹ (2007) 28 ILJ 2846 (LC)

seeking final relief, the respondents' version must prevail unless it is far-fetched or untenable. In this regard see *Pascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*². A number of submissions point to the conclusion that the respondents' version is far-fetched. The respondents submitted that each employee using the sleeping facilities has a bed allocated to him which was for his exclusive use. It is common cause that employees work an 8 day shift and are off for 4 days thereafter. The applicant's version is that it has 350 employees and about 80 beds. The only explanation that more than 80 employees could use 80 beds is consistent with the applicant's version. The first respondent conceded at least that workers could go home at the end of the 8 day shift. This means that their beds would not be used for 4 days. And if they chose to go home each time they were not on active duty their beds would not be used by workers on active duty who needed to use them. The example given by the first respondent when illustrating their right to the sleeping facilities is telling, it is that they are allowed in the facilities when they are not on active duty when they are ill or injured until they are able to return to work. This example refers to an exception rather than the rule as it connotes that it is in circumstances when they are not physically strong to go home that they are allowed to use the sleeping facilities when they were not on active duty. They therefore needed a valid to be at the facility and not be there because they were exercising their right to be at the facility whenever they please. The allegation that the striking workers had a right to use the sleeping facilities on off days is inconsistent with common cause evidence that the striking workers lived at their homes and it changes the sleeping facilities into their homes. The applicant's version must in the circumstances prevail.

- [9] The picketing rules provide that accommodation will be determined by the terms and conditions of employment of the striking workers which existed before the strike and picketing. They therefore did not create new rights to accommodation for the striking workers but merely confirm the position which prevailed before the picketing and the strike. The position being that the

² 1984 (3) SA 623 (A)

striking workers were entitled to use the sleeping facilities only when they were on active duty.

[10] It was argued on behalf of the respondents that this court must exercise its discretion in a manner which advances rather than limits or undermines constitutionally guaranteed fundamental rights, as well as the objects set out in section 1 of the LRA, in particular the right to strike, the right to engage in collective-bargaining and participate in union activities, and the right to picket, as well as the LRA's objects of giving effect to the rights guaranteed by section 27 of the Constitution, promoting orderly collective-bargaining in the effective resolution of labour disputes. I have considered these submissions carefully as well as counterarguments on behalf of the applicant. The obligation to take into account the rights enshrined in the Constitution does not eliminate the obligation to be fair to both parties. The constitutional right to strike is partly regulated by section 67 of the LRA which provides that a person does not commit a delict or a breach of contract by taking part in any conduct contemplated in furtherance of a protected strike. I am of the view that section 67 (2) of the LRA requires employers not to violate employees' right to picket. Employers are therefore precluded from either behaving in a manner that will encroach on employee's right to strike or disturb them when exercising their right to strike and picket. The right to strike and picket does not create an obligation on employers to enhance striking employees' right to picket and make their strike more effective. The respondents did not prove their right to the sleeping facilities when not on active duty. There is therefore no basis for the applicant to create that right when they are on strike. If use of the sleeping facilities formed the striking workers' payment in kind, they would have requested its continued use during the strike terms of section 67 (3). The applicant therefore has proved its right to have the striking workers ordered to vacate the sleeping facilities.

[11] The applicant has proved that it is suffering material injury as a result of the striking workers' continued use of the sleeping facilities as it is unable to use them to accommodate rostered workers who are not participating in the strike and alternatively labour. It has no alternative relief as the CCMA has no

jurisdiction to grant an order for the striking workers to vacate the applicant's sleeping facilities.

[12] The applicant further sought an order interdicting the striking workers from engaging in unlawful conduct during the strike. The conduct includes blocking of access or egress, brandishing weapons, threatening behaviour, failure to picket in the designated picketing area, absence of convener and marshals and failure to control picketing. The applicant failed to prove that the persons who committed the unlawful conduct were the striking workers in circumstance where identification of the persons was possible. It therefore failed to establish a right to have the striking workers interdicted from engaging in unlawful conduct during the strike.

[13] In the premises the following order is made:

13.1 The applicant's failure to comply with the provisions of Section 68(2) of the Labour Relations Act of 1995 ("the LRA"), and disposing of this matter as one of urgency, in accordance with the provisions of Rule 8 of the Rules of this Court is condoned.

13.2 A rule nisi is hereby issued, calling upon the respondents to show cause on 17 April 2015 at 10h00 why a final order should not be granted in the following terms:

13.3 Declaring that the Second and Further Respondents have no right to make use of the sleeping facilities on the Applicant's premises for the duration of the strike and lock out.

13.4 Ordering the second and further respondents to vacate the sleeping facilities on the applicant's premises immediately.

13.5 The relief in paragraph 13.1, 13.2, 13.3 and 13.4 operate as an interim order with immediate effect pending the finalisation of this application on the return date.

13.6 Costs stand over for determination on the return date.

13.7 Services of this order be effected as follows:

13.7.1 By faxing a copy of the order to the First Respondent's head office to (013) 656 5112 and emailing same to flipmarais1@gmail.com.

13.7.2 On the Second and Further Respondents by communicating the provisions of the order to them as such premises they find themselves by issuing copies of the order and to be placing copies of the order on the notice boards to which the second and further respondents have access.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Redding SC

Instructed by: Cliff Dekker Hofmeyr

For the Respondents: Advocate Kennedy SC and Advocate Govender

Instructed by: Larry Dave Incorporated Attorneys

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