REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2182/2015

In the matter between:

NATIONAL UNION OF FOOD BEVERAGE
WINE SPIRITS AND ALLIED WORKERS (NUFBWSAW) **First Applicant**

THE PESONS WHOSE NAMES ARE LISTED
IN ANNEXURE "A" TO THE NOTICE OF MOTION **Second and Further Applicants**

and

UNIVERSAL PRODUCT NETWORK (PTY) LTD **Respondent**

In re:

Labour Court

UNIVERSAL PRODUCT NETWORK (PTY) LTD **Applicant**

NATIONAL UNION OF FOOD BEVERAGE
WINE SPIRITS AND ALLIED WORKERS **First Respondent**

THE PERSONS WHOSE NAMES ARE LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION **Second to Further Respondents**

Application argued: 6 November 2015

Judgment delivered: 9 November 2015

Edited: 10 November 2015

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application in terms of Rule 8 (10) to anticipate the return day of a rule *nisi* granted by Nkuta-Nkontwana AJ on 30 October 2015. The order reads as follows:

IT IS ORDERED THAT:

1. The Applicant's failure to comply with the time limits referred to in Section 68(2) of the Labour Relations Act, No. 66 of 1995 (as amended) ("the Act"), is hereby condoned, and that the matter is dealt with as one of urgency in terms of Rule 8 of the Rules for the conduct of proceedings in the Labour Court.

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2. That a *Rule Nisi* is hereby issued, calling upon the Respondents to show cause, if any, to this Honourable Court at **10H00** on **11 December 2015**, or so soon thereafter as the matter may be heard, why an Order should not be granted in the following terms:

   2.1 It is hereby declared that the current strike by the First, Second and Further Respondents ("the individual Respondents" as identified in Annexure "A") in pursuance of the strike notice annexed as annexure "B" to the founding affidavit constitutes an unprotected strike as contemplated by the Labour Relations Act, No. 66 of 1995;

   2.2 It is hereby declared that by virtue of the threats of violence and the political nature of the demands associated with the present strike action, the actions of the Respondents no longer constitute lawful strike action in pursuance of a demand / demands of mutual interest, and is on that basis also unprotected;

   2.3 The First and/or Second to Respondents are hereby interdicted from participating in any and all strike action, including any conduct in furtherance of any strike action, in pursuance of the strike notice annexed as annexure "B" to the founding affidavit;

   2.4 The sheriff is authorised to enlist the assistance of the SAPS - Olivenhoutbosch to do all such things as may be necessary to comply with this Order and to keep the peace;

   2.5 The First, Second to Further Respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

   2.6 Further and/or alternative relief.

3 Pending the outcome of this application paragraph 2.3 above operates as an interim order with immediate effect.

4 Service of this order be effected as follows:

   4.1 upon the First Respondent by the Applicant's attorney sending a copy of the order to the First Respondent's facsimile at 011 8331503 and the sheriff of this Honourable Court serving a copy at the First Respondent's premises at 4th Floor, 1 De Villiers Street, Johannesburg;

   4.2 upon the Second to Further Respondents by copies of this Order being distributed to so many of the Second to Further Respondents that are present at the Applicant's workplace and for a copy to be affixed to the Applicant's gate, and by the Sheriff of this Honourable Court reading out the order to those

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> individual Respondents gathered at the Applicant's workplace or outside, every morning until such time as the individual Respondents' comply with the order.

[2] For convenience, I refer to the parties as they are cited in the application that served before the court on 30 October 2015, and to the first respondent in those proceedings as 'the union'. The applicant sought the interim order on two grounds. The first is that the strike notice issued by the union on 6 October 2015 is invalid on account of its failure properly to articulate the demands that the applicant is required to meet; the second is that the strike has in any event ceased to be protected on account of violence committed by the striking workers and the political nature of their demands. It is not clear on what basis the interim order was granted; no reasons have been furnished for it.

<u>Anticipation of the return date</u>

[3] Rule 8 (10) of the Rules of this court provides:

> Unless otherwise ordered a respondent may anticipate the return day of an interim interdict on not less than 48 hours' notice to the applicant and to the registrar.

[4] The interim order in question does not preclude anticipation of the return day. The applicant opposes the anticipation application on the basis that the respondents have failed to comply with the provisions of Rule 8 (10), that it is prejudiced in relation to its right to reply and that the respondents have failed to establish special circumstances justifying anticipation of the return day.

[5] It is not disputed that the applicant was informed by email at 21h55 on Saturday, 31 October 2015 of the intention to anticipate the rule *nisi* at 10h00 on Tuesday 3 November 2015. It is not clear when the application was served on the registrar as required by the Rule, or whether 48 hours' notice was given to both the applicant and the registrar. Be that as it may, on 3 November 2015 the application was postponed, by agreement, to Friday 6 November 2015. In these circumstances, whatever prejudice there may have been to the applicant

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regarding the short service of the application to anticipate and its right to file a replying affidavit has been cured. The only relevance of the first two points raised by the applicant relates to costs, an issue to which I shall return in due course.

[6] The primary contention raised by the applicant in its opposition to the anticipation application is that the respondents have failed to make out any additional facts or special circumstances as to why the return day should be anticipated. The respondents, on the other hand, contend that the application raises important and unique legal issues, that the interim order includes a declarator which is a legal nullity in interim proceedings and that contrary to what the applicant submits, the respondents do not seek, in effect, to appeal the interim order.

[7] The applicant sought an interim order declaring the strike to be unprotected. The fact that it did is no doubt due to a practice in this court where applicants seek interim orders where the relief sought is not truly interim, i.e. it is not sought pending the outcome of other proceedings. (For example, an application to stay a writ of execution pending the outcome of an application to review and set aside an arbitration award.) When an applicant seeks to have a strike or lock-out declared unprotected, little purpose is served by the granting of an interim order when all of the facts are before the court and the matter has been fully argued. I suspect that the commonly employed practice of seeking interim relief in these circumstances has more to do with the lower threshold faced by an applicant (a right *prima facie* established as opposed to a clear right) and the prospect of a return day six or eight weeks later (which is the norm, certainly in Johannesburg), by which time any final order is usually academic.

[8] The granting of interim relief in these circumstances inevitably results in this court becoming a vehicle through which the power play between the parties to industrial action is continued by another means – an interim interdict against a strike or lock-out, with a return day weeks away, will in most instances put an end to the industrial action on the applicant party’s terms. Inevitably, the order interferes with the power dynamics at play and more often than not, its effect

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upon the exercise of a constitutional right is profound and the respondent's lack of alternative remedies acute.

[9] Of course there are circumstances where interim orders are appropriate, especially where despite proper service the respondent party is not present in court, or where some other imbalance or injustice would result from the granting of a final order. I am not so naïve as to think that parties to industrial action will seek to use the law to their advantage but this court, as an institution, should be wary of being drawn inappropriately into the power play and being used by one party to gain a strategic advantage at the expense of the other. This is perhaps best accomplished by requiring parties to applications to declare strikes or lockouts unprotected as far as possible to file a full set of papers thus enabling the court to treat the application as one for final relief or, where interim relief is appropriate, by fixing return days within a few days of the granting of the interim order.

[10] The concerns that I have expressed are not new. As far back as 1988, Prof Kate O'Regan criticised the granting of interdicts in the context of industrial action:

> Firstly, because the ordinary principles of civil procedure, ensuring that both parties have a full opportunity to present the case prior to the issue of an order, may be waived by the judge in the injunction cases; and secondly, because the substantive law relevant to labour injunctions favours employers and gives little weight to the legitimacy of strike action in the collective-bargaining process.

(See O'Regan C 'Interdicts restraining strike action – implications of the Labour Amendment Act 83 of 1988' (1988) 9 *ILJ* 959.)

[11] Prof Alan Rycroft has observed that the interdict process gives applicants, usually employers, a tactical advantage because the likelihood of a full trial in most instances is small, and the employer's widely expressed assertions of 'interference with business' and 'extreme violence' become *prima facie* evidence (see Rycroft A 'What can be done about strike-related violence?' (2014) 30 (2) *International Journal of Comparative Labour Law and Industrial Relations* 199 - 216).

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[12] In the present instance, when the interim order was granted on 30 October 2015, the court had before it the founding affidavit, an answering affidavit and a number of supplementary affidavits. The applicant’s representative elected to argue the application without a replying affidavit. The legal issues, it would seem, were comprehensively argued. The interim relief sought was the same as the final relief that the applicant indicated it would seek on the return day.

[13] In my view, the application ought to have been treated as one for final relief. The fact of the matter is that it wasn’t. In these circumstances, the respondents are entitled to anticipate the return day without establishing any additional facts on which the order should be reconsidered. It is sufficient that the test for final relief is different, and that the respondents are entitled to have the merits of the applicant’s claim reconsidered and adjudicated on that basis as opposed to the lower threshold applicable to the granting of interim relief. To hold otherwise would ignore the effect of the interim order on a fundamental constitutional right in the form of the right to strike and the respondents’ acute lack of alternative remedies.

<u>The main application</u>

<u>Factual background</u>

[14] The applicant fails to set out in the founding affidavit the full factual context in which the order declaring the strike unprotected is sought. Much of what follows is drawn from the answering affidavit, but it is largely a matter of common cause.

[15] On 15 June 2015, the union addressed a letter to the applicant setting out a comprehensive list of demands relating to the terms and conditions of its members employment. On 25 July 2015, the union referred a dispute to the CCMA, contending that the applicant was refusing to bargain with it in respect of these demands. The dispute was conciliated on 12 August 2015. The dispute on the refusal to bargain was settled. A settlement agreement was concluded between the parties, who agreed to meet on 24 and 25 August 2015 to negotiate wages and terms and conditions of employment. On 24 August 2015, a meeting

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was held but no agreement reached. On the same date, and the union referred a dispute to the CCMA, the referral form reflecting that the dispute was one about wages. The desired outcome was reflected as one that required the applicant to meet the union's demand in respect of wage negotiations. That dispute was set down for conciliation on 10 September 2015. The parties could not reach agreement. The conciliating commissioner urged the parties to meet once more which they did on 18 September 2015. Again, the parties failed to reach agreement. Following a request for a further meeting, the applicant informed the union that a meeting could only take place to sign acceptance of the applicant's offer of wages and terms and conditions of service.

[16] On 6 October 2015, the union issued a notice of its intention to strike. The notice indicated that the strike was in support of demands negotiated on 24 August and 18 September. The full text of the strike notice reads as follows:

> Following the negotiations held on the 24th August and 18th of September 2015 between the union and company and their failure to reach an agreement. The Union members hereby seek to exercise its rights to embark on a protected strike in terms of section 64 sub-section 1 paragraph (a) (ii).
>
> As the employer, you are therefore given notice of the Union's members at your Midrand Distribution centre that will be embarking a protected strike. The notice will run from today the 7th day of October 2015 to the 12th day of October 2015. This then implies that the morning shift of Monday the 12th of October 2015 at around 0600 am will commence with the strike action and the remain shifts will follow.
>
> The union remains committed for the resolution of same provided management would bring their revised position meaningfully (sic).

[17] After the strike notice was issued, the applicant and the union agreed on picketing rules. The strike commenced on 12 October 2015.

[18] The applicant later alleged that the striking employees had failed to comply with the picketing rules and had committed various acts of strike-related misconduct. On 19 October 2015, this court granted an order under case number J 2111/15 in

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terms of which the picketing rules were effectively enforced and misconduct interdicted. The union avers that the application was set down for 14h00 on that day, and that the application was served on the union after that time. By the time the union's attorney attended court, the interim order had already been granted. On the applicant's version, the application was served at 13h00 by email and an unsigned copy handed to the union's shop stewards at 12h45. Be that as it may, the applicant subsequently filed an application to hold the union and two of its unions' officials in contempt of the order granted on 19 October. That application remains pending.

[19] It is not in dispute that during the course of the strike, banners were displayed criticising the applicant's holding company, Woolworths, for doing business with Israel and that Palestinian flags were waved. It is also not disputed that during the course of the strike, members of a political party, the Economic Freedom Fighters (EFF), became involved in strike in that on 23 October 2015, officials and members of the EFF visited the applicant's premises demanding to negotiate with the applicant's management. On the same evening, four EFF members travelling in two cars addressed the individual respondents present stating that they should not give up hope or surrender until their demands were met, that they should intensify the strike by targeting trucks doing deliveries and entering and leaving the applicants gates, that the EFF would provide legal assistance and would publicise the strike.. The applicant submits that the EFF is seeking to use political power and threats of violence and that the strike ceased to be lawful on account of the associated demands made in service of the wider political goals of the EFF. It goes so far as to suggest, consequent on a meeting between four EFF members and a member of the applicant's management that the union's members have aligned themselves with political demands and objectives and in particular, that the individual respondents are pursuing political demands in the course of an EFF-led action.

[20] The union admits that banners of the sort described by the applicant were displayed but denies having organised that display, and denies having sanction

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the use of the union's logo on the banners. The union further avers that it has never demanded that Woolworths break its ties with Israel and asserts that those organisations who have taken this position have shown solidarity with the strikers' demands. Similarly, the union states that it is not in alliance or in partnership with the EFF, and has no control over the EFF and its programs. While some of the union's members may well be members of the EFF and while the EFF may have demonstrated solidarity with the striking workers, these are not matters that have been sanctioned by the union.

[21] The background to the present dispute is best captured by an exchange of correspondence between the parties' respective attorneys. On 26 October 2015, the applicant's attorney wrote to the respondent's attorney in the following terms:

> We are instructed by Universal Product Network (Pty) Ltd.
>
> We refer to your clients notice of strike dated 6 October 2015 and a noted that such notices defective in that your client fails to state what the issues in dispute/demands are and accordingly the strike presently underway is unprotected…
>
> Furthermore, notwithstanding the defective nature of the strike notice, it has become apparent that the current strike (which is unprotected) is in any event not in pursuit of matters of mutual interest, but it is in pursuit of political and violent goals. Subsequently it has become apparent with reference to the slogans and signs of your members, that your clients demand that our clients cease 'trading with Israel'.
>
> Furthermore the economic freedom Fighters ('EFF') have become your clients partner in the strike in that:
>
> 1) the EFF together with your clients members have demanded entry to our clients premises to negotiate with management;
> 2) the EFF has threatened to 'bring the dc down';
> 3) the EFF have indicated that they are 'not afraid to die' to support your union and its members;

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4) the EFF threatened to bring the marchers in respect of the EFF financial sector strike down to our clients distribution centre;

5) the EFF are threatened in presence of your members to 'attack Woolworth stores'.

It is apparent that your union and its members have allied themselves with the EFF and the demands made above and in the joint conduct witnessed over the last five days.

It is apparent that our client now faces political demands and threats of violence including attacks on their stores (which are workplaces outside the ambit of this particular dispute). Accordingly your members conduct no longer constitute a protected strike action the objective of the strike is now become one in pursuit of violence and political issues are not in settlement of legislative demands of mutual interest …

[22] On 27 October 2015 the union's attorneys wrote to the applicant's attorneys recording amongst other things the following instructions:

…4. On behalf of our client instructed by its general secretary to inform you, as we hereby do, as follows:

4.1 The strike is protected. Our client will resist any attempt to declare the strike unprotected and you and your client are called upon to deliver any application is threatened in your letter upon our client and asked timelessly so that our client can deal with the application properly. A client will object most strenuously to any further attempt on your client's part to rush through an application as it did with the interim interdict obtained on 19 October 2015.

4.2 The strike concerns demands relating to wages and conditions of employment. This has always been the case and remains the case.

4.3 The strike notice is not defective.

4.4 The union is not aligned to any political party and that includes the economic freedom Fighters (EFF). Members of the union are free to belong to any political party of their choice, as is guaranteed in the constitution. The union believes that its members belong to various political parties and that some do not belong to any political party.

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> 4.5 That the EFF has demonstrated solidarity with the strikers and added its voice of protest against your client and Woolworths (Pty) Ltd on other matters is nothing to do with the union. The union has not aligned itself with the EFF's demands. Individual members may have, but this is not sanctioned by the union and does not represent the union's demand in relation to the strike. It certainly does not transform the dispute relating to the strike, which are about wages and conditions of employment.
>
> 4.6 The EFF's actions cannot prevent the union and its members from exercising their constitutional right to strike and to picket peacefully.
>
> 4.7 The union has communicated to the EFF and a copy of this letter will be sent to in due course.
>
> 4.8 The union denies that it strikers in support of political or violent objectives.
>
> 4.8 The union is not aware of any violence associated with the strike, although vague allegations to this effect are bandied about by your client and Woolworths (Pty Ltd from time to time. Insofar as any may have occurred, which the union is not aware of, the union condemns the violence and disassociate itself from it…
>
> 4.10 The union has no knowledge of any threats relating to attacks on stores and condemns any such threats.
>
> 5. Our client calls upon your client to return to the negotiating table for genuine negotiations about the issue in dispute – wages and conditions of employment – and to stop wasting all of the parties' energies on matters such as interdict applications, contempt applications, the characters and suchlike. We reiterate our client's suggestion that negotiations recommence in earnest about the issues in dispute. Our client suggests that these negotiations be facilitated by CCMA mediator or another mutually agreed upon private mediator…

[23] On the same day, the union addressed a letter to the Economic Freedom Fighters. The relevant part of the letter reads as follows:

> While the union and its members appreciate solidarity from members of the community and other organisations, the union is most concerned that the EFF

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and its members and supporters are encouraging the union's members to breach the court order, making them vulnerable to conviction for contempt of court.

In addition, as a result of the EFF's intervention, the Universal Product Network (Pty) Ltd has threatened to have the strike declared unprotected because the strike is now allegedly in support of political demands relating to, for example, Woolworths dealings with Israel.

We are obviously not able to prevent the EFF and its members from protesting in the manner they see fit and we are not able to prevent the EFF from raising other issues, and neither would the union wish to prevent the EFF from exercising its constitutional rights of free assembly, free speech and the right to peacefully protest. However, we reiterate that the union strike is about wages and conditions of employment and we wish to prevail upon the EFF and its members not to encourage members to breach the court order or any other law.

Although some of our members may be members of the EFF and others may be members of other political parties, we place on record that the union is not aligned to any political party I trust that the EFF will not act in a manner that is detrimental to the union, its members and its protected and legitimate strike for increase wages and better conditions for its members. I also trust that the EFF will consider and heed the requests made herein.

Applicable legal principles

[24] Section 64 of the LRA establishes a number of procedural constraints on the exercise of the right to strike. Section 64 (1) (b) reads as follows:

> Every employee has the right to strike and every employer has the right to lock out if –
>
> > (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer…

[25] The legal principles that apply to the minimum content of a notice of intention to strike are fairly well-established. In the present instance, what is disputed is the sufficiency of the content of the notice in relation to the demands made by the

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union. In *SA Airways (Pty) Ltd v SATAWU* [2010] 3 BLLR 321 (LC), this court said the following:

> The same purpose of approach adopted by the Labour appeal Court requires that a strike notice should sufficiently clearly articulate the union's demands so as to place the employee in a position where it can take an informed decision to resist or exceed to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands. Some of the issues giving rise to the intended strike, as they articulated in the strike notice, are clear. The issue of the disciplinary action demanded in respect of Venter, as well as the demand in relation to retention bonuses, are relatively clearly expressed, and to require more would be to adopt an unnecessarily and unjustifiably technical approach. The same cannot be said however in respect of the reference to 'demands for which certificate of non-resolution was issued on 21 September 2009.' This is particularly so in a case such as the present, where the referral to conciliation was made, it would seem, in respect of unspecified in various grievances and petitions lodged over a period of months preceding the notice. Any employer faced with a strike notice issued in such imprecise terms would be hard pressed to know which element of what grievance and petition it was being asked to resist or concede.

[26] Mr Orr, who appeared on behalf of the respondent's, submitted that the Constitutional Court's judgment in *South African Transport and Allied Workers Union (SATAWU) and others v Moloto NO and another* [2012]12 BLLR 1193 (CC) suggested that no more was required by the LRA than that the strike notice state the date on which the intended strike would commence. The *SATAWU* case concerned a strike notice issued by a majority union at a workplace and specifically, whether it was necessary for non-union members employed in the bargaining unit for which the union was the recognised representative were required to issue their own notices. Put another way, the issue before the court was whether every employee who intends to embark on a strike must notify the employer that intention personally, or through a representative (for example, a trade union), for a strike to be protected. In the course of its judgment, the court

emphasised that the right to strike is protected in the constitution as a fundamental right without express limitation and that constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them (see paragraph 53 of the judgment). The court observed that the provisions of s 64 (1) (b) of the LRA do not extend the requirements of the content of a notice beyond the simple an express requirement of when the strike will start, to an interpretation that requires fuller disclosure. The crisp issue was which interpretation of s 64 (1) (b) was better aligned with the spirit, purpose and objects of the Bill of Rights – an interpretation that required only one notice rather than separate notices by on behalf of each employee intending to strike. At paragraph 75 of the judgment, the court said the following:

> In our view there is really no contest. Interpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act – specifically that of orderly collective-bargaining – better; and gives proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power.

The majority of the court went on to find that the union, which had represented non-members in the bargaining unit in the course of wage negotiations and in the referral for conciliation, was entitled to give a single notice of intention to strike.

[27] The paragraph 91 of the judgment, the Constitutional Court went on to say the following:

> *Provided that the strike notice sets out to the issues over which the employees will go on strike with reasonable clarity*, the cases show that orderly collective-bargaining and the right to strike, in its proper sense as a counterbalance to the greater social and economic bar of employers, have been considered to be well served by the acceptance of a single strike notice (emphasis added).

[28] In short, the approach adopted by this court in relation to the content of a strike notice and in particular, the requirement that the union articulate the issue over which employees will go on strike, does not offend an interpretation of s 64 (1)(b)

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that is aligned to the spirit, purport and objects of the Bill of Rights. However, this court must be cautious when reading in requirements to s 64 (1) (b) that are not expressly stated – an interpretation less intrusive of the right to strike must be preferred.

[29] Turning next to the applicant's contention that the nature of the strikers changed to an extent that the union no longer pursues the settlement of legitimate demands relating to matters of mutual interest but pursues violence and political matters, it should be recognised at the outset that this court's intervention is reactive and thus limited. The law has its limits. What is obviously required is a more holistic approach and a greater understanding of the factors that contribute to mob violence, together with a pre-emptive process and measures that are supportive of good faith negotiation (see Rycroft *supra*).

[30] Be that as it may, this court has suggested on a number of occasions that violent and unruly conduct is the antithesis of the aim of a strike, which is to persuade the employer through the peaceful withholding of work to agree to the union's demands. *In Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Fututre of South Africa Workers' Union* (2012) 33 *ILJ* 998 (LC), the court said the following:

> [13] 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 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 there are any of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.

[31] Insofar as the applicant's claim has as its basis the contention that what may have been a protected strike has transmuted to an unprotected strike, the Labour Appeal Court has held that such a transmutation would only occur if it is shown that the employees had used the protected strike as leverage to achieve

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objectives other than those in respect of which strike action could legitimately be taken. (See *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metalworkers of SA & others* (2001) 32 *ILJ* 2939 (LAC), at paragraph 52.)

[32] The proper approach, it would seem to me, is that proposed by Prof Rycroft see Rycroft *supra*) who acknowledges the practical difficulties that clearly arise, not least the determination of how much violence will misconduct would have to have occurred before the court intervenes. He suggests that the court ask the following question 'Has misconduct taken place to an extent that the strike no longer promotes functional collective-bargaining, and is therefore no longer deserving of its protected status'? In answering this question, Prof Rycroft proposes that the court weigh the levels of violence and efforts by the union concerned to curb it. He explains that this is not an anti-union proposal; rather, he imagines a balancing counter-measure allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it is in response to unjustified conduct by the employer (see Rycroft *supra* fn 43). In my view, this is an eminently sensible approach to adopt.

Analysis

[33] I deal first with the issue of the strike notice. The issue, crisply stated, is whether the terms of the strike notice were sufficient to comply with s 64 (1) (b) insofar as the demands made by the union of the applicant are concerned. The principle, as reflected above, is that a strike notice must place the employer in a position reasonably to know which demands a union and its members intend to pursue through strike action and that it must therefore meet to avoid the prospect of industrial action.

[34] Each case must be determined on its own facts. In the present instance, it is not disputed that a comprehensive list of demands relating to the wages and other terms and conditions of employment of union members was tabled by the union on 15 June 2015. The settlement agreement reached between the parties on 12 August 2015 specifically records that the parties agreed to meet and negotiate wages and substantive issues. These can only be the issues raised in the union's

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initial list of demands. The referral to the CCMA when agreement could not be reached on 24 August reflects the unions desired outcome as one in which the applicant exceeds to the workers' demands in respect of wage negotiations. A further meeting on 18 September 2015 failed to resolve the dispute between the parties. Subsequently, in response to a request for a date to continue negotiations, the applicant assumed the stance that it was willing to agree to a date only if the union accepted the applicant's wages and conditions of service. In the circumstances, the only reasonable conclusion to be drawn is that the applicant was at all times fully aware of nature and extent of the union's demands and that this remained the position as at the date on which the strike notice was issued. This conclusion is fortified by the fact that the strike had endured for more two weeks without the validity of the strike notice being attacked.

[35] Mr. Cook, who appeared for the applicant, made much of the distinction between wages and other substantive issues. What this submission ignores is that the industrial relations term of art 'wage negotiations' almost inevitably extends not only to negotiations concerning actual wages but also other substantive conditions of employment that have a monetary implication. These are the issues included in the union's list of demands tabled on 15 June 2015 and which had been the subject of engagement between the parties.

[36] Finally, the applicant has always been fully aware of the purpose of the strike. In the founding affidavit, the deponent says the following:

> It is also become apparent that the first respondent and its members ('the second to further respondents) are no longer pursuing a settlement of legitimate demands of mutual interest but the objective of the strike has become one in pursuit of violence and political issues.

For the applicant to concede that the strike was originally in support of legitimate demands of mutual interest, it must have been aware of the nature of the demands. In addition, on 28 October 2015, the applicant sent out an SMS to workers stating amongst other things, "The company will not offer more than it has." Further, as is apparent from the supplementary affidavit filed on 4

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November 2011, when employees tendered the services in accordance with the interim order, they were required to sign a form indicating whether there was acceptance to the applicant's final wage offer. In these circumstances, it cannot be said that the applicant was ignorant of the union's demands or that it did not reasonably know what was required to meet them.

[37] In relation to the acts of violence in respect of which is the applicant seeks to have the strike declared unprotected, it is regrettable that the acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected. Strike -related misconduct is a scourge and a serious impediment to the peaceful exercise of the right to strike and picket. More than that, it is a denial of the rights of those at whom violence is directed, typically those who elect to continue working and suppliers of those employers who are the target of strike action, and poses serious risks to investment and other drivers of economic growth. A week in the urgent court where employers seek interdicts against strike-related misconduct on a daily basis bears testimony to this. What is more concerning is that those institutions whose function it is to uphold order (in most instances, the South African Police Services) appear content to remain spectators of wanton acts of violence, intimidation and sabotage, adopting the view that they will intervene if and only if the court order is granted. Why this court should be called upon routinely to authorise and direct the SAPS to execute its statutory functions in relation to strike -related violence is incomprehensible.

[38] While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in *SATAWU*, this court ought not to easily to adopt too intrusive an interpretation of the substantive limits on the exercise of the right to strike.

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[39] What the particular threshold might be is not a matter that I am called on to decide, but Prof Rycroft's proposals make eminent sense. On the facts before me, I am not able to find that in the present instance, the nature and degree of violence is not such that the strike no longer promotes functional collective bargaining. Further, the efforts made by the union to curb acts of violence and to disassociate itself from those acts appear to me to be sincere.

[40] The video and other evidence proffered by the applicant establishes that at least some of the respondents have on the face of it acted in breach of the interim interdict granted by this court under case number J 2111\15 on 19 October 2015. I must emphasise that any act of intimidation and violence or the threat of violence is to be deplored in the strongest terms. By resorting to or condoning acts of gratuitous violence a union calling the strike runs the risk that the exercise of the right to strike no longer supports the legitimate purpose of collective bargaining. In the present instance, there is a remedy available to the applicant. The application to hold the union and to individuals in contempt of this court on account of their alleged breach of an order granted by this court remains pending and it remains open to the applicant to set the matter down for hearing and to ensure that the relevant parties are sanctioned if the requirements of contempt are met.

[41] In so far as the applicant contends that the strike is no longer functional to collective bargaining in that it has assumed a different and political purpose, I am similarly not persuaded on the available evidence that this is so. It is not uncommon, both in South Africa and elsewhere, for community groups and even political parties to express their solidarity with striking workers and to identify with the course. The fact that one or more opportunistic fellow travelers elect to support a strike and during the course of that support, to express their own views or pursue their own more parochial interests ought to come as no surprise. That is not to say that there may well be a threshold that is crossed when the purpose of industrial action, initially in pursuit of matters of mutual interest, becomes directed at other purposes.

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[42] In my view, the facts do not support a contention that the industrial action currently undertaken is not directed at matters of mutual interest between an employer and employees. The evidence does not disclose that any 'political' demands have been made by the union. To the extent that the EFF has made demands of the applicant these are not demands made by the union, and indeed, the union has expressly disassociated itself from both the EFF's conduct and its demands. To the extent that the applicant remains aggrieved at the conduct of the EFF (which appears to be opportunistic at best), this is a matter that should be addressed with the EFF directly. In so far as the EFF has encouraged any of the individual respondents to breach the terms of the order granted on 19 October 2015, those respondents may in due course be required to answer for their actions. In so far as the EFF itself or its officials have made themselves guilty of criminal acts, the applicant has remedies against them.

[43] Similarly, to the extent that persons display banners during the course of the strike in support of the BDS movement, none of that organisation's objectives are the subject of any demand made by the union, nor is there any evidence to suggest that these are matters that give rise to the strike. What the papers disclose is that an unspecified number of banners appeared on unspecified days criticising Woolworths doing business with Israel, that on an unspecified day, and unspecified persons displayed a banner bearing the logos of both the union and the BDS movement and that an unspecified number of and unspecified persons waved Palestinian flags. It can cannot reasonably be concluded that on this basis, the strike is no longer in support of demands concerning matters of mutual interest and has transformed. For all of the reasons stated above, it follows that the rule *nisi* issued on 30 October 2015 ought to be discharged.

[44] In relation to costs, s 162 of the LRA affords this court a broad discretion to make orders for costs according to the requirements of the law and fairness. Ever since what was then the Appellate division of the Supreme Court's judgment in *NUM v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A), this court has been reluctant to make orders for costs where the litigants parties to an ongoing

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collective bargaining relationship, and where a costs order might serve to prejudice that relationship. This principle must militate against a costs order particularly where the parties, as they are in the present instance, remain in dispute and where settlement continues to elude them. Mr Orr submitted that a costs order is appropriate given what he termed the deliberate attempt by the applicant to mislead the court in relation to the strike notice and its misrepresentation of the evidence in its supplementary affidavit. I make no finding in this regard, but the application for interim relief was misguided. I equally have a degree of sympathy with Mr Cook's submission that the union ought to be liable at least for the costs of 3 November 2015, when the application was postponed on account of short service of the application to anticipate by the union. However, in my view, the broader interests of reconciliation between the parties must prevail and for that reason, I intend to make no order as to costs.

[45] Finally, this ruling should not be construed as legitimising or condoning those acts of strike -related misconduct that have occurred, or the political interference in the strike by either the EFF or the BDS. The ruling means no more than that on the facts placed before the court, the levels and degree of violence and interference by outside parties do not tilt the balance toward a finding that the protected strike called by the union should be declared unprotected. Of course, the applicant is not precluded from seeking similar relief should future circumstances warrant such an order.

I make the following order:

1. The rule *nisi* issued on 30 October 2015 is discharged.
2. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Labour Court

APPEARANCES

For the Applicant: Adv. AL Cook instructed by Mcgregor Erasmus Attorneys

For the Respondent: Adv. C Orr instructed by Haffegee Roskam Savage Attoneys

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