IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C 362/98

DATE: 26-3-1999

In the matter between:

WARNER LAMBERT SA (PTY) LTD Applicant

and

THE CHEMICAL WORKERS INDUSTRIAL First and Further Respondents

UNION & OTHERS

JUDGMENT

BASSON, J:

[1] The applicant approached this Court on 5 August 1998 for an urgent interim interdict in respect of alleged unlawful conduct on the part of the individual respondents (its employees) committed during the course of strike action at the applicant's premises.

[2] The conduct allegedly constituted mainly the blockading of the various entrances or exits to or from the applicant's premises and the preventing of access to and egress from the said premises.

[3] On 5 August 1998 the conduct was allegedly such that the employees working that day were prevented from leaving the premises after the working day had ended. These alleged offences were actions committed in the course of a lawful strike.

[4] A rule nisi was granted on 5 August 1998 on the basis of the brief founding affidavit supplemented by oral evidence.

[5] Before the return day, the applicant supplemented its founding papers to deal with the issues more fully and to correct certain errors occasioned by the fact that the application was brought as one of urgency.

[6] Proper service of the papers on the individual respondents in this matter had taken place.

[7] On the return day, 10 September 1998, a final interdict was granted by consent. The consent was given at Court on the morning of the return day.

[8] The issue of costs, however, was not agreed and was left over for determination at a later date.

[9] Subsequently, the respondents filed opposing affidavits in support of their opposition on the question of costs and the applicant filed papers replying thereto.

[10] The applicant seeks a final order in respect of costs only against those individual respondents against whom it had evidence of personal involvement in the misconduct complained of.

[11] In terms of section 162 of the Labour Relations Act, 66 of 1995 ("the LRA") I have a very wide discretion in terms of which I may make an order for the payment of costs according to the requirements of the law and fairness.

[12] Section 162(2) reads as follows:

"When deciding whether or not to order the payment of costs, the Labour Court may take into account-

(b) The conduct of the parties -

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court."

[13] The principles relating to the granting of an order in terms of the law and fairness was laid down in the leading decision of NUM v Ergo 1992 (1) SA 700 (A) in particular at 738A-G:

"The general rule of our law is that in the absence of special circumstances costs follow the event, is a relevant consideration however it will yield where considerations of fairness require it."

[14] In the Ergo judgment some factors militating against an award of costs on the basis of considerations of fairness were set out. Some of these factors identified were that parties come to the door of the Court in pursuing their disputes and this may well lead to settlement and the role of the Court in such settlement of labour disputes should not be under-estimated. The Appellate Division also emphasised the fact that there might be an

ongoing relationship between the parties and that unnecessary punitive costs orders may adversely affect this relationship.

[15] In the present matter the respondents conceded to the order being made a final order of Court on 10 September 1998. The question is, in the light of policy considerations, whether the Court should re-enter the merits of the application also in regard to the disputes of fact on the papers. In this regard, an informative decision of the Full Bench of the High Court on appeal in Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd 1996(3) SA 692 (CPD) at 700G-H, held as follows:

"Where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs."

And at page 701B-C:

"Costs must be decided on broad general lines and not on lines that would necessitate a full hearing of the merits of a case that has already been settled. However, the decision as to costs cannot be looked at in isolation from the merits. The Court's decision indeed would in the normal course largely be based on whether or not the parties seeking costs would have been successful on the merits."

[16] In the Gamlan judgment the Court determined that the respondents in that case were entitled to their costs up until the acceptance of the tender which accorded them substantially the relief they had been seeking in the application. Essentially the Court found they were successful in obtaining that relief as a direct result of having launched the application (at page 703C-E):

"In these circumstances can appellants be heard to say that they should not be responsible for all costs incurred up to that stage. In my view they cannot avoid the consequences of their actions and the Court a quo was correct in its approach that they are to pay these costs."

[17] In coming to a decision on an order as to costs, it has been held also by the Labour Court in judgments such as Call Guard Security Service (Pty) Ltd v Transport and General Workers Union & Other, 1997(18) ILJ 38 LC (at 388E-392B) that:

"The principles of law and fairness must be weighed equally and that in contemplating the dictates of fairness, regard must be had to a wide range of factors."

[18] I do not believe that these factors are a numerus clausus and accordingly all factors that might be relevant in

coming to a determination in regard to a costs order must be taken into account.

[19] As far as the factor of a possible settlement of disputes are concerned in bringing such disputes to the door of the Court, it would appear that this consideration does not apply with equal force in urgent applications for interdicts against unlawful actions, because there is in reality no bona fide underlying labour dispute which the Court has to decide, but the Court merely has to decide the question of the alleged unlawful conduct on the part of the respondents.

[20] Another factor that the Court may legitimately take into account is the conduct of the applicant during the duration of the strike.

[21] There are no facts in the present matter which tend to show any provocative conduct on the part of the applicant which played a role in the strike action.

[22] As far as the merits of the matter are concerned, it would appear that the fact that the respondents embarked upon a blockade were not denied, but the fact that they also partook in assaults and threats were, to an extent, denied.

[23] The fact that on 13 August 1998 there were further acts of misconduct committed by at least some of the seven respondents who are being identified as the culprits in the present matter was also not denied on the papers.

[24] A factor in favour of the respondents, however, is the fact that the misconduct appeared to cease after the rule nisi was issued on 5 August 1998, and although the strike continued up until 25 August 1998, apart from 13 August 1998, no further acts of misconduct were alleged. It can accordingly be said that the extent of harm committed by the blockade was not excessive in the circumstances of this matter.

[25] This is not to say that the Court will condone any unlawful acts committed in the conduct of a lawful strike. The alleged perpetrators or culprits can, of course, also be subjected to disciplinary hearings by the applicant concerned and this can also send a message to the culprits or to those who may wish to perpetrate any future acts of misconduct during strikes, that this will not be tolerated.

[26] In the present matter, the applicant's legal representative informed the Court that no such steps will be taken

against the seven individual respondents responsible for these actions and that a costs order will be seen to be a sanction and act as a deterrent against future unlawful conduct.

[27] I also have to take into account the continuing relationship between the parties when deciding the issue of a costs order. It would appear in the present matter that such continuous relationship is indicated.

[28] I believe that, in weighing up all the factors referred to above, there is a further factor and that is the question whether the applicant should have given more time to the respondents to consider their unlawful actions before approaching this Court for relief.

[29] However, in the circumstances of the present matter I believe that the conduct of the individual respondents was such that, although it is always advisable to grant persons who commit offences an opportunity to desist, the urgency pertaining to the situation (especially in regard to the blockade of the gates and the fact that the employees were not allowed to leave the premises) appears to have been such that the urgency justified the bringing of the application as a matter of extreme urgency.

[30] Taking into account all of the above factors, especially the factor that the seven respondents were engaged in unlawful conduct of a serious nature, I am of the view that the respondents, also as a deterrent to future acts of misconduct, should pay the costs of the application.

[31] However, in the interests of fairness, the respondents are to pay the costs only in regard to the application for an interim interdict as at 5 August 1998 on a party and party basis.

[32] In the event, I make the following order:

The individual respondents set out in Schedule 1 (as amended) to the papers (at pages 53-54), that is, Mr Bradley Van der Westhuizen; Ms Caroline Brown; Mr Selwyn Samuels; Ms Charlene Booysens nee Cupido; Mr Fahiem Halifax; Mr Claude Overmeyer and Mr Henriko Botha are to pay the costs of the application for a rule nisi on 5 August 1998, jointly and severally, the one paying the other to be absolved.

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BASSON, J

Mr Harrison from

Fonnenberg, Hoffmann & Galombik

Jason Whyte from

Chennells & Albertyn

26 March 1999

Ex tempore