IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: D 402/08

In the matter between

MASSDISCOUNTERS (PTY) LIMITED **APPLICANT**

And

SOUTH AFRICAN COMERCIAL CATERING AND ALLIED WORKERS UNION **FIRST RESPONDENT**

ONE THOUSAND FIVE HUNDRED AND NINETY SEVEN OTHERS **FURTHER RESPONDENTS**

JUDGMENT 19 June 2008

CELE AJ Today is the return date. In fact it is the anticipated return date of a *rule nisi* granted on 4 June 2008 in this matter by my brother, MOLAHLEHI J. The anticipated date was 7 August 2008. The terms of the order granted appear in paragraphs 2.1 right through to 5.2 of his order. It is contained in about three pages. This is pointed out with a view to indicating that reading it now into the record might take time, but I do need to highlight certain portions thereof, and in particular paragraph 2.1 up to 2.4. These read,

> "2.1 Declaring that the conduct of the Third and Further Respondents constitute an unprotected strike.
>
> 2.2. Interdicting and restraining the Third and Further Respondents from continuing with and participating in any conduct constituting a strike as

defined in section 213 of the Labour Relations Act, 66 of 1995, as amended ("the Act"), unless and until the provisions of Section 64 of the Act have been complied with;

2.3 Directing the Third and Further Respondents to comply with their Individual Contracts of Employment.

2.4 Interdicting and restraining the Second and Further Respondents from being upon the premises at which they ordinarily render their services to Applicant, as set out in annexures "A", "B", "C" and "D" annexed hereto, save to act normally in compliance with their individual contracts of employment, or for any other legitimate reasons."

The order proceeds as I've indicated, and it's fairly long.

The respondents filed their opposing papers on 17 June 2008 together with a notice in terms of Rule 8 sub rule (1) of the rules for the proper conduct of this Court, which is a notice to anticipate the *rule nisi*. They simultaneously filed a notice of counter application, seeking an order in the following terms.

"1. that the conduct of the Applicant in denying the First Respondent's members, who refused to undergo biometric imprinting or biometric scanning, access to their place of work constitutes

an unlawful lockout;

2. that the Applicant is hereby interdicted and restrained from denying the First Respondent's members access to their workplace in the event that they refuse to undergo further biometric imprinting and/or scanning by an access control device;

3. that the threat by the Applicant that the First Respondent's members would be denied access to their workplace and denied their pay as a consequence, is declared to be unlawful and coercive;

4. that the Applicant is ordered to delete from its computer systems the biometric imprints obtained from any of the First Respondent's members, on written request by any such member and to serve and file an affidavit from a suitably qualified expert that same has been done within 24 hours of such written request.

5. that the Applicant pays the costs of this counter application on attorney and client scale."

In respect of the prayer in paragraph 4 there is a suggestion that it should be amended to include after, "On written request by any such member", "and in circumstances where the imprint was obtained after 20 May 2008". That would sort of then limit the ambit of the prayer sought.

The counter application has been opposed by the applicant.

I therefore need firstly to deal with the initial or the first application, which application was filed by the applicant. As the matter is now opposed it must follow that the order sought is one in the nature of a final interdict, in which event the applicant must therefore show a clear right or a *prima facie* right, must show an injury actually committed or reasonably apprehended, it must show the absence of any suitable or alternative remedy, and in this approach see the decisions in Setlogelo v Setlogelo 1914 AD 221 and particularly *FAWU v Premier Foods Industries Limited (Epic Foods Division)* (1997) 15 ILJ 1082 (LC).

In order to sort of understand the salient issues it has become necessary to briefly look at the history of this matter. In doing so I will attempt to look at the version as it is presented by the parties to the extent that they are agreeable. Where they disagree I will make an attempt to point out such differences.

The applicant has always regulated the access to workplace of its employees through various mechanisms, including a mechanism which has become known as a time keeper. According to the applicant it experienced a number of difficulties and insufficient resources to attend to the software or hardware of the system and the suppliers could not support the system, resulting in the applicant being compelled to look for a new access system.

This declaration is disputed by the respondents. According to the respondents the first respondent and its members have never been made aware of any specific problems relating to their existing system, and where the first respondent was operating, first respondent being a union, a

representative union, utilisation of a clock card system such as was used previously by the applicant to regulate access to the workplace of the employees, appeared to have been a system that worked well. Shoprite Checkers is used as an excellent example. It is suggested that Shoprite Checkers successfully regulates access to the workplace by many thousands of employees using a similar system to that which the applicant now declares or claims is not up to the job.

I am, however, also conscious of a submission under oath by a Mr Colin Fleming, who declares under oath that he is an information technology executive employed by the applicant, who has testified to a large extent about the system which has been adopted by the applicant. I think it is appropriate to look briefly at what he says.

He says that he was part of a committee that investigated the replacement of an outdated and unsupported time and attendance system, coupled with the implementation of a new access control system at the applicant's stores. Together with himself, as one of four IT representatives, there were representatives from the human resources, payroll, store operations, and store development departments, as well as suppliers of the replacement system, who all sat on the executive steering committee and considered the implementation of a new time and attendance and access control system at the applicant's stores.

From this piece of his evidence it would appear that when a substantive decision was taken, the applicant acted with its members, with its employees, but did not sit together with any members that may have been representing the first respondent or the union itself. Well, whatever reason

underlying this, one would have expected that it would have facilitated the issues between the employer and employees if such a decision had been taken with the union being invited to sit down and take part in such an important deliberation.

However, Mr Fleming goes on to say that he dealt extensively with the supplier company, Business Connection, and with the literature and correspondence which was presented to them by the supplier, both of the software and hardware which is being utilised. He conceded that he is not an expert in the field of biometrics, but he professes to have learned the system which has become the subject of the first and further respondents' dispute. He says Leanne Elizabeth van der Byl is also no expert on biometrics. This is in reference to the deponent to the answering affidavit when Leanne commented on this system.

According to him the system that had been utilised by the applicant had become outdated and defunct. The whole system and the attendance system was based on the typical transponder card technology, and was linked to software that ran on DOS operating system. The system was called the time keeper system, and was implemented approximately 20 years ago. He believes that the applicant could no longer obtain hardware to run the system for new stores, or to maintain a stock of spares to support existing stores.

According to him what was an inadequate time and attendance system needed to be replaced by a system operating on supported hardware and software that would provide store management with better controls for budgeting, scheduling and managing exceptions, with a lower administrative

overhead. In addition the replacement is seen to be a prerequisite for an automated labour scheduling system that forms part of a broader and longer time labour management strategy. It is his view that it was simply too risky to continue operating with the time keeper system as support of the hardware and software and system knowledge were no longer readily available, causing problems with normal business functioning in store.

The applicant therefore chose to replace the time keeper with a new access control and time and attendance system that was cutting-edge, and that through capital investment would last the applicant a number of years, as had the time keeper system.

He says that the system requires access control software to interpret the scanned finger template from the biometric reader in order to provide *bona fide* persons with access to and from the store, and to prevent unauthorised access to the store. This requires that everyone the applicant wishes to have access to the stores be loaded onto the system prior to the system being able to record staff clocking, including head office staff according to him, and suppliers.

A staff member who has been loaded onto the system, who presents a finger template for scanning by the biometric reader will gain access to the store once their biometric template is matched to the one on record by the biometric software, which in turn releases the turnstile locking mechanism or paraplegic gate in the case of a paraplegic member of staff. If their biometric template cannot be matched to any of those on record in the system the individual will not be granted access to the store.

He then gives out how the process works, and he gives details in his

affidavit. He deals with the transponder and says the transponder card system is incompatible with the timekeeper system, which may result in the duplication of the time and attendance, or errors of time and attendance. The timekeeper system was designed for one time recording device or access control device. The data recorded by the timekeeper device will eventually be converted into weekly wages of the individual employees, however exceptions must be resolved by the store secretary firstly, and once that data has been captured it is sent to the head office for the payroll run. Exceptions are abnormalities from the norm, for example, unscheduled overtime.

He indicates that there was a pilot project that took place at Game Gateway and at Pinetown DC, thereafter from the beginning of May 2008 the pilot was rolled out to the following stores, Brooklyn, Gauteng, Menlyn Park, Pretoria, Colonnade, Gauteng, Game, Pinetown stores. Then he says that on 2 June the final rollout took place, and he indicates the various stores where this rollout was effected.

As I have noted the respondents are noting that the applicant indeed admits in paragraph 35 of the founding affidavit that a final decision to implement the timekeeper system had been made in November 2007. On its own version the decision was taken prior to any consultation with the first respondent.

The deponent to the answering affidavit gives out her own interpretation of how the system works, but what also is important is that this is said by the deponent to the answering affidavit, that the applicant's permanent team induction booklet, which is usually touted by the applicant

as containing terms and conditions of employment, states as follows under chapter 4, Policies and procedures, clause 8, to read among others, “On arrival at facilities you should clock your card or swipe your card.” According to the respondents, therefore, the applicant’s policies and procedures require only that employees make appropriate use of the staff card provided to them by the applicant. The concern raised by the respondent is that, whatever the precise terms and conditions of the employees’ employment might be, there is nothing contained therein which requires the employees to submit to biometric imprinting, which personal information taken is then stored by the applicant under questionable circumstances.

It is conceded by the respondents that in November 2007 there was a meeting between the applicant and the first respondent. The following history is given by the respondents. In and around September 2007 the applicant implemented a biometric access control system at the Gateway stores, and an ordinary update card access system at the Pavilion store. The matter came to the attention of the deponent in October 2007, when the first respondent’s Gateway members lodged a formal grievance against the applicant in respect of the implementation of the biometric access system. The grievance was brought to the attention of the first respondent’s official, one Mr Bongani Myeza, the Gateway shop steward. The deponent discussed that matter with Links Rajgopal, the applicant’s IR manager, and enquired as to why the biometric system was necessary. Mr Rajgopal’s response was that the purpose of the biometric system was to safeguard employees as they were instances of members of the public entering stores wearing fake staff uniforms, misappropriating stock.

According to the deponent that explanation did not make much sense, but then on 15 November there was a meeting that had been arranged for, for the purpose of discussing issues around provident fund arrangements in respect of permanent and part-time employees. Ms van Der Byl also attended that meeting and, as no satisfactory response according to her had been received to the grievance lodged by the Gateway employees, it was again raised as an issue at the subsequent meeting, the meeting of 15 November 2007.

According to her the applicant's representatives made it clear that they were intent on implementing the new system, as appears to be conceded in Mr Naidoo's affidavit, which is the founding affidavit. She then refers to a document marked LV1, which she annexes, and it summarises the objections to the system in the following manner: that there had been no consultation with the first respondent. The established company procedure required the use of a card system. It was unacceptable for the company to unilaterally decide to use the employees' fingerprints for their own purposes, and a breach of the workers' constitutional rights. The company had required the employees to submit to fingerprints without their consent.

Further aspects of the system were of concern to the employees, namely the failure of the system to pay overtime, inappropriate deductions for late access, no weekly reports, as had previously been the case. The system was incorrectly deducting an hour from the pay of flexitime workers. The workers, according to her, felt that they were tendering their services in circumstances more appropriate to a prison. The grievance recommends that the company suspends the system until proper consultation with the first

respondent had taken place. That is the position taken by the respondents in this respect.

There obviously are more issues that the parties deal with in their papers, which I have looked at and paid particular attention to.

What is then clear in this application is that it was brought about because the applicant introduced a new clocking system involving a biometric reader in circumstances in which some of its employees were not happy with the system. They still called on the applicant to engage them in further deliberations about the new system, and this crying out by the respondents is very clear in their papers. It is also clear in the annexures that have been given, or that have been filed by the respondents. I make reference to those annexures that are marked LV1 right through up to LV6. I have taken note of the data protection, biometric in the workplace, an attached document there.

Having looked at all these considerations I have to come back to the question whether or not the applicant has shown a clear right. When the founding affidavit was prepared obviously the applicant sought a *rule nisi*, and today, as I have indicated, this matter is opposed. The applicant seeks a final interdict.

From the papers that are before me it appears clear that the new system has not been included in a formal manner into the policy and procedure document of the applicant. The policy and procedure document still reads that, “On arrival at facilities every employee shall produce a clock card or a swipe card.”

I now have to investigate that it can be said successfully by the

applicant that it had a clear right to get the interdict that it seeks when it introduced a change under the circumstances where there was less room for negotiations with the union at least representing the employees or those that are not members of the union, such of them as can be involved in such deliberations.

It is indeed the prerogative of an employer to run its affairs, to run it's business which it is better equipped to run, but in so doing, to the extent that what it does is likely to have an effect on its employees, the Labour Relations Act is there to guide an employer on how to handle issues. The dispute that appears to be between the parties appears to me to be the one of mutual interest between the parties. It is a dispute which, once contemplated by either of the parties, ought to have been referred for conciliation by a proper body, a bargaining council if there be one, if not by the CCMA. This regrettably was not done. The employer or the applicant in my view ought to have taken that route as soon as it was realised that there was a dispute resulting from the change of the working environment.

It is clear from the documents before me that the clocking system is part and parcel of the procedures prescribed by the applicant. That portion of the reference to the policy and procedure clause (a), which has been disclosed by the respondent, has not been disputed by the applicant. Clearly therefore in my view this was a case that was crying out for proper negotiations between the two parties, the employer and the employees, so that at the end the employer could confidently then amend its policy and procedure, which would obviously be part and parcel of the terms and conditions of employment of its employees. Now it went all by itself

unilaterally to change a vital term of employment, which is governed under the policy and procedure, and thus exacerbated the dispute that arose between the parties.

Having been the catalyst to this dispute the applicant rushed to this Court and was able to get a *rule nisi*. In my view the applicant was not entitled to it. In my view as the papers stand the applicant did not have a clear right for which it would be entitled to the relief that it now seeks today. The injury that it cries out will actually be committed or is being committed, which means a loss of income at the moment, in my view was self-created again. This could have been obviated by prudent means.

My remarks must not be understood to be saying that the change ought not to have been introduced. As I have intimated that is the prerogative of the employer. The employer knows best what is suitable for it, but how it went about doing it was an issue that ought to have been open for deliberation by the parties.

As has been shown in the papers and in the addresses that have been given to me the new system has been implemented without much difficulty in some of the areas. It might well be that it is how those of the employer who were charged with such implementation took charge of the situation. They have been more convincing to the employees, thus facilitating the change.

The absence of any suitable alternative remedy, as I have intimated, once a party has cause a crisis itself it would be ludicrous to expect that it should be entitled to a relief on the guise that there is no other suitable relief. In my view the applicant is not entitled to the order that it seeks.

I have looked at the counter application as well. I do not think it is necessary of me to grant the respondents the order that they seek. As I have intimated, the two parties are still together, they are living together, they are working together, it must be left possible for them to find a way forward and resolve the issues that confront them. That the fingerprints have been obtained by coercion through the use of this court, and that such information as has been acquired should be wiped out, I do not really think that it is necessary to go that route, because if it is left for the parties to sit down and discuss the issue might resolve itself faster, it might even be unnecessary to wipe out the information that has been acquired, as I shall assume that even the process of acquiring these prints might be involving some expenses, and so in my view it is very much unnecessary to go that route, particularly because, as I have attempted to get it, it has not been stated clearly that the acquisition of such prints was a violation of any right protected by the constitution. Whilst respondent's papers seem to suggest that, but the address made by Mr Schumann here sort of changed that scenario, and I think rightfully so.

I have looked at the Constitution Act itself. As it stands it obviously names those rights that pertain to privacy, but it is not exclusive, it does not shut the door to other rights. But any party who wants to rely on a right that is protected by the constitution must clearly articulate that right, and in my view, whilst it might well be that in future it may be held that usage of the biometric reader might be seen to be violating such rights, but one would have to make out such a case on the papers. Therefore again the counter application is not successful.

This brings me finally to the question of costs. The applicant obviously has in my judgment and in my ruling lost out, and it is only fair that I should dismiss its application with costs. In respect of the counter application make no costs order. So the application is dismissed with costs. The *rule nisi* is therefore discharged.

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Cele AJ
Date: 27 August 2008

Appearances:

For the Applicant: Alex Rocher – Farrell and Associates Attorneys

For the Respondent: Adv Paul Schumann instructed by Brett Purdon Attorneys

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

HELD AT DURBAN

CASE NO : D402/08

DATE : 19 JUNE 2008

MASS DISCOUNTERS (PTY) LIMITED

versus

SACCAWU

BEFORE THE HONOURABLE MR JUSTICE CELE

ON BEHALF OF APPLICANT : MR A ROCHER

ON BEHALF OF RESPONDENT : MR SCHUMANN

INTERPRETER : NOT REQUIRED

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REPORT ON RECORDING

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MASS DISCOUNTERS (PTY) LIMITED v SACCAWU

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