IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J41/98

In the matter between :

DLAMINI VELA & OTHERS **Applicants**

and

SAKATO SAVO & OTHERS **Respondent**

__

CONSTITUTION OF THE COURT

THE HONOURABLE JUDGE D MLAMBO

For the Applicants:

MR MALULEKE

of NEWU

For the Respondent:

MR HIGGINS

of Sampson Okes Higgins Incorporated

PLACE AND DATE OF PROCEEDINGS : Arbour Square,

Braamfontein

Date of hearing 20 January 1998

Date of order **20**

January 1998 **Date of full reasons** **25**

February 1998

1. Today is the return date of a rule nisi obtained by the applicants on the 12th January 1998. That rule nisi was to the effect that:

"*1. A rule nisi is hereby issued calling upon the Respondents to show cause on* ***16 January 1998 at 14h00*** *or soon thereafter as the matter may be heard why an order in the following terms should not be granted:*

1.1 The Respondent must comply with the provisions of section 189 of the Labour Relations Act 66 of 1995.

1.2 The Respondents may not close down their business operations and terminate the services of the Applicants without complying with paragraph 1 of this order first.

1.3 The Respondents are to pay costs.

2.Paragraphs 1.1 and 1.2 shall operate as an interim interdict.

3. The Respondents are required to file their answering affidavits by not later than 12h00 on Wednesday 14 January 1998. The Applicant is to file its reply by not later than 10h00 on Friday 16 January 1997.

4. Costs are reserved until the final determination of this matter"

2. I discharged the rule and did not grant costs. The applicants have requested full reasons and these follow hereunder.

3. On the 21st November 1997 a final interdict was issued against the third respondent not to retrench certain individual applicants, in number about 25, before it had reasonably complied with the provisions of Section 189 of the Act. The Applicants in this matter are a number of individuals who have in their midst the individuals who were also applicants in the 21 November 1997 interdict.

4. Subsequent to the final interdict on 21st November 1997 correspondence was exchanged between the parties. The correspondence reveals that the Respondent requested to meet with the Applicants to consult on the proposed retrenchment but Applicants were not prepared to meet until they had been furnished with certain specific information they had requested. On 5th January 1998 Third Respondent locked out its employees alleging that their representative, the National Entitled Workers Union, was unwilling to consult on the issue of

retrenchments. On 9 January 1998 Applicants obtained an order interdicting the lockout on the basis that it was unlawful. On the same day a meeting was held between Mr Maluleka representing Applicants and Mr James F. Coertzee and Mr Lucas Coertzee representing Third Respondent in particular. The upshot of the meeting is that it was agreed between the parties to have another meeting at which would be discussed the Respondent's financial position and retrenchment.

5. The agreed meeting took place on 10 January 98. It appears that at this meeting several issues were discussed. Of importance is that Applicants' representatives were informed that on 9 January 98 a decision to close Third Respondent was taken.
It appears that some financial information was also supplied to the Applicants' Representatives. It further appears that alternatives to the closure of Third Respondent as well as the retrenchment of employees were discussed. No agreement could be reached however on any issue including the closure of the Third Respondent and retrenchment in general.
It appears that the 25 Applicants in the 21st November 1997 interdict also featured in the discussion. The Respondent's stance was to the effect that having

supplied financial information these applicants were to be retrenched on 12th January 1998.

6. There is a dispute of fact in the papers about exactly what was discussed on the 9th and 10 January 1998. The facts set out above are largely gleaned from the Respondents papers in accordance with the principles laid down in **Plascon Evans Paints v Van Riebeek Paints 1984 (3) SA 623 (A).**

7. Because of the lack of agreement Applicants' then instituted urgent proceedings in this court to interdict the closure of Third Respondent and the retrenchment of all employees. After hearing the Applicants' Representatives the Court granted the rule already referred to above.

8. In these proceedings the applicant requests the court to confirm the rule i.e to interdict the respondents from closing their business until agreement has been reached relating to a lock-out notice and until the resolution of a Section 16 dispute that was referred to the Commission on the 14th November 1997, and further until the consultation process, as agreed

by both parties allegedly on 9 January 1998 has been exhausted in accordance with Section 189 of the Act. The Applicants further seek an order compelling the respondent to continue with production and interdicting the respondents from terminating the contracts of employment of the individual applicants.

9. At the outset of the proceedings, Mr Higgins, who appeared for the respondents – I presume he appeared for all the respondents – argued certain preliminary points.

These are:

1. That the matter was res judicatae.

2. That there was a misjoinder as far as fourth respondent was concerned.

3. That the court lacked jurisdiction in terms of Section 158 :

3.1 to force the parties to reach agreement on retrenchment ;

3.2 to prevent the respondents from closing their

operation.

10. After the Rule nisi was granted a tender was made by

the respondents to the effect that employees other than the 25 who were the individual applicants in the matter that was finalised in November 1997 would not be retrenched until there has been compliance with Section 189. The effect of the tender in a nutshell is that other than the 25 no other employees' employment would be terminated for retrenchment reasons until Section 189 had been complied with. This tender was accepted, and as clarified by Mr Maluleke, it was accepted only in relation to the undertaking not to terminate employment contracts. It was not accepted, nor did it deal with, the closure of the business and the continuation of production. That being the case and that being common cause it would mean that the 25 individual applicants who were applicants in the November 1997 application are still very much a part of the present proceedings, and that the other Applicants are only a part of the present proceedings regarding the threat of closure and I suppose the threat of not continuing with production.

11. The basis of the present application is to preserve the applicants jobs. The tender that was made and accepted helped to preserve the employment of the other individual applicants other than the 25. The Third

Respondent contends that the 25 employees who were applicants in the November 97 have already been retrenched. The applicants dispute this and seek relief similar to the 21 November 1997 interdict in so far as their employment contracts are at stake. The applicants allege that the respondents have not complied with the court order issued on the 21st November 1997 regarding the 25 applicants. If there was indeed non-compliance with the order issued in November 1997, this court has been given no detail regarding attempts by the applicants to cure such non-compliance.
Mr Maluleke,who appears for the applicants, argues that the present application is completely different to the November 1997 matter as it deals with different relief, different facts and has different parties. I do not agree.

12. The tender by Respondent not to terminate employment contracts for operational reasons until Section 189 has been complied with has removed any threat of dismissal. The retrenchment notice regarding the 25 Applicants was not withdrawn and the tender does not apply to them. In this regard the res judicatae argument must succeed as they already have in their favour a final interdict for

similar relief. Because they have already been retrenched it is not open to them in urgent proceedings to seek to interdict the closure of the company as well as an order compelling the Respondents to continue with production. In so far as it may be argued that the November 1997 order was not complied with, contempt proceedings can cure that . The relief they seek in these proceedings has nothing to do with non compliance or contempt of a court order but relief similar to that granted in November 1997.

See Fedility Guards Holdings (PTY) LTD v PTWU & OTHERS *Case no: J843/97 dated 3 October 1997.*

13. Mr Maluleka persisted with an argument that the employees whose contracts will not be terminated in terms of the tender were entitled to an order interdicting the closure of the company and forcing the Respondents to continue with production.

14. The rationale in the granting of an interdict against closure of a business would be the continuation of employment contracts. Such interdict if granted would be for the period until there is compliance with the provisions of section 189. It casu no contracts of employment will be terminated until there is compliance

with section 189 i.e in terms of the tender .In the circumstances I cannot find any basis why the Respondent should still be interdicted from closing their business and be forced to continue with production as they have undertaken not to terminate contracts of employment pending compliance with Section 189. It is correct that in an appropriate case a company can be interdicted from closing down its business operation. It is not implicit that part of that order would be to force the company to continue with production. The rationale behind this is that contracts of employment are preserved by interdicting the closure and it does not follow that production must continue as long as contracts of employment have been preserved. **See Fawu v Simba (PTY) LTD (1997) 4 BLLR 408 (LC)**

15. Looking at the matter holistically, the court gets the distinct impression that this a classic case where the applicants are trying to conduct a retrenchment trial by way of urgent proceedings. This court, mindful of its duties under the Act, to ensure that the objects of the Act are achieved cannot allow an abuse of court process in that way.

I am therefore of the view that no case has been made

out by the applicants for the granting of the relief they seek and in view of the above I do not deem it necessary to consider in depth the misjoinder argument, save to assume without deciding, that there is no link between the third and fourth respondents. In this regard the court is guided by a demarcation award to that effect.

In view of the aforegoing therefore, the court discharged the rule nisi.

16. Relating to the issue of costs, this court is willing to consider that the applicants could have been misguided that they could come to court on urgent proceedings. The court does not find any maliciousness, and, furthermore, in view of the present state of affairs between the parties, the court does not deem it just to order costs against any party. There shall therefore be no order as to costs.

_____

HONOURABLE JUDGE D MLAMBO