



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 81/12

In the matter between:

NUM obo XOLANI NGADA & 8 OTHERS

Applicant

and

ASPHALT SERVICES CC

First Respondent

GLYNIS RANDAL (LARRETT)

Second Respondent

EVEN KENTANI

Third Respondent

Heard: 27 February 2015

Delivered: 6 March 2015

Summary: when a settlement agreement has been made an order of court which the respondents refuse to comply with, the application for contempt of court is based on the court order and not on the agreement.

JUDGMENT

LALLIE J

- [1] The applicant mainly seeks an order declaring that the second and third respondents ("the respondents") are in contempt of an order granted by this

Court on 14 July 2010. They seek a further order that the respondents be sentenced to pay a fine of R2000.00 or to thirty days' imprisonment, suspended for a period of two years, on condition that they are not convicted of contempt of court committed during the period of suspension. The application is opposed by the second and third respondents.

[2] The individual applicants were employees of the first respondent close co-corporation of which the second respondent is a member. The third respondent is a Human Resources Manager of the first respondent. A dispute ensued between the applicant and the first respondent which was referred to the Commission for Conciliation Mediation and Arbitration ("the CCMA"). Attempts to resolve it were successful in that the applicant, and the first respondent, represented by the third respondent reached a settlement agreement the salient terms of which are the following:

1. All employees ("applicant") who were laid off by the respondent shall be reinstated within two weeks from the date of settlement agreement.
2. If there is work the employees ("applicants") shall rotate with the other seven employees who are not laid off on a weekly basis.
3. No new employees shall be employed by the respondent unless there is enough work for all the old employees including the applicants.
4. In future if the contract ("service provider contract") is about to come to an end the respondent must inform all employees (including the applicants) and their trade union NUM a month in advance/
5. In the case of respondent laying-off the old employees (including the applicants) respondent will use the FILO (First In Last Out) system when employing'.

[3] The third respondent signed the settlement agreement on behalf of the first respondent on 14 August 2007. The respondent did not comply with the settlement agreement. The applicant approached this Court for an order making the settlement agreement an order of court ("the court order"). It was granted on 14 July 2010. On 3 August 2010, Mr Bengaqula ("Bengaqula") an

official of the applicant trade union (NUM) faxed the court order to the first respondent. On 9 November 2010, Bengaqula phoned the third respondent and informed him that some individual applicants would report for duty on 19 November 2010. It is common cause that only one of the individual applicants, Mr Ngada (Ngada) reported for duty on 19 November 2010. The respondents denied that the other individual applicants also reported for duty on the said date. The third respondent refused to reinstate Ngada. The parties are in dispute pertaining to the reasons for the refusal and the number of applicants who reported for duty on 19 November 2010. The applicant submitted that the respondents have failed and or wilfully neglected to comply with the court order.

- [4] For an application declaring the respondents to be in contempt of court to be successful, an applicant needs to establish that the respondents are bound by an order of a competent court which they have failed to comply with and that they are in wilful default of the court order. In this regard see *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paragraph [9]. It was argued on behalf of the respondents that the applicant failed to establish that the respondents are in contempt of court, inter alia, because it is the individual applicants who failed to comply with the settlement agreement and accordingly the contractual relationship between them and the respondents terminated by effluxion of time. It was further argued that because of the dispute of fact, the rule in *Plascon- Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) should apply. In terms of the rule when there is a factual dispute, final relief should be granted to the applicant if the facts stated by the respondent, together with the facts admitted in the applicant's affidavit justify the granting of the order. The respondents argued that there was no justification for the contempt of court order to be granted because the individual applicants' fixed term contracts terminated during September 2007 and none of the individual applicants reported for duty within two weeks in terms of the settlement agreement. According to the principle of reciprocity and the *exception non adimpleti contractus* there was no obligation on the first respondent to take the individual applicants into its employ at this stage. In addition the respondents argued that the applicant failed to prove beyond

reasonable doubt that the second and third respondents were *bona fide* in contempt of court.

[6] I have considered the submissions on behalf of both parties and I accept the applicant's version that this application is based not on the first respondent's failure to comply with the settlement agreement but on its failure to comply with the court order. In terms of the very *Plascon-Evans* rule, the respondents sought to rely on, the applicants' version should be preferred because it is not far-fetched. The applicants fought for their reinstatement and an agreement granting them their reinstatement was reached. When the applicant failed to comply with it, they had it made an order of court. The validity of the court order, which at least the third respondent became aware of in November 2010, was never attacked. The respondents have raised for the first time in this application that the individual applicants were on fixed term contracts, copies of which were not even attached to their papers. The third respondent did not deny having wilfully refused to comply with the court order. It is too late for him to allege that he was misled into entering into the agreement by a CCMA Commissioner because had that been the case, the respondents would have taken the necessary steps to protect itself against an invalid agreement. The second respondent who elected the third respondent to present her is bound by the court order and when she got to know of the court order and failed to comply with it she made herself guilty of being in wilful default of the court order.

[7] I could find no reason both in law and fairness for costs not to follow the result.

[8] In the premises the following order is made:

8.1 The second and third respondents are in contempt of the order granted on 14 July 2010 under case number J116/10.

- 8.2 The second and third respondents are sentenced to a fine of R2000.00 (two thousand Rand) or 30 days imprisonment, suspended for a period of two years, on condition that they are not convicted of contempt of court committed during the period of suspension.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Advocate Grogan

Instructed by: Wesley Pretorius and Associates

For the Respondent: Mr Kirchmann of Kirchmanns Inc

LABOUR COURT