COURT ONLINE COVER PAGE

IN THE LABOUR COURT, SOUTH AFRICA
Labour Court, Johannesburg, Labour Court, Johannesburg

CASE NO: **2024-100287**

In the matter between:

Appellant / Petitioner

and

Fikile Zwane and Others Respondent

Judgment by Daniels J 10 September 2024

NOTE: **This document was filed electronically by the Registrar on 11/9/2024 at 9:13:43 AM South African Standard Time (SAST). The time and date the document was filed by the party is presented on the header of each page of this document.**

ELECTRONICALLY SIGNED BY:

Registrar of Labour Court, Johannesburg , Labour Court, Johannesburg,Labour Court, Johannesburg

DELETE WHICHEVER NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

10/09/24
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

REGISTRAR OF THE LABOUR COURT OF SOUTH AFRICA BRAAMFONTEIN
Private Bag X82, Braamfontein 2017
REGISTRAR OF THE LABOUR COURT OF SOUTH AFRICA BRAAMFONTEIN

Case no: 100287/2024

In the matter between:

PREMIER FMCG (PTY) LTD Applicant

and

FIKILE ZWANE AND 293 OTHERS Respondents

Heard: 10 September 2023
Delivered: 10 September 2023
Summary: Application for urgent interdictory relief. Application dismissed with no order as to costs.

JUDGMENT

DANIELS J

011-2

Introduction

[1] The respondents have been engaged in a protected strike since 19 August 2024.

[2] The applicant alleges that the strike has turned violent. Initially, it sought to interdict respondents from participating in the strike on the basis that it had become unprotected - as a result of violence accompanying it. This was abandoned before the hearing and applicant now only seeks an order interdicting violence and misconduct.

[3] The applicant sought final relief, but during its address it asked the court to grant it interim relief if the requirements for final relief are not satisfied.

Background facts

[4] The respondents are non-unionised employees of the applicant. They are engaged in protected strike action following the applicant's conclusion of a three-year wage agreement with one of the larger unions, UCIMESHAWU,[1] operating within the workplace.

[5] UCIMESHAWU does not have a majority of employees in the workplace as its members and the wage agreement was therefore not extended in terms of section 23 of the Labour Relations Act 66 of 1995 as amended (the "LRA"). The Food and Allied Workers Union ("FAWU") also organises at the applicant's workplace.

[6] Nevertheless, the applicant decided to increase the wages of all its employees to align with those employees who are governed by the wage agreement.

[1] United Chemical Industries, Mining, Electrical, State, Health and Allied Workers Union ("UCIMESHAWU")

011-3

[7] The respondents referred a mutual interest dispute to the CCMA on 1 July 2024, and when a certificate of outcome of conciliation was issued, they issued a strike notice on 14 August 2024. The strike commenced on 19 August 2024.

[8] The General Secretaries of FAWU and UCIMESHAWU addressed letters to the applicant advising it that they were concerned about the safety of the unions' members during the strike.

[9] Between 20 and 29 August 2024, various acts of intimidation and assault, were reported by non-striking workers, to the applicant's management. Save for six employees identified in paragraph 7.25 of the founding affidavit, other employees have refused to depose to confirmatory affidavits allegedly for fear of repercussions. The non-striking employees, who have been threatened or assaulted, were unable to identify any of the perpetrators. The perpetrators were unknown to them. The applicant speculates that the perpetrators are outside persons, who are acting at the behest of the respondents. It produces no proof of this, but contends that this is a reasonable inference to draw.

[10] In its papers, the applicant alleges that four individuals, including the first respondent, are representatives of the striking employees. This allegation is admitted in the respondents' answering affidavit, deposed to by the first respondent. In the circumstances, I accept that the first respondent has authority to act in a representative capacity for all the respondents.

[11] In paragraph 7.20.2 of its founding affidavit, the applicant alleges that one of the striking employees has posted on Facebook something to the following effect: "*Gents where are you, I do not beg, come let's drink my provident fund of R300 000 – 00 and now I am going to be the killer*". The respondents, through the first respondent, filed an answering affidavit

Unfortunately the answering affidavit does not deal with this allegation in any satisfactory manner. It simply notes the allegation.

Legal principles and analysis

Urgency

[12] The applicant alleges that it met with the representatives of the respondents on two occasions and urged them to persuade the respondents not to behave violently. When this did not work, it contacted its attorney on 29 August. It collated the necessary information and consulted with its attorney on 3 September. The court papers were drafted and filed on 4 September.

[13] In *Maqubela v SA Graduates Development Association and Others*[2] dealt with urgency as follows:

> "*Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshoana AJ aptly put it in Vermaak v Taung Local Municipality:*
>
> > '*The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.*''

[2] (2014) 35 ILJ 2479 (LC) at para 32

[14] Given the facts in the founding affidavit I accept that the applicant acted with reasonable expedition, and took steps outside of court to address its difficulties. It cannot be blamed for attempting to resolve the issues outside of court. I also accept that the applicant will not be able to achieve substantial relief in the ordinary course. I therefore find that the application is urgent.

Section 68(2) of the LRA

[15] The applicant alleges that this Court has jurisdiction to hear the matter in terms of section 158(1)(a)(i) of the LRA, and not section 68. This is misconceived. Section 158 deals with the powers of the Court, not jurisdiction. In the present circumstances, the jurisdiction of the Court lies in section 68(2) read with section 157 of the LRA.

[16] Section 68(2) requires an applicant who seeks to interdict a strike, or conduct in furtherance of a strike, to give the respondents 48 hours' notice of the application. If 48 hours' notice is not given, the applicant may apply for condonation. In this matter, the applicant has not given 48 hours' notice of the application. The applicant applied for condonation from the bar. While this practice is to be discouraged, I am prepared to grant condonation. The respondents had a reasonable opportunity to file answering papers, which they did, and seek legal representation.

Requirements for final relief

[17] It is trite that an applicant seeking final relief must show: (i) a clear right, (ii) an injury actually committed or reasonably apprehended, and (iii) the absence of any similar protection.

[18] There can be no doubt that applicant has a right to conduct its business without unlawful interference, and it has the duty to protect the non-strikers against intimidation and assault.

011-6

[19] The respondents do not dispute that the acts of violence and intimidation set out in the founding affidavit have occurred. They simply state that they did not participate in the violence or intimidation and, therefore, no interdict may be granted against them. Accordingly, the real question is whether the applicant can demonstrate that the respondents are directly or indirectly responsible for the threats, intimidation, or assault of non-strikers.

[20] In *Commercial Stevedoring Agricultural & Allied Workers Union and others v Oak Valley Estates (Pty) Ltd and another*[3] the Constitutional Court established a number of important principles in a matter of this nature:

20.1 There must be a factual link between an individual respondent and the actual or threatened unlawful conduct,

20.2 Mere participation in a strike or protest in which there is unlawful conduct is insufficient to link the impugned respondent to such unlawful conduct in a manner sufficient for interdictory relief,

20.3 A link may be established between an individual respondent and the unlawful conduct where the misconduct is committed by a cohesive group including that individual,

20.4 Where there is widespread unlawful conduct there may be a duty on the individual respondent to dissociate from the unlawful conduct, however where there are isolated acts of misconduct it must be shown that the individual associated with the misconduct,

[3] (2022) 43 ILJ 1241 (CC)

20.5 The employer must put up facts from which an inference can be drawn that it is more probable than not that the employee engaged in the misconduct or associated with it.

[21] The Constitutional Court, in paragraph 43 of *Oak Valley*, quoting Lord Wedderburn, warned judges to be alert to the risk that where interlocutory interdicts are too easily granted they may become a "*a great engine of oppression against workers and unions.*" The Court further warned that some employers may seek to abuse interdicts in order to tilt the balance of power during a strike. Finally, of great importance, the Court warned that where interdicts are too readily granted this could undermine collective action, the right to engage in protected strike action, and debase and undermine the rule of law.

[22] The applicant argued that a reasonable inference may be drawn that the acts of misconduct are related to the strike action because of comments made by the perpetrators which suggest they targeted non striking employees. This may be so, but that does not link the perpetrators to all the respondents. The applicant has provided no factual basis to apprehend that all two hundred and ninety-four respondents have associated themselves with the perpetrators of the misconduct.

[23] The applicant referred the Court to two authorities, namely *Johannesburg Roads Agency (SOC) Ltd v SAMWU & others*[4] and *City of Tshwane Metropolitan Municipality & another v SA Municipal Workers Union & others*.[5] The applicant omitted to mention that the *Johannesburg Roads Agency* predates *Oak Valley*. In addition, the *City of Tshwane* matter does not purport to overturn *Oak Valley*. There the Court, per Snyman

[4] (2020) 41 ILJ 222 (LC) at paragraph 10

[5] (2023) 44 ILJ 2703 (LC)

AJ, finds that the respondents acted as a cohesive group. The learned judge applied *Oak Valley* as explained in paragraph 20.3 above.

[24] In the present circumstances, the applicant does not present any factual basis on which this court can find that the individual respondents are acting as a cohesive group. Nor, as previously mentioned, is there any basis to accept that any or all of the respondents have associated themselves with the misconduct. In the circumstances, there is no basis to grant final relief.

Interim relief

[25] In *Mgoqi v City of Cape Town and another; City of Cape Town v Mgoqi and another*[6] the Court held that for relief to fall under banner of "further and/or alternative relief" there must have been some sort of foreshadowing that the relief could be claimed in either the founding or replying affidavits. In this matter, the applicant expressly stated that it seeks final relief, and it has never stated otherwise except from the bar, during argument. In any event, the applicant does not address the balance of convenience in its papers. This is a necessary and important consideration in an interim interdict.

[26] In the circumstances, no case is made out for interim relief.

Costs

[27] Costs does not follow the result in this court, and I have been no reason to rule otherwise. I make no order as to costs.

[6] 2006 (4) SA 355 (C) at para 12

Conclusion

[28] In the result, the application is dismissed with no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Adv M Naidoo

Instructed by Lawtons Inc

For the Respondent:

Adv E Nhutsve

Instructed by Lawyers for Human Rights

011-10