

SOUTH AFRICA / JUDGMENT

**Spar Eastern Cape Distribution Centre v Transport,
Retail and General Workers Union (THOR) and
Others (P30/21) [2021] ZALCPE 12; [2021] 12 BLLR
1264 (LC); (2022) 43 ILJ 1689 (LC) (22 September 2021)
[2021] ZALCPE 12**

COURT

Labour Court Port Elizabeth

BEFORE

Rawjee

CASE / FILE NUMBER

P30/21

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**IN THE LABOUR COURT OF
SOUTH AFRICA, PORT ELIZABETH**

Not

Reportable CASE NO: P 30/21

In

the matter between:

SPAR
EASTERN CAPE DISTRIBUTION
CENTRE Applicant
and
TRANSPORT, RETAIL AND
GENERAL WORKERS
UNION
("THOR") First
Respondent
THE
INDIVIDUALS WHOSE NAMES ARE
ANNEXED
HERETO ON THE ANNEXURE
MARKED
"A" Second
and Further Respondents
Date
Heard: 17 June 2021

Delivered: This judgment was handed down electronically by circulation to the applicant's and the respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to be 22 September 2021.

JUDGMENT

RAWJEE AJ:

- [1] This is a contempt of court application brought by the applicant against the first and second to further respondents. Save for Mr Mteteleli Kala and Ms Nomawethu Monti, listed as the eighth and twenty-seventh respondents respectively, who were not present at the unlawful protest action, the first and second to further respondents are jointly referred to as the respondents below.
- [2] This contempt application stems from a court order issuing a rule nisi, an interim interdict and a mandamus by Lallie J on 19 March 2021. The return day for the rule nisi was 22 April 2021. The respondents were interdicted from: blocking or otherwise impeding access to and egress from the applicant's premises for the duration of the strike unlawful strike action; interfering with the passage of vehicles en route to and from the applicant's premises; harassing, intimidating, threatening or assaulting the applicant's non striking employees; preventing free use of the entrances to the applicant's premises by vehicular or pedestrian traffic; and causing damage to the applicant's property. The respondents were furthermore directed to comply with the picketing rules established by the CCMA and the regulations issued under the State of Disaster Management Act, 57 of 2002, in force; and the first respondent was directed to take all reasonable steps necessary to ensure the second to further respondents comply with the interim interdicts and the picketing rules.
- [3] In the early hours of the morning of 29 March 2021, one of the applicant's trucks was stoned by unidentified people; the strikers gathered at the corner of Main Road and Kohler Road (Kohler Road being the only road leading to the applicant's premises); Main Road was barricaded with burning tyres and motor vehicles were parked across the applicant's entrance gate blocking access to the applicant's premises. A large group of strikers were present from about six o' clock that morning. The South African Police Services ("SAPS") were called and members from the Public Order Policing unit ("POPS") were sent to the scene. The group was warned by POPS to move away so that access to the road leading to the applicant's premises was not blocked and they requested the owners of the vehicles blocking the entrance to the applicant's premises to remove the vehicles. The POPS members furthermore extinguished and removed the burning tyres. The strikers moved away but retaliated by throwing stones at the POPS members until they were scattered by force.

- [4] The applicant alleging that the respondents failed to comply with the court order of Lallie J on 19 March 2021 launched this contempt application on 30 March 2021. On 31 March Cele J issued an order calling upon the respondents to show cause on or before 6 April 2021 why this court should not find them guilty of contempt of court and sentence the first respondent to a fine of R10 000,00 and the second to further respondents to prison for 3 months.
- [5] On 8 April 2021, the contempt of court application which served before Van Niekerk J was postponed to the return day in the main application to allow the first respondent to file opposing papers and to secure the attendance at court of the second to further respondents.
- [6] On the return day the first respondent withdrew its opposition to the confirmation of the rule. Mr Ngcamu, acting for the first respondent only at this stage, submitted that such opposition would in the circumstances of this case be without merit. I agree with this submission. The rule was confirmed with no order as to costs against the first respondent. The issue of costs in respect of the second to further respondents were reserved to be determined together with the contempt application. The second to further respondents were not present at court despite Van Niekerk J's order that the sheriff apprehend and detain them to secure their attendance at court. Mr Grogan, representing the applicant, submitted that the sheriff had approached the applicant's attorneys advising them of the difficulties he had in securing the second to further respondents' attendance at court. Fortunately, in this instance the applicant did not seek redress against the sheriff. Instead, Mr Grogan graciously made out the sheriff's case as to the difficulties the sheriff experienced in trying to implement the order and sought a variation

of Van Niekerk J's order. In fairness to the second to further respondents who are employees of the applicant, Mr Grogan submitted that it is in the interests of justice that the applicant varies the order of Van Niekerk J to direct the second to further respondents to file opposing or explanatory affidavits and to be present at court at the next hearing as the Sheriff is unable to comply with the order. The parties by agreement requested a postponement of the matter to bring the variation application.

- [7] The applicant duly brought a variation application before this Court. On 30 April 2019 an order by agreement was granted to vary the order of Van Niekerk J whereby the second to further respondents were ordered to file explanatory affidavits showing cause why they should not be found to be in contempt of court of Lallie J's order. Mr Ngcamu submitted that he was now also briefed to act on behalf of the second to further respondents.
- [8] The parties agreed that argument proceed in respect of the first respondent only and that Mr Ngcamu and his instructing attorney would assist the second to further respondents in filing the explanatory affidavits. The court acquiesced to the parties further request that the determination of the contempt application in respect of the second to further respondents be postponed to a future date – after the respondents' explanatory affidavits had been replied to by the applicant. Before dealing with the first respondent's opposition in the contempt application, I digress to commend Mr Grogan and Mr Ngcamu for the collegial

and professional manner in which this difficult matter (for both parties) was dealt with by them.

- [9] The first respondent in its opposition to the contempt application referred to the affidavit of its Secretary General stating that he was in Durban on 29 March 2021. He did however make enquiries about the alleged unlawful behaviour of the second to further respondents using WhatsApp. The Secretary General's communication to the members on a WhatsApp group requested them to abstain from unlawful conduct and to comply with the court order. The first respondent relied on this action of the Secretary General to distance itself from the contemptuous actions of its members. The first respondent also submitted that not all the strikers and marshals present at the strike were members of the first respondent. This lack of control and oversight of the strike speaks to an abdication by the first respondent of its responsibilities as a trade union during a strike organised by it. The first respondent's members' failure to heed the message from the Secretary General is included into the melting pot of a loss of control by the first respondent of its strike, its leaders of the strike and its members participating in the strike. The convenor of the protest, as detailed below, allowed the protest action to continue in contempt of the court order.
- [10] The first respondent attempts to distance itself from the actions of its striking members including the convenor. As a trade union it simply cannot do this. Trade unions have a rich history as the voice of the working class in our country and played an important role in the democratisation of South Africa. The role played by trade unions pre-1994 laid a strong foundation for our current labour dispensation which has fairness and equality at its core. An important bargaining tool, which was hard fought for, is the right to strike and – now a statutorily protected right. While this right is now statutorily protected, trade unions still have an important role to play as the collective voice of employees. It is therefore the responsibility of trade unions to act within the law and respect the rule of law when exercising the right to strike. Each time unlawful activities are allowed to be carried out during strike actions organised by trade unions, the value of this right is corroded and the Labour Court, the LRA and Constitution are undermined. To protect the right to strike; the sanctity of the Labour Court; and to ensure compliance with the rule of law, such unlawful actions must meet the censure of the law. Having understood the role of the first respondent as the organising trade union of the strike, this court formed the view that before finally deciding as to whether the first respondent could be held in contempt of court, it was necessary to have the facts relating to the actions of the second to further respondents, as members of the first respondent on 29 March 2021 before it. Judgment was therefore reserved until the second to further respondents filed explanatory affidavits in respect of the contempt application which was heard on 17 June 2021.
- [11] The applicant, in addition to the evidence on affidavit showed a video recording of the actions of 29 March 2021 from the applicant's security cameras. The video footage confirmed the presence of the strikers on the scene outside the picketing areas and outside the picketing times engaging in protest action including singing (which would have been lawful

if carried out within the ambit of the court order); the burning of tyres across the road at the corner of Main Road and Kohler Road - the only road leading to the road on which the applicant's business is situated; the blocking off of Kohler Road by the protestors at the corner of Kohler Road and Main Road, the vehicles queuing at the corner of Main Road and Kohler Road, where the applicant's business is situated; vehicles belonging to the twelfth respondent, Mr Tabo Buqwana, the sixteenth respondent,

Mr Rusche Bottomley, the twenty second respondent, Mr Wellem Thembelani and the thirty sixth respondent, Mr Nigel Swartz, blocking

the entrance gate to the applicant's premises; some of the strikers not wearing face masks in contravention of the COVID 19 regulations; the strikers picking up stones; POPS engaging the strikers who continue to pick up stones and throw the stones in the direction of the POPS members.

[12] A confirmatory affidavit of Warrant Officer Johannes Lootie Du Preez, a member of the South African Police Services on duty at the premises on the morning of 29 March 2021 confirmed that the POPS members tried to clear the protestors off the road which they were blocking; that the four respondents blocked the entrance gate with their motor vehicles and initially refused to move same until the POPS members issued a warning to move them within five minutes failing which the motor vehicles would be forcibly removed; and that the strikers were picking up stones when the first truck made an effort to leave the premises and that the POPS members engaged the strikers at this time. The second to further respondents were identified conducting the abovementioned unlawful activities by Mr Mandisa Mbikwana, the applicant's HR Director (the deponent to the main affidavit and replying affidavit) and Mr Armeen Pearce, the security officer in charge of the CCTV control room. Mr Pearce filed a confirmatory affidavit confirming that he assisted in identifying the respondents on the video footage.

[13] The second to further respondents filed 38 explanatory affidavits. It was common cause that Mr Mteteleli Kala and Ms Nomawethu Monti who were listed as the eighth and twenty-seventh respondents respectively were not present at the protest action. It follows that they cannot be found guilty of contempt of Lallie J's court order. Mr Xolile Betela, the thirty first respondent did not file an explanatory affidavit. The applicant's averment that he was a part of the contemptuous strike action is uncontested and accepted as correct. I detail the remaining affidavits filed on behalf of the respondents starting with that of Mr Xolani Berito Juku ("Mr Juku"), the convenor of the strike whose evidence is relevant and material. Mr Juku's evidence is limited to a general and broad statement that as the convenor he did what was in his power to restrain the members from being in contempt of Lallie J's court order. There is no evidence on paper or on video which speaks to this bald averment by Mr Juku or particularises the steps he took to ensure compliance. Furthermore, Mr Juku's averment that "he asked members what was happening and who was burning tyres" not only places the first respondent's members and leaders of the strike at the scene but evidences the loss of control of the strike by the first respondent and its leaders of the strike. Mr Juku also fails to

detail what steps he took as a convenor to stop the contemptuous behaviour in particular the burning of tyres and blocking of entrances to the applicant's premises. It is this inaction by Mr Juku as the convenor of the strike action and the representative of the first respondent which speaks to the first respondent not having any control over its members thereby allowing them to act in contempt of Lallie J's court order.

- [14] Mr Rusche Bottomley (the sixteenth respondent) provided a more detailed explanatory affidavit. Mr Bottomley stated that they had a meeting with the ANC Youth League on 28 March 2021 to assist them with the strike. The strike action was to compel the applicant to share the profits with the second to further respondents which the applicant made during lockdown level
5. The ANC Youth League pledged their solidarity with the respondents at the meeting. Mr Bottomley makes no mention of Lallie J's court order and the picketing rules being discussed at the meeting. Mr Bottomley and Mr Tabo Buqwana (the twelfth respondent) further admit to parking their motor vehicles in front of the applicant's entrance gate but deny that it was their intention to block the entrance gate. I can infer no other reason for parking the motor vehicles in front of the entrance gate other than to block the gate. Mr Buqwana further claims no knowledge of the picketing rules which make this action unlawful which further speaks to the first respondent being in contempt of Lallie J's court order as at least one of its members, Mr Buqwana, claims to have no knowledge of the picketing rules.
- [15] In addition to Mr Bottomley and Mr Buqwana confirming their presence during the strike action, Ms Megan Warne Marks (the second respondent and an appointed marshal), Mr Dillon Classen (the third respondent), Mr Charlton Daniels (the fourth respondent), Mr Sibusiso Diamond (the fifth respondent), Ms Busisiwe Tonono (the sixth respondent), Ms Qhamisa Jack (the seventh respondent), Mr Aphelele Somdaka (the ninth respondent), Mr Daniel Fredericks (the tenth respondent), Mr Geoffrey Snyman (the eleventh respondent), Mr Mzwandile Marks (the thirteenth respondent), Mr Masixole Mehlala (the fourteenth respondent), Mr Siyanda Makana (the fifteenth respondent), Mr Ashton van Rooyen (the seventeenth respondent), Mr Enrico Williams (the eighteenth respondent), Mr Henry Gaseba (the nineteenth respondent), Mr Siphosethu Boltina (the twentieth respondent), Mr Sherwyn Morne Saaiman (the twenty first respondent), Mr Thembelani Wellem (the twenty second respondent and an appointed marshal), Mr Xabiso Mpati (the twenty third respondent), Mr Lungelo Mtati (the twenty fourth respondent and an appointed marshal), Mr Tiziyano Arnolds (the twenty fifth respondent), Mr Ayanda Ntoyando (the twenty sixth respondent), Mr Athenkosi Godlo (the twenty eight respondent), Mr Mwezi Ndingiswayo (the twenty ninth respondent), Mr Masixole Tshabalele (the thirtieth respondent), Mr Lubabalo Jacobs (the thirty second respondent), Mr Siphesande Msesiwe (the thirty third respondent), Mr Sinethemba Ponono (the thirty fourth respondent), Mr Lubabalo Kanana (the thirty fifth respondent), Mr Nigel Swart (the thirty sixth respondent), Mr Mhlanganisi Nam (the thirty seventh respondent), and Mr Khanyisa Sodladla (the thirty eight respondent) all admit to

being present during the unlawful strike and to joining the ANC Youth League in protesting outside of the picketing areas and/or picketing times. They deny burning tyres. Their admission to being present while tyres were being burnt makes them complicit in the actions of the ANC Youth League whose support they had requested. (See *National Union of Metalworkers of SA obo Ngazeni & Others v Dunlop Mixing & Technical Services & Others (Casual Workers Advice Office as amicus curiae)* (2019) 40 ILJ 1957 (CC) at para 46). The actions of Ms Warne Marks, Mr Wellem and Mr Mtati who were appointed as marshals to ensure compliance with Lallie J's court order but who instead took part in the contemptuous, unlawful actions is further evidence of the first respondent's loss of control of its strike and of being in contempt of the court order.

- [16] Furthermore, Mr Siphesande Msesiwe (the thirty third respondent) Mr Henry Gaseba (the nineteenth respondent), Mr Siyanda Makana (the fifteenth respondent) and Ms Busisiwe Tonono (the sixth respondent) confirmed that there was a voice note circulating on 28 March 2021 that the ANC Youth League would join the respondents in the strike action. Ms Busisiwe Tonono went further to state that the voice note further included a statement that the ANC Youth League was going to shut down the Spar DC on 29 March 2021. The respondents therefore had knowledge of this planned, unlawful act and willingly were present during the contemptuous, unlawful actions.
- [17] The applicant has placed evidence before the court confirming that some of the strikers were identified as employees of the applicant and members of the first respondent and have committed the unlawful and contemptuous acts during the protected strike. The respondents have failed to gainsay the contemptuous actions. The respondents all joined the protestors in contravention of the court order of Lallie J. In particular, the respondents were in contempt of the mandatory order to follow the picketing rules. This was not adhered to at all.
- [18] Khampepe ADCJ, in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (9) BCLR 992 (CC) (29 June 2021) encapsulated why court orders must be complied with as follows:
- "It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function."*
- [19] That its citizens abide by court orders is central to a functioning democracy and to the rule of law.

- [20] The applicant relies on the test set out by the Supreme Court of Appeal in *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 22, which is that once it is proven that an order exists and was served on a litigant who did not comply therewith, contempt will have been established beyond reasonable doubt unless the respondent establishes a reasonable doubt relating to wilfulness and mala fides.
- [21] The applicant in this matter has proven the existence of the court order and that it was served on the respondents. The evidence before this court, including the video evidence and the affidavits of the respondents establish non-compliance with the court order. The members of the first respondent first requested the help of the ANC Youth League in their strike and then joined the ANC Youth League and other community members during the strike who were inter alia, burning tyres and singing along outside of the picketing area and the picketing times in contravention of the Court Order. Furthermore, the regulations declared under the National State of Disaster Act were not adhered to by all the respondents all of the time.
- [22] The next question for this court to answer is whether the respondents establish reasonable doubt relating to wilfulness and mala fides. The actions of the second to further respondents (excluding the eighth and twenty-seventh respondents) confirms the element of wilfulness and mala fides on their part in that they willingly requested the assistance of the ANC Youth League to further their strike action, failed to advise the ANC Youth League of the existence of the Court Order, failed to provide the ANC Youth League with a copy of the Court Order and Picketing Rules at the meeting on 28 March 2021; did nothing to stop the unlawful actions of the ANC Youth League and community members but instead willingly joined in the contemptuous and unlawful actions on the morning of 29 March 2021; and the marshals appointed to ensure compliance with the Court Order also participated in the contemptuous, unlawful actions. The first respondent, as a trade union, cannot abdicate its duties and responsibilities towards its members and this court. It had a duty to ensure compliance with the Lallie J's court order but instead the convenor and marshals, as representatives of the first respondent, all acted contemptuously.
- [23] In *Pheko v Ekurhuleni City* (2015) (5) SA 600 (CC) at para 28 it was held that— “[t]he object of contempt proceedings is to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.”
- [24] From the confirmation of the rule nisi, I infer that there is a need to compel the respondents’ compliance with the confirmed rule and a coercive sanction will therefore be appropriate in respect of the second to further respondents (excluding the eighth and twenty seventh respondents). In vindicating the honour of this court and to compel compliance with the confirmed rule, the first respondent is sanctioned to pay a fine in the amount of R10 000,00 for contempt of court of Lallie J’s order and the second to seventh respondents, the ninth to twenty-sixth respondents and twenty eighth to thirty eighth

respondents be sanctioned to sentences of three months' imprisonment each, suspended for one year on condition that they are not again found guilty of contempt of court during the period of suspension.

[25] The second to further respondents did not deal with confirmation of the rule and the issue of costs of the urgent application and the applicant did not persist in seeking same at the hearing of this application. I therefore make no order as to costs in this respect. The applicant has sought costs on a punitive scale in the contempt proceedings. Had it not been for the first respondent's abdication of its responsibilities in ensuring compliance of the court order by its members this application would be unnecessary. The applicant has had to come to court and incur the costs of litigation only because of the contemptuous behaviour of the respondents. The respondents have as a result of contemptuous behaviour added this application to an already clogged up roll. It is in the interests of justice and fairness that a punitive cost order be awarded against the respondents. As the first respondent is the trade union and was therefore ultimately responsible for ensuring compliance with Lallie J's court order it must be held responsible for the costs of this application.

[26] I accordingly make the following order:

26.1. The eighth respondent, Mr Mteteleli Kala and the twenty-seventh respondent, Ms Nomawethu Monti are found to not be in contempt of court.

26.2. The first respondent is to pay a fine in the amount of R10 000,00 to the Registrar of this Honourable Court within 30 days of this Court Order.

26.3. The second to seventh respondents, ninth to twenty sixth respondents and twenty eighth to thirty eighth respondents are sanctioned to a period of imprisonment of three months suspended for one year on condition that they are not found guilty of contempt of court again during the period of suspension.

26.4. The first respondent is to pay the costs of this application on an attorney client scale.

A RAWJEE

ACTING JUDGE OF THE LABOUR COURT

Appearances:

For Applicant: Adv

Grogan,

Instructed by: Joubert

Galpin and Searle, Port Elizabeth

For Respondent: Adv Ngcamu

Instructed by: Jafta

Incorporated, Umhlanga Ridge

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Prepared on 12 October 2026 · Esheria