IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C 131/99

DATE: 25-3-1999

In the matter between:

NATIONAL EDUCATION HEALTH AND AND ALLIED WORKERS UNION Applicant

and

THE UNIVERSITY OF CAPE TOWN Respondent

JUDGMENT

BASSON, J:

[1] This is an application for urgent interim relief in terms of which the applicant, the National Education Health and Allied Workers Union ("NEHAWU") seeks an order declaring that:

1. The recognition agreement entered into between the applicant and the respondent on 6 March 1986 remains valid and in force;
2. Interdicting and restraining the respondent from evicting the applicant from its office on the premises of the respondent;
3. Interdicting and restraining the respondent from preventing the applicant from utilising facilities afforded to the applicant by the respondent in terms of the recognition agreement; and in particular,
4. Interdicting and restraining the respondent from disconnecting the applicant's telephone, e-mail and fax facilities.

5. Interdicting and restraining the respondent from redeploying and/or retrenching full-time shop stewards of the applicant.

[2] Further, in terms of an amended notice of motion, ordering that the provisions of paragraphs 1-5 above operate as an interim interdict with immediate effect pending the resolution of the dispute in terms of section 24 of the Labour Relations Act 66 of 1995 (”the LRA”).

[3] The said recognition agreement was attached as Annexure B to the papers (at pages 23 and further).

[4] Important in this regard is clause 2 of the recognition agreement which sets out the objectives of the agreement as follows:
"The purpose of this agreement is to regulate the relationship between the university (the respondent) and the union (the applicant) and in doing so, to strive to establish an effective and cooperative working relationship between them"(emphasis supplied).

[5] In giving effect to the cooperative working relationship, clause 9 of the agreement deals with consultative meetings and states that:
"Monthly meetings shall take place between not more than 15 members of the shop stewards' committee and an equal number of management representatives of the university."

[6] Also of decisive importance is clause 3.1.3 of the agreement which states that:
"The agreement shall commence on signature of this document and shall remain in force for a period of one year, unless either the university or the union acts in material breach of this agreement and the other party gives written notice of termination to the defaulting party which shall take effect immediately upon

service of such notice in addition to whatever other remedies may be available to the party at law"(emphasis supplied).

[7] A consultative meeting between the parties in terms of this recognition agreement took place on 10 March 1999. It was common cause between the parties that the following stance was taken by the applicant (and I quote from paragraph 5.1 of the applicant's papers at page 8):

“5.1 The applicant's decision (is) not to participate in any university structure with management until two dismissed shop stewards of the applicant are reinstated."

[8] This stance of the applicant is also borne out by the minutes of this consultative meeting (attached to the papers).

[9] The requirements for granting urgent interim relief were set out in the case of Ericsson Motors Limited v Protea Motors & Another, 1973(3) SA 684 (A) at pages 691C-F:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court where the right which it is sought to protect is not clear. The Court's approach in the matter of an interim interdict was lucidly laid down by Innes, JA in Setlogelo v Setlogelo, 1914 (AD) 221 at 227. In general, the requisites are:

(a) a right, which though prima facie established, is open to some doubt;

(b) a well-grounded apprehension of irreparable injury;

(c) the absence of an ordinary remedy."

In exercising its discretion, the Court weighs inter alia the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted, this is sometimes called the 'balance of convenience'. The aforegoing considerations are not individually decisive but are inter-related ...”.

[10] In the matter of Webster v Mitchell, 1947 (WLD) 1186-1189, the Court suggested

the following approach when considering the facts of an application of this nature:

"The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'."

[11] Having regard to the purpose of the recognition agreement in casu (quoted above) and especially to the fact that its objective is to establish an effective and cooperative working relationship between the applicant and the respondent, the action of the applicant in declaring that it would not participate in any university structure with management until two dismissed shop stewards were reinstated was clearly a material breach of the provisions of clause 2 and clause 9 of the recognition agreement which deal in particular with consultative meetings between the parties.

[12] The applicant sought to remedy the breach of the contract in a letter to the university (the respondent) at page 40 of the papers (Annexure C). It is to be noted that the letter of termination in terms of clause 3.1.3 (referred to above), was sent to the union on 15 March 1999, that is, five days after the breach had taken place.

[13] The letter by the union (the applicant) retracts the breach of the agreement in the following words, under the heading "Termination of Recognition Agreement" (which words also clearly indicate that the fact that the university sought to terminate the recognition agreement was made clear to the union at this stage) and

then proceeds as follows (at paragraph 2):

"1. We agree to retract to our demand for the reinstatement of the two dismissed shop stewards and we commit ourselves to the CCMA arbitration process that is hearing their case.

2. We re-state our commitment to the recognition agreement and to working with UCT on all matters of mutual interest, in particular we agree to continue participating in future consultative meetings."

[14] This letter does not state (as the applicant's legal representative tried to argue) that there was no wilful breach of the recognition agreement. It also does not state that the persons representing the union at the meeting of 10 March 1999 did not have the necessary mandate to state what they did (that is, that they refused to attend any future consultative meetings). In fact, this letter made it clear that there was a breach of the recognition agreement and that it consisted of a refusal to participate in future consultative meetings.

[15] In the event, there was a material breach of the recognition agreement by the union.

[16] The university acted in terms of clause 3.1.3 of the recognition agreement (*supra)* to terminate the agreement. Both parties had voluntarily agreed that such termination would be possible in the event of a material breach. The other party merely gives written notice of termination to the defaulting party and such termination then takes effect immediately upon service of such notice.

[17] I am accordingly of the view that the recognition agreement was terminated by the university (the respondent) in its letter of 15 March 1999.

[18] I am further of the view that the union, in using the recognition agreement as a bargaining chip in another dispute (that is, the dispute concerning the dismissal of

the said members of the union), took the risk and placed itself in the position in which it now finds itself, namely that the university would also exercise its rights in terms of the recognition agreement, especially its right to terminate the agreement in the event of a material breach thereof.

[19] I need not enter into any of the other alleged breaches of the recognition agreement. It was argued in terms of the heads of argument handed up to Court and also appeared from the papers that there was allegedly a breach also in regard to a previous strike and that there was also an alleged breach in regard to the use of one of the hall facilities of the university.

[20] The breach that I have referred to above clearly is material in that it would be purposeless to carry on under the recognition agreement if one of the parties refused to attend the required consultative meetings (see in this regard also the case of Sibonyone & Others v University of Fort Hare, 1985 (1) 19 SA (CKSC) at 32F-33C.

[21] The respondent (the university) therefore acted lawfully in terminating the recognition agreement and the applicant's (contractual) right is therefore open to serious doubt. In other words, the applicant has failed to establish a prima facie right.

[22] As far as the requirement of irreparable harm is concerned, (the second requirement for the granting of urgent interim relief in the form of an interdict) it is unclear why the infringement of rights of the shop stewards would amount to irreparable harm as they have other remedies in terms of the LRA should they face unfair dismissal, or (in terms of section 23) should they in separate proceedings wish to attack the validity or the actions of the respondent in terms of the recognition agreement.

[23] It also is not clear to me, and it is not necessary for me to decide in view of the fact that the first factor is not present, that the rights which the union stands to lose, although substantial, is such that it would cause irreparable harm.

[24] There is, of course, also another remedy available to the parties in the present matter and that would be to refer any dispute about the recognition agreement to the Commission for Conciliation Mediation and Arbitration ("the CCMA") in terms of section 24 of the LRA. This dispute was referred to conciliation only yesterday (even though the letter of termination was already received on 15 March 1999). Accordingly, also in this regard, I would, in normal circumstances, be wary to exercise my discretion in favour of the applicant, where the underlying dispute has not been referred for conciliation timeously to the structures provided for in the LRA. This discretion is exercised in terms of section 157(4)(a) of the LRA, which states that the Court can refuse to exercise its discretion in favour of an applicant if it is not satisfied that the underlying dispute has been properly conciliated.

[25] As the respondent is no longer seeking an order as to costs, I need dwell on this matter any further.

[26] In the event, I grant the following order: The application is dismissed. No order is made as to costs.

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BASSON, J

Ms Mandy Taylor

Cheadle, Thompson and Hayson

: Mr H.C. Nieuwout

Jannie de Villiers and Sons Attorneys

25 March 1999

Ex tempore