IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NO: D162/09

In the matter between:

APPOLO TYRES (PTY) LTD (FORMERLY	
DUNLOP TYRES INTERNATIONAL	
(LADYSMITH) (PTY) LTD)	APPLICANT
AND	
NATIONAL UNION OF METAL	
WORKERS OF SOUTH AFRICA ("NUMSA")	1ST RESPONDENT
SHADRACK SITHOLE	2ND RESPONDENT
AMERICAN XABA	3RD RESPONDENT
SIFISO MLAMBO	4TH RESPONDENT
PHILANI KHOZA	5TH RESPONDENT
BONGANI ZULU	6TH RESPONDENT
MUSA MSIMANGA	7TH RESPONDENT
ALFRED MCHUNU	8TH RESPONDENT
NHLANHLA MADONSELA	9TH RESPONDENT
THEMBA NGUBANE	10TH RESPONDENT
ELLIOT MASIMULA	11TH RESPONDENT
THOKOZANE DLADLA	12TH RESPONDENT
NKOSINATHI SHANDU	13TH RESPONDENT
INDIVIDUAL RESPONDENTS	

JUDGMENT

Molahlehi J

Introduction

[1] This matter concerns an application for costs arising from an interdict which the applicant had brought against the respondents. The interdict related to an unprotected industrial action which NUMSA and its members embarked upon. The applicant brought an urgent application in terms of which it sought a declarator that the respondents had embarked on an unprotected strike including an order interdicting and restraining the respondents from continuing with and participating in any conduct in furtherance of the unprotected strike.

The parties

[2] The applicant is Apollo Tyres (Pty) Ltd formerly known as Dunlop Tyres International (Ladysmith) (Pty) Ltd, a company duly registered in terms of the company laws of South Africa, carrying on the business of manufacturing of new tyres and is a member of the New Tyres Manufacturers Bargaining Council.

[3] The first respondent is the National Union of Metalworkers of South Africa ("NUMSA"), a trade union duly registered in accordance with the Labour Relations Act, 66 of 1995, and a majority union at the applicant's work place. Mr Mbuso Mchunu and Mr Thulani Ngubane are the local organizer and

regional organizer of NUMSA respectively. The further respondents are both members of NUMSA and its shop stewards at the workplace of the applicant.

Background facts

[4] As indicated above the applicant is a manufacturer of new tyres for the automotive industry and at the time dispute arose employed some 900 (nine hundred) employees in total at its Ladysmith plant. The applicant used to operate a 24 (twenty) hour, 7 (seven) days per week manufacturing operation. Because of the economic down turn in the purchase of new cars the applicant suffered a down turn in the volume required by the tyres market at large. According to the applicant it was because of this economic down turn that it was forced to institute a *"lay off"* on Sundays so that it could operate only six days a week being Monday through to Saturday, both days inclusive. This was also in an attempt to lower fixed overhead costs and to lower fiscal cost per unit and maintain financial viability and to retain employment of its employees.

[5] In protest against the implementation of the *"short time"* and *"lay off"* the respondents embarked on an industrial action during November 2008. In response to that industrial action the applicant launched an urgent application under case number D 837/08, which application was set down for hearing on 19th November 2008. However, that application was adjourned *sine die* on 19th November 2008 to afford the parties an opportunity to seek an amicable solution to their problem.

[6] On Friday, 23rd January 2009 the NUMSA referred a facilitation process to the CCMA in terms of section 189A of the Labour Relations Act of 1995, read with the provisions of clause 9 of the 2007/2010 Main Agreement of the New Tyres Manufacturing Bargaining Council. The applicant contends that at the time NUMSA referred the matter to the bargaining council, it had not issued notice indicating an intention to proceed with retrenchments as a result of the *"lay off"* and *"short time."*

[7] During November 2008, members of NUMSA embarked on an industrial action in protest against the implementation of *"short time"* and *"lay off"* which the applicant contended was unprotected and accordingly launched an urgent application under case number D837/08. This application was set down for hearing on 19th November 2008. The parties engaged in negotiations closer to the date of the hearing and accordingly the matter was put on hold pending the out come of the negotiations and the urgent application postpone *sine die* on 19th November 2008.

[8] On Friday, 23rd January 2009 NUMSA made a referral in terms of section 189A of the Labour relations Act to the CCMA read with the provisions of clause 9 of the 2007/2010 Main Agreement of the bargaining council. The applicant contended that the NUMSA launched the referral in terms of section 189A despite the fact that it (the applicant) had not prior to that referral given notice in terms of Section 189 (3), of an intention to proceed with a retrenchment exercise as a result of the *"lay off"* and *"short time."* The facilitation referral was according to the applicant not made in compliance with the provisions of section

189A (3) of the Labour Relations Act but on the basis of clause 9 of the Main Collective Agreement. Section 189 (3) provides:

> *"The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if-*
>
> *(a) The employer has in its notice in terms of section 189 (3) requested facilitation: or*
>
> *(b) Consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the commission within 15 days of the notice."*

[9] The CCMA set down the facilitation meeting despite the non compliance with the requirements of the provisions of section 189(3) of the Labour Relations Act. The meeting was facilitated by the commissioner of the CCMA on 4th February 2009, under CCMA case number KNDB 721-09. At that meeting the jurisdiction of the CCMA to entertain the dispute was contested by the applicant as the facilitation was not held pursuant to a section 189 (3) notice of the Labour Relations Act. The commissioner apparently refused to make a ruling on the jurisdictional point raised by the applicant.

[10] On the 27th January 2009, the respondents embarked on another industrial action and as result thereof the applicant re-instituted its urgent application which had been adjourned under case D837/08 on the 28th January 2009. That application

was however, dismissed on the basis that insufficient notice, being less than 48 hours was given to the respondents.

[11] The strike was resolved on 3rd February 2009, with the parties concluding an agreement in terms of which the respondents undertook not to engage in further unprotected industrial action and to ensure that they follow a dispute procedure should industrial action be contemplated.

[12] On 4th February 2009 the applicant issued a notice in terms of section 189(3) of the Labour Relations Act in terms of which it gave notice of possible retrenchments. The applicant contended that it was forced to consider the possibility of retrenchment because the respondents were unwilling to accept the "lay off and "short time" proposal it had made to address the financial difficulties it had found itself in.

Certificate of outcome

[13] The CCMA facilitator issued the certificate of outcome under case number KNDB721-09, indicating that the dispute remained unresolved as at 17th February 2009 and advising that the dispute was to be referred to the Labour Court. The applicant took the view that the certificate of outcome was invalid and of no force in relation to the referral by NUMSA. Based on this view and on the same day of receipt of the certificate, the applicant addressed a letter to NUMSA informing it that the certificate of outcome does not give employees any rights to embark on industrial action. In the letter the applicant further noted

that any industrial action based on the certificate of outcome will be unprotected and unlawful and will be interdicted.

[14] On 20th February 2008, NUMSA addressed a letter to the applicant requesting it to meet with the shop stewards for the purposes of:

> *"1. Issue notice for volunteers to be retrenched. This is only affecting Ladysmith and not Sydney Road operation.*
>
> *2. Agree with the union who will be affected by retrenchment. This is the list of employees excluded from volunteer list.*
>
> *3. We demand that this must happen within 48 hours from your receipt of this letter"*

[15] On the same day the applicant had also addressed a letter to NUMSA noting that an agreement was reached with the CCMA that it would be requested to provide Ms Hilda Grobler as a facilitator further to its notice in terms of Section 189 (3) dated 4th February 2009. In addition the applicant indicated in the same letter that the demands contained in NUMSA's letter of the 20th February 2009 headed "48 hours" would be dealt with at such facilitation.

[16] On 5th March 2009, NUMSA issued the applicant with notice of intention to embark on a strike action within 48 hours and would rely for that purpose on the certificate of outcome which was issued by the CCMA on 17th February 2009. In response to this notice the applicant indicated to NUMSA that the CCMA had

no jurisdiction to issue the certificate and that any strike action flowing from that certificate would be unprotected.

[17] In the mean time the CCMA had confirmed that facilitation process referred by the applicant in terms of section 189A was scheduled to proceed on 21st March 2009. The applicant called on NUMSA for this reason to call off its planned strike action.

[18] The strike action by members of NUMSA commenced on the 7th March 2009 and two days thereafter the attorneys of the applicant addressed a letter to NUMSA indicating the intention to launch an interdict interdicting the unprotected strike. There reports of violence by strikers and intimidation on those of the employees who whished to work including damage to property.

The law governing costs

[19] The issue of costs is governed by the provisions of section 162 of the LRA, which provides as follows:

> *"(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.*
>
> *(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –*
>
> *(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and*

(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."

[20] In *Jacob Jaure v Regent Life Company Ltd, unreported judgment case number JS 268/06* this Court following on the authority in *Callgaurd Security Service (Pty) Ltd v Transport & General Workers Union & Others (1997) 18 ILJ 380 (LC),* held that costs in this Court do not automatically follow their results because of provisions of section 162 of Labour Relations Act 66 of 1995 which, provides that the Court may make an order for the payment of costs, according to the requirements of the law and fairness. See also *SAMWU and another v SA Local Government Association, unreported judgment case number C229/07* and *The City of Cape Town v SAMWU (2008) 7 BLLR 618 (LC).*

[21] In *Callgaurd Security Service* Zondo AJ, as he then was, in considering the provisions of s 162 of the LRA said:

> *"It seems to me that what the Act has decreed is that whether or not this court should or should not make an order of costs in a particular matter depends on the "requirements of the law and fairness." In my view it is therefore important to appreciate that consideration should be given not only to the requirements of the law in disregard of the requirements of fairness nor should consideration be given only to the requirements of fairness in disregard to the requirements of the law."*

[22] In dealing with the issue of costs under section 17(12) (a) of the 1956 Labour Relations Act, which in all respect reads the same as the present section 162 of the Labour Relations Act of 1995, the Court *in National Union of Mine Workers v East Rand Gold and Uranium Co 1992 (1) SA 700 (A)* provided guidelines to follow in considering the issue of costs. In that case Goldstone J stated that the following guidelines should be taken into account in considering whether or not grant costs:

> *"1. The provision that 'the requirements of the law and fairness' are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.*
>
> *2. The general rule of our law 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.*
>
> *3. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it, especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following*

passage from the judgment in the Chamber of Mines case supra at 77G-I commends itself to me:

"In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The industrial court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalised unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is bona fide. . . ."

4. *Frequently the parties before the industrial court will have an ongoing relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.*

5. *The conduct of the respective parties is obviously relevant, especially when considerations of fairness are concerned."*

[23] In dealing with the facts of the case the Court found that even though the NUM was a successful party, its conduct in the negotiations process led to justifiable

unhappiness and frustration on the part of the company. The other factor which the Court took into account was the fact that the issues raised by the parties in that case were of fundamental importance, not only to the parties, but to all the players in the important arena of industrial conciliation. And more importantly the Court took into account the fact that there was ongoing relationship between the parties. It was for these reasons that the Appeal Court in same way as the Court a quo did not make an order as to costs.

[24] In the present instance the essence of the case of the applicant is that cost order should be granted in its favour taking into account the conduct of NUMSA and its members particularly that of embarking on an unprotected strike after being so advised that the strike was unprotected because it was based on an invalid certificate issued by the CCMA. Another point made by the applicant in this regard is that NUMSA and its members continued with the unprotected strike even after that Court order was issued interdicting such strike. It is further argued that it was as a result of the unprotected strike action at the Ladysmith branch that the Durban branch also participated in a sympathy strike.

[25] Although there are good and strong merits in the points raised by the applicant regarding the conduct of NUMSA and its members which ordinarily would support the view that costs should be granted in favour of the applicant, I am however, of the view that granting of costs would adversely affect not only in the short and medium term but also in the long term the relationship building exercise which the parties have embarked upon. In this respect I have in particular noted that the CCMA has already appointed a commissioner to

facilitate the process. As I understand the process it will facilitate dialogue so that parties may gain an understanding of the underlying issues that may have led to the unwarranted behavior of NUMSA and its members. It is also my understanding that very often, unresolved conflicts and disputes or the perceived manner in which a conflict has been handled can lead to deep divisions between management and workers. Granting a costs order against the respondents would not in my view strengthen and capacitate the value adding and essential process which the commissioner has to undertake. I have also taken onto account in arriving at the conclusion that costs should not be awarded that the issues that gave rise to the conduct of NUMSA members are very emotive and sensitive and that a certificate of outcome had been issue by a CCMA commissioner which NUMSA and its members relied on in embarking on the industrial action, invalid as it may have been.

[26] In the premises, I make no order as to costs.

Molahlehi J

Date of Hearing : 18th June 2009

Date of Judgment : 29th September 2009

Appearances

For the Applicant : Mr Kevin Dass of Farrel and Associates

For the Respondent: Thanusha Hoodley of Brett Purdon Attorneys.