

Right to strike, but what about responsibility during a strike?

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14 Mar 2019

South African industrial action has become synonymous with violent, unlawful conduct, as was discussed in the recent case of *Association of Mineworkers & Construction Union & Others v KPMM Road & Earthworks* (31 October 2018).



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KPMM successfully approached the Labour Court for an interdict against the employees' conduct but the employees failed to comply with the order, resulting in contempt proceedings against them. Having found that the employees acted with common purpose and that the Union failed to take "all reasonable steps to prevent and/or stop the unlawful conduct", the Labour Court upheld the contempt order against individual employees and the Union and a suspended fine of R1 million was made against the Union.

The Union and its members appealed the contempt order. The Labour Appeal Court (LAC) echoed the sentiments of the *Makhubela v S* case, that common purpose is proven where one can show that the

“ individual employee was present at the scene where the violence was committed. That individual must have been aware of the assault on the victim. The individual must have intended to have made common cause with those who actually perpetrated the assault, that is he/she must have manifested some common purpose with the perpetrators of the assault by himself or herself performing some act of association with the conduct of the others. Finally, the individual must have possessed the requisite mens rea. ”

The court found that KPMM did not satisfy any of the above requirements and therefore the order of contempt against the employees was set aside.

Turning to the Union's contempt the LAC confirmed that KPMM had to prove beyond reasonable doubt that the non-compliance was wilful and *mala fide*. This test is higher than usual in civil matters, because of the adverse effect of punitive measures that arise from contempt proceedings. The court found that KPMM had failed to prove that the non-compliance was wilful and *mala fide* and the appeal was upheld.

Employers are urged, if they wish to obtain relief against a Union in circumstances similar to that of the above dispute, to ensure that the notice of motion in the application prepared by their legal advisor for an interdict clearly indicates the nature of the unlawful actions of the employees and also provides details of such actions known to the Union and of what steps the Union ought to have taken to prevent or stop the illegal activities.



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