

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA47/2022

In the matter between:

CHRISTIAAN FREDERICH HOOGENDYK
(As a member of **MAESTRO HOUSING**)

First Appellant

JOHANNES HOOGENDYK
(As a member of **MAESTRO HOUSING**)

Second Appellant

and

HARRY ARTHUR GUNN

Respondent

Heard: 04 May 2023

Delivered: 17 August 2023

Coram: Musi JA, Savage AJA et Gqamana AJA

JUDGMENT

GQAMANA AJA

[1] This appeal, with the leave of the Court *a quo* is against the decision of the Labour Court (per *Moshoana J*) which held that the appellants were in contempt of the court order issued by Steenkamp J, on 26 July 2015 (*Steenkamp order*). The aforementioned order was issued against the appellants' *nominee officio* as Directors of SA Timber (Pty) Ltd (SA Timber).

- [2] The crisp issue in this appeal is whether the appellants, in their capacities as Directors of SA Timber, were guilty of contempt of court for failure to comply with the order of *Steenkamp J* referred to in paragraph 1 above. In the contempt application itself, the appellants were cited in their capacities as members of Maestro Housing (Pty) Ltd (Maestro Housing) and not as directors of SA Timber.
- [3] The facts upon which this appeal has to be decided can be succinctly summarised as follows: the respondent, Mr Gunn was employed by Maestro Housing as a Sales Representative with effect from 28 February 2011. His employment with Maestro Housing was short-lived as he was dismissed on 22 July 2011. Dissatisfied with his dismissal, he referred an unfair dismissal dispute for conciliation in terms of section 191(1)(a) of the Labour Relations Act¹ (LRA), to the Commission for Conciliation, Mediation and Arbitration (CCMA). That dispute remained unresolved at conciliation and accordingly, it was referred to arbitration in terms of section 191(5) of the LRA. Subsequent to the arbitration, the Commissioner issued an arbitration award in favour of Mr Gunn and ordered that he be reinstated to his original position and also be paid an amount of R33 500.00 as backpay. Curiously, the award was issued against SA Timber although the employer was Maestro Housing.
- [4] After the award was issued, Maestro Housing launched a review application in the Labour Court seeking an order that the aforementioned award be reviewed and set aside. The review application was dismissed by the Labour Court.
- [5] Thereafter, Maestro Housing filed an application for leave to appeal, which was also unsuccessful.
- [6] Mr Gunn, in pursuit of his victory, launched an application in the Labour Court for an order that the award be made an order of Court. Maestro Housing was cited as the respondent in that application.

¹ Act 66 of 1995, as amended.

- [7] On 29 July 2015, the award was made an order of court by the Labour Court. Almost a year later, on 15 April 2016, the Sheriff attempted to serve the said order on Maestro Housing at its premises in Welkom, but was informed by Mr Hoogendyk, a member of SA Timber that Maestro Housing had since relocated to Johannesburg.
- [8] On 2 August 2016, Mr Gunn received payment from Maestro Housing as ordered in terms of the award.
- [9] On 1 October 2019, Mr Gunn reported for duty at SA Timber in Welkom but was also advised that Maestro Housing's offices were in Johannesburg and he should liaise and discuss his situation with Maestro Housing, as his employer.
- [10] Instead of tendering his services at Maestro Housing as advised, Mr Gunn launched a contempt of court application in the Labour Court against both SA Timber and Maestro Housing.
- [11] On 28 November 2019, the application was withdrawn against Maestro Housing and curiously, Mr Gunn proceeded with the application only against SA Timber. A year later, on 20 November 2020, the contempt application against SA Timber was dismissed by the Labour Court.
- [12] Even before the ink was dry and within seven days of the date on which the contempt application was dismissed on 27 November 2020, Mr Gunn filed another contempt application wherein he cited the appellants in their capacities as members of Maestro Housing.
- [13] On 12 February 2021, that application was struck off the roll. Three months later, on 7 May 2021, inexplicably the same contempt application was re-enrolled.

[14] On 15 October 2021, a *rule nisi* was issued calling upon the appellants to appear in court or to file an affidavit and show cause why they should not be found guilty of contempt of court.

[15] On the return date, the matter was argued before Moshoana J. The Court *a quo* succinctly summarised the principal submissions which were advanced on behalf of the appellants as follows:

‘The principal submissions made by Mr Roux are that (a) the order allegedly not complied with was made against Maestro and not SA Timbers; (b) an attempt to vary the order of Steenkamp J was dismissed on 19 July 2019 by the learned Acting Justice Khosa; (c) the contempt application against SA Timber was dismissed on 20 November 2020; and (d) Gunn failed to tender his services within a reasonable time and on authority of *Numsa and another v Aircycle Engineering CC*, the present application must be dismissed with costs.’²

[16] Having heard argument, the Court *a quo* rejected the appellants’ submission that the order by Steenkamp J was made against Maestro Housing and not SA Timber. The Court *a quo* found that:

‘It is true that *ex facie* the written Court order, there appears Gunn and Maestro. However, what the document records as ordered are that the arbitration award of Commissioner Naniso was made an order of Court. It is without a shadow of doubt that Naniso ordered SA Timbers and not Maestro to reinstate Gunn.’³

[17] In light thereof, the Court *a quo* found that because SA Timber is a legal entity, it is incapable of complying with the order and therefore that the appellants as Directors of SA Timber were obliged to ensure compliance with the court

² [2023] ZALCJHB 130; [2023] 8 BLLR 787 (LC) at para 11.

³ *Ibid* at para 13.

order but they had failed to do so. Therefore, they were guilty of contempt of court.

[18] It is trite that, for an applicant to succeed in a contempt application s/he must show that:

18.1 an order was granted against the respondent(s);

18.2 the respondent was either served with the order or informed of the existence of such order, and

18.3 the respondent has either disobeyed the order or neglected to comply with it.⁴

[19] Once it is proven that an order exists and was served on a litigant who did not comply therewith, contempt will have been established beyond reasonable doubt unless the contemnor establishes a reasonable doubt relating to willfulness and *mala fides*.⁵

[20] The crucial issue herein as I see it, is whether there was an existing order against SA Timber. Put differently, was SA Timber a party cited in the *Steenkamp* order?

[21] It is undisputed that the party which was cited as the respondent in the application before *Steenkamp* J was Maestro Housing and not SA Timber. It, therefore, follows that there was no existing court order against SA Timber. The very first requirement for contempt of court was therefore not proved. Mr Gunn was never employed by SA Timber and his contract of employment attests to that. Further and on his own version, Mr Gunn accepted payment from Maestro Housing arising from the same award. In addition, when the sheriff attempted to serve the order at SA Timber, he was advised that

⁴ See: *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 11.

⁵ See: *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and others* [2021] ZACC 18; (2021) 5 SA 327 (CC) at para 37.

Maestro Housing had relocated to Johannesburg, a fact of which Mr Gunn was aware. It matters not that at one point or another SA Timber and Maestro Housing shared offices. The two companies remain separate legal entities with different Directors; the second appellant is not a Director of Maestro Housing, having resigned as such before the award was made an order of court by Steenkamp J. The contempt application should have been dismissed on this basis alone.

[22] In the circumstances, the appeal ought to succeed. The interests of justice dictate that there should be no order as to costs, particularly since the respondent, Mr Gunn, had an order in his favour which he felt prudent to enforce.

[23] In the result, the following order is issued:

Order

1. The appeal is upheld with no order as to costs.
2. The order of the court *a quo* is set aside and substituted with the following order:
 - “a. The contempt of court application is dismissed.
 - b. Each party to pay his own costs.”

N GQAMANA

Musi JA et Savage AJA concur.

APPEARANCES:

For the Appellants:

Advocate LA Roux

Instructed by Goldberg Attorneys

For the Respondent:

Mr CDM Kruger of Kruger Venter Attorneys