REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA ,JOHANNESBURG

JUDGMENT

Reportable

Case number: J 1960/2013

In the matter between:

SOUTH AFRICAN AIRWAYS TECHNICAL (SOC) LTD **Applicant**

and

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION **First Respondent**

EMPLOYEES LISTED IN ANNEXURE "A" **Second Respondent**

Heard: **30 October 2013**

Delivered: **08 November 2013**

Summary: Protected strike. Urgent application to obtain interdict for non compliance with picketing rules. Return date. Rule nisi discharged. Costs awarded against the union.

JUDGMENT

PRINSLOO AJ.

Introduction:

[1] On 30 August 2013 and by agreement between the Applicant (SAAT) and the Respondents, this Court granted an interim interdict prohibiting the Respondent union (SATAWU) and its members employed by SAAT from *inter*

alia disrupting the normal activities of SAAT, assaulting, intimidating or harassing any employee or members of the public, participating in any unlawful conduct, damaging property that belongs to SAAT or any of its employees and forcing or compelling employees to participate in the strike action. Costs were reserved to be determined on the return date.

[2] The return day was 30 October 2013 and when the matter came before this Court, SAAT indicated that the strike action came to an end on 7 September 2013 and that the rule *nisi* should be discharged. The only issue this Court had to determine was the issue of costs. The Respondents opposed the granting of a cost order.

Brief history

[3] This Court has to determine only the issue of costs associated with the urgent application that was brought in August 2013. In determining the issue of costs and although not necessary to set out the facts in detail, it is necessary to consider a brief factual background to this matter.

[4] The strike action arose in the context of a deadlock between the parties on wages. A dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and was conciliated on 20 August 2013, but remained unresolved. A certificate of non-resolution was issued on 20 August 2013 and on 22 August 2013 SATAWU gave notice of its intention to commence strike action on 26 August 2013. The strike was protected.

[5] On 25 August 2013 and prior to the commencement of the strike, SAAT's employee relations specialist, Mr Mike Fatane, met with the SATAWU shop stewards to agree on picketing rules.

[6] The picketing rules were agreed to and it made provision *inter alia* that the Respondents would carry out the strike 25 metres away from SAAT's entrance.

[7] The strike commenced on 26 August 2013 and during the course of the day the Second and further Respondents (the striking employees) engaged in conduct that included the blocking of entrances and exits and intimidation of non-striking employees. This was in contravention of the picketing rules

agreed to. On 27 August 2013 SAAT's attorneys addressed a letter to SATAWU, setting out the incidents and requested SATAWU's urgent intervention. SATAWU was requested to communicate to its officials that these acts are unlawful and should stop with immediate effect, to convene a meeting with the striking employees and to require them to adhere to the picketing rules and to furnish an undertaking that the unlawful conduct would cease for the duration of the strike. SATAWU was warned in this letter that should the undertaking not be given, SAAT would approach this Court on an urgent basis and that a cost order would be sought against SATAWU. The SATAWU shop stewards subsequently gave an undertaking that there would be no unlawful conduct and accepted that should there be any, it would constitute a contravention of the picketing rules and that SAAT would be entitled to obtain an interdict. A second and further undertaking was later given.

[8] Subsequent to the undertakings an Afrox truck was turned away from SAAT's premises after it was refused access. The access to SAAT's premises was blocked and the South African Police Services (SAPS) intervened to a limited extent. At this point the SATAWU shop stewards denied that there was any unlawful conduct on the part of the striking employees and the SAPS indicated that they would not be in a position to enforce the picketing rules without a Court order.

[9] The conduct became worse and more serious between 27 and 29 August 2013 and included intimidation and threats of violence, destruction of SAAT's property, blockading the access and egress from SAAT's premises, burning of tyres and assault.

[10] On 29 August 2013 SAAT filed the urgent application at this Court seeking an interdict to restrain the Respondents from *inter alia* disrupting the normal activities of SAAT, assaulting, intimidating or harassing any employee or members of the public, participating in any unlawful conduct, damaging property that belongs to SAAT or any of its employees and forcing or compelling employees to participate in the strike action. The application was enrolled for hearing on 30 August 2013.

[11] The Respondents did not file opposing papers but instead agreed to the interim order this Court issued on 30 August 2013.

[12] On the return date the Respondents opposed the matter in respect of costs.

The arguments

[13] Ms Linda, for the Applicant, submitted that SATAWU should be ordered to pay the costs associated with the urgent application. The Applicant was not seeking a costs order against the Second and further Respondents. She argued that the provisions of section 162 of the Labour Relations Act[1] should be considered as well as the conduct of the Respondents.

[14] The argument was that picketing rules were agreed between the parties on 25 August 2013, on 26 August 2013 the Applicant's attorneys warned that the conduct was unlawful and in contravention of the picketing rules and requested SATAWU to intervene and to ensure compliance with the picketing rules, SATAWU subsequently gave undertakings that there would not be any further unlawful conduct but within hours from the undertaking, SATAWU denied the existence of any unlawful conduct and did nothing to ensure compliance with the picketing rules. SAAT had no other alternative but to approach this Court on an urgent basis as the Respondents failed to adhere to the picketing rules and SATAWU remained unresponsive to the Applicant's pleas for intervention and compliance. Ms Linda submitted that had it not been for the Respondents' conduct and had the Respondents complied with the picketing rules, this application could have been avoided.

[15] Ms Linda argued that despite the fact that the urgent application was not opposed and that there is a relationship that continues between the parties, there is no reason why costs should not be awarded in favour of SAAT. There were picketing rules and the Respondents' failure to comply with it, constituted persistent unlawful conduct.

[16] Ms Hanif for the Respondents submitted that the conduct of the Respondents is indeed an important consideration. She submitted that the urgent application was not opposed, the Respondents agreed to the interim order, SATAWU attempted to comply with the picketing rules and its shop stewards gave an undertaking that the strike would be controlled.

[1] Act 66 of 1995.

[17] Ms Hanif further submitted that the relationship between the parties is already damaged at this point and the relationship should be repaired. The relationship is an ongoing one and at this junction a cost order would damage the relationship even further. She submitted that each party should pay its own costs.

The legal principles applicable to costs

The general principles

[18] Costs should be considered against the provisions of section 162 of the Labour Relations Act[2] and according to the requirements of the law and fairness.

[19] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness become applicable.

[20] The requirement of law has been interpreted to mean that the costs would follow the result.

[21] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[22] In *NUM v East Rand Gold and Uranium Co Ltd* [3] the Court in considering the requirements of law and fairness with regard to the issue of costs, adopted the following approach:

> '*(a)* 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] Act 66 of 1995
[3] 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A).

(b) 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.

(c) Proceedings in the Industrial Court may not infrequently be a part of the conciliation process. This is a role which is designedly given to it.

(d) 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.

(e) The conduct of the respective parties is obviously relevant especially when considerations of fairness are concerned.'

[23] In *Wallis v Thorpe and another*[4] the Court held:

> In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The ordinary rule, ie that costs follow the result, is a factor to be taken into account, but it is not a determinative factor…….'

[24] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and* others[5] it was emphasized that:

> "……unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings."

Matters settled without hearing the merits

[25] The courts have awarded costs in instances where matters are settled without hearing the merits of the matter as the applicant in such a case was

[4] [2010] 31 ILJ 1254 (LC)
[5] 2012 33 ILJ 2117 (LC).

substantially successful and the broad general approach applied namely that costs be awarded in favour of such applicant.

[26] In *National Union of Mineworkers and Others v Coin Security Group (Pty) Ltd*[6] the Court was persuaded, after a matter became settled and the Court had to determine the issue of costs only, that on the facts the applicants would have been substantially successful had the matter proceeded to trial. The Court held that:

> "In a case such as this, where the merits have been settled, a court will adjudicate the question of costs on broad general lines and not on lines that would necessitate a full hearing on the merits of a case. Thus in *Jenkins v SA Boilermakers', Iron and Steel Workers' and Shipbuilders' Socie*ty, Price J held:
>
> > 'The concession in respect of the first claim admittedly disposes of the dispute on the merits. It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of the case in respect of which the merits have been disposed of by the acceptance of an offer in order to decide questions of costs only ... I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days or perhaps even weeks, trying dead issues to discover who would have won in order to determine the question of costs, where cases have been settled by the main claims being conceded ... When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation ....
> >
> > In my view the costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled.'
>
> The issue in *Roupell v Metal Art (Pty) Ltd and Another* also concerned the costs that should be awarded in respect of a matter that had been settled on the merits the day before the trial was meant to commence. Margo J, following the principle in Jenkins, decided that: 'I therefore do not propose to engage in a close scrutiny of the various issues of fact raised in the conflicting affidavits that have been filed, nor do I propose to conduct a full investigation into the

[6] 2011 (32) ILJ 137 (LC).

> legal arguments advanced by the parties. I intend to resolve this issue of costs on the basis of a broad general approach to the matter.' The court then being of the opinion that the application would have succeeded and applying 'the broad general approach' awarded costs against the defendant."

[27] In *Dladla v Council of Mbombela Local Municipality and Another*[7] the Court considered the issue of costs as the employer has, subsequent to the filing of the urgent application, uplifted the employee's 'special leave' and the reason for the urgent application fell away. The Court held that:

> " The award of costs is a matter which falls wholly within the discretion of the court. In coming to a conclusion, the circumstances of the particular case should be taken into consideration including but not limited to the conduct of the parties which may have a bearing on the question of costs.
>
> …. Where a party is successful, a disputing party would generally be entitled to costs. I have already alluded to the fact that I am of the view that the applicant would have been successful had the application to interdict proceeded on the merits. In the light of this fact, the applicant would have been entitled to an appropriate costs order. The merits of the application were, however, not argued for the reasons set out above. There is, however, a more compelling argument why costs should be awarded in favour of the applicant: Because the resistance to the claim was effectively withdrawn when the resolution (on 11 February 2008) was taken to suspend the applicant in terms of clause 9 of the contract of service, the need to seek an interdict fell away."

Costs in a strike context where there are picketing rules in place

[28] In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and others*[8] the employer approached this Court on an urgent basis to obtain an interdict as the individual respondents acted in breach of the picketing agreement. The respondents did not deny participating in the unlawful action and the Court held that and they had to bear the consequences of their actions. The fact that the employees had returned to work was irrelevant as the issue was whether their conduct necessitated an application to Court and whether it was fair, having regard to all the circumstances, to order them to bear the casino's costs. The existence of a continued collective bargaining

[7] 2008 (29) ILJ 1893 (LC).
[8] 2012 33 ILJ 998 (LC).

relationship was found to be irrelevant. The fact that the casino was pursuing an order for costs was an indication that, at least as far as the casino was concerned, a future relationship with the union would not be prejudiced by any order for costs.

[29] In *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and others*[9] the employer approached this Court for an interdict to restrain striking employees from picketing in breach of picketing rules. In respect of the issue of costs the Court held:

> "Although there was some debate about the existence of a relationship between the parties I am of the view that even if there is an ongoing relationship, I can see no reason why the applicant should not be entitled to its costs in this matter. If the relationship between the parties is indeed important to the first respondent, then it should be expected that it would do everything possible to ensure that picketing rules are communicated and that any picketing is in terms of those rules."

[30] In *Security Services Employer's Organisation and others v South African Transport and Allied Worker's Union and* others[10] the Court held the view that there was no rule of law or of public policy which precluded the granting of costs where a rule nisi was discharged and not confirmed.

In casu

[31] *In casu* the parties agreed to picketing rules prior to the commencement of the strike. When the strike commenced, the picketing rules were ignored and despite a letter from the Applicant's attorneys demanding intervention from SATAWU and compliance with the picketing rules, the striking employees persisted with their unlawful conduct and thereby forced the Applicant to approach this Court for urgent relief.

[32] I have to consider the conduct of the Respondents, which caused the Applicant to bring this application in the first place. Ms Hanif submitted that I should consider that the application was not opposed and that the Respondents agreed to the interim order granted on 30 August 2013. The fact that the Respondents agreed to the interim order is irrelevant. In fact that

[9] (2012) 33 ILJ 448 (LC).
[10] 2007 28 ILJ 1134 (LC).

shows that the Applicant was substantially successful in its application and in applying the general rule, is therefore entitled to costs.

[33] The Respondents simply ignored picketing rules that were agreed to and despite undertakings to ensure compliance, there was simply no compliance and SATAWU failed to do whatever was necessary to ensure compliance. The right to engage in collective bargaining and to participate in protected strike action, is not a licence to engage in unlawful conduct. The conduct of the Respondents does not militate against an order for cost.

[34] Ms Hanif submitted that there is an ongoing relationship and that at this junction a cost order would damage the relationship even further. The reality is that it was the conduct of the Respondents that damaged the relationship, if such damage exists. The existence of a continued collective bargaining relationship and the potential prejudice a cost order might cause to that relationship, is irrelevant in this instance. As per the *Tsogo Sun* judgment the fact that SAAT was pursuing an order for costs against SATAWU is an indication that, at least as far as the employer was concerned, a future relationship with SATAWU would not be prejudiced by any order for costs. In my view there is no merit in the submission that the existence of a collective bargaining relationship militates against an order for costs.

[35] SAAT had to institute urgent Court proceedings where picketing rules were agreed to and where SAAT had the expectation that those rules would be complied with. When the picketing rules were ignored and when the unlawful conduct persisted, SAAT approached this Court for relief. Fairness dictates that the Applicant cannot be expected to endure enormous costs instituting litigation that ought not to have been brought in the first place, had there been compliance with the picketing rules.

[36] Ultimately, SATAWU is the author of its own misfortune. SATAWU is a well-established trade union quite capable of considering the consequences of failing to adhere to picketing rules and the failure to take steps to ensure compliance.

[37] Section 162 of the Act entitles this Court to make an order according to the requirements of the law and fairness. This is a broad discretion, and one that

must be exercised judicially. In my view and for the reasons *supra*, there is no basis, having regard to the law and fairness, why SATAWU should not be liable for the Applicant's costs.

Order

[38] In the premises, I make the following order:

38.1 The rule nisi issued on 30 August 2013 is discharged;

38.2 The First Respondent (SATAWU) to pay the costs.

_____

Prinsloo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate Linda
Instructed by:	Norton Rose Fulbright Attorneys
For the Respondents:	Attorney Ms Hanif
Instructed by:	Mitti Attorneys