REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: CA5/2012

THE DEMOCRATIC UNION OF

SECURITY WORKERS (DUSWO) **First Appellant**

DUSWO MEMBERS EMPLOYED BY

THE RESPONDENT **Second and Further Appellants**

and

ROYAL SERVE CLEANING (PTY) LTD **Respondent**

Delivered: 31 MAY 2013

CORAM: WAGLAY JP, TLALETSI JA, COPPIN AJA

JUDGMENT

TLALETSI, JA

Introduction

[1] This is an appeal against the whole order of the Labour Court per Conradie, AJ, in an urgent application brought by the respondent against its employees (second and further appellants) and their union (the first appellant).

[2] In the application the respondent sought orders to the following effect:

> '2.1 Ordering the respondents to comply with the picketing rules issued on 8 July 2011 by the CCMA;
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> 2.2 Interdicting and restraining the first respondent from calling upon, inciting or encouraging its members who are employed by the respondent to participate in unlawful gathering or demonstrating on the premises of the Victoria and Alfred Waterfront and the respondent's premises at Cnr Howard and Gardener Way, Pinelands, Cape Town, in breach of the picketing rules established by the CCMA;
>
> 2.3 Interdicting and restraining the second to further respondents from participating in any unlawful gathering or demonstration on the premises of the Victoria and Alfred Waterfront and the respondent's premises at Cnr Howard and Gardener Way, Pinelands, Cape Town, in breach of the picketing rules established by the CCMA;
>
> 2.4 That the second to further appellants be interdicted and restrained from marching through the premises of the Victoria and Alfred Waterfront and the respondent's premises at Cnr Howard and Gardener Way, Pinelands, Cape Town;
>
> 2.5 Interdicting and restraining the second to further respondents from unlawfully disrupting and disturbing the peace at the premises of the Victoria and Alfred Waterfront including overturning of refuse bins and obstructing members of the public in the ordinary cause of their visit or business to the Victoria and Alfred Waterfront; and the appellant's premises at Cnr Howard and Gardener Way, Pinelands, Cape Town;
>
> 2.6 Interdicting and restraining the second to further respondents from in any way interfering and obstructing access to an egress from the V and A Waterfront and the applicant's premises;

2.7 Interdicting and restraining the second to further respondents from intimidating, assaulting or threatening any employee of the applicant,

2.8 Authorising the South African Police Service to take such action as it may lawfully be permitted to take in the event that any of the second to further appellants refuses to comply with the instructions of the Sheriff or the obstruction of the Sherriff in the execution of his duties, save that this Order shall not preclude or limit the South African Police service from exercising any power which it may have in terms of any law; and

2.9 That the provisions of paragraphs 2.1 to 2.7 operate as an interim interdict pending the return day of the application.

2.10 That the costs of this application shall stand over the return day.

2.11 That pending the return date the parties agree to be bound by, implement and do all things necessary to resolve the dispute between them by way of the process set out in the agreement annexed hereto marked "A."'[1]

[3] On 14 July 2011, without any opposition by the appellants, the Labour Court granted the respondent relief in the form of a rule nisi which was returnable on 15 August 2011. On the return date, the respondent sought confirmation of the rule with costs. This time the appellants opposed the confirmation of the rule, but it was nevertheless confirmed with costs. On 17 February 2012, the Labour Court granted the appellants leave to appeal to this Court. No costs order was made. What follows is a factual background relating to the dispute between the parties.

Factual background

[4] The respondent carries on business in the cleaning services industry. Part of the respondent's business involves cleaning the premises of its clients. Lexshell 44 General Trading (Pty) Ltd, commonly known as the Victoria and Alfred Waterfront (V and A Waterfront), is one of the respondent's clients. The

[1]Annexure A is not relevant for the determination of the appeal and is therefore omitted.

second and further respondents were employed by the respondent and were allocated to clean the premises of the V and A Waterfront.

[5] Following a transfer of part of the V and A Waterfront, the respondent acquired the employees in terms of Section 197 of the Labour Relations Act.[2] The first respondent ('the union'), acting on behalf of its members, demanded improvements to the terms and conditions of employment of its members. The union, thereafter, referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The dispute was certified unresolved, entitling the union to embark on strike action.

[6] A dispute arose between the union and the respondent concerning picketing rules. The parties acquired the services of the CCMA to resolve their dispute relating to picketing rules. On 7 July 2011, the union notified the respondent that its strike would commence on Monday 11 July 2011 at 06:00. At this time, there were still no picketing rules either agreed upon, or determined by the CCMA.

[7] It is common cause that late in the afternoon of Friday 8 July 2011, the CCMA issued the picketing rules and transmitted the document to that effect by e-mail, to the first appellant's General Secretary, Piet Mabaso ("Mabaso") who is said to have left the office for Johannesburg the same day. However, the CCMA did not send a copy of the picketing rules to the first appellant's Cape Town offices or to its organiser responsible for the strike, namely, Ntsikelelo Bizo ("Bizo").

[8] On 11 July 2011, the employees embarked on a strike at 06h00. They picketed outside their workplace at the V and A Waterfront. Angelo Hendricks ("Hendricks") who is the respondent's Regional Human Resources Manager arrived at the V and A Waterfront. Hendricks informed Bizo that the picketing rules issued by the CCMA prohibited the employees from among others, picketing, gathering, or demonstrating in any way on the premises of the respondent's clients and that they were acting in breach of the picketing rules.

[2] Act 66 of 1995.

Bizo,in response, informed Hendricks that he did not know of any picketing rules.

[9] Hendricks stated that upon being advised to leave the premises, some employees refused to leave the premises and at least eight of them gathered at the entrance to the changing facilities and proceeded to picket on the premises chanting, singing and blowing vuvuzelas.Others proceeded slowly through various streets and corridors. Along the way, some overturned and emptied refuse bins, uprooted plants and blatantly marched through flowerbeds. However, according to Bizo upon being shown the picketing rules by Hendricks, he instructed the employees to leave the premises and they complied with his instructions and left the premises. They left the premises peacefully without causing any damage or disruption. Bizo, who was the responsible union official and a marshall on the day, averred that he was satisfied that the picketing rules were not breached and he was very strict with the employees. He disputed that any of the union members were responsible for the scattered papers depicted on the photographs and contended that there was nothing untoward with the photographs.

[10] Hendricks mentioned, further, that he received reports that on the same morning, the employees took up positions contrary to picketing rules in the area around the respondent's offices in Pinelands and destroyed the area, ripped up plants and scattered litter at the entrances to its premises. He also received reports from non-striking staff members that striking employees at the train station and bus station in Cape Town had prevented employees from coming to work at the V and A Waterfront.

[11] However, according to Bizo, the employees, who were at the V and A Waterfront, proceeded directly to Pinelands. The employees were led by him and Elvis Dlamini (shop steward). Neither of them was aware of any scattering of litter or vandalising of plants as alleged by Hendricks. He, further, denied that the photographs, attached to the founding affidavit, depicted any unlawful conduct by the union members.

[12] Bizo mentioned further that on Tuesday 12 July 2011, the union members held their picket in compliance with the picketing rules at the entrance to the V and A Waterfront from approximately 10h00 to 13h00. The South African Police Services members were present monitoring the situation and did not intervene since there were no complaints. At 13h00, they went to the respondent's Pinelands premises where they held another peaceful picket in compliance with the picketing rules from approximately 14h30. However, he mentioned that soon after their arrival some union members made a small fire, on a driveway in Pinelands using cardboard. This incident was brought to his attention and he immediately told the union members responsible that they were not permitted to make the fire and the members responsible immediately put out the fire and apologised for their conduct. According to him, the police who were present did not even intervene since they were satisfied that the organiser had the situation under control.

[13] According to Bizo, at approximately 16h00, Hendricks invited him aside in order to give him a document which he described as an offer. When Bizo attended at the respondent's offices with Dlamini and another shop steward, Siyabulela Maphikana, they were instead presented with the "Court papers" pertaining to this matter. They signed to acknowledge receipt. Whilst inside the offices, they received reports that the gathering of union members had been dispersed for no reason by the police using a water cannon r.

[14] As already pointed out, the matter was placed on the roll for hearing on 14 July 2011. In light of the denial of the appellants to any wrongdoing and their commitment to conduct themselves in a lawful manner and to abide by the picketing rules, the rule *nisi* was issued by consent. The parties further agreed to a temporary cessation of industrial action and for the appointment of a mediator to assist them to resolve the substantive dispute relating to the alleged deferential conditions of employment. However, this dispute could not be resolved by the appointed mediator.

[15] On the return date, that is 16 August 2011,the respondent moved for the confirmation of the rule *nisi* with costs . This was opposed by the appellants. In the main, the appellants contended that the respondent was not entitled to

the confirmation of the rule *nisi* since the requirements for the relief sought had not been met, and that no costs order should be made against the appellants.

Judgment of the Court *a quo*

[16] In its judgment, the court below held that Bizo disposed to an answering affidavit on behalf of the appellants and later to a supplementary answering affidavit in which he claimed not to have seen the respondent's supplementary affidavit when he deposed to the answering affidavit. The court found him not to be truthful because, according to the Labour Court, Bizo dealt with an issue of the employees making fire at the respondent's Pineland premises which issue was only raised in the respondent's answering affidavit.

[17] As regards the requirements for final relief, the Labour Court held that the respondent had established a clear right in that it was entitled to expect the appellants to behave in an orderly and lawful manner in pursuance of their strike; that the respondent had established an injury committed or reasonably apprehended in that on the respondent's version, the striking employees were gathered at the V and A Waterfront in areas which were off limits in terms of the picketing rules and, further, that the commercial relationship with its client, the V and A Waterfront, could be affected by the unlawful conduct of the appellants given the tough stance which the V and A Waterfront clearly took in respect of the strike action on its premises.

[18] With regard to the requirement of no other alternative remedy available to the respondent, the Labour Court considered the provisions in the picketing rules providing for the convenor of the Shopstewards and Company Managers to, as soon as possible, endeavour to resolve any alleged breach of the picketing rules by either party. The Labour Court found the process proposed not to be a reasonable alternative remedy in circumstances where a party to the agreement has already acted in flagrant violation of the rules in question and, further, where any unlawful conduct needed to be addressed without further delay.

[19] In awarding costs against the appellants, the Labour Court held the view that even if there was an on-going relationship between the parties it saw "no reason why the respondent should not be entitled to its costs" and that if the union regarded the relationship to be important it should then be expected that they would do everything possible to ensure that picketing rules are communicated and any picketing is in terms of those rules. The Labour Court concluded that "the fact that Bizo was not honest in his second affidavit is also a consideration in awarding costs against the respondents". In addition to confirmation of the rule *nisi,* the appellants were ordered to pay the costs of the application.

The appeal

[20] The grounds of appeal upon which the judgment and order of the Labour Court is challenged are, in essence, that the Court erred in granting final relief in circumstances where the pre-requisite therefore had not been met; erred in finding that Bizo was a liar because he claimed not to have had sight of Hendrick's supplementary affidavit when deposing to his first affidavit; and erred in awarding costs against the appellants.

[21] The respondent is not opposing the appeal. In this Court, counsel for the appellants argued that the respondent had failed to show that it had a clear right to an interdict; the alleged injury was in dispute and based on hearsay and that neither the respondent, nor the Court below, referred the matter to oral evidence; that there was an adequate alternative remedy provided by the picketing rules;and that the finding, that Bizo was a liar, was wrong in fact and in law.

[22] The nature of the remedy the respondent applied for in the court *a quo* is a final interdict intended to secure a permanent cessation of unlawful conduct on the part of the appellants. In order to be granted such relief, the respondent had to establish on a balance of probabilities all of the three well-known requisites, namely (i) a clear right on its part, (ii) an injury actually committed or reasonably apprehended, (iii) the absence of any other

satisfactory remedy available to it.[3] All three requirements must be present and be supported by evidence. The respondent had to establish that it had a clear right in that it expected the appellants not to breach the picketing rules, and that the applicants wrongfully and unlawfully breached the picketing rules or that the respondent had a reasonable apprehension that the applicants would breach the picketing rules and finally that it had no adequate, alternative relief.[4]

[23] The appellants have denied the allegations averred by the respondent. They in particular denied that they had any knowledge of the existence of the picketing rules when the strike action started; and averred that as soon as the rules were brought to its official's attention, the striking employees picketed within the parameters of the rules. They denied any wrongdoing on their part. Their denial is not a bold one since they give an account of their activities. Furthermore, some of the averments made on behalf of the respondents are based on hearsay evidence which was challenged by the appellants as incorrect.

[24] The effect of the denial on the part of the appellants meant that there is a dispute of fact. In the event, a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order. The position was authoritatively stated by Harms DP as follows:[5]

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version

[3] *Sanachem (Pty) Ltd v Farmers Agricare (Pty) Ltd and Others* 1995 (2) SA 781(A) at 788J–790C.
[4] *Diepsloot Residents and Landowner's Association v Administrator, TVL* 1994 (3) SA 336 (A) at 344 H-J.
[5] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.

> consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

In *casu,* having not referred the matter to oral evidence to resolve the disputes of facts, the Labour Court ought to have decided the disputed facts in favour of the appellants and not grant the final relief. However, the court seems to have incorrectly accepted the respondent's version despite the factual disputes and averments based on hearsay allegations.

[25] I agree with the contention by the appellants that the finding by the Labour Court that Bizo lied when he denied knowledge of the existence of the supplementary affidavit at the time when he deposed to his answering affidavit is incorrect. This is a finding that could not have been made on the papers, especially, since Bizo gave reasons for his denial. It is a matter that could only have been resolved through oral evidence.

[26] In light of my finding that the matter should have been decided in favour of the applicants, I am of the view that the finding by the Court below, that the picketing rules did not provide the respondent with an adequate remedy, is not the correct one. Such a finding cannot stand since the respondent had failed to establish that there was an injury actually committed or reasonably apprehended. In fact, at the time when the rule was confirmed, the striking employees had been back at work for a period in excess of a month. The interdict granted would have been to interdict conduct which had already taken place. The object of an interdict is the protection of an existing right and is not a remedy for the past invasion of rights.[6] It is, therefore, not necessary to make any determination as to whether the picketing rules provided an adequate remedy to the respondent that would render the granting of the interdict incompetent under the circumstances.

[6] *Condé Nast Publications Ltd v Jafee* 1951 (1) SA 81 (C) at 86C-J; *Phillip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another* 1991 (2) SA 720 (A) at 735 B.

[27] The appeal should, therefore, succeed and it would be in accordance with the requirements of the law and fairness that the appellants should not be awarded costs in this Court since the appeal was not opposed. It would also be unfair and not in accordance with the requirements of the law to make any order as to costs in the court below.

Order

[28] In the result, the following order is made:

1. The appeal succeeds and the order of the Labour Court is set aside and substituted as follows:

   'The Rule *Nisi* is discharged and the application is dismissed with no order as to costs.'

2. There shall be no order as to costs.

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Tlaletsi JA

Judge of the Labour Appeal Court

I agree

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Waglay JP

Judge President of the Labour Appeal Court

I agree

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Coppin AJA

Acting Judge of the Labour Appeal Court

Appearances:

For the Appellant: Adv S Harvey

Instructed by: Marieke van Rooyen Attorneys, Stellenbosch

For the Respondent: No appearance