THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

CASE NO: J1000/19

In the matter between:

JOHANNESBURG ROADS AGENCY (SOC) LIMITED

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS

UNION (SAMWU) **First**

Respondent

THE PEOPLE LISTED IN ANNEXURE ''X''

HERETO **Second**

Respondent

Heard: 13 August 2019

Judgment delivered: 15 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is the return date of a rule *nisi* issued on 12 April 2019. In terms of the interim relief granted on that date, the first and further applicants were interdicted from participating in an unprotected strike. The respondents oppose the confirmation of the rule *nisi* on the basis that there was no strike.

[2] A strike is defined in s 213 of the LRA as a '*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*…'.

[3] It is common cause that the parties were in dispute about an issue referred to as 'historical pay progression'. The applicant contends that the issue was concluded after a meeting with the first respondent (the union) on 1 April 2019 and in particular, that there was no agreement for a later 'feedback' meeting. The applicant avers that on 5 April 2019, the second to further respondents (the individual respondents) stopped work and embarked on a 'wild cat' strike by marching to and gathering at the applicant's building situated in Pixley Ka-Seme Street, Johannesburg. Further, when the individual respondents arrived at the building, chaos ensued consequent on unlawful acts committed by the individual respondents. These include the breaking down of doors, breaking windows, burning tyres, burning plastic road cones, smashing pot plants, barricading public

roads, overturning furniture, threatening to burn down the applicant's building, placing garbage on the steps of the entrance to the applicant's building, and blocking access to and egress from the building. The applicant annexed photographs to the founding affidavit in support of these averments. The respondents do not dispute the authenticity of the photographs.

[4] The respondents' version is that it is the applicant which should be blamed for the events that took place on 5 April 2019. The individual respondents do not dispute that they left their workplaces and gathered at the applicant's building by 9am. By 12.15pm, when no-one had responded to their gathering, they say that the situation 'started getting out of control'. The police and shop stewards intervened and the situation was later brought under control. The deponent to the answering affidavit, the union's local chairperson, states that he received a call from the applicant's chairperson proposing that the respondents disperse and return to work. This proposal was rejected by the respondents, who 'vowed to remain at the main entrance' until they had been addressed. At about 14.45, the applicant's managing director addressed the individual respondents, who then returned to their work stations.

[5] In so far as 12 April 2019 is concerned, the respondents aver that the applicant was advised on 11 April 2019 that no strike action was planned for that day.

[6] The respondents complain that the interim order was granted against the individual respondents without any evidence linking them personally to the actions complained of in the founding affidavit. Further, the respondents submit that confirming the rule *nisi* will 'have the undesirable effect of subduing collective bargaining in the workplace and unduly limiting the respondents' Constitutional rights', and further that that they returned to their workplaces and that 'the situation appears to be normal'.

[7] In so far as the respondents contend that there was no strike because they were 'waiting for feedback' from the applicant, there is no merit to this submission. The undisputed facts are that the individual respondents left their places of work on the morning of 5 April 2019, and that by 9am, none of them were at their

workplaces. It is also not disputed that they failed to return to work until later the same afternoon, sometime after 3pm. Further, it is not disputed that the purpose of the applicant's leaving their places of work (and thus refusing to work) was a concerted act that had as its purpose the demand that the dispute concerning historical pay progression be addressed. I fail to appreciate how it can be said that there was no strike in these circumstances. There was a concerted refusal to work (at least between 9am and 3pm on 5 April 2019) for the purpose of remedying a grievance or resolving a dispute. The respondents do not dispute that none of the procedural requirements for the exercise of the right to strike were fulfilled.

[8] In so far as the respondents seek to attribute blame to the applicant, what they in essence contend is that the strike was provoked. This is not a consideration in the determination of the existence or otherwise of a strike. It is a matter that is relevant to the determination of an appropriate sanction for participation in an unprotected strike (see item 6 (1) (c) of the Code of Good Practice: Dismissal). In short: the individual respondent's refusal to work on 5 April 2019 constituted an unprotected strike.

[9] I fail to appreciate how it can be said that the granting of the rule nisi or its confirmation will have the effect of 'subduing' collective bargaining in the applicant's workplace. The respondents clearly have an impoverished conception of the institution of collective bargaining, one that extends to a right to resort to unlawful action in the form of damage to property in pursuit of a demand made of an employer. As the recently published Code of Good Practice Collective Bargaining, Industrial Action and Picketing (the Code) notes, good faith bargaining requires that the parties should engage each other in a constructive manner and not act unreasonably. Negotiations should be conducted in a rational and peaceful manner in which disruptive and abusive behaviour is avoided. The individual respondents acted in breach of the Code – they resorted to what amounts to disruptive behaviour and wanton damage to property only because the applicant had not acceded to their demands. In so far as the applicants seek

to rely on the right to strike to justify their conduct, the Code recalls that the constitutional right to strike is not unlimited. It is subject to substantive and procedural limitations, all of which are designed to maintain the integrity of the process of collective bargaining and to protect the constitutional rights of others. The rights to bargain collectively and to strike do not extend to the trashing an employer's premises and public spaces.

[10] In so far as the respondents rely on the applicant's failure to identify and cite particular individuals that it has identified as having committed acts of misconduct, it is not practicable in matters such as the present to demand that only individuals positively identified be cited as respondents. The context in which the application was brought is one where the unions' members were aggrieved at the applicant's response to their demands and where the union and its members resolved to march *en masse* to the applicant's office. Given that the relief sought and granted prohibited the individual respondents from committing acts of serious misconduct (most of which constitute criminal offences), it was not unreasonable for the applicant to cite the individual respondents in the manner it did. That is not to say that all of them *actually* committed acts of misconduct – they were simply prohibited from doing so. Should there be any disciplinary consequences following the events of 5 April 2019, of course, a different test applies and it would ordinarily be necessary for the applicant to identify those employees who perpetrated acts of misconduct. But for the purposes of an urgent interim order in which employees are prohibited from committing acts that are in any event unlawful, it is not necessary for an applicant to establish that each and every respondent in fact committed the misconduct complained of. To the extent that the respondent's counsel submitted that the acts committed were not sanctioned by the union, there is nothing on record to establish that the union either distanced itself from those acts, or that it took any steps to prevent them being committed.

[11] In short, the rule *nisi* stands to be confirmed.

[12] Finally, in so far as costs are concerned, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. In the present instance, the respondents participated in an unprotected strike. They did so in aggravating circumstances, in the form of the acts of wanton destruction that took place at the applicant's premises. The costs of the repair of the damage that occurred is ultimately for the costs of the ratepayers of Johannesburg. I fail to appreciate why they should be expected to underwrite the costs of the present proceedings. As I have indicated, the union took no steps to prevent the trashing that occurred, and is unable to point to any disciplinary action taken by it against any member for doing so. The union is accountable for the actions of its members and it seems to me that the appropriate order is one that requires the union to pay the costs, including the costs of the postponement on 6 June 2019 when the matter could not proceed on account of the late filing of the answering affidavit. The applicant objected to the late filing of the affidavit and while that is condoned, the court ought properly to express its disapproval of the filing of the affidavit a day prior to the return date.

I make the following order:

1. The rule *nisi* issued on 12 April 2019 is confirmed.
2. The first respondent is to pay the costs of the proceedings, such costs to include the costs of 6 June 2019, when the matter was postponed on account of the late filing of the answering affidavit.

André van Niekerk

Judge