REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/45993
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
10.05.23

In the matter between:

HARROWLANE INVESTMENTS (PTY) LTD **t/a FOODTOWN HYPER SAVEMORE CASH & CARRY**	Applicant
and	
PHILLEMON PAULRON ZULU **(ID NUMBER: [...])**	First Respondent
SIPHO MAGUDULELA	Second Respondent
GENERAL INDUSTRIES WORKERS UNION OF SA	Third Respondent
GORDON NHLAPO **(ID NUMBER, [...])**	Fourth Respondent
NOMALI MBULI **(ID NUMBER, [...])**	Fifth Respondent

NTOMBENHLE NYAMBOSE **(ID NUMBER, [...])**	Sixth Respondent
THABO DAVID MOLOI **(ID NUMBER [...])**	Seventh Respondent
THE EMPLOYEES AS PER ANNEXURE "X"	Eighth Respondent
UNKNOWN MEMBERS OF THE PUBLIC	Ninth Respondent
SUNVILLE MEDIA (PTY) LTD	Tenth Respondent

Neutral Citation: *Harrowlane Investments (Pty) Ltd t/a Foodtown Hyper Savemore Cash & Carry v Phillemon Paulron Zulu and Others* (Case No: 2021/45993) [2023] ZAGPJHC 454 (11 April 2023)

JUDGMENT

WANLESS AJ

Introduction

[1] This is an application by HARROWLANE INVESTMENTS (PTY) LTD t/a FOODTOWN HYPER SAVEMOOR CASH & CARRY ("the Applicant") that the GENERAL INDUSTRIES WORKERS UNION OF SA ("the Third Respondent") pay the costs of the application instituted by the Applicant in this Court under case number 2021/45993, as it is more clearly set out hereunder.

[2] It is common cause in this matter that:

2.1 On the 7th of September 2021, employees of the Applicant embarked on an unprotected strike. The strike was orchestrated by the Shop Steward, Mr Nhlapo and a Mr Magudulela, a Union organizer.

2.2 The actions of the striking employees escalated and various acts of damage to property, assaults and intimidation took place between the 7th of September to the 6th of October 2021.

2.3 On the 6th of October 2021 the Applicant was granted urgent interim interdictory relief by this Court under case number 2021/45993 against not less than ten (10) Respondents. The return date of the application was 13 January 2022.

2.4 On the return date the matter was enrolled on the unopposed Motion Court roll. The only opposition thereto was that of the Third Respondent who had filed its notice of intention to oppose together with its Answering Affidavit on the 10th of January 2022.

2.5 The Third Respondent, in its Answering Affidavit, did not oppose the relief sought by the Applicant but disputed only its liability to pay the costs of the application jointly and severally with the other nine (9) Respondents.

2.6 On 13 January 2022 the interim order was confirmed save that the issue of costs against the Third Respondent which had initially been reserved in respect of all the Respondents, was postponed *sine die* (the other Respondents being ordered to pay the costs of the application jointly and severally the one paying the others to be absolved).

[3] In the premises, the sole issue to be determined by this Court is whether the Third Respondent should be ordered to pay the costs of the application, jointly and severally the one paying the others to be absolved, with the other nine (9) Respondents cited as such by the Applicant in that application.

[4] It must be noted that at the hearing of this application The Third Respondent sought leave to file a Supplementary Affidavit deposed to by one PHILLIP ZWANE on the 3rd of November 2022. This was originally opposed by the Applicant but during the course of argument this opposition was withdrawn by the Applicant's Counsel. In light thereof and in the interests of justice the late filing of the said affidavit was condoned and the Supplementary Affidavit was accepted as part of the evidence before this Court to be considered when determining this application.

The Applicant's Case

[5] The Applicant submits that:

5.1 The Third Respondent has consented to the *rule nisi* order being granted.

5.2 The Third Respondent is responsible for the actions of its members which includes the actions of its Union organizer and Shop Steward.

5.3 This Court is precluded from revisiting the merits of the application and that the only issue for this Court to determine is, having consented to the order, should the Third Respondent pay the costs? The Applicant relies on *Society for the Prevention of Cruelty to Animals, NO, WO 916 (Bloemfontein) v De Swart and Others* 1969 (1) SA 655 (O) at page 687 paragraphs G-H in support thereof.

The Third Respondent's Case

[6] On behalf of the Third Respondent it was submitted that:

6.1 It is not linked to any particular unlawful conduct and therefore should not pay the costs of the application;

6.2 It played a critical role in ensuring that the strike ends and the Applicant cannot deny such interventions. Having stated clearly to the Applicant that it was not condoning the actions of the members and that it has not been involved in any starting and perpetuation of the strike, it further requested meetings with the Applicant some of which the Applicant refused and had to ask the CCMA to intervene through Commissioner Sithole and there were numerous engagements with the Applicant and members by, amongst others, Phillip Zwane'.

6.3 The Third Respondent disagrees with the Applicant that this Court cannot revisit the basis of the Third Respondent's argument as the Applicant states that *"the Third Respondent is responsible for the actions of its members"*.

6.4 The consent to the order by the Third Respondent does not mean that it accepted liability for the strike but meant that it could not have been its purpose to engage in or to promote illegalities. Most cost orders which have been granted by courts against Unions are due to the Unions' involvements or complacency in the strike which cannot be found in this matter. Reliance is placed on *Algoa Bus Co (Pty) Limited v Transport Action Retail & General Workers Union & Others* (2015) 36 ILJ 2292 (LC); *Verulam Sawmills (Pty) Ltd v Association of Mine Workers and Construction Union (AMCU) & Others (unreported judgment J1580/15, 20 October 2015)*.

6.5 A *bona fide* and material dispute of fact exists upon the application papers before this Court as to the involvement, if any, of the Third Respondent in the strike. In the premises, in line with the *Plascon-Evans* test, this Court cannot reject the version of the Third Respondent and in the exercise of its discretion, should not order the Third Respondent to pay costs.

The Law

[7] In the first instance, it is necessary to consider the matter of *Society for the Prevention of Cruelty to Animals, NO, WO 916 (Bloemfontein)* referred to above and relied upon by the Applicant. The relevant principles as set out therein are, *inter alia*, the following:-

7.1 Where a *rule nisi* was issued in interdict proceedings and a Respondent did not appear to oppose but objected to the payment of costs and, by consent, the question of costs stood over for argument, costs had to be decided on the basis that the rule had been correctly confirmed;

7.2 as the Applicant was the successful party, that it was entitled to its costs unless the Respondent could show special reasons why it should not be entitled thereto.

[8] This Court is in agreement with the principles so clearly stated by De Villiers J in the aforesaid matter. There is no doubt that the reasoning therefor, based, *inter alia*, on the fact that the confirmation of the *rule nisi* in the absence of an application to vary or set it aside, gave rise to an order of court, which until challenged, remained intact and had to be obeyed. Allied to this, was that the same order was, until set aside, proof of an applicant's success in the application. This, in turn, gives rise to the generally acceptable principle in our law that, unless exceptional circumstances exist, costs should normally follow the result and a successful party should not be deprived of his or her costs.

[9] However, there is a further general principle that must be borne in mind. This is the overriding principle in respect of costs that they are in the discretion of the Court.[1] To this principle this Court would add another. That is, each case should be decided in light of its own particular facts.

Facts

[1] *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A); *Weare and Another v Ndebele NO and Others* (CCT15/08) [2008] ZACC 20; 2009 (1) SA 600 (CC) at 623.

[10] In deciding whether the Third Respondent should be ordered to pay the costs of the application jointly and severally with all of the other Respondents, it is necessary for this Court to decide –

10.1 Whether the Court is entitled to consider the merits of the application;

10.2 If so, whether the Third Respondent's involvement (or lack thereof) in the illegal strike is sufficient for this Court, in the exercise of its discretion, to order that the Third Respondent pay those costs.

[11] As to 10.1 above, it is the opinion of this Court that the Applicant's reliance on the matter of *Society for the Prevention of Cruelty to Animals, NO, WO 916 (Bloemfontein),* hereafter referred to as "*Society",* is misconstrued. Counsel for the Applicant has taken the principles so clearly enunciated by De Villiers J to the extreme. In this regard, it was submitted that since the *rule nisi* was correctly confirmed (unopposed by all of the Respondents except the Third Respondent who consented to the rule but opposed the granting of costs against it) that the issue of costs (on the basis of the Society matter) had already been decided.

[12] This is <u>not</u> what was held in the Society matter by De Villiers J. In that matter the learned Judge held that the question of costs had to be decided on the basis that the rule had been correctly confirmed and, as the Applicant was the successful party, it was entitled to its costs <u>unless</u> the Respondent could show special reasons why it should not be entitled thereto. That is very different to costs already having been decided, which flies in the face of the overriding general discretion given to the Court in respect of costs (as dealt with earlier in this judgment).

[13] That being the correct interpretation of our law, it is clear that this Court is entitled to examine the merits of the application insofar as they may be relevant to this <u>particular</u> matter and to the issue of costs.

[14] The relevant facts in relation to the aforesaid inquiry are, *inter alia*, the following:

14.1 The relief in the urgent application was aimed at prohibiting the further usage of a highly inflammatory message aimed as a "Clarion Call" for action against Foodtown and its staff and at interdicting the Respondents from intimidating and displaying violence aimed at the Applicant, its staff and customers.

14.2 Central to the merits of the application was the conduct of the Second Respondent, one Sipho Magudulela, a Union organizer; the Fourth Respondent, one Gordon Nhlapo, a Shop Steward and the other Respondents (with the exception of the 10th Respondent, being members of the Third Respondent).

14.3 On the 7th of September 2021 the Fourth Respondent gathered the Applicant's staff whereafter 61 employees stopped their work and began to strike.

14.4 Various acts of intimidation manifested, as displayed in the Founding Affidavit. The parties participating on different levels of this were the Respondents which incorporated the list of 61 employees of Foodtown.

14.5 A "Clarion Call" was issued on the 17th of September 2021, being a message distributed on social media which was highly inflammatory and aimed at mobilising "Social Justice Defenders" against the Applicant.

14.6 On the 20th of September 2021, 36 employees and ex-employees attended at the gate of Foodtown. They obstructed customers from entering and exiting the premises. Also on this date, it was recorded by one of the staff members (being on the list of striking employees) that *"the shop was not going to open until further notice as no customer will come to the store, the store managers are racist, the shop will remain closed until the store managers are removed, if the customers buy from the shop, they will take it and throw it on the floor".*

14.7 Further threats were observed and Foodtown was made aware that the store would be trashed and customers would be harmed. Notwithstanding complaints to the SAPS, no form of action manifested therefrom.

14.8 The store was closed on 20 September 2021 at 16h19 and the relevant parties were notified of same.

14.9 A written demand was directed to the Respondents to withdraw the "Clarion Call" by 17h00 hours on 21 September 2021. Only the Third Respondent responded thereto, when it distanced itself from the message and denied any wrongdoing.

14.10 The matter had reached a crescendo by Monday 20 September 2021 and Tuesday 21 September 2021. As a direct result of the Respondents' conduct the Applicant was forced to close down out of fear of harm to its staff, customers and infrastructure, including stock.

14.11 The intimidation, violence and threats to the Applicant continued despite the demand to cease and desist from such behaviour and this resulted in the Applicant's business remaining closed up to the hearing of the urgent application.

[15] In the Third Respondent's Answering Affidavit and Supplementary Affidavit filed in respect of the issue of costs only (to which the Applicant elected not to reply) it was averred, *inter alia*, that:

15.1 The non-opposition of the Third Respondent to the relief sought by the Applicant in the urgent application is consistent with its position that it did not support any misconduct on behalf of its members.

15.2 The Third Respondent took active steps on the day of the strike to resolve issues between its members and the Applicant. This resulted in these members returning to work.

15.3 The Applicant is aware of other organisations involved including the ANC and EFF but seeks to obtain an order for costs in respect of the Third Respondent simply based on the fact that members of the Third Respondent were involved in the illegal strike.

15.4 Nowhere in the Founding Affidavit of the Applicant is the Third Respondent directly linked to any particular unlawful conduct.

15.5 The Third Respondent co-operated with the Applicant at all material times.

15.6 Allegations are made by the Applicant without any real proof thereof.

Findings

[16] In light of the aforegoing, there is a clear dispute of fact on the application papers before this Court as to whether or not the Third Respondent had either done nothing to discourage its members from striking or that it had even distanced itself from the illegal strike, which would have justified this Court making an order that the Third Respondent be liable for costs.[2] Moreover, there are no grounds for this Court to reject the opposition of the Third Respondent as being far-fetched or unreasonable.

[17] In the premises, based on the principles as set out in *Plascon-Evans* and followed in a long line of decisions thereafter, this Court must find that the Applicant has failed to prove that the Third Respondent's conduct contributed towards the illegal strike and resulted in the Applicant having to institute the urgent application, thereby incurring costs.

[18] Of course, the issue of costs is not subject to either party discharging an onus of proof in the true sense. As set out earlier, this court has a general discretion in respect thereof. Together therewith is the general principle, as set out in the

[2] *Algoa Bus Company, (Pty) Ltd v Transport Action Retail and General Workers Union. (Thor, Targwu) and Another* [2015] 9 BLLR 952 (IC).

Society matter, that where a rule has been correctly confirmed (which is common cause in this matter) an Applicant is generally, entitled to its costs unless the Respondent can show special reasons why this should not be so.

[19] This Court has already stated that this principle (whilst undoubtedly correct) should not be over-emphasized to the detriment of this Court's general discretion. In addition thereto, is the genuine and *bona fide* dispute of fact as set out earlier in this judgment. Also to be considered when exercising its discretion are the probabilities in this matter.

[20] In this regard, this Court is satisfied that the probabilities favour the version as put forward by the Third Respondent. Indeed, the facts in support thereof are largely, if not wholly, undisputed on the application papers before this Court. This is as a direct result of the Applicant declining to file a Replying Affidavit but electing (erroneously) to place great reliance on the *Society* matter whilst misconstruing the true principles as set out therein. In the premises and in the exercise of its general discretion in respect of costs (exercised judicially and after consideration of all the facts) this Court finds that the application by the Applicant that the Third Respondent should pay the costs of the application, should be dismissed, with costs.

Order

[21] This Court makes the following order:

1. The application by the Applicant that the Third Respondent pay the costs of the application jointly and severally with the First, Second and Fourth to Tenth Respondents (including any reserved costs in the Application), is dismissed.

2. The Applicant is to pay the costs of the application as set out in paragraph 1 of this order.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	16 November 2022
***Ex Tempore*:**	11 April 2023
Transcription:	10 May 2023

Appearances

For Applicant:	WC Carstens
Instructed by:	RC Futter & Associates
For Third Respondent:	M Bayi
Instructed by:	Bayi Attorneys