IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J3725/18

In the matter between:

PLASTIC CONVERTORS ASSOCIATION OF SOUTH AFRICA (PCASA) OBO MEMBERS	**First Applicant**
DPI PLASTICS	**Second Applicant**
UBUNTU PLASTICS	**Third Applicant**
POLYOAK PLASTICS	**Fourth Applicant**
PLASTI PROFILE	**Fifth Applicant**
NYLOPAK	**Sixth Applicant**
BOWLER PLASTICS	**Seventh Applicant**

And

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA)	**First Respondent**
PARTICIPANTS IN PROTEST ACTION	**Second Respondent**
THE SOUTH AFRICAN POLICE SERVICES	**Third Respondent**

Date heard: 11 December 2019

Delivered: 13 March 2020

Summary: *Practice Manual - Clause 13 contempt procedure* – Not inconsistent with rule 7 of the Labour Court Rules. Clause 13 is designed to give effect to the rules of the Labour Court. In so doing it provides access to justice and promotes the statutory imperative of expeditious dispute resolution.

***Practice Manual - Clause 13 contempt procedure* – Not inconsistent with the normal approach adopted in contempt of court applications and the *audi alteram* principle not violated.**

***Practice Manual - Clause 13 contempt procedure* - A rule *nisi* on its own is not equivalent to, and does not automatically operate as, an interim order.**

***Practice Manual - Clause 13 contempt procedure* - Constitutionally compliant.**

JUDGMENT

CONRADIE, AJ

[1] This is an application by PCASA and certain of its members (jointly referred to as the applicants) to hold the first respondent (NUMSA) in contempt of court for failing to adhere to the terms of a strike interdict.

[2] The relief sought is the imposition of a fine of R1 000 000.00 (one million rand) on NUMSA. Initially, contempt proceedings were also instituted against NUMSA's General Secretary, Irvin Jim (Jim), and its Engineering Sector Co-ordinator, Vusumuzi Mabho (Mabho). However, they were incorrectly cited in their official capacities as opposed to in their personal capacities.[1] As a result, PCASA subsequently conceded that this was a material non-joinder and no longer seeks relief against Jim and Mabho.

[3] NUMSA opposes the contempt application and has in turn brought a counter- application challenging the contempt procedure contained in clause 13 of the Practice Manual of this Court.

Background Facts

[1] On the strength of the Constitutional Court's decision in *Matjhabeng Local Municipality v Eskom Holding Limited and others* 2017 (11) BCLR 1408 (CC).

[4] On 15 October 2018 NUMSA's members in the plastics sector went on strike in support of their demand for increased wages and improved working conditions.

[5] As a result of a number of violent attacks during the strike, the applicants approached this Court for an urgent interdict on 18 October 2018.

[6] By consent between the parties, a rule *nisi* was issued on 19 October 2018 by Moshoana J, pending a return date of 13 December 2018.

[7] In terms of the rule *nisi*, an interim order was granted (interim strike interdict) interdicting and restraining the respondents, their followers and supporters. The relevant portions of the interim strike interdict provides as follows –

3. A rule nisi, with return date Thursday, 13 December 2018 at 10h00 to be determined by this Honourable Court, is issued calling on the respondents to show cause why an order in the following terms should not be made final:

3.1 Interdicting and restraining the first and second respondents protestors, including their followers and supporters from directly or indirectly:

3.1.1 Participating in protest action within 150 meters from any entrance or exit of the second to sixth applicants' premises which are situated in the Roodekop Wadeville Industrial Park – but excluding the agreed picketing area as ordered by this Court in matter J3733/18 on 18 October 2018; and within 150 meters from the seventh applicant's business premises entrances at 10 Loper Street Aeroport, Isando, Kempton Park and at Fabian Street Boksburg Ekurhuleni.

3.1.2 Taking part in or instigating unlawful behaviour that may result in damage to any property of the applicants, or the infringement of the rights of any staff member and/or visitor to the applicants' premises;

3.1.3 Blocking any entrance or exit to the applicants' premises or preventing delivery vehicles form (sic) entering of (sic) exiting the business premises of the applicants;

3.1.4 Obstructing or preventing ingress or egress of staff or visitors to the applicants' business premises; and from interfering with the access control to any of the entrances to the applicants' premises; and unlawfully interfering with the proper working of the applicants' property or property under the applicants' control;

3.1.5 Infringing the traffic rules on the applicants' premises and adjacent public roads;

3.1.6 Unlawfully disrupting or otherwise interfering in any way with the normal activities of the applicants' business;

3.2 Interdicting and restraining the first and second respondents and,. where applicable, their supporters and/or followers from participating in, calling for, supporting, encouraging or inciting unlawful behaviour, violence, causing damage to property and from intimidating, threatening, harassing or harming;

3.2.1 Any employees of the applicants;

3.2.2 Any visitor of the applicants;

3.2.3 Any service providers of the applicants;

3.2.4 Or any other person present on the applicants' premises;

3.3 Restraining the first and second respondents and, where applicable, their supporters and/or followers from carrying firearms, or dangerous weapons defined in the Dangerous Weapons Act 15 of 2013, or axes, sjamboks, knobkieries, golf clubs, hammers, assegais, knifes (sic) or other sharp objects, sticks of any kind at, or near the entrance of the applicants' premises;

3.4 Restraining the first and second respondents, and where applicable, their supporters and/or followers from vandalising property or illegally occupying any buildings on the properties of the applicants;

3.5 The SAPS and/or Public Order Policing Unit (the third respondent) are directed to enter upon any premises of the applicants there and any other member of the first applicant's premises to ensure compliance with this Order and to prevent unlawful conduct at any of the first applicant's and its members' premises, which may include ensuring that the protestors remain 150 meters from the entrance or exit of any (sic) the first applicant's members' premises;

4. The first respondent and its officials are ordered to take all reasonable steps to encourage its members, supporters and followers not to engage in any unlawful conduct;

5. This order should be served on the first respondent's members, the second respondents by serving it on the first respondent (or its attorneys) by email, fax or hand, and by displaying it prominently at all entrances of the applicants' members' premises;

6. The first respondent is ordered to publically (sic) call upon its members, to abide by the provisions of this order to the striking employees and participants in the protest action who are present at such time at the second to seventh applicants' members' premises, in such languages which are commonly used for communication by them within 4 hours of receipt of this order".

[8] Notwithstanding the interim strike interdict, numerous violent attacks occurred at a number of PCASA's members' facilities across the country.

[9] In response, on 1 November 2018, the applicants launched an urgent contempt application in this Court, on an *ex parte* basis, claiming that NUMSA and its officials (namely Jim and Mabho) had wilfully disregarded the interim strike interdict.

The Contempt Application and the Counter-Application

[10] In its founding papers in the contempt application, the applicants complained that NUMSA, its members, supporters and/or participants had violated the terms of the interim strike interdict in that they:

10.1 caused unlawful injuries to and disregarded the 150 meter perimeter restriction at the premises of Bowler Plastics (seventh applicant);

10.2 instigated disruptive or riotous behaviour that resulted in damage to the property of PCASA's members;

10.3 infringed on the rights of non-striking employees (including the right not to be intimidated and the right to a safe working place);

10.4 blocked entrances preventing ingress and egress;

10.5 unlawfully disrupted normal business activities of PCASA's members;

10.6 acted in concert and formed a common purpose to act unlawfully and cause maximum damage to plastics employers;

10.7 acted violently;

10.8 harassed and assaulted non-striking employees;

10.9 caused widespread and severe damage to property;

10.10 carried prohibited weapons which were used in the destruction of property;

10.11 vandalised the property of certain of PCASA's members;

10.12 acted in concert for the common purpose to exhort maximum pressure on plastics employers to surrender to their demands; and

10.13 used the same *modus operandi* at all the premises which were attacked.

[11] The applicants further complained that NUMSA and its officials did not take reasonable steps to ensure compliance with this Court's order by discouraging its members and supporters from engaging in unlawful conduct, despite the restraining orders. Similarly, that NUMSA did not control its members or supporters. Therefore, paragraphs 4 and 6 of the interim

strike interdict had been breached and the contempt was wilful and *mala fide.*

[12] The contempt application was heard on 2 November 2018 and the following order (the contempt order) was made:

> "*Having read the documents and having considered the matter*
> *IT IS ORDERED THAT:*
> 1. *The provisions of the Rules of this Court pertaining to times and manner of service referred to therein, are condoned and dispensed with, and that this matter be considered and dealt with as a matter of urgency in terms of Rules 8 of the Rules of this Court;*
>
> 2. *The service of this order together with the notice of motion and founding papers shall be effected on the first respondent and on its representative Irvin Jim N.O and Vusumzi Mabho N.O by service on its attorneys Haffegee Roskam Savage by hand or electronic transmission.*
>
> 3. *The applicant is granted leave to supplement its founding affidavit within 5 days hereof.*
>
> 4. *The respondents may explain their conduct, should they wish to, by way of affidavit within 10 (ten) days of service of this order (although this will not excuse them from being present in Court on the return date);*
>
> 5. *A Rule Nisi is hereby issued calling on the first respondent, represented by Irvin Jim N.O and Vusumzi Mabho N.O, to appear in the Labour Court on 1 February 2019 at 10h00 to show cause why a final order should not be made in the following terms:*
>
> *5.1 Declaring first respondent and Irvin Jim N.O and Vusumzi Mabho N.O are in contempt of court of the Order by the Honourable Mr Justice Moshoana on 19 October 2018 under case number J3725/18;*
>
> *5.2 Imposing on the first respondent a fine of R1,000 000.00 [one million rand] or such other fine as deemed appropriate by the above Honourable Court;*

5.3 Imposing on Irvin Jim N.O and Vusumzi Mabho N.O fines of R100 000.00 [one hundred thousand rand] each or such other fine as deemed appropriate by the above Honourable Court, further alternatively imposing such other sentence upon them as this Honourable Court deems fit.

5.4 The costs of this Application to be paid by the first respondent, on an attorney and own Client scale, alternatively by those respondents who oppose the application".

[13] On 3 December 2018 NUMSA filed its answering affidavit in opposition to the contempt application. The answering affidavit was also used in support of a three-pronged counter-application in which NUMSA challenged the contempt procedure contained in clause 13 of the Practice Manuel of this Court on the basis that it:

13.1 impermissibly amends or overrules the rules of this Court [rule 7], making it inconsistent with section 173 of the Constitution;

13.2 impermissibly disregards the principles of substantive law, insofar as they do not require the applicant to fully explain why giving notice to an interested party would defeat the very object of the order sought. This disregard for substantive law is impermissible and inconsistent with the powers of this court in terms of section 173 of the Constitution;

13.3 infringes on a litigant's rights in terms of section 34 of the Constitution.

[14] It is necessary for me to deal with the counter-application first. Only if it fails will I have to deal with the merits of the contempt application.

The Counter-Application

Challenge 1 - Contrary to rule 7

[15] NUMSA argues that in terms of section 173 of the Constitution, the Labour Court has the inherent power to protect and regulate its own processes in the interests of the administration of justice. Section 173 of the Constitution provides as follows:

> *"Inherent Power*
> *173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*
> *[S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012.]"*

[16] With reference to the case of *Western Bank Limited v Packery*[2], NUMSA argues that even if in the interests of justice, there are limits on a court's inherent power to do as it wishes in the field of adjectival law. This is because the rules of court are delegated legislation, have statutory force and are binding on courts.

[17] NUMSA argues that clauses 13.1 and 13.2 of the Practice Manual exceed the ambit of the Court's power because these clauses have sought to change substantive law and the rules of the Labour Court. Clause 13 of the Practice Manual provides as follows:

> *13 CONTEMPT OF COURT*
> *13.1 It has been found that applications for contempt of court are so varied and often fail to meet the minimum requirement to obtain the relief sought. This is often discovered months after the application was launched. In order to avoid this and the prejudice which results therefrom an application for contempt of Court must be launched on an ex parte basis on a Friday in Motion Court, where the applicant must seek an order that the respondent be ordered to appear at the Labour Court to show cause why it should not be held to be in contempt.*
>
> *13.2 An application which seeks for the court to make a finding that a party is in contempt of an order of the Labour Court must be made ex parte by way of*

[2] 1977 (3) SA 141 (T) at para 138.

a notice of motion accompanied by a founding affidavit. The notice of motion must seek an order in the following terms:

a. That the respondent, [Chief Executive officer/Director General/owner/proprietor of the respondent] (full and proper names) appear in the Labour Court on (date) of (month) 2012 at 10 am to show cause why he/she should not be found guilty of contempt of court for failing to comply with the order of this court dated xyz;

b. that the respondent may explain its conduct by way of affidavit on the date of hearing or before that date (although this will not excuse him/her from being present in court);

c. that in the absence of providing an explanation to the satisfaction of the Court, or failing to appear in Court despite being properly served, the respondent(s) be found guilty of contempt and that;
the respondent(s) be incarcerated for such period as the Court deems appropriate; or for the respondent(s) to be fined in an amount the court deems appropriate; or other alternative relief;

d. That service of this order be effected personally upon the respondent [Chief Executive officer/Director General/owner/proprietor of the respondent].

[18] According to NUMSA, rule 7 of the Labour Court Rules applies to all applications in this Court, (except for reviews and interlocutory applications) and as such it is the only rule that deals with applications for contempt of court. As rule 7(1) requires that an application must be brought on notice to all persons who have an interest in the application, NUMSA should have been given notice of the contempt application. Yet, NUMSA was not given notice because clauses 13.1 and 13.2 of the Practice Manual stipulates that applications for contempt must be made *ex parte*. This is clearly in direct conflict with rule 7(1) as NUMSA sees it.

[19] According to the Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [3], *"Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interests of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome."*

[20] Clause 13 was introduced to control the process through which contempt of court applications are heard, and regulates and manages the procedure to be followed to achieve a just outcome. That this procedure is in the interests of justice is apparent, if regard is had to the reason for its introduction.

[21] According to Mr Myburgh SC, who appeared on behalf of the applicants, in the typical case of an employer failing to comply with an award or judgment, in order for the employee to secure justice, the employer must be brought before court and afforded a hearing as soon as possible, before a decision is made on the issue of contempt. Clause 13 facilitates this and is in essence no more than an elaborate notice of set down, with the clout of a court order. It puts a stop to employers continuing to run rings around employees who have awards or judgments in their favour.

[22] In *Macsteel Trading Wadeville v Van der Merwe NO & others*[4], the Labour Appeal Court held that:

> *"The underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the Rules of the Labour Court and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the*

[3] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) at para 42.
[4] [2019] 40 ILJ 798 (LAC) at para 22.

Practice Manual, depending on the facts and circumstances of a particular case before the court".

[23] In *Samuels v Old Mutual Bank*[5] the Labour Appeal Court held that:

> *"[14] The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, inter alia, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution.*
>
> *[15] The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore, are binding. The Labour Court's discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the court*.

[24] I do not believe that clause 13 is inconsistent with rule 7. Clause 13 is designed to give effect to the rules of the Labour Court. In so doing it provides access to justice and promotes the statutory imperative of expeditious dispute resolution. The Practice Manual came about in circumstances where the Rules Board ceased functioning in 2002 (and was only re-established in late 2017). That necessitated the addressing of issues of practice and procedure by the Judge President by means of the Practice Manual.[6] A speedy and effective dispute resolution system is the foundation of the LRA. Any frustration of the ability to enforce arbitration awards and judgments of this Court, shakes that foundation and threatens its collapse. It is clearly in the interests of justice that this Court develops a procedure that addresses the concern in question.

[5] [2017] 7 BLLR 681 (LAC).
[6] Anton Steenkamp *The Labour Courts in 2014: The Position after the Promulgation of the Superior Courts Act and in Light of the Amendments to Labour Legislation* (2014) 35 *ILJ* 2678 at 2686.

[25] In addition, the existence of rules does not oust a court's inherent power to protect and regulate its own process and to develop the common law on matters of procedure, in the interests of justice. This power remains in place notwithstanding any rules which may have been promulgated.

[26] Section 171 of the Constitution gives a court the authority to introduce rules. In terms of this section, "*All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."* In respect of the Labour Court, section 159 of the Labour Relations Act, 1995 (the LRA) establishes the Rules Board and gives it the power to make rules. What section 173 of the Constitution does is to reserve for a court the inherent power to protect and regulate its processes, should the need arise.

[27] In *Phillips and Others v National Director of Public Prosecutions*[7] the court held that:

> *"[47] The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore, courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, section 171 makes plain that "[a]ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation." On the other hand section 173 of the Constitution preserves the inherent power of the courts to protect and regulate their own process in the interests of justice. In S v Pennington and Another, this Court held that:*
>
> > *"It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' which vested in the Appellate Division prior to the passing of the 1996 Constitution. Even if it is subject to such*

[7] *Phillips and Others v National Director of Public Prosecution* 2006 (2) BCLR 274 (CC).

> *constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power."*

> *[48] In Parbhoo and Others v Getz NO and Another too, this Court turned to its "inherent power" to meet an "extraordinary" procedural situation pending enactment of relevant legislation and promulgation of rules of procedure. In both cases the points are made that ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process. The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution".*

[28] The need for the Labour Court to regulate and protect its processes arose in respect of the contempt procedure and the court responded accordingly by introducing clause 13 in the Practice Manual. This response is consistent with the court's powers in terms of section 173.

[29] For the above reasons, the first prong of the counter-application fails.

Challenge 2 - Audi Alteram Partem

[30] NUMSA accepts that there will be circumstances where it may be justified to bring an *ex parte* application and that this is permitted in terms of rule 7, alternatively rule 11. However, instead of requiring an applicant to justify proceeding *ex parte*, clauses 13.1 and 13.2 of the Practice Manual make it mandatory that all applications for contempt of court be brought on an *ex parte* basis, which subverts substantive law.

[31] NUMSA further contends that the duty to explain to a court why notice could not, or should not, be given is an essential requirement of our law, because

ex parte applications deprive a litigant of the fundamental right to be heard before an order is given.

[32] In the circumstances, NUMSA submits that it is impermissible for the Labour Court, through the Practice Manual, to disregard the *audi alteram partem* principle in relation to orders for contempt, even if the order is not final. Further, that this Court lacks the authority or competence to amend or vary the substantive law through the provisions of the Practice Manual.

[33] PCASA argues, *inter alia*, that even if the contempt order implies that the court was satisfied that a *prima facie* case had been made out, NUMSA suffered no material prejudice as the order has no formal legal effect. It is simply a rule *nisi* without interim relief.[8] I agree with this submission.

[34] It is clear from the contempt order that there is no reference in the order to the terms of the rule *nisi* operating as interim relief pending the return date. A rule *nisi* on its own is not the equivalent of an interim order. To argue otherwise is to conflate the two instruments. In *Drotske NO and Another v Coetzee*[9] the High Court dealt with a contempt application in relation to a rule *nisi* that was issued in relation to a spoliation order. The rule *nisi* did not specify that the order was to act as an interim order/interdict. Ebrahim J held the following:

> *"[10]... Intrinsic to our system of constitutional jurisprudence is the audi alteram partem rule. A court will normally not grant an order directly affecting the rights of a person and which may involve far reaching consequences to him/her without giving that person an opportunity of being heard. This principle has found expression in a rule of practice that in ex parte applications brought without notice, the court will order a Rule nisi to issue where the rights of other persons may be affected by the order sought. Herbstein and Van Winsen: The Civil Practice of the Superior Courts, 5th Edition at 455 defines a Rule nisi thus:*

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[8] *Victoria Park Ratepayers' Association v Greyvenouw CC and others* [2013] ZAECHC 19 ("*Victoria Park*") at para 9.

[9] (2767/2012) [2012] ZAFSHC 176 (20 September 2012).

"an order directed to a particular person or persons calling upon him or them to appear in court on a certain date to show cause why the Rule should not be made absolute; or, in other words, why the court should not grant a final order. In a proper case, for example, an urgent application for an interdict, the court may grant interim relief by ordering that the Rule nisi will operate as a temporary interdict. This rule of practice should be applied and followed unless sound reasons exist to depart from it."

10.1 The Rule nisi is therefore fundamental to both procedural and substantive fairness, that is its main purpose, for it allows flexibility in circumstances where a rigid application of the audi alteram partem rule might have the effect of defeating the very rights sought to be enforced or protected.

10.2 Where a temporary interdict is necessary to prohibit a party from doing something until cause is shown by him against it, the court is asked to make a specific order that the Rule nisi should act immediately as a temporary interdict, pending the return day. The utility of the Rule nisi acting at the same time as an interim order has been endorsed by the courts. (SAFCOR FORWARDING (JOHANNESBURG) (PTY) LTD v NATIONAL TRANSPORT COMMISSION 1982 (3) SA 654 (A) at 674 H – 675 A)

10.3 Consequently I do not agree with Mr Grobbelaar's interpretation that the Rule nisi is but one of two options which an ex parte applicant for interim relief has on approaching the courts, i.e. either to ask for it indirectly through and by virtue of a Rule nisi or directly by spelling it out coupled to a Rule nisi ("the rule nisi is to operate as a temporary interdict with immediate effect pending the return date").

10.4 On his interpretation, the omission of the interim order in Mocumie J's ruling of 27 June 2012, is not fatal to the applicants' case because the Rule nisi is an interim order. But he is not supported by authority for as was made clear by Corbett CJ in SHOBA v OFFICER COMMANDING, TEMPORARY POLICE CAMP, WAGENDRIFT DAM, AND ANOTHER; MAPHANGA v OFFICER COMMANDING, SOUTH AFRICAN POLICE MURDER AND ROBBERY UNIT, PIETERMARITZBURG, AND OTHERS 1995 (4) SA 1 (A) at

19 D – H where the learned Judge discussed the distinction between a Rule nisi and an Anton Piller order:

> *"A rule nisi..., contemplates that the relief sought will only be granted at some future date after the respondent has had time to show cause that it should not be granted... the interim interdict attached to a rule nisi usually seeks to maintain the status quo ante whereas an Anton Piller order gives instant relief subject to the possibility of a later variation or discharge of the order."*

10.5 Shoba makes it clear that the Rule nisi is not another name for an interim order/interdict. The two are not interchangeable. That is the law and the applicants must show that the respondent has acted wilfully and deliberately in contravention of the court order of 27 June 2012 to succeed with their contempt application. They have not done so. Whilst I find that knowledge of the court order of 27 June 2012 on the part of respondent has been proved by the applicants, that in itself is of no moment in light of the failure of the order to inform the respondent that the Rule nisi was to operate as an interim interdict with immediate effect pending the return day. [My emphasis]

[35] In the absence of an interim order it is not open to NUMSA to argue that it has been prejudiced by the issuing of the rule *nisi*.

[36] The contempt procedure contained in the Practice Manual is also consistent with the normal approach adopted in contempt of court applications. In *Matjhabeng Local Municipality v Eskom Holding Limited and others*[10] the High Court issued a rule *nisi* on an *ex parte* basis calling upon the municipal manager to file an affidavit setting out why he should not be held in contempt of court for non-compliance with a court order. After doing so and having appeared in court on the return date when he gave evidence, he was declared to be in contempt of court. On appeal, the Constitutional Court commented on the summary procedure in contempt proceedings. Nkabinde ADCJ, on behalf of a unanimous court, held as follows:

> *"[79] The appropriateness of the summary contempt procedure in Matjhabeng also requires this Court's attention. The common law procedure for the commencement of contempt proceedings, in cases of contempt while a court is not sitting (ex facie curiae) − like in the present cases – contrasts with*

[10] 2017 (11) BCLR 1408 (CC).

contempt that occurs in or near a court. The former has been described as follows by the Appellate Division in Keyser:

> *"[I]n every case of contempt ex facie curiae dealt with by our courts without a criminal trial, the proceedings were commenced by an order, served upon the offender, containing particulars of the conduct alleged to constitute the contempt of court complained of, and calling upon the offender to appear before the court and to show cause why he should not be punished summarily for the alleged contempt of court. Sometimes the order has been issued on the application of the Attorney-General, sometimes it has been issued by the court mero motu [of its own accord], but in every case it has informed the offender of the case he has to meet, and in every case it has allowed him sufficient time to consult counsel, to prepare his defence and to decide whether he will give evidence on oath or not."*

This general approach is constitutionally compliant. It affords the respondent procedural safeguards while ensuring that the authority of the court is vindicated". [my emphasis]

[37] Mr Berger SC, who appeared on behalf of NUMSA, argued that the context of *Matjhabeng* was very different to the context of the present application. According to him, in *Matjhabeng* the issue was not how the municipal manager was brought to court, but rather how he was treated once at court. As such, the dictum that *"this general approach is constitutionally compliant*" is *obiter*.

[38] I fail to see on what basis the above comment can be regarded as *obiter*. The Constitutional Court specifically looked at the common law summary contempt procedure, and after considering well-established authority of the Appellate Division, as it then was, it unequivocally confirmed that the procedure is constitutionally compliant, and in essence strikes a balance between a respondent's procedural safeguards and the need for a court's authority to be vindicated.

[39] Even if I am wrong in my conclusion and the comment was *obiter*, its persuasive value would bring me to the same conclusion reached above. In *Turnbull-Jackson v Hibiscus Coast Municipality and others (Ethekwini*

Municipality as amicus curiae) [11] the Constitutional Court stated the following in relation to *obiter dicta*:

> *"[56] The doctrine of precedent decrees that only the ratio decidendi of a judgment, and not obiter dicta, have binding effect. The fact that obiter dicta are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as obiter what is otherwise binding precedent. Only that which is truly obiter may not be followed. But, depending on the source, even obiter dicta may be of potent persuasive force and only departed from after due and careful consideration (relying on Durban City Council v Kempton Park (Pty) Ltd 1956 (1) SA 54 (N) (Kempton Park) at 59D-F and Rood v Wallach 1904 TS 187 (Rood) at 195-6)".*

[40] The judgment in *Matjhabeng* was that of a unanimous court and as such, even if the statement in question was made *obiter,* it would be of potent persuasive value.

[41] In the circumstances, the second prong of the counter-application must fail as well.

Challenge 3 - Clauses 13.1 and 13.2 are unconstitutional and invalid

[42] NUMSA'S arguments in respect of this prong of its counter-application can be summarised as follows –

42.1 Section 34[12] of the Constitution, which deals with access to courts, includes the right to be heard and the common law principle of *audi alteram partem*.

42.2 It is fundamental to the rule of law that court orders should not be made without affording all interested parties a reasonable opportunity to state their case.

[11] 2014 (11) BCLR 1310 (CC) at para 62.
[12] "*Access to Courts - Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

42.3 In the context of contempt of court, it is not open to the accused to stay silent. A *prima facie* case set up against an accused will become proof beyond reasonable doubt if the accused fails to *"advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide"*.[13]

42.4 The intended effect of clause 13 is that a respondent is prevented from opposing an application for contempt until a court has ordered that the applicant has made out a *prima facie* case and that the respondent must adduce evidence as to why a final order of contempt should not be made.

42.5 There cannot be a blanket exception given to applications for contempt. Notice must be given unless the applicant makes out a proper case for proceeding *ex parte*.

42.6 By their nature, *ex parte* applications limit the right to be heard of those who have an interest in the application. The limitation of the section 34 right of access to courts, is not justifiable.

[43] I have already dealt with the Constitutional Court's finding in *Matjhabeng* in which the court found the common law contempt procedure to be constitutionally compliant and that it strikes a balance between a respondent's procedural safeguards and the need for a court's authority to be vindicated. On the strength of the *Matjhabeng* decision, the third prong of the counter-application must also fail.

[44] This leaves only one more issue for me to deal with. Under the third prong, NUMSA also argues that in addition to the denial of a constitutional right, with an *ex parte* contempt order hanging over the heads of NUMSA's negotiators, the power balance in their collective engagement with the employer was shifted. According to NUMSA, the mere existence of the contempt order, and its implications, is enough to affect the power play.

[13] *Fakie NO* v *CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 42.

[45] NUMSA's submissions in this regard can be summarised as follows-

45.1 This Court has repeatedly stated that one must be mindful about the motivation for a strike interdict because it might be used to affect the power play.

45.2 In the United Kingdom, Professor Lord Wedderburn has cautioned that:

"Without scrupulous care by the judiciary – and sometimes even with it – the interlocutory labour injunction can become a great engine of oppression against workers and their unions."[14]

45.3 In *Metal & Electrical Workers Union SA v National Panasonic Co (Parow Factory)*[15] the court expressed the importance of ensuring that the judiciary not be drawn into collective bargaining disputes where its intervention is not warranted to ensure the institutional independence and authority of the court is not undermined.

45.4 Interim strike interdicts have the potential to create injustice, providing employers with a powerful tool to undermine legitimate collective action by labour and to attack trade unions.[16]

45.5 Van Niekerk J[17] recognised the potential for the institutional authority of the Labour Court to be undermined where employers bring interim

[14] Lord Wedderburn *The Worker and the Law* 3 ed (1986) 686.

[15] 1991 (12) ILJ 533 (C) quoting with approval E Cameron, H Cheadle & C Thompson - The New Labour Relations Act (1989) at 99.

[16] K O'Regan 'Interdicts Restraining Strike Action – Implications of the Labour Amendment Act 83 of 1988' (1988) 9 ILJ 985. See also A Rycroft 'Being Held in Contempt for Non-Compliance with a Court Interdict: In2Food (Pty) Ltd v Food and Allied Workers Union (2013) 34 ILJ 2589 (LC)' (2013) 34 ILJ 2499 and A Rycroft 'What can be done about strike related violence?' (2014) 30 International Journal of Comparative Labour Law and Industrial Relations 203-4.

[17] In *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW)* v *Universal Product Network (Pty) Ltd* 2016 4 BLLR 408 (LC) par 10-11, also endorsing Rycroft op cit (n1) at 203 ("The interdict / injunction gives applicants – usually employers – a tactical advantage because the likelihood of a full trial is in most cases small, and the employer's widely expressed assertions of 'interference with business' or 'extreme violence' become *prima facie* evidence which the union has to disprove"). (underlining added)

strike interdicts with the purpose of undermining collective action by labour.

45.6 In Canada, Suzanne Birks commented:

"Labour contempt, as it has developed in Canada, is potentially as effective a brake on union activity as was the nineteenth-century sanction of criminal conspiracy … what is at issue is often not the immediate offence, but rather the validity of the union's entire initiative in the dispute with the employer"[18]*"….*

When the restraining order is given the battle may shift from the immediate dispute to a more intensive struggle over the right to picket and the extent of controls on union activity generally"[19]

45.7 Civil contempt applications in the context of collective labour disputes have the same potential for injustice because they provide employers with a powerful tool to undermine the constitutional rights of trade unions and workers to engage in collective bargaining, to freedom of association and to strike. Therefore, the cautionary principles applicable to the granting of strike interdicts apply with equal, if not greater, force to contempt applications by employers pursuant to a strike interdict.

45.8 In the context of clause 13, the denial of a party's right to be heard has serious potential to prevent a court from being able to evaluate properly whether it should involve itself in the power play between the parties and/or whether the contempt application is "*an engine of oppression against workers and their unions*" that undermines legitimate collective action.

[46] I have already expressed the view that the rule *nisi* does not contain an interim order. On this basis alone it cannot be argued that the power play

[18] Suzanne Birks "*The doctrine of Labour Contempt*" (1976) 38 (3) *Queens Law Journal* 38 cited in Rycroft *op cit* (n1) at 2502. See also O'Regan *op cit* (n5) at 386, 389-91 and 407.
[19] *Ibid* at 49.

was affected because an interim contempt order was hanging over the heads of NUMSA's negotiators. In addition to this, all the authorities relied on by NUMSA in support of their argument are in the context of collective bargaining and strike action. It is difficult to take issue with the views expressed in this context. However, I do not see how this finds application to contempt applications in the context of collective labour disputes. Even though the interim contempt order was granted on an *ex parte* basis, it cannot be open to NUMSA to argue that this somehow tilted the scales against them in the collective bargaining process. The contempt order flows from allegations that the union and its officials had not observed the terms of the interim strike interdict. As we have seen, this order called upon NUMSA and its members not to engage in unlawful activity, including intimidating, threatening, harassing or harming any employees, visitors, services providers or any other person present on the applicants' premises, damaging property, blocking entrances and carrying dangerous weapons. If NUMSA, its officials and members indeed observed the terms of the interim strike interdict, as would be expected of them, there can be no concern that there is any merit in the contempt allegations. It must also be expected that NUMSA, its officials and members had no intention of engaging in the unlawful activities in question and as such they could not have had any concern that they had to tread carefully in the collective engagement process for fear of strengthening the contempt allegations against them.

[47] The third prong of the counter-application therefore also fails.

[48] Given that the counter-application fails, I now turn to the merits of the contempt application.

The Contempt Application

[49] The requirements for a finding of contempt of court were formulated as follows by Cameron JA in *Fakie NO*:[20]

> *"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. … 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."*

[50] The shifting of the evidentiary burden to the respondent to establish that his non-compliance was not wilful and *mala fide* once the first three requirements for contempt have been met (the order, service or notice, and non-compliance) equates to there being an inference[21] of wilful and *mala fide* non-compliance in such circumstances, which the respondent must rebut through the leading of evidence.[22]

[20] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 42.

[21] *Compensation Solutions (Pty) Ltd v Compensation Commissioner & others* (2016) 37 *ILJ* 1625 (SCA) at para 15.

[22] See also *SA Municipal Workers Union v Thaba Chweu Local Municipality* [2015] JOL 32840 (LC) where this court summed up the position as follows - *"Therefore, and in terms of the ratio in CCII Systems, for this court to be satisfied that a respondent in a contempt application is indeed in contempt of court, the court must be satisfied, beyond reasonable doubt, that: (1) there was a refusal to comply with the order; (2) this refusal was wilful (deliberate); and (3) the deliberate refusal to comply must be mala fide, in other words there must be a complete absence of any kind of bona fide justification for the refusal to comply (even if this justification relied on is ultimately found to be objectively unreasonable or unsustainable). Crystallised down to its simplest terms, a respondent is in contempt where the respondent knows and understands the terms of the order and what is required to be done to comply with the order, but then without any cause or justification deliberately does not comply."*

[51] When seeking to hold a union liable for contempt of court, it is important to distinguish the obligations imposed on the union from those imposed on its members. In *In2Food*[23], the LAC stated that:

> *"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."* (Own emphasis.)

[52] What this means is that a union cannot be held vicariously liable for contempt of court by its members; it can only be liable for contempt if it itself – through its officials[24] – breached the court order.

[53] Orders to the effect that a union should "*take all reasonable steps*" to persuade its members not to act unlawfully, will not give rise to a finding of contempt on the part of the union, because they are too vague and imprecise. In *AMCU & others v KPMM Road & Earthworks (Pty) Ltd*[25] the LAC held that "*If an employer wishes to obtain relief against a union in circumstances similar to that of the present dispute, it behoves its legal advisors to draft a notice of motion which gives clear content to the obligations which it wishes to impose upon the union*".

[54] In line with this, it has become customary for an employer in a strike violence interdict to seek orders requiring the union to take specific positive steps to bring the violence to an end. These include publicly calling on the strikers to abide by the order by, for example, reading it out by loud-hailer in the

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[23] *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 *ILJ* 2767 (LAC) at para 12.

[24] As the LAC put it in *In2Foods* at para 9, "*[t]he principle upon which a juristic entity is held to perform acts is by acting through its officials*".

[25] (2019) 40 *ILJ* 297 (LAC) at paras 18-19.

language that is commonly used for communication on the employer's premises.[26] As Lagrange J put it in *Swissport SA (Pty) Ltd v Mphahlele & others*:[27]

> *"…To meet this difficulty, strike interdict [and strike violence] 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 members or issuing a notice on a union letterhead. Such orders are often accompanied by time frames for compliance."*

[55] Orders of this sort are commonly referred to as "*ensure compliance orders*", i.e. orders compelling a union to ensure that the substantive order is complied with by its members.[28]

[56] What the above illustrates is that it is extremely difficult to hold a trade union in contempt of court for breaches of a strike interdict order by its members, beyond any positive obligations placed on the union. Seen in this context, it is not surprising that in its written and oral arguments PCASA only focussed on two alleged breaches – a breach of paragraphs 3.2 and 6 of the interim strike interdict. In respect of the numerous other allegations of breaches contained in its papers, PCASA recorded in its heads of argument that it has not abandoned these alleged breaches, yet it made no written or oral submissions in respect thereof. At most it referred to an 11-page summary contained in its replying affidavit in the contempt application, which it claims, establishes breaches of the interim strike interdict.

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[26] *GRI Wind Steel SA* v *AMCU & others* (2018) 39 *ILJ* 1045 (LC) at para 17.

[27] (2018) 39 *ILJ* 656 (LC) at para 12.

[28] See generally, Contempt of Court in the Context of Strikes and Violence - Contemporary Labour Law 109.

[57] I will deal with the alleged breaches of paragraphs 3.2 and 6 first and then deal with the rest of the breaches as summarised in PCASA's replying affidavit.

Breach of paragraph 3.2

[58] In terms of paragraph 3.2 of the interim strike interdict NUMSA was restrained "*from participating in, calling for, supporting, encouraging or inciting unlawful behaviour, violence, causing damage to property and from intimidating, threatening, harassing or harming*" employees, visitors, service providers or any other person present on the applicants' premises.

[59] On 5 November 2018, three days after the interim strike interdict was granted, Jim addressed NUMSA members at a meeting at NUMSA's head office in Johannesburg. Mabho was with him. The reason for the meeting was that striking members wanted to know how NUMSA was going to deal with the problem of members returning to work.

[60] Jim addressed the members and was captured on a cell phone video saying that *"We need to stop these rats who go to work. We need to sit down and have a strategy. Tomorrow at eleven we are switching our phones off. We do not want people taking pictures. Power, power, power".* The audience clapped and cheered in response to the message.

[61] Bonga Nonkonyane (Nonkonyane), an employee of Sondor Industries who was present at the meeting, received the video from an unknown source and shared it on his WhatsApp profile.

[62] On 6 November NUMSA held a mass meeting to discuss and deal with the issue of the rats.

[63] On 7 November, a NUMSA member, Constance Morare (Morare - also later referred to as Moo), sent a WhatsApp message stating that *"Today all hell is breaking loose, the rats and agents must be attacked/beaten; and with the*

assistance of 'chamdor' and 'bosmont' the gates must fall." This WhatsApp message was widely distributed amongst NUMSA members. That same day, an attack was launched on Sondor Industries. Nonkonyane was identified as one of the suspects involved in the attack on his employer, although he denies any involvement.

[64] In his affidavit Jim states that the gathering at the NUMSA Head Office took place on 5 November 2018. He explains that he was called into an impromptu and unscheduled meeting of NUMSA members in the plastics industry who had been on strike for about four weeks. He listened to their concerns, which were to the effect that the striking workers did not see sufficient support from NUMSA officials in mobilising workers to remain on strike, and as a result some strikers were returning to work.

[65] Having heard their concerns, Jim acknowledged that the members' problems were serious, but said that he could not deal with them then. He proposed that the union hold a mass meeting of the strikers the next day, where the problem could be addressed and workers would be motivated to remain on strike. His proposal was accepted and the meeting was arranged for the following day, 6 November 2018, at 11h00 in Elandsfontein.

[66] The mass meeting took place on 6 November 2018 and Jim addressed the strikers about mobilising people to continue with the strike.

[67] Jim's explanation in relation to switching off cell phones and not taking pictures is that he "*saw many people in the meeting with their phones in the air taking pictures. If they are taking pictures, they are not listening and focussing on the issue at hand. Therefore, I told them that when we deal with this serious issue, we will switch off our cell phones and not be taking pictures. In other words, we would be taking the matter seriously and engaging actively in discussions to address the problem."*

[68] Jim denies that he said or implied that when dealing with the issue of the workers returning to work, the workers' cell phones should be switched off

and no pictures should be taken so that there was no proof of the intimidation. He denies that he suggested, explicitly or implicitly, that strike-breakers should be attacked or beaten.

[69] Mabho and a Mr Mgcineni Tshambuluka (Tshambuluka), a NUMSA regional organiser, confirm the contents of Jim's affidavit relating to the meeting held at NUMSA's Head Office. Tshambuluka also confirms the contents of Jim's affidavit relating to the mass meeting that took place on 6 November 2018.

[70] Jim used the Xhosa word "*amagundwane*" in the meeting at NUMSA's Head Office to refer to the strike-breakers. He explains that the word means "*rats*" and refers to workers who break the picket line and return to work. He states that it is a common and widely used term in the union movement and that there are songs sung by workers about "*amagundwane*". He points out that in many countries with a history of strike action, strike-breakers have been referred to in derogatory terms. For example, in the United States of America, strike-breakers have for centuries been referred to in similar ways, such as "*blackleggers*", "*knobsticks*", "*rats*", "*finks*" and "*ratfinks*". He states that the etymology of the more common "*scab*" shows that it is similarly derogatory.

[71] With reference to Morare's WhatsApp message, Jim states that it *"could not have been the result of what I said at the meeting on 5 November or the mass meeting on 6 November. Such a message is contrary to the policies and programmes of the union."*

[72] PCASA argues that Jim's innocent version of the WhatsApp video must be rejected for the following reasons:

72.1 Jim's statement at the head office meeting that "*we need to stop these rats who go to work*", speaks for itself and is incapable of contextual dilution.

72.2 Jim's explanation for why he wanted a cell phone blackout during the mass meeting – namely to ensure that members paid attention – is so far-fetched and clearly untenable that it stands to be rejected on the papers.

72.3 In the absence of a tenable explanation for the required blackout, the inescapable inference is that it was aimed at ensuring that there was no record of an unlawful "strategy" to deal with the rats.

72.4 It is thus unsurprising that Jim does everything but take the court into his confidence about the terms of the "strategy" that he put forward at the mass meeting "to stop these rats who go to work".

72.5 Where else could Morare have obtained the information that she conveyed in her widely distributed WhatsApp message the morning after the mass meeting, other than at the head office meeting or mass meeting?

72.6 What Morare advised should happen on 7 November 2018 (namely that *"[t]oday all hell is breaking loose, the rats and agents must be attacked/beaten"*) is precisely what happened at Sondor Industries on that day. Amongst other things, four replacement labourers were attacked/beaten – one of whom landed up in ICU. To accept Jim's version would involve writing this off as an untimely coincidence.

72.7 The same applies to the (alleged) involvement of Nonkonyane in the attack on his employer. He attended both the head office meeting and mass meeting, and saw fit to publish the video clip of Jim on his WhatsApp profile, which depicts a cause that he no doubt identified with.

[73] Given the above, PCASA argues that NUMSA (through its officials, principally Jim) failed to comply with paragraph 3.2 of the interim strike interdict by "*calling for, supporting, encouraging or inciting unlawful*

behaviour". As such, NUMSA can be taken to have been complicit in the unlawful actions of its members and supporters referred to in the papers before court.

[74] NUMSA argues that there is insufficient evidence that it instigated or was involved in unlawful conduct, that many of the allegations are based on inadmissible evidence, that many of the perpetrators have not been identified or proved to be NUMSA members, and that where NUMSA members have been identified as being present, there is insufficient evidence to establish that such members perpetrated acts of violence.

[75] In the one instance where a member, Mr Edward Mathebula (Mathebula), was identified as a perpetrator, Mabho "*referred the matter to the union's National Office Bearers for investigation with a view to disciplinary action being taken against him in terms of NUMSA's constitution.*"

[76] NUMSA stresses that PCASA bears the *onus* of proving, beyond reasonable doubt, not only that NUMSA failed to comply with the interim strike interdict, but also that such non-compliance was both wilful and *mala fide*, and material.[29] In relation to the requirement of *mala fides*, the Court must be satisfied that there is "*a complete absence of any kind of* bona fide *justification for the refusal to comply (even if the justification relied on is ultimately found to be objectively unreasonable or unsustainable)*".[30]

[77] It also argues that the principal purpose of contempt of court proceedings, when a court order has been disobeyed, is twofold: (a) the imposition of a penalty to vindicate the Court's honour consequent upon the disregard of its order and (b) to compel performance of the order.[31] Since the strike has ended, part (b) is no longer applicable.

[78] NUMSA further argues that:

[29] *Victoria Park* at para 18.
[30] *Thaba Chweu supra* at para 27.
[31] *Victoria Park* at para 19.

78.1 The video of Jim's address at the head office on 5 November 2018 is about 11 seconds long. Without a full understanding of what transpired, the snippet may be easily misinterpreted.

78.2 Jim is a very popular leader. He is captured on cell phones whenever he speaks in public. He wanted the workers to concentrate on what he would be saying at the mass meeting and not to be distracted by taking videos with their cell phones. There is nothing far-fetched and untenable about this explanation.

78.3 It cannot be concluded beyond reasonable doubt that there is a complete absence of any kind of *bona fide* justification for his address or that Jim wilfully intended to breach the interim strike interdict order.

78.4 PCASA argues that the context within which Jim's words– "*we need to stop these rats who go to work*" – are said, must be ignored because they are "*incapable of contextual dilution*". The context within which particular words are said is always critical to a proper understanding of their meaning. PCASA cannot wish away the context in order to propagate the meaning it prefers. Ironically, PCASA invokes the context after Jim's address – Moo's message and the attack at Sondor – to support its assertion that Jim must have meant to incite violence and intimidation.

78.5 Jim has taken this Court into his confidence by explaining the nature of his interactions on that day, the problem and complaints from workers on that day, his proposed solution to deal with the complaints, and the purpose of the mass meeting – to mobilise continued support for the strike, which by then had endured for a substantial amount of time.

78.6 None of the allegations regarding Moo and the WhatsApp message are confirmed by anyone with personal knowledge. Moo's identity as

Constance Morare is not confirmed by anyone with personal knowledge, even though the identity of Moo's employer is known to PCASA.

78.7 PCASA's averment that the WhatsApp message was widely distributed is not confirmed by anyone with personal knowledge. No person confirms by way of an affidavit how and when this message came to their attention. PCASA provides no explanation for not tendering evidence by persons with personal knowledge.

78.8 The evidence about Moo and the WhatsApp message constitutes inadmissible hearsay evidence. Most importantly, the authenticity of the WhatsApp message has not been proved.

78.9 The high water mark of PCASA's submission is a rhetorical and speculative question: "*Where else could Ms Morare have obtained the information that she conveyed in her widely-distributed WhatsApp message the morning after the mass meeting, other than at the head office meeting or mass meeting?*"

78.10 Attacks on workers who were not participating in the strike started well before 5 November 2018. Moo's statement (if it is authentic) could have been sent before any of these incidents as well. There is no direct evidence to link Moo's statement to Jim's address to the gathering on 5 November 2018, or his address to the mass meeting the following day, or the attack at Sondor, Benoni on 7 November 2018. There is also no direct evidence linking Jim's addresses to the attack at Sondor.

78.11 PCASA's evidence amounts to no more than a contextual interpretation of Jim's address and the coincidence of events for which there is no evidence that NUMSA was involved, a snippet of a meeting without context, and a purported WhatsApp message from a

person initially alleged to be a shop steward but for which no direct evidence and/or authentication is provided.

78.12 PCASA has not proved, beyond reasonable doubt, that Jim's statements to the meeting on 5 November 2018 constituted a breach of paragraph 3.2 of the interim strike interdict. In any event, Jim's explanation for his statements to the meeting on 5 November 2018 constitutes clear evidence that establishes, at the very least, a reasonable doubt as to whether he wilfully and *mala fide* intended to breach the interim strike interdict order.

[79] In my view, PCASA has failed to establish beyond a reasonable doubt that NUMSA is in breach of paragraph 3.2 of the interim strike interdict. There is insufficient evidence that NUMSA called for, supported, encouraged or instigated, or was involved in, the unlawful conduct complained of.

[80] PCASA's entire case in respect of the breach of paragraph 3.2 rests on the 11 second long video of Jim's address on 5 November 2018. While Jim cannot, and does not, deny that he uttered the words "*we need to stop these rats who go to work"* these words by themselves are not sufficient to establish a breach of paragraph 3.2 on the part of NUMSA, at least not beyond a reasonable doubt, which is the test that must be applied.

[81] While the choice of words by Jim is unfortunate to say the least, particularly given that he is a popular leader and that he was addressing workers in the context where they were disillusioned with the level of support from NUMSA's officials in mobilising workers to remain on strike, resulting in some strikers returning to work, there is simply not enough evidence to establish that this in itself amounts to a breach of paragraph 3.2.

[82] There is no evidence that shows a link between Jim's reference to stopping rats and the subsequent violence, damage to property, intimidation and harassment which occurred at the premises of certain of the applicants' members.

[83] While the attack at Sondor Industries occurred on the same day as the WhatsApp message, to the effect that the rats would be attacked/beaten that day, there is no evidence beyond a reasonable doubt that the message and the attack can be linked to Jim's statement. In spite of this, NUMSA cast doubt on the date of the WhatsApp message and argues that it could have been sent prior to 7 November 2018.

[84] PCASA argues that NUMSA has not shared with the court the details of the strategy which was discussed at the mass meeting in Elandsfontein. However, Jim, in his affidavit, states that he addressed the strikers about mobilising people to continue with the strike. While it is correct that the details of how this was to be done has not been disclosed, this in itself is not sufficient to establish a breach of paragraph 3.2.

[85] With regard to the switching off of cell phones, PCASA itself argues that the inescapable inference is that it was aimed at ensuring that there was no record of an unlawful strategy to deal with the rats. An inference is not sufficient to establish beyond reasonable doubt that NUMSA is in contempt of court.

[86] In the circumstances, my view is that PCASA has not proved beyond a reasonable doubt that Jim's statements on 5 November 2018 constituted a breach of paragraph 3.2 of the interim strike interdict. Regardless, Jim's explanation establishes, at the very least, a reasonable doubt as to whether he wilfully and *mala fide* intended to breach the interim strike interdict.

Breach of paragraph 6

[87] Paragraph 6 of the interim strike interdict ordered that:

> *"The first respondent is ordered to publically (sic) call upon its members, to abide by the provisions of this order to the striking employees and participants in the protest action who are present at such time at the second to seventh applicants' members' premises, in such languages which are commonly used for communication by them within 4 hours of receipt of this order."*

[88] PCASA's argument in respect of the breach of paragraph 6 can be summarised as follows:

88.1 Paragraph 6 ordered NUMSA to, "*within four hours of receipt of this order*", "*publically (sic) call upon its members [present at the second to seventh applicants' premises] to abide by the provisions of this order*" – this in languages commonly used for communication by them.

88.2 Paragraph 6 of the interim strike interdict is a classic *"ensure compliance order"*, in that it placed a positive obligation on NUMSA to call upon its members to *"abide by the provisions of this order"*, which call was to be made publicly by NUMSA at each of the premises of the second to seventh applicants, within four hours of NUMSA being in receipt of the order.

88.3 The interim strike interdict was issued on Friday, 19 October 2018. The terms were agreed by the parties at court, with Mabho in attendance.

88.4 In a press release made thereafter, Jim made no mention of the interim strike interdict.

88.5 The interim strike interdict was also not posted or referred to on NUMSA's website.

88.6 On Monday, 22 October 2018, the PCASA's attorneys addressed a letter to NUMSA's attorneys complaining about the breach of the interim strike interdict, including non-compliance with paragraph 6 thereof.

88.7 Also on 22 October 2018, Mabho issued an internal communiqué to various NUMSA officials. Although the communiqué makes reference to the interdict application, the terms of the interim strike

interdict are not set out therein, nor was the order attached. With apparent reference to the interim strike interdict, Mabho stated:

"The courts seem willing to accept orders that instruct the union to "publicly call on its members to abide by the court order" and "do all that is reasonably possible to ensure compliance with the order." The employers love this kind of order because they know that it has the potential of dividing the membership from the union and therefore weakening the union and the strike. The employers don't understand or even care that we are a democratic organisation and worker controlled. So, when we are ordered to do this, we must try to do it in a way that doesn't undermine the union in the eyes of its members." (PCASA's emphasis.)

88.8 On 23 October 2018, NUMSA distributed (by email) the interim strike interdict amongst its officials. This was the first time that it did so. On 31 October 2018, Jim made another press release. With apparent reference to the interdict application, he stated:

"Employers have been trying various tactics to try and weaken the strike and daily as a union we have been defending our members' rights, and winning in the courts in opposing their malicious and manipulative interdicts brought by them …." (PCASA's emphasis.)

88.9 On 1 November 2018, the applicants launched the contempt application on an ex parte basis, which led to the rule nisi being issued the following day.

[89] PCASA further submits that the following aspects of the various affidavits warrant highlighting:

89.1 The applicants' founding affidavit in the contempt application explicitly alleges non-compliance with paragraph 6 of the interim strike interdict.

89.2 The applicants' supplementary affidavit in the contempt application does likewise.

89.3 In its answering affidavit in the contempt application, NUMSA places emphasis on the communiqué and the other interactions between Mabho and NUMSA officials – as opposed to members – in relation to the interim strike interdict. In paragraph 96, Mabho states: *"As I will deal with more fully below, the NUMSA officials did in fact communicate to striking NUMSA members the terms of the strike interdict order".* The balance of the text of the answering affidavit provides no proof of this.

89.4 The applicants' replying affidavit in the contempt application highlights that NUMSA has not established compliance with paragraph 6 of the interim strike interdict.

89.5 In an extraordinary move, after the applicants had delivered their replying affidavits in both the contempt and interdict applications, NUMSA delivered a supplementary affidavit in response thereto. In responding to the applicants' contentions about non-compliance with paragraph 6 of the interim strike interdict, Mabho places reliance (solely) on three supporting / confirmatory affidavits to NUMSA's answering affidavit in the contempt application, namely those of: (i) Ms Maria Bogatha (Bogatha); (ii) Mr Stompie Phanuel Mosiane (Mosiane); and (iii) Mr Harryson Maharala (Maharala).

89.6 These three affidavits do not establish compliance with paragraph 6 of the interim strike interdict.

89.6.1 Bogatha (a NUMSA local organiser) says that, on 19 October 2018, she went to the Roodekop industrial area where she came across a group of picketers who "*were from various companies in the area*", near the corner of Setchell and Bevan Roads. She then "*addressed [them] and informed them about the court order and its contents*". Mosiane simply confirms this.

89.6.2 Bogatha does not even contend that she visited the premises of each of the second to sixth applicants at the Roodekop industrial park. She also does not contend that she called upon the picketers "*to abide by the provisions of this order*", as paragraph 6 thereof instructs. NUMSA was not required to simply serve the order as Bogatha did; it was instructed to ensure compliance therewith by calling upon its members "*to abide by the provisions of [the] order*", i.e. to encourage / persuade them to do so. It is apparent from Mabho's communiqué that NUMSA was well aware of this.

89.6.3 Maharala (a shop steward at Bowler Plastics) says that upon being provided with a copy of the interim strike interdict on 19 October 2018 by the company, he telephonically contacted a NUMSA local organiser for advice because of some confusion around the perimeter order. On the advice of the organiser, Maharala (together with other shop stewards) then communicated the order to the strikers and told them that they should comply with it (and that the organiser had said so).

89.6.4 Paragraph 6 of the interim strike interdict does not contemplate NUMSA sending a hearsay message to its members. Rather it compelled NUMSA (via its officials) to itself attend upon the premises of Bowler Plastics to

"*publicly*" call upon its members to abide by the terms of the interim strike interdict, which it failed to do.

[90] In conclusion, PCASA argues that, on the papers, non-compliance with paragraph 6 of the interim strike interdict on the part of NUMSA has been established.

[91] NUMSA's argument in respect of paragraph 6 can be summarised as follows:

91.1 In the founding affidavit of the interdict application, PCASA states that *"[the] second to sixth applicants … have their business premises and plastics works at an industrial park in Wadeville, Roodekop between Berry and Setchell Roads."*

91.2 In the affidavit of Bogatha, filed with Mabho's answering affidavit, she describes how she left from the Labour Court immediately after the interim strike interdict order was made *"to ensure that the union complied with paragraph 6 of the Court's order of 19 October 2018."* She states that: *"When I got to the Roodekop industrial area I found the picketers next to the robots near the corner of Setchell and Bevan Roads."* She then describes how she addressed the picketers.

91.3 Mosiane, a NUMSA shop steward at DPI Plastics, the second applicant, confirms what Bogatha states in her affidavit. He further confirms that Bogatha visited the picketers at Roodekop regularly, almost on a daily basis, and in her interactions she *"always emphasised the need to have peaceful protest action or pickets"*.

91.4 The applicant complains that Bogatha did not visit the premises of each of the second to sixth applicants. Bogatha states that she addressed the picketers in the Roodekop industrial area where she found them. She informed them *"about the court order and its*

contents, including the provision relating to the 150m and the provision relating to the role of the SAPS." She also *"addressed them in a mix of English, Zulu and Sotho as is usually the case.*"

91.5 PCASA also complains that Bogatha, in her affidavit, does not say that she *"called upon the picketers to abide"*, but rather that she *"informed them about the court order and its contents"*. This pedantic criticism of Bogatha's evidence seeks to mask the good work that she performed, especially in the context where (as Mosiane confirms) she visited the picketers regularly, almost on a daily basis, and in her interactions she "*always emphasised the need to have peaceful protest action or pickets*".

91.6 NUMSA complied with the provisions of paragraph 6 in respect of Bowler Plastics. Maharala describes how paragraph 6 was complied with. The interim strike interdict order was given to him by the General Manager of Bowler Plastics. The 150 meter perimeter provision was confusing because of their prior agreement with management to picket 30 meters from the gate of the company. He subsequently telephoned the union and was advised that they had to comply with the order and that he should advise the workers present at the time of the order. He then informed the workers present (a sizable number) about the order and that they should comply with it. As a result of his communications with the workers, they moved a substantial distance away from Bowler Plastics and gathered near the gate of another company.

91.7 In its heads of argument, PCASA contends that there was no compliance because paragraph 6 required NUMSA's "officials" to make the public call to its members at Bowler Plastics and not to send a "hearsay message" to its members.

91.8 Paragraph 6 does not require NUMSA officials to make the call at Bowler Plastics. At Bowler Plastics, the order was handed by the

General Manager to Maharala who was the chairperson of the shop stewards committee and an office bearer who then in turn communicated the terms of the order to the members present. He also called upon the members to abide by the order, which resulted in their compliance.

91.9 There was no hearsay involved. Maharala had a copy of the order with him when he called upon the members to abide.

91.10 There is no evidence of non-compliance with paragraph 6 of the order, certainly not material non-compliance. There is also no basis to conclude beyond a reasonable doubt that NUMSA wilfully and *mala fide* intended to breach paragraph 6 of the interim strike interdict.

[92] The obligation on NUMSA in terms of paragraph 6 of the interim strike order was to, within 4 hours of receipt of the order, publicly call upon the striking employees and participants in the protest action, who were present at the second to seventh applicants' premises at such time, to abide by the provisions of the court order. This had to be done in such languages which are commonly used for communication by them.

[93] Even if Bogatha did not visit all of the second to seventh applicants' premises, she addressed the picketers in the Roodekop industrial area where she found them and informed them about the court order and its contents. She did this in a mix of English, Zulu and Sotho. As far as Maharala is concerned, he communicated the terms of the order to the members present. He also called upon the members to abide by the order.

[94] In my view, this is substantial compliance with the court order and may even have been more effective than going to the second to seventh applicants' premises (particularly if no one was gathered there). Based on the wording of paragraph 6, if only a few striking employees and other participants in the protest action were present at the premises in question, NUMSA would have

complied with the order if it made the call to these few employees. If none of the identified people were present at any of the premises then conceivably there would be no obligation on NUMSA to make the public call.

[95] In addition, based on the wording of paragraph 6, there was nothing that obliged NUMSA to refer to the terms of the order in media statements and to put it on its website.

[96] In the circumstances, I agree that there is no evidence of non-compliance with paragraph 6 of the order. Even if there was evidence of non-compliance this does not assist the applicants. This is because such non-compliance would not be material and more importantly there no basis on which I can conclude beyond a reasonable doubt that NUMSA wilfully and *mala fide* intended to breach paragraph 6 of the interim strike interdict.

The other breaches

[97] As stated above, even though PCASA has not submitted any written or oral arguments in support of the rest of its allegations of breach of the interim strike interdict, it has not abandoned these allegations. This has left me with the unenviable task of working through a multitude of affidavits to try and establish if there is any merit in the rest of the allegations. I deal with these below.

Breach of 3.1 -

DPI Plastics

[98] According to PCASA, on 6 November 2018 a group of NUMSA protesters carrying weapons obstructed a public road and tossed rocks at passing delivery trucks. A screenshot of a video depicting a group of people in the middle of a road and a truck nearby the group has been provided to support this allegation. PCASA argues that it is evident that NUMSA breached the 150 meter perimeter and the requirement to take reasonable steps to get its

members to refrain from unlawful conduct. Three NUMSA members were identified, including Mosiane, a shop steward at DPI. As a NUMSA official he was representing it and *"his conduct illustrates how NUMSA discredits the order by wilful and mala fide participation in various forms of illegalities".*

[99] PCASA also refers to an "affidavit" by Gerhard Troskie, an employee of PRSS, who states that he was mandated *"to secure DPI Plastics Factories and assets during a NUMSA strike"*. According to Troskie:

99.1 He contacted the Public Order Policing Unit (POP) to request assistance at the facility as there had been a breach of the interim strike interdict as the 150 meter perimeter was breached, there was blocking of the road and damage to the property of DPI. On arrival of the POP they were informed of the situation, but did not react to the crowd and eventually slowly drove behind the crowd down the road.

99.2 Further backup was called, but assistance was not received.

99.3 A truck escort was arranged to transport three of DPI's clients off the premises. When attempting to exit the premises the crowd blocked the exit and three trucks were stoned. On the third truck being stoned, Troskie and his crew, who were following the escort in a bakkie, fired three warning shots into the air with a paintball rifle. After this, the crowd's attention was diverted to the bakkie and they threw bottles, branches and stones at the bakkie. They, in turn, fired paintball shots into the crowd in the hope that the throwing of objects would stop. Eventually the POP climbed out of their vehicle gesturing to the crowd to calm down, which allowed them the opportunity to flee the scene.

99.4 According to Troskie three staff members were positively identified in the crowd as well as several NUMSA members.

[100] NUMSA denies the above and refers to the affidavits of Bogatha and Mosiane. According to Bogatha, DPI has two facilities in Setchell Road of which one is not operational and is closed. The operational facility is in a *cul de sac*. On 6 November 2018 workers gathered at the picketing site outside Mpact (another plastics employer). According to Mosiane he had been discussing the situation with a number of non-strikers and shop stewards from a plastics facility a short distance from the picketing area. They noticed that the workers had moved to Setchell Road (the *cul de sac*). The shop stewards followed them and found that some workers had congregated in front of DPI and the crowd was still moving further up the road. They encouraged the crowd to move away from DPI, in compliance with the 150 meter perimeter order. Police were also present and moving the crowd up the road. When the crowd reached the non-operational DPI site, delivery trucks started passing through with an armoured vehicle in front. Mosiane was standing to the side and did not see any objects or stones thrown. Suddenly shots were fired. Two workers were shot at close range by a private security company. One was shot in the face and the other in the back. Following the firing of the shots many of the marchers started running. It was then that Mosiane saw stones and other objects being thrown.

[101] In its replying affidavit, PCASA makes reference to NUMSA's reliance on Bogatha's affidavit, which indicates that strikers were in Setchell Road. PCASA states that by virtue of this location it necessarily means that Bogatha conceded to having breached the 150 meter perimeter order. Bogatha's affidavit puts NUMSA workers at the scene shown in the video where trucks were stoned. Her affidavit states that Mosiane and others noticed strikers going down Setchell Road and when they caught up with them they were outside DPI Plastics factory and once strikers reached DPI's non-operational site (close to Ubuntu Plastics) trucks started to move through. PCASA further argues that Mosiane's evidence is contradictory since he first states he did not initially see objects being thrown and later concedes to seeing things being thrown – this was done within the 150 meter perimeter in defiance of the order.

[102] In the replying papers PCASA further submits that Johan Pieterse, the Chief Executive Officer of PCASA, who deposed to the affidavits on its behalf, conducted site visits to DPI and had daily telephonic discussions, relating to issues being experienced, with the Managing Director of DPI, Nick De Waal (De Waal). According to De Waal and Sandy Visser, the Group HR Executive of DPI's Holding company, Dawn Ltd, NUMSA members were seen blocking entrances.

PSA Plastics

[103] PCASA provided photographs which depicted the destruction of vehicles and property and a non-striking worker who was injured. Among these images is one depicting a group of people in red t-shirts at a gate and images of the gate lying on the ground. According to PCASA, the damage amounted to hundreds of thousands of Rands.

[104] In its supplementary affidavit, PCASA states that Mariette Burger, the HR Manager, obtained handwritten affidavits from NUMSA members who stated that they were never informed about the interim strike interdict order. Photographs are referred to depicting a few employees in red t-shirts in a facility and some gathered at a gate.

[105] NUMSA argues that the images provided do not reflect that its members were involved in the alleged damage to property. NUMSA relies on the affidavit of Manoko Margaret Hogana (Hogana), a local organiser, and the confirmatory affidavit of Lesley Mooba Sebola (Sebola), the chairperson of the shop stewards committee.

[106] According to Hogana:

106.1 On 24 October 2018 Mabho contacted her to visit the premises at PSA. On arrival at midday, there were no NUMSA members present. Sebola told her that there had been eighteen NUMSA

members sitting under a tree approximately 300 meters away from the facility. They saw a large group of people in red t-shirts approaching and ran away.

106.2 The injured worker in the photograph is Sebola's brother who is a NUMSA member and who did not partake in the strike. Sebola was unable to identify anyone else in the photographs.

[107] In reply, PCASA refers to the affidavit of Sebola wherein he admits that Bushy Maimela, Moses Mabuza, Ndiwahla Mundlozi and Mpho Mamapha were identified as perpetrators in the attack on Edward Mokghala, a non-striker, at PSA Plastics. Criminal cases have been opened against Maimela, Mabuza and Mamapha (all employed at PSA Plastics, Clayville).

AMPA Plastics

[108] PCASA refers to an incident that took place at AMPA plastics on 9 November 2018. They provide photographs of the attack.

[109] According to PCASA, the *modus operandi* of the attack on this facility is similar to other attacks, which include breaking through security gates, attacking and assaulting non-striking employees, throwing stones at the premises and windows, breaking through doors and shutters to gain access to the facility, throwing petrol bombs and torching trucks. The attacks continued without the intervention of NUMSA.

[110] NUMSA states that they have no knowledge of the attacks on the facility and allege that their members at AMPA were exempted from participation in the strike because of an ongoing dispute between itself and the company regarding a lack of written employment contracts.

[111] In reply, PCASA refers to Mabho's affidavit where he denies any evidence linking NUMSA or its members. PCASA say this amounts to a bare denial and is *mala fide*. It also refers to the criminal case number and the employment and identity details of an employee at ALPLA Packaging SA, Zakhele Mbongo, who was identified in a group of ALPLA employees on 25 October 2018 and on 9 November at AMPA. He was witnessed assaulting the General Manager of AMPA, Brett Goldberg.

Bowler Plastics

[112] According to PCASA, protestors, mostly dressed in NUMSA t-shirts, which were inverted so as not to be recognised, stormed and broke open the front security gate and threw stones in the direction of the buildings and security cameras. A guard house was set alight and a CCTV camera was destroyed at the guard house. In support of these submissions photographs and confirmatory affidavits of two managers, Brent Carelse (Carelse) and Marlow Smith (Smith) were provided. The photographs depict a group of people in red t-shirts at a gate on 25 October 2018 at midday. Subsequent photographs depict the gate open and destruction to vehicles and property.

[113] Carelse confirms specific instances of destruction by protestors. He does not however identify the protesters as NUMSA members or specifically identify the members as having worked for Bowler Plastics.

[114] Marlow alleges that he saw a group of around eight people approaching the reception area and witnessed the destruction caused by the stone throwing. He too does not identify the protesters as NUMSA members or specifically identify the members as having worked for Bowler Plastics.

[115] NUMSA contends that it cannot identify any persons in the photographs as its members and suggest that the people in red t-shirts could be members of another trade union or a political party (with similar red attire). NUMSA relies on the affidavit of Maharala and the confirmatory affidavits of Letabo Selowe

(Selowe) and Marcia Silaule (Silaule). Maharala states that he has no knowledge of the incident nor does Selowe and Silaule. On the day in question they were all at Elandsfontein Station. He further denies that the attack was by NUMSA members as he cannot identify anyone in the photographs.

[116] In its replying papers PCASA avers that Mathebula, an employee of ALPLA Packaging and a NUMSA member was identified as having participated in the violent protest at Bowler. He was witnessed as having broken down the front security gate with other protesters in red t-shirts. He was also witnessed throwing stones at trucks and the premises. Photographs and the identity and employment details of Mathebula were referred to. Reference was also made to the affidavit of the Operations Manager of Alpla Packaging, Johannes Doman, who confirms that he personally identified the individuals in the photographs and provided the information to PCASA and SAPS.

Sondor (Sebenza)

[117] PCASA refers to an incident in which two non-striking employees were attacked. This incident was not mentioned in the founding or supplementary papers and was put up in PCASA's replying papers. Reference is made to a criminal case that was opened and the identities of ten NUMSA members suspected of the attack.

[118] Hogana states in her affidavit that there is no direct evidence establishing that the persons identified as suspects were involved in the assault. From her affidavit it also appears that:

118.1 The two ladies who were allegedly assaulted are not identified. NUMSA members have identified one of them from the pictures provided.

118.2 PCASA's attorneys have admitted that video footage relating to the incident cannot be located.

118.3 One of the ten people identified, Edward Khumalo, is not a NUMSA member.

118.4 Several of the persons who are suspects have provided affidavits denying that they were involved.

[119] In my view, there is no evidence to show that NUMSA was involved in, or instigated, the breaches referred to above. Even if PCASA has been able to identify individual NUMSA members who breached the interim strike interdict, this is not sufficient in contempt proceedings to hold NUMSA liable for these breaches. Many of the perpetrators have in any event not been identified or proved to be NUMSA members, and where NUMSA members have been identified as being present, there is insufficient evidence to establish beyond a reasonable doubt that such members perpetrated acts of violence.

Breach of paragraph 4

[120] In terms of paragraph 4 of the interim strike interdict, NUMSA and its officials were required to take all reasonable steps to encourage its members, supporters and followers not to engage in any unlawful conduct.

[121] PCASA submits that NUMSA has not complied with paragraph 4 for the following reasons:

121.1 Although Mabho purports to illustrate how NUMSA communicated the existence of the interim strike interdict to its officials he has not made any allegations to demonstrate that the nature and exigency of the order was explained to its members and protestors.

121.2 Mabho also fails to give evidence of what NUMSA and its officials have in fact done to discourage members from engaging in unlawful conduct. Although he may have instructed officials to ask members not to engage in unlawful conduct, he fails to illustrate what if anything was communicated to the members, supporters and followers.

[122] There are several affidavits filed on behalf of NUMSA which claim compliance with the interim strike interdict. In this regard:

122.1 According to Mabho, on Monday 22 October 2018 (the interdict was issued on Friday 19 October) he sent out an internal communique about the strike in the plastics sector and the interdicts of MPACT and PCASA. The relevant portion of the communique reads as follows:

"The courts seem willing to accept orders that instruct the union to 'publically call on it members to abide by the court" and "do all that is reasonably possible to ensure compliance with the order". The employees love this kind of order because they know that it has the potential of dividing the membership from the union and therefore weakening the union and the strike. The employers don't understand or even care that we are a democratic organisation and worker controlled. So, when we are ordered to do this, we must try to do it in a way that doesn't undermine the union in the eyes of its members"…. "The next trick may involve contempt of court proceedings. We must, therefore, be vigilant. If we are ordered by the courts to do something, then we must do it, and be seen to be doing it. We must proof we have done it. If you don't know how to do it, then you can ask for help". We must protect the union and its members… To protect the union and its members, we should always advise our members, and be seen to be advising them, to act lawfully. Let us be militant, but let us also be disciplined. "We urge you to ensure that you communicate this message to members".

122.2 Mabho further states that NUMSA officials communicated the interim strike interdict by email to national office bearers including the President and Vice presidents, the Treasurer, the General Secretary and Deputy General Secretary.

122.3 On the same day picketing rules were distributed which reiterated, among other things, that the purpose of the picket, which was to be facilitated by marshals, was to be carried out in a peaceful demonstration, lawfully and without weapons. Members were to refrain from violent action and damage to property.

122.4 In response to an email received from PCASA on 22 October 2018, NUMSA's attorney of record emailed PCASA's attorney of record a letter in which it stated that it informed PCASA that it had distributed the strike interdict order widely via email.

122.5 According to Mabho, it was however later discovered that he had in fact widely distributed MPACT's strike interdict order and not PCASA's strike interdict order. He further submits that *"this was a pure oversight on my part".* Further, that at the time of the oversight, he was inundated with internal queries, negotiations and allegations coming from PCASA. Mabho says that in any event, the order was widely distributed on 23 October 2018 by Pieterse and himself.

122.6 In clarification of the position, and in response to confusion by certain members of NUMSA as to whether the strike interdict was applicable to them, Mabho sent out an email stating that *"It has come to our attention that some comrades think that the Court order of 19 October 2018 only applies to the companies referred to in the heading of the court order. Please note that it applies to all PCASA members, I attach a copy of the court order."*

122.7 Mabho also states that he had meetings with regional organisers and other officials in which he emphasised the need to ensure compliance with the court order and the need to ensure peaceful and lawful strike activity. He further states that in preparation for a negotiations meeting on 27 and 28 October 2018 he spoke to officials at length about these matters. After a committee meeting of the MEIBC on 6 November 2018 he met with NUMSA's representatives at the MEIBC meeting and discussed the matter with them too. Maharala confirms this in his affidavit. Mabho states that he did the same at numerous internal NUMSA meetings.

122.8 There was further email communication between PCASA and NUMSA's attorneys on 23 and 24 October 2018 regarding non-compliance with the interim strike interdict wherein NUMSA denied that it had not made any effort to avert alleged unlawful activity.

122.9 In an email on 25 October 2018 between Mabho and Vuyo Lufele (Lufele), a NUMSA official, regarding MPACT Cape Town, Mabho urged Lufele to *"ask our members to always refrain from any unlawful acts."* Copied into this email were a number of other NUMSA officials, employees and managers.

122.10 Thsepho Mokhele, a regional organiser at NUMSA in the Free State, confirms that he notified workers of the court order and the consequences of the order.

122.11 Joseph Mosia, a regional education officer with NUMSA in the Free State and the Northern Cape, confirms that he visited Alpla in Harrismith. On two occasions he discussed the order, its nature, import and extent with the workers who were present. This is further confirmed by two other shop stewards (Chere Tshabalala and Jacob Kheswa).

122.12 Batshegi Soaratlhe, an employee of Alpla Denver, and a member of the shop stewards committee, confirms that a number of NUMSA officials (she identifies seven) addressed workers in Elandsfontein and advised them to act peacefully and lawfully.

122.13 Hogana, a local organiser of NUMSA, stated that she regularly visited workers at PSA Plastics alongside Sebola, the chairperson of the shop stewards committee at PSA Plastics. At these meetings she would speak with workers about the need to ensure that pickets were peaceful, that workers should not prevent ingress and egress of cars and trucks; that workers who continue to work should not be harmed and NUMSA members should not carry dangerous weapons. She visited other sites and repeated the above message. Sebola informed her that Frans Mathega, a local organiser for NUMSA, had done the same. Sebola and Charlotte Makholwa, chairperson of the shop stewards committee of Sondor Sebenza, Simon Morune an employee of Plaslope and a NUMSA member, confirm the contents of Hogana's affidavit.

122.14 Andre Hicks, a local organiser of NUMSA in Bellville states that he told workers at Peninsula Packaging to remain focussed on the objectives of the strike and not to conduct themselves in any way that would justify disciplinary action being taken against them and to behave in a peaceful and lawful manner.

122.15 Rashid Caroulus, an employee of Peninsula Packaging (Cape Town) and a shop steward, states that he conveyed the message to workers to conduct themselves peacefully during the strike and persuaded them to act in a disciplined manner.

122.16 Mzamo Effort Khoza (Khoza), a union official, stated that on Monday 22 October he publicly communicated the contents of the order to members of NUMSA engaged in the strike in Isipingo. He

requested that members abide by the order and act lawfully. He repeated this admonition on several occasions and says that he has done all in his power to ensure that the strike is lawful. He also gave his cellular number to SAPS in order for them to contact him if there was any unlawful conduct so that he could assist in ensuring that the strike was conducted lawfully.

122.17 Maxwell Hlongwane, an employee of Swan Plastics (Pty) Ltd and a shop steward, confirms the affidavit of Khoza and states that on Monday 22 October 2018, when Khoza addressed workers about the content of the court order, he expressly called on NUMSA members to abide by the content of the court order and to act lawfully.

122.18 Lizwi Mthombeni (Mthombeni), an employee of Swan Plastics (Pty) Ltd and a NUMSA shop steward, confirms the contents of Khoza's affidavit and states that Khoza expressly called on NUMSA members to comply with the court order and to act lawfully. Mthombeni further adds that he, at all times, prevailed on members to act lawfully and in accordance with the contents of the court order. He states that he has also been of assistance to SAPS to ensure that members utilize the shopping complex opposite Barrier Film Converters without breaching the interdict.

122.19 Maharala confirms that Tshambuluka addressed workers outside Bowler Plastics premises and told them, among other things, that workers must conduct themselves in a peaceful manner and that they should not do unlawful things.

122.20 On 22 October 2018, on instruction from Xoli Takalo, a local organiser of NUMSA, Maharala informed workers at Bowler Plastics of the Court Order, including the 150-meter perimeter and the need to comply with the order. Silaule and Selowe (both

employees of Bowler Plastics and members of the shop stewards committee of NUMSA at Bowler) confirm the affidavit of Maharala.

122.21 Bogatha states that Mosiane confirms in his affidavit, that besides herself, a number of union officials have, from time to time, visited workers at the sites in Roodekop and Wadeville and during these visits the officials have always emphasised (among other things) the need to have peaceful protest action or pickets. Bogatha says that she also visited the picketers on an almost daily basis.

[123] The onus is on PCASA to prove beyond a reasonable doubt that NUMSA has not complied with the interim strike interdict, including paragraph 4. This means that PCASA had to show that NUMSA did not take reasonable steps to encourage its members, supporters and followers not to engage in any unlawful conduct. In my view, it has failed to do so. At most, PCASA referred to statements, as opposed to affidavits, by a few "NUMSA members" who say that they were not informed about the interdict.

[124] In any event, NUMSA has illustrated, at least with reference to the workplaces where most of the problems occurred, that they communicated the order. Once again, it cannot be expected of NUMSA and its officials to show what steps it took to encourage its members, supporters and followers not to engage in any unlawful conduct in the absence of PCASA being able to show where NUMSA failed to do so. Given the evidence put up by NUMSA of its compliance, even if it falls short of what was required by paragraph 4, as contended by PCASA, I cannot find that any non-compliance was wilful or *mala fide*.

[125] As referred to earlier, PCASA did not submit any written or oral arguments in support of the above breaches. I have no doubt that if PCASA believed that there was a case for NUMSA to answer in respect of the alleged breaches it would have advanced the necessary arguments. Its decision not to do so is telling.

[126] In the circumstances, I must conclude that it has not been established that NUMSA can be held in contempt of the interim strike interdict order. It is simply not possible to reach this conclusion given the high threshold to prove contempt.

[127] My conclusion in no way means that I condone the heinous acts of violence, intimidation, torching and destruction of property that accompanied this strike. It is also definitely not cause for NUMSA to regard itself as victorious. There are no winners in this sad saga. What remains as fact is that the strike was accompanied by rampant violence resulting in non-striking workers ending up in ICU and at least one of them beaten nearly to death. Despite its denials, it is simply not possible given all of the incidents of violence, intimidation and destruction, that NUMSA members played no role in perpetrating these acts and that it is the work of criminals, other unions or political parties. This type of conduct is unacceptable and for too long has been a prominent feature of many strikes in South Africa, despite the introduction of the LRA in 1995. It can only be hoped that NUMSA, as a major trade union and participant in the strike in question, has invested as much resources, financial and otherwise, in trying to establish if any of its members were involved in the criminal conduct, as it must have invested in respect of this litigation. This is particularly so as NUMSA repeatedly stated in its papers that such conduct is contrary to its policies.

[128] Senior leaders of NUMSA, such as Jim and Mabho, should also be mindful of what they say to their members in circumstances where their members may be disillusioned that their protected strike is not having the desired effect and support for the strike is waning. Responsible leadership is required.

Costs

[129] I am of the view that no cost order should be made in this matter. The issues raised in this case are of substantial importance and neither party can

be faulted for launching their respective applications. There is therefore no basis for burdening either party with a cost order.

[130] In the circumstances, I make the following order:

Order:

1. The contempt application is dismissed.

2. The counter-application is dismissed.

3. There is no order as to costs.

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BN Conradie

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate Anton Myburgh SC

Instructed by: Anton Bakker Attorneys.

First Respondent: Advocate Daniel Berger SC

Instructed by: Haffagee Roskam Savage Attorneys.