IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: **J 1507/05**

In the matter between:

MAKHADO MUNICIPALITY	Applicant
and	
SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU)	First Respondent
AS RABAKALI	Second Respondent
and 669 OTHERS	Third and Further Respondents

JUDGMENT

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[1] This is the return day of a rule *nisi* granted on 11 August 2005 and subsequently extended on 7 September, 21 October and 22 November 2005. The final relief sought flows from the alleged conduct of striking workers during a protected national strike called by SAMWU in August 2005.

[2] On 11 August 2005, a rule *nisi* was granted in the following terms on an unopposed basis:

> "1 That the Second and further Respondents employed by the Applicant be interdicted and prohibited from picketing inside all the identifiable and identified premises of the Applicant, including but not restricted to the municipal offices, work stations, water and sewerage works, electrical installations and any other office, yard or facility of the Applicant, without the permission of the Applicant being had or obtained or the CCMA having laid down picketing rules in terms of section 69 of the Labour Relations Act, 66 of 1995;
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> 2 That the Second and further Respondents employed by the Applicant be interdicted and prohibited from causing or

threatening to cause damage to, or intimidating or preventing to work or from entering of premises, any member of senior management and any other employee of the Applicant in the alternative the movable or immovable property of the Applicant;

3 That the Second and further Respondents employed by the Applicant be interdicted and prohibited from preventing or harassing members of the general public from entering the premises of the Applicant, in the alternative doing business with the Applicant;

4 That the Second and further Respondents employed by the Applicant be interdicted and prohibited from in any manner whatsoever preventing or interfering with the supply of essential services by the Applicant and / or its employees;

5 That the Second and further Respondents employed by the Applicant be interdicted and prohibited from carrying on with their strike action in any manner whatsoever that may cause damage to the person or property of the general public."

[3] On the return day, the Applicant sought final relief in the same terms.

[4] The Respondents contended that:

1. There is no purpose to be served in confirming a rule in respect of alleged conduct that has long since ceased.

2. Final interdicts of indefinite duration will rarely be granted unless the Applicant can show a likelihood that such conduct will be repeated within that time, which is not shown on these papers, rather the reverse.

3. The Applicant has not referred the dispute about picketing on its premises to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') thereby rendering any interdict in respect thereof (which at most could only be of interim duration pending the adjudication of the matter) incompetent and purposeless.

4. The Applicant seeks drastic and wide-ranging final relief, including costs against 307 of the union's members, without any attempt to identify the alleged perpetrators of the conduct complained of; without providing any explanation why this is not possible; and without any factual basis for treating the second and further respondents as a group beyond their participation in a protected strike.

5. The application is fraught with disputes of fact. There is no application to refer the matter to oral evidence. The matter must therefore be determined on the Applicant's uncontested allegations set out in its founding affidavit, together with those contained in the Respondent's answering affidavit. These fall far short of sustaining the wide relief sought.

6. The Applicant attempts, in large measure, to make out its case in its replying papers, and on inadmissible hearsay and similar fact evidence, which is impermissible. In situations of urgency, the proper course would have been to seek to supplement the founding affidavit, so that the Respondents would have a proper opportunity to respond thereto.

FIRST POINT *IN LIMINE*: CONDUCT HAS CEASED

[5] Mr Euijen, for the Respondents, raised a point in *limine* that the protected strike action embarked upon by the union's members had ceased and that the final relief sought would, therefore, serve no purpose. He argued that the rule should be discharged for that reason alone.

[6] It is trite that in order to obtain a final interdict, there must be a continuing injury or a reasonable apprehension of future harm occurring. The court will not grant an interdict restraining an act already committed.[1] The object of an interdict is to protect an existing right; it is not a remedy for a past invasion of rights.[2] This principle has been endorsed by the Labour Court in a situation such as the present. In ***Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others***[3], Brassey AJ stated the position as follows:

> '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

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[1] ***Maeder v Perm-Us (Pty) Ltd*** **1939 (CPD) 208;** ***Conde Nast Publications v Ltd v Jaffe*** **1951 (1) SA 81 (C) at 86;** ***Performing Right Society Ltd v Berman*** **1966 (2) SA 355 (R) at 357;** ***Francis v Roberts*** **1973 (1) SA 507 (RA) at 511-513**.

[2] ***Phillip Morris Inc & another v Marlboro Shirt Co. SA Ltd & another*** **1991 (2) SA 720 (A) at 735 B**.

[3] **(1999) 20 *ILJ* 392 (LC)**

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] In the present case, however, the union has not unequivocally called off the strike action. The second Respondent, A S Rabakali (the chairperson of the union at Makhado Municipality) stated under oath in his answering affidavit that the union had "suspended" its strike on 15 August 2005 and that it was "unlikely" that it would recommence with the strike in respect of this year's round of wage negotiations. It is common cause that the wage dispute giving rise to the strike action has not been resolved. The union elected to "suspend" the strike rather than to end it. In the circumstances, there is still a possibility that the strike may be resumed.

[8] The point in *limine* does not succeed. The likelihood of future harm, however, remains to be considered.

SECOND POINT *IN LIMINE*: REFERRAL OF PICKETING DISPUTE TO CCMA

[9] In terms of section 69(8)(b) read with section 69(11) of the Labour Relations Act ("the LRA")[4] a dispute about the right to picket during a protected strike must first be referred to the CCMA for conciliation, prior to adjudication by the Labour Court.

[10] Section 69(10) states unequivocally: "The Commission must attempt to resolve the dispute through conciliation." Only if the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

[11] It is common cause that no dispute regarding the Respondents' request to be allowed to picket on the Applicant's premises has been referred to the CCMA for conciliation.

[12] The Applicant contends that this court ought to condone this failure, as it had done in the matter of ***Lomati Mill Barberton (a division of Sappi Timber Industries) v PPWAWU & others***.[5] In that case, however, the court condoned the failure to refer a dispute to the CCMA in a situation of urgency – similar to the stage at which the rule *nisi* in this matter was granted on 11 August 2005. The Applicant now seeks final relief. It has had a further three months to refer any such dispute to the CCMA for conciliation and to this court for adjudication. It has not done so.

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[4] **Act No 66 of 1995**

[5] **1997 4 BLLR 415 (LC) at 418 A**

[13] In the circumstances, I agree with Mr Euijen that the relief sought in paragraph 1 of the rule *nisi* cannot be granted in the form of final relief in the absence of a referral to the CCMA.

THE MERITS

[14] It is trite that an applicant for final relief is confined to establishing its entitlement to a clear right from "... those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent ..."[6].

[15] It is impermissible to make out a case for relief only in the replying papers.[7] Where considerations of urgency have precluded the preparation of a comprehensive founding affidavit, leave should be sought to supplement such founding affidavit, prior to requiring the respondents to answer the allegations made against them.[8]

[16] The Applicant sought and was granted the rule *nisi* against the union and 669 of its members, purely on the basis of their membership of the union.

[17] Subsequently the Applicant has conceded in its replying affidavit that no more than 307 of the union's members were on strike. It is also constrained to maintain, also in its replying affidavit, that there were only approximately 200 strikers present at the picket. It is immediately apparent that, on the Applicant's version, it seeks relief against approximately 100 persons without any justification therefor.

[18] Throughout the applicant's founding affidavit, no attempt is made to identify any act of any particular individual (save in two instances dealt with below). The second and further Respondents are referred to throughout as 'the strikers', the 'crowd', or a 'mob of strikers'. Not even

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[6] ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 A at 634 H-I**

[7] ***Bayat v Hansa*** **1955 (3) SA 547 (N) at 553 C-G;** ***Union Finance Holdings Ltd v IS Mirk Office Machines II (Pty) Ltd*** **2001 (4) SA 842 (W) at 847 D-E;** ***Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers union of SA & another*** **(1991) 12** ***ILJ*** **340 (LAC) at 343 C-H**

[8] ***Polyaok (Pty) Ltd v Chemical Workers Industrial Union & others*** **(1999) 20** ***ILJ*** **392 (LC) at 395 B-D**

the strike committee is pertinently identified by name, let alone alleged conduct, save for the second applicant.

[19] The Labour Court has previously warned that it will not grant relief against unidentified members of a faceless crowd, unless a proper basis is laid therefor.[9] No such attempt is made in the founding, or even the replying papers in this regard.

[20] The Respondents admit that some of them picketed in the municipal parking lot outside the municipal offices during the morning of 8 August 2005 and again at the municipal workshop on 10 August 2005. It is common cause that this conduct has not been repeated since then. Even though the strike has been 'suspended' only, the Applicant makes out no case for a reasonable apprehension of further harm.

[21] The Respondents deny the Applicant's bald allegations concerning the picketing. Their denial is substantiated with details of the measures taken by the strike committee to ensure that access to the Applicant's premises was facilitated, namely:

21.1 Through the appointment of 20 marshals to control the picketers; and

21.2 Cordoning off the picketers with barrier tape.

[22] The Applicant's case in this regard is based on two statements:

22.1 A statement made at the meeting with the strike committee on 8 August 2005 that 'this is the beginning of the war'; and

22.2 a statement allegedly made by 'David', who is said to have told Mr Pretorius, a plumber employed by the Applicant, to 'f... off and go back to [his] office.' The Respondents have not had an opportunity to answer this allegation, as 'David' is only identified in the replying affidavit.

[23] The remainder of the Applicant's case in this regard amounts to a number of unsubstantiated conclusions regarding alleged threatening or intimidatory behaviour, without any particularity supplied, or perpetrator identified. All of this is denied by the Respondents.

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[9] **Ex parte *Consolidated Fine Spinners and Weavers Ltd* (1987) 8 *ILJ* 97 (D); *Mondi paper (A division of Mondi Ltd) v PPWAWU & others* (1997) 18 *ILJ* 84 (D); *Great North Transport (Pty) Ltd v TGWU & another* [1998] 6 BLLR 598 (LC) at paras [21-29]; *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 *ILJ* 1991 (2) SA 630 (C) at 634**.

[24] The Applicant's case in this regard is purely speculative, based largely on hearsay and similar fact evidence; and largely made out in reply. This is the type of evidence that is criticised in *Polyaok*[10]: "In the absence of evidence identifying the respondent as a prospective perpetrator or accomplice in the acts of a perpetrator ... he or she cannot be interdicted, and it matters not that the person is one of a group of strikers containing malefactors or that his or her interests as a striker happen to be promoted by the wrongdoing in question. Our law knows no concept of collective guilt."

[25] Strike action in compliance with the Act is protected. Actions of vandalism, violence, intimidation and damage to property are not. In terms of s 67(8) of the Act, the protection conferred by subsections (2) and (6) of s 67 do not apply to any act in contemplation or furtherance of a strike, if that act is an offence. Nevertheless, an Applicant wishing to interdict such behaviour has to make out a proper case on the papers. Although some latitude is permissible in applications for interim relief on an urgent basis, the requirements for final relief should be met if and when final relief is sought on the return day.

[26] In the present case, the Applicant has failed to fulfil the requirements for final relief.

[27] The rule *nisi* is discharged with costs, including the costs of 6 September 2005.

Steenkamp, AJ

Acting Judge of the Labour Court

Date of judgment: 19 December 2005

For Applicant: G van der Westhuizen of Macrobert Inc, Pretoria

For Respondents: Adv M Euijen instructed by Cheadle, Thompson & Haysom, Johannesburg

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[10] *Supra* at 396A