IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 892/2006

In the case between:

THE CENTRAL UNIVERSITY OF TECHNOLOGY Applicant

and

THE NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION – CUT OFS BRANCH First Respondent

ALL MEMBERS OF THE NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION – CUT OFS BRANCH Second Respondent

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HEARD ON: 4 MAY 2006

JUDGMENT BY: VAN DER MERWE J

DELIVERED ON: 25 MAY 2006

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[1] The applicant is the Central University of Technology, a higher education institution with its main campus situated in Bloemfontein. The first respondent is the National Education, Health and Allied Workers Union, a registered trade union in terms of the Labour Relations Act, No. 66 of 1995 ("the LRA"). At all times relevant hereto, the first

respondent was represented by the leadership of its branch named Central University of Technology, Free State–Branch ("the branch"). The second respondent herein is cited as all the members of the branch employed by the applicant at its campus in Bloemfontein. I will shortly return to the question of the citation of the so-called second respondent.

[2] On 7 March 2006 the applicant obtained an order of this Court on an urgent basis and *ex parte*. The order included a rule *nisi*, operating as interim interdict with immediate effect, with the exclusion of paragraph k thereof, in the following terms:

> "A *Rule nisi* is issued calling upon the respondents to show cause, if any, on 30 March 2006 at 09h30 why the following orders should not be made final:
>
> a. the second respondents are individually and collectively interdicted from entering the ZR Mahabane Building, for any reason other than legitimate work related reason, situated in the campus of the applicant without prior appointment arranged through their supervisors.
>
> b. the first respondent is interdicted from entering the ZR Mahabane Building, for any reason other than legitimate

work related reason, situated in the campus of the applicant without prior appointment arranged through its branch chairman.

c. the respondents are individually and collectively interdicted from committing any act which in any way may impede upon, disrupt, disturb, or in any way negatively influence the conduct of the applicants activities in respect of its graduation ceremonies to be held on 8 and 9 March 2006 in the vicinity and at the Boet Troskie Hall on the main campus in Bloemfontein.

d. the respondents are individually and collectively interdicted from committing any act which in any way may impede upon, disrupt, disturb, or in any way negatively influence the conduct of the applicants activities in respect of its graduation ceremony to be held on 10 March 2006 in the vicinity and at the City Hall in Welkom.

e. the respondents are individually and collectively interdicted from committing any act which in any way may impede upon, disrupt, disturb, or in any way negatively influence the conduct of the applicants business, lectures, tests and examinations on its campuses.

f. the respondents are individually and collectively interdicted from committing any act which in any way may impede upon, disrupt, disturb, or in any way

negatively influence the conduct of the applicants activities in respect of the students' academic, sport or cultural activities on the campuses.

g. the respondents are individually and collectively interdicted from committing any act which in any way may impede upon, disrupt, disturb, or in any way negatively influence the conduct of the applicants activities in respect of its Food and Wine Festival to be held from 13 – 18 March 2006 on the main campus in Bloemfontein.

h. the respondents are individually and collectively interdicted from committing any act which in any way harm, intimidate, victimize or threaten to harm, intimidate, victimize or threaten to harm, intimidate, victimize any student, co-employee, office bearer, visitor or dignitary, with specific reference the executive management and to Mr T Loate and Prof C A J van Rensburg.

i. the respondents are individually and collectively interdicted from threatening and intimidating any of the persons whose names appear in annexure 'A' to the founding affidavit.

j. the second respondents are ordered to execute all lawful instructions by the applicant in preparation of the graduation ceremonies.

k. the respondents jointly and severally pay the cost of the application."

[3] On the extended return date of the rule *nisi* the applicant applied for the confirmation of only paragraphs (a), (b), (e), (f), (h), (i) and (k) thereof. The reason why the confirmation of the other paragraphs of the rule *nisi* is not sought, is that the events referred to in those paragraphs of the rule *nisi* have already taken place.

[4] The respondents move for discharge of the rule *nisi* with costs. This is done on various grounds, including that this Court had and has no jurisdiction to determine the matter. I deal with the question of jurisdiction below.

[5] I should, however, mention at the outset that in my judgment no order should have been made against any person referred to as the second respondent or included in the citation of the second respondent. As stated above, the applicant cited in this application as second respondent all members of the branch employed by the applicant at his campus in Bloemfontein. No names have, however, been supplied, not even by reference to a list attached. This is contrary to the fundamental principle that an order of court can only be made against or in respect of a party to legal

proceedings. See **KAYAMANDI TOWN COMMITTEE v MKHWASO AND OTHERS** 1991 (2) SA 630 (C) at 633 I – 635 C. In the answering affidavit deposed to by the chairperson of the branch, the following is stated:

> "The Second Respondents are members in good standing of the First Respondent. I have attached a list of the names of the Second Respondents marked as annexure **'A'.**"

The list referred to contains the names of some 344 persons. It appears that the list reflects the members of the first respondent belonging to the branch. It is undisputed that the list contains names of persons employed in management positions with the applicant and that it even includes the name of the deponent to the applicant's founding affidavit. There is no indication or reason to believe that the attorneys who purport to oppose the application on behalf of the first respondent and the second respondent, have been mandated by any or all of the persons on this list to act for them in their personal capacities. I do not accept that any person can be made a party to an application in this fashion. However, even if all the persons on the list can be regarded as the second and further respondents, an order should not

have been issued against any of them as no case or cause of action has been established against any one of them, at the very least on the basis that is impossible to say which of these persons, if any, would have participated in any unlawful conduct. In this regard it must also be taken into account that it is stated repeatedly on behalf of the applicant in the papers that the applicant believes that the majority of the members of the branch did not mandate or support the leadership of the branch in respect of the action or conduct referred to hereinlater. In this regard see **MONDI PAPER (A DIVISION OF MONDI LTD) v PAPER PRINTING WOOD & ALLIED WORKERS UNION AND OTHERS** (1997) 18 ILJ 84 D at 90 I – 93 D.

[6] Two documents emanating from the first respondent and attached to the founding affidavit form the foundation of the applicant's case. The first is a document entitled "PETITION TO CUT CEO" ("the petition"). The petition was received in the office of the acting rector and chief executive officer of the applicant on 28 February 2006. The second is a letter dated 6 March 2006 and received at the offices of the acting

rector and chief executive officer of the applicant on the same date ("the letter").

[7] It is necessary to set out the contents of the petition herein:

> "This petition is intended to indicate a vote of no confidence to the CUT Acting CEO: Prof. CJ van Rensburg for his inability to handle the institution's management and administrative issues.
>
> **I. RACISM AND DISCRIMINATION AGAINST BLACK EMPLOYEES**
>
> - Use of racial abusive language by white employees against black counterparts:
> - 'Parp-vreter' made bobbejaan
> - Non-extension of Dr. Selaledi's employment contract as Welkom Campus Principal v/s Extension of Mr A Murray's contract as Science Park Manager.
> - Discriminatory practices in handling black v/s white employees' disciplinary cases e.g. Mr. Mbele was dismissed for pointing a finger at white colleague.
> - Unfair suspension of Mrs. Hanong
> - Patterns/practices of giving acting post to white employees even though their better qualified black employees.
> - Women abuse Mrs. Phetlhu, Mrs. Hanong and Dr. Mkhonza by the Dean of Students.

II. INCONSISTENCIES IN THE INSTITUTION POLICY AND PROCEDURES

- Filling in of vacant post due to voluntary packages
- Extension of white employees' employment contract e.g. Mr. Murray.
- Perpetuation of filling of temporary posts by whites especially at Finance Department.
- Medical aid subsidy / pre-funding
- Unprocedural suspension of Mrs. Hanong.
- Acting positions for program heads.
- Discrepancies in overtime payment and acting allowances-project manger human resources; scope and projects managed.
- Inconsistency in the study benefits.
- Discrepancy in handling black v/s white by assistant director labour relations and non-compliance with handling of the case of executive director: human resource disciplinary hearing.

III. MANAGEMENT STYLE OF ACTING CEO

- Rules through intimidation and fair for committees and union.
- Failure to take steps upon executive director finance's late payments of salaries.

- Non-adherence to agreement reached with NEHAWU and refusal to meet the union.
- Acting CEO is a dictator and promoter of racism.
- Inability to protect the institution property e.g. disappearance of computer parts at the Library, computer from Council Chamber and R 20 000 from the Hotel School.

IV. NEHAWU THEREFORE DEMANDS THE FOLLOWING:

1. Immediate termination of acting CEO's acting contract.
2. Suspension of executive director human resources on the bases of his recommendation for the calculation of Mr. Bakker voluntary packages.
3. Assistant director labour relation should not be involved in Mrs Hanong's misconduct.
4. Employees whose jobs has not been evaluated must be evaluated immediately.
5. Immediate suspension of the Dean of Students: Dr. E. Sedibe and the assistant director residences – Mrs. M Greyling for their involvement in deepening the Huis Tech. crisis.

- **Immediate compliance with the following policies:**

1. Voluntary package
2. Policy and procedure on acting.

3. Policy and procedure on suspension of employees.
4. 01 & 02 September Agreement between NEHAWU and Management.
5. Immediate finalization of Grievance lodged by Mrs. Hanong against Mrs. Greyling and Dr. Sedibe.
6. Investigation of document DSM/03/01/01 submitted by the institution to CCMA on 21-02-2006 (Case number FS 541-06).
7. Immediate withdrawal of Mrs Hanong's suspension saga
8. Immediate suspension of all employees who used racist and abusive language

NB: Herewith attached please find NEHAWU membership signatures

The union gives the management a 48 hour period to respond to these demands."

A list containing names and signatures of approximately 104 persons is attached to the petition.

[8] The letter provides as follows:

"**Subject:** Petition

Greetings to you,

Nehawu submitted a petition to your office on the 28/02/06, with a clear mandate to receive response within 48 hours.

Indeed patiently so 48 hours notice has lapsed on the 03/03/06 and no response from your office nor an indication that the matter is receiving your attention.

Nehawu continued to show their patience on Friday after being aware of Council Committees activities including Executive of Council meeting not to demand a response.

Even today on the 06/03/06, we are still waiting for a response from your office and no indication as to whether the respond is coming or not.

It is with disappointment to inform you that if no response by 16h30 today. We are left with no option but to allow our members to get the response from your office as agreed upon in our general meeting at any time from 09h00 tomorrow.

Regards

_____
NEHAWU"

The applicant issued this application early on the following morning, 7 March 2006.

[9] The applicant expressly accepts what is conveyed in the letter, namely that members of the first respondent would approach the offices of the acting rector and CEO of the applicant in order to obtain a response to the demands set out in the petition. The applicant states further, however, that in the light of events that took place during 2005 and in which the first respondent and/or its members were allegedly involved, the applicant fears that in the process or as a result of the action contemplated in the letter, intimidation, victimization, assaults, damage to property, invasion of offices and general disruption of the business of the applicant will take place if the interdict is not granted, especially in respect of the events referred to in the rule *nisi*. In this regard the applicant points out that none of the issues or demands raised in the petition were raised previously, that the issues that were in fact previously raised by the first respondent were all resolved or in the process of being resolved and that the contemplated action circumvents established structures for resolution of disputes. The applicant therefore concludes that the action contemplated in the letter was intended to bring undue and unlawful pressure

to bear on the applicant to concede to demands set out in the petition.

[10] On behalf of the respondents all the allegations in respect of unlawful conduct are denied and is further submitted that on the applicant's own showing, this Court does not have jurisdiction to determine the matter. The submission in essence is that the conduct that the applicant complains of constitutes a strike that does not comply with the provisions of chapter IV of the LRA or conduct in contemplation or in furtherance of such strike and that therefore, in terms of section 68(1)(a)(i) of the LRA, the Labour Court would have had exclusive jurisdiction to grant the interdict that the applicant obtained.

[11] Section 68(1)(a)(i) of the LRA provides as follows:

> "(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-
>
> (a) to grant an interdict or order to restrain-*

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike;"

[12] A "strike" is defined in section 213 of the LRA as the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.

[13] The applicant did not in the papers or in argument rely on concurrent jurisdiction of the High Court in terms of section 157(2) of the LRA on the basis of any alleged or threatened violation of any fundamental right entrenched in the Constitution. It is also common cause that if a strike is involved, it would be one that did not comply with the provisions of the LRA, within the meaning of section 68(1) of the LRA. The questions for decision therefore are whether the conduct or action contemplated in the petition and the letter fall within the definition of "strike" in the LRA and whether the accompanying or resultant unlawful conduct

feared by the applicant, constitute conduct in contemplation or furtherance of a strike. If so, according to the clear wording of section 68(1) of the LRA, the Labour Court had exclusive jurisdiction to interdict any or all of such conduct.

[14] The striking feature of the definition of "strike" is that it is couched in very wide terms. The term "obstruction of work" is in itself very wide. In this regard I agree with the following passage in Du Toit et al, **Labour Relations Law**, 4th Edition, p. 276:

> "The phrase 'obstruction of work', while most obviously referring to those situations where employees physically obstruct work (for instance by 'sitting in' or barring access to the premises), is broad enough to include action such as 'work-to-rule' (a refusal of work beyond the perceived letter of the contract) which has the effect of obstructing the normal flow of work."

A dispute is defined in section 213 of the LRA as including an alleged dispute. Similarly, the phrase "a matter of mutual interest between the employer and employee" must be given the widest possible meaning. See for instance **RAND TYRES & ACCESSORIES (PTY) LTD & APPEL v**

INDUSTRIAL COUNCIL FOR THE MOTOR INDUSTRY (TRANVAAL) MINISTER FOR LABOUR AND MINISTER FOR JUSTICE 1941 (TPD) 108 at 115. I do not agree with the submission on behalf of the applicant that the meaning of matters of mutual interest between employer and employee in terms of the definition of "strike" is restricted by the provisions of section 65(1) of the LRA. In my view, if a strike as defined takes place in respect of a grievance or dispute in respect of which the right to strike is excluded by section 65 of the LRA, then by definition it is a strike that does not comply with the provisions of chapter IV of the LRA, within the meaning of section 68(1) thereof.

[15] It is true that the respondents made no reference to the term "strike" before the filing of the answering affidavit. The question is, however, one of substance and not of form or dependent on labels used by parties. There can be little doubt that the action contemplated in the letter would have amounted to at least partial concerted refusal of work and/or obstruction of work by employees of the applicant. Members of the first respondent would in terms thereof leave their workplaces and posts and gather at the offices of the

management of the applicant and in all probability remain there until their demands were met or at least a response satisfactory to them was obtained. This much was not disputed by counsel for the applicant. This would have been done for the purpose of remedying the grievances and/or resolving the disputes referred to in the petition. It is therefore not a case where any obstruction of work was merely incidental to some other unlawful conduct. Also, in my view, clearly at least a substantial portion of the matters and demands referred to in the petition are matters of mutual interest between the applicant and its employees. The allegations on behalf of the applicant that the demands as well as the contemplated action are unreasonable, appear to be not without justification, but are not relevant to the present enquiry. I have therefore reached the conclusion that the conduct contemplated in the letter must be regarded as an unprotected strike in terms of section 68(1) of the LRA.

[16] On the applicant's own case, the unlawful conduct feared by it, would have been conduct in furtherance of the strike. The Labour Court also has exclusive jurisdiction to grant interdicts to restrain unlawful conduct in furtherance of an

unprotected strike. See **COIN SECURITY GROUP (PTY) LTD v SA NATIONAL UNION FOR SECURITY OFFICERS AND OTHER WORKERS AND OTHERS** 1998 (1) SA 685 (C) and the **MONDI PAPER**-case, *supra*.

[17] For these reasons I am driven to the conclusion that this Court had no jurisdiction to grant the rule *nisi* of 7 March 2006.

[18] The rule *nisi* dated 7 March 2006 is discharged with costs.

C.H.G. VAN DER MERWE, J

On behalf of applicant: Adv. P R Cronjé
Instructed by:
Phatsoane & Henney Inc
BLOEMFONTEIN

On behalf of respondents: Adv S Motloung
Instructed by:
Hill McHardy & Herbst Inc
BLOEMFONTEIN

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