IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

SE NO

Reportable
Case No: J1404/06
JR1934/06
Date Delivered: 2006-09-08
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In the matter between

SHOPRITE CHECKERS (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION 1ST Respondent

COMMISSIONER W EVERETT N.O. 2ND Respondent

SACCAWU 3rd Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 8 SEPTEMBER 2006

T: MR PRETORIUS SC
(Instructed by Perrot Van Niekerk & Woodhouse Inc)

ENTS: MR P SCHUMANN
(Instructed by Brett Purdon Attorneys)

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

JUDGMENT 8 SEPTEMBER 2006

PILLAY D, J

Background

[1] Shoprite Checkers (Pty) Ltd (Shoprite), the applicant, obtained an urgent interdict on 11 August 2006, amending the picketing rules determined by W Everett, the second respondent and a commissioner of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), and preventing strikers from intimidating, assaulting and committing certain other unlawful acts. That application is accompanied by an application to review the picketing rules.

Jurisdiction

[2] Several jurisdictional challenges were raised. As they revolve around the interpretation, application and nature of the process prescribed by section 69 of the Labour Relations Act No 66 of 1995 ("the LRA"), that should be the starting point of the analysis of the jurisdictional objections. Section 69(4) and (5) provide:

"(4) If requested to do so by the registered *trade union* or the employer, the Commission must attempt to secure an agreement between the parties to the *dispute* on rules that should apply to any picket in relation to that *strike* or *lock-out*.

(5) If there is no agreement, the Commission must establish picketing

rules, and in doing so must take account of -

(a) the particular circumstances of the *workplace* or other premises where it is intended that the right to picket is to be exercised; and

(b) any relevant *code of good practice*."

[3] The processes involved are not described as conciliation and arbitration in the LRA. Whatever process or techniques are applied, it commences with consensus-seeking. That could involve conciliation, mediation, facilitation, a relationship by objectives exercise or any other means of getting an agreement. The commissioner can choose the most appropriate route to get an agreement.

[4] Failing an agreement, the rules must be established. Establishing picketing rules is also a flexible process of decision-making. It anticipates a rational decision being made based on relevant and reliable information. Usually the information is fact-bound and the facts are common cause. If they are disputed it may be necessary to test them through evidence, the relative formality of which will depend on the nature of the challenge and the materiality of the information.

[5] The first stage of agreement-seeking flows seamlessly into the second stage

of establishing the rules. Information gleaned in the first stage feeds into the second stage. This is how the process unfolds in practice, as the commissioner acknowledges. That being so, it follows that the deliberations during the agreement-seeking phase is not automatically confidential or without prejudice. The parties may agree on some issues, disagree on others and narrow down aspects of the dispute which they may carry forth into the second stage for the commissioner's decision. The parties should be aware of what information disclosed during the agreement-seeking phase will be used to reach a decision and to have an opportunity to withdraw or comment on the information which becomes relevant, no longer for the purpose of reaching agreement, but for the making of a decision.

[6] The establishment of picketing rules is a decision made by the commissioner as an act performed in terms of the LRA. It has elements that qualify it as an adjudicative decision.

[7] Contrary to the commissioner's view (paragraph 17.3, page 56), the decision involves weighing and evaluating submissions of the respective parties. As the decision is fact-bound, a useful safeguard is for the commissioner to test the proposed rules with the parties before they are established to ensure that they are clear, precise and workable.

[8] The process is not arbitration (see Brassey *Employment and Labour Law*,

volume 3, R51/2000 at A4; 63 for a contrary view) because, as the commissioner correctly observes (paragraph 69, page 54), there is no reference to arbitration in the LRA. The commissioner is required to "establish picketing rules" and not issue an award with brief reasons. Arbitration lacks the flexibility that is required for determining picketing rules. The CCMA may be called upon by the same parties to establish picketing rules for them each time there is industrial action. Hence the reference to "that strike or lock-out" in section 69(4).

[9] The CCMA may also be approached to re-establish, revise, supplement or modify picketing rules several times in respect of the same industrial action. Firstly, as in this case, the workplace consists of several sites located in rural and urban areas, within shopping areas, malls and centres and as stand-alone stores. The stores share many common characteristics, such as the size and lay-out; but local conditions may differ, thereby warranting a variation in the picketing rules to meet local conditions. In such a situation the CCMA may establish initially general picketing rules that apply across the board to all stores. If they are inappropriate for particular stores, the CCMA can be asked to revise, supplement, modify or otherwise amend the general rules.

[10] Secondly, circumstances may change materially after the picketing rules have

been established. In this case, picketing rules had been established in 2003. Neither side considers them appropriate in 2006.

[11] If the picketing rules were an arbitration award, the commissioner would be *functus officio* or would only be able to vary the award in the limited circumstances of rule 32 of the Rules of the CCMA, which do not meet the needs of section 69 of the LRA.

[12] A party must be able to demonstrate changed circumstances to persuade the CCMA to amend its picketing rules. Not every change in circumstance will result in an amendment of the picketing rules. Only changes that are material will succeed in securing a variation. Nor is the application for variation an appropriate procedure if the very legality of the agreement-seeking or decision-making process is challenged.

[13] A challenge to the legality of the process or the decision must be brought by way of review under section 158(1)(g) of the LRA. The Promotion of Administrative Justice Act, Act No 3 of 2000 (PAJA) has no application to such a review, not least because such an application would have to be brought in the Labour Court as a specialist court, usually as a matter of urgency and possibly accompanied by an interdict, as has happened in this

case. Although PAJA allows for the variation of the time limits and the granting of interdicts, the balance that a Labour Court strikes between the socio-economic rights of the parties, the rights to freedom of expression and property and the obligation to comply with international labour standards do not apply to all administrative acts.

[14] As an adjudicative administrative act, a commissioner should give reasons for the picketing rules. The rules could be self-explanatory. If they are not, the preamble to the rules or an accompanying memorandum can provide the reasons.

[15] The rulings on the jurisdictional objections are made against this jurisprudential background to establishing picketing rules. The South African Catering Commercial and Allied Workers Union, SACCAWU, the third respondent submitted firstly, that the review was not permissible because the commissioner's decision was "*sui generis*". Whether the decision is *sui generis* or not, it is an act performed in terms of the LRA under the auspices of the CCMA. As such, it is reviewable under section 158(1)(g).

[16] As the Court has the power to review the legality of establishing the picketing rules, SACCAWU's second objection, namely that the immunity against civil

proceedings conferred by section 69(7), read with section 67, bars the review, must also fail.

[17] The applicant challenges the legality of the picketing rules on grounds discussed below. Such an application is premised on the commissioner having issued a defective result. An application for variation, as suggested by SACCAWU, is appropriate where the circumstances affecting the parties have changed. It is not appropriate to get the CCMA to review its own previous defective decisions. The third ground of objection must fail.

[18] As the dispute is not about the breach of the picketing rules, a referral to the CCMA in terms of section 69(8) is also not appropriate. The fourth ground of objection also fails.

Background to the review

[19] The crux of this review turns around the commissioner's decision to permit in-store picketing. Section 69(2)(b) of the LRA allows picketing inside an employer's premises if the employer so permits. An employer may not unreasonably withhold permission (section 69(3)). If an employer's refusal is reasonable, that would be the end of the matter. The commissioner's discretion is not invoked. If an employer refuses permission unreasonably,

the commissioner can overrule the employer (item 5(d) of the Code of Good Practice Regarding Picketing) ("the Code").

[20] Even if the Code does not permit this, it is implied that a commissioner is empowered to substitute her decision if she finds that an employer's refusal is unreasonable. No purpose would be served in making a finding that an employer's refusal is unreasonable if the commissioner has no power to correct the unreasonable conduct.

[21] In this case the commissioner did overrule Shoprite's refusal of permission.

International Law Position

[22] *The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th revised edition) provides:

"583. The action of pickets organised in accordance with the law should not be subject to interference by the public authorities.

584. The prohibition of strike pickets is justified only if the strikes ceases to be peaceful.

585. The Committee has considered legitimate a legal provision that prohibited pickets from disturbing public order and threatening workers who continued work.

586. Taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries.

587. The requirement that strike pickets can only be set up near an enterprise does not infringe the principles of freedom of association."

[23] In a similar vein, the Freedom of Association and Collective Bargaining Report of the ILO states at paragraph 174:

"The Committee considers in this respect that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful."

[24] In 1988 the ILO had occasion to consider a complaint against the Government of Canada (British Columbia) presented by the Canadian Labour Congress (CLC)). (Report No 256, case No 143) The complainant alleged that an amendment to the Canadian Labour Code severely restricted the place or site at which a union may lawfully picket and that in certain circumstances lawful picketing could be prohibited entirely. The response of the Canadian Government was that it was not intended to restrict the right of striking or locked-out workers to express their opinions through picketing. The purpose of the amendment was to eliminate the unnecessary impact and disruption of picketing activity on third parties that do not have a direct involvement in the primary dispute. The Government added that the Canadian Charter of Rights and Freedoms provides fundamental protection to individuals on grounds such as the freedom of expression and that trade unions and their members could, if they felt that their freedoms were infringed, have legal avenues to remedy the situation. The Government contended therefore that the limited restrictions on picketing introduced by the amending

Bill were warranted, given its beneficial impact on neutral third parties. The ILO committee ruled that restrictions on the places or sites at which a trade union may lawfully picket and the requirement that strike pickets cannot be set up near an enterprise where workers are lawfully on strike did not infringe the principles of freedom of association in so far as these strikes have been legally declared in accordance with the principles of the ILO.

[25] The following extracts from the LRA and the Code set out the purpose of pickets, what form they may take, where they may be held and how picketers should conduct themselves.

"Section 69 Picketing

(1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating-

(a) in support of any protected strike; or

(b) in opposition to any lock-out.

(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held-

(a) in any place to which the public has access but outside the premises of an employer; or

(b) with the permission of the employer, inside the employer's premises.

[Sub-s. (2) amended by s. 20 of Act 42 of 1996.]

(3) The permission referred to in subsection (2) (b) may not be unreasonably withheld."

Extracts from the Code:

1… (7) A picket with purposes other than to demonstrate in support of a protected strike or a lockout is not protected by the Act. The lawfulness of that picket or demonstration will depend on compliance with the ordinary laws.

….

3 Purpose of the picket

(1) The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lock-out. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.

….

6…

(5) Although the picket may be held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons.

(6) The picketers must conduct themselves in a peaceful and lawful manner and must be unarmed. They may-

(a) carry placards;

(b) chant slogans; and

(c) sing and dance.

(7) Picketers may not-

(a) physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer's premises;

(b) commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be violent."

[26] This exposition shows that our national law complies with international labour law. Both jurisdictions must determine the limits of peaceful picketing on a case by case basis. In the complaint against the Canadian Government the ILO Committee had to adjudicate whether picketing near, not on or at the employers premises violated the principles of freedom of association. The Committee concluded that it did not.

[27] A difference, however, is that International law is in general terms as it has to secure support from a wider jurisdiction. National law is more specific. Thus the LRA regulates picketing on the premises. Carrying placards, chanting slogans, singing and dancing fall within the definition of peaceful and lawful conduct in the South African context. (*Picard Hotels Ltd v Food and Allied Workers Union and others (1999) 20 ILJ 1915 LC*) Another consideration is that the conflict-co-operation dynamic varies from one jurisdiction to the next. Thus in mature and enduring industrial relations settings with a high degree of mutual inter-dependence and trust, picketing on the employer's premises is

permitted. International law does not prescribe these nuances.

[28] In the pre-LRA decision of *Larsens Division of BTR Dunlop Ltd v National Union of Metal Workers of SA and others (1992) 13 ILJ 1406 (T)* the employer obtained an interim interdict preventing the union from approaching within 1000 meters of the employers premises. On the return day, the union proposed that 30 striking employees should be allowed within 1000m radius of the employer's business. Du Plessis J declared that each one of the striking employees was in principle entitled to be within the 1000 meters radius. Each employee had the right to do exactly as she pleased provided that what was done was lawful.

[29] Whether action is unlawful must be decided by reference to whether it is objectively reasonable according to the legal convictions of society. The court found that the striking employees had threatened and intimidated the workers by their mere presence. Congregating outside the employer's premises was therefore found to be unreasonable and unlawful. However, to restrict the union more than was necessary would have resulted in lawful conduct being prohibited. The balance struck by the court was to allow the employees to picket within 1000 metres of the perimeter of the employer's premises.

[30] Peaceful picketing is not limited to non-violent conduct only. Placards that invoke violence, racial hatred or are defamatory can be neither peaceful nor lawful. Chanting and singing would cease to be peaceful if they are so loud as to become a nuisance to third parties or impair their ability to go about their business normally. If the picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coersive and disruptive of the business of third parties, the picket ceases to be reasonable

and lawful.

[31] The matrix of permissible conduct that evolves ultimately as the picketing rules is a particular permutation that balances logistics, the nature of the business, the industrial relations history of the enterprise and the union with the impact of the picket so that the rules are determined not too narrowly or too broadly to exacerbate industrial conflict or obstruct the substantive resolution of the dispute. Thus rules that put the pickets "out of sight and out of mind" of the employer, a phrase coined in this application, could, on the one hand, prevent intimidation of non- striking workers and customers. On the other hand, it can be counter-productive to workplace peace in the longer term if the picketers became increasingly frustrated as they would be if their picket has little impact. The employer's incentive to resolve the dispute substantively could also diminish if the striking employees are out of sight and out of mind.

The *onus* of proof

[32] Mr *Pretorius* submitted that the *onus* of proving the reasonableness of the refusal of permission for in-store picketing rests with SACCAWU, in the same way that proving unreasonableness of a lessor to allow sub-letting rests on the tenant. (*Bryer and Others v Teabosa CC trading as Simon Chuter Properties and Another* 1993 (1) SA 128 (C) at 131.)

[33] The general rule is that there is no picketing on the premises except with the permission of the employer. An employer has the right to its property. A union has no right to picket on the employer's premises. It has to obtain permission from the employer to be able to picket on the premises. A union bears the *onus* of persuading an employer to grant permission and, failing

that, the commissioner to determine the issue in its favour.

[34] The Court accordingly agrees with the submission that SACCAWU bears the *onus* of proving that Shoprite's refusal to grant in-store picketing by 20 workers was unreasonable.

[35] The only motivation presented for SACCAWU was that Pick 'n Pay allowed 20 workers to picket in store. Against that, Shoprite presented information of the kind contemplated in item 5 of the Code for determining the reasonableness of an employer's refusal to allow in-store picketing. Item 5 states:

"Pickets on employer's premises:

1. A picket may take place on the employer's premises with the permission of the employer. The permission may not be unreasonably withheld. In order to determine whether the decision of the employer to withhold the permission is reasonable, the factors that should be taken into account include -

(a) the nature of the workplace eg. a shop, a factory, a mine, etc;

(b) the particular situation of the workplace eg. distance from place to which public has access, living accommodation situated on employer premises, etc;

(c) the number of employees taking part in the picket inside the employer's premises;

(d) the areas designated for the picket;

(e) time and duration of the picket;

(f) the proposed movement of persons participating in the picket;

(g) the proposals by the *trade union* to exercise control over the picket;

(h) the conduct of the picketers."

[36] Against these guidelines Shoprite resisted in-store picketing because the nature of its business was such that it operated hundreds of stores; that it would be difficult to control pickets, that it would be hugely disruptive of the employer's business, that it would afford SACCAWU an unfair collective bargaining advantage; that the location of its stores are in remote and outlying areas where SACCAWU would not be able to control the conduct of in-store picketers. From its previous experience with strike action and picketing its stores were trashed and customers intimidated and threatened. Strike rules had been breached and interdicts had to be obtained. In-store picketing would be perceived as a licence to disrupt the employer's businesses, which SACCAWU would not be able to control. The rights of landlords and tenants in shopping malls where many of the Shoprite stores were situated were likely to be adversely affected. The physical design of stores did not lend itself to accommodating in-store picketers. The potential for conflict between striking and non-striking employees would be untenable. So it was submitted to the commissioner.

[37] It is not evident from the picketing rules or the affidavits that SACCAWU addressed any of these grounds for refusing permission to picket in-store. It is common cause that the commissioner did not during the determination

phase put to the parties issues material to her decision that arose during the conciliation phase. It is not possible therefore to gauge what submissions made during consensus-seeking were taken into account and what was ignored when she decided to allow in-store picketing. By allowing in-store picketing, the commissioner reasoned as follows in her affidavit filed in response to the review application. (page 55-56):

"13. In the retail sector, and particularly in chain stores, it is well known that many stores are located in shopping malls or centres. The employer informed me that during previous strikes, employees had been allowed to picket outside the store, but in the mall. On more than one occasion employees “stormed” the stores and caused damage and disruption inside the stores. I was shown photographs of the damage allegedly caused. In addition, so the employer informed me, adjacent businesses in the malls were severely disrupted by the picketers. For these reasons I concluded that picketing inside the mall had clearly not been orderly in the past (in respect of the employer) and it had also unfairly disrupted adjacent businesses.

14. The dispute over wages and terms and conditions of employment is between the union and Applicant. Disruption to adjacent stores who are not parties to the dispute, should be minimised as far is possible. Picketing outside the employer's premises but inside the mall has a potential to disrupt adjacent businesses inside the mall.

15. On the other hand, if picketing is confined to outside the mall or centre, members of the public, once inside the shopping centre would have no awareness of the picketing outside. The purpose of picketing is to “peacefully encourage non-striking employees and members of the public to oppose a lock-out or support strikers involved in a protected strike. It may be to dissuade replacement labour from working. It may be to persuade members of the public or other employers and their

employees not to do business with the employer". (Code of Good Practice on Picketing issued by NEDLAC.) I humbly submit that the purpose of picketing would be largely defeated if picketers were restricted to picketing outside the entrances to shopping malls. In the circumstances it was unreasonable for the employer to refuse permission for a limited number of picketers to picket inside the store.

16. I took account of the employer's submissions regarding the lay-out of Shoprite Checkers stores, and how they differed from Pick and Pay, where picketing was also allowed inside the stores during 2005. Accordingly, I allowed no more than six picketers to picket inside each stores, as opposed to 20 and 40 picketers inside normal and hyper-stores, respectively (in the Pick 'n Pay Picketing Rules). This is a sufficiently small number of picketers for both the union and the employer to exercise control."

[38] It is common cause that the rationality test as enunciated in *Carephone (Pty) Ltd v Marcus N.O. & Others* (1998) 19 ILJ 1425 (LAC) and *Shoprite Checkers (Pty) Ltd v Ramdaw N.O. & Others* (2001) 22 ILJ 1603 (LAC) applies to the commissioner's decisions and that an objective test applies to determining the reasonableness of the employer's refusal. (*Larsens Division of BTR Dunlop* above)

Grounds of Review

[39] In this case SACCAWU's proposal was that Shoprite should adopt the Pick 'n Pay picketing rules which allowed 20 workers to picket in-store. Shoprite was opposed to in-store picketing altogether. The commissioner determined that six workers should picket in-store.

[40] The first ground of review is that the commissioner failed to establish the jurisdictional prerequisite that Shoprite's refusal of permission was

unreasonable before determining herself what would be reasonable in-store picketing. Mr *Pretorius SC*, who appeared for Shoprite, submitted that as the commissioner rejected SACCAWU's proposal by allowing only six workers for in-store picketing, she must have accepted that Shoprite's refusal was not unreasonable. Once she came to that conclusion, that was the end of the matter. In-store picketing could not take place as Shoprite's refusal of permission was not unreasonable.

[41] Mr *Schumann* for SACCAWU, conceded that the commissioner did not expressly declare Shoprite's refusal to be unreasonable but submitted that this must have been her conclusion when she did allow six picketers to picket in-store. He added that she was not required to express the reasons for her finding. Having found that Shoprite's total ban on in-store picketing was unreasonable, the commissioner had to devise an appropriate remedy, which she did by establishing that six workers could picket in-store. To require the commissioner to determine the reasonableness of Shoprite's refusal as a jurisdictional prerequisite was to impose an unduly technical standard on commissioners. In this case the commissioner was correct in devising a remedy, so it was submitted for SACCAWU.

[42] That the jurisdictional prerequisite must be established is implicit from section

69(2)(b) and (3). Moreover, item 5 of the Code gives guidance by enumerating factors that should be taken into account when determining whether an employer's refusal is reasonable. It is therefore a substantive enquiry which must be undertaken before the commissioner invokes her own discretion.

> [43] In this case the commissioner did not declare Shoprite's refusal of SACCAWU's proposal of 20 picketers to be unreasonable when she established picketing rules. In her affidavit which she submitted after being alerted to this ground of review, she stated that it was unreasonable for Shoprite to refuse permission for a limited number of picketers (paragraph 55, page 55).

[44] SACCAWU failed to discharge the *onus* of proving that it was unreasonable to refuse permission for 20 in-store picketers. This is implicit from the commissioner's decision to allow only six picketers. The *onus* rested on SACCAWU to make another request or proposal for, say, a smaller number of picketers or periodic picketing or to motivate further for in-store picketing. There is no evidence that this was done. In the absence of a revised request for permission to picket in store, there was nothing over which the commissioner could exercise a discretion. She could not, in the absence of a counter-proposal from SACCAWU, exercise her own discretion to allow in-store picketing.

[45] As stated above, her discretion to allow picketing on Shoprite's premises is invoked only if its refusal is unreasonable.

[46] The reason for requiring a request or proposals and counter-proposals from the parties is that they know the logistics of Shoprite's business and what rules would work in practice. SACCAWU would know whether it would be able to control pickets and formulate its request on that basis. The to and fro of proposals and counter-proposals would give the commissioner a sense of the boundaries of what would be workable, so that ultimately if she were to find Shoprite's refusal to be unreasonable, she could substitute her own decision which would be more appropriate than if it had not been tested through the process.

[47] The failure or omission to determine the reasonableness of Shoprite's refusal as a jurisdictional prerequisite is fatal to the commissioner's decision, which falls to be set aside on that ground alone.

[48] The second ground of review about the procedure followed at the hearing before the commissioner arises from the first ground of review.

[49] As indicated above, it is common cause that the commissioner omitted to alert

the parties as to what factors she intended to take into account to establish the rules. She did not invite Shoprite, whose legal representative was allowed to join the decision-making phase, to make representations or lead evidence for the purpose of establishing the rules. The commissioner also did not test her opinion about what would be reasonable with the parties before establishing the rules regarding in-store picketing. It is trite law that a party against whom an adverse decision is to be made should be given a hearing.

[50] The decision to grant in-store picketing was clearly against the interests of Shoprite and they should have been heard on the issue before the rules were established.

[51] The third ground of review is an inevitable consequence of the first two grounds of review. Shoprite contends that the picketing rules are unjustifiable. The commissioner's reason for allowing in-store picketing was that "the purpose of picketing would be largely defeated if picketers were restricted to picketing outside the entrances to shopping malls". That reasoning does not apply to stand-alone stores where picketers would be visible, standing in front of the store entrances. More than 70% of Shoprite's stores are stand-alone stores.

[52] The fourth ground of review was that the commissioner failed to apply her mind to limiting the number of out-of-store picketers and to prevent them from picketing directly in front of the entrance. It is not clear to the Court precisely what information was before the commissioner on this issue. The commissioner operated under stressful circumstances. The entire process lasted several hours. The atmosphere was adversarial as no agreement could be reached. The very next day the rules were established. In all the circumstances, it would be unfair to the commissioner to make any finding in this regard, even if the Court were able to decide it on the limited information available. Besides, it is not necessary to do so as the first three grounds of review succeed.

The Interdict

[53] In addition to the jurisdictional objections discussed *in limine* SACCAWU objected to the complaint of intimidation and violence being tagged to the review application. This complaint is, in the opinion of the Court, more about form than opposition to the substance of the allegations. SACCAWU disputes the allegations of unlawful conduct. The Court does not have the capacity to allow the parties to ventilate each allegation of unlawfulness, nor is it necessary for it to do so.

[54] Whether fact-finding into the veracity of the allegations will be conducive to reaching settlement on the substantive reasons for the strike is better assessed in the context of the strike negotiations. The allegations of unlawful conduct may be relevant to the deliberations concerning the fresh picketing rules, in which case the commissioner charged with that responsibility can sift the information relevant for that purpose.

[55] On 4 September 2006 the Court granted an order in the following terms:

"(1) The matter is referred back to the CCMA for picketing rules to be determined by a commissioner other than W Everett.

(2) The rule is extended pending the final order of this Court.
(3) The CCMA may commence forthwith with the determination of new picketing rules.
(4) Costs reserved.
(5) The reasons for the decision and further orders will follow in due course."

[56] These then are the reasons for granting that order and for the orders to follow hereafter. In making the further orders, the Court, makes no pronouncement on the reasonableness of Shoprite's refusal to allow in-store picketing nor does it seek to regulate out-of-store picketing. This is the function of the commissioner, performed under the auspices of the CCMA. These are matters that should be fully ventilated before the commissioner hearing the matter afresh in terms of section 69.

[57] Furthermore, the Court makes no findings of fact regarding the allegations of unlawful conduct. The rule in this regard is confirmed on the basis that the interdict prevents conduct that is unlawful under the common law. In any event, SACCAWU's members are bound by the order to do no more than what they are obliged to under the common law.

[58] The order that I now grant is the following:

(1) The rule in paragraph 1.1 of the order granted on 11 August 2006 is extended until it is substituted by fresh picketing rules agreed between Shoprite and SACCAWU or established under the auspices of the CCMA in terms of section 69 of the LRA.

(2) The rule granted in terms of paragraphs 1.2 to 1.5, inclusive, is confirmed.

(3) Costs are reserved.

_____

Judge D Pillay
Date: 15 September 2006