THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. J684/09

In the matter between:

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION **Applicant**

and

ELLERINE HOLDINGS (PTY) LTD t/a ELLERINE FURNITURES (PTY) LTD AND ELLERINE TRADING (PTY) LTD **Respondent**

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks wide-ranging relief, *inter alia* to interdict the respondents from implementing unilateral changes to conditions of employment and restructuring its workforce pending the final determination of a dispute referred to the CCMA on 6 October 2008. The applicant also seeks the restoration of the status quo (including the reversal of any retrenchments put into effect) that applied to affected employees before the change to their conditions of employment, pending final determination of the same dispute. In this regard, the applicant appears to rely on section 64(4) of the Labour Relations Act. The applicant further seeks an order placing a moratorium on any intended store closures and workplace restructuring pending the final determination of the dispute referred to the CCMA on 6 October 2008.

[2] The requirements for interim relief are well-established. They are:

(a) a prima facie right, even if open to some doubt;
(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;
(c) the balance of convenience must favour the granting of an interim interdict; and
(d) the absence of any other satisfactory remedy.

(See *Webster v Mitchell* 1948 (1) SA 1186 (W)).

When an application is brought on an urgent basis (as applications for interim relief inevitably are), the applicant must also satisfy the requirements of this court in relation to urgency, and justify a departure from the provisions of Rule 7 of the Rules of this court.

[3] The applicant avers that during 2008, following the acquisition of the respondent by African Bank, the respondent initiated store closures on a large scale. The details of these closures are chronicled in the applicant's founding affidavit, and I do not intend to repeat them here. In September 2008, the applicant declared a dispute after the respondent was not prepared to agree to a moratorium on what the applicant viewed as the unilateral restructuring of the workplace, store closures, retrenchments, the downward variation of working conditions and the change in status of permanent employees to what the applicant terms "freelancers". The dispute was referred to the CCMA on 6 October 2008.

[4] In the form 7.11 referred to the CCMA, the applicant invoked the provisions of s 64(4) of the Act. That section provides that when a party refers a dispute about a unilateral change to terms and conditions of employment to the CCMA for conciliation, it may require the employer party not to implement the change or if it has already done so, to restore the terms and conditions that applied before the change. This "status quo" provision endures "for the period referred to in subsection (1)(a)", being the issuing of a certificate that the dispute remains

unresolved, or the lapse of a period of 30 days, or any agreed extension of that period, following receipt of the referral by the CCMA.

[5] A conciliation meeting was convened on 3 November 2008. For reasons not germane to this application, the conciliation process was postponed for various reasons. On 10 November 2008, the parties agreed to extend the 30-day period referred to in s 64 (1) (a) by a further 30 days. On 10 March 2009, a certificate of outcome was issued by the CCMA. The certificate records that the dispute referred to conciliation remains unresolved (the parties are *ad idem* that the date of the certificate, which records the dispute as having been referred on 19 February 2009, is incorrect and should read 6 October 2008). The certificate reflects the dispute as one concerning mutual interests and relating to restructuring. After the referral of the dispute to the CCMA on 6 October 2008, the applicant avers that the restructuring effected by the respondent has continued unabated. The founding affidavit records various instances of notices of changes to job descriptions, commission structures and store closures given during February, March and April 2009. The respondent denies that it has acted unlawfully in effecting any closures if its stores or any changes to the conditions of employment of its employees and avers that at all times, it has complied with the requirements of the Act.

[6] After the certificate was issued, the applicant took steps to exercise the right to strike. The respondent applied to this court to interdict the strike, and on 27 March 2009, this Court (per Basson J) issued a rule nisi, with a return date of 19 June 2009, interdicting any industrial action in support of the demands referred to the CCMA. The basis for the order, it would appear, was a concession made by the applicant's representative that the matter giving rise to the strike concerned the procedure adopted by the respondent in effecting retrenchments, a matter that is justiciable by this court and in respect of which there is accordingly no right to strike. But that is a matter to be determined by

this court on the return day of the rule nisi, and it is of no consequence in these proceedings.

[7] Reverting now to the relief sought by the applicant, the conduct about which the applicant complains has been the subject of discussion between the parties since late last year, and a referral of a dispute to the CCMA in October 2008. On 5 January 2009, the respondent issued a formal notice in terms of s 189A notifying the applicant that it was contemplating "changing the structure and process in terms of the service delivery process within the 'old' Relyant structure" and inviting the applicant to consult on the matter. The union replied on 7 January 2009, rejected the invitation, advised the respondent that it should wait for the CCMA set down to discuss the matter further, and invited the respondent to withdraw the notice within 48 hours failing which the applicant would approach this court "for the immediate relief" (sic). That was three months ago. Since then, as I noted above, further notices of closure have been issued by the respondent but, on the papers before me, there is no evidence of any one or more events or occurrences that render this matter urgent and that justifies the setting down of this application on less than 24 hours notice, as it was, with a full set of papers being made available only hours before the hearing. There is no harm or prejudice to the applicant that is immediately pending and that cannot be dealt with in terms of those provisions of the Act which provide remedies more specifically directed against unfair employer conduct in the context of restructuring and retrenchment.

[8] The absence of urgency notwithstanding, I wish to make a few observations in relation to the prima facie right on which the applicants rely in bringing this application. Section 64(4) is a temporary remedy. It may be invoked when a party refers a dispute to the CCMA in circumstances where an employer party has or intends unilaterally to change terms and conditions of employment. The employer must restore the status quo or agree not to implement the changed terms, as the case may be. The penalty for a failure to comply with the

requirements of s 64(4) is that the time limits otherwise applicable to the acquisition of the right to strike fall away – a union may immediately commence strike action. In these circumstances, it is doubtful whether this court is empowered to grant interdicts enforcing the restoration or maintenance of the status quo – the section contains its own remedy. But the remedy is limited – s 64(4) applies only for so long as the conciliation process continues; once the period for conciliation lapses, or once a certificate of outcome is issued, the protection offered by the section falls away. The purpose of the section is clear – once it is invoked, equality in the bargaining position of the parties is maintained for the duration of the conciliation process. In the present instance, section 64(4) ceased to have any effect once the agreed-to extension to the 30 day period lapsed during December 2008. To the extent that the present application relies on a right derived from s 64(4), it is misconceived. To the extent that the applicant's complaints relate to events that occurred after the date of the referral of the dispute to the CCMA on 6 October 2008, these disputes have not been referred to the CCMA, nor has the applicant elected to invoke the remedies established by s 188A(13) to challenge the procedural fairness of any of the closures announced by the respondent. These remedies are far reaching, and contemplate intervention by this court, on an urgent basis if necessary. The existence of these alternative remedies is another reason why this application should fail.

[9] A submission by Mr. Boboyi, the applicant's national legal unit coordinator, prompts me to make a final observation. With the union's unsuccessful attempt to defend the respondent's application for an interim interdict in relation to the applicant's strike, no doubt in his mind, Mr Boboyi inferred that the court should be mindful of the possible response by the applicant's members should the applicant be unsuccessful in these proceedings. The implication of the submission, as I understood it, is that an adverse finding by this court may cause the applicant's members to lose faith in the law generally (and in this

court in particular) and to seek to take matters into their own hands. If my understanding is correct, this is a regrettable line of argument. I have already noted the array of remedies available to unions and employees when employers seek to restructure their business in a way that stands to prejudice the work security of employees. These are an integral element of a broader purpose underlying the Act, which is to encourage the settlement of labour disputes through conciliation and other means. The applicant has elected throughout this matter to adopt a legalistic approach. Of course, this is its right. But should misconceived litigation result in strategic setbacks, that is not a matter for which blame can be attributed to the LRA or this court.

[10] In relation to costs, section 162 of the Act confers a broad discretion on the court to make an order for costs according to the requirements of law and fairness. Ordinarily, costs should follow the result, particularly in a case such as this where an application is ill-conceived. In *National Union of Mineworkers v East Rand Gold and Uranium* 1992 (1) SA 700 (A), the court listed as one of the factors to be taken into account the collective bargaining relationship between the parties, and the prejudice to prospects of conciliation that an order for costs might bring about. In the present matter, the respondent states that it remains willing to engage with the applicant on the issues that are the subject of this application. I would not want to compromise the prospects of any conciliation between the parties, remote as they may seem having regard to the papers before me, by making an order for costs against the applicant.

I accordingly make the following order:

1. The application is not urgent and is struck from the roll.
2. There is no order as costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 9 April 2009
Reasons furnished on: 14 April 2009

Appearances:

For the applicant: Mr Boboyi (union official)
For the respondents: Ms K Savage, Bowman Gilfillan Inc