

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1004/ 2016

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION obo MEMBERS**

Applicant

And

TRANSEM (PTY) LTD

First Respondent

ATTIE DU PLESSIS

Second Respondent

Heard: 14 May 2021

Date of Reasons: 12 March 2024

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

REASONS FOR ORDER

PRINSLOO, J

Background

[1] The Applicant filed an *ex parte* contempt application with this Court on 14 April 2021 for the Second Respondent (Mr du Plessis), to appear in Court to show cause why the Respondents should not be found in contempt for failure to comply with a Court order of 30 January 2020. The *ex parte* application was enrolled for hearing on 14 May 2021, when the Respondents opposed the matter. It is apparent that the Applicant served the *ex parte* application on the Respondents and did not

comply with the provisions of the Practice Manual of the Labour Court¹.

[2] The Respondents instructed counsel to present their case in Court.

[3] The Court order of 30 January 2020 ordered that the dismissal of the employees whose names appear in annexure “A” of the notice of motion was substantively unfair and that they were reinstated retrospectively with a backdated period of 12 months, from date of the order.

[4] The First Respondent (Transem) filed an application for leave to appeal and when that was dismissed, a petition was filed to the Labour Appeal Court (LAC). On 31 March 2021, the LAC granted an order in the following terms:

- ‘1. The petitioner is granted leave to appeal to the Labour Appeal Court against the judgment and order of the Labour Court with the exception of the findings in paragraphs 25 and 31;
2. The petitioner is required to deliver the record of appeal within sixty (60) days of this order;
3. Costs shall be cost in the appeal.’

[5] On 6 April 2021, the Applicant wrote to Transem that the union’s members would report and resume their duties on 12 April 2021. Transem responded on 13 April 2021 to advise the Applicant that their interpretation of the petition of appeal was incorrect as paragraphs 25 and 31 of the judgment, which was excluded from the appeal, only reinstated two individual employees and that no further employees would be reinstated.

[6] It is evident from the judgment that paragraph 25 thereof dealt with Ms Bettie Manganyi, who Transem conceded should not have been dismissed and paragraph 31 dealt with Mr Thabo Jonas, whom Transem also conceded should not have been dismissed. Those two employees were the only ones who were excluded from the appeal.

¹ Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

[7] The Applicant however insisted that all the employees were to be reinstated by 12 April 2021, failing which it would be approaching this Court for contempt. Transem insisted that the Applicant's interpretation of the petition of appeal was incorrect.

[8] On 14 April 2021, the Applicant filed a contempt application, seeking the incarceration of Mr du Plessis, alternatively that he be fined for being in contempt of Court.

[9] The Applicant submitted that Transem is fully aware of the Court's order of 30 January 2020, that it failed or refused to comply with the order and that the Respondents' conduct is deliberate and intended to undermine compliance with the Court order.

[10] When the matter was argued, Mr Ngoato, appearing for the Applicant, conceded that Ms Bettie Manganyi and Mr Thabo Jonas were back at work. Mr Ngoato argued that the contempt application was brought in respect of the other individuals mentioned in paragraph 31 of the judgment. It is evident that paragraph 31 did not grant any relief, let alone reinstate, the individuals mentioned in the said paragraph. There was no finding made in respect of any other individual, apart from Mr Jonas, in paragraph 31 of the judgment.

[11] The LAC only excluded the findings in paragraphs 25 and 31 of the judgment from the appeal, which means that the remainder of the judgment was subject to appeal. Mr Venter for the Respondents submitted in Court that Transem wanted to appeal the judgment of 30 January 2020, but could not appeal against the concessions that were made and for that reason, they were excluded from the petition, and it was so specified in the notice of motion for the petition.

[12] Mr Venter submitted that the Respondents could only be in contempt of an order of this Court and the order granted on 30 January 2020, which ordered that the dismissal of the employees whose names appear in annexure "A" of the notice of motion was substantively unfair and that they be reinstated retrospectively with a backdated period of 12 months, is subject to appeal.

[13] Mr Venter argued that it was unfortunate that the Respondents were dragged to Court in contempt proceedings as their attorney tried to engage with the Applicant to explain that the petition did not exclude the remainder of the employees, yet the Applicant persisted with the contempt of court application. The Respondents tried to dissuade the Applicant from proceeding and pleaded that they reconsider the position. The Applicant was warned that the Respondents would be seeking a punitive cost order if the contempt application was persisted with.

[14] Mr Venter further argued that the Respondents were forced to come to Court to defend an application which was wrong in so many respects – it was not brought on an *ex parte* basis, the notice of motion was defective, there is no merit in the application and it was vexatious. Mr Venter argued that the Respondents are entitled to punitive costs, that the application be so dismissed and that no further time and resources would be spent on it.

[15] In reply, Mr Ngoato argued that the Applicant should not be penalised for misunderstanding the Court order and should not be ordered to pay the costs.

[16] The application was dismissed and the Applicant was ordered to pay the costs on a party and party scale.

Request for reasons

[17] Surprisingly on 1 February 2024, two years and eight months after the matter was heard and dismissed, Dockrat Inc. Attorneys, acting on behalf of the Applicant, requested reasons for *“Judgment was handed down dismissing a rule 11 application on the 21 May 2021. Kindly furnish us with written reasons for the judgment. The Court order is attached hereto for ease of reference”*.

[18] There are a few observations to be made. Firstly, Dockrat Attorneys requested reasons almost three years after the matter was dealt with. It is not clear what the purpose would be for requesting reasons after such a long period, but the request contributed significantly to the burden of this Court. As the matter was dealt

with in May 2021, I had no recollection of what transpired and the transcript of the Court proceedings had to be requested, at a cost for this Court, contributing to a further strain on the already limited financial resources of this Court. I had to peruse the file afresh and provide reasons in 2024 on a matter that was dealt with in 2021. The load of this Court is well known, and it is regrettable that limited resources should be spent on a request such as this one. The Applicant is entitled to reasons, but the request should in all fairness be made within a reasonable time to avoid the unnecessary spending of limited resources.

[19] Secondly, the request made is confusing. Dockrat Attorneys requested reasons for a judgment that was handed down, dismissing a Rule 11 application on 21 May 2021. The attorneys should know that if a judgment was handed down, it contains the reasons for the judgment and it is non-sensical to request 'written reasons' for a judgment that was handed down.

[20] This Court never dealt with a Rule 11 application and did not dismiss such an application on 21 May 2021. The court order the attorneys themselves attached to their request for reasons is clearly an order issued on 14 May 2021.

[21] To the extent that Dockrat Attorneys seek reasons for the order issued on 14 May 2021, they are set out *infra*.

Contempt of Court: general principles

[22] 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

² (2003) 24 ILJ 2289 (LC) at para 26.

(c) that the respondent is in wilful default and mala fide disobedience of the order.'

[23] 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 CCII 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 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."

[24] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*;

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

*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.’

[25] The Applicant had to prove the aforesaid requisites beyond reasonable doubt.

[26] To establish non-compliance requires more than a failure to comply with the order. In *Matjhabeng*,⁵ 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.⁶

[27] *In casu*, Transem was granted, on petition, leave to appeal the judgment of 30 January 2020, with the exception of paragraphs 25 and 31 of the judgment. It was common cause that the two employees, in respect of whom findings made in the said paragraphs, were reinstated and that the remainder of the judgment was subject to appeal.

[28] Section 18(1) of the Superior Courts Act⁷ provides that:

‘(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.’

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

⁵ *Ibid* at para 65.

⁶ *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.

⁷ Act 10 of 2013.

[29] It is trite that the default position is that the operation and execution of a decision (other than a decision not having the effect of a final judgment) are suspended pending the outcome of an application for leave to appeal or an appeal.

[30] The Respondents did not comply with the Court order of 30 January 2020, as it was subject to appeal. Non-compliance with a suspended Court order is not willful or *mala fide* and does not constitute contempt.

[31] The Applicant could not prove contempt beyond reasonable doubt and failed to satisfy the requirements to prove that the Respondents were in contempt of Court.

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

[33] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*⁸, it was emphasized that:

‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.’

[34] The Respondent had to defend a contempt application where the application should not have been brought in the first place and where the Applicant dismally failed to make out a case for contempt. The Respondents’ attorneys attempted to dissuade the Applicant from proceeding with the application and warned the union that if the contempt application was persisted with, they would seek a punitive cost

⁸ [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

order.

[35] Fairness dictates that the Respondents could not be expected to endure costs defending litigation that ought not to have been brought and SACCWU, a well-established trade union was quite capable of considering the consequences of instituting litigation where it was unable to satisfy even the basic requirements for contempt. The Applicant failed to consider the effect and consequences of a pending appeal.

[36] The Applicant had to put in some earnest thought and consideration into the merits of this case before proceeding and dragging the Respondents to Court, more so where it was warned by the Respondents' attorneys that a cost order would be sought.

[37] It is for these reasons that the order on 14 May 2021 was issued and costs were awarded in favour of the Respondents.

Connie Prinsloo
Judge of the Labour Court of South Africa