REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: C1008/2012

In the matter between:

ALPHA PHARM WESTERN CAPE (PTY) LTD **Applicant**

and

NATIONAL EDUCATION, HEALTH AND

ALLIED WORKERS UNION **First Respondent**

THE PERSONS REFERRED TO IN

SCHEDULE "1" TO THE NOTICE OF

APPLICATION **Individual Respondents**

Heard: **5 March 2013**

Delivered: **5 March 2013**

Summary: Strike violence – interdict – rule *nisi* confirmed.

JUDGMENT

STEENKAMP, J

[1] This is the extended return date of a rule *nisi* granted by Madame Justice Lallie on 18 December 2012 by agreement between the parties and extended by Moshoana AJ on 22 January 2013.

[2] The issues before this Court are:

2.1 whether the rule *nisi* should be confirmed or discharged; and

2.2 which party, if any, should be held liable for the costs of the application.

[3] The background is that the first respondent, NEHAWU ("the Union") called out its members on a strike on 10 December 2012. It is common cause that that strike was unprotected and the union commendably, when it realised that it was unprotected after taking legal advice, immediately called off the unprotected strike. It then followed the proper procedure set out in section 64 of the LRA and its members embarked on a protected strike as from 14 December 2012.

[4] However, based on what it alleged to be unlawful and violent conduct by at least a portion of the striking workers, the company (the applicant) then approached this Court on 18 December when the rule *nisi* was granted.

[5] It is common cause that that strike ended on Christmas eve on 24 December 2012. I use the word "ended" in a wide sense because there is a dispute as to whether it was in fact terminated or whether it was suspended. In the normal course, in circumstances where a strike has

come to an end, this Court will not grant relief that has become moot or that is academic.

[6] That type of order has been criticised in the past, for example, in the well-known case of *Polyoak (Pty) Ltd v CWIU*,[1] where Brassey AJ commented:

> 'The fourth prayer I consider improper, is an open-ended one. That is one that binds the respondents for a period whose duration is indefinite and potentially unlimited. As I have said, an interdict can be granted only to restrain misconduct that is likely to occur in the future. The period during which this is likely to happen is a question of fact, but it will rarely, if ever, be indefinite. It will normally last for no longer than the motive for wrongdoing remains alive - typically, within this context, the duration of the strike plus the time it thereafter takes for life to return to normal. The unlimited operation of a sword of Damocles to which I referred above is more than simply undesirable, it is legally wrong.'

[7] However, in the case before me the facts are to be distinguished from those in *Polyoak.* The dispute that the union referred to the CCMA for conciliation and that resulted in the protected strike is one over the payment of a bonus. It was summarised by the Union as follows:

> 'The company Alpha Pharm Western Cape refuses to agree to NEHAWU's demand of a full 13th cheque (4.333 weeks' pay) *in lieu* of an annual bonus for all employees payable no later than 16 December 2012.'

[8] It must be presumed that the words "*in lieu* of" used here means its opposite and not that it was demanded in place of an annual bonus, but that it would constitute an annual bonus.

[9] When the rule *nisi* was issued, the parties agreed that the company would make financial information available to the Union and that it would

[1] (1999) 20 *ILJ* 392 (LC) at 396H-J.

give the Union's consultant or accountant or auditor access to its financial records for purposes of inspecting it. It also appears from the union's answering affidavit that the issue around a bonus is still alive.

[10] In these circumstances, as Mr Seymour for the Union readily conceded, it is not inconceivable that the same issue i.e. the dispute over bonuses may not be resolved and that the Union may take further industrial action over the same dispute. If that is the case, there is for the reasons that were set out when this application was brought, still a reason to hold the Union's members to the interdict preventing them from acting unlawfully.

[11] The next question then is whether there was in the first place a reason to grant that interim order and to confirm it today. As this is the return day, the question then is whether the company has made out a clear right for the relief it seeks.

[12] In this regard, the applicant has placed extensive evidence before the Court, including video footage of employees who have been identified as members of NEHAWU and who have been identified by name, engaging in various acts of misconduct including blocking the entrances to the company's premises with their cars and that has resulted in disciplinary action against 25 individuals who were specifically identified.

[13] Those individuals were found to have conducted specific acts of misconduct, as specified in each case in the transcript of the disciplinary findings, and those individual employees were dismissed. Three of them were present in court today in circumstances where Mr Seymour made it clear that he is acting only of behalf of the Union and not on behalf of the individual employees.

[14] The evidence set out in the answering affidavit, deposed to by a provincial organiser, Mr Shaun Wildschut, is to a large extent contradicted by the clear evidence on the video recording. For the rest it

constitutes mainly bare denials of any misconduct by the individual employees and vague allegations that the Union and its officials tried to prevent the employees from engaging in the unlawful conduct.

[15] However, despite Mr Seymour's complaint that the South African Police Services should have done their job, Mr Wildschut himself acknowledges that when the SAPS tried to do just that, he told them to go away, as he described the actions complained of as a labour dispute where the police had no place.

[16] Also, when the company's management tried to speak to Mr Wildschut and other Union officials in order to have a meeting to agree on picketing laws, the Union did not agree to that. They simply complained that they were not prepared to speak through the gates of the employer's premises.

[17] The principles regarding motion proceeding are well known. It is set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd*,[2] What is important though, is that that case also confirms that in certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact, as set in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions*,[3] and *Da Mata v Otto*.[4]

[18] The Court also made it clear in *Plascon-Evans* that there may be exceptions to the general rule as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[19] That is the situation before this Court. Where there is a dispute of fact it is created by the bare denials of Mr Wildschut, much of which, as I have said, has been belied by the clear evidence on the video recording.

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[2] 1984(3) SA 623 (A)634E-635C.
[3] 1949(3) SA 1155 (T) at 1163-5.
[4] 1972(3) SA 858 (A) at 882 D-H.

[20] This is also not a case such as that criticised in *Polyoak* where the individual perpetrators have not been identified. In the case before me the applicant has gone out of its way and has properly identified those individuals who did commit the misconduct complained of. They have established a clear right for the relief sought and for the rule to be confirmed.

[21] That brings me to the question of costs. The general principle that costs should follow the result is of course not applicable to this Court in terms of section 162 of the LRA which compels the Court to consider the requirements of law as well as fairness, as set out in *NUM v East Rand Gold and Uranium Co Ltd*.[5]

[22] There have been numerous instances in this Court where costs have been granted, albeit mainly in a context of an unprotected strike, such as that in *Mutual Construction Company (Pty) Ltd v Federated Mining Union*,[6] where Landman AJ, as he then was, said:

> 'An order of costs is imperative, not only to compensate the applicant but to stress the point that unprocedural strikes are contrary to the ethos of the new labour dispensation and ought not to be tolerated.'

[23] In the case before me, it is common cause that the strike was protected. However, I would similarly venture that unlawful and violent action concomitant to a procedural strike, is contrary to the ethos not only of our labour dispensation - not so new anymore -- but also to the constitutional principles that protect the right to strike and the right to assemble peacefully and unarmed.

[24] I take into account that on the evidence before me, the individual employees have engaged in unlawful conduct and the union has not fulfilled its responsibility to stop that conduct.

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[5] 1992(1) SA 700 (AD) at 738J-739G.
[6] [1997] 11 BLLR 147O (LC) at 1472.

[25] I also take into account that although the union initially agreed to a rule *nisi* it has sought to oppose the application today, not only on the question of costs but also on the merits, when it had very little evidence to do so.

[26] I agree with Mr *Stelzner* for the applicant that confirmation of the rule and the granting of costs will confirm an important principle that is increasingly being disregarded in our labour dispensation, and that is that the hard fought and constitutionally protected right to strike is one that carries with it certain responsibilities, one of those being to exercise the rights within the confines of the law and the Constitution.

[27] Lawlessness cannot and will not be tolerated, and it is incumbent upon this Court to send out that message not only to the Unions, but to strikers and to the South African Police Services. It will continue to do so.

[28] In those circumstances, I grant an order in the following terms:

[1] The rule *nisi* granted on 18 December 2012 is confirmed and is made final.

[2] The first respondent, NEHAWU, and the individual respondents listed in schedule 2 to this draft order, are ordered to pay the costs of this application, including the costs of 22 January 2012, jointly and severally, the one paying, the other to be absolved.

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Steenkamp J

APPEARANCES:

For the Applicant: RGL Stelzner SC

Instructed by: Joubert Galpin Searle, Port Elizabeth.

For the First Respondent: V Seymour attorney, Cape Town