

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J2499/01

In the matter between:

LEONARD DINGLER (PTY) LTD

Applicant

and

NATIONAL ENTITLED WORKERS' UNION (NEWU)

First Respondent

**SOUTH AFRICAN FOOD & ALLIED TRADE
WORKERS' UNION (SAFATU)**

Second Respondent

THE EMPLOYEES LISTED IN ANNEXURE "A" HERETO

Third and Further
Respondents

JUDGMENT

JAMMY AJ

On 21 June 2001, pursuant to an application brought that day as a matter of urgency by the Applicant, a *Rule Nisi* was issued by this court calling upon the Respondents to show cause on 25 June 2001 why a final order should not be granted in the following terms:

Interdicting and restraining the Third and Further Respondents from committing any one or more of the following wrongful or unlawful acts:

preventing access to and egress from the Applicant's premises situated at corner Christopher and

Siding Avenue, Boksburg East, Industrial Sites, Boksburg;

assaulting or intimidating any of the Applicant's customers, suppliers or employees;

damaging any of the Applicant's property or the property of any of the Applicant's customers or suppliers or that of surrounding businesses.

Evicting the Third and Further Respondents from the Applicant's main entrance situated in Siding Avenue and ordering them to remain at least 100 metres therefrom.

Ordering the Third and Further Respondents to pay the Applicant's costs jointly and severally, the one paying the other to be absolved".

By virtue of what the court accepted was the urgency for the interim relief sought by the Applicant, the *viva voce* evidence of the Applicant's Managing Director, Mr M L Wraith, was admitted by the court in support of the application. The Applicant was however ordered to file a formal affidavit traversing the evidence presented by Mr Wraith, together with any supplementary affidavits relevant thereto, by close of business the following day, 22 June 2001 and duly did so.

An answering affidavit deposed to on behalf of all of the Respondents by Mr A T Chiliza, a union official of the First Respondent, was thereafter served and filed and a comprehensive replying affidavit by Mr Wraith followed in sequence.

It is unnecessary in my view, that I traverse the substance of those affidavits in detail. One unusual feature thereof however was that the Respondents' answering affidavit purported to incorporate an application for an interdict restraining the Applicant and the South African Police Services "from participating, *inter alia*, in Applicant's unlawful lock-out". It is common cause however that on the return date, and in the light of picketing rules which had in the interim been defined and agreed upon between the parties, that application was not pursued.

The return date of the *Rule Nisi* was ultimately extended to 25 July 2001, when its confirmation and the issue of a final order based thereon, was opposed by the Respondents. The substance of that opposition was couched in two documents file of record.

The first of these was headed:

**“SPECIAL PLEA IN ABATEMENT
(MISJOINDER): OBJECTION”;**

prehensive document headed:

HEADS OF ARGUMENT”

sections. The first was a sub-titled –

STRIKE OUT”

b-titled:

MINE”

Having, on 25 July 2001, heard submissions from the representatives of the parties, - Mr M D Maluleke, a union official of the First Respondent on behalf of all the Respondents, and Advocate A Myburgh for the Applicant, I dismissed the Respondents’ special plea of misjoinder, as well as its *in limine* objection to the effect that this court had no jurisdiction to confirm aspects of the *Rule Nisi*. The *Rule Nisi* was confirmed and a final order in terms thereof was issued. The Third and Further Respondents were ordered jointly and

severally to pay the Applicant's costs. I indicated that I would furnish reasons for these orders in due course and they are the following.

The Respondents' special plea of misjoinder was based on a contention that no cause of action had been shown in the Applicant's founding affidavit to exist against the First and Second Respondents and that no common basis between them and the Third Respondents was in evidence to justify their citation as Respondents in the application. In essence, Mr Maluleke argued, the two trade unions were not the agents of, but rather the spokesmen for, the Third and Further Respondents. Their joinder was therefore misconceived and should be struck out. That, Mr Maluleke conceded, was the only basis upon which the First and Second Respondents opposed the confirmation of the Rule.

Relevant to the determination of that issue however is the salient fact that no relief of any form is sought by the Applicant against either the First or Second Respondents. The two trade unions are manifestly cited in their representative capacity. It was in that capacity that they processed the referral of the individual Respondents' dispute with the Applicant to the Commission for Conciliation Mediation and Arbitration. The Certificate of Non-Resolution issued by the Commission cites them as Respondents. The notice of impending strike action was issued by them on behalf of the individual Respondents and in that context, it was the unions who motivated and in effect instigated the strike action legitimately thereafter embarked upon. They are manifestly participants in the process and their conduct in that context is not the conduct of mere spokesmen but of active, energetic collective bargaining agents of the individual Respondents. Their joinder in the proceedings was therefore indicated and proper.

. The objection *in limine* is couched by Mr Maluleke in the following terms:

"The Applicant's founding affidavit does not make out a *prima facie* case for the relief claimed and this Honourable Court has no jurisdiction to grant or confirm order No. 1.1.1 and order No. 1.2 sought by the Applicant".

. Those orders, as I have indicated interdicted the Respondents from interfering with

access to and egress from the Applicant's premises and from assaulting or intimidating any of its customers, suppliers or employees. The third order was that removing the Third and Further Respondents' from the main entrance to the Applicant's premises.

The activities complained of, Mr Maluleke submitted, could only be interdicted if they constituted criminal conduct or a breach of the picketing rules. No picketing rules had at that stage been formulated and agreed upon and the conduct complained of, if indeed it was occurring (which the Respondents' denied) was not criminal in nature. The court therefore lacked jurisdiction to have made the orders in question.

Those arguments in my view have no substance in law. The orders relating thereto were based on allegations of fact placed before the court by Mr Wraith and subsequently confirmed as directed. The Applicant was faced with a hostile demonstration causing, in effect, the holding of some twenty to thirty people within the Applicant's premises and who were unable to leave, and the blockading of the forecourt of the building. The fact that picketing rules were subsequently formulated and now regulate the situation is of no relevance to the state of affairs which existed when the Applicants came urgently to court. The court was satisfied, on the basis of that evidence, that the Applicant was entitled to the relief which it sought and to suggest that it had no jurisdiction to afford it, is a spurious submission. Indeed the nature of the relief granted is on all fours with that provided by this court in a multitude of preceding and similar applications. It was for that reason that the objection *in limine* was dismissed.

Finally Mr Maluleke argued strenuously against the admissibility of detailed submissions made in the Applicant's replying affidavit regarding the state of the affairs at the Applicant's premises and occurrences there taking place. All of these, he contended, constituted either new factual allegations or legal argument which the Applicant was not entitled to introduce in a replying affidavit where they were not made in the founding submissions. Much of Mr Wraith's evidence was, moreover, hearsay and inadmissible as such.

. Once again, there is no substance to these submissions. The application, as I have stated, was brought as one of urgency and the orders made at that time were based on oral evidence, submitted in the context of the exigencies existing. The Respondents' answering affidavit in essence, constitutes nothing more than a bare denial of the factual allegations orally made by Mr Wraith and thereafter substantiated in his affidavit and the supporting and confirmatory affidavits filed therewith. In the face of those bare denials, unsubstantiated by relevant factual submissions in acceptable form, the Applicant was entitled, in its reply, to submit rebutting evidence and that, in Mr Wraith's second affidavit and the supporting and confirmatory affidavits filed simultaneously, is precisely what it did.

. On the final issue of costs, the matter was argued as an opposed application and I can find no reason to deviate from the normal and conventional principle that an award of costs in matters of this nature will ordinarily follow the result. Notwithstanding its lack of legal substance however I do not regard the Respondents' opposition to the application and Mr Maluleke's passionate argument in that cause, to have been either frivolous or vexatious and it was for that reason that the award of costs which I made was on the ordinary scale and not on the scale as between attorney and own client for which Mr Myburgh contended.

B M JAMMY
Acting Judge of the Labour Court

6 August 2001

Representation:

ant: Advocate A Myburgh instructed by Moss-Morris Inc.

nts: Mr M D Maluleke