

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

Not Reportable

Case No: D 306/11

COMMUNICATION WORKERS UNION

Applicant

and

TLHLEFANG PLACEMENTS

First Respondent

MR D SIYAKHANE

Second Respondent

Date of Hearing: 31 May 2011

Date of Judgment: 01 June 2011

JUDGMENT

STEENKAMP J

Introduction

[1] This is a judgment in the urgent application that I heard yesterday.

The relief sought in this matter is the following:

1. Declaring that this application be heard as one of urgency and dispensing with the provisions and rules of the Court relating to time limits and manner of service.

2. That a *rule nisi* is issued for the respondents to show cause, on a date to be determined, why a final order should not be granted in the following terms:

[These are then the following terms]:

- 2.1 That the respondents be declared to be in contempt of the order of this Court of 19 April 2011.
- 2.2 That the respondents be ordered immediately to pay the remuneration owing to the applicant's members from 10 April until 8 May 2011.
- 2.3 Declaring that the second respondent, that is Donald Otto Siyakhane, be joined to these proceedings.
- 2.4 That the second respondent be committed to detention in prison for a period of 15 days from date of this order.
- 2.5 That on the expiry thereof they shall be brought before the Court again to show cause why a further period of committal should not be imposed.
- 2.6 In the event of the respondents complying with the order of court, or tendering to comply, that they may be brought before the Court on an earlier date than the expiry period of 15 days.

Paragraph 3 significantly asks that the provisions of paragraphs 2.1 and 2.5 operate as an interim order pending the return date.

[2] Ms *de Klerk*, who appeared for the respondents, pounced on this prayer 3 with alacrity. She pointed out that the only interim relief that was sought was for contempt, even though Ms *Harries*, who appeared for the applicant, argued the matter on the basis that she was also seeking payment for the outstanding period. Despite Ms *de Klerk*'s reliance on this prayer, there was no application to amend the notice of motion or application for postponement, and I have to consider the application on this basis.

[3] Despite some initial confusion, Ms *Harries* clarified that, despite the fact that the matter had been opposed, she was still seeking interim relief at this stage. I will therefore deal with the application on that basis and consider the requirements for interim relief, i.e. whether the applicant has established a *prima facie* right, the aspect of the apprehension of irreparable harm and the balance of convenience.

[4] The Court order that the applicant Union referred to was one granted by consent by His Lordship Cele J on 19 April of this year. That order reads as follows:

1. The respondent, that is Tlhlalefang Placements CC, is ordered to immediately reinstate the remuneration and further benefits of their contracts of employment to the applicant's members with effect from 10 April 2011.
2. It is ordered that each party pays its own costs.

[5] The wording of that first paragraph is crucial and I am constrained to say that it may well be that when consenting to the order on that day, the respondent may have snatched at a bargain, but the reason why I express that sentiment will become clear in the course of my judgment.

[6] Firstly, dealing with the question of urgency, the order as I say was granted on 19 April 2011. This further application was brought on 27 May 2011. The reason for that, as set out in the applicant's papers, is that they usually get paid on the 25th of each month. When it came to 25 May 2011, they realised that they had not been paid, as they would have been in terms of the court order, with effect from 10 April 2011. The next day, that is 26 May 2011, the applicant's attorneys sent a letter to the respondent, pointing this out and stating the following:

"We are instructed that our client's members are paid on the 25th of each month. Upon our members seeking to access the remuneration from 10 April 2011 which was payable on 25 May 2011, our client's members discovered that they had not been paid in terms of court order. . You are accordingly in contempt of the order of court. Our instructions are therefore to move a further urgent application declaring your Mr Donald Siyakhane to be in contempt of the order of court. That application will be made on Monday 30 May 2011. We are in the process of preparation of the papers, which will be served on you shortly."

[7] At the hearing of this matter, I asked Ms de Klerk why her client or her attorneys did not respond to that letter and I expressed the view that the conduct of the litigation in this matter smacks of a lack of common sense on the side of the attorneys on both sides. She responded by pointing out that this letter was sent at 13:09 on 26 May and merely two hours later, at 15:31, the application was launched, hence the lack of response.

[8] I remain of the view, though, and this is simply *obiter*, that had the parties and their legal representatives displayed more willingness to engage with each other rather than approaching this Court, this matter could well have been resolved. That as an aside, though. The matter is before me and I have dealt with it.

[9] With regard to urgency, Ms de Klerk, who appeared for the respondents, referred me to the case of *Democratic Nursing Organisation of SA and Another v Director-General, Department of Health and Others*.¹ In that case at paragraph [15] Molahlehi J had the following to say with regard to the facts of that case:

"The application further stands to fail on the ground that the applicant has failed to demonstrate the existence of urgency. In *Hultzer v Standard Bank of SA (Pty) Ltd* (1999) 20 ILJ 1806 (LC); [1999] 8 BLLR 809 (LC) at paragraph 13 the court held that financial hardship or loss of income is not regarded as a ground of urgency."

¹ (2009) 30 ILJ 185 (LC) at para 15.

- [10] And he then referred back to the earlier decision in *University of the Western Cape Academic Staff Union and Others v University of the Western Cape*.² He went on to say,:

“The Court in *Malatji v University of the North* [2003] ZALC 32 (LC), and following the decision in *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO and andere* (1990) 11 ILJ 971 (T), held that, in general, financial hardship and loss of income are not considered to be grounds for urgent relief. In order to succeed when reliance is placed on financial hardship, *exceptional* circumstances must be shown before urgent interim relief can be granted.”³

- [11] Although I consider myself bound by those *dicta*, I am satisfied that this is a case where there are exceptional circumstances. Exceptional circumstances are that there is an existing court order and the allegation is that the respondents are in contempt of that order. The applicant Union and its members only became aware of that situation when the members who are present here in court saw in their bank accounts that they had not been paid as they had thought they would be. They immediately instructed their attorneys and the attorneys acted with due haste. I am satisfied that the matter is indeed urgent.

² (1999) 20 ILJ 1300 (LC) at para 17.

³ Above n: 1 at para16.

[12] That brings me to the question of whether the applicants have established a *prima facie* right, and in this regard I specifically refer to the issue of whether they have established that the respondents are in contempt of court. In the same matter of *Democratic Nursing Organisation of SA* that I have just referred to, Molahlehi J also considered the requirements for a successful application for contempt of court, and he said in paragraph [14]:

“In contempt proceedings, the applicant must show that both the court order and the contempt application have been served on the individual who is responsible for the implementation of the court order. This is important because the consequences of the contempt proceedings are that an individual's liberty may be restricted. It is for this reason that I find this application [referring to the one before him] to be fatally defective in that the applicants have failed to show that the application was served on the individuals responsible for the implementation of the court order in their personal capacity for the purposes of the contempt proceedings.”

[13] Unfortunately for the applicants in these proceedings, Ms *Harries* was constrained to concede that the court order in this case had not been served on the second respondent, Mr Siyakhane, in his personal capacity. She pointed out that this may be academic, because Mr Siyakhane in fact deposed to the answering affidavit and he must therefore have had knowledge of the court order. I agree with her, but

once again I am bound by earlier decisions of this Court and it appears to me that, in a technical sense, the application is defective, and on that ground it must fail.

[14] However, even if I am wrong in that regard, I have considered the other requirements for a successful application for contempt, as set out most succinctly by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*,⁴ and specifically at paragraph 9 and 10. He said:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and *male fide*.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide*, (though unreasonableness could evidence lack of good faith.)”

[15] And he went on to summarise the requirements in paragraph 42 as follows:

“The applicant must prove the requisites of contempt, (the order; service or notice; non-compliance; wilfulness and *male fide*) beyond reasonable doubt.”

⁴ 2006 (4) SA 326 (SCA).

[16] I have already dealt with the issue of service or notice. With regard to the question of whether the respondents acted *male fide*, or wilfully, I have to deal with it on the basis of the rules set out in *Plascon-Evans v Van Riebeeck Paints*,⁵ in circumstances where no replying affidavit has been filed.

[17] The respondents say, in short, firstly that they are not in contempt because they have paid in terms of the contract of employment as the order says. Secondly, though, they say that their client, which is MTN, has not had cause to seek the services of the individual members here in court, for various reasons, principally among those that they fear that these workers may again embark on an unprotected strike, as they had done before, and that they may interfere with the business of the client, that is MTN, and that they may destroy certain information such as e-mail correspondence attached to the answering papers.

[18] What bedevils this application is the specific employment relationship between the Union's members, their employer, which is a temporary employment service, and the employer's client. This is a typical example of the tripartite employment relationship involving a labour broker, or in the words of the Act, temporary employment service, that has led to much criticism and potential amendments to our labour law.

⁵ 1984 (3) SA 623 (A),

- [19] The contract of employment, or a *pro forma* contract that pertains to these applicants, is attached to the answering papers. It states, *inter alia*, the following, and is of course signed by each employee:

“My remuneration by Tihlalefang Placements is on a pre-agreed hourly basis. In the event of me not working a full day or part thereof for any reason whatsoever, I accept that the principal of ‘no work, no pay’ will apply.”

- [20] The approach taken by the respondents in this matter is, if I may say so, a cynical one. They say quite simply that the client where these workers have been working, that is MTN, don’t require their services. Because of that they are not working. Because of that and in terms of the contract they are not being paid. Despite that, the respondents have complied with the court order, because the court order only states that the respondent is ordered to reinstate the remuneration and further benefits of the contract of employment to the applicant’s members.

- [21] The terms of this contract have bothered me, because the non-payment of the workers in these circumstances is in my view clearly not in the spirit of the court order, and in any normal employment relationship the principle that goes far back in our common law would have applied, namely as set out in the case of *Johannesburg Municipality v O’Sullivan*⁶ as far back as 1923:

⁶ 1923 AD 201.

“The duty to pay and the commensurate right to remuneration arise not from the actual performance of work, but from the tendering of service.”

[22] However, the terms of the contract in this case are clear. They are also not unusual, and may be opened to constitutional challenge. As Craig Bosch has argued in his article titled “Contract as a Barrier to ‘Dismissal’: The Plight of the Labour Broker’s Employee” (2008) 29 *ILJ* at 813-840:

“In recent decisions the Supreme Court of Appeal (SCA) has acknowledged that ‘public policy in its modern guise is now rooted in our Constitution and the fundamental values it enshrines’.”⁷

[22] And quoting from Cameron JA’s judgment in *Brisley v Drotsky*⁸:

“It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so. The decisions of this Court that proclaim that the limits of contractual sanctity lie at the borders of public policy will therefore receive enhanced force and clarity in the light of the

⁷ Bosch “Contract as a Barrier to ‘Dismissal’: The Plight of the Labour Broker’s Employee” (2008) 29 *ILJ* 817.

⁸ 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at para 92 as cited by Bosch “Contract as a Barrier to ‘Dismissal’: The Plight of the Labour Broker’s Employee” (2008) 29 *ILJ* 817..

Constitution and the values embodied in the Bill of Rights.”

And Bosch concludes by saying, at 840, that:

“Many of the problems relating to the relationships between a TES and its employees and those employees and the client of the TES arise because of the legislative instruction that the TES is the employer of the employees concerned. In many cases the client is the real wielder of power in the triangular relationship established by labour broking and should rightfully be regarded as the employer, or an employer of the workers supplied by a TES. Until that changes we will continue to be confronted with difficulties such as those alluded to above and need to ensure that we respond to them appropriately in order to ensure the full and proper protection of fundamental rights.”

[23] I align myself with those sentiments. This is a prime example of a situation where, had these workers been employed by the client, they could not have been suspended without pay following – or rather pending disciplinary procedures. However, the contract submitted by the respondents stands as it is and I have to accept the facts as set out in the answering affidavit. This is not a case where the constitutionality of that contract has been challenged and I am not empowered to decide whether that contract is either constitutional or perhaps contrary to public morals. I must apply it as it stands.

- [24] On those facts, I cannot find that the respondents have acted *male fide*. The application must therefore fail.
- [25] With regard to costs, even though both parties have asked that costs should follow the result, I am not inclined to accede to that request. I am enjoined to apply both law and fairness when deciding on costs. In this case, there is an ongoing relationship between the parties; that is the Union and the temporary employment service, albeit a fraught one. It may be that they will need to forge a better relationship going forward, and I fear that a costs order at this stage may have a chilling effect on such a relationship. Cool heads have not prevailed in this matter up till now, and one hopes that it may do so in future.
- [26] Before I make the final order I may just add *obiter* that this is a matter in which the conclusion to which I have come does not fill me with any sense of comfort, and I want to express the wish again that the parties will continue talking to each other, perhaps with the help of a mediator, and that they will be able to seek a proper solution to the disputes between them.

[27] The order is then:

1. That the application is dismissed.
2. No order as to costs.

STEENKAMP J

Appearances

For the Applicant:
Instructed by:

Ms J Harries
Brett Purdon

For the Respondent:
Instructed by:

Ms M De Klerk
Futcher Attorneys