IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1142/20

In the matter between:

CLOVER SA (PTY) LTD **Applicant**

and

GENERAL INDUSTRIES WORKERS UINION OF SOUTH AFRICA **First Respondent**

SOUTH AFRICAN POLICE SERVICES **Second Respondent**

INDIVIDUAL RESPONDENTS WHOSE NAMES APPEAR ON ANNEXURE 'A1' TO THE NOTICE OF MOTION **Third Respondent**

Heard: **30 October 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court website and release to SAFLII. The date and time for the hand-down is deemed to be on 31 October 2020 at 13:00**

JUDGMENT

TLHOTLHALEMAJE, J

[1] On 16 October 2020, the parties in this case came before Van Niekerk J, who had issued an order by agreement in the following terms;

1. "The first and third to further respondents are to comply with the picketing rules established between the applicant and the first and third to further respondents on 11 June 2019.

2. The first and third to further respondents are interdicted and restrained from interfering with road traffic on national and access roads and from barricading the entrance and exit points to and from the applicant's premises;

3. Without insinuating that all of the first and third to further respondents have committed acts of violence and unlawful conduct, the first and third to further respondents are interdicted and restrained from conducting any violent and unlawful conduct in pursuit of their demands, including the harassment or intimidation of any employee, contractor, service provider and/or supplier of the applicant or any other person on its premises or causing damage to property or preventing any of the applicant's employees, contractors or service providers from tendering his/her or their services to the applicant;

4. The first respondent is ordered to assist the applicant in the identification of those of its members who breach the provisions of this Court Order by committing violent and unlawful acts in pursuance of the First Respondent's wage demands

5. The second respondent is directed to enforce compliance with this Order.

6. The provisions of the paragraphs above shall be a final Order.

7. …

8. …"

[2] The background material to the current application is set out in the three sets of affidavits and it is not necessary to repeat same in detail other than to mention that the first respondent (GIWUSA) and its members who are cited as the third – further respondents, have embarked on a protected strike since 13 October 2020 in pursuance of wage demands. The Order before Van Niekerk J was obtained following an urgent application to interdict unlawful conduct allegedly perpetrated by the third to further respondents in the course of the protected strike.

[3] With this further urgent application, the applicant seeks a variety of orders, which in reality amounts to a duplication of the Order obtained before Van Niekerk J. Having raised my concerns with Mr Yeates for the applicant, it was conceded that in the end, only one primary relief was sought, which was

the suspension of the terms and operation of the Picketing Rules for the duration of the protected strike.

[4] The first and third to further respondents had raised various preliminary points. However after Mr Yeates had agreed with the Court that the primary relief was narrow, these preliminary points were not pursued by Mr Kubayi on behalf of the first and third to further respondents.

[5] Central to this application therefore is whether a case has been made out for this Court to suspend the operation of the Picketing Rules. The starting point is that the Picketing Rules were set by the CCMA following a dispute referred under section 69(5) of the Labour Relations Act (LRA)[1] and an agreement between the parties. It is not necessary to set out these Rules in detail other than to point out that they are meant to regulate any picketing that would take place in relation to any mutual interest disputes affecting the parties. Clause 11 of these Rules makes provision for non-compliance, and provides under clause 11.2 that this Court may in terms of section 69(12)(c) of the LRA, suspend a picket at one or more designated locations, if these Rules have not been complied with.

[6] The purpose of section 69 of the LRA, as read with the Code of Good Practice Relating to Picketing Rules is to regulate protest action and demonstrations during protected strike action, and to ensure that it is lawful and peaceful. It is further intended to offer striking employees protection against discipline and undue interference[2].

[7] Fundamental to the right to picket as can be gleaned from section 69(1), is the requirement of 'peaceful demonstration'. I therefore agree with the sentiments expressed in *Dis Chem Pharmacies Ltd v Malema and Others*[3] that unlawful conduct, violence, harassment, are inimical to the principle of 'peaceful demonstration'.

[1] Act 66 of 1995, as amended
[2] *SA Airways v SA Transport and Allied Workers Union and Others* (2013) 34 ILJ 2064 (LC) at para 54.
[3] (J 4124/18) [2018] ZALCJHB 451; (2019) 40 ILJ 855 (LC) at para

[8] The wanton violence, destruction of property and the rule of the mob in the course of strikes, whether protected or not is an everyday occurrence, and one cannot help but add that this state of affairs has sadly become the 'new normal' in our industrial relations. In the end, the employees' demands, whether reasonable or not supersedes everything else, including, life, limb, property, common sense and our very sense of humanity or *ubuntu*. In this regard, it is not unusual to find instances where co-employees, who also happen to be members of the same communities, and who have known each other over time, readily and easily turning on each other in the most violent and heinous manner, simply on account of differences of opinion or approach on how their workplace demands should be pursued. Examples in this regard are cited by the applicant in its founding papers, of instances where its employees were attacked whilst at their homes, or on their way to and from work, or where their residences were attacked, and thus not only affecting those employees but their immediate family members. In the end, one can only reiterate what was said by the SCA in *Hotz v UCT*[4] as follows;

> "Protest action is not itself unlawful. As pointed out by Skweyiya J in the passage already quoted from Pilane the right to protest against injustice is one that is protected under our Constitution, not only specifically in section 17, by way of the right to assemble, demonstrate and present petitions, but also by other constitutionally protected rights, such as the right of freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of freedom of association (s 18) and the right to make political choices and campaign for a political cause (s 19(1)). But the mode of exercise of those rights is also the subject of constitutional regulation. Thus the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm (s 16(2)(c)). The right of demonstration is to be exercised peacefully and unarmed (s 17). And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups and people must recognise this when exercising

[4] *Hotz and Others v University of Cape Town* [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA)

> their own constitutional rights. As Mogoeng CJ said in *SATAWU v Garvis*, 'every right must be exercised with due regard to the rights of others'. Finally the fact that South Africa is a society founded on the rule of law demands that the right is exercised in a manner that respects the law…"[5]

[9] Where the rule of the mob and unlawful conduct replaces peaceful demonstrations/picketing, and the provisions of agreed Picketing Rules are flagrantly ignored, section 69(12) enjoins this Court to intervene and grant urgent relief as was the case *Dis Chem Pharmacies Ltd v Malema and Others,*[6] where a suspension of the rules was ordered. The facts of that case were indeed extreme, as the Court had found that the complete suspension of the employees' right to picket was called for and justified[7] .

[10] Even though in this case certain averments were made in the pleadings that indicates violence against non-striking employees either at their residences or on their way to and from work, and an attack on trucks and service providers, there are indeed differences between the facts of this case and those as pleaded in *Dis Chem*, insofar as the functionality of the picketing rules is concerned.

[11] The Court in determining whether a complete or partial suspension of the picketing Rules, or even their variation is called for and justified, is required to take all the facts and circumstances of each case into account. This involves a balancing act between the employees' guaranteed rights under section 17 of the Constitution and section 64(1) of the LRA, the employer's rights to conduct its affairs without hindrance, the general interests of all its employees, customers and clients, and a determination of whether those rules no longer serves the purpose intended. Thus, an order suspending the operation of Picketing Rules in the middle of a protected strike should not be lightly granted, and the onus is clearly on the applicant to demonstrate that such measures are necessary, and further that the rules as are applicable are flouted or not achieving the primary objective of peaceful demonstration in pursuance of the demands. Thus the applicant must place evidence

[5] *Ibid* at para 63
[6] *supra*
[7] See at paragraphs at paragraphs 13 -16 of the description of the conduct in question.

supporting the need for intervention by the Court. In my view, the bar should be set even higher where the employer seeks a total suspension of the rules.

[12] In this case, the applicant contends that following the order of Van Niekerk J, there has been non-compliance with the provisions of the interdict. It contends that the relief sought was necessitated by the further unlawful conduct of the first and third to further respondents, who are engaged in unlawful conduct and continuing to interrupt access to and egress from its premises, perpetration of violence and intimidatory conduct in pursuit of the strike demands. The applicant made reference to a schedule of incidents which have occurred since 18 October 2020, which it contends records unlawful acts on the part of the employees in total non-compliance with those Rules or the Order of this Court.

[13] Other incidents of unlawfulness cited by the applicant pertain to non-strikers being prevented from freely entering or leaving premises, and incidents of violence having spiralled into communities, where shop owners, customers and clients in those communities have been threatened or harassed. To the extent that these incidents took place, it was submitted by Mr Yeates that the suspension of the Picketing Rules will assist in their curtailment, and also afford the second respondent (SAPS), to properly monitor the situation and enforce the law and order.

[14] The first and third to further respondents obviously took issue with the applicant's approach and allegations. Of course any allegations of unlawful and violent conduct on their part are denied by the GIWUSA and the employees. Mr Charles Phahla, GIWUSA's Deputy General Secretary contends that after the Court order was obtained on 16 October 2020, he personally went to the applicant's premises in Clayville and addressed employees on the implications of that order, the need to respect law, and order and property. He contends that the incidents cited by the applicant took place away from the workplace and in Tembisa, and at about 20h00.

[15] One need only look at the incidents[8] cited by the applicant in seeking a suspension, and from these, it cannot be said that the denial of the allegations by the first and third to further respondents is bare. A bulk of those incidents took place away from the applicant's premises, or to be more specific, away from the picketing demarcated areas. It is indeed correct that incidents of assaults, intimidation, and harassment were reported by individuals, as well as damage to trucks that were stoned. However, most of these incidents as cited took place in the communities where the employees reside, or were perpetrated by unknown individuals, or in some instances, were unrelated to the strike as they involved warring taxi owners operating in the area. The non-striking employees identified as having been assaulted by striking employees have in some instances known who the perpetrators were, but had refused to pursue criminal charges for obvious reasons.

[16] I agree with the applicant's contentions that clearly it has a right to be fearful for the safety of its non-striking employees, and its truck drivers. Its fears were *inter alia* based on the fact that an EFF member was allowed to attend meetings held with the employees with a view of resolving the strike, or the fact that this member was allowed to address the employees in the picketing area, resulting in inflammatory comments made by him in terms of which an escalation of the strike and violence was promised. This one incident in my view cannot on its own justify the drastic measures that the applicants seeks.

[17] In similar fashion as Mr Kubayi had done, the Court had enquired from Mr Yeates whether contempt proceedings would not have achieved the objectives sought to be achieved through the suspension of the Rules. Mr Yeates' concerns however pertained to the time constraints that it takes to have contempt proceedings brought before the Court.

[18] I agree with Mr Kubayi that where urgency is claimed, relief cannot be granted in circumstances where the applicant has alternative relief. As already stated, the suspension of Picketing Rules is not to be readily ordered in the light of its implications on the employees' protected rights of assembly and to strike. It is apparent from the Order obtained before Van Niekerk J that the Union and its

[8] Pages 82 – 86 and 177 – 189 of the Founding Affidavit

members had agreed to abide by the Picketing Rules, and that the Union had agreed to assist in the identification of persons who contravened the Rules. If this is the case, and to the extent that some or most of the events at the picket have been or are being recorded, all that the applicant needed to do was to call upon the Union to identify individuals from video material that are in said to be acting in breach of the rules, and to have action taken against them. There is nothing to suggest from the pleadings that the applicant has approached the Union to undertake any identification process other than to send correspondence to Phahla to raise concerns about the continued unlawful conduct.

[19] Worst still, to the extent that the Union was ordered to do certain things in accordance with the Order of Van Niekerk J, surely there are ways of dealing with the non-compliance in question, and it is not sufficient to simply state that correspondence was sent to Phahla to inform him of the incidents of violence and unlawful conduct without taking the matter any further other than to seek drastic measures which would impact on guaranteed rights. Equally so, and for what it is worth, the second respondent (SAPS), was also ordered to take measures to enforce compliance with the Order.

[20] This brings me to second option available for the applicant, which is that it was open to it to approach this Court by way of contempt proceedings on an urgent basis and to obtain a *rule nisi*. Contrary to Mr Yeates' contentions, the utilisation of the *rule nisi* procedures is encouraged especially where a party seeks interim relief in order adequately to protect his immediate interests[9].

[9] See *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A), at 674H675C, where Corbett JA stated:

'The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law. ... This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. The rule nisi procedure must be considered in conjunction with the provisions of Rule 6(12) which, in the case of urgent applications, permits the Court to:

"dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with

There is therefore nothing cumbersome about that legal process, and clearly the prospects of a heavy prison sentence or financial penalty within the context of a *rule nisi* will be more effective than suspending the picketing rules. On the contrary, the possibility of a suspension exacerbating the situation is even higher, especially where there is no discernible evidence indicating that the rules have become dysfunctional on account of unlawful conduct taking place within the defined demarcated areas.

[21] For obvious reasons, picketing rules can only be applicable between employer and the employees, and thus what happens outside the framework of those Rules and into the communities, is clearly a matter for the criminal justice system. This is not to suggest that employers should not be concerned with the well-being and safety of its employees outside of the workplace during strikes. All that is being said is that any alleged breach of picketing rules cannot be extended to incidents that take place communities after hours, unless there is evidence to suggest that acts of criminality were planned and executed within the four corners of those Rules.

[22] In this case, and in accordance with the Ruling of Commissioner Madubanya on 11 June 2019 when settling the Rules, two picketing areas were specifically identified in the Clayville area, being on Axle Drive and Spanner Road. In relation to the identified picketing areas, the incidents identified by the applicant are said to have either have taken place in areas identified as '*coming to Clayville'; 'Clayville to Atlas'; 'Highway before the Fountain circle'; 'R21 Highway'; or 'Striking employees on corner'*. The rest of the areas as identified are far removed from the demarcated areas. In these circumstances, it has not been demonstrated that the there is a need to suspend the Rules as a whole, let alone even vary the demarcated areas. It therefore follows that a case for the relief sought has not been made out, and the application should therefore fail.

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such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet".

(And see in this connection *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H782G.) In fact, the rule nisi procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief.'"

[23] Mr Kubayi on behalf of the Union and the employees sought a punitive costs order against the applicant. Having had regard to the requirements of law and fairness, an award of costs is clearly not warranted. The mere fact that it was not established on the facts as pleaded that there was a need to suspend the picketing rules does not imply that GIWUSA and its members are angels with clean hands. They are not. In fact, its members should hang their heads in shame for the wanton violence perpetrated against their fellow employees in their own communities. The strike is clearly accompanied by acts of violence, especially towards non-striking employees. Clearly this application even if unsuccessful, was necessitated by desperation on the part of the applicant, to protect those employees under attack, and its other interests. The application can hardly be considered as frivolous or vexations.

[24] Accordingly, the following order is made;

Order:

1. The applicant's urgent application is dismissed.

2. There is no order as to costs

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr Michael Yeates of Cliffe Dekker Hofmeyr Incorporated
For the First & Third – Further Respondents:	Mr NE Kubayi of Novedi Eddy Kubayi Incorporated