IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 685/20

In the matter between:

DE HEUS (PTY) LTD **Applicant**

and

SOUTH AFRICAN COMMERCIAL AND CATERING WORKERS UNION (SACCAWU) **First Respondent**

THE PERSONS WHOSE NAMES ARE LISTED IN ANNEXURE 'X1' TO THE NOTICE OF MOTION **Second - Further Respondents**

Heard: **21 August 2020 (Via Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 7 September 2020 at 10:00**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The Applicant seeks confirmation of a Rule *Nisi* granted by Moshoana J on 23 July 2020 in terms of which a strike embarked upon by the Second to further Respondents (The Employees) on 9 July 2020 was declared unprotected, and further interdicting and restraining them from committing a variety of acts in pursuance of that strike. The First Respondent (SACCAWU) opposed the application, and seeks that the Rule *Nisi* be discharged.

[2] The Applicant operates its business from its premises in Klerksdorp where the Employees are employed. It has about 106 employees in its employ, and thirteen of those are members of SACCAWU. The Applicant is in the business of manufacturing 6000 metric tons of animal feed. It depends on outside suppliers for raw materials which are delivered daily at its premises and stored in bunkers.

[3] The industrial action (SACCAWU denies that there was a strike) which commenced on 9 July 2020 was precipitated by revelations that one of the Applicant's employees (Ms Greyling) who is employed in the administration office had on 30 June 2020, displayed symptoms of Covid-19. The Applicant contends that upon this information being known, it had immediately instructed Ms Greyling to vacate its offices and to undergo testing.

[4] Immediately after Ms Greyling had vacated her office and the premises, measures were then taken to clean up her office in accordance with the normal protocols. Similar measures were again undertaken on 9 July 2020 by a private company, and the cleaning was extended to the whole premises.

[5] Ms Greyling's test results confirmed on 6 July 2020 that she had indeed tested positive for Covid-19.What appears to have exacerbated the problem is that Ms Greyling upon receiving her test results had on the same date, posted a message on a WhatsApp group of employees advising them of her results. The Applicant's response was to immediately reassure the employees that measures had been taken to mitigate possibilities of the spread of the virus, and implored them to communicate with the Plant Manager (Mr Quintus Surmon), who is also the deponent to the founding affidavit, should they have any concerns about their safety, .

[6] The strike commenced on 9 July 2020 when the day shift failed to report for duty and Employees commence picketing near the main entrance. According to the Applicant, the Employees demanded that an inspection of the premises should be conducted independently by the Department of Employment and Labour (DEL), and to ensure that measures were taken and implemented to mitigate any exposure to the virus.

[7] In the answering affidavit, SACCAWU contends that the Employees were concerned with their health and wellbeing, since there was no discernible proof that measures to contain the virus had been taken subsequent to Ms Greyling having revealed her test results. As the strike action progressed, ultimatums were issued on the same date (9 July 2020), instructing the Employees to return to work. Upon copies of the ultimatum being served on SACCAWU, it had *inter alia* demanded their immediate withdrawal.

[8] It is not necessary traverse the factual disputes raised in the pleadings in regards to the events that took place between 9 July 2020 and 22 July 2020 when the applicant approached this Court for an interim interdict, other than to point out that it contended that it was compelled to seek urgent relief from this Court due to;

8.1 The unprotected strike having continued and accompanied by acts of violence and misconduct, including hindering and blocking delivery of raw materials and collection of its products at its premises, threats to set alight diesel tanks and bunkers where raw material was kept; the throwing of petrol bombs into the premises; and management receiving threatening text messages.

8.2 The strike had continued despite officials from DEL having visited the premises, conducted an investigation and found that the applicant was compliant with the health and safety protocols pertaining to Covid-19

[9] SACCAWU on the other hand disputes that the Employees went on strike. It contends that after the test results of Ms Greyling were made known, the Employees had out of concern for their safety, not reported at their workstations and gathered at the main entrance, and had sent correspondence to DEL for its intervention. It further refutes the Applicant's contentions that officials from DEL inspected the premises. SACCAWU nonetheless conceded that only on 14 July 2020 did the officials from DEL come to the premises, and as a consequence of that visit, the Employees did not enter the premises.

[10] SACCAWU further contends that flowing from directives issued by the Minister of DEL on 4 June 2020, employees have a right to refuse to undertake their duties if they have reason to believe that they may be exposed to risks of Covid-19, and it is on that basis that they had not reported for duty upon receiving information about the status of Ms Greyling. It was denied that there was any form of violent conduct committed by the Employees as the members of the South African Police Services were always present where the Employees had gathered.

[11] It is trite that on the return date, the court is required to determine the substantive merits of the applicant's claim, and whether a final order ought to be granted. Thus the court must be satisfied that a proper case has been made out for each facet of the relief sought.[1] Emphasis is placed on each facet of the relief sought in this case, particularly in the light of the disputed facts raised in the papers and the nature of interim relief that was granted.

[12] The approach of the Courts in motion proceedings when factual disputes are raised is that as stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2]*.* Equally so, it was held in *Da Mata v Otto NO*[3] that;

[1] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 ILJ 329 (LC) at 395 para B

[2] 1984 (3) SA 623 (A) at 634 and 635, where it was held that;

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…"

[3] 1972 (3) SA 858 (A) at 882G

> "In the preliminary enquiry, ie as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided only after *viva voce* evidence has been heard."

[13] The starting point is whether the industrial action took place and is so, whether it was protected or not. It cannot be doubted that indeed the Employees embarked on industrial action following the revelations of Ms Greyling's Covid-19 status. I have difficulties in appreciating SACCAWU's contentions that there was no strike that took place, and that the Employees had merely assembled at the applicant's main entrance whilst waiting to have discussions with management. In the same breath however, SACCAWU did not seriously dispute that no services were rendered from 9 July 2020 following confirmation of Ms Greyling's Covid-19 status.

[14] There is further no doubt that central to the Employees' demands (*albeit* they phrase these as 'health and safety concerns'), is that they wanted assurances that the workplace was safe and free of Covid-19 in accordance with the standard protocols and Regulations issued by DEL. As Mr Mthombeni for SACCAWU confirmed, the issues in contention related to the alleged non-compliance with Regulations and implementation of Covid-19 protocols at the workplace. In its own correspondence dated 16 July 2020, and in response to the Applicant's attorneys of record's demand that the strike be ended, SACCAWU conceded that the Employees should go back to work as soon as possible upon the conclusion of all precautionary measures for their safety. Notwithstanding SACCAWU's stance and undertakings that the Employees would return to work by 20 July 2020, when they ultimately did so, they had refused to comply with measures taken by the Applicant in enforcing Covid-19 protocols prior to entering the premises. That failure to report for duty despite an undertaking by SACCAWU and the Employees' overall conduct, fell within

the confines of the definition of a strike as contemplated in section 213 of the Labour Relations Act (LRA)[4].

[15] Equally important is that no attempt was made by the SACCAWU and its members to comply with the provisions of section 64 of the LRA.[5] There can be no doubt that health and safety issues in the current climate of Covid-19 are paramount, and that the safety of employees at all workplaces should not

[4] **"strike"** means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.

[5] Section 64. **Right to strike and recourse to lock-out**

(1) Every employee has the right to strike and every employer has recourse to lock-out if -
  (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and
    (i) a certificate stating that the dispute remains unresolved has been issued; or
    (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that -
  (b) in the case of a proposed strike, at least 48 hours 'notice of the commencement of the strike, in writing, has been given to the employer, unless -
    (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
    (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
  (c) in the case of a proposed lock-out, at least 48 hours 'notice of the commencement of the lockout, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
  (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days 'notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes –
  (a) a refusal -
    (i) to recognise a trade union as a collective bargaining agent; or
    (ii) to agree to establish a bargaining council;
  (b) a withdrawal of recognition of a collective bargaining agent;
  (c) a resignation of a party from a bargaining council.
  (d) a dispute about -
    (i) appropriate bargaining units;
    (ii) appropriate bargaining levels; or
    (iii) bargaining subjects.

be compromised. However, this does not entitle employees to embark on industrial action at a whim, without first raising the issues with employers, or DEL where the Regulations are not complied with, or without first complying with the provisions of section 64 of the LRA. To this end, the industrial action embarked upon by the Employees was unprotected.

[16] SACCAWU took issue with the order granted in respect of the Employees' conduct. Having had regard to the full set of the pleadings and the factual disputes raised by the respondents, it is apparent that the factual disputes raised by SACCAWU are not real, genuine or *bona fide*, and that its allegations or denials of the events as outlined by the Applicant are bare, far-fetched and clearly untenable, and thus ought to be rejected.

[17] If their 'gathering' as they called it was peaceful, why then was there a need for members of the SAPS to be present throughout from 9 to 14 July 2020 as they had confirmed, and furthermore, what would have been the reason for the Applicant to source the services of a private security company (TSU Protection Services (Pty) Ltd) at a cost of R15 525.00 a day, unless there were threats to property and limb?

[18] In its founding and replying papers, the Applicant had alleged that the Employees conducted themselves in a generally aggressive, intimidating, threatening and disruptive manner. They had prevented non-striking employees from reporting for work as they gathered at the main entrance and hindered the delivery and collection of goods at the applicant's premises. It is alleged that the Employees had lit fires next to the main entrance and hindered all access to the premises.

[19] It is accepted that the Applicant's allegations in regards to other forms of misconduct (*i.e.*, threats to burn down the premises and houses of non-striking employees, intimidation of non-striking employees, and threats by the Employees to gain forced entry into the premises, which threats were thwarted by the Private Security personnel) were thin on details. Be that as it may, all that the Employees and SACCAWU could offer in response were

mere denials. In the circumstances, I am satisfied that a proper case was made out for the confirmation of the Rule *Nisi* issued on 23 July 2020.

[20] I have further had regard to the issue of costs. SACCAWU was warned not to oppose this application, and paragraph 5 of the interim order specifically stated that the Applicant's costs were to be paid jointly and severally by the respondents, in the event of an opposition. That warning went unheeded and SACCAWU had proceeded to file an answering which did not assist its case. In my view, clearly the requirements of law and fairness dictate that SACCAWU be burdened with the costs of this application.

[21] Accordingly, the following order is made;

Order:

1. The Rule *Nisi* issued by Moshoana J on 23 July 2020 is confirmed.

2. The First Respondent (SACCAWU), is ordered to pay the costs of this application.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv A May, instructed by Manong Badenhorst & Badenhorst INC
For the 1st and 2nd – Further Respondents:	V Mthombeni (SACCAWU Official)