REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C514/2016

Not Reportable

In the matter between:

IRWIN & JOHNSON LIMITED **Applicant**

and

NATIONAL CERTIFIED FISHING & ALLIED WORKERS UNION (NCFAWU) **1st Respondent**

THE PERSONS LISTED IN ANNEXURE "A" HERETO **2nd to Further Respondents**

Heard: **2 November 2016**

Delivered: **3 February 2017**

JUDGMENT

RABKIN-NAICKER, J

[1] This matter came before me for argument on costs. The parties had entered into an agreement which was made an order of court on the 16 of August 2016 by Tlhotlhalemaje J. The order read in relevant part as follows:

"Pending the outcome of the hearing of the dispute referred to arbitration by Rabkin-Naicker J in her judgment of 22 April 2016 under case no: C895/2015 finding that the dispute in question is a dispute concerning the interpretation of a collective agreement which the Applicant has a right to refer to arbitration in terms of section 65(1) (c) as read with section 24(2) of the Labour Relations Act 66 of 1995, the Respondents are interdicted and restrained from participating in the current unprotected strike."

[2] Having found that the real issue in dispute between the parties was the interpretation of a collective agreement in the judgment referred to, and should be arbitrated, the order that I gave was that the rule issued on 15 October 2015 was discharged and that there was no order as to costs. I did not include a referral to arbitration in my order. I note that the founding papers stated that I referred the matter to the CCMA in my order.

[3] Section 24(2) of the LRA provides that: "(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement."

[4] It is unclear to me why the order by consent makes reference only to the applicant having a right to refer the matter to arbitration. Be that as it may, the dispute was only referred to arbitration by the applicant on the 2 August 2016 and the matter set down for arbitration on 19 August 2016. No explanation is provided by the company as to why it took from May (when a certificate recording conciliation had failed was issued) until August 2016, to ask for the matter to be arbitrated. One can only surmise that given applicant's view that my judgment made it peremptory for the matter to be arbitrated before a protected strike could take place, it was in no hurry to obtain an Award. On the day before the referral, the 1st of August 2016, the applicant had issued a lock-out notice in response to the first respondent's strike notice served on the company on Saturday 30 July 2016. The strike was to commence on 1 August 2016 at 13h00.

[5] The founding papers contain detailed allegations as to acts of misconduct by the respondents, including acts of assault and intimidation on employees, service providers and clients of the company. The answering papers do not in my view raise genuine disputes of fact in relation to these allegations and it must be accepted that at least those respondents named in the founding papers were involved in unlawful acts after the strike and lock out notices were issued.

[6] The applicant has sought punitive costs in this application relying on the judgment of Verulam Sawmills (Pty) Ltd v AMCU & Others[1]. In that matter which stands to be distinguished in which punitive costs were awarded, the union was in breach of picketing rules. As Mybergh AJ stated:

"[14] Reverting to the position locally, while the precise legal basis upon which a union may be held accountable for the unlawful conduct of its members is not

[1] (2016) 37 ILJ 246 (LC)

settled in all instances, where a picketing rules agreement is in place, the union's legal obligations and potential liability for a breach thereof arise from the agreement itself. Notwithstanding the express terms of a picketing rules agreement, it seems to me that it is implicit in any such agreement that a union is obliged 'to take all reasonable steps' (to borrow from the words of Van Niekerk J in Tsogo Sun) to ensure compliance by its members with the terms of the agreement."

[7] The principles governing costs set out in National Union of Mineworkers v East Rand Gold and Uranium Co Ltd [2] per Goldstone JA as to the granting of costs bear repeating:

> "1. The provision that 'the requirements of the law and fairness' are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.
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> 2. The general rule of our law that, in the absence of special circumstances costs follow the event, is a relevant consideration. However, it will yield where considerations of fairness require it.
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> 3. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it, especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following passage from the judgment in the Chamber of Mines case supra at 77G-I commends itself to me:
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> 'In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The industrial court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalised unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is bona fide. . . .'
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> 4. Frequently the parties before the industrial court will have an ongoing relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the

[2] 1992 (1) SA 700 (A) at p.739

dispute has been a bona fide one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.

5. The conduct of the respective parties is obviously relevant, especially when considerations of fairness are concerned.

The aforegoing considerations are in no way intended to be a numerus clausus. A very wide discretion is given by the Act to the three courts with regard to the exercise of their powers and no less in respect of orders for costs. Such a discretion must be exercised with proper regard to all of the facts and circumstances of each case."

[8] I accept the union's submissions that the question of its right to strike was important to its members. I further accept that the parties had different interpretations as to my judgment and order when I discharged the rule nisi. On the facts before me it is my view that neither of the parties have embraced their rights to ensure orderly collective bargaining. A swift referral to arbitration of the interpretation dispute may well have avoided the need for the application launched on the 16 August 2016.

[9] The order by agreement dated the 16th August 2016 stayed any strike action pending the arbitration award to be issued arising from the section 24 dispute. By that stage, the parties had filed founding and answering affidavits. As is stated in the replying affidavit, the replying affidavit was filed for purposes of arguing costs. The replying affidavit plus its annexures runs to some 146 pages. I see no reason why the respondents should pay for same.

[10] Taking into account the facts and circumstances of this case, and making clear the court's displeasure at unlawful conduct in pursuance of collective bargaining, I find it just and equitable to exercise my discretion as regards costs as follows:

Order

1. The respondents are to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, up until and including the 16 August 2016.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: L.W. Ackermann instructed by Bowman Gifillan

First Respondent: Union official