Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J1917/16

In the matter between:

SWISSPORT SOUTH AFRICA (PTY) LTD	**Applicant**
and	
MPHAHLELE, EPRHRAIM	**First Respondent**
RAPHETHA, MASHUDU	**Second Respondent**
SOLOMON, ELEANOR	**Third Respondent**
MOTSUGI, KARABO	**Fourth Respondent**
NTE, CRAIG	**Fifth Respondent**
MOKHINE, RONNIE	**Sixth Respondent**
MANAMELA, CHRISTOPHER	**Seventh Respondent**
OLIFANT, FEZILE	**Eighth Respondent**
THOSE INDIVIDUALS LISTED IN ANNEXURE "A"TO THE NOTICE OF	**Ninth to further**

MOTION **Respondents**

Heard: 10 February 2017

Delivered: 19 December 2017

Summary: (Contempt – service on members of union of order through union – implied duty on union to convey it to members – nonetheless, mala fides not established)

JUDGMENT

LAGRANGE J

Background

[1] The applicant ('Swissport') applied for an order of contempt against the individual respondents, the first seven of whom are national office bearers of the National Transport Movement ('NTM') a union, and the ninth respondent is the Provincial Chairperson of NTM Western Cape. The applicant withdrew the application against the third respondent when it transpired that she was on sick leave at the relevant time.

[2] On 30 August 2016, an order was handed down in which NTM and individual employees were interdicted from participating in unprotected strike action due to commence on 31 August 2016 or "engaging in any conduct in contemplation" of the same. NTM was further prohibited from calling a strike on any issues agreed upon in respect of various settlement and wage agreements. They were also directed to comply with sections 24(2) to (5) inclusive of the Labour Relations Act, 66 of 1995 ('the LRA') and ordered *inter alia* not to interfere with the smooth flow of Swissport's business , or to obstruct access to and exit from Swissport's property.

[3] The order further stated that service of the interim order was to be effected on the individual employees by transmitting a copy of the order by fax to NTM. It is not disputed this was done. On 1 September 2016 in a letter to first respondent, the general secretary (' Mphahlele'), the applicant raised the fact that certain members of NTM were ignoring the interdict and it

called upon NTM to urgently call upon employees to cease participation in the unprotected strike, failing which they would face contempt proceedings and, or alternatively, disciplinary action. That letter did not specifically refer to NTM members in Cape Town, but clearly would apply to any NTM members who were acting in breach of the order.

[4] Mphahlele's initial response was that NTM was not aware of any strike action in Cape Town. At 23h16 pm on 1 September he reverted saying:

> "Ok. We have communicated to our Provincial Office Bearers in the Western Cape to assist in making necessary intervention and accordingly advise the employees concerned of the legal requirements pertaining to the protected strike action."

Mr P Kohl, the CEO of Swissport ('Kohl') immediately queried this saying;

> "What "protected strike action" are you talking about? That is the very problem… people think they are participating in a protected strike and you are suggesting the same thing in your email below. I think we have a problem here…."

Mphahlele's response was that members in Durban, East London, Port Elizabeth and Johannesburg had been advised not to strike, but "(w)e did not communicate the same message to Cape Town as we did not have members in Cape Town to our knowledge."

[5] In response, Kohl pointed out that this was a baseless assertion because Mphahlele himself had been submitting membership forms to Swissport since November 2015. There is no dispute that Mphahlele had submitted membership forms for Durban and Cape Town members under cover of a letter signed by himself.

[6] The applicant alleges that on 1 and 2 September 2016, 28 NTM members at Cape Town (the individuals listed in Annexure "A") were striking in breach of the court order and that NTM was in breach of the order because it had failed or refused to notify NTM members in Cape Town of the order, whilst notifying members in other cities. As such NTM was clearly in breach of the order and in contempt of court. This was set out in a letter from Swissport's attorneys dated 6 September 2016 warning that if NTM did not notify its members in Cape Town of the order and if they did

not stop their unprotected action, an urgent contempt application would be launched.

[7] In his answering affidavit, Mphahlele claims that he and one Mzuvukile Tofile did intervene and persuaded striking workers to return to work on 2 September 2016.

[8] The vast majority of the ninth to further respondents were dismissed for their participation in the unprotected strike. The answering affidavits of the other respondents, were simply plain denials that they had disobeyed the order of the court *because* they did not contact anyone in Cape Town or incite or urge anyone to participate in the unprotected strike. The view expressed in those affidavits essentially was that, they were not in breach of the order as they had taken no steps to contravene the literal meaning of the order. At the hearing of the application, Mphahlele argued a different defence which was not actually in accordance with the affidavits.

[9] The applicant argued that the office bearers of NTM had a positive duty to inform NTM members at the workplace in Cape Town of the court order and in breaching this duty they were in contempt of the order.

Legal Principles

[10] The central requirements of civil contempt were succinctly stated by the SCA in ***Fakie NO v CCII Systems (Pty) Ltd***:

> '*(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.
>
> *€* In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
>
> *(d)* But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to

wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) a declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'[1]

Evaluation

[11] There is no doubt that Mphahlele was fully aware of what the applicant was calling on NTM to do once NTM members in Cape Town went on strike. It was highly disingenuous and duplicitous of him to claim to have no knowledge of such members as an excuse for not contacting them. There is nothing on the papers to show when the other office bearers became aware of the court order. In any event, the crisp issue is whether the applicant can impute contemptuous conduct to the officials because they did not take active steps to inform the Cape Town members of the order.

[12] Unlike many orders interdicting strikes, the order only made provision for service on the strikers through the union. Even then, although for the purposes of service of the order, it might be sufficient simply to serve on the union, when it comes to contempt care must be taken not to equate proof of service with the imposition of specific duties on office bearers and that failing compliance with such unspecified duties they would lay themselves open to contempt of the court order. To meet this difficulty, strike interdict orders often contain very express instructions about what union office bearers or, at the very least, the union is required to do. This usually takes the form of an order compelling the union to convey the order to members and sometimes identifies specific officials who must do this. Further, the order may actually require the union to actively encourage members to desist from strike action by way of addressing

[1] **2006 (4) SA 326 (SCA)** at 344-5

members or issuing a notice on a union letterhead. Such orders are often accompanied by time frames for compliance.

[13] In this instance, at best for the applicant, it was implicit in the order that the union was expected to convey it to members. In the absence of identifying other officials responsible for giving effect to that order, that responsibility would fall at the very least on the most senior executive officials of the union, being the General Secretary and National Office Bearers of NTM. That is not to say that they personally had to undertake the task of notifying strikers of the order, but they had to ensure that the necessary steps were taken by the union so that the notification took place. In respect of those individuals, it is clear that they breached their implicit obligation to ensure that the order was conveyed within a reasonable time. It was insufficient in the context of an urgent order for Mphahlele to only do so on 2 September 2016, two days after the order was issued.

[14] In so far as the regional office bearers are concerned, in the absence of an order directing them specifically to take steps, I am loathe to impute such a duty to them. The ninth to further respondents were not before court as there was no personal service of the contempt application on them. In any event, even if they had been served with the application, the applicant did not try to demonstrate that they must have had knowledge of the order before Mphahlele conveyed it to them on 2 September, which is when they ended their action. Consequently, they could not have been held to be in breach of the order in the absence of it being shown that they continued with their action thereafter.

[15] Having established that the national office bearers were in breach of the order, the question then arises if their non-compliance was *mala fide* and wilful. On the admittedly sparse evidence, it seems to have been the belief of the deponents to the answering affidavits that provided they did not actively promote the strike they could not be held in contempt of the order, because it did not, on the face of it require them to do anything positive. The fact that they had a duty to convey the order does not mean that they actually appreciated the existence of this positive obligation on them. They

believed as long as they did not engage in conduct which promoted the strike they could not be accused of being in breach of the order.

[16] Mphahlele was made aware of applicant's expectation regarding what the union was required to do, and accepted that the union had a responsibility to convey the order, as reflected in his disingenuous explanation that the union had no members in Cape Town and therefore there was nobody to notify there. Nonetheless, in the answering affidavit he deposed to, purportedly on his own behalf and of all the other respondents, he also challenged the applicant to prove which paragraph of the order the respondents had contravened. Elsewhere he also confidently asserted the defence that they had nothing to incite the workers in Cape Town to continue with an unprotected strike. I am sceptical of this rationale for the inactivity of the office bearer's but I cannot confidently say beyond a reasonable doubt that they could not genuinely have believed this was a legitimate way of not breaching the order and that it was only positive encouragement of the strike which would have placed them in breach of it. It may have been expedient, but I am not satisfied that it can be said to have been established beyond a reasonable doubt that their non-compliance with the obligation to notify workers was *mala fide* in the sense that they believed the court order itself compelled them to do so.

[17] Another defence, which it is not necessary to consider, but I will mention, is that, the applicant had not established that the strike embarked on by workers in Cape Town was the same strike, and the union had suspended the interdicted strike itself so the strike in Cape Town could not be the same one and was not subject to the interdict. This also seems to be a disingenuous argument because he never so much as hinted in his correspondence with the applicant that it was not strike action contrary to the interdict.

[18] In light of the above, I am compelled to acquit the respondents of contempt, even though the answer would probably have been different if I had been deciding it as a matter of probability.

Order

[1] The contempt application is dismissed.

[2] The respondents are acquitted of being in contempt of the order of this court handed down under the same case number on 30 August 2016.

[3] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	O Molatudi of Hogan Lovells Inc.
RESPONDENT:	E Mphahlele of NTM