Not reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J 2801/07

In the matter between:

NATIONAL UNION OF MINEWORKERS 1st Applicant

EPHRAIM CHULU AND OTHERS 2nd and further Applicants

and

BILLARD CONTRACTORS CC 1st Respondent

VAN ROOYEN G 2nd Respondent

Date of hearing: 8 September 2011

Date of judgment: 5 October 2011

JUDGMENT

VAN NIEKERK J

[1] This is an application for an order declaring the first respondent to be on contempt of an order made by this court on 25 April 2006 under case no JS 929/02. The applicant further seeks to have the second respondent, as sole member of the first respondent, committed to prison for a period to be determined by this court. Thirdly, the applicants seek an order directing the first respondent to pay to the individuals set out in annexure EK2 to the founding affidavit the monthly wages set out in the annexure for the period from May 2006 to date of judgment.

[2] This application was first heard on 4 December 2010, when an order was made that the matter be referred to oral evidence on the question whether the first respondent's compliance with the order concerned was wilful and mala fide. Certain conditions were attached to that order relating to the calling of witnesses and the discovery of documentation.

[3] In the event, the second respondent did not give evidence. A medical certificate to the effect that he was medically incapacitated and unable to attend the proceedings was submitted. Only Mr de Beer, a chartered accountant who has since 1980 provided services to the second respondent and his group of companies, gave evidence. In the course of his evidence, De Beer stated that the first respondent had been placed in liquidation.

[4] The fact of the first respondent's liquidation is supported by public records held by the Companies and Intellectual Property Commission. It transpires from those records that the first respondent was de-registered in error in November 2009, and that consequent on an order of court, the de-registration process was cancelled during April 2010, and that on 23 July 2010, the first respondent was placed in liquidation. The current status of the first respondent is reflected as 'voluntary liquidation'.

[5] With that background, I deal first with the applicant's claim for wages. The claim is made on the basis of a tender of services by the affected individuals. To the extent that the second element of the applicants' claim is a contractual claim, the effect of the liquidation of the first respondent is to stay the proceedings pending the appointment of a liquidator. There is nothing before me to suggest that a liquidator has been appointed, or that an appointment is imminent, but on the assumption that an appointment has been made, it remains open to the applicant to join any liquidator to these proceedings.

[6] Turning next to the question of contempt, the purpose of contempt proceedings is to compel compliance with orders of court and to vindicate the court's honour consequent on the court's disregard of its orders. The principles relevant to contempt were set out by Cameron J in *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). The order in question must be one *ad factum praestandum*, the order must have been served on the respondent or the respondent must have been

advised of the order in circumstances where there are no reasonable grounds for disbelieving the information, and respondent must have failed to comply with the order, and the failure to comply must be both *mala fide* and wilful (see also *Uncedo Taxi Service Association v Maninjwa & others* [1998] BCLR 683 (E)). Once it has been proved that the order in question was issued and that the respondent failed to comply with it, there is an evidentiary burden on the respondent to demonstrate *bona fides* and that that the disobedience of the order was not *mala fides*. *Fakie NO* (*supra*), the court made the point in the following way:

> *"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."*

[7] In these proceedings, as indicated by the terms of the order made on 27 March 2011, the first three requirements are not in dispute. The first respondent denies that it was in wilful and *mala fide* disobedience of the order granted on 25 April 2006, principally on the basis that it was unable to comply with the order since it had had been dormant for some four years before the order was issued, and had no assets.

[8] As stated above, what is before the court is the uncontested evidence of De Beer to the effect that the first respondent has been placed in liquidation. In these circumstances, and given the nature of the first respondent's defence, it seems to me that the appropriate order in the contempt proceedings is that which I intend to make in respect of the claim for the payment of wages.

[9] To the extent that the applicant's claim against the second respondent is predicated on his having caused the first respondent to disobey the order, it follows that no purpose would be served in dealing any differently, and in any event, it is not a matter that can be dealt with on a piecemeal basis. I intend therefore, for the reasons reflected above, similarly to stay the contempt proceedings against the second respondent.

[10] Finally, it is appropriate that at this stage, there be no order as to costs. The costs of the hearing on 4 December 2010 were effectively reserves, and I intend to adopt the same approach in respect of the referral to oral evidence.

I accordingly make the following order:

1. The proceedings against the first and second respondents are stayed pending the appointment of a liquidator, or in the event of a liquidator having been appointed, any application to join the liquidator.
2. The costs of the proceedings in relation both to 4 December 2010 and 8 September 2011 are reserved.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT