REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 561/17

In the matter between:

GRI WIND STEEL SOUTH AFRICA	Applicant
and	
AMCU	First respondent
LONN VAN GRAAN	Second respondent
LENNOX MATINGA	Third respondent
EBEN JANSEN	Fourth respondent
GEORGE YEKISO	Fifth respondent

Heard: 17 November 2017

Delivered: 23 November 2017

SUMMARY: Contempt of court – violent and unlawful acts during protected strike. Wilful and mala fide acts by trade union and shop stewards not proven beyond a reasonable doubt.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application to hold a trade union, the Association of Mineworkers and Construction Union (AMCU), and four of its shop stewards in contempt of court.[1] It arises in the all too common South African context of a protected strike turning violent; striking workers committing violent and unlawful acts; and the South African Police Services standing idly by, playing an observer's role without arresting a single perpetrator.

Condonation

[2] After pleadings had closed following a timetable agreed to on a previous date, both parties filed supplementary affidavits late. At the hearing I granted condonation for the late filing of those affidavits.

Background facts

[3] AMCU called its members at GRI in Atlantis out on a protected strike. Things deteriorated rapidly. Striking workers blockaded entrances and exits to the premises; set tyres alight; prevented non-striking workers from entering, while brandishing knopkieries, hammers and steel bars; assaulted and threatened non-striking workers; threw beer bottles and other objects at vehicles entering the premises; and made fires on a private road.

The court order

[4] On 13 September 2017 Tlhotlhalemaje J issued an order interdicting and restraining AMCU from:

> "3.1 encouraging or instructing its members to perform any acts or omissions, which may directly or indirectly endanger the property of the applicant, its employees or any member of the public;

[1] A court order was granted against the union and all of the striking workers as respondents, but the employer could only prove service of the order on the union and the four shopstewards.

3.2 encouraging or instructing its members to perform any acts of intimidation;

3.3. encouraging or instructing its members currently to perform acts or omissions which may, directly or indirectly, endanger the lives or physical safety of any members of the public or any of the applicant's employees; and

3.4 encouraging or instructing its members to interfere with, or obstruct, access to and exit from the applicant's premises at 3 John van Niekerk Street, Atlantis, Cape Town."

[5] The striking workers (including the four shop stewards) were interdicted and restrained from:

"4.1 performing any acts, or omissions, that may directly or indirectly endanger the property of the applicant, its employees or members of the public:

4.2 performing any acts of intimidation;

4.3 performing acts or omissions which may, directly or indirectly, endanger the lives or physical safety of any members of the public or any of the applicant's employees; and

4.4 interfering with, or obstructing, access to and exit from the applicant's premises at 3 John van Niekerk Street, Atlantis, Cape Town."

Contempt: the principles restated

[6] The legal principles with regard to contempt proceedings were usefully and eloquently summarised by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*: [2]

"(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.

[2] 2006 (4) SA 326 (SCA) par 42. See also *Orthocraft (Pty) Ltd t/a Advanced Hair Studios v Musindo* (2016) 37 ILJ 1192 (LC); *Robertson Winery (Pty) Ltd v CSAAWU and Others* (2017) 38 *ILJ* 1171 (LC).

(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.

[7] These principles were restated by the Labour Appeal Court in *FAWU v In2Food (Pty) Ltd*.[3] In that judgment, turning to the liability of trade unions, that Court said :

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

[8] And in *SAMWU v Thaba Chweu Local Municipality*[4] the Court summarised the requirements thus:

> "Crystallised down to its simplest terms, a respondent is in contempt where the respondent knows and understands the terms of the order and what is required to be done to comply with the order but then without any cause or justification deliberately does not comply."

[9] Court orders are enforceable in the Labour Court by way of contempt proceedings such as this one. Tlhotlhalemaje J recently observed in *Betafence South Africa (Pty) Ltd v NUMSA*[5] :

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[3] (2014) 35 *ILJ* 2767 (LAC) par 9.

[4] [2015] ZALCJHB 31 par 27.

> "This Court is approached on a daily basis by both unions and employers on a variety of issues including strike interdicts and dismissals emanating from those strikes. Where strike interdicts are issued and employees find themselves dismissed as a result of participation in those strikes or other conduct related thereto, they are quick to exercise their rights and approach this very Court, sometimes on an urgent basis, to seek their reinstatement and/or other relief. When court orders are issued in their favour, employees would insist, and correctly so, that employers should abide by and comply with those orders. It therefore follows that it would be untenable for this Court to countenance instances where litigants pick and choose which of its orders should be obeyed, and which should be disregarded with impunity.
>
> An observation that needs to be made in this Court is that employees, especially in the face of strike interdicts, routinely disregard the orders of this court for no reason other than that they simply do not like them. This contemptuous approach towards orders of this court is in some or most instances, aggravated and/or encouraged by unions, their officials and/or shop stewards. In some instances, as in this case, employees refuse to even heed the advice of their union representatives and leaders. In the latter instance, and where unions even confirm in papers before the court that the employees had indeed refused to heed court orders, the invariable conclusion to be reached is that the non-compliance by the employees was indeed both wilful and mala fide…
>
> This level of contempt has reached a point where if unchecked, the rule of law will become meaningless. In the end, anarchy and mayhem, which normally characterises most industrial actions we have witnessed, will become the new normal. This cannot bode well for our constitutional democracy, and only a stern approach by the courts can stop this slippery slope."

[10] The Labour Appeal Court reiterated in *FAWU v In2Food (Pty) Ltd*: [6]

> "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]).

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[5] [2016] ZALCCT 33 (15 September 2016) paras 53-54.

[6] (2014) 35 *ILJ* 2767 (LAC) paras 7, 9 and 18.

…

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

[11] The LAC held that it had not been proven, in *In2Food*, that the union had breached the court order. It nevertheless aligned itself with the following sentiments expressed by the court *a quo*:

"The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long have trade unions glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act 66 of 1995, which has now been in existence for some 17 years and of which trade unions, their office-bearers and their members are well aware, makes it extremely easy to go on a protected strike, as it should be in a context where the right to strike is a constitutionally protected right.

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

The LAC said:

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

[12] A lesson to be learnt from the LAC is that the initial interdict should be drafted in terms that hold the responsible trade union accountable – a factor that weighs heavily in the case before me. As Sutherland J pointed out:

> "In other cases where contempt proceedings have been prosecuted that degree of clarity in the orders has been the point of departure for the enquiries. The point is illustrated in *Security Services Employers' Organisation and Others v SATAWU* (2007) 28 *ILJ* 1134 (LC). The union was directed by a court order to ensure that copies of an order interdicting further strike action were brought to the attention of its members by affixing copies at various places and to maintain such notices until the workers all resumed work. The union did not do so. Thus a breach was proven. Upon that platform the court addressed the reasons why there was a breach and unsatisfied with the explanation concluded that a contempt had occurred and fined the union R500 000, suspended on certain conditions. The liability of the union was based on its direct breach of obligations imposed upon it. A further example is that of *Supreme Springs, a Division of Met Industrial v MEWUSA* (J 2067/2010) where the relief granted in the interdict specifically instructed the union to take concrete action, ie to refrain from inciting the striking employees from participation in the strike. The union official responsible thought it appropriate to approach the management and try to negotiate a cessation of the strike in return for the employer abandoning the court proceedings. The court held that this behaviour was inconsistent with the order directing the union not to encourage or incite the strikers to persist, held the union in contempt, imposing a fine of R100 000 on the union and imposing suspended terms of imprisonment on named union officials. At [18] – [20] it was reasoned by Van Niekerk J as follows:
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> '[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."

[13] The implications of the failure to obey interdicts and how that undermines the rule of law was discussed in a fairly recent article by Anton Myburgh SC.[7] He cited Van Niekerk J's comments at the 2012 SASLAW national conference:

> "The first and fundamental concern is one that acknowledges that what may be at issue is a breakdown of the rule of law, especially where orders are issued and then blatantly disregarded. It is not uncommon on return dates to be told that when the order granted by the court was served, the recipients of the order refused to accept them, or threw them to the ground and trampled on them. At its most basic level, this is demonstrative of a rejection of the rule of law, and contempt for its institutions."

[14] As Conradie JA commented in *Steve's Spar* [8] :

> "It is becoming distressingly obvious that court orders are, by employers and employees alike, not invariably treated with the respect they ought to command … Obedience to a court order is foundational to a state based on the rule of law."

[15] Davis JA expressed similar sentiments in *North West Star*:[9]

> "Upholding the submission made by counsel would make a mockery of the Constitution and the rule of law that forms part of the foundations of our constitutional democracy. It would be a licence for people to disregard orders of courts simply because they do not agree with the court that such orders should have been issued. A society that would allow such would in

[7] Myburgh SC, "The failure to obey interdicts prohibiting strikes and violence: the implications for labour law and the rule of law", *Contemporary Labour Law* Vol 23 No 1 (August 2013).

[8] *Modise & others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC) para [120], also cited by Myburgh SC.

[9] *North West Star (Pty) Ltd v Serobatse* (2005) 26 *ILJ* 56 (LAC) para [17].

> no time be a society of chaos and lawlessness … If we want to deepen our democracy, promote the rule of law, discourage self-help and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites others to disobey an order of court."

[16] In *Ram Transport* [10] Van Niekerk J sounded a note of warning:

> "This court is always open to those who seek the protection of the right to strike. But those who commit acts of criminal and other misconduct during the course of strike action in breach of an order of this court must accept in future to be subjected to the severest penalties that this court is entitled to impose."

[17] More recently, in *Richfield Graduate Institute of Technology v Private Schools and Allied Workers Union (PRISAWU) and Others*,[11] the union was ordered to take specific steps to bring an unprotected strike and associated violence to an end. These included publicly calling on the strikers to abide by the interim order by reading out the interim order by loud-hailer in the language that is 'commonly used for communication on the [employer]'s premises' and distributing sufficient leaflets at the employer's premises bearing the union's name and logo, and signed by a senior official, informing strikers of the terms of the interdict in wording prescribed by the court. In addition, the union was ordered to report to the court after three days by way of affidavit 'to show that [those concerned] have complied with the terms of this interim order'. The union did not comply, and made no demonstrable attempt to do so. It was accordingly found to be 'in flagrant disregard of the interim court order'.

[18] As an aside, the levels of violence associated with strikes and the level of contempt for the rule of law has reached such alarming levels that the Labour Relations Amendment Bill, published on the day that this application was being argued[12], envisages a new section[13] that provides

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[10] *Ram Transport (Pty) Ltd v SATAWU* (2011) 32 *ILJ* 1722 (LAC) para [9].

[11] [2017] ZALCJHB 236 (13 June 2017).

[12] Labour Relations Amendment Bill, 2017, published in GN R 1273, *Government Gazette* No 41257, 17 November 2017.

for the director of the CCMA to appoint an advisory arbitration panel in the public interest to make an advisory arbitration award if the director has reasonable grounds to believe that "there is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat of or damage to property".

Evaluation on the facts of this case

[19] As Mr *Ackermann* pointed out, AMCU has the proverbial sword of Damocles hanging over its head. In *KPMM Road and Earthworks (Pty) Ltd*[14] the union was fined R1 million, suspended for three years, for contempt of court, on the condition that it is not found to be in contempt of any order of this Court within that period. And that case was also decided in the context of violent, albeit protected, strike action.

[20] The existence and service of the court order is not in dispute. The applicant must prove non-compliance; once that is proven, the respondents have an evidential burden in relation to wilfulness and *mala fides*. Should the respondents fail to adduce evidence that establishes a reasonable doubt as to whether their non-compliance was wilful and *mala fide*, contempt is established beyond a reasonable doubt.[15]

Non-compliance?

[21] It will be immediately apparent that the order against AMCU does not impose any positive obligations on it. Perhaps the notice of motion was unwisely drafted; but be that as it may, it only prevents the union from actively encouraging or inciting its members from acting unlawfully – something that, in an ideal world of collective bargaining, should be entirely superfluous. What it does not do, is to impose obligations on the union to take active steps – for example, to address its members publicly and to remind them of the limits of peaceful picketing; to distribute flyers to that effect; or to take out advertisements reminding its members of their

[13] s 150A(4)(b).

[14] J 1520/2016 (18 September 2017). [AMCU has applied for leave to appeal in *KPMM*].

[15] *Fakie v CCII* par 42.

obligations under the law and the terms of the interdict. That is in contradistinction to the order in *KPPM*[16] where AMCU was specifically ordered "to take all reasonable steps within its power to persuade the [striking members] not to engage in unlawful action associated with the strike".

[22] The union members, on the other hand, are interdicted from various unlawful acts or omissions: although clumsily worded, that has the effect that they cannot wash their hands of unlawful acts committed by their comrades in their presence. That much also goes for the four shop stewards.

[23] It is not disputed that unlawful acts were committed. The employer has not been able to identify individual perpetrators. In what has become a worrying trend in these sorts of incidents, SAPS has not arrested anyone, despite the fact that they were acting unlawfully. The employer has had to set its sights on the four individuals on whom it has been able to serve the interdict, i.e. the four shop stewards (out of seven). And it alleges omissions rather than positive acts by the shop stewards – in short, they have omitted to prevent the unlawful acts by their members.

[24] A number of acts took place or continued after the order had been granted and served, and contrary to the terms of the order. I will deal with each in turn.

Interfering with members of the public

[25] The court order specifies that the strikers may not interfere with members of the public. Yet one of the shop stewards, Van Graan, readily admits that the striking workers "are blocking cars at the intersection of John van Niekerk and Neil Hare Roads".

[26] His answer to this fact is to say that he – Van Graan – cannot identify the perpetrators because they are wearing balaclavas. And he then exculpates the shop stewards by saying they are thin on the ground: the seven shop stewards are split between the front and rear gates of the factory premises, ostensibly to ensure that the strikers do not block those

[16] *Supra* para 18.

entrances. As a result, he says, the strikers have blockaded the road further down the road (150-200 metres away), and the shop stewards are unable to control that. He also readily admits that the strikers are acting with impunity because they have sought solace in the fact that the employer has only sought to bring contempt proceedings against the four shop stewards.

[27] Mr *Cook*, in his argument, also engaged in a bit of "whataboutism" – what about NUMSA members, who, although they are not on strike, may also be engaging in these acts? And what about members of the public? They could be the ones responsible. This is not only improbable, it seeks to exculpate AMCU members where they are clearly, on the probabilities, the ones who are causing mayhem; but even though they have not complied with the court order, the applicant has to prove that the four shop stewards have, by omission, not complied (as it cannot identify the actual perpetrators), as well as the union; and if it can do so, the respondents must show that it was not wilful and *mala fide*. And contempt must be established beyond a reasonable doubt.

Obstructing access

[28] Van Graan also admits that strikers have placed tyres on the road, thus obstructing access. But he says he and other shop stewards have removed the tyres and have not encouraged the other strikers to block the entrances.

[29] He goes further to say that he actively intervened when an "unknown individual" snatched the car keys from GRI's human resources manager, Graham de Koker. The individual – who said that he works for GRI – swore at De Koker and threatened to assault him. Van Graan denies knowing him.

Objects being thrown

[30] De Koker stated under oath that two beer bottles were thrown at his car when he was forced to stop at a tyre barricade. Van Graan and Jansen, two of the shop stewards, were present.

[31] Van Graan does not deny this incident. Nor does he deny that the occupants of a Hilux bakkie attacked a vehicle belonging to TSU security company that was transporting striking workers. They threw a brick at the vehicle, breaking the window and narrowly missing one of the non-striking employees inside. But whilst acknowledging the presence of an "angry mob" and hearing "objects being thrown", he says that he shouted at the crowd to stop throwing anything.

The meeting of 16 October

[32] The shop stewards attended a meeting with management on 16 October 2017. One of them, Mr Cenya, said that the court order did not apply outside GRI's premises – a statement that is clearly not borne out by the order itself. And another shop steward, Mr Sikhum, said that they cannot help what happens in the "location". None of the four shop stewards cited in this application spoke up to correct their colleagues.

[33] In response to this allegation of "breach by omission", Van Graan says that he "did not think it appropriate to undermine Senya in the meeting" but that he subsequently made it clear to Senya that the order extends beyond GRI's premises. With regard to Sikhum's comment, he says that the shop stewards "cannot prevent what happens outside of their area of control and influence".

[34] It is tempting to construe the shop stewards' silence at the meeting, in the fact of Senya's misleading interpretation of the court order, as deliberate non-compliance. In *KPMM*[17] the court referred to the *dictum* of Cameron JA in the context of collective misconduct in *Leeson Motors*:[18]

> "The question of collective motive and the workers' silence during the repeated confrontations about the sabotage warrant further consideration. The possibility that the damage was inflicted by a maverick individual with an idiosyncratic grudge against management can in my view be excluded as overwhelmingly unlikely. If this had been the case, the workers' response would undoubtedly have been to volunteer indignant and alarmed

[17] Above at par 41.

[18] *Chauke & Ors v Lee Service Centre t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC) paras 40-41.

> assistance to management in the detection of the perpetrator. Given the physical circumstances, that they failed on repeated occasions to do so suggests, as the most likely inference, either that each worker was on one or more occasion individually involved in planning or inflicting sabotage, or that each worker knew who was responsible, and deliberately chose to associate himself with him or them through silence. It must in my view therefore be inferred, as a matter of probability, that each worker culpably participated in the campaign of sabotage."

[35] But in this case, Van Graan says that he corrected Senya afterwards; and that the four shop stewards simply cannot control what their members do in the township. Even if there was non-compliance in the meeting, the question remains whether it was wilful and *mala fide*. And, unlike the case in *Leeson Motors,* the standard of proof required in this case is beyond a reasonable doubt and not on a balance of probabilities.

Wilful and mala fide?

[36] In assessing the allegations of the shop stewards, the Court is bound by the rule in *Plascon-Evans.*[19]

[37] Wilful non-compliance must be established beyond a reasonable doubt. And on the version of the respondents before me – even if it is improbable – I cannot find beyond a reasonable doubt that they are in wilful and *mala fide* breach of the court order.

[38] The shop stewards refuse to (or say they cannot) identify the perpetrators. And they say that, far from omitting to do so, they have done their best to ensure that their members do comply with the court order. They have cast doubt on the applicant's version that they have not done so. In law, that means that the Court cannot find that they are in contempt.

[39] The same considerations apply to the meeting of 16 October. Applying the rule in *Plascon-Evans*, I must accept that Van Graan corrected Senya's misleading statement after the fact; and I cannot, on the evidence before me, find that the shop stewards were in a position to prevent the barbaric

[19] *Plascon-Evans Paints (Tvl) (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A).

and violent actions of their members directed against non-strikers in the township, but wilfully omitted to do so.

[40] In the case of AMCU, the contempt application is hamstrung by the same considerations as those that applied in *In2Food.* As Sutherland JA remarked in that case:[20]

> "The fact that a trade union can be liable for the acts of its members does not assist in deciding whether the trade union, in its own right, has breached a court order… [T]he liability of the [union] for contempt of a court order is strictly determined by reference to what the court ordered the trade union, itself, to do and the presentation of evidence that it did not do as it was told."

[41] In this case, only paragraph 3 of the court order was directed at AMCU itself. That paragraph instructed the union to refrain from inciting or encouraging its members to perform unlawful actions.[21] But the applicant has not been able to show beyond a reasonable doubt that the union itself did so after the order had been granted, despite the continuing unlawful acts of its members.

Conclusion

[42] The applicant has not been able to cross the significant threshold of proving contempt beyond a reasonable doubt. That means that perpetrators of violent facts have come off scot free – largely because SAPS have not acted and arrested them. Mr De Koker states in his supplementary founding affidavit:

> "The local police refuse to assist despite being shown the interdict. The riot police say they don't work early hours, and they can't get there because they have to come from Faure. Then in the afternoons they say they have to leave at 4 PM in order to be back at 6 PM.… The local police and the riot police have also informed us that they can only take action if the strikers are on 'our property'".

[20] *FAWU v In2Food (Pty) Ltd (supra)* para 12.

[21] Much as was the case in *Supreme Springs,* referred to in par 14 of *In2Food.*

[43] This is a depressingly common scenario. It is reminiscent of the #feesmustfall protests at South African universities, where the SCA dealt with the violent protests at the University of Cape Town and remarked: "Attempts by university management to invoke the assistance of the police were unsuccessful."[22] It should not be for the employer to identify individuals who hide behind balaclavas and to prove in contempt proceedings that they have wilfully and *mala fide* breached the exact terms of a court order.

[44] Be that as it may, on the facts before me I cannot find beyond a reasonable doubt that AMCU and the four shop stewards have knowingly, wilfully and *mala fide* breached the order of Thlothlalemaje J. The Court can only express the vague hope that, in future, trade unions and their officials will do more to inculcate in their members the boundaries of peaceful picketing in protected strikes; and that striking workers will take heed of the agreement in NEDLAC as recently as last month (October 2017), in which the parties (including trade union federations) affirm that "the constitutional right to strike and the statutory right to lock out must be peaceful, free of intimidation and violence, including violence and intimidation that may be associated with police action". In the same accord, trade unions undertake to make public statements calling on members to act in a law abiding and peaceful manner; and to take all necessary steps to prevent violence, intimidation and damage to property "and to comply with a court order interdicting violence, intimidation and damage to property".

[45] Mr *Cook* urged the Court to make a punitive costs order against the employer. There is no reason to do so. The union's allegations of union bashing and of the employer favouring NUMSA over AMCU are not only oblique and without real substance, it has little to do with the merits of this case. It is apparent that members of AMCU have behaved in an appalling, violent and unlawful fashion; that some non-striking NUMSA members may or may not have joined in the mayhem, is really beside the point. The applicant was unsuccessful because it could not prove beyond a

[22] *Hotz & Others v University of Cape Town* 2017 (2) SA 485 (A) at 492F.

reasonable doubt that AMCU and the four identified shop stewards had wilfully breached the court order. The fact that the employer was forced to obtain an interdict in the first place in an effort to prevent further unlawful and violent action, and that the union could not control its members, can hardly go very far to persuade the Court, in law and fairness, to make such an order. Instead, in the vague hope that good sense may prevail and that the parties will be able to forge a better relationship now that the strike is over, I do not think a costs order either way is advisable.

Order

The application is dismissed.

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Anton J Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: L W Ackermann
Instructed by Guy and associates.

RESPONDENTS: A L Cook
Instructed by Larry Dave Inc.