IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 147/2017

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION — **First Appellant**

INDIVIDUALS SET OUT IN ANNEXURE "FA1" — **Second Appellant**

and

KPMM ROAD AND EARTHWORKS (PTY) LTD — **Respondent**

Heard: **25 September 2018**

Delivered: **31 October 2018**

Summary: Contempt of court of order against both employees and union- employer failing to prove that employees making common purpose with those committing misconduct- doctrine of common purpose restated – in respect of union, court restating requirements for contempt application- court finding that order of the Labour Court unclear so as to enable union to know what is expected of it. Held that if an employer wishes to obtain relief against a union in circumstances similar to that of the present dispute, it behoves its legal advisers to draft a notice of motion which gives clear content to the obligations which it wishes to impose upon the union. Appeal upheld Labour Court's judgment set aside.

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Coram: Waglay JP, Davis and Sutherland JJA

JUDGMENT

DAVIS JA

Introduction

[1] This case concerns important implications for the use of contempt proceedings in the fraught context of South African industrial relations. The appeal before this Court is against an order of the court *a quo* in which the first appellant and the second to further appellants ("the individual appellants") were held to be in contempt of an order of Lagrange J of 18 July 2016 and in terms of which first appellant was ordered to pay a fine of R 1 000 000.00 which payment was suspended for three years on condition that the first appellant was not held by the Labour Court to be in contempt of any order of the Labour Court during such period. The individual appellants were ordered to pay a fine of R 1000 each, which amounts were immediately payable and could be deducted from their salaries.

[2] The material facts are largely common cause. Certain of the respondent's employees embarked on a protected strike on 15 July 2016. According to respondent, a version which is denied by appellants, on 14 July 2016 the individual appellants intimidated non-unionised employees. On 15 July 2016, the individual appellants engaged in various unlawful acts, including breaching the parameter of respondent's site in an attempt to remove non-striking employees blockading a section of the highway, preventing non-striking employees and the respondent's subcontractor's employees from attending work and intimidating non-striking employees.

[3] On 15 July 2016, respondent's attorneys addressed a letter to appellant's attorneys in which it was alleged that first appellant's members had engaged in

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these unlawful acts, to which the reply came that first appellant had found them to be without merit and therefore it denied the allegations. On 15 July, first appellant provided respondent's attorneys with an undertaking that it would take reasonable steps to ensure that, during the course of the strike, its members would conduct themselves in a peaceful manner and refrain from any acts of violence and/or intimidation and misconduct. According to the letter, "a representative of our client (first appellant) has again this afternoon addressed those members who were on strike and conveyed the content of the above undertaking to said members."

[4] In terms of the founding affidavit, respondent averred that, notwithstanding this undertaking, acts of intimidation and threats continued both towards respondent's non-unionised employees and the employees of various subcontractors. Further incidents then occurred on 15, 16 and 17 July 2016.

[5] Pursuant thereto respondent's launched an urgent application in the Labour Court. On 18 July 2016, the Labour Court handed down an order in the following terms:

> '2.1 Interdicting the second to further respondents from obstructing access along the applicant site, which is made up of the portion of the N11 spanning approximately 27.5 kilometres, commencing approximately 26.5 kilometres from Middelburg and ending approximately 54 kilometres from Middelburg ('the Site');
>
> 2.2 Interdicting the second to further respondent from obstructing and preventing any employees' access to the site (including the applicant's employees and/or employees of any of the applicant's sub-contractors);
>
> 2.3 Interdicting the second to further respondents from threatening, intimidating, harming or assaulting any employees employed or engaged at the site (including the applicant's employees and/or employees of any of the applicant's sub-contractors);

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2.4 Interdicting the second to further respondents from threatening, intimidating, harming or assaulting any persons utilising the road located at the site;

2.5 interdicting the second to further respondents from intimidating subcontractors' employees employed or engaged at the site (including the applicant's employees and/or employees of any of the applicant's sub-contractors;

2.6 Interdicting the second to further respondents from assembling or congregating within 2000 metres of the site in furtherance of the strike (or such other distance as this Honourable Court deems fit)

2.7 Directing the first respondent to take all reasonable steps within its power to persuade the second to further respondents not to engage in unlawful action associated with the strike…'

[6] On respondent's version, various incidents of unlawful conduct and the intimidation continued to occur, notwithstanding this order. According to the answering affidavit, a memorandum of understanding was signed on 19 July 2016 between first appellant and five subcontractors to respondent confirming that no acts of intimidation or violence had been committed by first appellant or its members against these contractors after the first appellant had provided the respondent with the undertaking on 15 July 2016. On 19 July 2016, Mr Mahlomuz, the regional organiser of first appellant in Mpumalanga attended at the site office and communicated the terms of the court order to first appellant's members. He informed them that in terms of the order, individual employees were interdicted from assembling or congregating within 2000 metres of the respondent's site in furtherance of the strike. He stated that, as a result of his intervention, the employees vacated the site and congregated at the local ground, "which is well outside the 2000 metres parameter". He also confirmed that meetings were held on a daily basis at the local grounds where the individual appellants were informed by the first appellant and their shop stewards of the status of the strike and the need to comply with the court order. On 20 July 2016,

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respondent's attorneys sent further letters to first appellant's attorneys alleging that there was a continuation of the breach of the court order by first appellant's members.

[7] According to certain of the subcontractors' affidavits, the intimidation ceased on 20 July 2016, by which time many of first appellant's members had returned to work. On 25 July 2016, the strike was temporarily suspended.

[8] On 01 August 2016, respondent launched an *ex parte* contempt application which was set down for hearing on 12 August 2016. It cited 56 individual appellants as respondents in this application. On 12 August 2016, Whitcher J granted an *ex parte* order in terms of which the appellants were required to show cause why they should not be found guilty of contempt of court for failing to comply with the interim order. On the return day of 11 November 2016, the court *a quo* heard argument as to whether the interim order should be confirmed. Pursuant thereto, it found both first appellant and the individual appellants to be in contempt of the order of 18 July 2016 and ordered the appellants to be fined as indicated above.

The appeal

[9] On appeal, two separate issues were raised, namely whether the individual appellants were guilty of contempt and whether the first appellant could be found to be guilty of contempt. In respect of the former, the court *a quo* applied the principles of common purpose to determine the guilt of the individual appellants. Sitting in the court *a quo*, Snyman AJ said the following in his judgment:

> 'Where a group of striking employees continue with unlawful conduct in the face of an interdict and order of this Court, it can be said that, even if contempt of Court is regarded as criminal behaviour, that these employees continue to act with a common purpose. It is not necessary for an employer to establish a nexus between each individual employee sought to be held in contempt of Court, and the misconduct or unlawful conduct perpetrated. Neither is it necessary to

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> identify every individual perpetrator. These employees continue to act for a common purpose, in support of the exercise of their right to strike.'

[10] When the matter was argued before this Court, on appeal, Mr Watt-Pringle, who appeared together with Ms Darby on behalf of respondent, conceded that there was no basis by which to hold the individual appellants guilty on the basis of the common purpose doctrine. In the first place, there was no mention in the founding papers of individual employees being alleged to be in contempt on the basis of common purpose. Respondent was unable to identify which of the individual employees were guilty of contempt. In short, the concession was made that the evidence could not justify the application of the common purpose doctrine.

[11] In *Makhubela v S,*[1] the Constitutional Court set out a series of requirements which are necessary to justify the application of the doctrine of common purpose. In the first place, it must be shown that the individual was present at the scene where the violence was committed. That individual must have been aware of the assault on the victim. The individual must have intended to have made common cause with those who actually perpetrated the assault, that is he/she must have manifested some common purpose with the perpetrators of the assault by himself or herself performing some act of association with the conduct of the others. Finally, the individual must have possessed the requisite *mens rea*.

[12] In this case, on these papers, none of the individual appellants, with the exception of two, were even placed at the scene of the incidents giving rise to the alleged contempt. No evidence was produced that these individual appellants were aware of the alleged incidents, giving rise to the alleged contempt or that they had manifested common cause with those allegedly breaching the court order. There was certainly no evidence which justified a finding of *mens rea*. Significantly, two persons identified Kenneth Masenya and Sophia Utla were not listed as amongst the second and further appellants and the list of names

[1] 2017 (12) BCLR 1510 (CC).

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annexed to the court order, nor were they identified by the respondent as members of the first appellant. In none of the incidents set out by the respondent in its founding affidavit are the individual appellants identified as having participated or having been aware of these various incidents.

[13] In short, the finding of the court *a quo* that the common purpose doctrine applied, in this case, is in clear breach of the established principles of common purpose and, accordingly, there was no legal basis by which the court *a quo* could have come to its finding with regard to these appellants. It is for this reason that the concession made by Mr Watt-Pringle was a wise one in the circumstances.

[14] I turn then to deal with the finding in respect of the first appellant. The central finding of the court *a quo* against first appellant is encapsulated in the following passage from the judgment:

> '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. This is evident from the attitude and approach adopted by the first respondent in the answering affidavit which in essence seeks to place blame on the applicant for trying to protect its business and non-striking employees with a request for punitive costs and accepting no responsibility, and also seeking justification on the basis of contending that it must be remembered that the strike was protected. In short, the attitude of the first respondent was that of what was taking place was the applicant's problem.'

[15] In a similar fashion to this approach, Mr Watt-Pringle submitted on appeal that first appellant should, at the very least, have investigated the alleged misconduct of its members and, having established the facts, devised appropriate steps to deal with the problem. If the allegations were found to be true, then first appellant ought reasonably to have appointed marshals to monitor the conduct of its members so that it could react appropriately to the facts that it had established. The principles of the procedure for civil contempt are well established, having been set out luminously by Cameron JA in *Fakie v CCII Systems (Pty) Ltd* 2006

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(4) SA 326 (SCA) at para 42. The applicant is required to prove three requisites for the grant of the order, namely service or notice of the order, noncompliance and wilfulness and *mala fides* in respect of this noncompliance. Having proved these requisites, Cameron JA stated:

> 'once the applicant had 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.'

[16] The test of beyond reasonable doubt is important. As the Constitutional Court said in *Matjhabeng Local Municipality v Eskom Holding Limited and Others:*[2]

> 'The civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the civil standard of proof beyond reasonable doubt – applies always.'

[17] In this case, respondent contends, in line with the judgment of the court *a quo,* that more was required of first appellant than the convening of meetings where members were informed of the implications of a court order. To that, as Mr Boda who appeared together with Ms Collet on behalf of the appellant noted, the first appellant had shown in its answering affidavit that it had gone further and ensured that its members would not congregate within the 2000 metres parameter. There is, therefore, a dispute as to what constitutes the taking of "'all reasonable steps within its power to persuade". Significantly, both the court *a quo* and Mr Watt-Pringle sought to give these words an expansive interpretation. In short, respondent associated itself with the findings of the court *a quo*, that what the order envisaged was a continuous marshalling of the striking employees and

[2] 2017 (11) BCLR 1408 (CC) at para 67.

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having the responsible union officials continuously present "on the ground" to deal with instances of a violation of the order. Furthermore, the employer should be kept "constantly appraised of the efforts" of first appellant.

[18] The very nature of these submissions indicates the core of the problem: the wording of paragraph 2.7 of the order is too vague. The words thereof were open to a different interpretation which is evident from the competing versions set out in the founding and answering affidavits. To contend, on the basis of such an open-textured order, that the respondent had proved beyond a reasonable doubt that the first appellant had the requisite wilfulness or that it exhibited *mala fides* which would justify such a finding of wilfulness and *mala fides* (even though there is an evidential burden on the first appellant) cannot be upheld in these circumstances.

[19] This finding should not be interpreted as giving succour to any form of conduct by union members or other employees which constitutes violence, intimidation or other unlawful behaviour pursuant to a strike. The very purpose of the LRA is to ensure that industrial conflict is regulated within the parameters of law, which manifestly includes a punctilious adherence to the criminal law. However, if an employer wishes to obtain relief against a union in circumstances similar to that of the present dispute, it behoves its legal advisers to draft a notice of motion which gives clear content to the obligations which it wishes to impose upon the union.

[20] It may well be that the obligations which the court *a quo* sought to read into the generalised formulation of para 2.7 of the order could constitute the kind of guidance which is required in a suitable order. Once the notice of motion is so drafted, it is possible for the union to argue what it may be able to do in the circumstances of the industrial dispute and for the court effectively to engage in a dialogue with the parties in order to craft an order whereby the obligations imposed upon the union are clear to all concerned. This did not happen in this

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case and, accordingly, the court *a quo* erred in finding that the first appellant exhibited the requisite wilfulness and *mala fides* to justify the order it granted.

[21] In the circumstances, the appeal is upheld, including the costs of two counsel and the order of the Labour Court is altered to read:

‘*The application is dismissed with costs*.’

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D Davis

Judge of Appeal

I agree

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B Waglay

Judge President

I agree

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R Sutherland

Judge of Appeal

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APPEARANCES:

FOR THE APPELLANT: Adv F Boda SC and Adv S Collet

Instructed by Larry Dave Attorneys

FOR RESPONDENT: Adv C Watt-Pringle SC and Adv F Darby

Instructed by Knowles Husain Lindsay Attorneys

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