In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No: 1693/16P

In the matter between:

Durban University of Technology	Applicant
And	
Sphiwe Zulu	First Respondent
Thabiso Luthuli	Second Respondent
Simon Khumalo	Third Respondent
Ozayo	Fourth Respondent
Phoswa	Fifth Respondent
Wele 1	Sixth Respondent
Wele 2	Seventh Respondent
Ntethe	Eighth Respondent
Andile Zondi	Ninth Respondent
Lushozi	Tenth Respondent
Siphosenkosi Dlungwane	Eleventh Respondent
Malishe	Twelfth Respondent
Mbulelo Sithole	Thirteenth Respondent
Other Students of the Durban University of Technology	Fourteenth Respondent

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Judgment

Lopes J

[1] This is an interdict application brought by the applicant, the Durban University of Technology. The applicant is an institution of higher learning and has five campuses in and around the Durban area, and two in Pietermaritzburg. Student dissatisfaction has been ongoing since the campuses re-opened in January of 2016. This dissatisfaction came to a head on the 17th February 2016, and there was widespread disruption on the campuses which showed no signs of abating. The unrest included a number of acts of vandalism during which property of the applicant was damaged.

[2] Pursuant to an urgent application, and without notice to the respondents, on the 18th February 2016 an order containing a rule nisi was granted calling upon the respondents to show cause why they should not be interdicted and restrained from :

'1(a) (i) disrupting or calling for the academic program of the applicant to be disrupted or instigating others to perform acts designed to disrupt the academic program of the applicant and in particular from performing any act or making any threat or instigating any act or threat by others, designed to disrupt lectures, practical work sessions or tests and examinations at any of the various campuses of the applicant or from entering any venue, lecture hall, practical session room or test examination venue

unless they are students of the course in question and are attending only to participate in the lecture or academic program;

(ii) assaulting, threatening to assault, intimidating, by way of violent protest action or otherwise instigating others to assault, threaten or intimidate students or staff at any of the campuses of the applicant;

(iii) damaging property or instigating others to damage property by way of student protests at any of the campuses of the applicant;

(iv) demonstrating or gathering at any place closer than 100 metres from the perimeter of any of the applicant's campuses.'

[3] The order also directed that the rule operate as an interim interdict pending the final determination of the application. Further provisions were made in the order for service of the application papers and the order on the respondents. There are fourteen respondents, thirteen of whom are named or referred to in an effort to identify them. The fourteenth, with whom this judgment is concerned, is referred to as 'Other Students of the Durban University of Technology' ('the other students').

[4] The matter was adjourned from time to time and the rule extended with the interim relief continuing to operate. The matter came before me on the 17th May 2016. I was requested to adjourn the matter *sine die* and to extend the rule against the first, fourth, ninth, and tenth respondents, all of whom opposed the relief sought by the applicant. They have delivered affidavits in support of their opposition.

[5] I was also asked to confirm the rule nisi in respect of the other students. Because I had reservations as to the correctness of such an order, I reserved judgment with regard to the relief sought against the other students.

[6] I invited the applicant to make written submissions which were delivered to me on the 20th May 2016. In addition, Mr *Boulle*, who appeared for the applicants, argued the matter before me on the 2nd June 2016. My concerns about the grant of an order against the other students were :

(a) they are not named;

(b) no cause of action is established by the applicant against any of them individually;

(c) the relief sought against them is, at best, an attempt to ensure peace and harmony on the campuses of the applicant, and to discourage students from protesting in a manner which is disruptive of the academic programme of the applicant.

[7] The requirements for a final interdict are:

(a) a clear right;

(b) an injury actually committed or reasonably apprehended;

(c) the absence of similar protection by any other ordinary remedy.

See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[8] At the outset I raised my concerns with Mr *Boulle* regarding the wording of the order sought, as an interdict should do no more than protect the rights of an applicant from unlawful conduct. In this regard, paragraph 1(a)(i) purported to interdict and restrain the other students from disrupting or calling for the academic programme of the applicant to be disrupted. In my view it may be a lawful form of protest for one student to encourage another, for example, not to attend lectures because of some perceived evil or complaint about the way in which the lectures are presented or the content thereof. Such a form of protest, and others which one may easily imagine, are not unlawful. Mr *Boulle* submitted that this sub-paragraph could easily be remedied by the insertion of the word 'unlawful' prior to the description of the various prohibited forms of conduct.

[9] Mr *Boulle* also raised the so-called perimeter interdict sought in sub-paragraph 1(a)(iv). He proposed an amended formulation of that sub-paragraph to include the words 'where such demonstration or gathering is designed to achieve, or has the effect of achieving, the conduct or consequences listed in sub-paragraphs 1(a)(i), (ii), and (iii)' at the end of sub-paragraph 1(a)(iv).

[10] Accepting for the moment that these amendments will render the order an appropriate one, (and I am by no means certain that the amendment to sub-paragraph 1(a)(iv) will do so) there remains the difficulty of granting an interdict in any form against the other students in circumstances where they have not been

identified, and no unlawful conduct or breach of the applicant's rights by them is alleged.

[11] Mr *Boulle* submitted that in order to justify an order against the other students it is necessary to establish:

(a) an allegation against the globular body of the other students;

(b) that they were served with the interim order;

(c) that they did not respond;

(d) that their interests were weighed against the interests of the applicant and the wider public interest.

[12] Mr *Boulle* drew to my attention the efficacy of similar interdicts which have been granted by this court on previous occasions. He submitted that although people may realise that their acts are unlawful, once they believe that the eye of the court is upon them, so to speak, they are more likely to behave in a manner which is not in conflict with their lawful obligations.

[13] Mr *Boulle* also drew to my attention the fact that the members of the South African Police Services are unwilling to go onto a university campus to deal with demonstrations until an interdict has been granted by the court. This is so even where there is violence and students are breaking the law. Members of the South African Police Services are not entitled to insist upon an interdict to prevent unlawful

conduct such as that alleged by the applicant. They are under a constitutional duty to enforce the law, and do not need the assistance of courts orders to authorise them to do so.

[14] Mr *Boulle* stressed that it is the function of courts to be effective and where an applicant is entitled to relief and it is in the public interest that such relief be granted, it should be ordered. There is no doubt that it is in the public interest that violence should not be tolerated. That is so whether it involves damage to the applicant's property, or the unlawful intimidation of other students and the staff of the applicant.

[15] Mr *Boulle,* however, conceded that there was a risk inherent in any order granted against what have been referred to as 'innocent non-participants'. He also conceded that the interdict could only be effective against the other students if they performed illegal acts. He submitted, however, that there is no harm in interdicting a person from doing something which he/she was not allowed to do in any event.

[16] Mr *Boulle* recognised the stringent consequences of the breach of a court order inasmuch as the other students may be charged with contempt of court should they breach the order. He submitted that in those circumstances the defence of not knowing of the existence of the order could always be raised if that was appropriate. If the other students committed acts knowing of the court order, then it was right and proper that they be held in contempt of court. In this regard, Mr *Boulle* drew my attention to *Mondi Paper (a Division of Mondi Ltd) v Paper Printing Wood & Allied*

Workers' Union & Others (1997) 18 ILJ 84 (D) and *Ex parte Consolidated Fine Spinners & Weavers Ltd & Another in re Consolidated Fine Spinners & Weavers Ltd & Another v Govender and Others* (1987) 8 ILJ 97 (D).

[17] In *Consolidated Fine Weavers & Spinners* Page J heard an application for a rule nisi operating as an interim interdict restraining some 795 respondents from interfering with, assaulting or intimidating any of the applicant's employees, customers, or other visitors to the applicants' factory complex. The respondents were all employees of the two applicants in a factory complex. Differences of opinion had arisen between two groups of workers at the factories and this had led to an illegal strike. There was in addition widespread harassment and intimidation, including the use of force against those employees of the applicants who wished to work, by those who were on strike. The applicants were not, however, in a position to identify individual perpetrators of the unlawful acts.

[18] In the application before Page J the applicants tendered not to seek final relief against any innocent parties who could be identified prior to the return day of the rule nisi they sought. In this regard Page J stated:

'In my view the inability of the applicants to identify the perpetrators does not afford any justification in law for granting an order against a number of people including persons against whom no cause of action has been established. The practical exigencies of the situation … also do not afford a justification for such a course, however desirable it may appear to be.

I accept that it is indeed desirable for purposes of maintaining order and restoring proper labour relations that the courts should be able to intervene, but this cannot in itself justify the court in arrogating a power which it does not have in law. I do not think that it is, as was contended by counsel for the applicants, a discretionary matter at all. Either there is a cause of action or there is not.'

[19] It was submitted to Page J that the respondents should be considered as a group whose group conduct is sought to be restrained. The fact that there may have been individual members who had not perpetrated the acts complained of does not warrant a refusal of relief. Page J was of the view that in that case there was not sufficient evidence before him to establish membership of a group in the sense for which it was contended. The only common factor among all the workers against whom relief was sought was that they had stayed away from work the day before the application. Page J was of the view that there was no justification for making an order against a person without proof of his complicity, and then requiring him to establish his innocence. As this was not an application for a final order, the onus on the applicant was only to establish a prima facie case. The application was still not granted.

[20] The judgment of Page J was considered by Nicholson J in *Mondi Paper*. Strike action had commenced and the applicant alleged that sabotage had taken place, and that non-striking employees were being intimidated during the course of picketing. The matter came before Nicholson J on the return date. He dismissed the application on the basis that the court did not have the necessary jurisdiction and

that matter should have been dealt with in the Labour Court. He then opined, on the basis that even if he was wrong in his jurisdictional conclusion, that the rule should be discharged because the respondents were not identified and linked with alleged acts of intimidation and sabotage. Only hearsay allegations had been made in the papers before him.

[21] Nicholson J then quoted extensively from *Consolidated Fine Spinners & Weavers.* He recorded that a court order is the law and the equivalent of an act of parliament insofar as the parties defined by it are concerned. In any subsequent criminal proceedings for contempt of court, the criminal court would correctly assume that the Supreme Court order was properly granted and any 'innocent non-participant' would have to establish that the original court order ought not to have been granted against him/her. Nicholson J pointed out that this reversal of the onus runs counter to every notion of criminal justice and the onus of proof.

[22] Nicholson J stated that the flaw in the argument could best be illustrated by considering an interdict directed at only one 'innocent non-participant'. If there was no evidence which could justify an interdict being granted against one of the persons selected out of the mass of workers, then the same could be done for every other person on the list of respondents against whom there was no evidence whatsoever. In the context of that case he stated:

'The evil of intimidation of employees by striking workers and the unlawful blocking of transport to company premises can never be condoned. Juxtaposed against that evil is that of a court granting orders against "innocent non-participants" without evidence. The latter

evil seems to me to outweigh the former. It seems to me that the whole court system will lose the respect of the public at large if it grants orders against “innocent non-participants”.’

[23] Mr *Boulle* submitted that *Mondi Paper* was distinguishable because in that case service had not been effected, or stated to have been effected. This would also distinguish *Consolidated Fine Spinners & Weavers*.

[24] I do not agree that those cases are distinguishable from the facts of the present matter. In the present matter the applicant seeks an order against all the other students registered with it who are not one of the first to thirteenth respondents in the application. No unlawful act whatsoever is alleged against any one of them. No allegation is made that any of them is likely to behave unlawfully against the applicant in the future.

[]25] Mr *Boulle* pointed to the fact that, in this matter, service of the rule nisi had been effected by delivery of the court order to all employees and students of the applicant by email. A full set of the application papers and the interim order were posted on the applicant’s website and posted on the main noticeboard on each campus, together with a notification that a complete set of the application papers was available for inspection at the administrative office of each campus.

[26] Mr *Boulle* submitted that the answer to granting an interdict against an innocent party is that that person may come to court, and object to the order being

granted against them. On that basis they would be joined as a separate party and no order would be made against them, and they would no longer be part of 'the other students' as the fourteenth respondent.

[27] I appreciate the difficulties with which the applicant is faced, and I regard the damage to property and the unlawful intimidation of other students and members of staff by threats of violence to be wholly unacceptable and something which the applicant rightly should seek to prevent. That sympathy, and indeed the public interest in putting a stop to unlawful protests and acts of violence and criminal damage to property, are not reasons for me to grant an order against persons against whom no individual allegations of such conduct are made. I accept also in this regard that an interdict may have a salutary effect upon those against whom it is granted. That is still not a basis for sweeping up innocent persons in the preventative net of an interdict. It would seem to me that with the modern methods of access control, CCTV cameras, etc, there is ample opportunity for the applicant's security services to be able to identify those persons who were on the campus when the violence occurred, and steps could be taken to identifying them. Once identified, the relevant criminal prosecutions could be instituted.

[28] Mr *Boulle* also referred me to *Larsens Division of BTR Dunlop Ltd v National Union of Metalworkers of SA and Others* (1992) 13 ILJ 1405 (T). This case involved the grant of a final interdict, including a perimeter restriction, albeit on a more restricted basis than the interim relief. In my view the case is distinguishable from the present matter because it regarded the respondents as being culpable because

they did not oppose the relief sought on the return date. No consideration was given to the principles underlying the grant of a final order against persons of whom no unlawful conduct was alleged.

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[29] I have considered the judgment of Budlender AJ (as he then was) in *City of Cape Town v Yawa and Others* [2004] 2 All SA 281 (C) where he refused an application to interdict unnamed persons who may in the future seek unlawfully to occupy certain property, without the consent of the owner. The interdict was refused both because the respondents were not identified and because they did not constitute an ascertainable or identifiable group of persons properly before the court and against whom an effective order could be made. Significantly, he referred to *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) where Conradie J, when referring to the grant of interdicts against unnamed persons, stated that such an interdict 'would have the generalised effect typical of legislation. It would be a decree and not a Court order at all.' I agree.

[30] In the present case there are undoubtedly students (I would venture to suggest the overwhelming majority of them) who vehemently oppose the use of violence and causing damage to the applicant's property. The suggestion that they have been interdicted by the High Court from behaving unlawfully and requiring them to observe a perimeter interdict may well invoke a sharp reaction of indignation. Properly so, in my view, because no allegations have been made against them specifically. Accordingly they cannot be viewed as an identifiable group – the

commonality of being students being wholly insufficient to form a basis for collective responsibility.

[31] The applicant has, in any event, an alternative and ordinary remedy to rein-in the exuberance of the other students. Proper security and surveillance measures will ensure the future identification of wrongdoers. They can then be prosecuted. The short-cut of a blanket interdict, and reliance on a contempt application is no less difficult to achieve than a criminal prosecution.

[32] What if more student demonstrations take place after a blanket interdict is granted? Are all students served with the order to be charged. Clearly, that would be untenable. They would each have to be identified as having acted unlawfully. If that can be done they can be criminally charged. As unpalatable as a police presence on the campus of a university may be to both staff and students, when violence is adopted as a form of demonstration, the police services have a duty to intervene to protect life and property.

[33] In the result I make the following order :

'The rule nisi granted against the fourteenth respondent on the 18th February 2016 is discharged.'

Dates of hearing : 19th May 2016 and 2nd June 2016

Date of judgment : 27th June 2016

For the Applicant : Mr A Boulle (instructed by NSG Attorneys c/o Stowell & Co)