



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no: DA10/2015

In the matter between:

ILEMBE OUTSOURCING AND RECRUITMENT CC

First appellant

LOUIS MARTIN PHEIFFER

Second appellant

HANDSOME MPIOYENKOSI MZIMELA

Third appellant

and

MONWABISI HOWARD NOSANGO

Respondent

Heard: 22 March 2018

Delivered: 19 April 2018

Summary: Respondent's suspension from duty found unfair at arbitration with company ordered to uplift the suspension and reinstate respondent with arrear wages. Respondent offered alternative position at a lower salary, which the respondent refused. After the arbitration award was made an order of court respondent launched a contempt application. Cele J directed compliance with the arbitration award and ordered the reinstatement of the respondent at the same site. In the event of non-compliance, the Court was to be approached to find that the second and third respondent be committed to prison for 15 days. On appeal: found that appellants had not reinstated respondent into his employment in accordance with the terms of the arbitration award, as made an order of court. Order of Cele J substituted. The second and third appellants as

the natural person members of the first appellant close corporation found to be in contempt of court with the committal order suspended pending compliance with the order to reinstate respondent and pay him 12 months back pay. Appellants ordered to pay the costs of the appeal jointly and severally.

Coram: Musi JA, Hlophe and Savage AJJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of the Court *a quo*, is against the judgment of the Labour Court (Cele J) in a contempt application brought by the respondent, Mr Monwabisi Howard Nosango. In his application, he sought that the appellants be found to be in contempt of court; that their arrest be authorised in order that they be brought to court; that they be committed to jail for a period of 15 days from the date of the final order; that they thereafter be brought to court again to show cause why a further period of committal should not be authorised; and that the appellants pay the costs of the application jointly and severally.
- [2] The respondent was employed as a lasher by the first appellant, Ilembe Outsourcing and Recruitment CC, from 1 March 2009. On 4 May 2012, he was suspended from duty, apparently after having been involved in an altercation with employees affiliated to different trade unions. Aggrieved with his suspension, the respondent referred an unfair labour practice dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) for determination. On 22 April 2013, following the arbitration of the dispute, which proceeded in default, the first appellant was ‘... *directed to uplift the suspension of the applicant and reinstate him in his employment...*’, with arrear wages to be paid to the respondent in the sum of R25 781,35 within seven (7) days of the date of receipt of the arbitration award.

- [3] On 2 May 2013, the respondent tendered his services in accordance with the terms of the arbitration award but was informed by the first appellant's operational manager, Mr Wilson Mfanakayise Ngema, that there was no work for him. The first appellant thereafter brought an application to rescind the arbitration award. On 2 July 2013, the rescission application was refused on the basis that the first appellant had not offered an intelligible explanation for its default and that the prospects of success were poor since no attempt was made to advise the respondent of the outcome of investigations into allegations of misconduct raised against him or summon him to attend a disciplinary hearing.
- [4] On 4 June 2014, Gush J made the arbitration award an order of the Labour Court in terms of s158(1)(c) of the Labour Relations Act 66 of 1995 (LRA). After this, at the instance of the respondent, the Sheriff attached certain goods of the first appellant, which led the first appellant to pay the monetary amount due to the respondent in terms of the arbitration award in three instalments.
- [5] From January 2014, various unsuccessful attempts were made to resolve the matter. After there had still not been compliance with the terms of the arbitration award, in September 2014, the respondent pursued a contempt application. That application was opposed by the appellants, with an answering affidavit was deposed to by Mr Ngema.
- [6] In his affidavit, Mr Ngema disputed that the appellants were in contempt of court and stated that the appellants had "*duly complied*" or complied "*in so far as it is possible*" with the order. Mr Ngema recognised that the respondent was not dismissed from his employment and expressed the view therefore that the order of reinstatement made by the arbitrator was not appropriate. He noted that since the first appellant's business is that of labour outsourcing, like other employees, the respondent had been employed by way of a fixed term contract. The fixed term contract annexed to the answering affidavit was signed by the respondent but no expiry date had been inserted into the contract.

[7] According to Mr Ngema, the respondent was suspended from his position at Durban harbour following incidents in which other employees had been prohibited from going to work, which had escalated into a hostile situation between two trade unions. Apparently, as a result of this, Mr Ngema stated that he was concerned about the respondent's safety and recommended his placement at a different site, being ABI Coca-Cola in Phoenix, but at a reduced salary. The respondent refused to sign the contract to work in that position although, according to Mr Ngema, each employee employed by the first appellant knows that "*in terms of the provisions of their employment, [the first appellant] is entitled to place them at any site where their services are required*".

[8] Thereafter, apparently in a further attempt to resolve the matter, the respondent was made another offer, this time to be placed at a different site at the Durban harbour from where he had worked but with no salary reduction. He was requested to report for work on 27 August 2014. When he did not do so, a letter signed by Mr M H Mzimela, the third appellant, was delivered to the respondent the same day. The letter, at the foot of which the names of the second and third appellants were recorded as the two members of the first appellant, stated:

'Further to our conversation with your legal representative we place on record that we have offered you alternate employment at a site where you will not be required to catch two taxi's to reach work and thereby incurring more costs. The same rate and terms will apply. You are therefore instructed to report to site ILEMBE offices 28/08/14 at 07.30am and will be taken to the site ZMS LOGISTICS, thereafter to commence work.'

[9] The respondent did not report for work on 28 August 2014 and launched the contempt application against the first, second and third appellants. Mr Ngema stated that from the facts, it was apparent that the appellants had not acted *mala fide*, but that they had sought to protect the welfare of the respondent whose life was threatened by other employees.

[10] Although no replying affidavit was filed by the respondent when the matter came before the Labour Court, Cele J viewed with suspicion the appellants' contention that the respondent risked exposure to a dangerous situation were he to continue with his employment at the site from which he had been suspended. This was so since in the correspondence exchanged between the parties from January 2014 there was no reference made to any such danger. The judge stated that "*I can only infer from all of this that the respondent was very much mala fide in its behaviour*" since there had not been compliance with the arbitration award over an extended period. In addition, it was found that there was no bar on the respondent being placed back into his employment at the site he had been employed in that the appellants could later raise the existence of any such alleged danger with him. The Court had regard to the fact that the respondent was required to execute against the first appellant's movables in order to secure payment of the monetary sum owing to him and that, faced with further non-compliance, was forced to approach the Labour Court for a contempt order. Consequently, on 23 March 2015 in an *ex tempore* judgment, an order was made by the Labour Court –

'...directing the respondent to take into its employ the applicant and to give him the same site as had been given to him before he was suspended where he can work under similar conditions as appear in the arbitration award and to pay him the outstanding amount of salary up to the date when he starts working and to continue doing so. Secondly, the employee, the applicant must tender his services within four days of today. Finally, in the event that there is non-compliance with the directive of this Court, the Court will be approached on notice given to the respondent and the Court will therefore issue an injunction or a directive that the second and third respondent be committed to prison for 15 days each if there is no compliance.

There is no order as to costs.'

Discussion

[11] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court.¹ In *Fakie NO v CCII Systems (Pty) Ltd*,² it was held that when

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9 (*Fakie*).

a committal to prison for civil contempt is sought, the criminal standard of proof applies, while the civil standard applies when an application is made for a declarator of contempt without imprisonment and a mandatory order.³ The applicant for a committal order must establish (a) the order; (b) service or notice of the order; (c) non-compliance with the terms of the order and (d) wilfulness and *mala fides*, beyond reasonable doubt. But, once the applicant has proved (a), (b) and (c), the respondent bears an evidentiary burden in relation to (d).⁴ Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt.⁵

[12] There is no dispute that by the time the matter came before Cele J there had been partial compliance with the terms of the arbitration award insofar as the monetary amount owing to the respondent in terms of the award had been paid to him. What is notable however is that the appellants had not complied with the order to pay the monetary amount in a lump sum within seven days of the arbitration award but elected to pay the amount due not in one instalment but rather in three separate instalments beyond the seven days ordered. Furthermore, the offer to deploy the respondent at a different site, first at a reduced salary and then apparently at the same salary, did not amount to compliance with the order that the respondent's suspension be uplifted and he be reinstated into his employment. This is so since that order intended that the respondent resumes his duties with the first appellant through the restoration of his employment by being placed back into the position previously held by him and not employed under a new contract of employment. Neither his contract of employment nor the order made permitted employment in a different position or at a reduced salary unless this had been agreed between the parties.

[13] Since the offer of alternative employment made to the respondent was not accepted by him, the appellants were required to comply with the terms of the

² Ibid at para 19.

³ At para 42.

⁴ *Fakie op cit.* at para 42.

⁵ *Fakie op cit.* at paras 22-24.

order and place the respondent back into the position he held before his suspension. This did not occur and neither the second nor third appellants provided a cogent or acceptable explanation as to why they did not comply. The suggestion that the appellants had adopted a benevolent approach to the upliftment of the suspension by offering alternative employment so as protect the respondent from union rivalry was simply not borne out by the facts, with no indication why it was necessary to remove the respondent from the workplace as opposed to other employees. The period of time which has elapsed since the order was made provided an extended opportunity to the appellants to comply with the order. Yet, the second and third appellants failed to discharge the evidentiary burden resting upon them and advance evidence or provide a valid explanation for their failure to comply with the order. As a consequence, they failed to show that their non-compliance was not wilful and *mala fide*.

- [14] The order of Cele J required compliance with the arbitration award and failing such compliance, stated that *"the Court will be approached on notice given to the respondent and the Court will therefore issue an injunction or a directive that the second and third respondent be committed to prison for 15 days each if there is no compliance"*. The appellants took issue with the fact that the Court was to be approached on notice to *"the respondent"* and not to *"the second and third respondents"* (the second and third appellants), who would face the consequences of any contempt finding. Furthermore, while the Labour Court found *"that the respondent was very much mala fide in its behaviour"*, the appellants contended that no finding of *mala fides* was made against the second and third appellants when a contempt order cannot be made against a close corporation, but only against its members or other individuals.

- [15] It is so that the order of the Labour Court is not a model of clarity. In its current form, it cannot stand and must be substituted with an appropriate order. Having regard to the merits of the matter, it is apparent that the second and third appellants did not discharge the evidentiary burden resting upon them to show that as the two natural persons who are members of the first appellant

close corporation, their non-compliance with the terms of the arbitration award was not wilful and *mala fide*. They relied on Mr Ngema's opposition to the application in which he recognised that the respondent had not been dismissed. As such, restoration of the employment of the respondent in the position he had previously held was clearly, even on the appellants' own version, required. No acceptable reason was advanced as to why this did not occur. It follows that the respondent succeeded in proving contempt of the court order against the second and third appellants beyond a reasonable doubt.

[16] Given the lack of evidence that the respondent took appropriate steps to mitigate his losses, fairness dictates that the back pay payable to him be limited to a period of 12 months.

[17] With the parties engaged in an ongoing employment relationship, there is no reason to interfere with the decision of the Labour Court not to order costs in the contempt application. As to the appeal however, the appeal would have been unnecessary had the appellants complied with the terms of the order. There is, therefore, no reason in law or fairness as to why the appellants should not bear the costs of the appeal even in circumstances in which the matter has technically had some success.

Order

[18] In the result, an order is made in the following terms:

1. The appeal succeeds with costs, such costs to be paid by the appellants jointly and severally the one paying the other to be absolved.

2. The order of Cele J is set aside and substituted as follows:

- '1. *The first, second and third respondents are found in breach of the order of Gush J made on 4 June 2014 and the second and third respondents as natural persons are found to be in contempt of such order.*

2. *The second and third respondents are to be committed to imprisonment for a period of 15 days for contempt of court.*
3. *The order in paragraph 2 above is suspended for a period of 12 months on the following conditions:*
 - 3.1. *that the first appellant reinstates the respondent into his employment at the same workplace he was engaged at the time of suspension within ten (10) days of receipt of this order;*
 - 3.2. *that the first appellant pays to the respondent 12 months back pay at the rate that he received on date of his suspension within ten (10) days of receipt of this order.*
4. *There is no order as to costs.'*

Savage AJA

Musi JA and Hlophe AJA agree.

APPEARANCES:

FOR THE APPELLANTS:

Adv. A P Van Der Westhuizen

Instructed by Brimelow DE Oliveira Ekerold Inc

FOR THE RESPONDENT:

Mr M P Nonyongo

Instructed by M. P. Nonyongo Attorneys.