

Not reportable

Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J 2067/10

In the matter between:

**SUPREME SPRING, A DIVISION OF
METINDUSTRIAL LTD**

Applicant

And

**MEWUSA
THE INDIVIDUALS LISTED IN
ANNEXURE "A" OF THE NOTICE OF MOTION**

First Respondent

**Second to further
Respondents**

JUDGMENT

VAN NIEKERK J

Introduction

[1] On 18 October 2010, this court issued a rule *nisi* together with certain interim interdictory relief. The latter included an order declaring a strike at the applicant's premises to be unprotected, interdicting and restraining the second to further respondents ('the striking employees') from participating in the strike, and interdicting the first respondent ('the union') from encouraging or inciting the striking employees

to participate in the strike. These elements of the order were directed to operate as an interim order with immediate effect, pending the finalisation of the application. The court ordered further that the respondents were entitled to anticipate the return date on 48 hours notice to the applicant. The rule *nisi* was confirmed without opposition on 5 November 2010.

[2] On 19 October 2010, the applicant filed an application in terms of which it sought an order declaring the respondents to be in contempt of the order granted on 18 October. The court granted an order calling upon the general secretary of the first respondent (Mr Kgagudi) and certain named persons (Zungu, Lesapo, Radebe, Mbangata, Thobejane and Makgoba, (to whom I shall refer as the individual respondents) to appear in court on 22 October 2009 to show cause why the union should not be fined and why the individual respondents should not be committed to prison for their contempt. The matter was postponed on 22 October and again on 27 October and thereafter to 2 November to secure the filing of answering affidavits on behalf of the individual persons named above. The application was eventually argued on 10 November.

Factual background

[3] The facts giving rise to the application for interim relief and the present application are set out in the founding affidavit to both applications, and I do not intend to repeat them here. For present purposes, the following summary will suffice.

[4] On 2 September 2010 those of the applicant's employees who are members of the union joined a strike that had been called by NUMSA on 1 September. On 9 September 2010, the applicant advised the union that it intended to take disciplinary action against certain employees, including five shop stewards. The parties met at the end of September to discuss the issue. Little progress was made, and on 11 October 2010 the union brought an urgent application to interdict the applicant from conducting the disciplinary hearing. The application was dismissed. On 14 October 2010, the applicant dismissed two of the shop stewards.

[5] On 18 October 2010, the union's members commenced a strike at the applicant's plant. It is not disputed by any of the union officials and office bearers in the answering affidavits filed by them that at about 9h15 that morning, striking

employees stormed the administration block at plant 2, and that they broke the door of the human resources manager, attempting to gain access to her office.. It is also not disputed that the group moved down the corridor, broke a trellidor in the passage that separates the managing director's office from the rest, and that they demanded to be addressed by the human resources manager or the managing director on the issue of the reinstatement of previously dismissed shop stewards. The respondents do not deny that the striking employees then gathered at behind the administration building, at an area where undercover parking is available. The vehicle belonging to the applicant's managing director was damaged – all four tyres were punctured, the windows were broken and the vehicle was dented. Employees who were working were intimidated, and forced to move out of the plant.

[6] At approximately 10h15, members of the respondent's management, including the industrial relations manager, Msomi, met with union shop stewards. The shop stewards demanded that the two dismissed shop stewards be reinstated. They also demanded better benefits and wages, a proper grading system and lunch breaks as the law requires.

[7] The order granted on 18 October was served on the union on the same date and on the applicant's employees on the morning of 19 October. The events that give rise to the present application occurred on 19 October. Early that morning, Msomi met with two shop stewards, Mbangata and Ndwandwe. They informed him that the union's officials had advised the striking employees that they were entitled to continue the strike for 48 hours, referring to that part of the order which permitted the union to anticipate the return date on 48 hours notice to the applicant.

[8] The applicant's attorney of record (Ms Louw) thereafter telephoned Adv Phala, the union's legal adviser, to explain the nature of the order. Phala acknowledged that he understood the correct meaning of the order (i.e. that a provision to the effect that the union could anticipate the return date on notice did not mean that the striking employees could continue their strike), but stated that he had not communicated an incorrect interpretation of the order to the striking employees. Louw thereafter requested Phala to intervene, which he undertook to do. At 11h05 Phala had not reverted to Louw. Louw then addressed a letter to Phala stating that in the absence of intervention by the union, the applicant would bring a contempt

application. At 11h42, Phala telephoned Louw and advised her that the union's organisers had been sent to the applicant's premises to persuade the striking employees to return to work.

[9] At some point on 19 October, Kgagudi addressed a general letter to union officials and office bearers drawing their attention to clauses 49.1 to 49.5 of the union's constitution, claiming that the union would be responsible only for industrial action carries out in terms of the clauses concerned. The letter continues :

Therefore this implies that MEWUSA shall not be liable for any industrial action carries out contrary to clause 49.1 – 49.5. Organisers and all structures should continuously inform and capacitate members and shop stewards about this clauses of industrial actions (sic).'

There is no evidence that this letter was ever sent to any of the officials or members of the union delegation engaged in discussions at the applicant's plant.

[10] At the meeting with management representatives held on the morning of 19 October, the union delegation, which included Zungu, Mbangata, Thobejane, and Makgoba, told Msomi that they were there to negotiate the situation from a clean slate. When Msomi refused, the union delegation requested and was granted an opportunity to address the striking workers. At 12h15, the delegation again met with Msomi, who again advised them that the dispute about the dismissals would run its course and that they should instruct the striking employees to return to work. The delegation refused, and demanded that Bekker address them. By 13h20, a stalemate had been reached, with the union delegation stating that they would call off the strike only if there would be no disciplinary action against the employees and if the disciplinary process in respect of the previously dismissed employees was finalised by 21 October. None of these averments are specifically denied by any of the individual respondents. . On the respondents' version, agreement was reached at around 15h30 that the striking workers would return to work, which they did the next day. The applicant denies that any agreement was reached, but that is not a dispute that is relevant for present purposes.

[11] The individual respondents called upon to show cause why they should not be committed for contempt filed affidavits in response to the contempt application. The averments made by each of them are summarised below:

Zungu

Zungu is employed by the applicant. He is also a shop steward. He states that at about 10h00 on 19 October, Thobejane and Magoba came to the applicant's premises and held a meeting with management. Thobejane called members and explained the interdict and said that the strike should be called off. He also stated that the strike did not comply with the union's constitution. At a meeting held with the applicant's management at 1130 the same morning "to address calling off the strike and how management intends and/or plans to resolve workers grievances and demands", the management refused to discuss any issues with Thobejane, Makgoba and the shop stewards. After further discussion with the members, they finally returned to work at about 15h30. After a meeting with the applicant's management, it was agreed that the members would resume their duties on 20 October.

Lesapo

Lesapo is an employee of the respondent and a shop steward. He states that on the afternoon of 19 October, union officials arrived to call off the strike, and that everyone went home because it was already late. He states further that he did not encourage any employees to go on strike and that he was part of 'the people' who addressed employees and said that the union was distancing itself from the strike.

Radebe

Radebe is an employee of the respondent. He states that he was informed by fellow employees that there was an interdict from the Labour Court, but that the interdict allowed employees 48 hours to continue the strike. He convened a meeting (when this was done is not stated, but it would appear to be 18

October) to discuss the court order. He had no reason to doubt the interpretation of the order that he had been given. He took a copy of the order home. On 19 October, he did not attend at the applicant's premises. During the same afternoon, he realised that he had a copy of the order with him. On reading the order, he realised that the order had been misinterpreted regarding the 48 hour provision. He urgently made his way by taxi to the applicant's premises. To tell members that the order did not permit them to continue their strike as they thought. On arrival at the applicant's premises at about 1530, Radebe says he saw Mogoba and Thobejane with shop stewards, discussion the 'dissolving' of the strike. When he joined them, they were about to convey a message that the general secretary of the union had condemned the strike and had mandated two officials to put an end to the strike. The officials then went to inform the respondent's management that the members would resume work the following day.

Mbanyatha

Mbanyata states that he is an employee of the applicant. He is also a shop steward. His affidavit is cast in terms virtually identical to that of Zungu.

Thobejane

Thobejane is employed by the union as a deputy general secretary. He states that on 19 October, he was instructed by Kagadi to accompany Thobejane to visit the applicant's premises to inform the union's members that their strike was illegal and to encourage them to return to work. He states further that after addressing the members, they raised the issue of shop stewards who have been dismissed and suggested that the issue be discussed with the applicant's management. He and Thobejane then requested an audience with management. At a meeting on the same morning, Makgoba states that he and Thobejane had made it clear to the members that the strike was not sanctioned by the union, and that the union was doing its best to encourage the members to return to work. On the issue of the dismissed employees, the management stated that they were not prepared to discuss the matter with the union since appeals had been submitted and remained pending. They subsequently met with the members once more and instructed them to return

to work. The members were reluctant to do so but after making it clear that the union was distancing itself from the strike they agreed unconditionally to resume duty on 20 October.

Makgoba

Makgoba is employed by the union as an organiser. His affidavit is cast in terms identical to that of Thobejane.

[12] None of the individual respondents denies the averments in the founding affidavit regarding the sequence of events on the morning of 19 October, or the exchanges that the applicant avers took place between its management and the union delegation. It is clear from the papers that on the undisputed version of the applicant, the union delegation that met with management on the morning of 19 October set preconditions to a return to work, in circumstances where the union and the members of its delegation were aware of the order granted by this court to the effect that the strike was unprotected, and that the union should not encourage or incite its members to participate in the strike. It was only after the refusal by management to attach any preconditions to the return to work that on after 15h00 on the afternoon of the 19th, the union delegation persuaded the striking employees to return to work with effect from the next day.

Legal principles

[13] The purpose of contempt proceedings is to compel compliance with orders of court and to vindicate the court's honour consequent on the court's disregard of its orders. The principles relevant to contempt were set out by Cameron J in *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). It is a crime unlawfully and intentionally to disobey a court order, the essence of which lies in violating the dignity, repute or authority of the court. The order in question must be one *ad factum praestandum*, the order must have been served on the respondent or the respondent must have been advised of the order in circumstances where there are no reasonable grounds for disbelieving the information, and respondent must have failed to comply with the order, and the failure to comply must be both mala fide and wilful (see *Fakie NO (supra)*, *Uncedo Taxi Service Association v Maninjwa & others* [1998] BCLR 683 (E)).

[14] Once it has been proved that the order in question was issued and that the respondent failed to comply with it, there is an evidentiary burden on the respondent to demonstrate bona fides and that that the disobedience of the order was not mala fides. *Fakie NO (supra)*, the court made the point in the following way:

Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

Analysis

[15] In so far as the present application concerns a failure by any of the individual respondents to return to work, it seems to me that any finding of contempt in these circumstances would be at odds with one of the primary purposes of contempt proceedings. In these circumstances, the principle referred to in *Naidu & others v Naidoo & another* 1993(4) SA 542 (D) applies. In that case, Alexander J held:

“By the time, however, that the present matter was argued on 12 March this particular dispute had ceased to exist. The sale has not only been cancelled but possession of the business handed back to the Naidus. Counsel for the respondents submitted accordingly that the very basis on which the committal order depended had disappeared – whatever the merits of the dispute- no longer availed the applicants. His contention rested squarely on the full Court decision of Cape Times Ltd v Union Trades Directories (Pty) Ltd 1956 (1) SA 105 (N). As stated there, it was held that “a litigant has no locus standi to seek an order for contempt arising out of a breach of an order obtained in a civil proceeding where the punishment is not calculated to coerce compliance with the order (at 643B-C)”

It is not disputed that by the time the present application was argued, the strike had ended. On the basis of the above authority, I do not intend therefore to consider whether any failure or refusal to return to work in itself constituted contempt.

[16] It is trite that a corporate body can be in contempt of a court order, and that directors of companies and members of close corporations can be liable for contempt if they cause the body concerned to be in breach of a court order (see *Ntombela v Herridge Hire and Haul CC & another* [1993] 3 BLLR 253 (LC) and

Twentieth Century Fox corporation & others v Playboy Films Pty) Ltd & another 1978 (3) SA 22 (W)).

[17] The union was represented by Thobejane and Makgoba, both senior officials, in the discussions held with the applicant's management on the morning of 19 October. The evidence establishes beyond a reasonable doubt that both Thobejane and Makgoba were aware of the court order when they arrived at the applicant's premises on the morning of 19 October, but that they nevertheless initiated a discussion with the applicant's management in which they placed preconditions on a return to work by the striking employees. This was clearly a breach of the order, which required the striking employees to return to work unconditionally, and which required the union not to encourage further participation in the strike. It was only after the attempt to negotiate the terms of a return to work failed that during the mid-afternoon of 19 October, that the union delegation advised the striking employees to return to work.

[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.

[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.

[21] I make no finding in respect of those individual respondents who were not part of the union delegation. Radebe avers that he remained at home until the afternoon of 19 October, when he returned to the applicant's premises after having had the revelation that the interpretation initially placed on the court order was incorrect, and that the order required the striking workers to return to work immediately. Radebe's version conflicts with the versions deposed to by others, notably Thobejane and Makgoba. I have no doubt that the version proffered by Radebe is a pack of lies, but the evidence does not establish beyond reasonable doubt that he acted in breach of the court order. Similarly, the evidence against Lesapo, whose affidavit is woefully vague and inadequate, does not disclose any wilful attempt to act in breach of the order. I wish to emphasise that this narrow finding does not serve to exonerate either Radebe or Lesapo from any other misconduct that they may have committed during the course of 18 and 19 October.

[22] In relation to sanction, in *SA Police Services v Police and Prisons Civil Rights Union others* (2007) 28 ILJ 2611 (LC), this court issued a rule nisi calling on the respondents to show cause why the union should not pay a fine of R500 000 for what was alleged in that instance to be its contempt of court. In *Security Services Employers' Organisation & others v SATAWU & others* (2007) 28 ILJ, 1134 (LC), this court imposed a fine of R500 000 on a union for its contempt, and sentenced union officials to imprisonment for 6 months, suspending sentences in each case for 5 years. In the present matter, I must necessarily take into account the fact that the effect of the contempt was to protract the strike by a day, and that it is not disputed that the applicant suffered a loss in revenue of some R1.05 million as a consequence.

[23] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the Act to make costs orders according to the requirements of the law and fairness. In the present matter, I must necessarily take into account the conduct of the respondents in opposing the application for contempt. The terms of the order granted on 19 October were such that the respondents were called upon to appear on 22 October 2010. On that date, the application was postponed at the respondents request to 27 October. The matter was again postponed to 2 November, and then again to 10 November to enable the individual respondents the opportunity to place their versions before the court. The respondents failed to meet the time frames fixed by the order granted on 2 November. The unprofessional conduct of the case aside, I must also take into account the conduct of the union's officials and office bearers, and what appears to be a culture in terms of which orders made by this court appear to be secondary to the seeking of bargained advantages. There is no reason why the applicant should be required to bear the costs of these proceedings.

I accordingly make the following order:

- 1 The first respondent and the following persons are found to be in contempt of the order granted by this court on 18 October 2010:

Nthandiyenkosi Zungu

Sinethemba Mbanyata

Edward Thobejane

Albert Makgoba.

2. The first respondent is ordered to pay a fine of R100 000, suspended for a period of 5 years on condition that the first respondent is not found guilty during that period of contempt of an order of this court.
3. The persons named in paragraph 1 of this order are sentenced to imprisonment for a period of 3 months, which sentence is wholly suspended for a period of five years on condition that the named persons are not during that period found guilty of contempt of an order of this court.

4. The first respondent is to pay the costs of these proceedings, including the wasted costs of 22 October 2010, 27 October 2010, and 2 November 2010, when the proceedings were postponed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing 10 November 2010

Date of judgment 10 August 2011

Appearances:

For the applicant Ms E Louw ENS Attorneys

For the respondents: Noveni Eddy Kubayi Inc Attorneys