IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

NOT REPORTABLE

Case No D87/09

In the matter between:

MOTORVIA 1993 (PTY) LTD **APPLICANT**

and

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA PROTECTOR WORKERS UNION **FIRST RESPONDENT**

THOSE PERSONS MENTIONED IN ANNEXURE "A" **SECOND RESPONDENT**

JUDGMENT

VAN NIEKERK J:

[1] On 12 February 2009, this Court issued a rule nisi calling on the respondents to show cause why a final order should not be made, *inter alia*, declaring a strike by the third and further respondents to constitute an unprotected strike, interdicting them from participating in the strike and from committing acts of misconduct, and ordering the first and second respondents to take steps to ensure compliance with the order.

[2] On the return day, 20 February 2009, the applicant sought to have the rule confirmed. All of the respondents opposed the application, mainly on the ground that they denied the existence of any strike action

against the applicant. When the application for interim relief was heard on 12 February 2009, the respondents submitted an affidavit deposed to by Mr. Zack Mankge, an official of the first respondent. The affidavit contains a bare denial of any strike or go-slow, and seeks to explain poor productivity figures as a consequence of short time introduced by the applicant. In the answering affidavit filed on 19 February 2009, Mr. Mashalaba, the deponent, does not rely on this explanation, but resorts instead to what amounts to a bare denial of the existence of industrial action at the applicant's operations.

[3] Since the applicant seeks final relief, the application falls to be decided on the basis of the principles set out in *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A). This requires that where there is a dispute of fact, a final interdict should only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit, justify such an order. This rule is tempered by an exception in cases where the dispute raised by the respondent is not real, genuine or bona fide (at 634I - 635A).

[4] The applicant contends that its operations at the Durban Car Terminal and in the export department, long haul driver department and final line depot, have been affected by a strike in the form variously of a work stoppage, go-slows and overtime bans. The industrial action of which the applicant complains has a history. The applicant alleges that in the first week of September 2008, a go-slow was instituted, as a result of which drivers completed approximately half the number of normal trips per day. The respondents deny this allegation, and state that the drivers were given extra responsibilities which needed more time to execute. There is no attempt to explain, however, why the drivers only completed approximately half their normal trips.

[5] The applicant avers that in October 2008, 32 export drivers again engaged in a go-slow, achieving only half the number of trips that they were required to undertake. This allegation is not disputed by the

respondents, who allege that a two day strike occurred because the applicant refused to recognise the first and second respondents as representatives of their members employed by the applicant. There is no suggestion in the papers that the first and second respondent had complied with the relevant provisions of the Act prior to the commencement of the strike that they admit occurred in October.

[6] On 17 and 18 November 2008, the applicant alleges that the export drivers, the long haul drivers and the yard drivers engaged in a strike that resulted in a complete cessation of work. The respondents fail to deal with this allegation in their answering affidavit.

[7] The applicant avers that on 22 January 2009, Mr. Leslie Ntuli was dismissed for the theft of fuel. Approximately 80 to 100 long haul drivers ceased work and were joined by approximately 35 export drivers. The respondents dispute that a work stoppage occurred. The respondent alleges that 15 – 20 long haul drivers requested management to address them on the dismissal of Ntuli, and what would be expected of them should they find themselves in a situation similar to that of Ntuli. The respondents aver that no working time was lost during this incident.

[8] In their answering affidavit, the respondents do not deal with the applicant's averment that Mr. Esterhuizen, the human resources manager, spoke to the regional chairperson of TAWUSA at approximately 17h00 on 22 January 2009, requested him to come to the plant to deal with the strike, that Mr. Dlamini came to the depot, and that the striking employees returned to work at approximately 22h00 that night. In the absence of a denial, these facts must therefore be regarded as admitted. The respondents similarly fail to deal with a letter dated 23 January 2009 in relation to what the applicant termed unprotected industrial action, and warning that if it persisted, the applicant would seek an interdict in this Court.

[9] On 9 February 2009, the applicant avers that 60 long haul drivers stopped work and raised various grievances. During the course of the day, export drivers joined the strike. The strike itself is denied by the respondents, who state that they required management to address them on the dismissal of Ntuli. This denial stands in stark contrast to the terms of a settlement agreement concluded between the parties on 9 February 2009. The terms of the agreement include the following paragraph:

> *"The company undertakes not to take disciplinary action against the particular employees who engaged in industrial action on 9 February 2009. This concession shall not constitute a precedent for any future industrial action*."

This term, which is clear evidence of the existence of a strike on 9 February 2009, is not dealt with in the respondents' answering affidavit.

[10] On 10 February 2009, the export drivers and lashers on dayshift engaged in a go-slow. On the same night, the nightshift joined the strike. The respondents deny the strike, but do not dispute or otherwise deal with the drop in productivity figures set out in the founding affidavit. The respondents rely on Annexure "F" to the founding affidavit, an extract from a driver's log book completed by a Mr. Mlotshwa. The argument, as I understand it, is that the log book constitutes some form of misrepresentation or fabrication of the evidence, since it records that the vehicle concerned was taken for service on that day. The log book records that Mlotshwa went to McCarthy Toyota at 11h01, but provides no detail as to what Mlotshwa did until that time, nor why when he left McCarthy at 11h47, he did only one trip. The respondents' averment that the "absence of other log books is clear induction that they do not exist"(sic) is fatuous. On 16 February 2009, the applicant's attorney wrote to the respondents tendering copies of all of the relevant log books, and attached to the letter a summary of the log books, reflecting trips done by the drivers

concerned on 9, 10, and 11 February. The respondents have elected not to deal with this information.

[11] In short, the respondents answering affidavit largely constitutes a bare denial of the applicants averments, and in many respects simply fails to deal with central allegations relating to the existence of a strike. Having elected to respond to the applicant's averments with bare denials and in vague and non-specific terms, and having failed in many instances to respond to crucial averments, the respondents must live with the inevitable consequence of that strategy. I am satisfied that in these circumstances and having regard to the exception to the general rule applicable to factual disputes in applications for final relief, that a proper factual basis has been established for the relief that the applicant seeks.

[12] I am satisfied that the urgent; one of the undisputed consequences for the strike include the non-renewal of the applicant's contract with Toyota. The respondents did not contend that the applicant had failed to establish the remaining requirements for the granting of final relief.

[13] Finally, I deal with the issue of costs. The Act empowers this Court to make costs orders, subject to the requirements of the law and fairness. The guidelines remain those established in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A), where what was then the Appellate Division of the Supreme Court called attention to the prejudicial effect that a costs order may have on a collective bargaining relationship. To say that industrial relations at the applicant's operations have been strained in the last few months would be an understatement, and considered engagement by both management and the first and second respondents will be necessary. A costs order against the respondents may well impact negatively on this engagement. However, against this, I have to balance the conduct of the respondents. One of the fundamental tenets underlying the Act is the right to strike, and in particular, protection for those who exercise

that right against a number of consequences, including dismissal, that previously flowed from strike action. But protection is conditional on a strike meeting the substantive and procedural limitations established by the Act. The first and second respondents have, on their own version, resorted to strike action in circumstances where they have deliberately flouted the provisions of the Act. The first and second respondents, and their leadership, clearly regard the statutory preconditions to protected strike action as an inconvenient barrier to the exercise of economic power. On 23 January 2009, the first and second respondents were warned that in the event of further unprotected strike action, the applicant would seek an interdict, in which event a cost order would be sought.

[14] The conduct of the first and second respondents extends to the conduct of these proceedings. The respondents' answering affidavit, viewed as a whole, and constituting the bare denial that it does, is nothing less than a mendacious attempt by the union leadership to deny the existence of a pattern of unlawful industrial action that has clearly been initiated by the first and second respondents and that has served to disrupt labour relations at the applicant's plants since September 2008.

[15] In short, the conduct of the respondents both in relation to the events that give rise to these proceedings and in relation to the conduct of these proceedings, warrants a costs order.

I accordingly make the following order:

1. The rule nisi issued by this Court on 12 February 2009 is confirmed.
2. The respondents, jointly and severally, the one paying the other to be absolved, are to pay the costs of the proceedings on 12 and 20 February 2009.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of Hearing: 20-02-2009

Date of Judgment: 23-02-2009

Appearances:

For the applicant Adv G O Van Niekerk, SC

Instructed by Deneys Reitz Attorneys

For the First Respondent Adv F G Mdladla

Instructed by Ngcobo & Xulu Incorporated