



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 759/14

In the matter between

MOLAHLEHI FRANCE KAMOLANE

Applicant

and

PROTEA COIN GROUP (PTY) LTD

First Respondent

BAREND SIMION DE WAAL

Second Respondent

Date of hearing: 4 November 2016

Date of ruling: 31 March 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to hold the respondents in contempt of court on account of their refusal or failure to comply with an order granted by this court on 7 October 2015. In terms of the order, a settlement agreement concluded between the parties four years earlier, on 12 October 2011, was made an order of court.
- [2] The principles applicable to civil contempt are well-established. The purpose of contempt proceedings is to compel compliance with orders of court and to vindicate the court's authority consequent on the 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). It is a crime unlawfully and intentionally to disobey a court order, the essence of which lies in violating the dignity, repute or authority of the court. 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 *Fakie NO (supra)*, *Uncedo Taxi Service Association v Maninjwa & others* [1998] BCLR 683 (E)).
- [3] 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 fide.
- [4] The respondents do not dispute that they were aware of the order. They aver that they complied with the order, at least to the extent that they offered the applicant reinstatement, which he refused.
- [5] The relevant clauses of the settlement agreement that forms the subject of the present proceedings reads as follows, with handwritten insertions on the pro

forma CCMA agreement indicated in bold:

1. REINSTATEMENT

- 1.1 The respondent agrees to reinstate the applicant on the same terms and conditions of employment which governed the employment relationship prior to the dismissal dated **15 july 2011**.
- 1.2 The said reinstatement is to operate retrospectively with effect from **15 july 2011**
- 1.3 As a result of the retrospective effect of the reinstatement the respondent agrees to pay remuneration due to the applicant in the amount of R---- by no later than -----.
- 1.4 The applicant must report for duty on **13/10/11** (date) at **7:00** (time) at **BAMBANANI OFFICES** (place)...

6. OTHER

6.1 WHEN A VACANCY ARISES OUTSIDE HARMONY SOUTH IN WELKOM, THE APPLICANT WILL BE APPOINTED THERE.

- [6] In his founding affidavit, the applicant avers that on 13 October 2011, he reported for duty at the Bambanani offices. He states that he was advised 'by the First Respondent' (no person is named) to report back on a later date. The applicant also appears, from correspondence next to the founding affidavit, to believe that he is entitled to payment in the amount of some R344, 000 in the form of back pay and interest consequent on the arbitration award.
- [7] The respondents, in the answering affidavit, admit the settlement agreement but, as I have indicated above, deny that they failed to comply with its terms. The first respondent's industrial relations manager, Mr Masire, deposed to her confirmatory affidavit in which he states that the terms of the settlement provided that the applicant would be reinstated on the same terms and conditions with effect from 15 July 2011, that he was to report for duty on 13 October 2011 at 7:00, and that he's reinstatement was conditional on him being appointed into position when a vacancy arises outside of Harmony South in Welkom. Masire states that it was specifically agreed that the applicant would not be remunerated by the first respondent until such time as a position had been secured and for this reason, the parties did not agree to the payment of any back pay. In other words, the applicant would remain an employee of the respondent and once a vacancy became available he would be notified and appointed to that particular site.

Masire avers that on 13 October 2011, the applicant did not report for duty as he states. On 17 October 2011, Masire stated he became aware of a vacancy into which the applicant could be placed in the Vaal region. He states that he contacted the applicant to advise of the vacancy and informed him that he must report to the site concerned. The applicant declined the position and so that he could not relocate to the Vaal. A further position was offered to the applicant at AEL in Welkom, which the applicant refused. Masire states that the applicant did not communicate any further with him or the first respondent or attempt to report for duty at any of the sites offered by the first respondent in compliance with its obligations under the settlement agreement.

[8] In his replying affidavit, the applicant reiterates that he reported for duty on 13 October 2011. He then deposes to a version which was not canvassed in the founding affidavit, to the effect that when he reported for duty on that date, he was taken to Rustenburg where he was informed by Masire to return home and that he would be contacted should there be a vacancy in which he could be placed. The applicant states that he then went home and waited the further advices of the first respondent. He states that on 17 October 2011, Masire telephonically contacted him and advised him that there was a post at Rustenburg. The applicant considered that the post offered did not amount to compliance with the settlement agreement and when he reported to the first respondent's officers on 18 October 2011, he was advised by Masire that he should go home and would be contacted if there was a post available.

[9] In motion proceedings, the affidavits constitute not only the pleadings but also the evidence relied on by the applicant in support of his claim. The party is required in the founding affidavit to set out the facts fully, simply, clearly and in chronological sequence without any argumentative matter (see *Reynolds N.O. v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78). The case of a dispute of fact, the applicable principles of those set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)). These require that in motion

proceedings, a final order may be granted only if the facts alleged in the respondents affidavit coupled with those engaged in the applicant's affidavit which have been admitted or denied by the respondent, permit such relief. In short, motion proceedings are about the resolution of legal disputes based on common cause facts; they are not designed to determine probabilities (*NDPP v Zuma* 2009 (2) SA 277 (SCA) at 290D).

- [10] Further, as a general principle, an applicant in motion proceedings must make out a case in the founding affidavit. Generally, new matter will not be permitted to be raised by way of a replying affidavit. In the present instance, the replying affidavit comprises material that was known to the applicant at the time he deposed to his founding affidavit. The facts to which he deposes all relate to events between 13 October 2011 and November 2011. There is no reason why these could not have been canvassed in the founding affidavit. I am not persuaded that I should exercise my discretion in favour of allowing new evidence to be introduced by the applicant in his replying affidavit. The application stands to be determined therefore on the basis that to the extent that the replying affidavit introduces new evidence, it is to be excluded from consideration.
- [11] In the present instance, the settlement agreement concluded between the parties is drafted in a most unsatisfactory manner. This court has previously warned commissioners not to endorse settlement agreements that are ambiguous or that are not clearly definitive of the parties' respective rights and obligations, precisely because imprecision gives rise to disputes such as the present. Be that as it may, both parties accept that the applicant was obliged to report for work on 13 October 2011. The dispute between the parties is one of fact – the applicant states that he reported for duty in terms of the agreement and that he was told to report back on a later date. The respondent's version is that the applicant's reinstatement was conditional on a vacancy arising outside the Harmony contract, that the applicant did not report for duty on 13 October 2011, that

vacancies were nonetheless found and offered but refused by him

- [12] In his founding affidavit, as I have indicated, the applicant deals with the crucial issue of whether or not he reported for duty in a single sentence, in which he says no more than that he reported for duty and that he was advised by some unknown person to report back on a later date. From this terse statement, the applicant draws the conclusion that the first respondent 'avoided upholding the settlement agreement'. The version deposed to by the respondents, and particularly that reflected in the confirmatory affidavit of Masire, paints a very different picture. The picture painted is one in which the applicant was offered appointments at two different sites, both of which he declined.
- [13] I am unable to find on the papers before me that the respondents disregarded the order concerned, or that any disregard was *mala fide* and wilful. First, the settlement agreement is reasonably capable of bearing the interpretation placed on it by the respondents. This is supported by the nature of the applicant's employment and the placement of the respondent's employees to the sites of its various clients. The fact that the applicant could not be employed at a Harmony Gold Mines site is supported by the uncontested evidence that Harmony had refused the applicant access to any of its sites. In terms of the *Plascon Evans* rule, I am bound to accept the version proffered by the respondent that the applicant did not report for duty on 13 October 2011 as directed, that he was offered placement at least two sites other than the site at Harmony Gold, and that the applicant refused both placements. In these circumstances, on the papers before me, the respondents did not act in breach of the settlement agreement and thus in breach of any order of this court.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr A Goldberg, Goldberg Attorneys

For the respondents: Ms S Lancaster, Lancaster Kungoane Attorneys

Labour Court