

SOUTH AFRICA / JUDGMENT

SA Container Depots (Pty) Ltd t/a Bidvest SACD v Sheriff: Durban Coastal and Others (D16/2025) [2025] ZALCD 3; (2025) 46 ILJ 1263 (LC) (28 January 2025) [2025] ZALCD 3

COURT

Labour Court Durban

BEFORE

Allen-Yaman

CASE / FILE NUMBER

D16/2025

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IN

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case

No: D16/2025

Not

Reportable

In

the matter between:

SOUTH
AFRICAN CONTAINER DEPOTS (PTY) LTD
t/a
BIDVEST SACD
Applicant
and

SHERIFF: DURBAN COASTAL
First Respondent
PROVINCIAL
COMMISSIONER, SAPS
Second Respondent
NUMSA
Third Respondent
RETUSA
Fourth Respondent
PERSONS
MENTIONED IN ANNEXURE A
Fifth to Further
TO
THE FOUNDING AFFIDAVIT
Respondents
Heard: 20 and
23 January 2025

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 28 January 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicant applied to this court on an urgent basis for an order in the following terms

‘1. That the Applicant’s failure to comply with the time limits referred to in Section 68(2) of the Labour Relations Act, 66 of 1995 (as amended) (‘the Act’) be and is hereby condoned, dealing with the matter as one of urgency in terms of Rule 8 of the Rules for the conduct of proceedings in the Labour Court;

2. Directing that a Rule nisi do issue calling upon the Respondents to show cause on the __ day of __ 2025, why an order should not be made in the following terms:

2.1 That the current strike action, which commenced on 6 January 2025, pursuant to a strike notice issued by the Third Respondent on the 3rd of January 2025, be declared unprotected.

2.2 In the alternative, that the Fourth, Fifth to Further Respondents are interdicted and restrained from directly and/or indirectly engaging in a strike as defined in Section 213 of the Act, unless and until such time as the provisions of s69 of the Labour Relations Act, 66 of 1995 have been complied with and Picketing Rules have either been agreed to or issued by the CCMA.

2.3 That the Fourth to Further Respondents are interdicted and restrained from:

2.3.1 disrupting or calling for the disruption of operations of the Applicant and/or instigating others to perform such acts designed to disrupt the Applicant's operations;

2.3.2 making any direct or indirect threats designed to cause disruption to the Applicant's operations;

2.3.3 blockading or obstructing the entrances and egress to the Applicant's premises and/or hindering the entrance and exit of vehicles travelling to and from the Applicant's premises;

2.3.4 unlawfully interfering with, or obstructing the conduct of the business of the Applicant;

2.3.5 inciting other employees or other individuals to participate in any other unlawful conduct;

2.3.6 unlawfully interfering with the employment relationship between the Applicant and its employees;

2.3.7 assaulting, threatening to assault, intimidating, by way of violence or violent demonstrations, other otherwise inciting others to assault, threaten or intimidate the Applicant's workers and/or staff and/or service providers and/or members of the public entering the premises;

2.3.8 entering the Applicant's premises and being within the port precinct; and

2.3.9 damaging any property or inciting others to damage property owned by, or in care of, the Applicant.

2.4 Interdicting and restraining the individual Respondents from intimidating, assaulting, harassing or in any way interfering with any employees, customers, clients, suppliers, service providers or any other persons involved in or connected with the Applicant and its service providers.

2.5 Interdicting and restraining the individual Respondents from in any way unlawfully interfering with or damaging the property or assets of the Applicant and its service providers or any of their employees or any other persons involved in or connected with the businesses of the Applicant and their service providers.

2.6 That the Second Respondent is required to do all things necessary and take all such steps as are necessary to ensure that the provisions of paragraphs 2.1 to 2.5 above are complied with.

2.7 Ordering the Third, Fourth, Fifth to Further Respondents to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

3. That prayers 2.1 and 2.3 to 2.7 operated with immediate effect as an interim order pending the final determination of this application.

4. In the Alternative, that prayers 2.2 to 2.7 operate with immediate effect as an interim order pending the final determination of this application.

5. In the Alternative, that prayers 2.3 to 2.7 operate with immediate effect as an interim order pending the final determination of this application, with the Third, Fourth, Fifth and Further Respondents being directed to Picket outside of the Port precinct in the area identified on annexure “J1” to the Founding Affidavit, pending the issuing of Picketing Rules by the CCMA.
6. Directing that the service of this order be effected as follows:
 - 6.1 upon the First, Second, Third and Fourth Respondents by the Applicant’s attorney sending a copy of the order to the email addresses provided in this notice of motion;
 - 6.2 upon the Fifth to Further Respondents by the terms of this order being read out by a representative of the Applicant and read out by the Sheriff to so many of them as are present at the Applicant’s premises and for the Sheriff to give copies of the order to so many of the Fifth and Further Respondents that are present and for a copy to be affixed to the Applicant’s gate.’
- [2] The application was first enrolled for hearing on 20 January 2025 at 14h00. By that time the third respondent had delivered its answering affidavit evincing its opposition to the application, whilst the fourth respondent, represented by its official Mr Tshezi, indicated that it intended to argue the interim relief sought by the applicant on the applicant’s version pending the delivery of the fourth respondent’s answering affidavit.
- [3] At the hearing of the application the applicant sought leave to hand up a confirmatory affidavit, with conditions relating to the confidentiality thereof. Both the fourth respondent and Ms Mbotho, the third respondent’s Legal Officer for the Region of KwaZulu-Natal, objected thereto. In view of the fact that it was then necessary for the applicant to bring a formal application for the introduction of its affidavit in the manner sought by it, and the fact that it was understood by the parties that the Commission for Conciliation Mediation and Arbitration would issue Picketing Rules by close of business that day, this court enquired of the parties whether it would then be possible for them to agree to an interim order pending a short adjournment which would enable the parties to deliver the further application and affidavits required for the matter to be finally determined on such later date. The parties so agreed and the application was adjourned to 23 January 2025, with paragraphs 2.3 to 2.6 (the numbering thereof having been amended) to operate as interim orders pending the finalisation of the application.
- [4] By 23 January 2025 a full set of affidavits had been delivered. In addition the applicant had initiated its interlocutory application, in which it sought orders pertaining to the delivery of a confirmatory affidavit which had been deposed to by one Mr Nel, which had served to confirm the correctness of certain allegations by the deponent to the founding affidavit in the main application which pertained to him, the applicant’s National Human Resources Manager, Ms Sithabile Khanyile. Having heard argument in relation to the relief sought by the applicant in its interlocutory application, which was opposed by the third and fourth respondents, this court granted orders as follows,

‘1. The applicant’s redacted confirmatory affidavit shall be admitted into evidence, and form part of the record, subject to the orders at paragraphs 2 and 3 below.

2. The unredacted confirmatory affidavit of Mr Nel to the initial founding affidavit of Sithabile Khanyile be submitted to and accepted by the above Honourable Court on a confidential basis.

3. It is directed that the unredacted confirmatory affidavit of Mr Nel be subjected to the following confidentiality regime.

3.1 The applicant shall disclose the contents of the unredacted confirmatory affidavit to the court and to the representatives of the third and fourth respondents, Ms Simile Mbotho and Mr Velile Tshezi, respectively.

3.2 That the respondents’ representatives referred to above, save for the purposes of considering the allegations in the affidavit and taking instructions on those allegations shall not disclose, whether directly or indirectly, the full names of Mr Nel to those they are consulting with for such purpose, or to any other party.

3.3 The court will not retain the unredacted confirmatory affidavit in the original court file and same will be kept separate from the file in a confidential space / archive.’

[5] The confirmatory affidavit evinced no more than that the deponent thereto confirmed the correctness of the allegations made by Ms Khanyile insofar as such allegations related to him, having added no new evidential material to the application. The request for confidentiality was premised upon Mr Nel’s involvement in certain murder and attempted murder investigations which he believed were linked to the strike action which has been undertaken by certain of the applicant’s employees, the fifth to further respondents. His allegations that by virtue of his involvement in those investigations in his capacity as a private investigator, he was apprehensive as to the certainty of his own as well as the safety of his family in the event that his involvement in such investigations became a matter of public knowledge, could not be gainsaid by either the third or fourth respondents. Their objection to the introduction of the affidavit in the manner requested by the applicant was, in effect, predicated upon their argument as to the questionable nature of the timing thereof. The founding affidavit had not evinced an intention to deliver the confirmatory affidavit in question, which was sought to be introduced only after the fourth respondent had delivered its answering affidavit in which it had pointed out the unsubstantiated nature of Ms Khanyile’s hearsay allegations. In response, the applicant’s attorney, Mr Kirby-Hirst, explained under oath that the confirmatory affidavit had been deposed to prior to receipt of the answering affidavit, but that Mr Nel’s concerns had only been made known to him at that time, which had left him unable to deliver the affidavit in its unredacted form. There was no reason for this court to doubt the explanation advanced by Mr Kirby-Hirst.

- [6] In the event that the confirmatory affidavit was to be delivered in the ordinary course, the full details of the deponent thereto would become a matter of public record, known not only to the third to further respondents, but also to any member of the public who wished to inspect the court file. Given that three murders have already occurred, and he is involved in the investigation thereof, Mr Nel's concerns pertaining to safety cannot be dismissed as fanciful. Given this, and that neither the third nor fourth respondent's representatives could identify any possible prejudice which the third to further respondents might suffer as a result of the confirmatory affidavit being treated as confidential, this court granted the orders as set out above.
- [7] Having considered the confirmatory affidavit provided under the protection of confidentiality, this court was satisfied that the allegations made by Ms Khanyile concerning the actions and opinions of Mr Nel had been confirmed by him. Both the third and fourth respondents declined the opportunity which was then afforded to them to supplement their own answering affidavits in consideration of the possible effect which the introduction of Mr Nel's confirmatory affidavit may have had on their own respective cases.
- [8] In respect of the main application, both the third and fourth respondents challenged both the issue of urgency as well as the merits thereof. In light of the fact that the CCMA had issued Picketing Rules by the time the application was argued, and in further consideration of the evidence at its disposal, the applicant abandoned certain of the relief which had been sought by it at the outset. Mr Kirby-Hirst indicated that the applicant then sought orders in terms of paragraphs 1, 2.1, 2.4, 2.5 and 2.6 (with the numbering referred to therein to be amended).

Background

- [9] The applicant is a freight handling company operating from the Bayhead district of the Durban Port, providing the services of cargo and container management, supply chain management, logistics and infrastructure services to its clients. During the course of 2024 it commenced a retrenchment exercise which was facilitated by the CCMA in terms of s189A of the LRA. The facilitation process concluded in December 2024, and on the 27th of that month the applicant gave notice of the termination of 100 of its employees' employment, the majority of whom were members of NUMSA. The employees' notice period was to operate during the month of January 2025, with the termination thereof effective at the end of the month.
- [10] Rather than have referred a dispute to the CCMA in which the fairness of the dismissals would have been challenged, on 3 January 2025 NUMSA gave the applicant 48 hours' notice of its members' intention to strike in terms of s189A(7)(b)(i) read with s189A(9) of the LRA. The singular demand underpinning the anticipated strike was that the applicant retract the termination notices issued pursuant to the facilitation process which had been undertaken by the CCMA. As had been indicated, the strike commenced on 6 January 2025 at 06h00.

- [11] No Picketing Rules had been agreed to prior to the commencement of the strike. Although there was a dispute between the parties concerning what, if any, efforts had been expended by the applicant and NUMSA in this regard, no determination need be made in relation thereto, save as is relevant to the issue of urgency, for the reason that the disputes between the parties which related to the Picketing Rules were resolved when the CCMA decided the issue on 20 January 2025.
- [12] The fourth respondent gave the applicant notice of the intention on the part of its members to join the strike on 7 January 2025.
- [13] Although the applicant alleged that certain incidents had occurred upon the commencement of the strike, insofar as it had been contended that certain of the striking workers had stopped public transport utilised to convey non-striking employees and forced them to walk to the applicant's site, no interdict in relation to this conduct was sought. The third and fourth respondents having denied the correctness of these assertions and the applicant not having identified any of the culprits, Mr Kirby-Hirst conceded at the outset that no interdictory relief in regard to specific acts of misconduct which were alleged to have occurred could be granted by this court.
- [14] That three of the applicant's employees, or employees of its contractors have been killed and an assault was mounted against a group of other employees since the commencement of the strike was not seriously challenged by the third and fourth respondents, although responsibility for such acts by or on behalf of both unions' members was denied. This issue is relevant to both that of urgency and the merits.
- [15] On the evening of 6 January 2025 (the first day of the strike) one of the applicant's employees who had not participated in the strike was shot and killed on his way home from work at the vicinity of the Ntuzuma / Phoenix taxi rank in Durban. An employee of a contractor appointed to the applicant, FXO, was shot and killed at the self-same taxi rank at some point thereafter, although the timing of such incident was not described. On 9 January 2025 an unknown number of employees who were leaving the applicant's premises after work was shot at on the corner of South Coast and Bayhead Roads. Another individual in the employ of another of the applicant's contractors, Adcorp Blu, was shot and killed at the Umbilo train station in the early hours of the morning of 14 January 2025.
- [16] The parties in the interim had met with one another and had exchanged correspondence. Pursuant to having received NUMSA's strike notice, the applicant responded immediately to express its view that any picket in support of the strike would then be premature, by reason that no Picketing Rules had been agreed, and that any picketing within the Port Area in the vicinity of its site would be prohibited by virtue of this area falling within the area of a National Keypoint. Immediately thereafter, having referred to the previous facilitation process which had been undertaken by it, the applicant requested the CCMA to enrol the matter for the

establishment of Picketing Rules.

[17] Upon the commencement of the strike on 6 January 2025 a letter was addressed to NUMSA by the applicant's attorneys. That letter reiterated the applicant's previously expressed views concerning the legality of the picket absent Picketing Rules, and requested the union's urgent intervention in regard to the cessation thereof. The applicant's attorney also relayed the allegations that the striking employees had been misconducting themselves,

'... since the commencement of the strike this morning, attempted to interfere with our client's service providers entering the premises. This interference also includes intimidating these service providers and requiring that they exit their vehicles and that they would not be permitted to enter their premises.'

[18] The letter indicated further that failure to ensure the cessation of picketing pending the determination of Picketing Rules by 13h30 that day would result in the applicant approaching this court as a matter of urgency for an interdict.

[19] NUMSA responded to this letter by way of its own undated letter a few days thereafter. NUMSA denied that its members had engaged in any acts of misconduct at all, and specifically that they had interfered with the applicant's service providers. Although NUMSA acknowledged that no Picketing Rules were then in place, it pointed out that draft picketing rules had been submitted to the applicant for its consideration, but that these had not been entertained by it and that it had, in response, given NUMSA its own proposed picketing rules, which it had subsequently withdrawn. NUMSA evinced its intention to oppose any interdict application launched, and restated its demand for the retraction of the termination letters which had been issued by the applicant pursuant to the conclusion of the s189A process.

[20] The CCMA enrolled the issue of Picketing Rules for hearing on 13 January 2025 but this did not resolve the issue. There was a dispute between the parties as to what, precisely, had transpired on that occasion but in all events, it is common cause that no Picketing Rules were finalised that day. The following day the applicant's attorney addressed further correspondence to NUMSA in which it then raised the issue of the murder of its own, as well as its contractor's employees, detailed as follows,

'Our client has provided us with instructions with regards to various deplorable incidents which have occurred during the current strike action.

At the time of writing this correspondence, there have now been three fatalities which have occurred in respect of one Bidvest SACD employee and two contractors providing their services to the business. The latest fatality occurred this morning in Umbilo Road where a contractor was walking to work and was shot and killed.

In addition to the latest fatality, two fatalities occurred during the first week of the strike action, with both employees being shot and killed on their way home.

Finally, an incident has also occurred where a vehicle transporting SACD employees and/or contractors was shot at whilst the employees were on their way home from their shift on that date in question.

It is no co-incidence that all of these individuals were continuing to tender their services to the business during the course of the strike action, and without further being said, such conduct is despicable and cannot be permitted to continue.

...

This conduct is particularly concerning following a comment made by your Mr Mnyende at a meeting with the company and various other stakeholders on 10 January 2025, where your Mr Mnyende had stated that whilst the strike may at this point be peaceful, the company should be careful not to provoke employees which could then turn the strike violent.

It is apparent that this strike action has already reached that point given the conduct referred to above, and it quite obviously cannot be mere co-incidence that since the commencement of the strike action, three fatalities have been suffered and a further vehicle shot at transporting employees of the company.

We now require your intervention in this matter and confirmation that you have addressed your members by close of business today on this issue, and what steps you have taken as the Union to ensure that such conduct ceases.

We require a suitable explanation for all actions taken by the Union, including confirmation that you are investigating the current set of circumstances, by close of business today.

Our client reserves its rights to approach the Court on an urgent basis to now declare this strike as unprotected, in light of the most egregious violent conduct which has resulted in these unfathomable fatalities.'

[21] NUMSA responded to the applicant's attorneys that day. In such correspondence, NUMSA vehemently expressed its denouncement of its own association with any acts of violence or intimidation, and assured the applicant that it had initiated an internal investigation

into the issues raised. It did, however, remind the applicant that the parties had by then met on at least two occasions since the commencement of the strike, the most recent of which meetings had been the previous day, and that the applicant had not then mentioned any of the issues being raised in its most recent correspondence. NUMSA assured the applicant that,

'In the event that evidence emerge substantiating a connection between these incidents and the strike action, NUMSA will not hesitate to take the necessary steps to address and rectify the situation in accordance with the law.'

And,

‘In light of the seriousness of these allegations, NUMSA will address its members again and collaborate with other unions involved in the strike to ensure adherence to peaceful conduct.’

[22] The determination of Picketing Rules was once again enrolled for determination by the CCMA on 17 January 2025, the day on which the applicant launched the present application, enrolled for hearing on 20 January 2025. The issues which arose on that occasion have been canvassed above.

Urgency

[23] Had this application been launched as a matter of urgency on the basis of the absence of Picketing Rules alone, this court would have been disinclined to enrol it as such. The applicant was aware of the absence of Picketing Rules as early as 3 January 2025. The steps taken by the parties in the intervening period have been set out above. Notwithstanding the applicant’s complaints concerning the absence of Picketing Rules, and the fact that the picket was taking place otherwise than in the area where the applicant preferred the picket be conducted, neither the absence of Picketing Rules nor the dispute between the parties concerning the area in which the picket was to take place gave rise to any particular need to approach this court on an urgent basis. Less so in circumstances in which the dispute concerning the Picketing Rules was enrolled before the CCMA on the very day on which the application was launched. The fact that the applicant did not then know when the CCMA might issue the Picketing Rules also does not detract from the fact that the applicant did not demonstrate that it had suffered serious harm as a result of such lacuna.

[24] That was not, however, the only basis upon which the applicant approached this court as it did; its further grounds related to the violent attacks which have resulted in the deaths of three individuals associated with its workplace. On the applicant’s

version, it acquired knowledge of the various incidents over time and it was only by 14 January 2025 that it had formed the view that the circumstances and the timings of the murders and the assault were such that they must have been linked to the strike. It thereafter addressed correspondence to NUMSA and, dissatisfied with the response given, approached this court within the week. Accordingly, the applicant cannot be accused of having delayed the taking of action as soon as it believed there was a need to do so.

[25] As to the question whether the applicant could obtain substantial redress in due course in the event that the application was to be dealt with in the ordinary course, it is self-evident that the answer is in the negative.

[26] In the circumstance the application will be enrolled to be determined on an urgent basis.

Analysis

[27] The relief sought by the applicant that the strike be declared to be unprotected was premised on two foundations:

- The absence of Picketing Rules, coupled with the third respondent's indifference thereto;
- Its contention that the acts of violence which have been committed against its own and its contractor's workers were directly linked to the strike, which were to be regarded as anathematic to rational collective bargaining with the result that the strike action has become counter-productive to collective bargaining.

[28] The Picketing Rules having been issued, the first ground upon which the applicant relied required no further consideration. As to the second, as will be explained hereunder, regardless whether the offences in question can be found to be linked to the strike, such a finding cannot result in the strike becoming one which is unprotected.

[29] The applicant asserted in its founding affidavit that,

'Most certainly one cannot submit that the right to strike is above that of the right to life of those individuals that are involved, and should the above Honourable Court not act in interdicting the strike action, the Applicant is fearful of further killings which will result from this continued strike action.'

[30] The applicant's argument was articulated in its Heads of Argument in the following terms,

'Not only is the violence which has been committed and the murders of these individuals entirely senseless, it is contrary to the very notion of peaceful strike action in support of the demands of a workforce.

This goes against the very tenants of the LRA and should not be condoned. The strikers obviously turned counter-productive in respect of these violent incidents, and it is submitted that this violence should be sufficient in the circumstances to justify the declaration sought.'

[31] The applicant relied on two decisions of this court in support of its assertion that acts of violence can found a basis upon which an otherwise protected strike may be declared to be unprotected. In the first, *Tsogo Sun Casinos (Pty) Ltd t/A Montecasino v Future of South African Workers Union and Others* (2012) 33 ILJ 998 (LC), this court remarked obiter,

'This court will always intervene to protect both the right to strike and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and the LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.'^[1]

[32] In *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and Others v Universal Product Network (Pty) Ltd*

(2016) 37 ILJ 476 (LC) this court acknowledged that the principle established by the Labour Appeal Court that a strike's

protected status may be forfeited was premised, not on the basis of any violence which may have been perpetrated in the course thereof, but rather in circumstances in which permissible demands devolve into the realm of the impermissible. This principle was expressed in *Edelweiss Glass and Aluminium (Pty) Ltd v National Union of Metal Workers of South Africa and Others* (2011) 32 ILJ 2939 (LAC) wherein the Labour Appeal Court had been called upon to determine the fairness of the dismissal of employees who were alleged to have participated in an unprotected strike. The employer's assertion that the strike had, at a point in time, ceased to enjoy protection was predicated upon what was alleged to have been a variation of the employees' initial demand. Of relevance to the issue of when and whether a strike may in the course of its subsistence lose its protected status the Labour Appeal Court stated,

'In my view, the articulation of the demand for a 13th cheque did not cause the protected strike to transmute to an unprotected strike. Such a transmutation, as contended for by the

Applicant, would only occur if it is shown that the employees had used the protected strike as leverage to achieve other objectives in respect of which no strike action could be taken.'

[33] In the present matter, there was no suggestion that the demand which underpinned the strike had been varied since its inception: the third to further respondents have called for the applicant's retraction of the termination of employment of those to whom notice of retrenchment was given by it at the end of December 2024.

[34] Returning to the issue of violence and the possible effect thereof on a protected strike, this court in *NUFBWSAW* suggested that the most sensible approach to be adopted would be that proposed by Professor Rycroft in his paper entitled 'What can be done about strike-related violence?'

'The proper approach, it would seem to me, is that proposed by Prof Rycroft who acknowledges the practical difficulties that clearly arise, not least the determination of how much violence will misconduct [sic] would have to have occurred before the court intervenes. He suggests that the court ask the following question 'Has misconduct taken place to an extent that the strike no longer promotes functional collective-bargaining, and is therefore no longer deserving of its protected status?' In answering this question, Prof Rycroft proposes that the court weigh the levels of violence and efforts by the union concerned to curb it. He explains that this is not an anti-union proposal; rather, he imagines a balancing counter-measure allowing unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it is in response to unjustified conduct by the employer. In my view, this is an eminently sensible approach to adopt.'

[35] In elaboration this court stated,

'While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution this is not a

conclusion

that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in SATAWU, this court ought not to easily to adopt too intrusive interpretation of the substantive limits on the exercise of the right to strike'[5]

[36] In the absence of authority for the propositions advanced by Professor Rycroft or this court in Tsogo Sun and NUFBWSAW (that the Labour Court could declare a strike to be unprotected on the basis of no more than violent conduct associated therewith) this court is respectfully unable to concur with the conclusions previously reached by both.[6] Had those matters been considered from the perspective of the distinction which is to be drawn between the separate right to strike

and right to picket, the limitations placed on each right in the LRA may well have resulted in different conclusions.

[37] Both the right to strike and the right to picket are guaranteed in the Constitution, 1996.[7] As such, both rights may only be limited in terms of laws of general application. Section 36 of the Constitution reads,

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[38] Both the right to strike and the right to picket are, indeed, subject to limitation by way of a law of general application: the LRA. In terms of s69(1) a picket may only be authorised for the purposes of peaceful demonstration. Insofar as the right to strike is concerned, procedural limitations are imposed in terms of s64 and substantive limitations in terms of s65.

[39] None of the limitations imposed in terms of the LRA on employees' right to strike expressly provide that a strike which is marred by the commission of one or more acts of violence, however egregious such acts may be, will become unprotected. Not only is such limitation

not expressly stipulated in the LRA, but nor can such a limitation be inferred from even the most generous interpretation of any of the limitations which are established therein. Absent an express limitation in the LRA, or one which could be reasonably be found to be present through the mechanism of interpretation, this court cannot itself impose extraneous limitations on the right of employees to strike and thereby establish additional grounds upon which a strike could be declared to be unprotected.

[40] Section 67(1) of the LRA is unambiguous,

‘In this Chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out that complies with the provisions of this Chapter.’

[41] It is common cause that the strike embarked upon by the third to further respondents in the present matter was in compliance with the requirements established in terms of the LRA, and did not offend the limitations imposed therein.[8] As no acts of violence can alter the legal regime promulgated both to give effect to and to limit the right of employees to strike, the strike cannot be regarded as anything other than one which is protected.

[42] The further relief sought by the applicant necessitated that it establish a connection between the conduct complained of and the fifth to further respondents themselves. Such requirement was expressed by the Constitutional Court in *Commercial Stevedoring Agricultural and Allied Workers’ Union and Others v Oak Valley Estates (Pty) Ltd and Another* 2022 (5) SA 18 (CC) in the following terms,

‘Two important principles can be distilled from this Court’s jurisprudence, and this line of cases. First, mere participation in a strike, protest, or assembly, in which there is unlawful conduct, is insufficient to link the impugned respondent to the unlawful conduct in the manner required for interdictory relief to be granted. Second, the necessary link can however be established where the protesters or strikers commit the impugned unlawful conduct as a cohesive group.’[9]

[43] In the present matter, by reason of the attacks having taken place away from the vicinity of its own site, the applicant has not yet been able to identify the perpetrators thereof. In the absence of any connection having been established between any one of the strikers, or an identifiable group of them, this court is unable to grant the applicant the interdictory relief sought by it.

Costs

[44] Certain decisions of this court appear to have given rise to a bona fide belief on the part of the applicant that the strike could be declared to be unprotected on the grounds of violence alone. Given

the timing of the acts of aggression, and to whom they have been directed, the applicant’s belief (whether informed by Mr Nel or merely arrived at in the light of ordinary human experience) that those acts were linked to the strike and were intended to intimidate non-striking workers

was not one which was unreasonable. It was, however, not possible to identify one or more of the striking workers as having been responsible therefor. There is also no evidence that either the third or fourth respondents had any involvement in the acts in question, whilst positive evidence to the contrary indicates that both trade unions have categorically and unequivocally denounced such type of conduct.

[45] In consideration of the totality of circumstances which informed the application, the applicant cannot be faulted for having sought this court's intervention. On the other hand, neither of the trade unions can be faulted for the violence which has occurred and the perpetrators of the violence have not yet been identified. In these circumstances, this court is of the belief that fairness requires that each party bear its own costs.

Order

1. The application is dismissed.
2. There is no order as to costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr G Kirby-Hirst, MacGregor Erasmus Attorneys

Third Respondent:

Ms S Mbotho, NUMSA

Fourth Respondent:

Mr V Tshezi, RETUSA

[1] At paragraph 13

[2] At paragraph 52

[3]

(2014) 30 (2) International Journal of Comparative Labour Law and Industrial Relations

[4] At paragraph 32

[5] At paragraphs 38

[6] See also, Van Eck and Kujinga, 'The Rule of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and Others v Universal Product Network (Pty) Ltd

(2016) 37 ILJ 476 (LC), PER/PELJ 2017 (20)

[7] Section 23(2) guarantees the right to strike, whilst s17 guarantees the right to picket.

[8] The issue regarding Picketing Rules having become resolved prior to the conclusion of the matter.

[9] At paragraph 42

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