



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2606/08

In the matter between:

**INDEPENDENT MUNICIPAL AND
ALLIED TRADE UNION OBO J
ERASMUS AND ABJ CRAUKAMP**

Applicant

and

THE CITY OF JOHANNESBURG

First Respondent

**THE MUNICIPAL MANAGER OF THE
CITY OF JOHANNESBURG**

Second Respondent

Heard: 12 October 2012

Delivered: 13 December 2012

Summary: Application to compel compliance with order and counter-application to rescind - application to compel dismissed with costs.

JUDGMENT

BHOOLA J

Introduction

- [1] There are four applications before this court.
- [2] In the first application (“the contempt application”), the applicant seeks an order compelling the first respondent to comply with an arbitration award dated 6 September 2005 and made an order of this court in terms of section 158(1) (c) of the Labour Relations Act, 66 of 1995 (“the Act”) on 12 March 2007, in which the arbitrator ordered the reinstatement of the individual applicants J Erasmus and ABJ Craukamp retrospectively to 6 September 2005.
- [3] The second application is a counter-application instituted by the first respondent to rescind and set aside the order made by Pillay J, on the ground that it was null and void, alternatively had been vitiated by fraudulent non-disclosure on the part of the applicants in their section 158(1) (c) application of the fact that they had been removed from the register of the Health Professions Council of South Africa (“HPCSA”), and further that the HPCSA had not been joined as a party.
- [4] The third application is an application instituted by the applicants to strike out the answering affidavit in its entirety, or alternatively certain paragraphs thereof as constituting hearsay evidence.
- [5] The fourth application is an application for condonation of the late delivery by the first respondent of its answering affidavit and counter-application. The grounds relied upon are that the extensions to time period were agreed expressly or tacitly by the parties during settlement negotiations.

Background facts

- [6] Erasmus and Craukamp were employed by the first respondent as fire fighters by subsequently qualified as basic ambulance attendants (also referred to as medical technicians), and in this capacity were required from time to time to attend to persons in need of medical treatment as *inter alia* part of a municipal emergency team. They were registered with the HPCSA as basic ambulance attendants and as such fell under the jurisdiction of the Professional Board for Emergency Care personnel (“the

Board”), a body which functions under the statutory umbrella of the HPCSA.

- [7] An incident occurred on 21 September 2004 during which it was alleged that they had refused to treat or arrange hospitalisation for an indigent individual who became ill on the street and who had died the following day. The incident caused a public media outcry. They were dismissed on 17 February 2005 following a finding by a Johannesburg Emergency Management Services (“JEMS”) Tribunal that they were guilty of misconduct.
- [8] On 2 February 2006 Erasmus and Craukamp were also found guilty by the HPCSA on a charge relating to unprofessional conduct related to the incident for which they were dismissed by the first respondent. As a result their names were removed from the register of the Board. They lodged an appeal with the Appeals Committee of the HPCSA and in September 2005 also referred a dispute concerning their unfair dismissals to the South African Local Government Bargaining Council (“SALGBC”). Following an arbitration held under the auspices of SALGBC they were reinstated with retrospective effect in an award issued on 6 September 2005. The first respondent was ordered to pay them compensation equal to twelve months’ salary respectively and was further directed to reinstate them within 14 days of receipt of the award. The first respondent’s representative had elected not to participate in the arbitration on account of being refused a postponement, and the arbitration proceeded in its absence.
- [9] In the enquiry held on 2 February 2006 by a committee of the HPCSA, Erasmus and Craukamp admitted that they had not acted in line with ethical rules and protocols. They also admitted to not having taken primary response equipment to the patient, as a result of which they failed to ensure that he was admitted to a hospital.
- [10] On 6 September 2005 the applicant forwarded a copy of the arbitration award to the first respondent, demanding compliance with the award. No response was forthcoming and the applicant proceeded with an application in terms of section 158(1) (c) of the Act to make the award an

order of court, which was granted on 12 March 2007. The first respondent had by then complied with the compensation awarded and only their reinstatement remained in issue.

[11] In March 2007 the applicant demanded the reinstatement of Erasmus and Craukamp in compliance with the court order. The first respondent addressed a letter to the applicant on 22 March 2007 requesting proof, to be provided on or before 26 March 2007, of their registration with the HPCSA, and stated that it would not be able to comply with the court order unless “your members illustrate satisfactorily that they meet the minimum requirements to practice in their respective jobs.”

[12] There was no response to this letter.

[13] The employees appealed the penalty imposed by the HPCSA, following which the sanction of removal from the register was set aside and substituted with the following ruling :

“That the sanction of erasure be substituted by a suspension from practice for a period of two years and eight months, effective from 2 February 2006 which sanction is suspended on condition that the applicants undergo a BAA course within four months of the date of the decision”.

[14] On 12 September 2008 the applicant attached the outcome of the appeal in correspondence to the first respondent (in reply to the letter of 22 March 2007 from the first respondent) and indicated that Erasmus and Craukamp had been reinstated on the register with effect from 1 September 2008 and since they had now met the minimum legal requirements they were entitled to reinstatement.

[15] The first respondent replied on 17 September 2008 as follows :

“We acknowledge receipt of your letter of 12 September 2008.

In response thereto, we wish to draw your attention to our letter to your good selves dated 22 March 2007, which is self-explanatory.

Kindly be reminded that we requested you to provide us with the proof of registration of your members with the Health Professions Council (as prescribed by the relevant legislation) on or before 26 March 2007, which you failed to provide or at least explain as to why it could not be provided to the City at the time. We further warned you that in the event that you did not provide us with

these documents on or before the then set date, we will not be able to comply with the Labour Court order, and in view of this, we proceeded to fill the positions previously held by your members.

It is worth mentioning that you chose to ignore our letter despite a clear warning to the effect that we will not comply with the order in the absence of the required documents. It is over a year now since we requested you to provide us with proof of registration and yet, you still approach us without providing a plausible explanation for the undue delay in providing us with the information.

Our view is that your members repudiated their contract of employment with the City by their conduct and failure to comply with a reasonable request by the City to provide it with the requested documents done on the 26 March 2007, as such the City is of the view that it is no longer obliged to comply with the order of the Labour Court.

We advise that your members are at liberty to apply should any vacancies arise in future.”

The contempt application

[16] The first respondent submits that it had no option but to fill the posts left vacant by Erasmus and Craukamp by virtue of impossibility of performance. The applicants were lawfully unable to tender their services for a period of 18 months, hence the union's failure to respond to the first respondent's letter of 22 March 2007. The first respondent could not reasonably have been expected to keep their positions vacant for the period that they had been struck off the register. In any event, Mr Boda submitted, the clear import of the letter of 17 September 2008 was that the first respondent had terminated their contracts of employment as a result of their inability to perform, and this raises a fresh dispute.

[17] Mr Glendinning, appearing for the applicant, submitted that the first respondent was clearly in contempt of the award and the court order in setting unnecessary preconditions for the reinstatement of the individual applicants. Its contention that there were no vacancies or suitable alternative posts available was preposterous and it was deliberately seeking to avoid reinstatement. Such an approach, he submitted,

warranted punitive costs. He relied on the *dictum* in *Sparks v Sparks* 1998 (4) SA 714 (W) at 726 E to the effect that :

“In general all orders of court, whether correctly or incorrectly granted have to be obeyed until they are properly set aside. If it were otherwise respondents would be able to defy court orders with impunity, contending that they believed such orders to be wrong.”

[18] He relied further on the warning issued by Goldstein J in *Culverwell v Beira* 1992 (4) SA 490 (W) cited in *Clipsal Australia (Pty) Ltd and others v Gap Distributors and others* 20120 (2) SA 289 (SCA) at [22] to the effect that “orders of court have to be obeyed until set aside and ..chaos may result if people were allowed to defy court orders with impunity”. In the same matter “.. in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 E at 228F-230A where, relying on *Culverwell* and *Kotze, Froneman J* said that an order of a court of law stands and must be obeyed until set aside by a court of competent jurisdiction”.

[19] As such, Mr Glendinning submitted, the first respondent was in contempt as it had simply refused to reinstate the employees in compliance with the court order. In regard to the capacity in which Erasmus and Craukamp had tendered their services, he confirmed that they had tendered their services as fire-fighters, and were not obliged to tender services as medical technicians. For the latter submission he relied on the outcome of an arbitration held by the first respondent in relation to a grievance lodged by Craukamp in 2005, which concluded on 13 March 2006 that he had been appointed to the position of fire fighter and not Emergency Medical Technician (“EMT”) or fire fighter /EMT and that the first respondent had unilaterally varied his terms and conditions of employment by forcing him to assume duties that are not part of his substantive post. The award concluded as follows: “I order the respondent to restore the status quo ante in that the applicant cannot be forced to carry out the duties of an ambulance assistant or EMT and any such refusal will not constitute misconduct by them. The applicant is to be required to perform only his duties in his substantive post of fire fighter.”

[20] Accordingly, Mr Glendinning submitted that the first respondent could not lawfully require Craukamp to work as a medical technician and the HPCSA

registration ceased to be of relevance. The suspensive condition requiring compliance with a BAA course was also therefore not applicable. In conclusion he submitted that the first respondent had for over four years evaded compliance with a court order and the applicant was entitled to an order compelling compliance.

- [21] In regard to the impossibility of performance allegation made by the first respondent and insofar as it seeks to suggest that the court order is vitiated by the allegedly fraudulent non-disclosure, Mr Glendinning submitted that this defence was tantamount to endorsing the anarchy and chaos warned of in the abovementioned decisions.
- [22] In regard to the substantial period of time that has expired since the court order, he submitted that this was not relevant as the employees retained an absolute right to seek compliance until such time as the order prescribed. The respondents have in essence deferred to the court of public opinion in holding them guilty in a trial by media that was conducted against Erasmus and Craukamp at the time, when numerous press articles were published suggesting that they had acted callously in leaving an individual to die in the streets. This appeared to be the predominant reason for their failure to comply.
- [23] There are in essence only two issues to be determined. Firstly, whether the applicants are entitled to an order compelling the respondent to comply with the court order. If this application is dismissed it would dispose of the entire matter and there would be no need to determine the other three applications. However if the applicants are granted relief in the first application, then the counter application becomes relevant and I would be required to consider whether the court order should be rescinded on the grounds of fraudulent non-disclosure.
- [24] In regard to the first application Mr Boda submitted that when a party seeks specific performance in the form of reinstatement, a partial tender of services is not sufficient. See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 419H, *3M SA (Pty) Ltd v SACCAWU & Others* [2001] 5 BLLR 483 (LAC) at para [9].

- [25] *In casu* the employees would have been entitled to reinstatement if they were able to tender services in full i.e. as both fire fighters and medical technicians. They were unable to do so for a period of approximately 18 months and the first respondent was left with no option but to fill their vacant posts. With reference to the pleadings he submitted that in settlement proposals made on 24 July 2009 it was unequivocally communicated to the applicant that the first respondent would be willing to reinstate them provided proof was forthcoming that they had completed the BAA course. This, Mr Boda submitted, would have given them full redress. The offer was repeated a number of times thereafter and was finally rejected on 17 June 2011. It appears from their papers that the justification for this rejection was that they would be entitled to tender partial services as ambulance drivers but not as healthcare professionals.
- [26] During this two year period it appears that the applicant changed attorneys on a number of occasions and the employees tendered their services but were turned away and requested to provide proof of their registration with the HPCSA and compliance with BAA training. On 25 July 2011 when it appeared that settlement negotiations had broken down and the first respondent was requested by the current attorneys of record to file its answering affidavit, the first respondent's attorneys again requested the applicant to provide proof that the employees had attended a BAA course within four months of the appeal outcome. None was forthcoming. As was submitted by Mr Boda, the first respondent had made a *bona fide* settlement proposal to reinstate Erasmus and Craukamp provided they submitted proof of their compliance with the appeal ruling. In other words, provided that they could tender their services in full. This proposal appeared to have been made from about 24 July 2009 until it was rejected two years later.
- [27] I understood Mr Glendinning to rely on the grievance arbitration in support of the submission that it was unlawful to impose the requirements of registration with the HPCSA and the BAA course since the award issued in Craukamp's favour had confirmed that the first respondent could not lawfully require him to perform duties as a medical technician. Mr Boda submitted that this was an attempt to make out a case in reply that did not

feature in the founding affidavit but I am not required to determine this as the lack of relevance of this award, somewhat obfuscated in Mr Glendinning's submissions, was clarified in reply to bear no relation to the Craukamp who is an applicant herein and of no relevance to this matter whatsoever.

[28] The employees are still left with the hurdle that they were employed as both fire fighters and medical technicians and were reinstated in the same capacity and therefore the respondent was entitled to insist that they meet the requirements of both components of their jobs. The court order makes no mention of the duties having been changed and only varied the back pay which they had been awarded. This is an issue that should have been raised at the section 158(1)(c) application but was not. The court order compels the first respondent to comply with an award which effectively reinstated them to both duties and unless they are able to comply with both duties the respondent is not obliged to reinstate them. They have made no attempt to date to meet the requirements for reinstatement as medical technicians by undergoing the BAA course. They have not done so and despite having repeatedly been asked over a 2- 3 year period to produce proof that they have met this requirement, they are to date still not able to do so.

[29] Indeed, as Mr Boda submitted, the first respondent is justified in rejecting what amounts to a tender of partial performance, and the application falls to be dismissed on that ground alone. He submitted that as of the date of termination in the final letter, no employment relationship existed between the parties and the second termination gave rise to a new dispute which the applicant has not sought to challenge. However I am in agreement with the submission in reply by Mr Glendinning that a second dismissal could not have in law been effected unless the two employees had first been reinstated. In fact, if the second dismissal was lawful and fair, they would then have been dismissed on account of their failure to provide the requested proof that they met the minimum requirements for reinstatement. In any event in so doing the first respondent was not in contempt as it was not refusing to comply with a court order, but was

instead relying on new facts that arose after the termination of the employment relationship.

[30] Clearly the contempt application is without merit as first respondent cannot be said to have disobeyed a court order or acted in bad faith and cannot be held in contempt. In any event even if I am wrong on this point, the applicants were reinstated on the register subject to a suspensive condition with which they have to date not complied. They have not provided satisfactory proof of their re-enrolment on the register, which was made subject to completion of the BAA course. On the basis of these two points it is competent to dismiss the application. I am accordingly not required to determine whether the court order was vitiated by fraud and having determined the contempt application the remaining applications are *a fortiori* disposed of.

Order

[31] In the circumstances, I make the following order :

The contempt application is dismissed with costs.

Bhoola J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

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RESPONDENTS:

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