**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: JA61/2013

**FOOD AND ALLIED WORKERS UNION** **Appellant**

and

**IN2FOOD (PTY) LTD** **Respondent**

**Heard:** **28 May 2014**

**Delivered:** **12 June 2014**

**Summary: Alleged Contempt of court order by a Trade Union – what constitutes proof of trade union participating in an unprotected strike - meaning to be attached to a Trade union and its members 'continuing' a strike - strike unprotected and violent- Labour Court interdicting continuation of strike- strikers ignored order- Labour Court finding union also in contempt of court- Contempt of court principles restated- whether trade union culpable of breach of court order a question of fact - mere fact that its members are in contempt of court order is insufficient to establish breach of court order by trade union - No proof that Trade union in its own right in breach of the court order - Appeal upheld - Labour Court order set aside – nevertheless sentiments expressed by Labour Court about need for Trade union accountability for adherence to court orders approved and endorsed**

**Coram: Tlaletsi DJP, et Coppin, & Sutherland AJJA**

**JUDGMENT**

SUTHERLAND AJA:

Introduction

[1] This appeal is against an order of the Labour Court which held the appellant union in contempt of a court order and imposed a fine of R500,000. The judgment is reported as *In2Food (Pty) Ltd v FAWU and Others* (2013) 34 ILJ 2589 (LC). The single ground of appeal is that there was no evidence of a breach of the court order by the appellant. As such, the appeal turns on a finding of fact.

[2] The relevant circumstances are summarised as follows. The workers of the respondent embarked on an unprotected strike on 14 February 2013. The strike was violent. An interdict was obtained against the appellant union and the individual strikers on Saturday 16 February 2013 to address the unlawfulness of the violence and to bring about the cessation of the unprotected strike. The relevant orders were:

> ' 1.1 That [union and the strikers].....be interdicted and restrained from continuing with their illegal and unprotected strike action.
>
> 1.2 That the [union and the strikers] be interdicted and restrained from preventing employees, replacement labourers, members of management, drivers, clients, suppliers and visitors free movement and access to the premises of the [employer]
> 1.3 That the striking employees be interdicted and restrained from coming within 300 metres of the premises of the [employer]
> 1.4 That the striking employees be interdicted and restrained from harassing , assaulting and intimidating any non-striking employee, replacement labourer driver or visitor to the premises.
> 1.5 That the striking employees be interdicted and restrained from carrying any weapons and blocking the access in any manner whatsoever.
> 1.6 That the striking employees be interdicted and restrained from interfering with the supply and collection of and goods dispensed at the [employer's] premises and supplied to clients.'

[3] After the interdict had been granted, the violence did not abate and the strike did not stop. Pursuant to an urgent application brought before the Labour Court, a rule *nisi* was issued on 22 February 2013, calling upon the interdicted parties, ie, the appellant and its members, to show cause why they should not be held in contempt. In the affidavits, an account is given of the striking workers' vandalism, thuggery and utter disregard for the order.

[4] In regard to the conduct of the appellant union *per se*, there is an allusion in the respondent's affidavit to the actions of a union official, William Ditjoe. As the violent strike escalated from its commencement on 14 February, the respondent's management wanted the appellant to intervene. It wrote on 15 February, stating "…despite 4 attempts by your union to convince the workers to return to work they do not listen to you and it is clear that you have no control over them."

[5] Ditjoe's response, also on 15 February, a day before the interdict was granted without opposition, accused the respondent of causing the strike by refusing to bargain. He stated further: "We will not be responsible nor our members held liable to such action" (sic). By so stating, he evaded remarking upon the patent unprotected status of the strike, unjustifiably asserted the workers could not be liable for such conduct and implicitly disavowed any responsibility by the appellant in relation to the continuation of the strike, characterised as it was by barbarism. *Prima facie*, it would be reasonable to regard the stance evidenced by these remarks as deplorable, however, other indications of the appellant union's reaction to the strike ameliorate such a perspective, not least the respondent's own assertion of the four attempts by the appellant to end the strike at its outset being in vain.

[6] On the strength of the respondent's allegations the court *a quo*, on the return day of the rule *nisi*, held that "the union and its members are clearly in contempt of the order issued." The Court *a quo* then made this important policy statement:

> 'The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions

have glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act 66 of 1995, which has now been in existence for some 17 years and of which trade unions, their office-bearers and their members are well aware, makes it extremely easy to go on a protected strike, as it should be in a context where the right to strike is a constitutionally protected right.

However, that right is not without limitations. Firstly, the proper procedures set out in s 64 of the LRA should be followed. And secondly, it must be in line with the constitutional right to assemble and to picket peacefully and unarmed, as entrenched in s 17 of the Bill of Rights. Very simply, there is no justification for the type of violent action that the respondents have engaged in in this instance. And alarmingly, on the evidence before me, the union and its officials have not taken sufficient steps to dissuade and prevent their members from continuing with their violent and unlawful actions. Instead, having confirmed that it represents and acts on behalf of its members, the union's organizer, Mr Ditjoe, merely stated that the unprotected strike was 'as a result of your refusal to bargain. We will not be held responsible nor our members held liable for such action'. These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.

The applicant has suffered losses of more than R16 million as a result of the respondents' actions. I cannot disagree with Mr *Bekker* when he says that a fine of R500,000 to be paid by the union is not unreasonable in these circumstances."

Was a Breach proven?

[7] Proof of contempt of a court order requires, in particular, proof of the order, of due service on the relevant party, and of deliberate wilful disobedience. Moreover, there must be proof beyond reasonable doubt. (*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [42]).

[8] The true question for decision is whether the evidence adduced about the appellant union's conduct contributes to proving that the appellant committed a breach of the order, as distinct from a breach by the individual union members on strike. An examination of the order reveals that only orders 1.1

and 1.2 apply to the appellant. In essence the appellant, no less than the strikers individually, were forbidden to "continue" the strike. More specifically, they were forbidden from blocking access to the premises and inhibiting people entering and leaving. The question is therefore whether evidence exists of the appellant doing these things.

[9] The principle upon which a juristic entity is held to perform acts is by acting through its officials, agents or members, acting within the scope of a mandate from the juristic entity to persist in given activity. What is required is proof that the strike and the blockade occurred in pursuance of a decision by the appellant or of an agreement with its members to strike. In the case of a protected strike, the observance of the formalities by a trade union in terms of section 64 of the LRA would establish the fact of the union's complicity. In the case of an unprotected strike the establishment of the fact of union complicity is likely to be by inference.

[10] Mr Van der Riet contends that upon a reading of the order of the court *a quo*, insofar as it requires action or inaction on the part of the appellant union, there has been no evidence adduced of a breach by the appellant; ie no case is made in the papers that union in its own right "continued" with the strike after 16 February, nor that it in its own right blocked entrances to the premises.

[11] Mr Bekker, for the respondent was not able to point to any evidence of a breach by the appellant in its own right. The argument he advanced was twofold; first, that the conduct of the appellant's members must be attributed to the appellant, and secondly, it could not have been misunderstood by the appellant when it got the court order that an interdict to stop from "continuing" with the strike meant that it had to take positive steps to bring the strike to an end. He relied on the passages from the judgment of the court *a quo*, cited above.

[12] The first difficulty from which these submissions suffer does not flow from the proposition that a trade union can or ought to be vicariously liable for its members' actions, but rather, derives from a confusion of two distinct bases for liability that can be incurred by a juristic person. The fact that a trade union

can be liable for the acts of its members does not assist in deciding whether the trade union, in its own right, has breached a court order. This distinction was also not addressed in the judgment of the court *a quo*. The upshot is that when there is evidence to implicate the union vicariously in the unlawful acts of its members, there may well be an action available to the respondent for redress, but the liability of the appellant for contempt of a court order is strictly determined by reference to what the court ordered the trade union, itself, to do and the presentation of evidence that it did not do as it was told.

[13] The second difficulty from which these submissions suffer is the dependence on a generous interpretation of the term "continue" in the order directing a cessation of the strike, to imply that the appellant*, a fortiori,* had to take "'positive steps" to bring the strike to an end. What might such positive steps be that are to be implied by stating that the appellant was not to continue with the strike? Bearing in mind the quasi-criminal sanction for a breach, it is to be expected from the text of an order that the party interdicted is left in no reasonable doubt as to what exactly is to be done or refrained from. The formulation of the order against the appellant is vague, having not been insightfully framed with logistics of proof of breach and of effective execution in mind. An interdict order against a union should prudently state plainly what action is mandatory, and not elide the union's obligations with that of its members. The terminology of, "'continuing" the strike, whatever broad meaning might be attributed to that term, is, in my view, too vague to be useful in a context where quasi-criminal sanctions are at issue.

[14] In other cases where contempt proceedings have been prosecuted that degree of clarity in the orders has been the point of departure for the enquiries. The point is illustrated in *Security Services Employers' Organisation and Others v SATAWU* (2007) 28 ILJ 1134 (LC). The union was directed by a court order to ensure that copies of an order interdicting further strike action were brought to the attention of its members by affixing copies at various places and to maintain such notices until the workers all resumed work. The union did not do so. Thus a breach was proven. Upon that platform the court addressed the reasons why there was a breach and unsatisfied with the

explanation concluded that a contempt had occurred and fined the union R500,000, suspended on certain conditions. The liability of the union was based on its direct breach of obligations imposed upon it. A further example is that of *Supreme Spring, a Division on Met Industrial v MEWUSA* (J 2067/2010) where the relief granted in the interdict specifically instructed the union to take concrete action, ie to refrain from inciting the striking employees from participation in the strike. The union official responsible thought it appropriate to approach the Management and try to negotiate a cessation of the strike in return for the employer abandoning the court proceedings. The court held that this behaviour was inconsistent with the order directing the union not to encourage or incite the strikers to persist, held the union in contempt, imposing a fine of R100,000 on the union and imposing suspended terms of imprisonment on named union officials. At [18] – [20] it was reasoned by Van Niekerk J as follows:

> '[18] In my view, it was incumbent on the union delegation, given the terms of the interim order, and in particular the interim interdict against encouraging or inciting the striking employees from continuing their strike, to have unequivocally advised their members to return to work. To use the opportunity of the meeting with management to attempt to negotiate conditions attaching to a return to work was a wilful and *mala fide* defiance of the order.
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> [19] It does not assist the general secretary of the union to raise the defence (which he appears to do) that the union did not sanction the strike and that it was therefore not in contempt of the court order. If that were so, it would not have been open to Thobejane and Makgoba to continue to use the strike as a bargaining chip to secure the demands that they tabled in their meetings with the applicant's management. In so far as the union relies on its constitution and a memorandum addressed to union officials on 19 October, in my view, this does not assist the union. The existence of the constitution and the fact that the strike that is the subject of these proceedings was called other than in accordance with its terms does not necessarily mean that the union did not at least tacitly support the strike that took place on 18 and 19 October 2010. It is significant that at no stage did the union contact the applicant to distance itself from the strike action. As I have already found, the actions of the union's deputy general secretary and organiser on 19 October

were to continue to use the strike as leverage to obtain concessions from the applicant's management despite the clear terms of the order.

[20] On this basis, the union acted in contempt of the order granted on 18 October, as did Thobejane and Makgoba in their capacities as union officials. For the same reasons, those of the individual respondents who were part of the union delegation, in their capacity as shop stewards, are in contempt. On the papers, these persons are identified as Zungu and Mbanyatha.'

[15] The sole morsels of evidence that have been invoked to contend that there was a culpable act of association between the appellant and its members who had engaged in a strike improperly, were, first, the letter of 15 February, referred to above and, secondly, an email of 26 February, sent shortly before the return day, in which a union official, Sipho Mhlahlo, in response to talks that had taken place with the respondent to resolve the strike writes:

'We seem to be on par with regard to the prevailing situation and I am certain that we will resolve this matter real soon. I will use my influence and move my members toward resolving and ending the strike today, I however will need your legal team to withdraw the application at the LC on Friday [ie the return day of the contempt application] as there will no longer be a need to enforce the claim against the union. Of course this will only be done at court when we meet. I assure you that in future things will be different and we will not have this sort of thing happening outside the confines of the law…'

[16] Mr Bekker contended that this email of 26 February was further evidence of the appellant exploiting the strike as leverage to win a bargaining advantage, thereby placing the appellant in a position similar to that described in *Supreme Spring Case* (Supra). That reading of the text is not justified, as there is no conditionality to the request to withdraw the application. A better reading is a plea by Mhlahlo to assist him to influence the strikers to cease striking by facilitating a claim that he could make to his members that he had the ear of the management of the respondent. Effective negotiation strategy often requires one negotiator to assist his opponent to enable him to influence the opposing constituency. Moreover, the context in which this letter must be construed is the circumstances described in the respondent's letter of 15

February to the appellant, in which the failed attempts of the appellant to persuade the strikers to cease are remarked upon.

[17] No more evidence exists to describe what the appellant did after service of the order. The Affidavit of Ditjoe, delivered on the return day, addressing the initial interdict application, alleges that the appellant had advised members to return to work; however no detail or corroborative information is given when or how such a communication took place. The application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (AD) at 673E F means that this allegation of the appellant union, then the respondent *a quo*, must be accepted as the version upon which the decision of the court had to made. Accordingly, there is no evidence of the appellant deciding to block or inciting or encouraging the blockage of the entrance.

[18] The respondent's thesis that a trade union, as a matter of principle, has a duty to curb unlawful behaviour by its members indeed enjoys merit. Indeed, the principle of union accountability for its actions or omissions is beginning to gain recognition, as evidenced by the decision in *FAWU V Ngcobo NO* 2013 (12) BCLR 1343 (CC) where, as it happens, the very appellant in this case, was held liable to its own members for failure to prosecute the members interests properly in litigation. However, there is no room, upon that platform alone, to build a case that the appellant, in its own right, in this instance, breached this order of court.

[19] The sentiments expressed by the court *a quo* which are cited above have been rightly described by Alan Rycroft as a "…significant moment of judicial resolve". (Rycroft, A "*Being held in Contempt for non-compliance with a court interdict: In2food (Pty) Ltd v FAWU*" (2013) 34 ILJ 2499). Indeed, the sentiments deserve endorsement, and are adopted by this Court. Nevertheless, on the facts of this matter, the appellant has not been shown to have breached the order.

The costs

[20] Having regard to the overall equitable considerations relevant to the regulation of the relationship between the parties, it is appropriate that this appeal should not attract a costs order.

The order

a) The appeal is upheld.

b) The whole of the order granted by the court *a quo* is set aside.

c) There shall be no costs order in either the court *a quo* or in the appeal.

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Sutherland AJA

I agree

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Tlaletsi DJP

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Coppin AJA

APPEARANCES:

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