REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No J2630/13

In the matter between:

CIRO BEVERAGE SOLUTIONS (PTY) LTD	Applicant
and	
SOUTH AFRICAN TRANSPORT & ALLIED WORKERS' UNION	First Respondent
RAYMOND MAPHUTHI MATLAKEYA	Second Respondent
MMAHOKO SIMON MATHEBANA	Third Respondent
MESO JAYMAN RAMPHELE	Fourth Respondent

Heard: **18 November 2013**

Delivered: 12 December 2013

Judgment

Shaik AJ,

A. INTRODUCTION

[1] In this application the Applicant seeks orders against the Second, Third and Fourth Respondents (**the Respondents**) declaring them to be in contempt of an order granted by this Court on 18 November 2013.

[2] In addition, the Applicant seeks orders against the Respondents for their committal to jail for a period of 30 days alternatively the imposition of monetary fines on the Respondents for an amount that this court deems appropriate.

B. LAW: contempt of court

[3] No person may unlawfully and intentionally disobey a court order. Contempt of court, in the form of disobedience of a court order, is part of a broader prohibition, which can take many forms but the essence of which lies in violating the dignity, repute and authority of the court and intentionally damaging the administration of justice.[1]

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[1] Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA); Attorney-General v Crockett 1911 TPD 893 at 925-6

[4] The purpose of an application to hold a person or persons in contempt of court serves two objectives namely to seek enforcement and to punish the non-complier.

The test for contempt of court

[5] Cameron, JA stated as follows in *Fakie N.O*. v *CCII Systems (Pty) Ltd* (supra):[2]

> *"Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide, the offence will be established beyond reasonable doubt: The accused is entitled to remain silent, but does not exercise the choice without consequence.*[3]

The burden and standard of proof

[6] As set out above, in order to succeed in an application for civil contempt of court, an applicant must prove the requisites for contempt namely the order; service thereof or notice; non-compliance therewith and *mala fides* and wilfulness beyond reasonable doubt. The overall burden of proof lies

[2] at 338C - 339A; See also Mtimkulu and another v Mohamed and others 2011 (6) SA 147 GSJ at 154G - H

[3] Osman v A-G Transvaal 1998 (4) SA 1224 (CC) at par [22]

on the applicant in this regard which burden must be discharged beyond reasonable doubt.[4]

[7] 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*. In discharging this evidential burden, a respondent must demonstrate, if he or she can, a reasonable doubt in relation to his or her wilful and *mala fide* breach of the order. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance is wilful and *mala fide*, civil contempt will have been established beyond a reasonable doubt.[5]

D. DISPUTES OF FACT

[8] The papers in this matter reveal that there are significant disputes of fact. The parties did not avail themselves of the right to refer the matter to oral evidence and elected for the matter to be determined on the papers alone. That being said, I am not certain if the outcome of this matter would have been any different nor would it have served any useful purpose to refer the matter for oral evidence.

[9] The well-known dictum in *Plascon-Evans Paints Ltd* v *Van Riebeek Paints (Pty) Ltd*[6] is also apposite:

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[4] Fakie N.O. v CCII Systems (Pty) Ltd (supra) at 344H; H v M 2009 (1) SA 329 (W) 332D - G

[5] Fakie N.O. v CCII Systems (Pty) Ltd (supra) at 344J

[6] 1984 (3) SA 623 (A); See also Wrightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at 375

"Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact… If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court… and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks…"

E. **ANALYSIS**

[10] It was submitted by the Applicant that there are no relevant or material disputes of fact in the contempt of court application, which are not capable of resolution on the papers before this Honourable Court.

I disagree. There is a dispute of fact as to whether there was effective service such that it can be said the Second to Fourth Respondents were

indeed aware of and had knowledge of the Order that was handed down by this court on the 18 November 2013, the flouting of which has given rise to these proceedings.

[11] The following background facts are relevant to place this application in context:

11.1 The Respondents embarked upon a protected strike together with employees of the Applicant on 18 November 2013 pursuant to a wage dispute which remained unresolved[7].

11.2 As a consequence of various unlawful conduct of the striking employees which included inter alia blocking the entrance of the main gate and preventing access and egress to and from the Applicant's premises and causing damage to vehicles driven by employees who sought to access the main gate,[8] the Applicant obtained an interim order from this Court interdicting and restraining the Applicant's employees (including the Respondents) from engaging in unlawful conduct during the strike. The application was launched on an urgent basis on 18 November 2013.

[12] The matter was enrolled for hearing before me in the urgent court on 18 November 2013. On that day, and in the absence of answering affidavits

[7] FA (first application) p9 para 14

[8] FA (first application) p 12 – 13 paras 22 - 27

having been delivered by any of the Respondents, I granted an interim order pending the return day. The relevant terms (in the term sought) of the interim order were the following:

13.1 A *rule nisi* is issued, calling upon the Respondents to appear and show cause on 7 February 2014 at 10h00 or soon thereafter as the matter may be heard, why an order in the following terms should not be made:

13.2 The Second to Further Respondents are interdicted and restrained from in any way interfering with or obstructing the normal operation of the Applicant's business including, but not limited to, access to and egress from the premises at 30 Diesel Road, Isando (the premises) and in particular, Unit 3A of the premises;

13.3 Second to Further Respondents are interdicted and restrained from preventing any employees of the Applicant or employees of the labour broker engaged by the Applicant from tendering their services;

13.4 The Second to Further Respondents are interdicted and restrained from in any manner intimidating, threatening, assaulting or interfering with any employee, or service provider, or customer of the Applicant;

13.5 The costs of this application are to be paid by the Second to Further Respondents, jointly and severally, the one paying the

other to be absolved, and by the First Respondent in the event of the First Respondent opposing the relief sought in this application.

[14] With regard to service, I made the following order (in the terms sought):

14.1 Upon the First Respondent by faxing a copy of the order to the First Respondent's local office using fax number 011 394 3748;

14.2 Upon the Second to Further Respondents (which included the respondents to the contempt application) by the terms of the order being read in **English** by a person nominated by the Applicant, explaining the content and import of the order to such or so many of them as may be present at the premises during normal working hours and by displaying a copy of the order on the wall of the security cottage at the main entrance to the premises;

14.3 Provided that if any of the Second to Further Respondents request a copy of the order, the Applicant shall make such copy available to him or her.

[15] The Respondents deny having being made aware of the Order and this denial is not bald. Having regard to the explanations given by the Respondents, disputes of facts arise. Still, the dispute is capable of determination by having regard to the affidavits filed by the Applicant in particular in so far as it relates to service.

[16] According to the Applicant, Thuthukile Mbekeni ("Mbekeni"), who was nominated by the Applicant to read the court order to the Second to

Further Respondents, attempted to read and explain the content and import of the court order on the Second to Further Respondents present at the premises. They refused to listen to her and began to abuse her verbally in addition to raising the volume of the music on the loudspeakers so that she could not be heard. It is not apparent if any of the Second to Fourth Respondents were present at this event and even so, according to this version of the events, the reading of the order was inaudible, incomplete and abandoned.

[17] It is alleged by Willem Hermanus Visser, that he handed ten copies of the order to a shop steward Welcome Dlamini with the request that he distribute same to the striking workers. By his say so, Dlamini accepted the copies but refused to distribute it.

[18] He goes on to say that he placed the order made on the sidewall of the security cottage at the entrance to the premises, in full view of the striking employees and took a photograph of the order so displayed. It is apparent from the photograph that the Annexure A, the list of affected employees, to whom the order was directed at, was not on display.

[19] In light of the Second to Further Respondents' refusal to allow Mbekeni to read and explain the court order to them, the Applicant, at a meeting with a union official and two of the shop stewards, requested the CCMA commissioner in attendance to read and explain the content of the order to them, which the commissioner duly did. The Second to Fourth Respondents were not present at the reading by the Commissioner.

[20] The Applicant contends it is implausible for any of the Respondents to suggest that they had no knowledge of the court order which:

20.1 Was served on their representative trade union;

20.2 Was served on their elected shop stewards (10 copies);

20.3 Was placed in full view of the striking employees on the side wall of the security gate at the entrance to the premises for them to read.

[21] I disagree. It is probable and plausible that the Second to Fourth Respondents had no knowledge or not sufficient knowledge of the terms of the order or its import or that it was directed at them, personally.

[22] On reflection, the order sought, with regard to service, did not go far enough. It directed that the terms thereof be read in "English by a person nominated by the Applicant, explaining the content and import of the order to such or so many of them as may be present at the premises during normal working hours..."

[23] The features I consider bad, have been underlined. It is obviously not appropriate–and meaningless- for an order of this court to be read out in English to persons who cannot speak, read or write that language with fluency. It would serve the purpose better if the order was translated into a language that is commonly used and understood by the employees.

[24] It is also inappropriate and in the circumstances of this case, bad for an order to be made that the Applicant nominates any person to read and

explain the order and the circumstances that befell Thuthukile Mbekeni is illustrative of the problems associated with such a process. And again, who is to say that such an effort was satisfactory even if it was done as envisaged? Crystal attests to the fact, confirmed by Mbekeni, that as "as soon as Mbekeni commenced reading the order" the striking employees began shouting and abusing her verbally. I gather she abandoned the effort. Even so, it is not apparent that the Respondents were present at the time.

[25] It is also not appropriate in the circumstances of this case that the order be brought only to the attention of persons who happen to be around at a particular place at a particular time chosen by the Applicant. Knowledge then, and in these circumstances, of the court order, is a matter of happenstance.

[26] In this matter it was not helpful that the order was posted on a wall of a security house without the annexure listing the named persons affected by the order. In the result there is nothing to gainsay the fact that the Second to Fourth Respondents were not made aware that an order was made that affected them personally.

[27] Neither was it helpful to give the order to a shop steward – a shop steward has no duty in law- to serve as a Sheriff. It is evident that the effort to press him into service was resisted. The fact, that shop steward stuffed the orders in his backpack, makes it clear that he did not hand it out to anyone.

[28] On the version of the Applicant, the respondents were not present when the order was read out by the Commissioner.

[29] In the circumstances I am not satisfied that it can be said, beyond a reasonable doubt, that there was effective service of the order. There is nothing to gainsay the testimony of the Respondents before me that they had knowledge of the order made, and that that order was directed at them, *personally so*.

[30] It may well be that service was –more or less- in compliance with the order that I made. It was contended in argument that service on the union and the shop stewards, as representatives and bargaining agents, was sufficient and good. I disagree. The union and the shop steward do not serve as the duly appointed agents, of employees and in this case the Second to Fourth Respondents, to receive court processes and an employer cannot compel them to play that role. They are not hand maidens to be pressed into service by an employer to do their bidding. In saying this I do not hold that in certain appropriate circumstances this may not be done.

[31] I am mindful of the fact that it is alleged that the respondents concerned, acting in concert, orchestrated an attack on the occupants (employees of the labour broker) of the Applicant's truck and shattered the windscreen with bricks in addition to pouring petrol into the vehicle and onto the occupants of the vehicle with the aim of setting the vehicle alight.

[32] If there was effective service such that it could be said beyond a reasonable doubt that the Respondents were aware of the order, that it was made against them and personally so, I would have had no hesitation, in finding that the Respondents are guilty of civil contempt and thereafter made an appropriate order.

[33] But in circumstances such as this, such an order will be manifestly unjust. I am not moved by maudlin sentimentality. Service, is a critical element to satisfy, and in this matter, service was less than satisfactory. This matter gave rise to anxious deliberation and I cannot, with liberty, hanging on a thread, find that there was service, good and proper to justify a finding of contempt.

[34] Apart from matters relating to service, there were other disturbing features in the proceedings. Following the launch of the contempt proceedings, the Respondents were abandoned by the First Respondent, SATAWU, who sought to disassociate from the conduct of the Second to Fourth Respondents and sent a letter to the Applicant advising them that it will not oppose the orders sought. As a result the Second to Fourth Respondents had to procure the services of an Attorney and on short notice, file papers in the matter. By agreement, they had in effect about 24 hours and less, to supply an answering affidavit. They complain “that due to short-time, we are unable to give full instructions to our attorneys of record to be able to properly oppose this matter on our behalf.”

[35] The complaint is good. It matters not that the agreement on time limits was made an order of court. It was short as it was tight. For the liberty or punishment of a citizen to hang on such time limits, that causes prejudice to and affects the right of representation, is unjust.

[36] The Applicant insisted that the contempt proceedings be heard on an urgent basis. This court, ought not to have acceded to that request, as the strike had come to an end and there was no longer any need for the compliance sought. The purpose of the proceeding was only to invoke the punishment of this court.

[37] As is apparent, the disputes of fact I have referred to, are not capable of resolution by referral to oral evidence and it would have served no useful purpose to have referred the matter for oral evidence. The parties in fact requested that the matter be determined on the papers alone.

[38] In the circumstances, the Applicant has failed to discharge the onus beyond reasonable doubt that there was effective service on the Second to Fourth Respondents such that it can be said that they were aware of the order and notwithstanding were wilful and mala fide in contempt thereof.

[39] The fact that it is alleged they committed a grievous assault and caused damage to property, and on the face of it, there is prima facie evidence to support the allegation, these are matters that should be referred to the South African Police for investigation and prosecution. I direct that this be done.

[40] For all the reasons mentioned, the application is dismissed. However, having regard to the features of the order made that is the subject of these proceedings, I do not deem it appropriate that cost follow the result.

[41] **Order**

1. The application is dismissed.

2. The parties are to pay their own costs.

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Shaik, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: M Chavoos (Norton Rose Fulbright)

For the Third Respondent: M Baloyi (MM Baloyi Attorneys)