**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**Reportable**

**CASE NO J 158/14**

**ANGLO AMERICAN PLATINUM LTD** **1ST APPLICANT**

**RUSTENBURG PLATINUM MINES LTD** **2ND APPLICANT**

and

**ASSOCIATION OF MINEWORKERS**

**AND CONSTRUCTION UNION** **1ST RESPONDENT**

**JOSEPH MATHUNJWA** **2ND RESPONDENT**

**JIMMY GAMA** **3RD RESPONDENT**

**INDIVIDUALS LISTED IN ANNEXURE TO**

**THE NOTICE OF MOTION** **FURTHER RESPONDENTS**

**Application heard: 5 March 2014**

**Judgment delivered: 6 March 2014**

**JUDGMENT**

**VAN NIEKERK J**

Introduction

[1] This case has its origins in a strike called by the first respondent (the union) on 23 January 2014 on the applicants' mines, a strike that remains ongoing. On 24 January 2014, this court (per Cele J) granted an order in the form of a rule *nisi*, coupled with an interim interdict. The interpretation to be given to that order is central to the present application in which the applicants seek to have the respondents held in contempt of court for their failure to comply with the order and sanctioned appropriately.

[2] The application first came before the court on 21 February 2014. At that stage, the union and the individual respondents had not filed an answering affidavit. It was agreed that in respect of the first, second and third respondents (the union, its president and general secretary respectively), the parties would file affidavits and that the matter would be argued on 5 March 2014. In respect of the remaining respondents, it was agreed that answering and replying affidavits would be filed at a later stage. These proceedings (and this judgment) are accordingly limited to the allegations of contempt made against the first, second and third respondents.

The order

[3] The order that is the subject of these proceedings was granted after the applicants filed an urgent application. The union's attorneys were advised on the morning of the 24th that an application would be set down in the same afternoon. The union and the other respondents did not oppose the application, but it is fair to say that the order was not granted by consent. In a letter addressed by the second respondent to the applicants' attorneys on 24 January, the second

respondent provided the assurance that the union did not condone violence by any of its members and that "*We agree to an order that gives effect to prevent violence*". The order that was ultimately granted reflects a draft prepared by the applicants. It reads as follows:

> "Having read the documents and having considered the matter:
>
> IT IS ORDERED THAT:
>
> 1. The provisions of the Rules of this Court relating to times and manner of service referred to therein are dispensed with and the matter is dealt with as one of urgency in terms of Rule 8 of this Court's Rules.
>
> 2. The short notice of the application in terms of Section 68(2) of the Labour Relations Act is condoned.
>
> 3. A *Rule Nisi* is issued calling upon the Respondents herein to appear and show cause on **14 March 2014 at 10:00** as to why a final Order should not be granted in the following terms:
>
> 3.1. **DIRECTING** that the Second to Further Respondents are interdicted and restrained from instigating, inciting or engaging in:
>
> 3.1.1. any unlawful conduct interfering with or aimed at interfering with the business of the Applicants;
>
> 3.1.2. any unlawful conduct intimidating and/or preventing any of the Applicants' employees, especially the employees involved in essential services, minimum services, maintenance services and other services critical to the Applicants' health and safety obligations, the general upkeep and operation of the mine from tendering their services to the Applicants;
>
> 3.1.3. any unlawful conduct which damages the property of the Applicants; and
>
> 3.2. **DIRECTING** that the First Respondent is interdicted and restrained from instigating, inciting or engaging the Second to Further Respondents in engaging, inciting or instigating:
>
> 3.2.1. any unlawful conduct interfering with or aimed at interfering with the business of the Applicants;
>
> 3.2.2. any unlawful conduct intimidating and/or preventing any of the Applicants' employees, especially the employees involved in essential services, minimum services, maintenance services and other services critical to the

Applicants' health and safety obligations, the general upkeep and operation of the mine from tendering their services to the Applicants;

3.2.3. any unlawful conduct which damages the property of the Applicants; and

4. **ORDERING** that the provisions of paragraphs 3.1 to 3.2.3 shall operate with immediate effect as an interim order pending the finalisation of this application.

5. **ORDERING** the First Respondent to communicate, on an urgent basis, to its members the picketing rules attached to the Notice of Motion as an annexure marked "A".

6. **ORDERING** the First Respondent to ensure compliance by its members with the picketing rules attached to the Notice of Motion as an annexure marked "A".

7. **ORDERING** the Second to Further Respondents to comply with the picketing rules attached hereto as an annexure marked "A".

8. **ORDERING** the South African Police Services to enforce this Order.

9. **ORDERING** the Respondents who oppose this application to be held jointly and severally liable to pay the costs of the application.

10. **DIRECTING** that the service of the *Rule Nisi* be effected as follows:

10.1. Upon the First Respondent by faxing it to the First Respondent's attorneys of record.

10.2. Upon the Second to Further Respondents per hand by displaying copies thereof on the notice boards at the Applicants' premises, which are usually used by the Applicants to communicate with its employees and by distributing copies of the order to as many of the First to Further Respondents as may request same.

10.3. Upon the Second to Further Respondents whose cellphone numbers are known to the Applicant by sms with the following wording: "*The Labour Court of South Africa has interdicted you from committing violent acts and from stopping any fellow employee to go to work. The Labourt* (sic) *Court has also ordered that you comply with the picketing rules which are available from AMCU and HR."*

BY THE COURT

REGISTRAR"

The relevant legal principles

[4] The principles applicable in an application such as the present are well-established. In *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt committal is a 'peculiar amalgam' since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see paragraph [8] of the judgment). The court summarised the position as follows:

> '[42] To sum up:
>
> (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.
> (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 of a balance of probabilities.'

Analysis

[5] It is not in dispute that the above order was granted on 24 January 2014, nor is it in dispute that the order was served on the first to third respondents. What is central to these proceedings is whether or not they have complied with the order, an issue that is dependent on a determination of what it is that the order required the respondents to do or not to do. The applicants' case is that the union and its office bearers, and in particular the second and third respondents, are in breach of the order because they failed to communicate the picketing rules to union members and ensure compliance by union members with those rules. Some 20 separate instances of non-compliance are recorded in the founding affidavit, amongst them instances where it is alleged that members of the union attended meetings armed with knobkerries and sticks, gathered in places other than designated picketing areas, carried dangerous weapons, intimidated those who wished to work and obstructed access to the applicants' mines. The applicants also aver that the second and third respondents have gone so far as to advise members not to comply with the picketing rules, since the union was not a party to their formulation. In the answering affidavit, the respondents note that they intend to respond to these averments in the later proceedings that concern the 4th to 39th respondents. For present purposes, the first to third respondents have been content to rely on broad statements to the effect that the union does not condone unlawful behaviour, that it has consistently advised its members that they ought to conduct themselves in a lawful, peaceful and orderly manner and that of those who do not will be disciplined. Whether or not any union member has been disciplined is not apparent from the papers.

[6] The primary issue to be determined in these proceedings is whether the order granted on 24 January 2014 required the first, second and third respondents to act in terms of paragraphs 5, 6 and 7 of the order, i.e. whether the union was obliged immediately to communicate the contents of the picketing rules to its members and to ensure that they complied with the rules, or whether the terms of

the order do no more than require the respondents to show cause on the return date why a final order should not be made to this effect.

[7] Adv. Cassim SC, who appeared for the respondents, submitted that properly construed, paragraphs 5, 6, 7 and 8 of the order have no immediate binding effect as an order of court. First, unlike the provisions of paragraphs 3.1 to 3.2.3 of the order, they are not made to operate as an interim order. In other words, paragraphs 5, 6, 7 and 8 are subject to the broader preamble to the order which contemplates no more than that the respondents appear on the return date (14 March 2014) to show cause why a final order should not be granted in those terms. On this interpretation, only the provisions of paragraphs 3.1 to 3.2.3 operate as an interim order with immediate effect, pending the finalisation of the main application. This much, it was submitted, is specifically recorded in paragraph 4 of the court order. Since the respondents have until 14 March 2014 to show good cause why paragraphs 5, 6, 7, 8 and 9 should not be made an order of court, the picketing rules are not the subject of any existing court order and to the extent that the crux of the applicant's case in the present application is a failure by the union and its office bearers to comply with the picketing rules or take steps to ensure compliance with them, there was no obligation on the respondents to do so. In the circumstances, they cannot be in contempt of any court order.

[8] Adv. Bruinders SC, who appeared for the applicants, urged me to adopt a different interpretation of the order. He submitted that while paragraphs 3.1 to 3.2.3 operate with immediate effect as an interim order, the balance of the order, and in particular paragraphs 5, 6 and 7, constitute final orders. The respondents were thus obliged immediately to comply with the provisions of those paragraphs.

[9] It seems to me, viewing the terms of the order in context, that a strong case can be made for the proposition that the respondents' obligations in relation to the picketing rules are not the subject of any interim interdict or final order and that at most, the order does no more than call on the respondents to show cause on 12 March 2014 why a final order should not be granted in the terms they

encapsulate. There are three indications that support this interpretation. The first is the nature of the order itself. A rule *nisi*, by definition, is an order directed at particular persons calling on them to appear in court on a certain date and show cause why the court should not grant a final order. The court may grant interim relief by ordering that the rule *nisi* or parts of it operate as a temporary interdict.

[10] In the present instance, the form of the order implies that but for that relief specifically designated as the subject of a temporary interdict, a final order will be granted if and only if on the return date, the court determines that the applicant has made out a case for final relief. Indeed, in the present instance, paragraph 4 indicates which part of the rule is to operate as a temporary interdict. As I have indicated, the temporary interdict is limited to paragraphs 3.1 to 3.2.3 of the order. Paragraph 9 of the order is also a strong indication that the provision of paragraphs 5, 6 and 7 were not intended to constitute final orders. Paragraph 9 seeks to make respondents who oppose the application liable for costs, jointly and severally. Given the circumstances in which the order was granted (effectively on an *ex parte* basis), the intention is clearly to alert the respondents that their opposition to the confirmation of the rule *nisi* stands, potentially at least, to attract a costs order. The significance of paragraph 9 is that it is a 'stand-alone' paragraph, like paragraphs 5, 6 and 7, separate from those parts of the order specifically recorded to be orders made with immediate effect. This suggests that all of these paragraphs are subject to the preamble that appears in paragraph 3, which calls on the respondents to show cause on 14 March 2014 why a final order should not be granted.

[11] In making these observations, I do not intend to interpret the order in any definitive manner; for present purposes, it is sufficient for me to find, which I do, that there is an element of ambiguity in the order. Once there is ambiguity and ambivalence in an order, it will generally not be open to a court to make a finding of wilful non-compliance and mala fides, especially where the respondents rely, as they do in the present instance, on an interpretation of an order that is not far-

fetched or unreasonable and where their conduct is not in conflict with their understanding of the terms of order so understood.

[12] For these reasons, in my view, the applicants have failed to establish that the first to third respondents have failed or refused to comply with the order granted on 24 January 2014. The application accordingly stands to be dismissed.

[13] In regard to costs, Adv. Cassim submitted that the application filed on 24 January 2014 and the present application were little more than a stratagem to undermine the ability of the union and its members to exercise the right to strike, and that an order for costs was therefore appropriate.

[14] It would be naïve to think that in the context of industrial action, parties do not resort to litigation as a means to an end. Applications to challenge the lawfulness of strikes and lock-outs and to declare the conduct and actions of managers and workers respectively to be unlawful are routine fare in the urgent court. The real purpose of many of these applications, no doubt, is to bring pressure to bear on the opposing party – this is evidenced by the large numbers of rules *nisi* that are granted, only to be discharged weeks later once the fray giving rise to the application is over. What the court ought to guard against is the abuse of its process. There is a fine line between seeking tactical advantage through litigation and abuse of process, but it is a line that parties ought to respect and which the court ought to maintain.

[15] Nothing in the papers before me to indicate that the present application falls into the category of abuse. The applicants were entitled, as they did, to protect and advance their interests by seeking an order that union members should not act unlawfully, and that there should be compliance with the picketing rules. Given the terms of the order that was granted, it is by no means an abuse of process to suggest, as the applicants have, that the respondents were in contempt of the order. Equally, the union has not hesitated in present circumstances to use the law to secure tactical advantage. In particular, the temporal coincidence in the filing of the answering affidavit and the lodging of an application to rescind the

picketing rules more than a month after they were issued, reeks of expediency. The union's case in relation to the picketing rules borders on the disingenuous – the second respondent, Mathunjwa, states in the answering affidavit that he has urged members to comply with the picketing rules. In the same breath, the unions seeks to make the case that the rules are invalid or should not be observed because they were established unilaterally.

[16] In any event, it is practice in this court not to grant orders for costs where the parties to the dispute are engaged in collective bargaining, and where a costs order runs the risk of prejudicing the relationship between them, especially where that relationship is fragile.

For the above reasons, I make the following order:

1. In respect of the first to third respondents, the application is dismissed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Adv. T Bruinders SC, instructed by ENS Attorneys

For the respondents: Adv. N Cassim SC, instructed by Larry Dave Attorneys.