REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J1239/13

In the matter between

XSTRATA SOUTH AFRICA (PROPRIETARY) LIMITED	**Applicant**
and	
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**First Respondent**
NATIONAL UNION OF MINEWORKERS	**Second Respondent**
THE MINISTER OF POLICE OF THE REPUBLIC OF SOUTH AFRICA	**Third Respondent**
THE NATIONAL COMMISSIONER OF POLICE OF THE REPUBLIC OF SOUTH AFRICA	**Fourth Respondent**
THE INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION	**Fifth to Further Respondents**

Heard: **13 February 2014**

Order granted: **25 February 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] There are three separate but interrelated applications before the Court. The first two concern extended return dates of a *rule nisi*. These are:

1.1 An application brought by the Applicant (Xstrata) to confirm an interim order (in the form of a *rule nisi*) granted by Molahlehi J on 11 June 2013 in terms of which the Court interdicted an unprotected strike action and strike related misconduct. This application will be referred to as the "Main application" and is opposed only by the First Respondent (AMCU).

1.2 An application brought by Xstrata to confirm an interim order (in the form of a *rule nisi*) granted by Snyman AJ on 26 July 2013, which placed AMCU, the Second Respondent (NUM) and the individual respondents in contempt of Court on the grounds that they had contravened the order of Molahlehi J. This application will be referred to as the "Contempt application", and is also opposed only by AMCU.

1.3 An application brought by AMCU to strike out a portion of Xstrata's founding affidavit in the "contempt application". This will be referred to as the "Strike out application". This application is opposed by Xstrata.

Background:

[2] The background to these applications is fairly common cause. They affect Xstrata's operations at Thorncliffe, Helena and Magareng Mines (The Company's mines). These mines engaged about 1 256 hourly paid employees, who were members of both AMCU and NUM. On 28 May 2013, the individual respondents embarked on an unprotected strike at the mines. This was one of the many unprotected strikes that the individual respondents had embarked upon in the recent past.

[3] On 30 May 2013, the individual respondents were dismissed. The dismissals were confirmed on 5 June 2013. Following incidents of violence on 6, 7 and 10 June, Xstrata launched an urgent application before this Court on 10 June

2013. On 11 June 2013, Molahlehi J granted an interim order (in the form of a *rule nisi*) in the following terms;

> "1. The provisions of the Rules of this Honourable Court relating to times and manner of service referred to therein are dispensed with and the matter is dealt with as one of urgency in terms of Rule 8 of the Labour Court Rules.
>
> 2. *Rule nisi* is issued calling upon the Respondents herein to appear and show cause on 16 August 2013 why a final order should not be granted, in the following terms:
>
> 2.1 the strike which commenced on morning of 28 May 2013 is not in compliance with Chapter IV of the Labour Relations Act, 66 of 1995 and is unprotected;
>
> 2.2 the Third to Further Respondents (Fifth to Further Respondents as cited in these applications) are interdicted and restrained from:
>
> 2.2.1 gathering at any of the Applicant's entrances to the workplace, and/or blocking such entrances
>
> 2.2.2 encouraging and/or inciting any of the Applicant's employees to participate in the unprotected strike; and
>
> 2.2.3 intimidating any of the Applicant's employees to participate in the unprotected strike; and
>
> 2.2.4 being within 4 (four) kilometres of the Applicant's Helena, Magareng and Thorncliffe Mines.
>
> 2.3 The First and Second Respondents are ordered to ensure that their members comply with this order."

[4] On 11 June 2013, Xstrata served the order on the Fifth to Further respondents in the manner prescribed in prayer 5 of the order itself. The order was also e-mailed to AMCU's attorneys of record, even though they had yet to be formally instructed in the matter. On 22 July 2013, the same order was formally served on AMCU at its head office and also on NUM by telefax.

[5] Following incidents of intimidation and violence during the period 11 to 25 July 2013 allegedly perpetrated by members of the individual respondents, Xstrata then launched the contempt application. On 26 July 2013, Snyman AJ issued a *rule nisi* in the following terms;

"2.1 The first and Second Respondents are in contempt of the Court order of this Honourable Court dated 11 June 2013 ("the Court Order")

2.2 The Fifth to Further Respondents are in contempt of the Court Order.

2.3 The First and Second Respondents, are ordered to appear in this Court on 12 September 2013 to show cause why the First and Second respondents should not be ordered to each pay a fine to be determined by the Court for their contempt of the Court Order.

2.4 The following persons are ordered to appear in this Court on 12 September at 10h00 to show cause why they should not be imprisoned for a period to be determined by the Court for their contempt of the Court Order. (20 individuals are listed)

2.5 The Third and Fourth Respondents are directed and ordered to ensure that the SAPS removes the Fifth to Further Respondents from within 4 (four) kilometres of the Applicant's Helena, Thorncliffe and Magareng Mines at any time when they are within 4 (four) kilometres of the Applicant's Helena, Thorncliffe and Magareng Mines following the service of this order.

2.6 The Third and Fourth Respondents are directed and ordered to ensure that the SAPS enforces the rule of law and arrests all persons who contravene the Court Order and/or who conduct themselves in an unlawful manner;

2.7 The Third and Fourth Respondents are directed and ordered to take such steps as may be reasonably necessary to give effect to and enforce the Court Order."

<u>The Main Application:</u>

[6] As a consequence of the dismissal of the individual respondents, paragraphs 2.1; 2.2.2; and 2.2.3 of the Order issued by Molahlehi J are no longer pertinent. AMCU however opposes the granting of a final order in respect of prayer 2.2.4 (The "perimeter order") and prayer 2.3 (The "ensure compliance order").

"The Perimeter order"

[7] AMCU's contention was that in terms of section 21 of the Constitution of the Republic of South Africa 108 of 1996 (The Constitution), everyone has the right to freedom of movement, and that its members were entitled to move freely throughout South Africa, and lawfully to be at any place that they wished to be. Furthermore, it was submitted on their behalf that in terms of section 17 of the Constitution, AMCU members have the right, peacefully and unarmed, to assemble, to demonstrate and picket. To this end, it was submitted that the "perimeter order" was too wide and had the effect of placing unnecessary, unjust and unreasonable restrictions on the Members' constitutional rights.

[8] AMCU's further contention was that the "perimeter order" would preclude its members, for an indefinite period, from being within 4 kilometres of the Xstrata Mines. It had also pointed out that it would be nonsensical to confirm the order in that some of the individuals sought to be interdicted and restrained, have since been reinstated or re-employed. Impracticalities were also pointed which it was contended would severely prejudice the Fifth to Further respondents. These mainly related to access to either the main public road or to the Mines for a variety of reasons.

[9] Xstrata's contention was that it sought confirmation of the "perimeter order" on the grounds that firstly, the T-Junction where the Thorncliffe access road met with the R577, which is the only access point to the only road to the mines, is exactly 3.1 km's from the plant entrance to the Thorncliffe Mine. Secondly, the 4 kilometre order was sought on the grounds that during the course of the unprotected strike, the individual respondents had gathered at the T-junction and prevented other employees and other private persons from accessing the mines. Thirdly, subsequent to their dismissals, the individual respondents have continued to gather at the T-junction and prevented persons from accessing the mines. Fourthly, Xstrata was of the view that since the dismissals and a referral of a dispute in that regard, there was a "likelihood that the dismissed employees will persist at gathering at the T-junction and in participating in incidents of violence and unlawful behaviour". It was thus submitted that this was not a case where the underlying dispute that formed the subject of the *rule nisi* has been extinguished, in which event the Court might be inclined to discharge the rule. To this end, Xstrata sought

confirmation of the "perimeter order" that would prevent the individual respondents from gathering at the T-junction, which is a critical point of access to the company's mines, and which the members had utilised to block access to the company mines.

[10] In regards to the concerns raised by AMCU regarding the impracticalities associated with the "perimeter order", Xstrata submitted that the concern can be addressed by the replacing of the word *"being"* at the beginning of paragraph 2.2.4 of the order with the word *"gathering",* in order to be in line with paragraph 2.2.1 of the order.

Evaluation: ("The Perimeter order")

[11] In *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others*[1], Brassey AJ held as follows in regards to matters before the court on the return day;

> "It is trite that on the return day, the court must be satisfied that a proper case has been made out for each facet of the relief sought. Where the original papers fail to do this – because the allegations are either incomplete or strictly speaking inadmissible – the applicant should supplement them so that their deficiencies are remedied before application is made for confirmation of the rule"

[12] It is further trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time[2]. The Court in *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*[3] had regard to *Shephard v Tuckers Land and Development Corporation (Pty) Ltd*[4] and also acknowledged that the rule against raising new material for the first time in the replying affidavit was not inflexible. Nestadt J in *Shephard* had illustrated the point in the following terms[5];

> "This is not however an absolute rule. It is not the law of the Medes and Persians. The court has a discretion to allow new matter to remain in a

[1](1999) 20 ILJ 329 (LC) at 395 para B
[2] See *Betlane v Shelly Court CC* (2011 (1) SA 388 (CC) para 29 and also *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (0) at 568E).
[3] (2003) (5) SA 1 (C)
[4] 1978 (1) SA 173 (W) at 177
[5] at 177H – 178A

replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits."

[13] There can be no doubt that the Fifth to Further respondents' constitutional rights to freedom of movement under section 21 and section 17 of the Constitution are sacrosanct. However and most importantly for the purpose of this case, section 17 of the Constitution provides that *"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions"*.

[14] In the light of Xstrata seeking to have the "perimeter order" confirmed, it needs to show that the Fifth to Further respondents are likely to be within 4 kilometres of its Helena, Magareng and Thorncliffe Mines for no other purpose than to do wrong. Thus Xstrata has to show that the Fifth to Further Respondents' constitutional rights to be within the said area should be subject to limitations on account that they have no legitimate reason for being there other than for illicit purposes[6].

[15] In his written heads of argument, Adv Redding SC on behalf of AMCU pointed out that the only reference made by Xstrata in its founding affidavit to a point that is four kilometres away from its Mines was at paragraph 16 of the founding affidavit deposed to by Johan Combrink, its General Manager at the Mines. Combrink had averred that on 6 May 2013 a number of buses transporting employees to Thorncliffe Mine, arrived at the Applicant's Thorncliffe Mine, and the employees disembarked from the buses and gathered at the bus stop in front of the main entrance to the Thorncliffe Mine. The bus stop is located on the main access road to Thorncliffe, Helena and Magareng Mines, which road is also the main access road to the Xstrata's Mototolo Mine. The road leading to Thorncliffe is the Thorncliffe Road, and the main road which is used to access the Thorncliffe Road is the R577, which is approximately 4 (four) kilometres from Thorncliffe Mine.

[16] Reference to the four kilometre area was made by Combrink at paragraph 51 of the founding affidavit wherein he had stated the following;

"On Thursday, 6 June 2013, the dismissed employees gathered at the pick-up points where buses belonging to the Applicant collect employees to take them

[6] See *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & Others* (supra at p396 para B).

to work at the Applicant's Mototolo operation. They intimidated the employees on 2 (two) of the buses and forced them to disembark from the buses. They then intimidated the bus drivers of these 2 (two) buses and forced the bus drivers to take them to an area approximately 4 (four) kilometres from the Applicant's Thorncliffe Mine, where they disembarked and walked towards the Applicant's Thorncliffe Mine, carrying axes, pangas, sticks and other weapons and prevented various vehicles from passing. I attach, marked "JC18", a still image from a video recording taken on 6 June 2013, in which the Applicant's employees en route to the Applicant's Mototolo Mine are seen being removed from a bus of the Applicant. I attached marked "JC19" a picture on 6 June 2013, in which the group is seen preventing a private vehicle from passing"

[17] Adv Redding SC further submitted that Xstrata had for the first time, made mention of the T-junction in its replying affidavit. He submitted that on Xstrata's own version as gleaned firstly from the replying affidavit, secondly, the annexure "SYV1" as attached to the replying affidavit, which is a map of the area in question, and thirdly, the contents of paragraph 48 of the replying affidavit in respect of the contempt application, there were differing versions as to how far the Thorncliffe Mine entrance was from the T-junction. The argument further went that if the purpose of the "perimeter order" was to prevent the Fifth to Further respondents from blocking access to the company's mines at the T-junction or any other point, the company should simply have sought such an order, which it did not. It was further submitted that to the extent that prayer 2.2.1 sought an order to interdict and restrain the Fifth to Further respondents from *"gathering at any of the Applicant's entrances to the workplace and/or blocking such entrances"*, they would in any event be precluded from blocking access or entrance to the Company's mines, whether at the T-junction or any other point. To this end, it was argued that the "perimeter order" was superfluous.

[18] In *Ripple Effect 40 (PTY) LTD t/a Mkuze Bus Service v SATAWU and Others*[7], Van Niekerk J with reference to *Lourenco & others v Ferela (Pty) Ltd & others*[8] opined that the respondent is obliged, on a return day, to show no more than that the order should not have been granted at the outset because there was no proper case made out for that order on the papers. In my view,

[7] CASE NO: D 440/09 at para 16
[8] 1998 (3) SA 281 (T) at 289 I-J

AMCU's opposition to the confirmation of the "perimeter order" had more to do with the consequences of the confirmation of that Order rather to show why it should not have been granted at the outset. In essence, AMCU failed to make out a case in its answering affidavit to counter the factors presented by Xstrata as to the necessity of this "perimeter order". This conclusion is based on the following:

[19] AMCU did not deem it necessary to either respond or refute Combrink's averments in relation to the reason the "perimeter order" was sought in the first instance. Instead, in its answering affidavit, AMCU merely stated that it would abide by the decision of the Court in relation to prayers 2.1, 2.2.1, 2.2.2 and 2.2.3 of Molahlehi J's Order. In its view, it did not deem it appropriate to respond to allegations made by Xstrata as it considered them irrelevant considering its (AMCU's) opposition to the relief sought.

[20] In opposing the confirmation of the "perimeter order", Marais, AMCU's Head Legal Advisor in his answering affidavit did not at all challenge or refute allegations made by Combrink surrounding incidents of intimidation, the unlawful stopping of buses ferrying employees to the Mines, the carrying of an assortment of weapons by members, the prevention of access to the Mines, the removal of other employees from buses and thus preventing them from reporting for duty. Paragraphs 2.1; 2.2.2 and 2.2.3 of the *rule nisi* have since become superfluous in the light of the strike having ended and the subsequent dismissals of the strikers. The confirmation of the "perimeter order" however, was being pursued on the basis of subsequent events to the dismissal of the strikers, and also in view of the fact that the ending of the strike had not diminished the need of such an order.

[21] On AMCU's concession that it would abide by the Court's decision in respect of prayer 2.2.1, it should be inferred that at the very least, it acknowledges that its members have been gathering at any of the Applicant's entrances to the workplace and have been or had blocked such entrances. It can also be inferred that AMCU further acknowledges that its members may be guilty of having gathered at the company's entrances, and may have intimidated, and prevented other employees from reporting for duty whilst carrying an assortment of dangerous weapons. Notwithstanding, AMCU believes that its members should be allowed to continue with their actions unhindered as they

are acting in pursuance of their constitutional rights. This attitude cannot be countenanced in a democracy such as ours, where the rule of law is still a founding value in the Constitution.

[22] It is further a fundamental value, if not obligation of a democratic society that every right must be exercised with due regard to the rights of others. Thus inasmuch as the constitutional rights of AMCU members under sections 17 and 21 are acknowledged, in the same vein, other employees of Xstrata, or any other individuals who seek to do business with Xstrata, and who are not affected by the dispute with AMCU, also have rights, including to go about their business free from all forms of violence, intimidation and harassment, which incidents Combrink alluded to. Furthermore, Xstrata has a right to conduct its business and affairs with whomsoever unhindered, and has a right to have its employees who seek to render their services to do so unhindered.

[23] The right to assemble, to demonstrate, to picket and to present petitions under section 17 has inherent limitation by the insertion of *"peacefully*" and *"unarmed*". Mogoeng CJ in *South African Transport and Allied Workers Union and Another v Garvas and Others*[9] explained the rights in section 17 of the Constitution as follows;

> "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions." "That is what section 17 of the Constitution promises the people in South Africa."
>
> And,
>
> "Nothing said thus far detracts from the requirement that the right in section 17 must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection".

[24] It is acknowledged that Xstrata had not in clear terms sought an order in prayer 2.2.4 to prevent the Fifth to Further) Respondents from blocking access to the Company mines at the T-junction, and it can thus not make out its case in that regard for the first time in its replying affidavit. Prayer 2.2.1 of

[9] 2012 (8) BCLR 840 (CC) at para 51 - 52

the Order is specific in application as it merely refers to gathering at any of the Applicant's entrances to the workplace, and/or blocking such entrances. It does not refer to a radius, and to this end, it cannot be correct that prayer 2.2.4 is therefore superfluous as argued on behalf of AMCU. Adv Redding SC in his arguments was correct in pointing out that the Court's intention was to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. It is apparent that the Court drew up the order in the terms sought by Xstrata, and in my view, the order in its language and intent is clear and unambiguous.

[25] Xstrata had suggested that the word *"being"* in prayer 2.2.4 should be substituted with *"gathering"* in order to circumvent some of the practical problems highlighted by AMCU. Inasmuch as the language and intent of the order is clear and unambiguous, and further since Xstrata should be bound by its Notice of Motion, it is my view that in its application, the Order in its current form is indeed too wide and may have unintended consequences, some of which have been pointed out by AMCU. However, in view of Xstrata's uncontested contentions regarding incidents of intimidation, the blocking of access and other unsavoury incidents complained of, the constitutional rights allegedly exercised by members concerned cannot be unfettered, as the members have no intention of exercising those rights peacefully. Furthermore, in view of the current and prevailing complaints in regard to the gathering of members of the Fifth to Further Respondents at the areas within the four kilometre area, and further the reasonable apprehension of harm as a consequence of the continued gathering of these individuals, it is my view that the this "perimeter order" should be confirmed, *albeit* not in its current form.

[26] AMCU has not shown that the Fifth to Further Respondents have any intention of gathering at any point within the four kilometre radius peacefully. They are more likely to gather at the area in question for no purpose other than to do wrong. If this was not the case, AMCU would have at least indicated so in its answering affidavit. It is acknowledged that the word *"being*" in the order is wide enough to infringe on unaffected members of AMCU's right of movement in the area, and also those who might be in the area for legitimate reasons. It could not therefore have been envisaged by either the Court or Xstrata that the consequences of the "perimeter order" should be far-

reaching as to impact on unaffected individuals' constitutional rights, let alone inhibit the movement of Xstrata's own employees who would be in the area for legitimate reasons.

[27] The purpose of the "perimeter order" was clearly to prevent individual members or the Fifth to Further Respondents from gathering within a radius of 4 kilometres of Xstrata's Mines for nefarious and untoward reasons. To this end, and merely for the purposes of convenience, the "perimeter order" should be confirmed with an amendment, and the substitution of the word *"being"* in prayer at the beginning of 2.2.4 with the word *"gathering"* as suggested by Xstrata. This is also to make certain as to what conduct is restrained from taking place within the perimeter.

[28] As regards the duration of the order, it is apparent that the order was sought on the basis that the dismissed employees continue to, or are more than likely to converge or gather in the area concerned for reasons already stated until the unfair dismissal dispute is resolved or determined. The nature of the order and its duration in its current form appears to be unlimited. This is clearly undesirable and legally wrong[10]. It would however defeat the purpose of the order to limit it to a specific period in view of the uncertainty surrounding the finalisation or determination of the unfair dismissal dispute. To this end, the "perimeter order" is to remain in effect and binding on the Fifth to Further Respondents, until the determination or resolution of the unfair dismissal dispute referred to the CCMA.

The "Ensure Compliance Order"

[29] Xstrata seeks a final order that AMCU "ensures" that its members comply with the Court Order granted by Molahlehi J. AMCU conceded that it is in a position to take reasonable steps in order to attempt to ensure that its members comply with the Court Order. It however opposed the granting of the order on the following grounds;

It would be inappropriate for the Court to order that AMCU "ensures" compliance by its members with the Court Order. Furthermore, AMCU holds the view that to order it to "ensure" compliance would be to place an obligation

[10] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & Others* (supra) at 396 - I

on a trade union, for which there is no legal basis. AMCU had further submitted that as an independent trade union, its relationship with its members was governed by its constitution. There was no duty that arose either in contract, delict, or statute as between union and its members that would compel a union to police its members and to ensure that its members acted in a lawful manner. AMCU acknowledged that it was obliged to act within the scope of the Labour Relations Act in its collective bargaining relationship with an employer, but however, there was no duty owed by a union to an employer to ensure that its members do not engage in unlawful activities, especially in an unprotected strike that was not authorised, instigated, ratified, promoted or encouraged by the union, and where the union does not support such activities. Lastly, it was argued that any obligation placed on a union to physically "police" its members, in circumstances where its members are engaged in unlawful activities could result in "disastrous consequences".

[30] Xstrata's arguments in seeking confirmation of the order were as follows;

All that was required of AMCU was to do what is "reasonably necessary" to ensure compliance. Secondly, there existed a legal and factual basis for the ensure compliance order due to the following reasons;

AMCU had a collective bargaining relationship with the company. The unprotected strike was called and engaged in by a large group of members of AMCU. The strike was called primarily in opposition to the company's decision to take disciplinary action against Mr. Malibu, an AMCU Full Time Shop Steward and mine branch secretary, and also against Mr. Mohlala, an AMCU member. Malibu was the chief protagonist in the strike and had called upon his fellow AMCU members to join the *"fight against the company".* The company had held various meetings with AMCU during the course of the strike and had communicated with AMCU members through it during the course of the strike. The company had met with AMCU, including its president, Mr. Mathunjwa after the dismissals in an attempt to resolve the matter. At no stage did AMCU distance itself from the conduct of its members and AMCU continues to represent the individual respondents. All of these factors saddled AMCU with various legal obligations with the "ensure compliance" order.

Evaluation ("Ensure compliance order")

[31] The relationship between unions and employers is usually governed by recognition agreements, which sets out the rules of engagement. That collective bargaining relationship, cannot for practical purposes, set out all the do's and don'ts in the parties' relationship. Some of these rules will be developed as the relationship grows, and some of the rules are expected to be common knowledge as they arise out of the common law. Depending on how volatile the engagement may be at any given time, further rules may be agreed upon in the form of picketing rules in terms of section 69 of the Labour Relations Act[11]. This is the only provision in the LRA that places an obligation on the union and its members to act *"peacefully".*

[32] The Labour Relations Act does not regulate the relationship between the union and its members[12]. The only provisions that can be said to regulate that relationship to a limited extent by imposing certain obligations on the union are those under sections 98[13], 99[14] and 100[15]. Even then the monitoring and enforcement in that regard is left to the Registrar of Labour Relations under the Department of Labour. On the contrary, section 97 (2) of the LRA[16] appears to absolve members of a registered trade union from that union's obligations and liabilities.

[33] The relationship between a union and its members is regulated by its constitution. It is doubted however, that the definition of a *"member in good standing"* in the definition section of the constitution would extend beyond payment of union subscriptions. It is further doubted that in any union constitution, one would find a clause regulating its members' conduct during strikes, protests or similar activities. Invariably, when such activities are embarked upon, union members are let loose, as the union's constitution does not make provision for consequences of untoward behaviour no matter

[11] Which provides that a registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating-
(a) In support of any protected strike; or
(b) In opposition to any lock-out

[12] See *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale and Others* (1994) 15 ILJ 277 (LAC)

[13] Provision relating to accounting records and audits

[14] Duty to keep records

[15] Duty to provide information to the registrar

[16] Which provides that; The fact that a person is a member of a registered trade union or a registered employers' organisation does not make that person liable for any of the obligations or liabilities of the trade union or employers' organisation

how abhorrent, despicable, cruel and criminal that behaviour may be. As AMCU had stated; *"Any obligation placed on a union to physically "police" its members, in circumstances where its members are engaged in unlawful activity, could result in disastrous consequences"*[17].

[34] From AMCU's attitude as gleaned above, it is apparent that the "disastrous consequences" referred to can only be in relation to how the union will be perceived by its members when it makes attempts to implore them to behave like civilised citizens. For fear of being seen by its marauding members as "weak" and "counter-revolutionary", the union would rather let the chaos unfold in front of its eyes rather than intervene as the perception is that there is no legal or moral obligation to intervene. It is therefore clear from AMCU's attitude that the "disastrous consequences" of the actions of an unruly mob should be more tolerable and palatable to everyone other then the unions themselves. In my view, what this attitude implies is that the concept of a *"disciplined cadre"* within the context of strikes, protest action and similar activities has become confined to and defined by how much mayhem a union member can cause.

[35] It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not. The perception that a union has no obligation whatsoever to control its members during such activities, which are invariably violent in nature cannot be sustained. There are various grounds upon which in my view there is an obligation on unions to "police" their members. The first, *albeit* open to debate, is a constitutional obligation. Section 3 of the LRA provides that;

> Any person applying this Act must interpret its provisions:-
>
> (a) to give effect to its primary objects;
> (b) in compliance with the Constitution; and
> (c) in compliance with the public international law obligations of the Republic

[36] Thus when a union calls upon its members to take part in strike action or some form of protest action, this will lead to further activities associated with the strike including marches, demonstrations and handing over of petitions.

[17] At paragraph 24 p12 of the written heads of argument.

To the extent that the union members would be engaged in these activities during that strike, section 17 of the Constitution places an obligation on them to do so *"peacefully"* and *"unarmed".* By implication, the same obligation is placed on the union to ensure that its members indeed exercise these rights likewise, and within the confines of other laws of the land. As already indicated elsewhere in this judgment, the rights enshrined in the Bill of Rights are not self-standing, they also impose obligations.

[37] Secondly, the obligation arises out of the fact that there is a relationship of guardianship between the union and its members. The leadership, be it shop stewards or the national leadership, were elected on the basis that the members trust them to lead and guide them. Inasmuch as the members can be guided on whether to embark on a strike action or some other protest action, in the same vein, the leadership, including shop stewards, should also lead and guide the members and advise them to behave lawfully during actions undertaken. Leadership and guidance by the union should persist until the end of the action undertaken, and not end at the point that the action commences.

[38] Thirdly, the collective bargaining relationship between unions and employers places an obligation on both parties. Maserumule AJ in *Mangaung Local Municipality v Mouthpiece Workers Union*[18] held that once a trade union has a collective bargaining relationship with an employer, it has a duty to ensure that its members complied with the provisions of the LRA in relation to such an employer. In similar vein, to the extent that there is a Court Order granted by this Court in terms of the provisions of the LRA, by virtue of that relationship, the union should be obliged to ensure that its members comply with that order, as it pertains to that relationship with the employer.

[39] In the light of the above, when as in this case, members of AMCU went on strike and have since been dismissed as a result of that strike, AMCU, by virtue of its on-going bargaining relationship with Xstrata is expected to call its members to order, and to ensure that they behave in a civilised manner even if they seek to show their displeasure at being dismissed. That obligation

[18] [2002] 1 BLLR 84 (LC)

should be on-going until all matters pertaining to the dismissal are resolved or determined.

[40] A process of engagement between the parties further gives rise to this obligation. In this case, and based on all of the factors or incidents pointed out on behalf of Xstrata as indicated elsewhere in this judgment, AMCU cannot simply extricate itself from its responsibilities arising out of that engagement. In this regard, it was *inter alia*, pointed out on behalf of Xstrata that AMCU had called the unprotected strike and a large number of its members had taken part in that strike. The strike was called primarily because its members were aggrieved with disciplinary measures taken against its official and members. Various meetings were held between AMCU and Xstrata, and AMCU had not distanced itself from its members and continues to represent them, including in this matter and also in respect of a dispute referred to the CCMA.

[41] All that AMCU had done in its answering affidavit is to deny that there is a legal basis for the order sought. Furthermore, it raised a complaint that this "ensure compliance order" would amount to an infringement of its members' rights under Chapter II of the LRA. Even though AMCU perceived this application to be an attack on it in retaliation to the violence that took place at the mines during and after the strike, in my view, the "ensure compliance order" can hardly be considered an infringement of its members' rights to freedom of association. On the contrary, it is more the consequences of that association of its members and AMCU's obligations in that regard that remains the focus.

[42] It cannot be doubted that AMCU has fully associated itself with the conduct of its members throughout the illegal strike, even after the dismissal of the strikers. AMCU cannot therefore, when it is required to account for the actions of its members, wash its hand of them in the mould of the proverbial Pontius Pilate. AMCU has conceded that it is in a position to take reasonable steps in order to attempt to ensure that its members comply with the Court Order. This concession implies that it does appreciate its obligation to indeed "police" its members.

[43] Orders obliging unions to ensure that their members acted in a lawful and peaceful manner during strikes are meant to reinforce what the unions should know and do. In view of the volatility associated with strike or protest action in the workplace, employers are now bound to depend on the Courts to issue such orders. Thus, when a Court Order obliges unions to ensure that their members act in a particular manner or refrain from doing certain things, the Courts, and by implication, the employers, are not expecting unions to perform miracles. All that is expected of unions is for them to take reasonable steps and measures, to ensure that their members comply with the Court orders.

[44] The term *"ensure"* is not fanciful or awkward to understand. It might *inter alia* imply that one must give a guarantee. However, it is known that there can be no guarantees in a volatile strike situation. However, all that AMCU had to show was it did whatever was necessary, and within its means and powers, to ensure that its members complied with the Court order. It is not even required of the union leadership to physically and at all times police its members. The "policing" can be done by the shop stewards, and the union's national leadership can provide a supporting role. Shop stewards are in a unique situation where they can control the members as they have exercised a liaison function between the union and its members in respect of the activity in question. In the same fashion that the shop stewards were used by the union to organise the action in question, they can and should be used to control it. I am of the view that this is not too much to ask from a union in the bigger scheme of things, especially where the action in question has turned violent. To this end, it is concluded that AMCU has not made out a case why the "ensure compliance order" should not be confirmed.

The Contempt Application:

[45] Xstrata in its Notice of Motion had sought an order declaring that AMCU and NUM were in contempt of the Court order of 11 June 2013 and that an appropriate penalty should be imposed against the two unions. A similar order was sought against the Fifth to Further Respondents. For the purposes of this application, Xstrata has since abandoned the relief against NUM and the Fifth to Further Respondents.

[46] As it was correctly pointed out in both sets of written heads of argument, the principles relating to contempt proceedings are set out in *Fakie NO v CCI Systems (Pty) Ltd*[19]. In summary, an applicant must prove the requisites of contempt, viz, the order, the service or notice, non-compliance, and wilfulness and *mala fides* beyond reasonable doubt. Once an applicant has proved the order, service or notice and non-compliance, the respondent bears the evidentiary burden in relation to wilfulness and *mala fides*. Thus 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.

[47] In its application, Xstrata complained about the unlawful and illegal conduct of the Fifth to Further Respondents at or near the Applicant's Thorncliffe Mine in flagrant breach, defiance and deliberate disregard of the Court Order of 11 June 2013. AMCU opposed the application on two grounds. Firstly, that the order of 11 June 2013 was not properly served on it, and secondly, that it was not guilty of wilful and *mala fide* non-compliance.

[48] In regards to service of the order, in terms of paragraph 5 of that order, it was directed that it be served on AMCU by tele-faxing a copy of the application to it at its Head Office (number 031 656 5112) in accordance with the provisions of Rule 4 of the Rules of this Court. Xstrata's contention was that the order was sent to AMCU's attorneys of record by e-mail on the same date it was issued. It was then formally served on AMCU's head office by telefax on 22 July 2013.

[49] In his answering affidavit in respect of the contempt application, AMCU's President, Joseph Mathunjwa (Mathunjwa), submitted that Xstrata had failed to provide any proof whatsoever in respect of the service of the order on AMCU, as required in terms of Rule 4 (2) (b) of the Rules of the Court, read together with paragraph 14.1.5 of this Court's Practice Manual. He further submitted that Xstrata relied on hearsay evidence in contending that there was indeed service of the order by telefax. In addition, Mathunjwa contended that personal service of the application had not been affected on AMCU. He

[19] (2006) 4 SA 326 (SCA) at para 42

however confirmed that the order was faxed to AMCU's head office on 22 July 2013.

[50] Mathunjwa further acknowledged that the order was sent by e-mail to Larry Dave Attorneys on 11 June 2013. He however contended that this did not constitute proper service as these attorneys were not on record at the time. Adv Redding SC on behalf of AMCU had argued that despite the order not being properly served, hardly three days had passed after it was properly served on AMCU had Xstrata launched the contempt application.

[51] Adv Myburgh SC on behalf of Xstrata had had made reference to *DENOSA & another v Director-General, Department of Health & others* [20] and acknowledged that contempt of court applications may be found defective where formal service of the order on the respondent had not been established. He however submitted that service of the order was not absolute in itself, and that being informed or notified may be sufficient. Adv Myburgh SC further submitted that even if the order was only faxed to AMCU on 22 July 2013, actual service was not necessary in that AMCU was aware of the order firstly through its attorneys, secondly the order was conveyed through sms, and thirdly that Mr. Bhengu, its AMCU's regional secretary had met a crowd gathered at the T-junction on 21 June 2013 and requested them to comply with the order. To this end, it was argued that AMCU had knowledge of the order.

[52] It was further argued on behalf of Xstrata that even if it is found that reliance can only be placed on the order having been faxed to AMCU's head office on 22 July 2013, AMCU on its own version did nothing to ensure that its members complied with the order from then until the contempt application was heard on 26 July 2013. Insofar as AMCU had placed reliance on the practice manual, it was contended that this was misplaced as the manual dealt with service of applications and not the order in question.

[53] Where a Court has ordered that its order should be served on the respondents and other affected parties in a specific manner, it would be required of the applicant party to serve that order in the manner prescribed. There can be no deviations or half-measures in respect of the directive of the

[20] (2009) 30 ILJ 1845 (LC)

Court concerning the service of its orders, unless the applicant can show that it was not possible to effect service in the manner prescribed, or alternatively service in the manner prescribed by the Court was frustrated by some factors beyond its control. The reasoning behind this view is that the Court, more specifically in urgent applications, is guided by the applicant as to how service should be effected in order for compliance to follow, and furthermore, the Court ordinarily takes into account the circumstances of the application in deciding on the manner of service of its orders.

[54] The Order issued by Molahlehi J required that it be served on AMCU at its Head Office by telefax at a specific number in accordance with the provisions of Rule 4 of the Rules of this Court. In terms of Rule 4 (2) (b), service is proved in court if it was effected by fax, by an affidavit of the person who effected service, which must provide proof of the correct fax and confirmation that the whole of the transmission was completed. There is nothing vague or ambiguous about how service was to be effected as per the court order. The contention that from the fact that the order was e-mailed to Larry Dave, it must be assumed that AMCU was aware of it as the attorneys must have informed it cannot be sustained. Service of a court order cannot be assumed to have been effected. There must be proof that it was effected, and that there was compliance with the method prescribed by the Court. In this case, such proof would be by means of a service affidavit as required by the provisions of Rule 4 (2) (b) of the Rules of this Court. Furthermore, Larry Dave attorneys were not AMCU's attorneys of record then, and there was no obligation on them to inform or notify AMCU or even forward the Order to AMCU. The obligation on Larry Dave attorneys, if any, arose out of professional courtesy and nothing more.

[55] As appears from the e-mail correspondence[21] between Rian Itzkin of the Xstrata's attorneys of record and Jayson Kent of Larry Dave Attorneys, the latter had informed the former on 11 June 2013 that the firm had not been able to obtain instructions in the matter. Thereafter, there does not appear to be any further confirmation by or on behalf of Xstrata in respect of these instructions. It appears that Xstrata was content with merely e-mailing the Court Order to Larry Dave attorneys, which it was not even sure were

[21] Annexure "CRA1" of the Applicant's replying affidavit in the contempt application

mandated by AMCU to receive the order. Notwithstanding the importance of the matter, no attempt was made between 11 June 2013 and 22 July 2013 to serve the Court order in the manner prescribed. There is neither an explanation nor an excuse for not effecting service in the manner prescribed by the court, and given the circumstances of this case and its importance to the parties, this omission cannot be excused, and it is concluded that as a result of the defective service, the application for contempt should be dismissed.

[56] Even if it is accepted that proper service of the order was effected on 22 July 2013, in my view, it appears convenient that Xstrata would within three days thereafter launch the application for contempt, and more specifically, pursue it against AMCU. It is not doubted that there may have been non-compliance with the Court order by the Fifth to Further Respondents from the moment it was granted in the manner described by Combrink in his founding affidavit. It appears strange that Xstrata could not have brought the application at any time before 25 July 2013 if indeed the matter of non-compliance was serious to it. Be that as it may, in respect of the period after the Court order was properly served, Combrink had averred that on 22 July 2013, there were two incidents which were perpetrated by members of the Fifth to Further Respondents. These included a security vehicle of a contractor engaged by the Applicant being attacked with a petrol bomb, and damage caused to another security vehicle of a contractor that was caused when a rock was thrown at it. Combrink had further averred that on 23 July 2013, about 30 members of the Fifth to Further Respondents had continued to gather at the same T-junction and the incidents of intimidation and violence had not ceased.

[57] In my view, notwithstanding the incidents identified by Combrink, it cannot be said that on the whole AMCU had not taken any measures to ensure compliance by its members with the Court order. Despite AMCU's initial contentions that it was not obliged to ensure that its members complied with the Court, Mathunjwa as can be gleaned from his answering affidavit, had on 26 June 2013, personally addressed the members that had gathered at the T-junction and implored them to conduct themselves in a lawful manner. Before then, Bhengu, the AMCU's Regional Secretary had on 21 June 2013

addressed the people at the same spot and requested them to comply with the court order. Notwithstanding the fact that AMCU had not been properly served with the court order, Malibu of AMCU had on 11 June 2013, upon being in receipt of an sms from Xstrata taken the effort to measure a distance of four kilometres from Thorncliffe Mine, and had found the T-Junction to be 4.2 kilometres away from that Mine. Malibu had then addressed people that had gathered at the Mine gate and requested them to move to a point of 4.2 kilometres away from the Mine, and further requested them to maintain discipline. The contention that Mabilu was seen driving around in his bakkie on 25 July 2013 using a loud speaker and allegedly inviting people to *"join him in the fight against the company"* is hardly sufficient for a conclusion to be made that he was encouraging people not to comply with the Court order, more specifically if the context within which he made those remarks is unknown.

[58] These interventions might not be seen to be enough. However, in view of the fact that essentially there was no proper service of the court order for a period of 44 days after it was granted, the fact that some of the AMCU officials had nevertheless acted on that court order in my view does not indicate wilful or *mala fide* non-compliance. It cannot be doubted that some of the persons identified amongst the Fifth to Further respondents might have not complied with the court order. It cannot be justifiable for Xstrata to specifically target AMCU for contempt in circumstances where it (Xstrata) had created the conditions of non-compliance (i.e. by failure to properly serve the order). This is even more so where the focus and allegations of non-compliance with the Court order as gleaned from Combrink's founding affidavit seems to be on the Fifth to Further Respondent rather than on AMCU itself.

<u>The application to strike out:</u>

[59] At paragraph 38 of Combrink's founding affidavit in respect of the contempt application, he had alleged that 20 individuals were identified as having been involved in incidents of violence and intimidation. AMCU sought to have this paragraph struck out. To the extent that relief in the contempt application was not longer pursued against these individuals, the application to strike out became academic.

Costs:

[60] A determination in respect of an order of costs is made after consideration of the interests of law and fairness. Given the nature of the three separate but interrelated applications before the court, and further in respect of the conclusions made in that regard, it is deemed appropriate that no order should be made as to costs.

Final Order:

[61] In respect of the *rule nisi* issued by Molahlehi J on 11 June 2013, it is ordered as follows;

61.1 Paragraph 2.2.1 of the *rule nisi* is confirmed.

61.2 Paragraph 2.2.4 of the *rule nisi* is confirmed with the following amendments and substitutions to read;

"being within 4 (four) kilometres of the Applicant's Helena, Magareng and Thorncliffe mines during and for a period that the unfair dismissal dispute referred to the CCMA by AMCU is finally resolved or determined."

61.3 Paragraph 2.3 of the *rule nisi* as above is confirmed, with the deletion of any reference to the Second Respondent (NUM).

61.4 Service of this final order on the affected respondents shall be as directed in paragraph 5 of the Order granted on 11 June 2013.

[61] The application for contempt as brought by the Applicant is dismissed

[62] There is no order as to costs

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. AT Myburgh SC
Instructed by:	Edward Nathan Sonnenbergs
For the First Respondent:	Adv. A Redding SC with S Collet
Instructed by:	Larry Dave Attorneys