



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J 2636/14

In the matter between:

FRESHMARK (PTY) LIMITED

Applicant

and

FREDERICK MABASA

First Respondent

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION

Second Respondent

TC NKOSI

Third Respondent

VELEMINAH MOKOENA

Fourth Respondent

Heard : 30 January 2015

Judgment : 10 February 2015

Summary : Contempt application, whether statements made by a union office bearer constitutes contempt of a Court Order.

JUDGMENT

AC BASSON, J

[1] This is an application to have the second respondent (the South African Transport and Allied Workers Union – hereinafter referred to as “the union”)

declared to be in contempt of a court order of this Court granted on 29 October 2014 (“hereinafter referred to as “the order”).

[2] The salient part of the order reads as follows:

“ 1.1 Interdicting and restraining the second and further respondents (“the individual respondents”) from intimidating, assaulting, harassing, or in the applicant’s business at corner Kruisfontein and Old Paarl Roads, Brackenfell (“the applicant’s premises”);

1.2 Interdicting and restraining the individual respondents from in any way unlawfully interfering with or damaging the property or assets of the applicant or any of its employees or any other persons involved in or connected with the conduct of the applicant’s business;

1.3 Interdicting and restraining the individual respondents from damaging or threatening to damage the applicant’s premises, blockading the points of access to and egress from the applicant’s premises, interfering with the access or egress control to the applicant’s premises, interfering with the proper working of the applicant’s property or property under the applicant’s control; interdicting and restraining the respondents from inciting, prohibiting and restraining the respondents from inciting, prohibiting and restraining any person from tendering their services to the applicant;

1.4 Directing the first respondent to do all such things and take all such steps as are necessary to ensure that the provisions of paragraphs 1.1 to 1.3 above are complied with by the individual respondents;”

[3] The strike that resulted in this order has since been terminated. Consequently the applicant is not persisting with a contempt order against the union in respect of certain events that occurred subsequent to the granting of the interim interdict. In the stead the respondent now only seeks an order for contempt against the union based upon certain statements made by a certain Ms Irene Thulani (who is the Provincial Secretary of the union) to the striking workers on 4 November 2014. It is instructive to point out that Ms Thulani is not cited as a one of the respondents to this contempt application. The applicant’s stance is that this conduct is in direct contravention of the terms of paragraph 1.1 of the order in that the union was required, in terms of paragraph 1.4, of the order to take all steps necessary to ensure compliance with the terms of paragraph 1.1

of the order. The basis upon which the applicant is therefore instituting contempt proceedings against the union is because it is of the view that the union has breached the order by failing to do all such things and to take all such steps that are necessary to ensure that the orders contained in paragraphs 1.1 to 1.3 are complied with. More in particular, it was submitted that the conduct of the Ms Thulani fell within the context of the order contained in paragraph 1.1 of the order.

- [4] The Court was referred to correspondence between the applicant's attorneys and the respondents' attorneys. In a letter dated 5 November 2014 in paragraph 4.13 reference is made to a woman believed to be a SATAWU official who addressed 150 SATAWU members. The respondent alleged in this letter that this individual stated to the striking workers that if the applicant did not accede to SATAWU's demands, it would close down the business and burn down the applicant's buildings. The attorneys on behalf of the respondents initially disputed that this individual ever uttered these words. However, it is clear from the answering affidavit that the union later conceded, after it had regard to the CCTV footage taken of the address by officials from the union, that she did in fact utter words to this effect. It can therefore be accepted that Ms Thulani is the one who made certain comments addressed to members of the union and to members of management and that she did so in her capacity as the Provincial Secretary of the union.
- [5] According to the transcript provided in the answering affidavit, Ms Thulani said the following:

"I'm surprised why you're standing so far away from us ... because we don't even have guns. You're the ones who have guns and dogs but you're standing very far from us. Why are you scared of us? Maybe we should be running from you instead of you running from us. Do we scare you? Do we look like monkeys aw we're sitting here?

We are here for a reason. We are only asking for one thing. For you to treat these employees as human beings. Like yourselves, for you to do what you do for yourselves for them. It's not hard.

Do you want us to come and burn the building first only then will you listen to us?"

- [6] The applicant submitted that these words constituted a threat and that Ms Thulani's conduct constitute a breach of the court order and consequently should not go unpunished. On behalf of the union it was submitted that this statement clearly was not a threat and that Ms Thulani merely asked a rhetorical question that was intended to reveal the absurdity of the applicant's refusal to engage with the striking workers in the face of what was an obviously peaceful gathering. It was further submitted that no representative of the applicant was willing to accept the memorandum from the striking workers and that whilst management stood behind the heavily armed police and security contingents. According to the respondent, these remarks seen and placed in context are simply an expression of the frustration by the Provincial Secretary and that these remarks were not made in the context of an undertaking to commit any act of violence towards the applicant or its property. It was also submitted that the Court order was unambiguous and that Ms Thulani's conduct did not fall within the ambit of the Court order.

Contempt proceedings

- [7] The principles governing contempt proceedings are well known and need not be restated in detail. Suffice to point out that it is trite that in order to succeed with an application for contempt the applicant must prove that the respondent is in contempt of an order of a court. This entails proof of the order, due service of the order on the relevant party and that the respondent acted in deliberate wilful disobedience of the order of this Court. Proof must be beyond reasonable doubt. These principles were set out in the well-know case of *Fakie NO v CCII Systems (Pty) Ltd*:¹

“[42] To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

¹ 2006 (4) SA 326 (SCA).

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: 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.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

Application to facts: did CCII show beyond reasonable doubt that the Auditor-General's non-compliance was wilful and *mala fide*?"

[8] It is also accepted that a distinction should be drawn between the union's conduct and whether that is in breach of the court order and the breach of the court order perpetrated by the individual members on strike.¹ The importance of this distinction was highlighted in *Food and Allied Workers Union v In2Food*:²

"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.

² JA61/2014 at paragraph [8] of the judgment.

[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.³ 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."

- [9] The important point emphasised in this judgment is that, before the union can be held in contempt, there must be evidence of a breach by the union "*in its own right*".⁴ In the *In2food* matter the Court held that there was no evidence to show a breach by the union in its own right. In the present matter the facts are distinguishable in that it was the Provincial Secretary – who is an office bearer of the union – who made these remarks. At best for the applicant it can be found that the union may be held liable for remarks uttered by an office bearer provided that it is found that those words were uttered in breach of a Court order.
- [10] This brings me to the next question: Did the Provincial Secretary by uttering these words act in breach of the Court order?. On behalf of the respondents it was submitted that the Provincial Secretary had not breached this order simply because the order did not provide for this kind of behaviour and consequently submitted that the order is not formulated in such a way that it is clear and unambiguous.
- [11] It is accepted that an order that is formulated in such a way that compliance is left to the discretion of the person bound by the order is not capable of enforcement.⁵ It is therefore accepted that for an order to be enforceable the wording of the Court order must be clear and unambiguous.⁶ In *In2food*⁷ the

³ My emphasis.

⁴ *Ibid* at paragraph [9].

⁵ See in general: *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA) at paragraph 19.

⁶ See in this also regard *The Body Corporate of The Tuzla Mews Scheme v Yang*.2001 JDR 0166 (W).

⁷ *Supra*.

Labour Appeal Court also made it clear that an order should be clear so that there is no reasonable doubt as to what exactly is to be done or refrained from:

“[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).…”

[12] I have perused the Court order and I am not persuaded that the order contained in paragraph 1.1 is vague and unambiguous to the extent that it excludes utterances that can be construed as intimidating persons involved in or connected with the applicant’s business. Certainly if a union official utters words which may incite the members of the union to burn down a factory or utter words that are aimed at intimidating management, such act will be prohibited by paragraphs 1.1 of the Court order.

[13] Having accepted that the Court order is not vague or ambiguous it still needs to be considered whether what the Provincial Secretary said amounts to intimidation or a threat to damage the applicant’s premises as contemplated in paragraph 1.1. If the answer to this question is in the affirmative the union can, in my view, be held liable by virtue of the provisions of paragraph 1.4 of the order which directs “*the union to do all such things and take all such steps as*

are necessary to ensure that the provisions of paragraphs 1.1 – 1.3 above are complied with by the individual respondents.”

[14] I have had an opportunity to carefully scrutinize what the Provincial Secretary said and more particularly the context within which these words were uttered. I am persuaded by the submission that her statements are not capable of being construed as a threat when it is placed within its immediate context. The demonstration appears to have been calm and peaceful. Moreover, the Provincial Secretary has explained her state of mind at the time of making the statement. She explained that she was frustrated because the applicant refused to engage with the striking workers in the face of what was an obviously peaceful gathering. She was also frustrated by the fact that management was intent on not accepting the memorandum and that management were intent on remaining behind the heavily armed police and security contingent. I am not persuaded beyond a reasonable doubt that, in light of the Provincial Secretary's explanation of her state of mind at the time and viewed in its proper context, that it can be concluded that she was wilful or *mala fide*. The application is therefore dismissed. I can find no reason why costs should not follow the result.

Order

[15] In the event the following order is made:

15.1 The application for contempt against the second respondent is dismissed.

15.2 The Applicant to pay the costs of this application.

AC BASSON

Judge of the Labour Court

Appearances:

For the Applicant : Advocate F A Boda

Instructed by : Norton Rose Fulbright South Africa Inc.

For the Respondent: Advocate LM Spiller

Instructed by : Cheadle Thompson & Haysom Inc.

LABOUR COURT