

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1329/23

In the matter between:

KERRY SHILLAW

Applicant

and

ICUBED SALES (PTY) LTD

First Respondent

DEEPAK LOGANATHAN
Respondent

Second

Heard: 25 January 2024

Delivered: 12 March 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be on 12 March 2024.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant approached this Court for an order to find the First Respondent (ICubed) and the Second Respondent (Respondent) guilty of contempt of Court. The

Respondent is the sole director of ICubed. He opposed the application and filed an explanatory affidavit.

Brief history

[2] The Applicant was employed by ICubed as chief executive officer (CEO) in August 2021 until she was dismissed on 1 February 2022. The Applicant subsequently referred an unfair dismissal dispute to the CCMA and on 5 August 2022 an arbitration award under case number GAJB 4013 was issued in her favour, ordering ICubed to pay compensation in the sum of R 1 740 000.

[3] ICubed subsequently filed an application for review under case number JR 1847/2022. During January 2023, the arbitration award was certified and the Applicant obtained a writ of execution. On 22 June 2023, the sheriff attended at the premises of ICubed and attached various assets. However, on 26 June 2023, the Respondent's attorneys indicated that the attached assets belonged to a sister company of ICubed.

[4] On 26 July 2023, the Applicant's attorneys requested security from ICubed, as provided for in section 145(7) and (8)(b) of the Labour Relations Act¹ (LRA) and were informed by its attorneys that the Respondent was considering placing ICubed into liquidation because it was "*heavily indebted to its creditors*".

[5] On 3 August 2023, the Applicant approached this Court on an urgent basis, seeking an order that ICubed be ordered to furnish security, within 48 hours of the order being made, in the sum of R 2 000 000, as provided for in section 145 of the LRA and that ICubed and/or its directors/representatives/shareholders/ employees be interdicted from placing ICubed into provisional/final liquidation and or business rescue, prior to the furnishing of security.

[6] The Applicant's case was that the review application was filed solely to frustrate her claim and to avoid paying her. She further submitted that no proper

¹ Act 66 of 1995, as amended.

security was furnished and in the review application the Respondent stated that at the end of the 2021/2022 financial year, ICubed recorded losses in excess of R 6 million. She expressed a real fear that the Respondent would move the assets of ICubed, that he would contrive the financial state of ICubed in order to avoid paying out the compensation awarded to her and that ICubed would be placed into liquidation or business rescue.

[7] The urgent application was enrolled for hearing on 10 August 2023, when the following order was issued:

‘1. The non-compliance with the ordinary Rules of Court, including the provisions of rule 7, and the manner of service is condoned and the matter is enrolled and heard on an urgent basis in terms of rule 8, and further the applicant’s deviations from the directives by this Court are condoned.

2. The respondent is ordered to furnish security in the sum of R2 000 000.00 (Two Million Rand) in terms of section 145(7) read with section 145(8)(b) of the Labour Relations Act 66 of 1995, by:

2.1 Furnishing a valid and irrevocable security bond issued by a duly authorised and registered Financial Services Provider; or

2.2. By payment of security into the trust account of the applicant’s attorneys, namely Ian Levitt Attorneys, with Trust Account details as follows:

Ian Levitt Attorneys Trust Account

Bank: ABSA

ABSA Account no: 40 – 4625 – 3714

Branch: [...]

Branch name: [...]

Ref: Security MAT 3938

Within 48 hours of this order being made, failing which the respondent’s application for review under case number JR 1874/2022 against the award of the second respondent dated 5 August 2022, shall automatically be dismissed with costs.

3. The respondent and/or its directors and/or representatives and/or shareholders and/or employees are interdicted from placing the respondent into provisional and/or final liquidation and/or business rescue, prior to the furnishing of security as provided for in paragraph 2 *supra*.

4. The costs of this application are to be paid by the respondent on the attorney and client scale.'

[8] On 22 September 2023, the Applicant filed a contempt of court application because the Respondent failed to comply with the terms of the Court order of 10 August 2023. The contempt of Court application was heard on 25 January 2024.

Contempt of Court: general principles

[9] In *Bruckner v Department of Health and others*², the Court dealt with the requirements for contempt and it was held that:

'It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:

- (a) that the order was granted against the respondent;
- (b) that the respondent was either served with the order or informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and
- (c) that the respondent is in wilful default and mala fide disobedience of the order.'

[10] In *Anglo American Platinum Ltd and another v Association of Mineworkers and Construction Union and others*³, the Court has held that:

'The principles applicable in an application such as the present are well-established. In *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt committal is a 'peculiar amalgam' since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see para 8 of the judgment). The court summarized the position as follows at para 42:

"To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for

² (2003) 24 ILJ 2289 (LC) at para 26.

³ [2014] ZALCJHB 60; (2014) 35 ILJ 2832 (LC) at para 4.

securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[11] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*⁴ (*Matjhabeng*), the Constitutional Court confirmed the requisites for contempt of court as follows:

'I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*. It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof – beyond reasonable doubt – was applicable.'

[12] The Applicant has to prove the aforesaid requisites beyond reasonable doubt and I will deal with them in turn.

[13] Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden to adduce evidence to rebut the inference that the non-compliance was not wilful and *mala fide*. If the respondent fails to advance evidence that establishes a reasonable doubt as to whether non-

⁴ [2017] ZACC 35; 2017 (11) BCLR 1408 (CC) at para 73.

compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.⁵

[14] To establish non-compliance requires more than a failure to comply with the order. In *Matjhabeng*,⁶ the Constitutional Court affirmed that contempt of court does not consist of mere disobedience of a court order, but of “*contumacious disrespect for judicial authority*”. The requirement of wilfulness and *mala fides* means that contempt is committed not by a mere disregard of the court order, but by the demonstration of a deliberate and intentional violation of the court’s dignity, repute or authority.⁷

Analysis

Existence of the order and service

[15] *In casu*, the existence of the Court order is not disputed.

[16] Service of the Court order is disputed.

[17] The Applicant’s version is that, after judgment was handed down on 10 August 2023, a copy of the Court order was served electronically upon the Respondent’s attorneys of record, at 13h56. The Court order was physically served on ICubed on 23 August 2023 and it was (attempted) served on the Respondent via the sheriff on 1 September 2023.

[18] The Respondent’s version is that in the urgent application brought under case number JR 1874/2022, he was not cited as a respondent, nor was any of ICubed’s employees or shareholders. Despite not being cited, a Court order was granted to the effect that ICubed and/or its directors/representatives/ shareholders/employees be interdicted from placing ICubed into provisional/ final liquidation and or business rescue, prior to the furnishing of security.

⁵ *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 41.

⁶ *Matjhabeng* supra at para 65.

⁷ *Dibakoane NO v Van den Bos and Others; Van den Bos and Others v Gugulethu and Others* [2021] ZAGPJHC 652 (17 August 2021) at para 29.5.

[19] The Respondent explained that upon receipt of the urgent application, he contacted ICubed's attorneys and he was advised by Rams Attorneys *inter alia* that if the company was insolvent, the shareholders may pass a resolution to place it in liquidation, that placing a company in liquidation is a right afforded to shareholders in terms of the provisions of the Companies Act⁸ and that a director was obliged to place a company in business rescue if the company is financially distressed.

[20] On considering the advice provided, the Respondent took a decision to place ICubed in liquidation as it was inevitable that ICubed would be placed in liquidation. On 7 August 2023, a special resolution was passed that the "*company be wound up by way of creditors' voluntary winding up*". The Respondent's attorneys transmitted the voluntary liquidation documents to the Companies and Intellectual Property Commission (CIPC) on 10 August 2023.

[21] The Respondent denies that he was aware of the Court order, as it was not served on him until 1 September 2023 and that he cannot be in contempt of the court.

[22] The Applicant has to show beyond reasonable doubt that the Court order of 10 August 2023 was duly served on or brought to the notice of the Respondent. The Applicant submitted that "*The respondents, despite its legal representative being fully aware of the court order, proceeded in their attempt to place the company in liquidation, prior to the applicant's urgent application being heard on 10 August 2023*". There is a number of difficulties with the Applicant's averment. On the Applicant's own version, the Court order was emailed to Vilikazi Attorneys at 13h56 on 10 August 2023 and to this day the Applicant's legal representatives were unable to confirm receipt thereof with Vilikazi Attorneys. This does not show, beyond a reasonable doubt, that the Respondents' legal representatives were fully aware of the Court order, nor does it constitute service on the Respondent and his knowledge of the Court order cannot be inferred.

⁸ Act 71 of 2008, as amended.

[23] The Court order was served by the sheriff on 1 September 2023 and applying the high standard of beyond reasonable doubt, this Court is not in a position to accept that the Court order was served on the Respondent before 1 September 2023 and there is no evidence to show that he was indeed notified about it before the said date. An email sent to Vilikazi Attorneys on 10 August 2023 and physical service on ICubed on 23 August 2023 is not sufficient to constitute proper service on the Respondent or to show that the Respondent was aware of the Court order.

[24] The Applicant did not prove beyond reasonable doubt that the Court order was served on ICubed before 23 August 2023 and on the Respondent prior to 1 September 2023.

Non-compliance with the Court order

[25] The next consideration is whether the Respondents are in wilful and *mala fide* disobedience of the Court order, which the Applicant must prove beyond a reasonable doubt.

[26] The Applicant's case is that the Respondents, despite its legal representative being fully aware of the court order, proceeded in their attempt to place the company in liquidation, prior to the Applicant's urgent application being heard on 10 August 2023. However, the liquidation was only with effect from 14 August 2023, well after the Court order was granted and served.

[27] The Respondent's case is that the resolution to place ICubed in liquidation was passed on 7 August 2023 and the liquidation commenced on 10 August 2023, prior to the Court order being granted or served on him.

[28] The winding up or liquidation of a company involves the closing and dissolution of the company through the recovery and sale of its assets and the payment of its outstanding debts and shareholders. The winding up or liquidation of

companies is regulated by two pieces of legislation, the 2008 Companies Act (2008 Act) and, to an extent, the now-since-repealed 1973 Companies Act⁹.

[29] Section 79 of the 2008 Act provides that a solvent company may be dissolved either by (i) voluntary winding-up initiated by the company and conducted either by the company itself (or its creditors) as determined by a special resolution of the company, or (ii) by way of court order. The High Court in *Furniture Bargaining Council v AXZS Industries (Pty) Ltd trading as Don Elly Enterprises*¹⁰ confirmed that the voluntary winding up of a company does not commence until the special resolution has been filed with the CIPC.

[30] The voluntary winding up of a company begins when the resolution of the company has been filed and *in casu*, this happened on 10 August 2023.

[31] I cannot find that the Respondents acted in wilful and *mala fide* disobedience of the Court order. The Respondents commenced with the process of voluntary liquidation prior to the existence of a Court order which interdicted such a process and by the time when the resolution was filed on 10 August 2023, the Respondents were not served with the Court order. They cannot be in wilful default of a Court order they were not aware of.

[32] I accept that the Respondent was aware by 3 August 2023 of the fact that the Applicant had approached this Court for urgent relief and that the relief, if granted, would include an order interdicting him from placing ICubed into liquidation or business rescue. I further accept that the resolution that was subsequently passed on 7 August 2023 and the filing thereof with the CIPC on 10 August 2023, could be attempts to avoid paying the Applicant the compensation awarded to her. However deplorable and calculated this might be, it does not constitute contempt of Court. Knowledge of an application, yet to be decided, does not constitute contempt of Court and the Respondents' conduct, prior to the obtaining of the Court order, was not interdicted and restrained and pre-empting what the Court would do, also does not constitute contempt.

⁹ Act 61 of 1973 (repealed).

¹⁰ [2020] 1 All SA 391 (GJ) at para 49.

[33] For the Applicant *in casu* to succeed with its contempt of Court application, she has to show, beyond a reasonable doubt, that the Respondent is in wilful and *mala fide* disobedience of the Court order of 10 August 2023. The mere fact that there is non-compliance with the Court order is not sufficient – more is required. The courts have confirmed that contempt of court does not consist of mere disobedience of a court order, but of “*contumacious disrespect for judicial authority*”.

[34] Based on the facts placed before this Court, the Applicant failed to prove beyond reasonable doubt that the Respondent is in wilful default and *mala fide* disobedience of a Court order. The resolution was passed at a time when there was no Court order granted and the subsequent filing thereof, happened at a time when the Court order was not served on the Respondents and there is no evidence before this Court to rebut the Respondent’s version that at the time, he was not aware of the Court order.

[35] As a result, this application has to fail.

[36] I am alive to the fact that the outcome of this application will be unsatisfactory to the Applicant, who took all possible measures to be paid the money she was awarded as compensation. I also took note of the Applicant’s personal circumstances, as set out in her affidavit, and that the Respondents’ conduct is in all probability calculated and is no doubt frustrating the Applicant. However, the threshold to find the Respondents in contempt of Court is high and the onus to do so, is on the Applicant, which onus she was unable to discharge.

Costs

[37] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[38] Both parties argued that a cost order should be awarded. However, in my view, this is a case where the interests of justice will be best served by making no order as to cost.

[39] In the premises, I make the following order:

Order

1. The application is dismissed;
2. There is no order as to cost.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate N Nortjè

Instructed by:

Ian Levitt Attorneys

For the Respondents:

Mr Moeketsane from Rams Attorneys