THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 4124 / 18

In the matter between:

DIS-CHEM PHARMACIES LTD **Applicant**

and

SOLLY MALEMA **First Respondent**

NATIONAL UNION OF PUBLIC SERVICE

AND ALLIED WORKERS **Second**

Respondent EMPLOYEES LISTED ON ANNEXURE "A" **Third to Further**

Respondents

Heard: **5 December 2018**

Delivered: **7 December 2018**

Summary: Picketing Rules – section 69 of the LRA considered – Labour Court entitled to grant urgent interim relief where picketing rules materially breached

Picketing Rules – section 69(12) – considering what is just and equitable – employees that continue to behave unlawfully despite enforced picketing rules forfeit the right to picket

Picketing – violence, unlawful conduct and intimidation – compliance with section 69(1) required – breach of section 69(1) justifies complete suspension of picket

Picketing rules – amendment granted as urgent interim relief pending further CCMA conciliation / adjudication proceedings

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REASONS FORJUDGMENT

SNYMAN, AJ

Introduction

[1] I will commence judgment in this matter by quoting what I said in *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union and Others*:[1]

> „As a point of departure in writing this judgment, it has once again been necessary for me to return to what has become a common side effect of protected strike action by trade unions and employees, being that of unlawful behaviour, violence and intimidation. I am quite sure that it was never envisaged or contemplated that the right to strike as enshrined in the Constitution, would have components of unlawful conduct, violence and intimidation as such a significant part of it. This kind of behaviour deserves no Constitutional protection, and should be completely rooted out of the employment environment. …"

[2] This matter before me is yet another case in point. It concerns a situation where, despite picketing rules having been issued by the Commission for Conciliation, Mediation and Arbitration („CCMA"), and these in fact having been enforced by this Court, striking employees simply remain in flagrant disregard of all these measures intended to regulate and establish peaceful protest as

an essential component of protected strike action. As said in *SA Transport and Allied Workers Union and Another v Garvas and Others*[2]:

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[1] (2018) 39 ILJ 609 (LC) at para 1.
[2] (2012) 33 ILJ 1593 (CC) at paras 51 – 52.

„… Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.' That is what s 17 of the Constitution promises the people in South Africa.

This means that everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose."

[3] What happened in this instance is entirely at odds with what is spelt out in the above dictum in *Garvas*. After hearing argument for the applicant, I issued the *inter alia* the following order:

„2. The Picketing Rules issued by the CCMA on 1 November 2018 are hereby varied in the following respect:

2.1 The Picketing Rules are hereby suspended; and

2.2 The Picketing rules are of no further force and effect for the duration of the issue in dispute.

3. The Second and Third to Further Respondents are interdicted and restrained from continuing or participating in any further Picket, gathering, Assembly or Protest Action in or at any of the Applicant"s Premises, or any place to which the public has access outside the Applicant"s Premises, including those listed in annexure "C" to the First Urgent Application. …

8. Written reasons for this order will be provided on 7 December 2018."

The above order was an interim order with immediate effect, returnable on 27 February 2019.

[4] This written judgment now constituted the reasons referred to in paragraph 8 of the order set out above.

<u>The relevant background</u>

[5] The applicant conducts business in the retail of pharmaceutical and related products. It has approximately 150 stores nationwide. The applicant also has a head office, and a number of distribution centres.

[6] The applicant employs 17 128 employees nationwide. The second respondent has recruited approximately 1 900 of these employees as members, and has sought to engage the applicant in collective bargaining on behalf of these members. Because the applicant considered the second respondent to be a minority union, it refused to bargain with the second respondent.

[7] The second respondent initially on 24 May 2018 tabled a number of demands relating to wages and conditions of employment of its members. A revised demand was tabled at the CCMA on 29 August 2018. But throughout the applicant refused to bargain with the second respondent.

[8] On 14 September 2018, the CCMA issued a ruling to the effect that the dispute concerned a refusal to bargain, and the parties then filed submissions for the purposes of the issuing of an advisory arbitration award. The advisory award followed on 8 October 2018, opening the way for the second respondent and its members to embark upon protected strike action to compel the applicant to bargain with it.

[9] A picketing rules dispute was referred to the CCMA. The parties met at the CCMA on 29 October 2018 to establish picketing rules. The various landlords of the applicant's stores also made submissions in this regard. The process took some time to complete, and final sitting was then convened for 7 November 2018.

[10] When the process reconvened on 7 November 2018, the second respondent refused to further participate in the process and left. The commissioner concerned then issued picketing rules on 7 November 2018, with final picketing rules following on 14 November 2018.

[11] Strike action ultimately commenced on 16 November 2018. From the outset, there were a number of material violations of the picketing rules, and unlawful conduct on the part of the striking employees. This conduct then formed the basis of an urgent application that same afternoon before Van Niekerk J, who

granted an order in terms of which the current respondents were ordered to comply with the picketing rules, and where interdicted and restrained from perpetrating acts of violence and intimidation, unlawful conduct, wielding weapons, blockading premises, and unduly interfering with the operations of the applicant.

[12] But it became apparent that the order by Van Niekerk J had no effect on the individual respondents. Despite the picketing rules of 14 November 2018, and the subsequent order of Van Niekerk J of 16 November 2018, the individual respondents remained steadfast in their conduct of violence, intimidation and unlawful behaviour. It was apparent that the first and second respondents either had no control over the individual respondents, or did not want to control them.

[13] The founding affidavit of the applicant sets out a plethora of conduct that can only be described as manifestly unacceptable and unlawful. I do not intend to repeat all the details thereof in this judgment and will suffice with a short summary. Over the period from 16 November 2018 and until this current application was brought, non-striking employees were actively intimidated, some non-striking employees were assaulted, the property of non-striking employees (such as homes and vehicles) were damaged, striking employees blockaded access to the Canal Walk, Cavendish Square, Zevenwacght, Sea Point, Ghandi Square, Park Station, and Boksburg North stores, forcing some of them to close for several hours, and even members of the public were assaulted.

[14] Further the conduct of the individual respondents in the Canal Walk shopping centre at the applicant"s store there, was such that all the surrounding retail outlets in the shopping centre had to close as well.

[15] At the Midrand and Delmas Distribution Centres, stones were thrown at non striking employees and passers-by, and passing and delivery vehicles, and property was damaged. Some non-striking employees were accosted, and seriously assaulted. Access to these Centres, as well as the Cape Town Distribution Centre, was blocked from time to time. There were even instances of fire arms being pointed at non-striking employees.

[16] In most of the instances referred to above, the intervention of SAPS was required to restore order, bring the striking employees under control, and protect persons and property.

[17] The applicant and its attorneys, as from 19 November 2018, took a number of steps to try and procure compliance with the picketing rules and Court order from the respondents. This included telephone calls, addressing of formal correspondence, the details of which were set out in the founding affidavit. Meetings were held with the second respondent"s officials, which was fruitless. None of these interventions resolved matters. The CCMA also sought to intervene in terms of section 150 of the LRA, but this equally could not resolve matters.

[18] The current application then followed.

Analysis

[19] It has become an almost common place occurrence that where there is a protected strike, violence and unlawful behaviour inevitably follows. It is almost as if striking employees believe this is how things should be done. One only has to spend a week in the urgent Court in this Court to appreciate the gravity of the problem.[3] A significant portion of the urgent roll is devoted to interdicting violence and unlawful behaviour during strikes. The situation perpetuates because it seems that there is very little consequence to transgressors, despite picketing rules and interdicts by this Court being issued.

[20] In my view, the only way to deal with this effectively is make consequences happen. Obviously, the most appropriate consequence had to be that where employees and trade unions conduct themselves in an unlawful manner, they should forfeit their rights under the LRA. Van Niekerk J flirted with this prospect in in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others*[4] where the learned Judge said:

[3] See the dictum in *National Union of Food Beverage Wine Spirits and Allied Workers and Others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers and Others* (2016) 37 ILJ 476 (LC) at para 37

[4] (2012) 33 ILJ 998 (LC) at para 13.

> „… But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status."

[21] But I struggle to think of any Judge brave enough to actually go down this road. The reason for this is that the limitation of the right to strike is specifically regulated by the LRA itself, in the form of substantive limitations in section 65, and procedural limitations in section 64. It must therefore follow that if it cannot be shown that the conduct or issue in dispute or any aspect relating to the strike falls foul of any of these provisions, then there simply exists no basis upon which to limit the right to strike. And unfortunately, unlawful conduct and violence and intimidation do not resort under any of these limitations.

[22] Closely associated with the right to strike is the right to picket. Hence the provisions of section 69 of the LRA. As held in *SA Airways v SA Transport and Allied Workers Union and Others*[5]:

> „… Therefore, the very purpose of s 69, as read with the code, is to regulate protest action and demonstration during protected strike action, and to ensure it is lawful and peaceful. However, and considering the provisions of s 69(7), the section is further intended to offer striking employees protection against discipline and undue interference (for example by interdicts) where they conduct picketing in terms of s 69, and this picketing would attract the same protection as a protected strike in terms of s 67. …"

[23] Considering section 69, it provides from the outset in subsection (1) that the picket must be „*for the purposes of peacefully demonstrating*". Unlawful conduct, violence and intimidation are incompatible with this principle. This principle also has important component of public policy, as recognized in *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union and Others*[6], where the Court said:

[5] (2013) 34 ILJ 2064 (LC) at para 54.
[6] (2016) 37 ILJ 246 (LC) at para 15.

> „… 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. …"

[24] The above being said, the logical question that follows is that if the primary objective of section 69(1) of peaceful protest is contravened, can it lead to a forfeiture or suspension of that right? In my view, certainly so. Guidance can be found in the judgment of *Garvas*[7] where the Court considered the limiting of the right of assembly under section 17 of the Constitution by way of the Gatherings Act.[8] In this regard, the Court held:

> „Nothing said thus far detracts from the requirement that the right in s 17 must be exercised peacefully. And it is important to emphasize that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection. …"

[25] I also wish to make reference to *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others*[9] where the Court held:

> „… Regrettably, the detailed incidents of violence and damage to property perpetrated by unidentified persons that are recorded in the papers are representative of a blight that has come to characterize the South African industrial relations landscape. This court is always open to those who seek the protection of the right to strike. But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose."

[26] It follows that it cannot be seen to constitute a violation of a fundamental right where employees are held accountable for failing to exercise their right to picket in a peaceful manner as required, by way of a suspension of forfeiture

[7] (*supra*) footnote 2.
[8] Act 205 of 1993.
[9] (2011) 32 ILJ 1722 (LC) at para 9.

of those rights. The right to protect, picket and assemble is directly linked to it being exercised peacefully. The one is a *quid pro quo* of the other. In short, if the exercise of this right is not peaceful, it should not be exercised at all.

[27] The only question that remains is whether the LRA as the directly applicable statute in the employment arena provides otherwise. In my view, and especially after the amendments to the LRA that came about in 2015,[10] it is in fact contemplated by the LRA that picketing that is not peaceful and which contravenes picketing rules, can result in the forfeiture or suspension of the right to picket. This is evident from the process that has been created to deal with these kind of contraventions. In this regard, section 69(8) now provides:

> „Any party to a *dispute* about any of the following issues … may refer the *dispute* in writing to the Commission-
> (a) an allegation that the effective use of the right to picket is being undermined;
> (b) an alleged material contravention of subsection (1) or (2);
> (c) an alleged material breach of an agreement concluded in terms of subsection (4); or
> (d) an alleged material breach of a rule established in terms of subsection (5)."

[28] Once such a dispute is declared, it must be adjudicated by this Court if conciliation fails.[11] In determining a dispute as contemplated by section 69(8), this Court is also given wide powers in terms section 69(12), which provides:

> „If a party has referred a *dispute* in terms of subsection (8) or (11), the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include-
> (a) an order directing any party, including a person contemplated in subsection (6) *(a)*, to comply with a picketing agreement or rule; or
> (b) an order varying the terms of a picketing agreement or rule."

[29] What is important to extract from Section 69(12) is that it allows for urgent interim relief pending conciliation and/or adjudication of the dispute, which relief must be „just and equitable". What is „just and equitable" is left up to this Court to decide. This being the case, I am comfortable in concluding that the

[10] The amendments were introduced by Act 6 of 2014, with effect from 1 January 2015.
[11] Sections 69(10) and (11)

concept of „just and equitable" could include relief in the form of the suspension or forfeiture of the right to picket. I would venture to suggest that this kind of relief is appropriate where the breaches of the picketing rules and violence, unlawful conduct and intimidation is persisted with despite attempts to secure compliance.

[30] The point I make above can be illustrated as follows. Where there is a breach of picketing rules, the employer can declare a dispute in terms of section 69(8) of the LRA and then approach this Court for urgent interim relief. In such instance, and once this Court grants an order, it is not only expected that employees must comply, but also these employees are legally compelled to comply. If the breaches persist, not only do the employees expose themselves to being held in contempt of Court, but in my view this Court can then also be approached by the employer to visit the employees with the consequence of the suspension or forfeiture of their right to picket, *in toto*. The reason why this is so is because this scenario demonstrates persistent conduct, and exhibits the kind of intention not to act peacefully, as contemplated by the *ratio* in *Curves*.

[31] Applying the above to the facts in this case, I am satisfied that the matter *in casu* is a prime example of the kind of situation where the complete suspension of the respondents' right to picket is called for and justified.

[32] The conduct of the respondents as summarized above is entirely unacceptable and without justification. It shows a clear contempt for the provisions of the LRA and orders of this Court. It is precisely the kind of conduct this Court is most critical of. It is conduct that is irreconcilable with the fundamental obligation, attached to the right to picket, of peaceful protect. In no universe can assaulting and intimidating fellow employees, blockading roads and premises, damaging property and wielding weapons be seen as peaceful protest.

[33] But what must surely cement the proposition that the respondents have no intention of complying with the picketing rules and their legal obligation of peaceful protest, is the fact that they were confronted by an order by Van Niekerk J, clear and unambiguous in its terms, which they chose to simply

disregard. The point next is that contempt proceedings is not the only basis upon which a Court can deal with such flagrant on-compliance of its orders. As said in *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[12]:

> „Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, *mandamus*, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. …"

In this instance, the appropriate manner in which to deal with the violation is to take away the right concerned, rather than to only seek sanction by way of contempt proceedings.

[34] Therefore, it is the kind of conduct that occurred in this instance that must lead to the forfeiture of the right to conduct a picket / protest as part of strike action. It is deliberate, calculated, and persistent, despite all the mechanisms in place to ensure that the obligation of peaceful protest is maintained. In short, if the respondents cannot behave, they cannot play. They are no longer allowed to picket.

[35] As touched on above, the applicant in this case has sought urgent interim relief. As such, the relief granted in terms of this judgment can only apply until the pending dispute in terms of section 69(8) of the LRA is either resolved at conciliation under the auspices of the CCMA in terms of section 69(10), or by way of final adjudication in this Court under section 69(11). In any event, and as said in *SA Airways*,[13] a particular picketing agreement or picketing rules only applies to a particular strike, and once that strike is resolved, the relevant rules / agreement falls away. The issue is therefore susceptible to be revisited on each and every individual occasion, and does not serve as some or other binding precedent covering all future strikes. This strikes an appropriate balance as well, where it comes to instances where rights are limited.

[12] 2018 (1) SA 1 (CC) at para 54.
[13] (*supra*) at para 43.

[36] It is for all the reasons above that I made the order that I did, as set out in paragraph 3 of this judgment, *supra*.

Sean Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate A Redding SC

Instructed by: Cliffe Dekker Hofmeyr Inc Attorneys

For the Respondents: No appearance