

Award

Van Niekerk J:

- [1] The applicants seek an order compelling the first respondent ("Implats") to institute disciplinary proceedings on charges of intimidation, in accordance with its disciplinary code and procedure, against the persons listed in Annexure "B" to the notice of motion. (The 21 persons listed are members of the second respondent ("AMCU")). The applicants submit that Implats has violated and continues to violate the freedom of association of the persons listed in Annexure "A" (members of the first applicant ("NUM"), all of them former NUM shaft stewards) and that by failing to take appropriate disciplinary action and failing to provide a safe working environment, Implats has breached their conditions of employment.
- [2] Advocate *Myburgh* SC, for Implats, did not pursue the issue of urgency, a point taken in the answering affidavit and the heads of argument. Many of the incidents of which the applicants complain occurred some years ago. The most recent incident occurred in April 2016, a month or so before the founding affidavit was filed. Although I have reservations whether the application is in fact urgent, I intend to deal with the merits of the application.
- [3] The relevant facts have their roots in the violence in the platinum mining sector that commenced in 2012, and its aftermath. Historically, NUM represented the vast majority of workers employed in the platinum belt. NUM's levels of representivity have plummeted, a development sparked, at least partially, by the dissatisfaction of some union members concerning NUM's handling of the 2011 wage negotiations. Soon afterward, AMCU commenced recruiting members in the sector, with significant success. Indeed, the NUM's level of representivity at Implats has dwindled to 3.38% of the bargaining unit, while AMCU has attained majority status.
- [4] During the first half of 2012, a strike occurred at Implats' Rustenburg operation, a strike that was marred by acts of violence. At this point, due to the volatility of the situation, it became unsafe for NUM shaft stewards to report for duty - they reported instead at the union's regional offices in Rustenburg. The strike culminated in a mass dismissal and the subsequent reinstatement of employees, over a period, on the same terms and conditions that prevailed at the time of dismissal. The shaft stewards returned to work only during October 2012 only to report to the regional offices again during January. During the course of the next month, February 2013, following a verification process, Implats terminated its recognition of NUM.
- [5] In July 2013, Implats concluded a recognition agreement with AMCU, which by that stage had secured majority representation within the bargaining unit. From September 2013 onwards, the former NUM shaft stewards, including the individual applicants, have continuously and repeatedly been called on to report for duty at Implats' Rustenburg operations.
- [6] Between September 2013 and December 2015, a number of meetings took place to address the situation at Implats and in particular, the return to work of the former NUM shaft stewards, the assessment of the prevailing risk and the terms on which a return to work was to be secured. These meetings variously involved the NUM, AMCU, and the Department of Mineral Resources ("DMR").
- [7] On 17 December 2015, an integrated security plan was accepted and signed by Implats, the NUM and the South African Police Services ("SAPS"). On the same date, Implats and NUM concluded a memorandum of understanding ("MOU") under the auspices of the CCMA, in which the return to work of the former NUM shaft stewards was addressed. Amongst other things, the MOU provides that the shaft stewards would report for duty on 21 December 2015 and follow an agreed integration process programme. It was also agreed that there would be compliance with the security plan facilitated by the SAPS and signed by both NUM and Implats. It was also agreed that the conclusion of the MOU was the final attempt at resolving the issue of a return to work. On 21 December 2015, a number of former NUM shaft stewards returned to work in accordance with the MOU. For present purposes, it is significant that the MOU makes no reference to the shaft stewards return to work being dependent on Implats instituting disciplinary proceedings against any AMCU members.
- [8] A number of former shaft stewards failed to return to work, for various reasons. In the present proceedings, NUM contends that the reasons are Implats' failure to investigate incidents of violence and intimidation and to discipline the perpetrators of that misconduct, and the failure by the SAPS to share its risk assessment report with the NUM at the joint operations committee meetings held on 5 and 8 February 2016. The SAPS had been unwilling to disclose the security report because it considered it to be a classified document. However, assurances had been given to the NUM (and to Implats) that the security plan took the security assessment into account.
- [9] On 9 March 2016, the general secretary of the NUM addressed a letter to Implats' Chief Executive Officer. Implats' response to that letter, on 5 April 2016, effectively drew a line in the sand in relation to the

return to work of the NUM shaft stewards and put NUM on notice that no further external interventions would be implemented and that the company would result of the measures available to it in terms of its own procedures and the relevant legislation. NUM's response was to file the present application.

- [10] The relevant legal provisions are well-established. An employer is obliged at common law to take reasonable care of the health and safety of employees by providing them with a reasonably safe system of work (see Freedland *The Personal Employment Contract* Clarendon Press 2003 at page 141). Consistent with this view of the nature and extent of the obligation, Brassey states that an employer is obliged to take action to combat labour unrest and any inter-union hostility that discloses a potential for violence and injury (see *Employment and Labour Law Vol 1* at E4:33). He goes on to say the following:

"But, it must be stressed, the standard is that of reasonableness, not excellence, still less perfection, and employers are not bound to make the workplace fool proof. The law seeks to do no more than strike an appropriate balance between the employer's interests in production and the employees in his self-preservation.

Absolute safety under all circumstances is not guaranteed to the labourer by the contract of employment. The employer is not an insurer. He is not bound to furnish the safest machinery, nor to provide the best methods for its operation, in order to relieve himself from responsibility."

- [11] With that background, and turning first to the timing of the incidents that form the subject of the present application, NUM relies on nine specific incidents over a period of some four years in support of the application. Four of these occurred in 2012 (the first on 1 February 2012); one occurred in 2013; three occurred in 2014 and one occurred in February 2016. In its answering affidavit, Implats has usefully identified six categories into which the nine incidents can be placed. The first category is one in which Implats investigated the incident and decided not to institute disciplinary proceedings due to lack of evidence. In the second, Implats instituted disciplinary proceedings but found the AMCU members concerned not guilty. In the third, the alleged victim was a member of AMCU and not NUM at the time, did not lodge a complaint and has subsequently been dismissed. In the fourth category, Implats has no record of the AMCU members who are alleged to have participated in the incidents; and in the fifth, the incident was never reported to Implats. In the sixth, I understand Implats to concede that acts of misconduct occurred during 2012/2013, a highly volatile period in the platinum mining sector but for the reasons canvassed below, no disciplinary action was taken against the perpetrators.
- [12] In regard to the first to the fifth categories above, Implats' defence is apparent from the nature of the categorisation, and no more need be said of it. In regard to the sixth category, it is not disputed on the papers of their [*sic*] Implats advised NUM as early as 2012 and consistently thereafter that it would not take disciplinary action given the circumstances that prevailed at the time. Implats advised NUM that it had waived its right to take disciplinary action in relation to these incidents, and that it would be unfair of it not to do so. This position was stated during a number of meetings held between 6 October 2014 and 16 February 2015. The minutes of the last meeting perhaps best reflect Implats' position. The meeting concerned, amongst other things, a submission tabled by the NUM to the effect that Impala management had failed to take action against employees who assaulted NUM members during 2012. Although in the replying affidavit, some "reservations" are expressed about the minutes, their content is not disputed. The minute reads as follows:
- "Several months after the assaults there were sporadic incidents of illegal strikes and the situation remained highly volatile as there was no recognised union to hold accountable.
- In July 2013, AMCU was recognised and management has been in talks with them about the return of former NUM shop stewards to the operations to which they indicated that they had no problems that refuse to have formal meetings with the NUM to discuss the safe return of former NUM shop stewards to the operations.
- It is furthermore too late to commence with disciplinary action against these employees as the doctrine of waiver applies. As discussed during the previous meeting we waived our right to take action during 2012 due to the highly volatile situation prevailing back then.
- Furthermore it would be impossible for the employer to argue that the working relationship has broken down irrevocably and dismissal will not be fair under the circumstances, should the relevant section be a dismissal.
- It would be destabilising to the operations to institute the disciplinary actions at this late stage and it would also complicate the reintegration of former NUM shop stewards to the operations."
- [13] It is apparent from the minutes that NUM has been aware since at least February 2015 of Implats' position in regard to the reasons for not taking disciplinary action against members of AMCU for alleged acts of misconduct committed some three years prior to that date. But the present application does not

concern the prudence or otherwise of Implats' decision. NUM contends that the failure to take disciplinary action and to provide a safe working environment constitutes a breach of the employment contracts of the affected shaft stewards, and to this extent, it is incumbent on NUM to establish that Implats has indeed committed a breach of contract by failing to meet the required standard of reasonableness.

[14] I am not persuaded that NUM has succeeded in discharging this onus. First, the facts disclose various interventions and other efforts to mediate between the parties conducted over a period of some four years prior to the filing of the present application. All of those initiatives were directed at securing peaceful working conditions and culminated in the MOU signed in December 2015. That agreement, which constitutes a collective agreement between NUM and Implats, sets out the final terms on which a return to work by the shaft stewards would be effected. As I have mentioned, it was not a term of that agreement that instituting disciplinary action was a condition of a return to work, nor is there any plausible evidence to suggest that after signature of the MOU, matters deteriorated to the extent that the safety of the shaft stewards was placed in peril. On the contrary, of some relevance too is the fact that no incidents of violence against former NUM shaft stewards occurred after the conclusion of the MOU. Three incidents of threatening behaviour and intimidation are recorded in the founding affidavit, all of which fall into one the categories one to five identified above. It is also not disputed that on 21 December 2015, a number of NUM shaft stewards returned to work in accordance with the MOU. In short, the applicant cannot credibly rely on Implats' failure to take disciplinary action against AMCU members arising out of incidents that occurred in 2012 as a basis for a refusal to return work in 2016. This is particularly so where in addition to the reasons recorded above (i.e. the fact that NUM was advised as early as 2012 of the reasons why disciplinary action had not been instituted and the terms of the MOU), some 33 out of 45 NUM shaft stewards either never left work or have long since returned to work, where only one of the individual applicants was allegedly a victim of the incidents complained of, where of all the alleged victims of the incidents complained of, only one remains in Implats' employ.

[15] For the above reasons, in my view, Implats took reasonable steps to ensure the safety of the individual applicants. The facts do not disclose that Implats acted unlawfully by failing to take disciplinary action against the 21 members of AMCU listed in Annexure "B", or that its actions constituted a breach of the contracts of employment of the individual applicants.

[16] Finally, in relation to costs, the Court is traditionally reluctant to make orders for costs where parties are engaged in a collective bargaining relationship and where an order for costs may have the potential to prejudice that relationship. This case does not fall neatly into that category, but in my view, the same principle ought to apply.

I make the following order:

1. The application is dismissed.

For the applicants:

dv JG van der Riet instructed by *Cheadle Thompson and Haysom Incorporated*

For the first respondent:

A Myburgh SC instructed by *ENS Africa*

For the second respondent:

S Collett instructed by *Larry Dave Attorneys*