REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

CASE NO: D1249/2002

Date of Hearing : 02/08/02
Date of Judgment : 05/08/02

In the matter between:

MIDLANDS PINE PRODUCTS (PTY) LTD Applicant

and

CEPPWAWU & OTHERS Respondents

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

FOR THE APPLICANT: ADVOCATE CRAMPTON
Instructed by: Austen Smith Attorneys

FOR THE RESPONDENTS: ADVOCATE SEERY
Instructed by: Chennels Albertyn & Tanner

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J U D G M E N T

PILLAY J

[1] This is the return day of a rule *nisi* which I granted on an urgent basis on 16 August 2002 and extended on 2 September 2002 interdicting the second and further respondent employees from acting unlawfully by, *inter alia*, blockading the applicant's premises and intimidating, harassing, assaulting or verbally abusing the applicant's employees. The parties have since had an opportunity to plead their respective cases fully. Whether the rule should be confirmed or discharged must be determined from all the information now before Court. The factors relevant for determining the matter finally are set out hereafter.

[2] Notice of the strike was given on 16 July 2002. A lockout was instituted on 18 July 2002. The initial acts of unlawfulness allegedly occurred on 30 July 2002 when veiled threats were allegedly made to non-strikers. Non-striking staff were instructed not to come to work from 2 August

2002 until further notice because of the alleged intimidation and threats by the employees. The factory was closed on 5 August 2002 after the staff were allegedly threatened. Three days later, on 8 August 2002, the applicant resolved to launch this application. Seven days later, on 15 August 2002, at 17h10, after normal business hours, the first respondent was served by fax. At 8h10 the following morning the first respondent was served by delivery of a copy of the application to its office in Durban.

[3] The respondents engaged attorneys and counsel at about 09h00 and 11h00 respectively on the morning of the application. The matter was stood down until 14h00 for argument, if it was not resolved before then.

[4] During argument in the interim application Mr *Seery*, for the respondent, had objected to the grant of the relief as no case for urgency had been made out. As he had been instructed only a few hours earlier, he had not had an opportunity to take instructions from employees as they were based some distance away in Wartburg. He had also submitted that the applicant had not exhausted alternative remedies. His instructions were to deny the unlawfulness of the conduct of the employees.

[5] It was common cause that the factory had been closed for about two weeks. *Prima facie* the closure was brought about by the conduct of the employees. In my view at the time, the closure of the factory was a drastic step which would not have been taken by the applicant unless the threat of harm was reasonably apprehended. Although the applicant delayed in launching the application, it appeared then to have taken the protective step of closing the factory. However, the factory could not remain closed indefinitely.

[6] With regard to Mr *Seery*'s submissions that the applicant deliberately gave late notice of the application to the respondent to disadvantage them as much as possible, and that there was an alternative remedy, I took the view that these submissions would be better dealt with once the respondents had filed their answering affidavit.

[7] All the applicant had established at the time was a *prima facie* right and urgency arising from the closure of the factory. The Court was not satisfied on the limited information before it that there was an alternative remedy. Erring on the side of caution, I granted the interdict which, in any event, temporarily prohibited the respondents from doing

what they were in terms of the common law not permitted to do anyway.

[8] The applicant re-opened the factory after the interim interdict was granted.

[9] From the answering affidavits it now emerges that during the period 18 July to 15 August 2002, the respondents assembled daily at the factory. Meetings were held with the shop stewards on a regular basis, yet no complaint was made whatsoever about the alleged unlawful conduct of the employees. Neither the shopstewards nor the first respondent was asked, either orally or in writing, to prevail on the employees to desist from conducting themselves unlawfully if this was what they were doing. They were not put on terms in any way. No notice of any sort was given to the respondent of the applicant's intention to launch this application before 15 August 2000.

[10] In its reply, the applicant fails to explain these omissions adequately. The submission that the intention to launch this application was not discussed at a meeting between the representatives of the parties held on 13 August 2002, two days before the application was served, because it was not "germane" to the discussion, when that meeting had

been convened to attempt to settle the wage dispute, manifests, at best, a naïve approach to labour dispute resolution. I cannot rule out the likelihood of the respondent being *mala fide* in the circumstances.

[11] The applicant's explanation for the delay in launching the application was that there was a long weekend starting on 9 August 2002. Furthermore, the matter was complex. If the matter was complex for the applicant, whose principal witness was its manager, Mr van Rensburg, it would have been equally if not more complex and time-consuming for the respondents. They were assembled together. They would be witnesses about their own conduct as well as that of their comrades. If it took the applicant all of a week to launch the application, it must have realised that giving the respondents less than 24 hours' notice would be wholly inadequate.

[12] At the hearing of the interim application the applicant had motivated that the interdict should be granted as it was interim, and to protect common law rights. On this basis, and taking into account the closure of the factory, the delay in giving notice of the application seemed less significant. However, in the absence of an explanation on the return day for not giving better notice, the only reasonable inference to draw is

that the applicant wanted to give as little notice as possible to the respondents of its application.

[13] With regard to the alternative remedy, the applicant attached to its founding affidavit a letter dated 17 July 2002 from its employer's association to the bargaining council. The letter sets out the picketing rules which the applicant would apply. Paragraph 1.1 of the letter provides:

"The company and the union are committed to implement the below-mentioned procedure in order to ensure acceptable conduct of all parties during any industrial action. If either party alleges a breach of this agreement a meeting shall be held to discuss the allegations as soon as possible, but not later than twelve hours of such allegation having being made.

Paragraph 1.2 states:

"Any party breaching the rules shall rectify such breach as soon as possible and within twelve hours after the meeting allowed for in sub-paragraph 2.1 above."

The rules include the following:

Para 2.1 Non-interference with the applicant's operations during a strike.

2.2 Non-interference with non-striking employees, service providers and

suppliers by strikers

2.3 No employee to be pressurised into participating in industrial action.

2.4 Prohibition of first respondent's officials and strikers from entering the factory premises for purposes other than a meeting with the applicant.

2.7 Non-interference with the applicant's access control procedures.

2.8 Prohibition of first respondent and its members obstructing roads on the respondent's premises.

3.7 Picketing shall not be used to intimidate non-strikers.

3.9 Picketers shall not interfere with access and egress of any person wishing to enter or leave the premises.

3.11 Picketers may carry no weapons of any kind.

[14] These rules regulate precisely the situation that is the subject of this application. The stipulation that the parties meet not later than twelve hours of an allegation of a breach being made, provides the process through which urgent relief could ensue. These were the rules that the applicant committed itself to and which, it alleged, were binding on the respondents. The rules, embodied as they are in a letter on behalf of the applicant to the bargaining council, is not a collective agreement. If the rules were binding on the parties, as alleged by the applicant, then the applicant has failed to abide by its own procedure.

[15] At the hearing of the interim application Mr *Seery* argued that the applicant's picketing rules and procedure provided an alternative remedy. Mr *Crampton*, for the respondent, submitted that the urgent relief sought was not the same as that which might ensue after a meeting before the bargaining council. These arguments were repeated in the application for final relief.

[16] In its reply, the applicant fails to give any explanation as to why it did not invoke the procedure of referring the dispute to the bargaining council for a meeting, either before or after the granting of the interim order. Mr *Crampton* merely repeated his submission that the remedy sought would not be the same. That, in my view, is pre-empting the outcome of the meeting. If there was such a referral this application could have been averted altogether. As a procedure that is far less aggressive than an interdict the respondents might have been more amenable to addressing the applicant's concerns. They might even have given an undertaking, without admitting any wrong doing, that had the effect of an interim order. The meeting procedure and this application are not mutually exclusive.

[17] A careful conspectus of all the evidence now before me militates against the extension of the interim order. The *prima facie* purpose of the application is the prohibition and prevention of harm and the protection against unlawful conduct. However, it is also underpinned by an ulterior motive, one of which is to gain a tactical advantage over the respondents in the dispute about wages and other issues.

[18] The confirmation of the rule requires a finding as a fact that the employees committed misconduct. They would then be put on the defensive. That would give the applicant a moral and psychological advantage over the employees. It could shift the balance of forces during bargaining. It is simplistic to suggest, as Mr *Crampton* did, that the order merely sought to prohibit and prevent that which the employees were not allowed to do anyway. Whilst that motivation may have been sufficient for an interim order, it does not meet the requirements for a final order.

[19] I say that the applicant was motivated by an ulterior purpose because, firstly, the applicant's failure to notify the respondents of its intention to launch the application was not merely an inadvertent omission but a deliberate effort to take the respondents by surprise. The natural and obvious course of action for the applicant was to have raised its

concerns with the respondents' representatives as soon as they arose. There was opportunity for doing so as the parties met frequently during the industrial action. It could also have sent a fax to the first respondent.

[20] Secondly, the applicant did not invoke its own procedures which were faster - twelve hours instead of the eight days that it took to launch this application - and significantly cheaper.

[21] Thirdly, the applicant has not demonstrated any inclination to resolve this dispute. It has still not referred the alleged breach of the picketing rules to the bargaining council. There was no reason for it to wait until this order was finalised. On the contrary, having regard to the reservations the Court expressed when granting the interim order about its failure to utilise the alternative procedure, the applicant should have referred the matter to the bargaining council immediately after the interim order was issued.

[22] Fourthly, the applicant's treatment of the respondents is offensive.

- The applicant refers to the employees as a "mob" in this application.
- It refused to pay the employees on 2 August 2000 unless they

assembled in the soccer field. If the applicant was apprehensive, it should have made arrangements that were not demeaning or provocative.

- Mr *van Rensburg* admitted saying sarcastically "Sure, I do not like blacks". His follow-up statement that "When I recently visited Zimbabwe, I mostly visited my erstwhile black employees and presented them with many gifts, etc" does little to ward off the accusation of racism levelled by the respondents.

[23] Fifthly, I am no longer convinced that the only reason for the closure of the factory was the alleged conduct of the employees. From 15 July 2002, before any industrial action, the applicant stopped the night-shift and operated with only one shift because of the lack of sufficient orders. If the closure was in fact triggered by the lack of sufficient work, it would explain why the applicant closed the factory for two weeks before approaching this Court for relief. There would have been no urgency for the application.

[24] The inferences which I draw in the preceding paragraph, without having heard argument, are not conclusive as there was no proof of what the applicant's orders were during the closure. However, it is sufficient to

cast doubt on the applicant's stated purpose of the relief sought.

[25] An interdict is not there for the asking simply because it seeks to enforce the common law. In labour law other factors, such as the collective bargaining obligations of the parties, may also be a consideration.

[26] Having found that the applicant was motivated by an ulterior purpose, I am disinclined to extend the rule. Although it is not necessary for me to deal with the substance of the applicant's complaint, I do so for completeness. In order to confirm the rule I must find as a fact that the employees committed acts of misconduct as alleged. This I am not able to do on the papers for, although the employees admit chanting slogans and carrying sticks and other objects, they deny that in the context their conduct was unlawful. Such a dispute of fact can only be resolved by oral evidence. I see no purpose in referring the matter for trial in this court when the same issues may be traversed in disciplinary proceedings.

[27] Further, there are other features that suggest that the applicant does not have a clear and convincing case for final relief.

[28] Mr *van Rensburg* testified that on 1 August 2002 the employees prevented a staff vehicle from entering the premises. When he arrived at 09h00 they blockaded the entrance. He had to hoot before they cleared the way. None of these incidents were recorded in the report on the industrial action. On the contrary, the report records that at 8.30 the situation was calm. At 9.05 the security approached the shopstewards to attend a meeting with management. The report does not present the same picture of tension and insecurity that Mr *van Rensburg* seeks to convey.

[29] In reply, the applicant attached letters from staff who applied for leave because they allegedly felt threatened by the employees. If they could submit such letters and have them incorporated in this application, I see no reason why they did not confirm the allegations on oath. Their allegations that they felt threatened therefore remains hearsay.

[30] The applicant employed a private security firm, Community Watch, whose armed guards supervised the salary payout on 2 August 2002. It is common cause that the applicants approached the South African Police Services to be in attendance when the payout occurred. That suggests to me that the respondents were equally concerned about safety and

maintaining order.

[31] In the circumstances the rule is discharged, the applicant to pay the second and further respondents' costs.

JUDGE D. PILLAY