THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1580/15

In the matter between:

VERULAM SAWMILLS (PTY) LTD	**Applicant**
and	
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION ('AMCU')	**First Respondent**
166 EMPLOYEES OF APPLICANT AND MEMBERS OF FIRST RESPONDENT	**Second and Further Respondents**

Heard: 7 August 2015

Delivered: 20 October 2015

Summary: Punitive costs - union members contravening picketing rules and union failing to take all reasonable steps to ensure compliance with rules – interdict granted by consent of the parties – punitive order of costs granted against union – principles of union accountability examined

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JUDGMENT

MYBURGH, AJ

Introduction

[1] On 7 August 2015, I granted an order, *inter alia*, compelling the second and further respondents ("the strikers") to comply with the picketing rules agreement concluded between the parties, and interdicting and restraining the strikers from engaging in various unlawful acts in contravention of the agreement.

[2] In circumstances where the aforesaid order was granted by consent of the parties, it was not necessary at the time to decide the issue of costs (a punitive order having been sought) on an urgent basis. Having heard argument and considered the papers, this is my decision on that issue.

Background

[3] On 28 July 2015, a protected strike over wages called by the first respondent ("AMCU") commenced at the premises of the applicant ("the company"), a sawmill operation situated in Mpumalanga.

[4] On 23 July 2015, and in the run up to the strike, the parties concluded a picketing rules agreement in terms of section 69 of the LRA[1] – this with the assistance of the CCMA. The agreement, which incorporated the Code of Good Practice on Picketing, is a typical one and its terms need not be narrated for present purposes save for one issue – it being that Mr Mazibuko (AMCU's regional organiser in Mpumalanga) was appointed as the strike control "convenor" and was to be available to be contacted at all times.

[5] On the evening of 4 August 2015, the company launched an urgent application for the relief referred to above, and enrolled the matter for hearing on 7 August 2015. On that day, AMCU delivered an answering affidavit, in which it indicated that it did not oppose the relief sought by the company, save

[1] Labour Relations Act 66 of 1995.

for the punitive costs order, and sought to defend itself against such an order. It was in these circumstances that the order (by consent) referred to above was granted, with the issue of costs being reserved.

The parties' cases

The company's case

[6] According to the company, immediately upon the strike commencing on 28 July 2015, the strikers failed to comply with the picketing rules. On that day and those that followed in the run up to the urgent application, the strikers contravened the picketing rules by: carrying weapons; picketing outside the designated area; moving into the main road; stopping vehicles and removing commuters from public transport; prohibiting employees from entering the workplace; blockading the entrance to the company's premises; and damaging a vehicle belonging to the company.

[7] Things got so out of control that, on 3 August 2015, the company was forced to shut down its operations completely. The next day, 4 August 2015, the strikers threatened the managing director by stating that he would not leave the premises that day, and chanting "shoot Edward". The SAPS' riot squad was called in, but it was apparently disinclined to intervene in the absence of a court order. It was in these circumstances that the urgent application was launched.

[8] For present purposes, the attempts made by the company to engage with AMCU to resolve the issue, and its response, warrant consideration (the company's version follows).

a) On the morning of Tuesday, 28 July 2015 (at 08h01), the company addressed a letter to Mr Mazibuko requesting his urgent intervention. The letter narrates a series of serious breaches of the picketing rules and unlawful conduct on the part of the strikers, including strikers carrying weapons (including machetes), moving to the main road,

stopping vehicles and removing commuters from public transport, and preventing entrance to the workplace. The letter also records that the company would hold AMCU liable for the costs associated with the enforcement of the picketing rules.

b) During the afternoon of 28 July 2015, the company addressed a further letter of similar content to Mr Mazibuko, bringing to his attention that the strikers were persisting in their breach of the picketing rules. Reference was made in this letter to the severe risks associated with strikers gathering unlawfully on the road used by heavy duty vehicles.

c) On the morning of Wednesday, 29 July 2015, the company addressed a follow up letter to Mr Mazibuko, again narrating breaches of the picketing rules by the strikers and requesting his urgent intervention. Mention was made of strikers again not being in the demarcated area, wielding dangerous weapons, and prohibiting non-strikers from entering the workplace. The letter ends by recording that the company would be forced to approach this court for an interdict, unless the situation was brought under control.

d) During the afternoon of 29 July 2015, the company sent another letter of similar content to Mr Mazibuko. It was recorded in this letter that the strikers were "chanting slogans referring to shooting the employer". Again, a threat of a Labour Court interdict was made.

e) Also during the afternoon of 29 July 2015 (at 14h57) (and apparently before receipt of the company's second letter of that day), Mr Mazibuko responded to the company's letters referred to above. The body of Mr Mazibuko's letter reads:

> "This union abide and confine itself to the picketing rules signed by both parties and as a result of this, our regional secretary (John Sibiya) did address the workers on 28 July 2015, that they need not to block the main road and that they should be within the designated areas that parties have agreed upon.

> To date, we have not received any complaints from the SAPS or heard of any forms of intimidation or damage of property by the striking members."

f) On Thursday, 30 July 2015, and in response to this, the company addressed a letter to Mr Mazibuko recording that "[t]he records of your members continuing to breach the picketing rules are available for your perusal". (No response was ever received to this invitation.)

g) On Tuesday, 4 August 2015, the company's attorneys of record addressed a lengthy letter to Mr Mazibuko. The letter records the terms of the picketing rules (including Mr Mazibuko's obligation to intervene on an urgent basis) and the history of what had transpired to date. It records that further to AMCU's letter of 29 July 2015, strikers continued to contravene the picketing rules, with mention being made of the fact that: all staff stayed away from work on 3 August 2015 due to fear of intimidation; the plant was now totally shut down as a result of the conduct of the strikers; strikers were carrying weapons and singing intimidating slogans; the strikers refused to remain in the demarcated area; and the safety of the workplace, employees and customers had been placed at severe risk by the strikers.

h) The letter goes on to put AMCU to terms: should the strikers persist with unlawful conduct in breach of the picketing rules that day, the company would approach this court for urgent relief, and seek a punitive costs order against AMCU. This letter appears to have been sent to AMCU (by email) at 07h43.

i) No response was received to this letter during the course of 4 August 2015, with the strikers persisting in their unlawful behaviour – it being on this day that the managing director was threatened (this after the aforesaid letter was sent). In the result, the company launched its urgent application.

AMCU's case

[9] The key allegations made by AMCU in its answering affidavit (deposed to by Mr Mazibuko) are as follows:

a) In effect, Mr Mazibuko's letter of 29 July 2015 adequately dealt with the matter up to that point in time.

b) Between 30 July and 4 August 2015, AMCU received no further complaints, with it being the deponent's belief that picketing had been conducted in accordance with the picketing rules.

c) On the morning of 4 August 2015, the company had failed to send busses to collect those of the strikers residing in the nearby townships and convey them to the designated area, as had been done in the past. This necessitated them having to walk to work, which caused them frustration and annoyance (which according to AMCU caused the company to send its letter to AMCU at 07h43). In response to the agitation of the strikers, Mr Ntlamane (the chairperson of the AMCU branch committee and one of the marshals appointed in terms of the picketing rules agreement) addressed them, and prevailed upon them to comply with the picketing rules.

d) Mr Ntlamane did so again on the afternoon of 4 August 2015, when strikers became disgruntled by the fact that electricity and water at the hostels had been turned off, which they imputed to the company. After addressing the strikers, Mr Ntlamane engaged with management, with AMCU having been informed later that afternoon that the electricity and water supply had been restored.

e) The company was aware of the concerns of the strikers and the reasons for "their particular frustration and non-violent demonstration on 4 August 2015". (What exactly this was meant to convey is unclear.)

f) With reference to the contents of the company's letter of 4 August 2015, AMCU baldly denied that: any property was damaged; the company ceased operations because of the conduct of the strikers; weapons were carried by the strikers; any threatening or intimidatory chants were made to anyone; and that any vehicles, security guards, clients or visitors were in any way threatened or harassed.

g) As far as AMCU was concerned, it had at all times "maintained positive engagement with the [company] and … responded promptly to each complaint or concern expressed by the [company]". In all the circumstances, there was (according to AMCU) no basis for the award of a punitive costs order.

Union accountability for the conduct of its members

[10] This court has previously indicated that unions are at risk of a punitive costs order where their members conduct themselves unlawfully during a protected strike, and where the union itself does not take all reasonable steps to prevent this. As Van Niekerk J put it in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC):

> "This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against *unions that refuse or fail to take all reasonable steps to prevent its occurrence*. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, *I would have had no hesitation in granting an order for costs as between attorney and own client*."[2] (Own emphasis.)

[11] This *dictum* accords with others in which this court and the LAC have endorsed the principle of union accountability for the unlawful conduct of its members during the course of a strike. The following quotes from some of the more well-known judgments will suffice.

[2] At para 14.

a) In *In2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 *ILJ* 2589 (LC), Steenkamp J held:

> "The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members."[3]

b) On appeal to the LAC in *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 *ILJ* 2767 (LAC),[4] Sutherland AJA (as he then was) held:

> "The respondent's thesis that a trade union, as a matter of principle, has a duty to curb unlawful behaviour by its members indeed enjoys merit. Indeed, the principle of union accountability for its actions or omissions is beginning to gain recognition[5] …
>
> The sentiments expressed by the court *a quo* which are cited above [see above] have been rightly described by Alan Rycroft as a 'significant moment of judicial resolve'.[6]… Indeed, the sentiments deserve endorsement, and are adopted by this court."[7]

c) In *Xstrata SA (Pty) Ltd v AMCU & Others* (J1239/13) [2014] ZALCJHB 58 (25 February 2014), Tlhotlhalemaje AJ held:

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[3] At 2591 H-I.

[4] In this judgement, the LAC reversed this court's decision that the union was in contempt of court. It did so essentially on the basis that while a union may be vicariously liable for the unlawful acts of its members, it cannot be vicariously liable for contempt of court – the union itself must be in contempt, with this not having been established on the facts. But this, in my view, does not detract from the important statements (quoted above) that the LAC went on to make about union accountability generally.

[5] The LAC referred here to *FAWU v Ngcobo NO & another* (2013) 34 *ILJ* 3061 (CC), where FAWU was held liable to its own members for failure to prosecute the members' interests properly in litigation.

[6] Rycroft, A *"Being Held in Contempt for Non-compliance with a Court Interdict: In2food (Pty) Ltd v FAWU & Others (2013) 34 ILJ 2589 (LC)"* (2013) 34 *ILJ* 2499.

[7] At paras 18-19.

> "It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not. The perception that a union has no obligation whatsoever to control its members during such activities, which are invariably violent in nature cannot be sustained."[8]

[12] These judgments make it abundantly clear that, in the context of the pandemic of unprotected strike action and strike violence in South Africa, the courts are inclined to hold unions accountable for the unlawful conduct of their members, and impose on them obligations to control their membership. This being a potential means of attempting to address the pandemic.

[13] This approach of union responsibility accords with the approach adopted in other jurisdictions. In the USA, for example, the National Labor Relations Board has held as follows:

> "Where a union authorizes a picket line, it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct. Similarly, if pickets engage in misconduct in the presence of a union agent, and that agent fails to disavow that conduct and take corrective measures, the union may be held responsible."[9]

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[8] At para 35. The court went on to find (in paras 36-40) that there exists four legal grounds upon which a union is obliged to police its members during the course of a strike / picket. Firstly, the obligation arises from section 17 of the Constitution, which guarantees everyone the right, peacefully and unarmed, to assemble, demonstrate and present petitions. As far as the court was concerned, while the right accrues to union members, the responsibility to ensure that they comply with the limitations implicitly falls on their union. Secondly, the obligation arises from the relationship of guardianship between the union and its members. Thirdly, the obligation arises from the collective bargaining relationship between unions and employers. Fourthly, the obligation arose on the facts from the process of engagement between the parties, including the fact that AMCU had called the strike, various meetings had been held between the parties, and the fact that AMCU had not distanced itself from its members and continued to represent them.

[9] *Plumbers, Local 195 (McCormack-Young Corp)* 233 NLRB 1087 (1977), quoted in Gorman *et al, Labour Law Analysis and Advocacy* (Juris Publishing, 2013) at 353, para 10.6. See for a comparable UK case, the judgment of the Employment Appeal Tribunal in *News Group Newspapers Ltd and*

[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 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*[10]) to ensure compliance by its members with the terms of the agreement.

[15] To my mind, this is a fundamentally important obligation. Not only are picketing rules there to attempt to ensure the safety and security of persons and the employer's workplace, but if they are not obeyed and violence ensues resulting in non-strikers also withholding their labour, the strikers gain an illegitimate advantage in the power-play of industrial action, placing illegitimate pressure on employers to settle. Typically, one of two things then happen – either the employer gives in to the pressure and settles at a rate above that reflecting the forces of demand and supply (which equates to a form of economic duress) or the employer digs in its heels and refuses to negotiate or settle while the violence is ongoing (which inevitably causes strikes to last longer than they should). Either way, the orderly system of collective bargaining that the LRA aspires to is undermined – and ultimately, economic activity and job security is threatened.

Evaluation and findings

[16] As set out above, AMCU's case is that nothing wrong occurred up until 4 August 2015, save for the strikers having left the demarcated area and blocked the road (which a marshal addressed them on), and that Mr Mazibuko's letter of 29 July 2015 constitutes a proper response by AMCU to

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others v SOGAT '82 and others [1986] IRLR 337, commented on by Deakin *et al, Labour Law* (Hart Publishing, 2012) at 1059, para 11.22.

[10] See para 10 above.

the company's complaints up to that point in time. I cannot accept this for the following reasons:

a) Firstly, it is difficult (if not impossible) to reconcile AMCU's denial of wrongdoing (beyond that admitted) on the part of the strikers with its consent to a wide-ranging court order against them, which was granted on 7 August 2015. Allied to this, it is difficult to accept a bald denial by AMCU in this regard over the contemporaneous complaints recorded by the company in a series of letters on 28, 29 and 30 July 2015.

b) Secondly, Mr Mazibuko's letter of 29 July 2015 was plainly inadequate for these reasons: (i) it took him almost two working days to respond to the company; (ii) the fact that AMCU had allegedly not received "any complaints from the SAPS" or "heard of" any intimidation or damage to property by the strikers, hardly served as an adequate answer to the company's complaints to the contrary; and (iii) the inadequacy in the response was further exposed by the fact that Mr Mazibuko did not take up the company's offer on 30 July 2015 to examine the evidence that was available in support of the company's complaints (see further below).

[17] Furthermore, AMCU's case that no further complaints were lodged with it between 29 July and 4 August 2015 is, to my mind, self-serving. This because, as mentioned above, on 30 July 2015, the company tendered the evidence it had to substantiate its complaints, but AMCU did not take up the offer to examine it. On the face of it, laying complaints with AMCU was not getting the company anywhere.

[18] The very purpose of appointing a strike convenor and marshals and putting in place a system of communication between them and the company during the course of a strike (as is now commonplace in picketing rules agreements) is to attempt to ensure compliance with the picketing rules, with a view to keeping a check on strike violence. Where, in this context, a company tenders evidence to the convenor of serious unlawful activity on the part of the

strikers, there can be little doubt that he or she is under an obligation to investigate it expeditiously. A failure to do so represents a failure on the part of the union to take all reasonable steps to ensure compliance with the picketing rules, and undermines the entire purpose of such (agreed) rules.

[19] Turning to AMCU's case regarding the events of Tuesday, 4 August 2015, it is difficult to understand. While AMCU pleaded, in effect, that the strikers were provoked on 4 August 2015 by the absence of transport and the disconnection of water and electricity in the hostels, it never really explained what conduct the strikers engaged in as a result thereof (and the link to the terms of the consent order granted on 7 August 2015). While denying the statement made in the company's letter sent at 07h43 that morning that intimidatory slogans were chanted, AMCU does not deny that – after the letter was sent – the strikers had stated that the managing director would not leave the premises that day, and chanted "shoot Edward".[11] There is nothing on the papers to suggest that the strikers were censured by the marshals in this regard. In addition to this, Mr Mazibuko's failure to respond to the company's letter of 4 August 2015 (sent at 07h43) throughout the course of that day is, again, significant.

[20] Regarding AMCU's allegation overall that it had at all times "maintained positive engagement with the [company] and … responded promptly to each complaint or concern expressed by the [company]", it seems to me implicit in this that AMCU recognised that it was under a legal obligation to do so. With this there can be no quarrel. But where I disagree is that AMCU acquitted

[11] In para 6 of the company's letter of 4 August 2015, the company sets out a list of five unlawful acts / contraventions of the picketing rules that had occurred after 29 July 2015. Para 6.2 recorded, in part, that "strikers are … singing intimidating slogans". In para 12 of AMCU's answering affidavit, AMCU deals pertinently with the contents of para 6 of the aforesaid letter, and denies the contents. However, in para 23 of the company's founding affidavit, it is alleged that, on 4 August 2015 and *after* the aforesaid letter was sent, the strikers threatened the managing director "by saying that he would not leave the premises today" and "chanting 'shoot Edward'". (The managing director confirms this in a confirmatory affidavit.) AMCU did not reply on a paragraph-by-paragraph basis to the founding affidavit, and did not deny this allegation in its answering affidavit.

itself of this obligation. It fundamentally failed to do so in not reacting to the company's tender of evidence on 30 July 2015.

[21] With reference to all of the above, I am satisfied firstly, that the strikers materially breached the picketing rules agreement and engaged in various acts of unlawful conduct (this having given rise to the court order of 7 August 2015), and, secondly, that AMCU itself did not take all reasonable steps to prevent such conduct and ensure compliance with the picketing rules agreement. (Consequently, the company was forced into bringing the urgent application, only for AMCU to then concede to the substantive relief sought by the company.)

[22] As held in *Tsogo Sun*,[12] this court will not hesitate in such circumstances to grant a punitive costs order against the union concerned. This is consistent with the general principles applicable to the award of a punitive costs order (such as costs on an attorney-and-client scale), which include that such an order is warranted where the conduct of the party concerned is vexatious and unreasonable.[13] The order is granted as a mark of the court's disapproval of the offending party's conduct – in this case, both the strikers and AMCU itself.

Order

[23] In the premises, the following order is made:

1) The first respondent shall pay the costs of the urgent application on the attorney-and-client scale.

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Myburgh, *AJ*

[12] See para 10 above.

[13] *Gois t/a Shakespeare's Pub v Van Zyl & others* (2003) 24 *ILJ* 2302 (LC) at paras 43 and 54.

Acting Judge of the Labour Court of South Africa

APPEARANCES:

Applicant's attorneys: Erasmus-Scheepers Attorneys

Respondents' attorneys: Larry Dave Inc Attorneys