CASE NO. NHK 12/3/178

IN THE INDUSTRIAL COURT

In the matter between:

F A W U + KAREL HENDRICKS — Applicant(s)

and

CAPE SLAUGHTERING FLAYING & DRESSING CO (PTY) LTD — Respondent(s)

CONSTITUTION OF THE COURT

Prof A Copeling — Additional Member

ON BEHALF OF:

Applicants:

Adv J Krige — Instructed by Ngcuka & Matana

Respondent:

Adv M Scholtz — Instructed by Mr P Faber of Sonnenberg Hoffmann & Galombik CAPE TOWN

DATE AND PLACE OF PROCEEDINGS:

28 AUGUST 1990 — CAPE TOWN

JUDGMENT

The present matter comes before me as an application for interim relief in terms of section 17(11)(a) of the Industrial Relations Act, no 28 of 1956 (hereinafter "the Act"), until an order is made by this court in terms of section 43(4) of the Act. The relief sought by the applicants is set out in paragraph (f) of their notice of application and includes, inter alia:

"(i) An order reinstating Applicants 2 - 286 in Respondent's employ upon terms and conditions no less favourable than those which governed the employment relationship prior to termination thereof.

(ii) An order whereby Respondent is directed to pay to the Applicants their normal wages from date of dismissal to date of reinstatement."

At the outset of these proceedings, Mr Scholtz, who appeared on behalf of respondent, sought to argue as a point in limine the question whether the instant application is possessed of the necessary urgency as to entitle applicants to the relief which they seek. The court, however, ruled that it would be inappropriate to deal with the merits of the instant application piece-meal, and argument then proceeded on the issue of whether the application met with all the requirements which must be satisfied in order for an application brought in terms of section 17(11)(a) of the Act to be

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successful. In this regard it is now settled law that an application for relief in terms of section 17(11)(a) must satisfy the requirements necessary for the granting of interim interdicts by the Superior Courts, which requirements may be summarized as follows:

(a) that the right which is the subject matter of the main action and which an applicant seeks to protect by means of interim relief is clear, or if not clear, is prima facie established though open to some doubt;

(b) that if the right is only prima facie established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy (see Jane Chetty v City Council of Durban, unreported, case no NHN 12/3/81, referred to with approval in National Union of Mine Workers v Grootvlei (Proprietary Mines) Limited, unreported, case no NH 12/3/212; PPWAWU & D Madida and Others v Tongaat Paper Company (Pty) Ltd, unreported, case no NHN 12/3/156; and Cameron et al, The New Labour

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Relations Act 188).

From this it must not be thought that the requirement of urgency does not remain a prime consideration in determining the success of a section 17(11)(a) application. Indeed, it is a prerequisite for the success of such an application. As much is clear from Cameron et al, op cit, at 187 where the learned authors state:

"Although S17(11)(a) may seem to create a wonderland of litigation the new remedy expresses its own limitation. The principal inhibiting factor here is the criterion of urgency. Since the statutory mandate expressly demands urgency it is plain that the court will not grant relief under S17(11)(a) unless the requirement is satisfied."

Now it is, perhaps, somewhat ironic that, having denied respondent the opportunity of arguing the absence of urgency in the instant application as a point in limine, and having listened at length to the arguments of counsel in regard to the presence, alternatively, the absence, of the other requirements necessary for a section 17(11)(a) application, I, at the end of the day, am constrained to find that the instant application is lacking in the urgency required of a section 17(11)(a) application. In seeking to establish such urgency, applicants have sought to rely on the following grounds set out in paragraph (g) of their notice of

application:

"(g) REASONS WHY THE MATTER IS URGENT

Applicants cannot wait for redress at a Section 43 hearing in that they are informed that the matter could take at least 2 or 3 months before a decision could be obtained and will suffer harm until then in that they are unemployed and will have no income until then. Even UIF benefits have a 6 (six) weeks delay. But most importantly Respondent has refused to give an undertaking not to employ new labourers and Applicants' jobs will be threatened in the long run should the Applicants 2 - 286 be replaced."

I am not persuaded that there is merit in the reasons so advanced. In so far as they relate to the allegation that applicants may have to wait two or three months for redress in terms of a section 43 hearing, it is obvious that they are based, largely, on speculation. In any event, as I indicated in open court to Mr Krige, counsel for applicants, I am informed by the registrar that the roll of this court is capable of accommodating a section 43 application in early October. In regard to the allegation that, pending the outcome of a section 43 application, applicants will be without employment and, therefore, income, I would point out that this in itself does not render the application urgent. Apposite here

are the following observations by de Kock M in PPWAWU & D Madida and others v Tongaat Paper Company (Pty) Ltd supra at 7:

"Section 17(11)(a) authorises the Court to grant urgent interim relief. The applicant must establish urgency, ie satisfy the Court that redress at a hearing in due course in terms of section 43 or section 46(9) of the Act would not be sufficient. The fact that the individual applicants have lost their employment and thus their remuneration is not, by itself, sufficient to establish urgency. Reinstatement at some subsequent date would, unless there are special circumstances, be sufficient redress."

These remarks have relevance, also, to the allegation that the instant application is engendered with urgency because of respondent's refusal to give an underdertaking not to employ a new work-force in the place of the dismissed applicants and the threat which the employment of a new work-force would, in the long term, pose to the jobs of the dismissed applicants. In my view, respondent's employment of a new work-force need not necessarily pose a threat to the jobs of the dismissed applicants. (It should be recorded that, as of the date of the instant application, respondent had, in fact, already filled 80% of applicants' posts with new employees - see the opposing affidavit of Johannes Claassen Olivier at para 23.2.1). Their subsequent

reinstatement by way of a section 43 application is always possible and should provide sufficient redress. Finally, inasmuch as resort to a section 17(11)(a) application necessarily entails a departure from the compulsory conciliation procedures provided for in section 43, it seems to me that the degree of urgency required of such an application must be substantial. As may be gathered from what I have said thus far, I do not consider this to be the case in the instant application.

In the light of the above observations and findings I make the following order:

ORDER

1. The application brought by the applicants for urgent interim relief under section 17(11)(a) of the Labour Relations Act, no 28 of 1956, is hereby dismissed.

2. There is no order as to costs.

DATED at CAPE TOWN this 21st day of AUGUST 1990.

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ADDITIONAL MEMBER: INDUSTRIAL COURT CAPE TOWN