THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J130/18

In the matter between:

**EPIC FOODS (PTY) LTD** **Applicant**

and

**INQUBELA PHAMBILI TRADE UNION** **1ST Respondent**

**THOKOZANI NTULI** **2nd Respondent**

**THE SOUTH AFRICAN POLICE SERVICES** **3rd Respondent**

**Heard**: **30 August 2018**

**Delivered**: **11 September 2018**

**Summary:** **Return day – Final order sought to interdict certain conducts by the first respondent and its members. Responsible conduct of a Trade Union during a strike action considered. Order against the third respondent – whether interim or final – discharge or confirmation thereof. Held: (1) All orders were discharged with costs in appropriate circumstances.**

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**JUDGMENT**

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**MOSHOANA, J**

Introduction

[1] Today is the return day for three separate orders issued by this court on 22, 24 and 25 January 2018 respectively. The first order interdicted and restrained certain conducts by the members of the first respondent and directed the first respondent to take steps to restrain its members. The second order found the first respondent to be in contempt of the first order and amended the picketing area. The third order withdrew the picketing rights and ordered and directed the third respondent to do certain things. It bears mentioning at this stage that the third order was obtained *ex parte*. The applicant had to lead oral evidence in an open court to obtain the order. None of the respondents, particularly the third respondent, was served and or given notice of the intention to obtain the order. The confirmation of all the orders are opposed by the first and third respondents. The second respondent has been removed and is no longer a relevant party in this application.

Background facts

[2] For the purposes of this judgment, it is not necessary to punctiliously recount the facts of this case. Suffice to state that on or about 18 January 2018, the employees of the applicant engaged in a protected strike action. In the course, the employees conducted themselves unlawfully. Such conduct prompted the applicant to approach this Court for relief. Consequent thereto, the first order was issued.

[3] The first respondent and its members allegedly failed to adhere to the first court order. Such non-adherence compelled the applicant to approach the Court for a contempt order. That gave birth to the second order. Yet again, the first respondent and its members allegedly failed to adhere to the orders. That compelled the applicant to approach this court for the third time on an *ex parte* basis. At this occasion, the court issued orders and directives against the third respondent in its absence.

[4] On 25 April 2016, the rule that was issued was extended to 30 August 2018, on which day I heard the matter and reserved judgment.

Evaluation

[5] At the time of hearing this matter, the alleged unlawful conduct had ceased to continue in or about June 2018 as confirmed by the applicant's counsel. Also, the members alleged to have been involved in the unlawful conduct ceased to be members of the first respondent on or about 31 January 2018. Therefore, the only live issue in relation to the first order was the issue of costs against the first respondent and the individual members. It is trite, that an urgent court is not the place to debate issues of costs. For that reason, I shall not in any details discuss the issue of costs. Apart from the issue of costs, the first order is moot and academic. On this ground alone, I am not prepared to make the order final.

[6] What then remains is the issue of the contempt order against the first respondent and the issue of the orders and directives against the third respondent. In other words, I shall, in this judgment, consider the first; second and the third order together with the issue of costs in respect of each. I shall deal with the third order first.

*The third order*

[7] The first and the most fundamental difficulty with this order is that it was obtained *ex parte*. The third respondent was not aware that some relief was being sought behind its back. The court transcript of the day reveals that the issue of service was not addressed at all by the applicant's counsel. After leading oral evidence, the applicant's counsel was afforded an opportunity to prepare a draft order, which, with minor amendments was adopted by this court. The High Court in *SAA SOC v BDFM and others*[1] had the following to say:

[1] Case number 2015/33205 delivered on 17 December 2015

> "[22] The principle of *audi alteram partem* is sacrosanct in the South Africa legal system. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent inadvertent harm, the only times that a court shall consider a matter behind a litigant's back are in exceptional circumstances. The phrase "exceptional circumstances" has regrettably been through overuse, and in the habits of hyperbole, lost much of its impact. To do that phrase justice, it must mean very rarely, only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed."

[8] The court went on to set out what is incumbent on any attorney of any person who contemplates an urgent application on less than 24 hours' notice[2]. I agree that it is incumbent on an attorney to contact the party on whom a relief is to be sought and also alert that party of an intention to be in court. Most importantly to alert the judge on urgent duty that the other party has been alerted. As pointed out above, none of the steps mentioned in *SAA SOC supra* were taken by the applicant in *casu*. On this ground alone, the order cannot be made final and or enforced as it were. To my mind the order is defective.[3]

*Is the third order interim or final?*

[9] Given the view I take; this question is academic. However, since it was argued before me, I shall deal with it. The third respondent contends that the order is interim in nature, whereas the applicant contends that the order is final in nature. Ordinarily, given the imperatives of the principle *audi alteram partem,* it is inappropriate for a court of law to issue a final order on an *ex parte* basis. Section 34 of the Constitution of South Africa[4] (the Constitution), provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

[2] See paragraph 26 of the judgment.
[3] See De Jager v Heilbron & others 1947 (2) SA 415 (W).
[4] Act 108 of 1996.

[10] In terms of section 205 (3) of the Constitution, the objects of the third respondent are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. Therefore, the third respondent, without being ordered by a court of law has a constitutional duty to enforce and uphold the law. If for any reason, the third respondent fails in its duties, a citizen of the Republic who suffers damages as a result of such a failure may approach competent courts for a claim in damages.[5] Courts are empowered to direct constitutional bodies to carry out their constitutional duties. In order to do so fairly, such bodies ought to be afforded *audi alteram partem*.

[11] *Ex facie* the order, it is apparent that the urgent court issued final orders. However, proper reading of the order suggests that the parties cited therein, the third respondent included, had a right to anticipate the return day. Although the order refers to the first respondent, the third respondent also had a right to anticipate. I am mindful of the fact that the order was drafted by counsel and adopted by this court. Certainly, counsel should have known that in an *ex parte* application the court cannot issue a final and definitive order.

[12] In *Fishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd*[6]*,* the SCA had the following to say:

> "[13] As indicated earlier in the judgment, the determination of this appeal depends on a proper interpretation of the Preller J order. The starting point is to determine the <u>manifest purpose of the order</u>. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it <u>must</u>

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[5] Life Esidimeni arbitration by the retired Deputy Chief Justice Moseneke.

[6] [2012] ZASCA 49 (30 March 2012)

<u>be read as a whole in order to ascertain its intention.</u> See *Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A).*"

[13] In understanding the obvious, it must follow that the order was to operate until the return day. It could not have been definitive of the rights of the affected parties. Therefore, the order was interim in nature. It may either be confirmed once *audi alteram partem* is afforded or discharged. In any event, there is a litany of disputed facts that cannot be resolved on the papers, the order is incapable of being made final apart from the fact that it is moot. The third order ought to be discharged with costs.

*The second order*

[14] The relevant issue here is whether the first respondent is in contempt. Before I deal with the principles applicable to contempt applications, it behooves me to consider the principle of trade unions accountability during a strike action.

[15] As a point of departure, it must be made clear that the right to strike is an individual one. It accrues to an individual. Similarly, the right to demonstrate and picket is an individual one.[7] Therefore, by law, these individual rights may be curtailed if not complaint. Differently put, if an individual fails to comply with the requirements of the law, the exercise of the right to strike and to demonstrate[8] may be prohibited. The right to form and join a trade union is a worker's right[9].

[16] Equally, every trade union has the right to determine its own administration.[10] In realizing this right, a trade union is required by the Labour Relations Act[11] (LRA) to adopt a constitution that meets certain requirements.[12] The adopted constitution must prescribe qualifications for and admission to membership, establish the circumstances in which a member will no longer be entitled to the benefits of membership and



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[7] Section 17 of the Constitution.
[8] See SATAWU v Garvis and others [2012] JOL 28986 (CC).
[9] Section 23 (2) (a) of the Constitution.
[10] Section 23 (5) (a) of the Constitution.
[11] 66 of 1995, as amended.
[12] Section 95 (1) (b) of the LRA.

provide for the termination of membership. Quintessentially the relationship between the trade union and its members is governed by the constitution of the trade union. Trade unions owe a duty of care to their members. Once a trade union is registered, it becomes a body corporate.[13] An individual may face civil legal proceedings for participating in an unprotected strike or for conduct in contemplation or in furtherance of an unprotected strike.

[17] Since a trade union is a body corporate, delictual principles of vicarious liability find application in relation to its employees. There is no employer and employee relationship between the trade union and its members. As to the principle of agency, before a principal could be held liable, it must be shown that the principal authorised and or ratified the action.[14] A trade union is a collective bargaining representative and not an agent.[15]

[18] Having considered the above principles at a broad level, the question relevant to this matter is whether the trade union is accountable during a strike action and to what level? This is a difficult question in itself. Accountability is a strong word with legal connotations. In my view, the guiding document would be the constitution of a trade union. I am certain that most, if not all, constitutions of trade unions oblige their members to uphold the law, particularly the LRA in this instance. However, it is not impossible to have errant members, hence wildcat strikes at times. Ordinarily, trade unions must only call upon their members to participate in a protected strike action. Having made the call, to my mind, a trade union has a duty in terms of its own constitution and the Regulation of Gatherings Act[16] to control its members participating in a protected strike.

[19] The strike action of 18 January 2018 appears to have been a protected one. However, it is difficult for me to appreciate such a duty in a wildcat strike action. An employee who participates in a wildcat strike action,

[13] Section 97 (1) of the LRA.
[14] See Mondi Ltd v CEPPAWU 2005 ILJ 1458 (LC)
[15] See S A Post Office v CWU [2010] 1 BLLR 84 (LC)
[16] 205 of 1993.

breaches the constitution of the trade union he or she is belonging to and the law.

[20] It is common cause before me that as of 31 January 2018, the members involved herein ceased to be members. Therefore, the umbilical cord has been severed. A trade union which servers an umbilical cord for errant members acts accountably. Therefore, it must be accepted that the first respondent acted responsibly in this regard. However, the issue here is with regard to the conduct of the first respondent upon receipt of the first court order. Strictly speaking this is not a matter of seeking to find what the accountability of a trade union is. The first order has already pronounced on what the first respondent should do to take accountability. The applicant relied heavily on the judgment of this court in *KPMM Road & Earthworks (Pty) Ltd v AMCU*[17]. In the applicant's submission, the authority is on all fours with the present matter. I am partly in agreement with the principles espoused in that judgment and have no reason to depart therefrom. I shall return to this judgment later. The first respondent argued that the judgment is distinguishable on the facts. In that judgment, the learned Acting Justice Snyman said the following:

> "[62] I am satisfied that in reality, all the first respondent did was to convey the order to its members, tell them to comply, and then washed its hands of what may happen thereafter…"

[21] Counsel for the first respondent submitted that such was not the case in this matter. The first order required the first respondent to take all such steps to restrain its members from acting unlawfully as set out in the order. When the order was issued, the first respondent's official and head (Mr Luthuli Senior) was present. There is overwhelming evidence littered in the founding affidavit of Nadim Hassam that the first respondent took no steps to act as ordered in the first order. This was evidenced by the continuation of the unlawful activity. The first respondent disputes this evidence. Clearly, there is a dispute of fact which would require

[17] [2018] 39 ILJ 609 (LC).

application of the *Plascon-Evans* rule.[18] The first respondent's witness testified that after the order, the officials discussed the first order with the shop stewards of the first respondent. The shop stewards undertook to inform the members. Further, the evidence is that on 23 January 2018, the terms of the order were fully explained to the members and they were specifically requested to desist from any unlawful activities referred to in the court order. No indication was given that the members would not observe the court order.[19] This evidence is in turn disputed by the applicant in the replying affidavit.[20]

[22] I am not satisfied that the version of the first respondent is real and genuine. It is more like a bare denial. If they did as they allege, the actions would not have continued. On the other hand, the version of the applicant is supported by a video footage and photographs. The first respondent did not request that the issue (whether they complied with the court order) be referred to oral evidence. I therefore decide this issue on the strength of the facts as asserted by the applicant[21]. My conclusion therefore is that the first respondent failed to comply with the first order.

[23] What then follows is the question: Is the first respondent guilty of contempt though? This is the question I am turning to now. The requisites of a contempt order are (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of the contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be willful and *mala fide*. It was held in *Pheko v Ekurhuleni Municipality (No 2)*[22] that while the courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect of judicial authority. All what is required is evidence that the contemnor is obstinately disobedient or rebellious. It

[18] See *KPMM* at paras 10-15.
[19] See paragraphs 32-39 of the Founding Affidavit.
[20] See Replying Affidavit paragraphs 29-35
[21] See Rail Commuters Action Group & others v Transnet 2005 (2) SA 359 (CC) at para 53.
[22] 2015 (5) SA 600 (CC)

ought to be shown that on the balance of probabilities the non-compliance was born of willfulness and *mala fide*.

[24] As to the standard of proof, the applicant before is seeking an imposition of a fine and as such, it must prove beyond reasonable doubt that the first respondent is guilty of contempt.[23]

[25] A further difficulty in this matter is that the first respondent is a body corporate and it is incapable of acting on its own. It acts through its officials. None of the relevant officials are cited in this application. In these papers, serious allegations are made against certain officials of the first respondent, but they are not before me. In *Matjhabeng*, the court per Nkabinde ADCJ, had the following to say:

> "[76] The next issue for determination is whether the non-compliance on the part of Mr Lepheana was willful and *mala fide.* The reason for these requirements lies in the nature of the contempt proceedings and its outcome. In order to give rise to contempt, an official's non-compliance with the court order must be willful and *mala fide*. In general terms, this means that the official in question, personally, must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible must have willfully or maliciously failed to comply. As the Supreme Court of Appeal has held "there is no basis in our law for orders for contempt to [be] made against officials of public bodies, nominated or deployed for that purpose, who are not themselves personally responsible for the willful default in complying with a court order that lies at the heart of contempt proceedings."

[26] At the heart of contempt proceedings lies the fact that someone capable of carrying into effect a court order must personally disobey the judicial authority. For that reason, I am unable to agree with the learned Acting Justice Snyman in the *KPMM* matter, where he held that a trade union

[23] See Matjhabeng Local Municipality v Eskom Holdings Ltd and others [2017] ZACC 35 at para 67

was in contempt. In my view, it is one thing to say that at a general level a trade union has certain duties and obligations and it is another to say a trade union is guilty of contempt. I do not see how a trade union could commit a crime, let alone a civil crime of contempt, as a legal entity[24]. To my mind, it seems ineffective to make orders against trade unions as entities as opposed to the relevant officials themselves. If an order is made against an entity, how could it be established that there was willfulness and *mala fide* in the case of non-compliance? In my view it is just impossible.

[27] In this matter, the first order was made against the trade union, in its capacity as such. A trade union as an entity is incapable of taking steps and thus cannot be "personally" liable. In *Fawu v In2Food (Pty) Ltd*[25] the Labour Appeal Court held that 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.

[28] I do accept that the first respondent was directed to take steps, the question that crops in my mind is how would a juristic person take steps? If the order had directed the President of the trade union or a particular official, it would have, in my view, been an effective order and if not followed, the willfulness and *mala fides* of the President or the named official would be questioned and tested in order to conclude that there was contempt. The High Court of Free State in the *Matjhabeng* matter before it reached the constitutional court had said the following:

> [29] A municipality is under a constitutional duty to comply with court orders and to lead by example. <u>Upon non-compliance of a court order, complaints of contempt may be proceeded with against the functionaries of the Municipality responsible for ensuring compliance with the order.</u>

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[24] In Telegram Newspaper Company v Commonwealth, 172 Massachusetts 294, the Chief Justice said: "We think that a corporation may be liable for certain offences of which specific intent may be a necessary element…See Mousell Bros Ltd v London and North Western Railway Co [1917] 2 KB 836.

[25] [2014] 35 ILJ 2767 (LAC).

[29] However, in rejecting the above finding, the Constitutional court concluded thus:

> "[103] Bearing in mind that the persons targeted were the officials concerned – the Municipal Manager and Commissioner in their official capacities – the non-joinder in the circumstances of these cases, is thus fatal. Both Messrs. Lepheana and Mkhonto should have been cited in their personal capacities – by name – and not in their nominal capacities. They were not informed, in their personal capacities, of these cases they were to face, especially when their committal to prison was in the offing."

[30] The above statement buttresses the point that contempt in its nature is to be committed personally. In this matter, the officials complained of should have been cited as parties. Possibly, their defences would have been that there is no order against them. However, if it is established beyond reasonable doubt that they were responsible for ensuring compliance, their defence may be defeated.

[31] In conclusion, I do accept that the LAC in *Fawu supra* found merit in the thesis that a trade union, as a matter of principle has a duty to curb unlawful behaviour by its members, but in my view, such does not imply that a trade union is capable of being found guilty of contempt. Its officials yes, but they must be cited and evidence must be led to demonstrate personal disobedience. The LAC after endorsing the sentiments of Rycroft A stated that upon that platform alone a case cannot be build.[26]

[32] Might I add that even in instances, like here, where a trade union as an entity has been ordered to do something, such an order would still require officials to do something. And if the officials who are responsible to act in terms of the court order fail, such officials ought to be cited personally.

[26] Paragraph 18 of the judgment

*The first order*

[33] The individual employees did not oppose the confirmation of the rule. However, it seems moot to confirm the rule in so far as they are concerned. The only live issue in respect of them is costs. On 31 January 2018, they ceased to be members of the first respondent. Around June 2018, the conduct they were interdicted for ceased to continue. Since the duty of this court is to issue effective orders, confirming this order would offend the doctrine of effectiveness.

[34] It was necessary for the applicant to have approached this court on the 22 June 2018. Clearly, the first respondent was unhelpful prior to the approaching of the court and actually was unreasonable in its opposition of the order. At issue was not the protection of the strike action but the unlawful conduct of the members participating in a protected strike action. For these reasons, even if I am minded to discharge the rule on the basis of mootness, the dictates of fairness drive me to the conclusion that a cost order in respect of this order must be made.

[35] Owing to the fact that on the return day all the orders were dealt with as one, it may be difficult and inappropriate to mulct the first respondent and the individual members with all the costs associated with this matter. The most appropriate thing to do is to apportion the costs. In my view, the first respondent and the individual employees should jointly and severally be liable for 33% of the taxed or settled party and party costs of the applicant.

[36] For all the reasons set out above, I am unable to confirm the orders.

[37] In the results I make the following order:

<u>Order</u>

1 The first order is hereby discharged and the individual respondents together with the first respondent are jointly and severally liable to pay 33% of the applicant’s taxed or settled party and party costs.

2 The contempt application is dismissed with no order as to costs.

3 The third order is hereby discharged and the applicant to pay the third respondent's costs.

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GN Moshoana

Judge of the Labour Court of South Africa.

<u>Appearances</u>

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| For the Applicant: | Advocate L Franck. |
| Instructed by: | S T Attorneys, Johannesburg. |
| For the 1st Respondent: | Advocate F A Darby. |
| Instructed by: | Mathopo Attorneys, Johannesburg. |
| For the 3rd Respondent: | Advocate M Mthombeni |
| Instructed by: | State Attorney, Johannesburg |