REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2510/11

In the matter between:

TSOGO SUN CASINOS (PTY) LTD t/a

MONTECASINO **Applicant**

and

FUTURE OF SOUTH AFRICA WORKERS'

UNION **1ST Respondent**

THE PERSONS MENTIONED IN

ANNEXURE 'A' TO THE NOTICE OF MOTION **2ND to further Respondents**

Heard: 2 December 2011

Delivered: 5 December 2011

Summary: Return date of rule nisi; issue of costs to be decided. Conduct of striking workers taken into account in the exercise of discretion in relation to costs order.

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is the return date of a rule *nisi* issued by Basson J on 5 November 2011 following an urgent application filed by the applicant. On the return date, the applicant sought the discharge of the rule, and an order for costs against the respondents. The respondents opposed the granting of any costs order.

The order

[2] The order granted by Basson J *inter alia* assumed the form of an interim interdict restraining the respondents from obstructing vehicles and persons from entering or leaving the applicant's premises, protesting or being present in Montecasino Boulevard, interfering with traffic or persons entering or leaving Montecasino Boulevard, picketing within 500 m of the premises, intimidating or assaulting persons or damaging property at or near the premises. The return date was fixed for 2 December 2011.

[3] On 1 December 2011, the applicant filed a further supplementary affidavit in which the deponent, the applicant's director of labour relations, summarised the history of the dispute and submitted that in the absence of a denial of the unlawful conduct referred to in the affidavits filed on the applicant's behalf, it was appropriate that the respondents be ordered to pay the costs of the application. The respondents filed an answering affidavit on 2 December 2011, in which they denied any liability for the costs of the proceedings..

Factual background

[4] It is not necessary for present purposes to set out the facts at any level of detail. Montecasino is a casino and entertainment complex situated in the Fourways area and which is owned by the applicant. The individual respondents were engaged in a protected strike called in support of a wage dispute between the applicant and the first respondent (the union). The applicant and the union

had concluded a picketing agreement, which spelled out in some detail the manner in which the second to further respondents (the individual respondents) would exercise their right to picket in support of the strike. Regrettably, the picketing that occurred was anything but peaceful. In the founding papers, the applicant averred that the individual respondents were acting in breach of the picketing agreement by engaging in a variety of criminal acts, including assault, theft, malicious damage to property, and blocking access to and egress from the applicant's premises. The conduct described in the founding and supplementary affidavits includes the emptying of rubbish bins onto the road outside Montecasino, burning tyres on the road, blocking the road with 20 litre water bottles, throwing packets of broken glass onto the road, throwing bricks at members of the SAPS, damaging vehicles, dragging passengers from vehicles and assaulting them, rolling concrete dustbins into Montecasino Boulevard, damaging patron's vehicles, and assaulting persons in the vicinity of Montecasino. The applicant's attempts to resolve the issue of strike-related violence by agreement with the first respondent failed – an undertaking given by the first respondent at the applicant's request proved to be worthless. Ultimately, intervention by the SAPS was necessary, but even this did not deter the individual respondents.

[5] During this period, the applicant took a number of steps to protect its interests. The picketing agreement to which I have referred was signed on 15 October 2011. From 18 October to 4 November 2011, the applicant advised the union on several occasions that both the union and the individual respondents were in material breach of the agreement. On 20 October the applicant referred a dispute to the CCMA in which it sought a determination that the union and the individual respondents comply with the picketing agreement. A conciliation hearing was convened for 27 October 2011. At the hearing, the union and the individual respondents did not dispute the evidence of the breaches of the agreement, but instead accused the applicant of 'provoking' them, and demanded that video surveillance cease. The CCMA was unable to resolve the dispute, and the matter was referred to this court.

[6] On 9 November 20112 the applicant filed a supplementary affidavit in these proceedings, with photographs and video footage of the damage caused

by the individual respondents. On 11 November 2011, the parties concluded an agreement in terms of which a return to work was agreed. On 29 November 2011, the applicant's attorneys wrote to the respondents' attorney to enquire whether the respondents would tender the costs of these proceedings.

[7] The respondents' main complaint on the return day, it appears, is that they did not receive the founding papers, since the second respondent (Motha) was in East London and the respondents' attorney not in his office (5 November was a Saturday). On this basis, the respondents contend that they were not in a position to defend the proceedings, and should not be held liable for the costs. Secondly, the respondents contend that they are individuals earning a relatively low income, and cannot therefore be ordered to pay the applicants costs. Thirdly, the respondents contend that the respondents' conduct is no longer in dispute, and that they cannot therefore be liable for costs. Finally, on the return date, Mr Levin, who appeared for the respondents, submitted that the existence of a collective bargaining relationship between the parties militated against any order for costs. What resulted was the exchange of affidavits on the issue of costs to which I have referred.

[8] Section 162 of the LRA entitles this court to make an order according to the requirements of the law and fairness. This is a broad discretion, and one that must be exercised judicially. In my view, for the reasons that follow, none of the submissions advanced on behalf of the respondents have merit, and there is no basis, having regard to the law and fairness, why the respondents should not be liable for the applicant's costs

Analysis

[9] To the extent that the respondents deny receiving a complete set of the papers on the day prior to the moving of the application, it is not seriously disputed that the notice of motion was served on the union and individual respondents at 16h15 on 5 November 2011. It is also not disputed that Motha was contacted telephonically at 15h06 and told that the application would be heard as a matter of urgency at 17h00, nor is it disputed that Lonie advised Motha to arrange for other union officials, Mhlanga or Mshengu, to attend at court. It is not denied that after the rule *nisi* was issued, copies of the order were

delivered to those of the individual respondents who were assembled at the circle outside Montecasino, and that attempts to hand over the copies of the order to them were thwarted. It is also not denied that the individual respondents present proceeded to tear up the copies of the order.

[10] The explanation for the respondents' failure to oppose the application (i.e. that they had not received a full copy of the papers) is fatuous – the respondents had been made aware of the proceedings and were fully entitled to approach this court with a request to be allowed reasonable time within which to file an answering affidavit. In any event, the respondents were perfectly entitled to anticipate the return date should they have felt that the order as granted in circumstances where they did not receive adequate notice. They failed to do so.

[11] The fact that the individual respondents are workers earning a relatively low income is of no consequence. They have not denied participating in the unlawful conduct alleged by the applicant, and they must bear the consequences of their actions. The fact that they have since the date of the order returned to work is neither here nor there. The issue is not that there was an agreed return to work – the issue is whether the respondents' conduct necessitated an application to this court and whether it is fair, having regard to all of the circumstances (including the respondents' conduct prior to the return to work), to order them to bear the applicant's costs. The existence of a continued collective bargaining relationship between the parties and the potential prejudice to that relationship that any order for costs might present is similarly irrelevant in this instance. The fact that the applicant pursues an order for costs in itself is an indication that at least as far as the applicant is concerned, a future relationship with the first respondent is would not be prejudiced on account of any order for costs in these proceedings. The respondents have not put up a cogent case to the contrary. The applicant has expressed its intention to seek damages against the union and it members, and that criminal proceedings had been initiated consequent of the conduct of the individual respondents. Those are obviously separate processes, and the law must take its course in respect of each. For present purposes, while the parties will necessarily have to pick up the pieces of a relationship that has been compromised on account of the respondents' conduct, I fail to appreciate how

the existence of a collective bargaining relationship or its future course militates against any award of costs. There is certainly no evidence before me to establish that a costs order may prove to be an obstacle to the continuation of a collective bargaining relationship, or that it will unduly strain that relationship. On the contrary, in my view, an order for costs will have a salutary effect and serve to emphasise for the individual respondents that the right to engage in collective bargaining is not a licence to engage in collective brutality and for the union and its officials, that responsibility for the collective requires individual action.

[12] Finally, and while this was not a matter specifically alluded to by either party, the court must take into account interests that lie beyond the direct interests of the parties to this dispute. The individual respondents misconducted themselves in the most egregious fashion, in a public place, with serious consequences for the applicant, its patrons and others. Despite requests to do so, the union failed throughout to intervene, nor did its officials demonstrate any form of leadership. The Supreme Court of Appeal, in a similar context, recently said the following:

> The chilling effect of s 11(2)*(b)* described on behalf of the Union is not only unsubstantiated but is contradicted by the police and the City of Cape Town, who presented unchallenged evidence that in their extensive experience the provisions of the Act have not deterred people from public assembly and protest. If anything, the regularity of public assembly and protest in the 15 years of the existence of the Act proves the contrary. The chilling effect that the provisions of the Act should rightly have is on unlawful behaviour that threatens the fabric of civilised society and which undermines the rule of law. In the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob.[1]

[13] This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny

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1 See *South African Transport and Allied Workers Union v Garvis & others* (007/ 11) at par [50]).

of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.

[14] This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against unions that refuse or fail to take all reasonable steps to prevent its occurrence. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, I would have had no hesitation in granting an order for costs on the as between attorney and own client.

For these reasons, I make the following order:

1. The rule nisi issued on 5 November 2011 is discharged.

2. The respondents are to pay the costs of these proceedings, jointly and severally, the one paying the other to be absolved.

André van Niekerk
Judge

APPEARANCES

APPLICANT: Mr. Clifford Levin, Clifford Levin Attorneys.

FIRST AND FURTHER RESPONDENTS: Adv AJS Redding SC, instructed by Edward Nathan Sonnenburgs Attorneys.