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 555/16

In the matter between:

ROBERTSON WINERY (PTY) LTD Applicant

and

CSAAWU First respondent

List of persons whose names appear on Annexure "A" Second and further respondents

Heard: 28 October 2016

Delivered: 18 November 2016

Summary: Application to hold trade union and its office bearers in contempt of court. Court order granted to prevent union, its members and office bearers from acting unlawfully during protected strike. Union officials participated in singing of song constituting hate speech in contravention of court order. Union also promoted carrying of weapons. Union did not prevent strikers from intimidating replacement labour and preventing them from going to work, but wilful non-compliance not proven in that instance. Contempt proven in respect of second element (promoting carrying of weapons) and singing of song. Suspended fine imposed.

JUDGMENT

STEENKAMP J

Introduction

[1] The first respondent, CSAAWU (the Commercial, Stevedoring, Agricultural and Allied Workers' Union), called its members out on strike after a wage dispute with the applicant, Robertson Winery, had deadlocked. The Winery recognises CSAAWU as the workers' collective bargaining agent. The strike is protected. It has also been long and acrimonious. At the time of this judgment, it had entered its twelfth week. Early on in the strike, the Winery obtained an interdict in this Court restraining the union, its members and office bearers from engaging in unlawful conduct in furtherance of the protected strike. It claims that the respondents – and in particular the union's strike committee – have acted in contempt of that court order. It has applied for an order holding a number of the union's office bearers in contempt; and for their incarceration or, alternatively, for a fine to be imposed on the union.

What this case is not about

[2] The strike and the events surrounding it have attracted a great deal of media attention. CSAAWU has embarked on a successful campaign to draw international attention to work practices and working conditions of farm workers supplying grapes to the Winery. In that context, it is perhaps important to set out, at the outset, what this application is NOT about.

[3] This Court is not called upon to express any view about the working conditions and working hours at the Winery or on the surrounding farms in the Robertson area supplying grapes to the Winery. Nor is it called upon to decide whether the current wages earned by the workers are fair, or indeed what is commonly referred to as a "living wage". It is common cause that the Winery pays above the prescribed sectoral minimum wage; but the union and the workers say that is far from a fair wage. That is why they are striking. It is not the place of this Court to decide whether the

Winery's current wage, the Union's demands, or the Winery's counter offer to those demands are fair. That is the arena of collective bargaining and the site of the current power play between the parties. That power play is regulated by the Constitution and by statute – in this case, the Labour Relations Act.[1] CSAAWU has followed the procedures set out in s 64 of that Act. The strike is protected, both by the Constitution and in terms of the LRA. The only question before this Court is whether the Union and of certain of its members are in contempt of the earlier court order. It is not this Court's place to decide on the merits of the wage dispute, nor is it called upon to do so.

The relief sought in this application

[4] The Winery claims that the respondents breached a final order granted by this Court [Coetzee AJ] on 25 August 2016. It says that the order was not complied with in two broad aspects:

4.1 Replacement labour was prevented from going to work; and

4.2 agreed picketing rules were breached.

[5] The Winery seeks an order holding a number of individuals – CSAAWU office bearers and members of the strike committee – as well as the union itself in contempt. Flowing from that, it seeks either an order committing those individuals to jail or for the union to pay a substantial fine, or both.

[6] In particular, the Winery asks for a final order to declare the following individuals to be in contempt of the court order:

6.1 Trevor Christians (General Secretary of CSAAWU);

6.2 Karel Swart (Assistant General Secretary);

6.3 Deneco Dube (Robertson organiser and spokesperson);

6.4 Melville Nokonya;

6.5 Marshalene Berdien;

6.6 Wendy Qhanqiso;

[1] Act 66 of 1995.

6.7 Jerome Hendriks;

6.8 Amanda Kamasa;

6.9 Ishmael Masolane; and

6.10 Adam Berdien.

Background facts and court orders

[7] CSAAWU called its members out on a protected strike at the Winery on Wednesday 24 August 2016.

[8] The Winery approached this Court for interdictory relief on an urgent basis the next day, Thursday 25 August 2016. It came before Coetzee AJ. CSAAWU opposed the application. After some initial argument, the matter was adjourned for further discussions between the parties' legal representatives. They reached an agreement for a final order to be granted in these terms:

> "1. The respondents[2] are restrained from:
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> 1.1 intimidating, harassing, threatening or in any other way interfering with:
>
> 1.1.1 any employee of the applicant, whether such employee is employed on a temporary, casual or permanent basis, who wishes to work in terms of his or her contract of employment;
>
> 1.1.2 any other person or persons involved in or connected with the conduct of the applicant's operations, including but not restricted to contracted workers employed for purposes of replacement labour;
>
> 1.2 in any way preventing any of the persons referred to in paragraph 1.1 above from gaining access to the applicant's premises at 17 Voortrekker Road (main entrance), McGregor Road (co-op entrance and motor gate) (hereafter 'the premises');

[22] i.e CSAAWU and the striking workers, listed in Annexure "A" to the court order.

1.3 in any way preventing any of the persons referred to in 1.1 above from leaving the premises;

1.4 in any way interfering with or obstructing the normal operation of the applicant's business, including but not restricted to all vehicles entering or leaving the premises, other than in accordance with the picketing rules once agreed or established by the CCMA;

1.5 in any way damaging or threatening the damage any property of the applicant;

1.6 in any way hindering, hampering, preventing or interfering with the loading, transportation and delivery of any product of the applicant;

1.7 attending at the premises at any time save for the purpose of presenting themselves for the execution of their duties with the applicant in accordance with their contracts of employment;

1.8 being within 100 metres of the perimeter of the premises for purposes other than those referred to in paragraph 1.7 or for purposes other than the peaceful and orderly picketing at the premises;

1.9 utilising weapons, including but not limited to pangas, assegais, poles, sticks and bricks, in carrying out their industrial action;

1.10 placing and/or burning tyres on the applicant's premises; and

1.11 obstructing all entrances, whether pedestrian or vehicular, on and to the applicant's premises.

2. The first respondent [CSAAWU] is restrained from inciting, instigating or promoting any unlawful conduct in contemplation, furtherance or incitement of the strike.

3. Paragraphs 1 and 2 shall operate as a final order as agreed between the parties.

4. The Sheriff is authorised and directed, and insofar as he or she may require the assistance of a law enforcement authority, such law enforcement authority is authorised and directed, to ensure that the individual respondents comply with the terms of this order.

5. Service of this order shall be effected in the following manner:

5.1 By email and telefax on first respondent's offices in Bellville, Western Cape province;

5.2 By the Sheriff of the High Court, or by his deputy, by affixing copies of the order at the main entrances of the applicant's premises.

6. There is no order as to costs."

[9] Picketing rules were agreed to by the parties and issued by the CCMA on the same day, effective from 26 August. The agreed rules confirmed that "the picketers must conduct themselves in a peaceful and lawful manner and must be unarmed." It specified that placards "will not reflect derogatory language directed at Robertson Winery or any of its employees or language inciting hate speech." The parties also specifically agreed that striking union members would not:

> "threaten, intimidate or assault any employee whatsoever who is not participating in the strike, whether that employee is in the full time or temporary employ of Robertson Winery;
>
> …
>
> "… be in possession of any offensive weapon or dangerous implements (including but not limited to sjamboks) …"

[10] On 29 August – four days after it agreed to the court order and to the picketing rules – CSAAWU posted photographs on its Facebook page of its striking members outside the Winery's premises brandishing sticks, sjamboks and a golf club. The union says that, although the photographs were posted on its Facebook page after it had agreed to the court order and the picketing rules, the photographs were taken a day before, on 25 August.

[11] On 31 August striking workers chanted a song containing the words, "Dubula Reinette". Translated into English, it translates to "shoot Reinette". It is common cause that they were referring to Reinette Jordaan, the Winery's human resources manager. The following individuals who are members of the strike committee participated in the chant:

11.1 Deneco Dube;

11.2 Melville Nokonya;

11.3 Wendy Qhanqiso;

11.4 Jerome Hendriks;

11.5 Marshalene Berdien; and

11.6 Amanda Kamase.

[12] On 31 August the winery brought this to the union's attention and pointed out that it is in contravention of the picketing rules and the court order. The union requested a meeting. The parties met on 31 August 2016 at 16:30. The union's attitude was that "there is nothing wrong with the song". It nevertheless "took a decision to stop singing the song" thereafter.

[13] The facts above are common cause. The Winery also alleges that the striking workers intimidated workers employed as replacement labour on a continuous basis and went so far as to pull them out of taxis to prevent them from going to work. The union denies it. The Winery has put up a number of WhatsApp messages and confirmatory affidavits from those replacement workers to corroborate its evidence.

[14] On 8 October, the Winery brought an interim application to hold the respondents in contempt of the final order granted by Coetzee J on 25 August. It was opposed. The Court granted a rule *nisi* for the respondents to show cause on 14 October why a final order should not be granted. The parties were given the opportunity to file further affidavits. On 14 October the application for final relief came before Rabkin-Naicker J. She extended the rule *nisi* for the parties to refer the underlying dispute to the CCMA in terms of s 150[3] of the LRA in order for it to attempt conciliation "in the public interest" and to appoint a national team to assist with that process. Those efforts came to naught. The contempt application then came before this Court for final determination again on 28 October 2016.

[3] That section reads: "**150. Commission may appoint commissioner to conciliate in public interest**.—(1) Despite any provision to the contrary in this Act, the director may appoint one or more commissioners who must attempt to resolve the dispute through conciliation, whether or not that dispute has been referred to the Commission or a bargaining council—

(a) with the consent of the parties; or

(b) in the absence of consent by the parties, if the director believes it is in the public interest to do so."

Contempt: the legal principles

[15] The legal principles with regard to contempt proceedings were usefully and eloquently summarised by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*:[4]

> "(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.
>
> (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.
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> (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.

[16] These principles were restated by the Labour Appeal Court in *FAWU v In2Food (Pty) Ltd.*[5] In that judgment, turning got the liability of trade unions, that Court said[6]:

> "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

[4] 2006 (4) SA 326 (SCA) para [42]. See also *Orthocraft (Pty) Ltd t/a Advanced Hair Studios v Musindo* (2016) 37 *ILJ* 1192 (LC).

[5] (2014) 35 *ILJ* 2767 (LAC).

[6] Para [9].

> 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."

[17] Court orders are enforceable in the Labour Court by way of contempt proceedings.[7]

The law applied to the proven facts

[18] In this case, the court order is not disputed – in fact, it was taken by agreement. It is also not disputed that it was properly served on the respondents. What remains to be decided, is whether there was non-compliance; and if so, if it was wilful and *mala fide*. In that respect, once the applicant has proven non-compliance, the respondents bear an evidential burden to establish reasonable doubt as to whether non-compliance was wilful and *mala fide*.

[19] Mr *Stelzner*, for the Winery, argued that the respondents had breached the court order in respect of three broad categories:

19.1 Intimidating replacement labour;

19.2 chanting a song ("dreunsang") that was aimed at threatening the HR manager, Reinette Jordaan; and

19.3 placing photographs on Facebook of the striking workers carrying dangerous weapons.

Replacement labour

[20] The court order specifically deals with the issue of replacement labour. It specifically restrains the strikers from intimidating, harassing or interfering with contracted workers employed for the purpose of replacement labour.

[21] Of course, an interdict could not prevent peaceful picketing. The Constitution guarantees the right to picket "peacefully and unarmed".[8] And the Code of Good Practice on Picketing[9] specifically states:

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[7] LRA s 163.

[8] Constitution of the Republic of South Africa s 17. Ironically, one of the Winery's ranges is named Constitution Road in celebration of the Constitution.

> "The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lockout or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lockout. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and employees not to do business with the employer."
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> "The picketers must conduct themselves in a peaceful, unarmed and lawful manner. They may –
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> (a) carry placards;
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> (b) chant slogans; and
>
> (c) sing and dance.
>
> Picketers may not –
>
> (a) physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer's premises;
>
> (b) commit any action which may be unlawful, including but not limited to any action which is, or maybe perceived to be violent."

[22] The Union is specifically restrained from inciting, instigating or promoting any unlawful conduct by its members.

[23] There is nothing unlawful about peacefully persuading fellow workers to join the strike or dissuading others from placing their labour at the disposal of the employer as replacement labour (colloquially referred to as 'scabs'). And the union may use other means to make its strike as effective as possible, including – as it has done in this case – calling for a boycott of the Winery's product. What the union and the strikers emphatically may not do, is to prevent those replacement workers by force or intimidation from going to work.

[24] The very specific allegations by replacement workers, set out in affidavits and backed up by a vast number of contemporaneous WhatsApp messages, were mostly met by bare denials on the papers. In a few

[9] Published in GN 765 of 1998, GG 18887 of 15 May 1998, Items 3(1) and 6(6) and (7).

instances, the denials are backed up by positive allegations that the strikers were merely marching and using loud hailers to garner support for the strike. In one instance, the respondents admit blocking a taxi but deny forcing the passengers out. Even though these are motion proceedings governed by the rule in *Plascon-Evans*[10], there can be no doubt that replacement labourers were forcefully prevented from going to work at the Winery. The denials were, on the whole, so far-fetched or clearly untenable that the Court could reject it on the papers.

[25] The Winery has attached to its papers a number of detailed WhatsApp messages received from non-striking employees and replacement labour over the period 26 to 31 August 2016. The names and company numbers have been redacted, but the original confirmatory affidavits containing those details were made available to the court. From the type of language and peculiar style of Afrikaans WhatsApp abbreviations used, there can be little doubt about their authenticity. They detail the following incidents:

25.1 Striking union members threatened and prevented temporary workers from entering the transport vehicles at various pickup points.

25.2 Temporary employees indicated that they felt threatened and scared for their and their families' safety and rather returned home.

25.3 Striking members waited for the temporary workers at the pickup points and threatened them upon their returning from work and told them that, as long as they did not go to work, they would not get hurt.

25.4 Temporary workers were chased from the pickup points and were told that they should return home; and that, if they try to go to work, they would be hurt.

[26] These are some examples of the WhatsApp messages (spelling and grammar as in the original):

> "Di mnse oz yti taxi ytghal by vgk Kerk";[11]
>
> "Hulle kon niemand laai want die stakers laai mense uit";

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

[11] i.e. "the people took us out of the taxi at VGK church", the church being one of the pick-up points.

"Di fokn mense ry agter di taxi aan wl he ek mt inklim ni vgk kerk";

"Di mense stan nu by di optel punte wt oz keer";

"Hulle het os gedreig en gese o smut uit klim";

"Di mense laat ons ni toe om di bussies te klim ni";

"Oz is bang hle mk oz seer ds hkm oz huistoe gekom het ";

"Ons ht omgedraai wnt di mnse dreig ons";
"Het gehoor by di stakers dat hulle niemnd van more af in die keller toe gaan laat nie".

[27] On 29 August the Winery communicated its concerns to the union. It noted that the transport company, Wentzel Vervoer, attempted to transport 53 casual workers from Ashton and attempted to gain access to the winery's premises but were denied access by striking workers. It also conveyed to the union that it had come to its attention that a strike meeting was held during which union members expressed the intention to prevent all casuals from accessing the premises. The union responded by denying any intimidation, stating that its members were merely distributing pamphlets and talking to those in the buses and taxis; and that "our members and supporters have meetings every morning and afternoon to discuss the plans for the day and how to effectively advance the struggle."

[28] A transport provider, Peter Wentzel, also lodged a criminal complaint of intimidation with the SAPS. He stated under oath:

"Op Vrydag 26 Augustus 2016 het ek Robertson Winery se werknemers probeer vervoer vanaf 05h45 met die optelpunte soos ooreengekom met Reinette Jordaan. Ek en die werkers is elke keer gedreig en die werkers is elke keer uit die kombi gehaal deur die stakers."

And:

"Op Saterdag 27 Augustus 2016 was ek uitstedig. My broer, Jacques Wentzel, woonagtig te Van Zylstraat 58, Robertson … het aan my gemeld dat die Unie mense met stakers voor sy deur kom staan het en met 'n 'loud hailing' toestel hom en sy familie geintimideer / gedreig het. Hy moes na die intimiderende stakers kom ter wille van sy familie se veiligheid en meld dat hy nie Robertson Winery se werksmense ry nie."

[29] In response, the Union admits that it "conducted a march" and passed Jacques Wentzel's house, and that its members "mistakenly thought this was the residence of Peter Wentzel." They "called upon Peter Wentzel to come out of the house"; yet they deny any intimidation.

[30] The very act of calling the person who is responsible for transporting non-strikers out of his house, had the effect of, at the very least, harassing him. That is in contravention of the court order.

[31] The union has simply denied that its members were responsible for preventing replacement labourers and other non-striking employees from going to work. It has not made any effort to convey to its members that they were not allowed to do so. It appears that the union does have control of its members, as is evident from the fact that the singing of the song constituting hate speech and the carrying of arms have ceased; yet one searches in vain for any attempt by the union to convey to its members that they may not threaten non-striking workers or prevent them from going to work.

"Dubula Reinette"

[32] The song containing the words, "Dubula Reinette" [i.e. "shoot Reinette"] is a variation of the well-known 'struggle song' containing the words, "Dubula iBhunu" ["shoot the boers"]. That song has been held to constitute hate speech in *Afriforum v Malema*.[12] And an incitement to kill does not enjoy constitutional protection, as the SCA reiterated very recently in *Hotz v UCT*[13]:

> "Freedom of speech must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard. It was rightly said in *Mamabolo* [14] that:
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> '… freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly,

[12] 2011 (6) SA 240 (EqC).

[13] [2016] ZASCA 159 (20 October 2016) paras [67] – [68].

[14] *S v Mamabolo* 2001 (3) SA 409 (CC) para [28]; *The Citizen v McBride* 2011 (4) SA 191 (CC) paras [99] – [100].

association and political participation protected by ss 15 - 19 of the Bill of Rights'.

But in guaranteeing freedom of speech the Constitution also places limits upon its exercise. Where it goes beyond a passionate expression of feelings and views and becomes the advocacy of hatred based on race or ethnicity and constituting incitement to cause harm, it oversteps those limits and loses its constitutional protection. In *Islamic Unity Convention*[15] Langa CJ explained the reason for this:

'Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.'

A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity. The message on Mr Magida's T-shirt said unequivocally to anyone who was more than a metre or two away that they should kill all whites. The reaction to that message by people who saw it, as communicated to Mr Ganger, was that this was an incitement to violence against white people. The fact that Mr Magida sought to explain away the slogan and suggest that it said something other than what it clearly appeared to say, is itself a clear indication that he recognised its racist and hostile nature. Whether it in fact bore a tiny letter 's' before the word 'KILL' is neither here nor there. The vast majority of people who saw it would not have ventured closer to ascertain whether, imperceptibly to normal eyesight, the message was something other than it appeared to be. They would have taken it at face value as a message being conveyed by the wearer that all white people should be killed. There was no context that would have served to ameliorate that message. It was advocacy of hatred based on race alone and it constituted incitement to harm whites. It was not speech protected by s 16(1) of the Constitution."

[15] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para [32].

[33] Ms *Harvey* argued that, nevertheless, it must be borne in mind that the workers stopped singing the song after the Winery had complained about it. But the fact remains that it clearly transgressed the court order and the picketing rules specifying that the strikers would not intimidate, harass or threaten any Winery employee; and that placards "will not reflect derogatory language directed at Robertson Winery or any of its employees or language inciting hate speech." They must have been aware that language of this kind, even in a song, would constitute hate speech; and in any event, it was clearly aimed at intimidating, harassing or threatening the HR manager. It also used language inciting hate speech in contravention of the picketing rules.

Carrying of weapons

[34] It is common cause that the union placed photographs on its Facebook page well after the court order had been granted, depicting its members brandishing sjamboks, sticks and a golf club – actions that are specifically prohibited in the picketing rules.

[35] In its defence, Ms *Harvey* argued that, although the photographs were posted on Facebook after the court order had been granted, the actions that they depict took place the day before the order was granted. In those circumstances, she argued, the Winery has not proven that the workers carrying those weapons contravened the court order. There is no evidence that they continued doing so after the order was granted.

[36] But, as Mr *Stelzner* pointed out, the act by the union of placing the photographs on Facebook after the court order had been granted, does show non-compliance with the order. The union is "restrained from inciting, instigating or promoting any unlawful conduct in contemplation, furtherance or incitement of the strike." The carrying of weapons such as sjamboks was unlawful and specifically prohibited by the picketing rules. Yet the union placed undated photographs of those very actions on its Facebook site on 29 August, four days after the order had been granted and after it had agreed to the picketing rules. That cannot be anything but "inciting" or "promoting" the actions of its members.

Was non-compliance proven?

[37] The question whether the Winery has proven non-compliance of the court order on a balance of probabilities will be discussed with regard to each of the categories complained of.

[38] Apart from the song aimed at the HR manager, no individual strikers or union officials have been identified. Instead, the Winery seeks to prove non-compliance by the union.

Replacement labour

[39] The union as well as its members were restrained from intimidating, harassing, threatening or in any other way interfering with non-striking workers and replacement labour. It was also restrained from preventing any such workers from gaining access to the Winery's premises; and from inciting, instigating or promoting any unlawful conduct in contemplation or furtherance of the strike.

[40] The union has been actively involved in promoting the strike. It has done so in a proper and peaceful manner by participating in the strike committee meetings, the CCMA negotiations in terms of section 150 of the LRA, and the meeting to agree picketing rules. But by the same token, it has associated itself with the actions of its members, other than denying that they had acted unlawfully. That much is clear from its public actions such as placing photographs of armed strikers on its Facebook page after the court order had been granted. It has taken no positive steps to ensure that its members would not harass non- striking workers transport to take them to work.

[41] It is tempting to accept the argument that, through its inaction, the union has breached the court order with regard to harassing or threatening replacement workers. As the LAC observed in *In2Food*[16]*:*

> "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."

[16] Above para [9].

[42] But in the same case,[17] the LAC set out the difficulty of holding the union itself liable:

> "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. This distinction was also not addressed in the judgment of the court a quo. The upshot is that when there is evidence to implicate the union vicariously in the unlawful acts of its members, there may well be an action available to the respondent for redress, but the liability of the appellant 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.
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> …
>
> Bearing in mind the quasi-criminal sanction for a breach, it is to be expected from the text of an order that the party interdicted is left in no reasonable doubt as to what exactly is to be done or refrained from. The formulation of the order against the appellant is vague, having not been insightfully framed with logistics of proof of breach and of effective execution in mind. An interdict order against a union should prudently state plainly what action is mandatory, and not elide the union's obligations with that of its members.
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> …
>
> 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 Spring, a Division on Met*

[17] *FAWU v In2Food* (2014) 34 *ILJ* 2767 (LAC) para [12] – [14].

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:

'[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.'

[43] In this case, the Winery has not shown that the union actively "incited, encouraged or instigated" the harassment or intimidation of replacement workers. Nor has it been able to identify any of the individual perpetrators. The inaction of the union and the absence of any evidence that it actively prevented its members from harassing replacement labour is to be decried; but that inaction does not, in my view, translate to a breach of the court order. The court did not order the union to take any active steps in this regard, but merely to refrain from inciting or instigating such unlawful actions. The Winery has not proven non-compliance of that part of the order.

Dubula Reinette

[44] It is common cause that the strikers sang the song, constituting hate speech, after the court order and picketing rules had been agreed to. The six members of the union who participated in that incident were specifically identified. They have not denied the fact that they participated in the singing of the song. Non-compliance has been proven.

Carrying of arms

[45] In the case of the Facebook photos and carrying of weapons: the Winery has proven non-compliance by the Union, but not by individual workers. By placing the undated photographs on its Facebook site after the court order and picketing rules had been agreed to, the union itself acted in contempt of the court order by inciting, instigating or promoting the carrying of weapons.

Was the non-compliance wilful and mala fide?

[46] The respondents bear a reverse onus to show that their non-compliance was not wilful and mala fide.

Replacement labour

[47] The respondents' bare denial of any harassment or intimidation of replacement workers is not convincing. The authenticity of the WhatsApp messages cannot be doubted. But it has not been shown beyond reasonable doubt that the union made common cause with the (unidentified) perpetrators. It has not been shown that the non-compliance with the court order in this instance was wilful and mala fide with regard to the trade union; and the individual perpetrators have not been identified.

Dubula Reinette

[48] The Winery took the singing of the song up with the strike committee. After some initial reluctance to admit to any wrongdoing, the matter was resolved. The union gave the assurance that the strikers would stop singing the song. They did. The strike committee did exactly what it should do, namely to resolve matters peacefully and to discipline its members.

[49] Nevertheless, the Winery has proven non-compliance on this aspect; and the union has not cast reasonable doubt on the question whether it was wilful or mala fide. On the other hand, once the non-compliance had been brought to its attention, the Union took bona fide steps to prevent it from recurring; but the fact remains that the identified individuals acted in contempt of the court order.

[50] I will deal with this aspect further under the heading of the appropriate penalty.

Carrying arms

[51] The Winery has proven that, by placing the photographs of its members carrying sjamboks and other weapons on its Facebook page, the union has not complied with the court order restraining it from inciting or promoting those actions. And the union has not shown that it was not wilful or mala fide. It did not attempt to remove the photographs; nor did it make any effort to put it in context, for example by adding a fresh post to point out that the photographs had been taken before the court order and picketing rules had been agreed to; that they, in fact depicted unlawful conduct; and calling upon its members not to repeat it.

Discussion

[52] In *In2Food*[18] the LAC reiterated that:

> "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.
>
> 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."

[53] The "sentiments expressed by the court *a quo"* and endorsed by the LAC were these, described by the LAC as "a significant policy statement":

[18] *FAWU v In2Food (Pty) Ltd* (2014) 35 *ILJ* 2767 (LAC) paras [18] – [19].

> "'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 trade unions have 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."

[54] It is so that the actions of CSAAWU and its members in this case have not translated into any significant violence. The strikers did carry arms, but stopped; they did threaten Ms Jordaan, but stopped; and whilst they did physically remove scabs from their transport and did prevent them from going to work, no significant injuries were reported or alleged in the evidence before me. It must also be borne in mind that the strike is protected and that CSAAWU did follow the procedures set out in the LRA when calling its members out on strike. The Union must also be commended for agreeing, with the Winery, to picketing rules under the auspices of the CCMA within a day of going on strike; and the s 150 process is still ongoing with the assistance of the CCMA. These actions are not indicative of an intransigent union taking a devil may care attitude to the actions of its members.

[55] Nevertheless, the breach of a court order is always serious. It undermines the rule of law. And in the context of collective bargaining, it undermines the very nature of the Constitutional rights to strike and to picket peacefully and unarmed.

[56] 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.[19] 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."

[57] Again, I must stress that in this case, CSAAWU did not reject the granting of the court order; indeed, it was granted by agreement. Yet the union's leadership and its members continued to breach at least aspects of the order. Even if those breaches were not as major or as violent as is, regrettably, the case in many other strike situations, to leave it unpunished would be to countenance a culture of impunity and it would further undermine the rule of law.

[58] As Conradie JA commented in *Steve's Spar*[20]:

> "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."

[59] Davis JA expressed similar sentiments in *North West Star*:[21]

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[19] 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).

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

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

> "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.[22] A society that would allow such would in 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."

[60] Most recently, in *Hotz v UCT*[23], the SCA reminded us:

> "Protest action is not itself unlawful. As pointed out by Skweyiya J in the passage already quoted from *Pilane* the right to protest against injustice is one that is protected under our Constitution, not only specifically in section 17, by way of the right to assemble, demonstrate and present petitions, but also by other constitutionally protected rights, such as the right of freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of freedom of association (s 18) and the right to make political choices and campaign for a political cause (s 19(1)). But the mode of exercise of those rights is also the subject of constitutional regulation. Thus the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm (s 16(2)(c)). The right of demonstration is to be exercised peacefully and unarmed (s 17). And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups and people must recognise this when exercising their own constitutional rights. As Mogoeng CJ said in *SATAWU v Garvis*[24], 'every right must be exercised with due regard to the rights of others'. Finally the fact that South Africa is a society

[22] Again, I hasten to add that, in this case, CSAAWU did agree to the court order; but the principles set out by Davis JA remain applicable.

[23] 2016 ZASCA 159 (20 October 2016) paras [62] – [63] (my underlining).

[24] 2013 (1) SA 83 (CC) para [68].

founded on the rule of law demands that the right is exercised in a manner that respects the law.

This court had occasion to deal with the right to demonstrate in *SATAWU v Garvis*.[25] It said:

'Our Constitution saw South Africa making a clean break with the past. The Constitution is focused on ensuring human dignity, the achievement of equality and the advancement of human rights and freedoms. It is calculated to ensure accountability, responsiveness and openness. Public demonstrations and marches are a regular feature of present day South Africa. I accept that assemblies, pickets, marches and demonstrations are an essential feature of a democratic society and that they are essential instruments of dialogue in society. The [Regulation of Gatherings] Act was designed to ensure that public protests and demonstrations are confined within legally recognised limits with due regard for the rights of others.

I agree with the court below that the rights set out in s 17 of the Constitution, namely, the right to assemble and demonstrate, are not implicated because persons engaging in those activities have the right to do so only if they are peaceful and unarmed. It is that kind of demonstration and assembly that is protected. Causing and participating in riots are the antithesis of constitutional values. Liability in terms of s 11 follows on the unlawful behaviour of those participating in a march. The court below rightly had regard to similar wording in the Constitution of the United States, where people are given the right to assemble peacefully. Such provisions in constitutions such as ours are deliberate. They preclude challenges to statutes that restrict unlawful behaviour in relation to gatherings and demonstrations that impinge on the rights of others."

Conclusion

[61] It has not been proven beyond a reasonable doubt that the Union or any identified individual respondents are in contempt of the order preventing them from harassing, threatening or interfering with contracted workers employed for purposes of replacement labour.

[25] 2011 (6) SA 382 (SCA) paras [47] – [49].

[62] The union is in contempt of the court order insofar as it instigated or promoted the carrying of weapons.

[63] The following individual respondents are found to be in contempt of the court order in respect of the singing of the song, "Dubula Reinette":

63.1 Deneco Dube;

63.2 Melville Nokonya;

63.3 Wendy Qhanqiso;

63.4 Jerome Hendriks;

63.5 Marshalene Berdien; and

63.6 Amanda Kamase.

The appropriate remedy

[64] Having found that the union and the six identified members of the strike committee are in contempt of the court order to the limited extent discussed, the remaining question is what the appropriate remedy or punishment will be. And although this court is loath to use the term "punishment" in a collective bargaining and broader labour law context, contempt proceedings, albeit civil, do envisage remedies akin to criminal punishment.

[65] In *Ram Transport*[26] 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."

[66] This is not a case where the extent of the contempt calls for "the severest penalties that this court is entitled to impose". But impose a penalty it must.

[67] I take the following mitigating factors into account:

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

67.1 Once the issue had been discussed with the strike committee, the strikers stopped singing the song directed at the HR manager that constituted hate speech.

67.2 Apart from posting the photographs of armed strikers on Facebook after the court order had been granted, there were no further incidents of the strikers arming themselves.

67.3 The incidents of preventing replacement labour from boarding transport and going to work also ceased a few days after the order had been granted; and although the union should have taken active steps to stop such incidents, it has not been proven that it actively encouraged it.

67.4 Apart from these incidents, the strike has been peaceful.

[68] On the other hand, the fact that these breaches did occur, cannot be ignored. A penalty should be imposed, but I do not consider either direct imprisonment or a fine to be paid immediately by the union to be justified. The first aim of the court order was to ensure compliance; that it achieved after the initial breaches. Further non-compliance can be prevented, in my view, with a suspended penalty imposed on the union to prevent further breaches.

[69] In respect of the trade union itself, it has been proven that it was in wilful contempt in that it did not – at least initially – prevent or dissuade its members from continuing with unlawful actions, such as carrying arms. A suspended fine would, in my view, cause it to act with more resolve in the future to discipline its members and to prevent similar actions. I do not consider a fine as high as the R500 000 that Mr *Stelzner* suggested to be justified. CSAAWU is a small trade union that has only recently started organising in this sector. It should be encouraged to represent its members to the best of its ability in a peaceful and disciplined fashion. In my mind, a suspended fine of R50 000 should achieve that objective.

[70] In *Pikitup*[27] Lagrange J imposed a fine of R80 000 on the union in these circumstances:

[27] *Pikitup v SAMWU* (2016) 37 *ILJ* 1710 (LC).

> "The union as an organisation must bear primary responsibility for the failure to prevent its officials from acting contrary to paragraph 2.6 of the interim order and any penalty should also be designed to deter a repetition of such conduct in what has been a long and drawn out conflict between Pikitup, the SAMWU members it employs and SAMWU itself. Mathe's omission to correct the flagrant breach of the order by Mohale is also deserving of severe censure. In determining an appropriate penalty, I am also mindful of the scale of the disruption caused by the unprotected strike action in which SAMWU claimed 4000 members were involved. However, the period in respect of which the findings of contempt were made ended on 3 December 2015 which has inclined me to impose much lower fines than would probably have been the case if the period of continued disruption after the confirmation of order was also under consideration."

[71] In this case, I further take into account that the strike was protected; and that, apart from the incidents outlined above, it was peaceful and disciplined. That is why I consider not only a relatively light fine, but a suspended one, to be appropriate. As Rycroft[28] commented, citing the interpretation of ILO Convention 87 by the committee of experts:

> "The principles of freedom of association do not shelter criminal acts committed during strikes. However, penal sanctions should be imposed only for the violation of strike prohibitions which are themselves in conformity with the requirements of freedom of association. All penalties in respect of illegal actions linked to strikes should be proportionate to the offence…"

[72] With regard to individual members, the Winery has only been able to identify certain individuals who breached the court order, such as singing the song, "Dubula Reinette". It is unfortunate that others who may have committed more serious acts – specifically by forcibly removing scabs from taxis and other transport – will get off scot free. Yet it will serve little purpose to sentence those who have been identified to direct imprisonment; nor is it justified in this case. Although the members of the strike committee who sang the song constituting hate speech aimed at the HR manager were unwilling to accept that they had done anything wrong,

[28] Alan Rycroft, "Being held in contempt for non-compliance with a court interdict: *In2Food v FAWU* (2013) 34 *ILJ* 2499.

they ceased after hearing management's view and after the fact that they were breaching the court order and the picketing rules had been explained to them. A punitive order will not, in my view, serve any purpose: the purpose of compliance has already been served.

[73] The members of the strike committee and the union leadership have an important and ongoing role to play in the negotiations between the parties that are continuing. And in the case where members of the strike committee actively participated in the breach of the court order by singing the song aimed at the HR manager, they corrected their behaviour – albeit reluctantly – once the Winery had brought it to their attention. I do not consider any prison sentence, direct or suspended, against any of the individuals to be appropriate.

Costs

[74] With regard to costs, I take into account that there is an ongoing relationship between the parties. CSAAWU is the recognised bargaining agent at the Winery. The striking workers are still employed by the Winery. More importantly, the strike is ongoing. So are the wage negotiations and the conciliation process under the auspices of the CCMA in terms of s 150 of the LRA. These fragile relationships may be undermined by an adverse costs order at this stage, especially in the light of my findings that the breaches of the court order were not serious enough to warrant a harsher penalty.

Order

[75] I therefore make the following order:

75.1 It is declared that the first respondent, CSAAWU, is in contempt of court.

75.2 The six respondents named in paragraphs 11 and 63 are declared to be in contempt of court to the extent discussed.

75.3 The first respondent, CSAAWU, is ordered to pay a fine of R50 000, 00 (fifty thousand Rand), which is suspended for a period of 12

months from the date of this order on condition the Union is not found guilty of contempt of any order of this Court during that time.

75.4 No penalty is imposed on the individual respondents.

75.5 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Robert Stelzner SC
Instructed by:	Basson Blackburn Inc.
RESPONDENTS:	Suzanna Harvey
Instructed by:	MacGregor Erasmus.