THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. J 2122/09

In the matter between:

CLABO BRAAIHOENDER CC
T/A KFC MOOKGOPHONG **Applicant**

And

CARE CENTRE, CATERING, RETAIL AND
ALLIED WORKERS UNION OF SOUTH AFRICA **1ST Respondent**

2ND TO FURTHER RESPONDENTS
(AS PER ANNEXURE "AJO1") **2ND TO FURTHER RESPONDENTS**

JUDGMENT

VAN NIEKERK J

[1] This is the return date of *rules nisi* issued on 2 October 2009 and 7 October 2009 respectively. In terms of the rule issued on 2 October 2009, the respondents were called upon to show cause why a final order should not be made interdicting them from engaging *inter alia* in various acts of misconduct, including intimidation, interference with suppliers and customers, harassment, assault, and obstructing entrance to and egress from the applicant's premises. The Court ordered that the *rule nisi* operate as an interim order pending the return date. The second *rule nisi*, issued by Molahlehi J, reads as follows:

> *"It is ordered that:*
>
> *1. The 1st respondent issues a public statement calling upon the 2nd to further respondents (as identified in the list annexed as Annexure "AJO1") to comply with the Court*

Order granted by His Lordship Mr. Justice van Niekerk on 2 October 2009 before close of business on 8 October 2009;

2. *A rule nisi, with return date Friday 13 November 2009 at 10h00, be issued calling upon the 1st and 2nd to further respondents (as identified in the list annexed as Annexure "AJO1") to show cause, if any, why a final order should not be granted in the following terms:*

2.1 *The officials of the 1st and 2nd to Further Respondents (as identified in the list annexed as Annexure "AJO1") be committed to prison for contempt of Court for a period of ninety (90) days;*

2.2 *The officer commanding SAPS, Mookgophong be authorised and directed to detain any one or more of the officials of the 1st Respondent or the 2nd to Further Respondents (as identified in the list annexed as Annexure "AJO1") who contravenes the Court Order granted by His Lordship Mr. Justice van Niekerk on 2 October 2009 and to transport them to a correctional facility;*

2.3 *The 1st Respondent be ordered to pay the costs of this application on the scale as between attorney and client.*

2.4 *The order in prayers 2.1, 2.2 and 2.3 to operate as an interim order, pending the return date of the rule nisi which is returnable on Friday 13 November 2009 at 10H00…"*

[2] The applicant opposes only the confirmation of the rule issued on 7 October 2009.

[3] In essence, the respondents contend that for the applicant to have established civil contempt, it was necessary for the applicant to prove the existence of the Court order, service of the order on the respondents and non-compliance with the order, and that the applicant failed to prove these elements. Prior to further considering this contention, some factual background is necessary. As recorded above, this Court granted an interim order on 2 October 2007, *inter alia* interdicting the first respondent's members from committing acts of misconduct during the course of a strike. The applicant avers that on the same afternoon, a copy of the order was delivered to the station commander at the local police station. At about 17h10, the applicant attempted to hand copies of the order to a shop steward and about 15 striking employees, who ignored those attempting to hand out the order and who walked away. At about 19h00, a copy of the order was handed personally to the general secretary of the first respondent, a Mr. Isaac Mosweu. At 08h45 the next morning, the applicant's personnel manager, a Mr. Oberholzer, read out the Order, using a megaphone. The order was translated to a group of striking employees. The Order was also attached to a notice board at the workplace. The group of striking employees was joined by other persons, not employees of the applicant, who shouted threats directed at employees who had continued working. The striking employees harassed and intimidated customers and other employees. Customers were prevented from entering the store. At 13h20 Mosweu held a meeting with the striking employees, after which he asked for a meeting on 5 October 2009. The striking employees did not cease their actions after the meeting. Their conduct continued for the duration of 4 October. At a meeting held at 9h00 on 5 October, Mosweu agreed with a representative of the applicant's management that the union and its members would respect and adhere to the picketing rules and the Court order. This did not happen, and the striking employees continued

to act in contravention of the court order. The police refused to intervene despite requests for them to do so.

[4] These averments are disputed in the answering affidavit filed by the respondents, a document that comprises little more than a bald and implausible denials. It is not necessary to canvass the dispute of fact generated on the papers – this matter stands to be resolved on a different basis.

[5] Contempt proceedings permit a private litigant who has obtained a Court order requiring an opponent to do or not do something to approach the Court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of Court, and imposing a sanction. (*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326, at para [6] of the judgment). It is incumbent on an applicant in contempt proceedings to prove the existence of the order, service on the accused and non-compliance (*Fakie NO* supra). In the proceedings launched on 7 October 2009, the relief sought was in the form of a *rule nisi*, with certain of the prayers (including that which committed the individual respondents to prison for contempt) to operate as an interim order pending the return date. In other words, what the applicant sought was the immediate committal of the individual respondents, pending the return date. I have my doubts as to whether this is competent. The applicant was in effect seeking a final order of committal for contempt against all of the individual respondents. I fail to appreciate why the applicant did not simply seek to have those respondents that it had identified as having acted in breach of the order granted on 2 October 2009 committed, making out a case based on the three requisites referred to above against each of them. If the applicant intended, by seeking an interim order, some degree of relaxation in the application of the requisites for a finding of contempt, this was misguided. In *Fakie NO*, the Supreme Court of Appeal emphasised the role of liberty, and in particular, the basic tenet that a person should not be deprived of liberty, even if that deprivation is to constrain

compliance with a Court order, if reasonable doubt exists about the essentials. Inherent in this approach is a right for the accused to furnish evidence raising a reasonable doubt as to whether non-compliance was willful and *mala fide*. To the extent that the *rule nisi* issued on 7 October 2009 contemplated the committal of any of the individual respondents in the absence of their being heard, that Order, in my view, should not have been granted.

[6] In any event, the founding affidavit failed to identify which individual respondents had acted in breach of the Order granted on 2 October 2009, or the nature of the misconduct committed by identified individuals that was alleged to constitute a breach of the Order. The founding affidavit refers only to 'a group of striking employees' The affidavit also failed to identify those individual respondents upon whom the order had been served, and whether the method of service was one contemplated by the terms of the order. For these reasons, those parts of the Order that contemplated committal for contempt should not have been granted, and to that extent, the orders contained in paragraphs 2.1 and 2.2 of the rule stand to be discharged.

[7] However, that is not the end of the matter. Paragraph 1 of the order granted on 7 October 2009 required the first respondent to issue a public statement calling upon the second to further respondents to comply with the order granted on 2 October 2009. There is no indication on the papers before me that the first respondent complied with this part of the order, nor did I understand Mr. Dlamini, who appeared for the respondents, to contend that it had. In these circumstances, the first respondent appears to have flouted an order of this Court, and in these circumstances, it must be afforded an opportunity to appear before this Court to answer for what appears to be its contempt.

[8] In regard to costs, there is no reason why the respondents should not be liable for the costs of the proceedings on 2 October 2009 – they

have properly conceded that the issuing of the *rule nisi* was proper and appropriate. In regard to the proceedings on 7 October 2009, because a substantial part of the *rule nisi* stands to be discharged for the reasons stated above, there ought to be no order as to costs.

I accordingly make the following order:

1. The *rule nisi* issued on 2 October 2009 is confirmed, with costs.
2. The *rule nisi* issued on 7 October 2007 is discharged, with no order as to costs.
3. The general secretary of the applicant, Mr. Isaac Mosweu, is ordered to appear in this Court on 26 January 2010 at 10h00 to show cause why this Court should not impose an appropriate sanction for the first respondent's contempt of Court by failing to comply with paragraph 1 of the Order granted by this Court on 7 October 2009.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 13 November 2009
Date of judgment: 14 January 2010

Appearances:

For the applicant: Adv H Gerber
Instructed by: Borman & Mostert Attorneys

For the respondent: Adv Dlamini
Instructed by: Selolo Ramashile Attorneys