IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable: No CASE NUMBER: J976/99

Of interest: No DATE: 1999-04-09

In the matter between:

Applicant

and

Respondents

J U D G M E N T

BASSON J:

This is the return day of a rule *nisi* issued by my sister Revelas J on 10 March 1999, calling upon the respondents to show cause, if any, why an order in the following terms should not be issued - Interdicting and restraining:

1.1 The second and further respondents from engaging in unprocedural strike action by refusing to work compulsory overtime in accordance with the operational requirements of the applicant;

1.2 The second and further respondents from intimidating and/or assaulting and/or threatening any employees of the applicant, or replacement labour employed by the applicant for the purposes of serving its operational needs;

1.3 The second and further respondents from instigating and/or inciting and/or organising and/or participating in any interference with the applicant's trade, customers, management, employees, suppliers or contractors and business, including the delivery of the applicant's products to customers; and

1.4 The first respondent from encouraging, inciting or instigating any of the second and further respondents from performing any of the acts referred to in paragraphs 1.1 and 1.3 above.

Service was effected in the manner stated in the interim order and faxed copies have been, as agreed between the parties, served as proper proof that such service has been effected.

Upon a reading of the papers, and I understand that this was also conceded in argument, it was not necessary for paragraph 1.1 of the order to have referred to “compulsory overtime in accordance with the operational requirements of the applicant”, but the word “compulsory” need not appear there.

The actions of the second to further respondents in refusing to work overtime would constitute unprotected strike action within the meaning of the definition of

strike action in terms of section 213 of the Labour Relations Act, 66 of 1995 (“the Act”) irrespective of whether the respondents had to work compulsory or voluntary overtime. Section 213 of the Act namely defines “strike” as follows :

"It means the partial or complete concerted refusal to work or the retardation of or obstruction of work by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interests between employer and employee and every reference to work includes overtime work, whether it is voluntary or compulsory" (emphasis supplied).

It is clear from the facts as they emerge from the papers that the second and further respondents refused to do overtime work in the furtherance of a dispute in regard to the conclusion of a proper agreement as to how overtime should be worked.

This dispute about overtime work and a possible conclusion of an agreement in this regard had been referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) for conciliation. However, none of the other requirements for a protected strike, such as a proper strike notice, had been complied with. Accordingly, the strike action *in casu* amounted to unprocedural or unprotected strike action in terms of the Act.

The respondent did serve and file a so-called opposing affidavit. However, it was attested to by the union representative, Mr Maredi, who also appeared in Court today, who does not have any personal knowledge of many of the facts which appear in the affidavit, such as the denial that there were any intimidation or assaults taking place by the second to further respondents. It was also not attested to under oath. Accordingly, this document does not comply with the requirements of the Rules for opposing affidavits and I cannot take any cognisance of it.

There was also a replying affidavit filed in this matter, but, of course, the usual principle would apply that the case which the applicant makes out must be made out in the founding affidavit.

Reading the founding affidavit, to my mind, shows, in the absence of any contrary averments by the respondents, that the second and further respondents not only embarked upon the said unprocedural strike action, but there were acts of intimidation and assaults and threats made to employees of the applicant by the individual respondents.

However, none of the second and further respondents who stand accused of these acts, are properly identified, apart from one of the affidavits which only identifies very few of the respondents and is, in any event, attached to the replying affidavit.

Nothing at all is said in the founding affidavit with regard to the fact that it may have been impossible to identify the real culprits in this regard, that is, those who assaulted, and, indeed, the averments in this regard are very sparse and bare and were also not supplemented by a supplementary affidavit which was foreshadowed in the founding affidavit. None of this happened in the present application.

In the event, there were no supplementary affidavits and the founding affidavit also did not properly identify the respondents who were allegedly intimidating, assaulting and/or threatening the applicant's replacement labour or employees. I will return to this matter below when the issue of an order as to costs is taken under consideration.

In regard to the role of the first respondent, nothing at all appears in the founding affidavit. There is namely no allegation or fact being stated in that the first respondent in any manner encouraged, incited or instigated the second and further respondents to perform the unlawful acts referred to above. There is only one reference (in paragraph 4.22 at page 14 of the founding affidavit) that there was a meeting held between a union official, Mr P. Keswa, and a shop steward, Mr P Khumalo, and the respondents and that when the meeting ended, it was ended on the basis of a threat that any replacement labour on the premises, even if it means that they have to been shot or shambocked, would be resisted.

In my view, it was open to the applicant to properly plead the fact that the first respondent was actively involved, (apart from this mention of Mr Keswa) in the unlawful acts complained of, that is, of intimidation, assault or threats. Mr Keswa is the only person who apparently made a threat in this regard and relief is not asked against him as a person nor he is not one of the parties, but he was merely involved on the facts of this matter.

In the event, I am not persuaded that the union (the first respondent) had indeed encouraged, incited or instigated the unlawful acts of which the second and further respondents stand accused. There is namely (apart from this bit of evidence), no allegation that the alleged unlawful acts were carried out at the instigation of the union as such.

In the event, I cannot confirm paragraph 1.4 of the rule *nisi* that was issued, to the effect that the first respondent is interdicted from encouraging, inciting or instigating any of the second and further respondents from performing any of the, unlawful actions referred to in the above paragraphs.

I can, however, confirm the order in regard to the second and further respondents from engaging in unprocedural strike action by refusing to work overtime in accordance with the operational requirements of the applicant.

However, I believe that this order must only be operative until such time, if and when the dispute over overtime is resolved between the parties. After such dispute is resolved there would namely be no sense in having such an interdict hanging over the heads of the second to further respondents.

The same would apply to the acts of intimidation or assault or other unlawful acts committed in pursuance of the unprocedural strike action which arose from the dispute over the overtime and the agreement in this regard.

Turning to the issue as to costs, the Court has a very wide discretion in deciding whether to make an order as to costs.

In the present matter the fact that the individual respondents who were allegedly guilty of intimidation or assault were not properly identified and the fact that no reason was given for this omission, does play a role, in my view, in the decision to award costs (in fairness) against parties or persons who may not even have been involved in these unlawful acts.

I do not believe that the fact that the action may be described as collective action as such would make it fair to award a punitive cost order against a person who may or may not have been involved at all in the unlawful acts complained of.

The same principle, however, does not apply to the unprotected strike action as this was clearly collective action (also in terms of the Act) and all the respondents were clearly partaking in the strike action as collective action.

In this regard I view the fact that there is that there is a continuous relationship between the parties, as well as the fact that there is the possibility of settlement negotiations of the underlying dispute at the moment undertaken before the CCMA, as important factors militating against the granting of a costs order against the individual respondents, that is, the second to further respondents.

Further, as far as the acts of intimidation and assault or threats are concerned, it is of course always open to the applicant to take any disciplinary action against the said respondents on the basis of misconduct and therefore it must not be seen that these acts are being condoned by the Court. It is merely being placed in the scale of weighing the different interests in coming to a fair conclusion in regard to an order as to costs.

Likewise, even if there were clear indications that the first respondent was involved in these acts, I would not regard it as fair to award a costs order against the first respondent, especially where the references to the exact acts that it is alleged to have incited and the identifying of the persons who were so incited is so

sparse or even omitted completely.

In the event, I believe that an order as to costs against the second and further respondents as well as against the first respondent would not be fair.

I make the following order:

The rule *nisi* issued on 10 March 1999 is confirmed in the following respects:

1.1 The second and further respondents are interdicted and restrained from engaging in unprotected strike action by refusing to work overtime in accordance with the operational requirements of the applicant.

1.2 The second and further respondents are restrained and interdicted from intimidating and/or assaulting and/or threatening any employee of the applicant and replacement labour employed by the applicant for the purposes of serving its operational needs.

1.3 The second and further respondents are restrained and interdicted from instigating and/or inciting and/or organising and/or participating in any unlawful manner with the applicant's trade, customers, management, employees, suppliers or their employees or contractors and business, including the delivery of the applicant's product to customers.

2. No order is made as to costs.

BASSON, J