IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case Number C380/2007

In the matter between:

NATIONAL UNION OF MINEWORKERS **APPLICANT**

and

BLACK MOUNTAIN – A DIVISION OF ANGLO

OPERATIONS LIMITED **RESPONDENT**

JUDGEMENT

BASSON, J

3) This is an urgent application for an order –

(i) declaring that the notice of lock-out issued to the Applicant and its members by the Respondent at 17H15 on 11 July 2007 to be invalid and of no force and effect;

(ii) declaring that the Respondent's lockout of the Applicant's members with effect from 6H00 on 14 July 2007 to be unprotected under section 68 of the Labour Relations Act 66 of 1995 (hereinafter referred to as the "LRA");

(iii) interdicting and restraining the Respondent forthwith from continuing with the lock-out;

(iv) directing the Respondent to permit all of the members of the Applicant who have been locked out in accordance with the lock-out to return to work;

(v) declaring that all of the Applicant's members who have been precluded from working at the Respondent's operations as a consequence of the aforesaid lock-out are entitled to be remunerated as if they had worked their normal shifts during the period of the lock-out.

4) In addition hereto, the Applicant also sought an order declaring that all the acceptance forms signed by members of the Applicant who have elected to resume employment to be void and of no effect and to declare that certain clauses in the acceptance form are unlawful in that they constitute an invasion of the individual worker's right to strike and

are in contravention of the provisions of section 5(3) of the LRA. In its reply the Applicant indicated that it no longer sought these orders in respect of the acceptance forms. As a result the only issue that remained to be decided on the papers was in respect of the legality of the lock-out.

BACKGROUND TO THIS DISPUTE

5) I do not intend referring to the background to this dispute in much detail in light of my conclusion that the matter is not urgent and that it should accordingly be struck of the roll. Suffice to briefly point out that the parties have for some time been locked in a dispute about the wage gap between certain grades in the bargaining unit. In an attempt to find a solution to this dispute, it was initially agreed that the parties would proceed with a job evaluation programme whereby all the positions within the bargaining unit would be evaluated. The parties were, however, not able to agree on an appropriate job evaluation programme or system which would be used to assist in determining a broad-banded job structure for all jobs in the bargaining unit.

6) In September 2005 the Respondent proposed that the so called “JE Manager” system be used in the job evaluation exercise in an attempt to close the wage gap between level 1 and C1. The parties could not

agree on this evaluation system. Ultimately the Respondent proposed that the so-called “Proudfoot Organizational Alignment” system be used. This seemed to be acceptable to the union. The parties later came to refer to this system as the “In die Kol”- project. Unfortunately the “In die Kol” project failed and in October 2006 the Respondent took a further initiative and introduced the so-called “Career Development System” (hereinafter referred to as the “CDS”) to progress the outcomes which it had hoped the “In die Kol” project would produce. Again the parties could not resolve the longstanding and ongoing dispute between them and on 15 December 2007 the Applicant declared a dispute. It appears from the minutes of the meeting held on 15 December 2006 that the Applicant had informed the Respondent that they were “no longer prepared to take the immense pressure from there (sic) members regarding the non-delivery of this project. The members gave them a mandate in October to declare a dispute”.

7) On 31 January 2007 the Applicant delivered a letter to the Respondent in which it formally declared a dispute in respect of the CDS. Two further dispute meetings were held between the disputing parties in accordance with the Recognition and Procedural Agreement whereafter the dispute was referred to the CCMA. The referral form described the dispute as one relating to the “In die Kol/CDS”. A

certificate of non-resolution was issued on 17 May 2007. After the mandatory "*cooling off period*" of 5 days was observed, a strike notice was issued. Members of the Applicant embarked on protected strike action on 17 June 2007.

8) According to the Applicant's papers the strike lasted until 6 July 2007 when Mr. Vass (the deponent of the founding affidavit and the full-time shopsteward of the Applicant) informed Mr. Van der Mescht (the Respondent's Employee Relations Manager) and Mr. Hans Botha (the Human Resources Manager) that the Applicant was "*suspending*" the strike. The founding affidavit further states as follows: "*The parties had not yet reached agreement, but the return to work signaled intensified attempts by the Applicant to negotiate a settlement*." It was contended by the Respondent that Vass had informed Van der Mescht (the deponent of the answering affidavit) that "*[o]ns kom net terug werk toe sodat die manne se mae weer kan vol word. Dan sal ons weer met ons dinge begin*".

9) A written lock-out notice was issued by the Respondent on 11 July 2007. In this notice the Respondent demanded, *inter alia*, the unconditional acceptance of the CDS. This demand corresponds with the dispute which the Applicant had referred to the CCMA and in respect of which a non-resolution certificate was issued. I interpose

here to point out that it was the Respondent's case that the lock-out was lawful in light of the fact that –

(i) more than 48 hours notice of the commencement of the lock-out was given;

(ii) the demand in relation to the lock-out was set out clearly in the notice; and

(iii) the demand was in respect of the same dispute that was referred to the CCMA. In this regard the notice stated that the lock-out was for the purpose of compelling the employees to accept this demand and was in response to the strike over the same issues which had been ongoing for three weeks and which had not been abandoned. The lock-out was further in respect of the employees in the bargaining unit.

9) It was, however, the case for the Applicant that the lock-out was unlawful and argued that a lock-out cannot be resorted to after a strike had ended or, put differently, in circumstances where there is no longer a refusal to work.

10) After the commencement of the lock-out the respondent made an offer to all the employees in the bargaining unit. In terms of this offer the

Respondent offered to all employees to accept the CDS as set out in the lock-out notice and to return to work in full and final settlement of the CDS dispute. Those employees who timeously accepted the offer would receive 50% of their basic wages that they had lost as a result of the lock-out that had commenced on 14 July 2007. It was common cause that some of the members of the Applicant had accepted the offer.

URGENCY

11) From the aforegoing it is clear that the lock-out notice was issued on 11 July 2007 with effect from 06H00 on 14 July 2007. What is, however, also clear is that the present urgent application was only filed with this Court on 30 July 2007 which is approximately three weeks after the lock-out notice was issued to the members of the Applicant. Moreover this application was brought on 48 hour's notice.

12) It is trite that an applicant who approaches this Court on an urgent basis must make out a case for urgent relief on the papers in sufficient particularity. This much is clear from Rule 8 of the Rules of the Labour Court which expressly states that a party that applies for urgent relief must file an application that complies with the requirements of Rule 7(1); 7(2); 7(3) and if applicable 7(7) of the Rules. Rule 7(2) expressly

requires that the affidavit in support of the application *must* contain the following:

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case; and

(c) if a party brings an application in a shorter period that that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

13) Urgency in itself does not relieve a party from this obligation and the Applicant should, in as much detail as possible, place such facts that are necessary before the Court and which will enable this Court to decide whether the forms and service provided for in the rules should be dispensed with.[1] Only once an applicant has persuaded the Court that sufficient grounds exist which necessitate a relaxation of the Rules and ordinary practice, will the Court proceed to consider the matter as one of urgency. The extent to which the Court will allow

[1] See *Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 *ILJ* 372 (W) at 387I: "An applicant who seeks relief by way of notice of motion should put all the facts, in as much detail as possible, before the Court. The mere fact that an application is urgent and urgent relief is sought does not relieve an application of this duty."

parties to dispense with the Rules relating to time periods will depend on the degree of urgency in the matter.[2]

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[2] See the well-known and often quoted decision in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) where the Court set out the principles as follows: "Undoubtedly the most abused Rule in this Division is Rule 6 (12) which reads as follows:

"12 (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of the application under para. (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".

Far too many attorneys and advocates treat the phrase "which shall as far as practicable be in terms of these rules", in sub-rule (a) simply pro non scripto. That this phrase deserves emphasis is apparent also from the judgment of RUMPFF, J.A. (as he then was), in Republikeinse Publikasies (Edms.) Bpk. v Afrikaanse Pers Publikasies (Edms.) Bpk., 1972 (1) SA 773 (AD) at p. 782B. Once an application is believed to contain some element of urgency, they seem to ignore (1) the general scheme for presentation of applications as provided for in Rule 6; (2) the fact that the Motion Court sits on Tuesdays through F to Fridays; (3) that, for matters to be on this roll on any particular Tuesday, the papers must be filed with the Registrar by 12.00 noon on the preceding Thursday; (4) that the time of day at which the Court commences its daily sittings is 10.00 a.m. and that, when it has adjourned for the day, the next sitting commences on the next day at 10.00 a.m.

These practitioners then feel at large to select any day of the week and any time of the day (or night) to demand a hearing. This is quite intolerable and is calculated to reduce the good order which is necessary for the dignified functioning of the Courts to shambles. Frequently one reminds counsel of certain basic matters, which I shall detail presently, only to be met with the answer that they and their attorneys are simply following practices which have arisen in the course of time. I am not convinced that this is so. I do not think that the majority of the members of the Bar or Side Bar follow such practices as I shall presently show with reference to the motion roll presently before Court.

For the sake of clarity I am going to set forth the important aspects of "urgency". In doing so I shall not deal with those ex parte applications which fall under Rule 6 (4). Urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court. The following factors must be borne in mind. They are stated thus, in ascending order of urgency:

1. The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.
2. Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.
3. Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10.00 a.m. or for the same day if the Court has not yet adjourned.

14) In the present matter the founding affidavit is devoid of any explanation of the reasons for urgency and why urgent relief is necessary.[3] It is also not sufficient to rely on an argument based upon implications and deductions which may be made from allegations contained in the affidavit that the matter is urgent.[4] In fact, the

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4. Once the Court has dealt with the causes for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.
Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

[3] See also the decision in *Mbaru & Others v Snacktique (Pty) Ltd* [1997] 6 *BLLR* 767 (LC) at 768D where the Court held as follows: "It appeared that the application was fatally flawed because the founding affidavit did not contain (under oath) the reasons for urgency and why urgent relief was necessary. In other words, the urgent application did not comply with the provisions of rule 8 of the Rules of Court".

[4] See *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 493A – G: "Sub-rule (12) provides that the Court may dispense with the ordinary notice generally required for applications by way of notice of motion in urgent applications. The Rule requires the applicant seeking such indulgence to set forth explicitly the circumstances which he avers render the matter urgent and also to forth explicitly the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. The practice in this Division, and in my experience also in other Divisions, has been for a petitioner seeking to rely on the provisions of this Rule to include a reference in his affidavit to the urgency of the matter and to ask the Court explicitly to dispense with the requirement demanded of an ordinary notice of motion. **It has not been the practice to rely simply on arguments based on implications and deductions which may be made from allegations contained in the affidavits, and to my mind the Rule contemplates a request to the Court to treat the matter as one of urgency and to condone the non-compliance with the normal procedure on notice prescribed earlier in the Rule.** True, a mere request for the matter to be treated as one of urgency is not in itself sufficient, but facts must also be laid before the Court to support the allegation that the matter is one of urgency……. I am not persuaded on the papers presently before the Court that I should accede to this argument, more particularly when Mr Smalberger has pertinently taken the point of non-compliance with the Rule. I regard it as desirable that an applicant seeking to dispense with the ordinary procedure should set out in his affidavit that he regards the matter as one of urgency, and should refer explicitly to the circumstances on which he bases this allegation and the reasons why he claims that he could not be afforded substantial relief at the hearing in due course." (Own emphasis.)

founding affidavit does not address the question of urgency at all: Apart from prayer 10 of the Notice of Motion in terms of which condonation is sought for the Applicant's non-compliance with the relevant provisions of the LRA and the Rules of this Court, no case has been made out on the papers as to why there should be a departure from the normal rules. More in particular the Applicant does not event attempt to explain why this application was not brought to this Court shortly after the lock-out notice was issued. It is trite that an Applicant cannot create its own urgency by delaying bringing an application.[5] This Court will not come to the assistance of an applicant who has delayed approaching the Court.[6] See *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 *ILJ* 1081 (LC) at 1092 paragraph [39] where Van Niekerk, AJ stated the following:

> "The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that

[5] See *Schweizer Reneke Vleis Mkpy (Edms) Pbk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T) at F11 - 12: "Volgens die gegewens voor die Hof wil dit vir my voorkom dat die applicant alreeds vir meer as 'n maand weet van die toedrag van sake waarteen daar nou beswaar gemaak word. Die aangeleentheid het slegs dringend geword omdat die applikant getalm het en omdat die tweede respondent, soos die applikant lankal geweet het of moes geweet het…. Al hierdie omstandighede in ag genome is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die Hof op hierdie stadium as 'n saak van dringendheid moet ingryp nie. Ek is dus, in die omstandighede, nie bereid om af te sien van die gewone voorskrifte van reël 6."

[6] See in this regard *Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV* 2006 (3) SA 92 (C) at paragraph 47.

afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits or any time-limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court. For these reasons, I find that the union has failed to satisfy the requirements relating to urgency."

15) As already indicated the Applicant in the present matter has launched this application on 48 hours notice to the Respondent approximately three weeks after the lock-out notice was issued to the employees. Yet the Applicant does not tender any explanation for the delay in its founding papers. I am in light of the aforegoing of the view that the Applicant has created its own urgency by the substantial delay. Furthermore, the application does not comply with the provisions of Rule 8 of the Rules of this Court which spells out in clear terms what is expected of an Applicant when he or she approaches this Court on an urgent basis. Consequently, I am of the view that the application falls to be struck of the role on this basis alone.

COSTS

16) In respect of costs it was argued by the Respondent that costs should be awarded including the costs of two counsel. On behalf of the Applicant it was argued that a costs order will be inappropriate in light of the fact that there is an ongoing relationship between the parties.[7]

17) It is indeed so that parties before this Court frequently have an ongoing relationship that will have to survive long after the dispute has been entertained by the Court. In exercising the discretion whether or not the general rule should be followed namely that costs follow the event, it is necessary to have proper regard to all the facts and circumstances including but not limited to the conduct of the parties in bringing this application on an urgent basis before this Court. I am of the view that a cost order is appropriate in the present circumstances: The Applicant has approached this Court on an urgent basis where clearly it has created its own urgency. Moreover, its papers are fatally defective in the sense that it contains no explanation for delaying the application until now.

18) In the event the following order is made:

[7] See in this regard *NUM v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A) at 738F 0 739G.

The application is struck off the role with costs (including the costs of two counsel).

BASSON, J

DATE OF HEARING: 1 AUGUST 2007

DATE OF JUDGEMENT: 2 AUGUST 2007

FOR THE APPLICANT:

P Gamble SC

H Rabrin-Naicker

Instructed by Cheadle Thompson & Haysom Inc

FOR THE RESPONDENT:

M Wallis SC

ML Norton

Instructed by Edward Nathan Sonnenburg