IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case No: C700/2008

REPORTABLE

In the matter between:

SOUTHERNWIND SHIPYARD (PTY) LTD Applicant

and

NUMSA First Respondent

B JACOBS & 173 OTHERS Second to 174th Respondent
(Those names are listed in annexure
"A" to the Founding Affidavit)

JUDGMENT

MOSHOANA AJ

INTRODUCTION

[1] On 24 October 2008 I issued the following order:-

1. Having heard the parties and considered the papers, I hereby make the following order, which shall be supported by reasons to be filed in due course:

1.1 The *rule nisi* issued on 26 September 2008 is hereby discharged with costs.

[2] What follows hereunder shall be the reasons for such an order.

BACKGROUND FACTS

[3] On 30 May 2008, the Applicant brought an application on an urgent basis. Basson J issued a *rule nisi,* which was returnable on 13 June 2008 temporarily interdicting the Respondents from participating in the strike or any conduct in contemplation or in furtherance thereof pending the return day of the *rule nisi*. The Respondent opposed the application on the return day and a temporary interdict was extended by agreement to 20 June 2008. On that day the matter was heard by Nel AJ, who at the conclusion of argument, reserved judgment and

further extended the interdict until the date of his final order. On 19 September 2008, Nel AJ issued an order in the main application in which he discharged the rule and ordered the Applicant to pay the Respondent's costs of suite. At the time of issuing the order, Nel AJ did not furnish reasons for the said order.

[4] On 23 September 2008 at 16H38 the First Respondent gave the Applicant a written notice that it will start its strike action on Monday 29 September 2008.

[5] On 25 September 2008, the Applicant's Attorneys of record responded to the Notice of Intention to Strike by sending a letter informing the Respondents that the Applicant had instructed them to apply for Leave to Appeal against Nel AJ's order, but they were not able to do so in the absence of his reasons for the order. The Applicant's Attorneys then requested the First Respondent to agree to the continued existence of the interdict granted on the 30 May 2008, pending the determination of the appeal. The First Respondent refused to give such a consent.

[6] In anticipation that the strike would commence on Monday 29 September 2008, Applicant instituted the present application as a

matter of urgency on the morning of Friday, 26 September 2008 and enrolled it for hearing at 14H15 that afternoon. It had served the Respondents with the said papers at about 07H59, 08H19 and 19H20 respectively.

[7] In the present application, the Applicants on 26 September 2008 sought the following order:-

1. That the *rule nisi* do issue calling 1 - 174th Respondents to show cause, if any, on a date and at a time still to be determined, why an order should not be granted in the following terms:-

1.1 Reviving the *rule nisi* issued on 30 May 2008 in Application proceedings between the above parties under Case Number: C340/08 in this Honourable Court (the first application), which *rule nisi* was discharged by the Honourable Mr Acting Justice Nel in an order contained in his judgment in the first application dated 19 September 2008;

1.2 Ordering that the provisions of the said rule shall operate as an interim order and interdict pending the final determination of:-

1.2.1 Applications to be timeously instituted by the Applicant in terms of Section 166 of the Labour Relations Act No.66 of 1995, in the Labour Court (and, if still necessary thereafter in the Labour Appeal Court) for leave to appeal against the aforesaid order discharging the said *rule nisi* and;

1.2.2 In the event of leave to appeal been granted an appeal to the Labour Appeal Court to be timeously instituted by the Applicant, against the aforesaid order discharging the said rule.

1.3 Ordering that the costs of this application shall stand over for later determination in the aforesaid applications for leave to appeal alternatively the aforesaid appeal.

2. Further or alternative relief.

[8] On 26 September 2008, Acting Justice Cele issued an order that the draft order as amended was made an order of court. The said draft order read as follows:-

1. A *rule nisi* is hereby issued calling upon 1st – 174th Respondents to show cause, if any, on 24 October 2008 why an order should not be granted in the following terms:-

1.1 Reviving the *rule nisi* issued on 30 May 2008 in application proceedings between the above parties under Case Number: C340/08 in this Honourable Court (the first application),

1.2 Ordering that the provisions of the said *rule nisi* shall operate as an interim order and interdict pending:-

1.2.1 The final determination of applications in terms of

Section 166 of the Labour Relations Act No.66 of 1995 to be timeously instituted by the Applicant in the Labour Court and if necessary, in the Labour Appeal Court, for leave to appeal against the order

(contained in the judgment of the Honourable Mr Acting Justice Nel dated 19 September 2008 in the first application) discharging the said rule nisi and;

1.2.2 In the event of such leave to appeal been granted, the final determination of such appeal to the Labour Appeal Court same to be timeously instituted by the Applicant.

2. The provisions of paragraphs 1.1 and 1.2 above shall operate as an interim order and interdict pending the return date of the *rule nisi* as aforesaid.

3. Service of this order upon the Respondents shall take place as follows:-

3.1 By telefaxing one copy of this order to First Respondent

on its fax number: (021) 945- 1796 or by delivering a copy thereof to an official of the First Respondent at its offices at Harry Gwala House, 61–64 Voortrekker Road, Bellville;

3.2 By posting one copy of this order on each of the four official notice boards of the Applicant at its factory premises at Rian Avenue, Athlone Industria 1, Cape Town.

4. The Respondents are granted leave to anticipate the return day of the *rule nisi* on 48 hours notice to the Applicant.

5. Should the Respondents intend to oppose the application, they are required to file the following documents:-

5.1 A notice of their intention to oppose the matter containing an address at which they will accept notices and service of all documents in this application;

5.2 An answering affidavit within ten days after the service of this order upon them;

5.3 A list of documents that are material and relevant to the application.

[9] As ordered, the Respondents filed the necessary papers opposing the application. Meanwhile on 26 September 2008, between 10H15 and 10H51 that morning, the employees had commenced the strike action.

[10] On 02 October 2008 Nel AJ furnished reasons of his order in a detailed judgment. On 17 October 2008, the Applicant filed with the Registrar a Notice of Application for Leave to Appeal in terms of Rule 30. On 22 October 2008, Nel AJ, in terms of Rule 30 (3)(A) directed the Respondent in the application for leave to appeal to file its submissions, if any, on or before 30 October 2008 and that the Applicant must file any reply on or about 04 November 2008. It is apparent that Nel AJ indicated that he was available to hear argument in the application for leave to appeal on 06 November 2008 if a court is available.

[11] On the return date 24 October 2008, the matter came before me for either to confirm the rule or discharge it.

ARGUMENT

[12] In court, Advocate Van der Riet SC appearing for the Respondents contended that I should discharge the rule. He contended that the Applicant needed to show that it will be successful on appeal and it needed to prove that the balance of convenience favours it. He further contented that the balance of convenience actually favours the Respondents, in that they needed to engage in a strike for it to be meaningful and achieve the purpose of which it was intended (whilst the iron is still hot). He further argued that what the Respondents are demanding is not what is dealt with in the Main Agreement. In short, he stated that the demand of the Respondents was for the Applicant to grant all the hourly paid employees the same bonuses which had been granted to the supervisors. This is confirmed by the letter dated 14 April 2008, signed by a Union Official. He submitted that the Applicant had not actually negotiated the issue of the bonus with the supervisors. He submitted that what had actually happened was that for some unknown reasons, the General Manger of the Applicant

promised the supervisors some bonuses if they successfully launched the Yacht 1006. This is supported by a letter dated 18 March 2008, by General Manager, which in parts reads as follows:-

"Due to the successful launch of the Yacht 1006 I am granting you the bonus I said I would. Not only is the bonus a ***demonstration of my word*** *but is an appreciation of the hard work and effort you have displayed in meeting the completion dates". (*My emphasis).

[13] On the other hand, Advocate Growe SC for the Applicant contended, after having filed lengthy Heads of Argument, that the application should be treated the same way as an application for leave to execute. He contented that the Applicant has met all the requirements for such an application and that the court must then confirm the rule. In the main, he argued that there are prospects of success in appealing the order made by Nel AJ. He pointed out parts of the judgment which in his belief, Nel AJ erred and on that basis the rule should be confirmed. In particular he stood firm on his argument that the demand was for negotiations of the bonus, which is dealt with in the Main Agreement, accordingly the strike is unprotected as the issue in dispute is one to be dealt with in terms of the Main Agreement.

[14] He referred the court to an award of a Bargaining Council, which, in his submissions, contradicts the judgment by Nel AJ, on what he contended to be similar points. He further contended that in holding that the Applicant had not complied with the provisions of Section 68(2) of the Labour Relations Act, Nel AJ was in clear error. He submitted that the issue, whether the provisions of Section 68(2)

were met, was a discretion to be exercised by the court of the first instance, in this regard, referring to when Basson J heard the matter. She had exercised her discretion in hearing the application and therefore it was not open for Nel AJ to reconsider the issue, so the argument went. He contended that on that aspect alone the judgment of Nel AJ is bound to be overturned on appeal, therefore there exists prospects of success and accordingly the rule should be confirmed.

ANALYISIS

[15] In this matter, what is common cause is that the *rule nisi* of 30 May 2008 was discharged. The question then becomes whether this Court can revive that rule? In answering that question, it is apposite to quote what the Learned Author Erasmus on Supreme Court Practice has said:-

"*The noting of an appeal against the refusal of a final order where interim interdictory relief was granted (but the final relief refused) that does not revive the interim order unless the parties have specifically agreed to the continued existence of the interdict pending an appeal. A party who desires further protection by way of interdict pending the determination of the appeal could also make application for the renewal of the interdict. Where an interim order is not confirmed,*

irrespective of the wording used, the application is effectively dismissed. There is accordingly no order that can be revived by the noting of the appeal and there is nothing that can be suspended. Interdicts, which endure until a specified event, fall away on the happening of the event. Should an appeal be noted against the decision which formed the conditional event, the interdict does not remain operative nor does it revive. Where application for leave to appeal was delivered against an order setting aside an order which was granted in an ex-parte application for attachment to found or confirm jurisdiction, the court held that the ex-parte attachment order was ex lege the uniform rules of limited duration pending the determination of the application to have it set aside. Once set aside, a notice of appeal could not have a positive effect of creating an order,

which did not exist. It therefore does not revive or perpetuate the order discharged or set aside. An appeal in a Criminal matter does not suspend the conviction and sentence or the civil consequences of a conviction such as disqualification to act as a Director or in certain elective offices".

[16] Effectively what the Learned Author is saying is that an Applicant, such as the one before me, has two options. The first option is to

seek an agreement to have the interdict issued earlier to continue to exist. The second option is to bring another application for an interdict, I may add, which ought to be considered on its own merits, whether the court should grant or refuse it.

[17] In this matter, it is common cause that the Applicant attempted the first option but it failed. It therefore follows that what was then left for it to do was to obtain a further interdict, hence this application. I need to comment at this stage and say: when an Applicant who brings an application for an interim relief pending the determination of an application for leave to appeal or the appeal itself, the factors would be those which a court would consider when granting an interim interdict. Such factors are well known, but most importantly the

Applicant need to show a *prima facie* right. I do not agree with Advocate Growe SC when he submitted that this application should be treated like an application for leave to execute. On the contrary in an application for leave to execute there must have been a positive order that is executable. Where a rule had been discharged, there exists no order and it is as good as nothing has happened.

[18] In the matter of **MV Snow Delta:Serva Ship Ltd V Discount Tonnage Ltd 2000 (4) SA 746 at 751 – 752** Harmse JA had the following to say:-

"It is convenient at the outset to say something about the judgment of Selikowitz J. The ratio of the decision was based on ***SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd 1968 (2) SA 535 (C****), where Corbett J had held that the granting of interim relief as an adjunct to a rule nisi is to provide protection to a litigant pending a full investigation of the matter by the court of the first instance. Once that interim order is discharged it cannot be revived by the noting of an appeal. This approach was and still is generally accepted as correct. Dissenting views were, however, expressed in* ***Du Randt v Du Randt 1992 (3) SA 281 (E)*** *and* ***Interkaap Ferreira Busdiens (Pty) Ltd v***

Chairman National Transport Commission, and Others 1997 (4) SA 687 (T). *The essence of these judgments was that Corbett J had failed to have regard to the common law rule as received by our courts that an appeal suspends the execution or, in other words of Rule 49 (11), the operation and execution of an order (* ***cf Reid and Another v Godart and Another 1938 AD 511****). Unfortunately, the criticism was based upon a misunderstanding of the concept of suspension of execution. For instance, an order of absolution from the instance or dismissal of a claim or the application is not*

suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. Where an interim order is not confirmed, irrespective of the wording use, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same court (albeit not the same judge) in the same proceedings after having heard the other side".

[19] He went further to say:-

"*Any other conclusion gives rise to an unacceptable anomaly. If an Applicant applies for an interim order with notice and the application is dismissed, he has no order pending the appeal; on the other hand*

the Applicant who applies without notice and obtains an ex-parte order coupled with a rule nisi and whose application is eventually dismissed, has an order pending the appeal".

[20] I am in full agreement with the sentiments expressed in that judgment.

[21] In **Ismail v Keshavjee 1957 (1) TPD 684**, Dowling J at page 688 A said the following:-

"*It seems to me that if a litigant desires further protection by way of interdict pending the determination of an appeal he must make application therefore. The court, in the light of the full knowledge of the facts brought to light at the trial may or may not renew the interdict. In my opinion the noting of an appeal does not automatically revive an interdict granted pendete lite".*

[22] From the authorities reviewed above, it is very clear that once an interim interdict is discharged same is gone and cannot be revived, except by agreement or through making a fresh application.

[23] What was strange for the Court in respect of the interim order that was granted on 26 September 2008 was that it sought to revive the interim interdict, which on proper consideration of the authorities cited above, such an order could not be revived. The true position, therefore is that an Applicant, if it seeks further protection has to bring a fresh application which sets out the basis upon which the court should grant a temporary interdict. In this matter, it is clear to me that the demand of the Respondents is not one that is dealt with in the Main Agreement. It therefore follows that this Court cannot interdict a strike that complies with the provisions of the Act. It does seem that the only basis upon which the Applicant contends that the strike is

unprotected is that the provisions of Section 65(1)(a), which provides that no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if that person is bound by a Collective Agreement that prohibits a strike or lock-out in respect of the issue in dispute, has been offended.

[24] In my judgment, the issue in dispute, being the demand that they be paid the same the bonus, is not regulated by the Main Agreement, it does not prohibit any strike on the demand. It does appear that the General Manager of the Applicant took a cavalier approach in promising only the supervisors the bonus for the successful launch of

Yacht 1006. If one has careful regard to this, the supervisors would ordinarily be supervising employees and I assume for the purposes of this judgment that those employees should be the hourly paid employees. The First Respondent is demanding that those employees be paid the same bonus. They definitely have contributed towards the successful launch of the Yacht 1006. It seems to me that in fairness, there exists no basis upon which they should not be paid the same bonuses. It ought to be considered that the demand of the Respondents is that they be paid the same bonuses. That does not prevent the Applicant, if it wishes to avert the strike or the continuation thereof, to propose that payment of the bonus be made

to them but not the same amount as that of the supervisors. I mention this point simply because Advocate Groewe SC submitted that if the application is not granted the Applicant stand to loose about R1 700 000.00 (On Million Seven Hundred Thousand Rand). This, taking into consideration that in the nature of strikes, demands are met but more often than not, not all. It would be unrealistic to say that the Applicant in fact is likely to suffer harm of paying R1 700 000.00. On the other hand the Applicant could negotiate with the Respondents to a point where they understand the basis upon which the differentiation came about and they may jettison their demand. All of these are not impossible. These are the considerations that I applied my mind to in

refusing to confirm the rule. This is so despite my misgivings around the question whether an interim interdict may be revived or not.

[25] The Applicant's Representative placed much emphasis on the fact that in terms of Section 68(2), Nel AJ was wrong in finding that he can refuse to grant an order in terms of that provision. He argued that the judgment is ignorant of the fact that the subsection provides that the court may permit a shorter period of notice if certain requirements are satisfied. I do not intend to decide this issue contrary to what Nel AJ has said, however I have the following to say. In my view it is incumbent for the court on the return day to still satisfy itself whether

the requirements of Section 68(2) are met. This is so if regard is had to the plain wording used in the subsection which is:-

"*The Labour Court **may not** grant any order in terms of subsection (a)*

unless 48 hours of the application has been given to the Respondent".

[26] It is clear that reference being made to any order, it includes the one contemplated in subsection 1(a), which is amongst others to grant an interdict or to restrain. It does not really matter whether on interim or on a final basis. Again the section is clear, it is that the Labour Court

and not the Labour Court sitting at a particular stage. This in my view requires the Labour Court, at any stage, before granting an order to exercise its discretion whether it should permit less than 48 hours. Exercise of that discretion, would depend upon whether on the facts the requirements in (a) – (c) are met.

[27] It is indeed correct what Brassey AJ said in **Polyoak (Pty) Ltd v Chemical Workers Industrial Union and Others 1999 (20) ILJ 392 (LC)**, where he said the following at page 394 H – 395 B:-

"*Many, but by no means all of these shortcomings are excusable when an application is brought as a matter of urgency. In the press of circumstances, the court may be quick to grant interim relief when it*

does so, when it does no more than oblige the Respondents to refrain from doing what in any event they should not do. By the time the return day arrives, however, the dust is settled, and then it becomes necessary for a court to consider whether a case has been made out for the relief sought. That an interim order has been granted in no way prevents this process, for, being interlocutory, it serves to dispose of none of the issues that arise in the case. The absence of opposition moreover, cannot cure deficiencies in the papers. Being uncontroverted, the allegations in the Founding

Affidavit can be accepted unless they are baseless or fanciful and they must still

embody evidence on which the court can act. Failure to oppose an application in no way constitute an act of submission to the relief sought. On the contrary, Respondents in an application that makes out no case has a right to assume that the court will arrive at this conclusion without the aid of argument from them. On the return day, in short, the court must be satisfied that a proper case has been made out for each facet of relief sought".

[28] As I have pointed out earlier, in an application to interdict a strike in terms of Section 68, the Labour Court has exclusive jurisdiction to grant an interdict or an order to restrain. Subsection (2) thereof states that the Labour Court may not grant any order unless 48 hours notice

of the application has been given to the Respondent. In my view, it was common cause that a shorter notice was given and on that basis alone, the relief could not be granted since it is contrary to the provisions of Section 68(2). Further, even if Nel AJ was to grant that order, he could have done so if he was satisfied on the facts that a shorter period is permitted. It may well be so that Basson J was satisfied at the time hence she granted an interim order, but that interim order could only live until then. For Nel AJ to issue another

order either confirming or discharging, he had to consider the application with all the facets for the relief sought. Accordingly, in my view this point cannot succeed on appeal. Nonetheless as I have pointed out, I refuse to confirm the rule, simply on the basis that the requirements of granting an interdict *pendete lite* has not been met.

CONCLUSION

[29] It is therefore my considered opinion that a court cannot revive an interim interdict, but a court can issue a further temporary interdict, if all the requirements are met. It is for these reasons that I had issued the order I had referred to earlier.

[30] In **National Council of SPCA v Open Shore 2008 (5) SA 339 SCA** the court repeated the requisites for a right to claim an interim interdict as follows:-

(a) A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law;

(b) A well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) The balance of convenience favours the granting of an interim interdict;

(d) The Applicant has no other satisfactory remedy.

[31] The court went further to say the following:-

"The following explanation of meaning of reasonable apprehension was quoted with approval in ***Minister of Law and Others v Nordien and Another****, a reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that on a balance of probabilities flowing from undisputed facts, injury will follow he has only to show that it is reasonable to apprehend that injury will result. However, the test for apprehension is an objective one. This means that on the basis of the facts presented to him the*

Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the Applicant".

[32] I can say no more, particularly because this is an application for an interim interdict. In the matter referred to above, the Supreme Court of Appeal although it was divided refused to grant an order for an interim interdict on the basis that the requirements were not met. I accordingly did the same with the order that I had referred to above.

G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing**:** 24 October 2008

Date of Judgment: 07 November 2008

APPEARANCES

For the Applicant: Adv Growe SC

Instructed by Dykman Attorneys

For the Respondent: Adv Van Der Riet SC

Instructed by Cheadle Thompson & Hayson Inc.