



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: J 269/2017

In the matter between:

MUSAWENKOSI THEMBANI NCANANA

First Applicant

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

Second Applicant

and

DUAL PRODUCTS INTERNATIONAL (SA) CC

t/a DUAL PRODUCTS

First Respondent

GERRY VAN RENSBURG

Second Respondent

STEPHEN VAN RENSBURG

Third Respondent

JACO KOEN

Fourth Respondent

Heard: 11 August 2017

Order: 11 August 2017

Date of Reasons: 24 August 2017

REASONS FOR ORDER

PRINSLOO J

Background

- [1] The Metal and Engineering Industries Bargaining Council (MEIBC) issued an arbitration award on 2 March 2014 wherein the First Applicant's (Ncanana) dismissal was found to be unfair and the First Respondent (the employer) was ordered to reinstate him retrospectively. Ncanana was ordered to resume his duties on 17 March 2014.
- [2] The employer failed or refused to reinstate Ncanana. The arbitration award was certified in terms of the provisions of section 143 of the Labour Relations Act¹ (the Act) on 27 May 2014.
- [3] The Second Applicant (NUMSA) acting on behalf of Ncanana communicated with the employer between September 2014 and June 2015 to facilitate Ncanana's reinstatement as per the arbitration award. There was no response from the employer.
- [4] In January 2017 Ncanana instructed attorneys and on 17 January 2017 Mabaso attorneys acting on behalf of Ncanana addressed a letter to the employer demanding compliance with the arbitration award, failing which a contempt application would be filed against the employer and the Third Respondent. The employer was informed that Ncanana would report for duty on 24 January 2017.
- [5] On 24 January 2017 Ncanana, accompanied by his attorney, reported for duty and he was told to return on 30 January 2017. On 30 January 2017 Ncanana reported for duty but once again he was told that he should return on 1 February 2017. Ncanana reported for duty on 1 February 2017, when he was told that the employer would not comply with the arbitration award.
- [6] Ncanana filed an *ex parte* contempt application in accordance with the provisions of the Practice Manual with this Court on 15 February 2017 and on 24 March 2017 an order was issued to the effect that the Second, Third and Fourth Respondents should appear in Court on 20 April 2017 to show cause why they should not be found in contempt for failure to comply with the certified arbitration award issued on 2 March 2014.

¹ Act 66 of 1995.

- [7] On 20 April 2017 the matter was postponed to 11 August 2017.
- [8] On 11 August 2017 Ncanana and the employer signed a settlement agreement in full and final settlement and such settlement agreement was made an order of Court by agreement between the parties.
- [9] The Fourth Respondent (Koen) has in compliance with the Court order of 24 March 2017, filed an affidavit to show cause why he should not be found in contempt of Court and he has instructed counsel to present his case in Court.
- [10] It appears from the Applicants' founding affidavit that Koen was cited as 'an adult male working for the corporation in the position of production manager'. The Second and Third Respondents were cited as 'members of the corporation'. In his affidavit Koen explained that he deposed to the affidavit in response to the Court order issued on 24 March 2017 and he explained that he was situated at the employer's Benoni factory and Ncanana was situated at the employer's Boksburg factory and he was at no stage involved in the disciplinary hearing of Ncanana and apart from knowing that Ncanana's employment was terminated, he had no further knowledge of the matter. The Applicants did not file an affidavit in answer to Koen's affidavit.
- [11] In argument before this Court Mr Lamprecht on behalf of Koen argued that the Applicants should pay Koen's costs for defending this matter as no case was made out against Koen.
- [12] On 11 August 2017 the contempt application served before me and the following order was made:
1. The Court order issued on 20 April 2017 is discharged;
 2. The settlement agreement entered into by and between the Applicant and the First Respondent on 11 August 2017 and marked "X" is made an order of Court;
 3. The First and the Second Applicants are ordered to pay the Fourth Respondent's costs, the one paying the other to be absolved.

- [13] The First and the Second Applicants subsequently requested reasons for the cost order made in favour of the Fourth Respondent. The reasons for the order issued on 11 August 2017 are set out *infra*.

The cost order

- [14] In *Bruckner v Department of Health and others*² the requirements for contempt were considered and it was held that:

“It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:

(a) that the order was granted against the respondent;

(b) that the respondent was either served with the order or informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and

(c) that the respondent is in wilful default and mala fide disobedience of the order.”

- [15] There are thus three requirements to be satisfied for contempt, namely an order, service and default.

- [16] In Ncanana’s founding affidavit he explained that a copy of the arbitration award was served on the Third Respondent, Mr Stephen van Rensburg (van Rensburg) on 19 March 2014. The letter from Mabaso attorneys dated 17 January 2017 made it clear that the Applicant would approach this Court ‘with contempt application against both your company and Mr van Rensburg.’ The employer responded to the said letter on 31 January 2017 and the letter is signed on behalf of Dual Products International (SA) CC with a clear indication that the Second and Third Respondents are the members of the employer entity.

- [17] The Applicant’s case is that Koen told Ncanana on 24 January 2017 to return on 30 January 2017 and on 30 January 2017 he told Ncanana to return on 1 February 2017. On 1 February 2017 Koen told Ncanana that

² 2003 24 ILJ 2289 (LC).

they would not comply with the arbitration award and he issued Ncanana with a letter. This is the letter of 31 January 2017 signed on behalf of Dual Products International (SA) CC with a clear indication that the Second and Third Respondents are the members of the employer entity. This letter was not signed or issued by Koen and at best he merely handed the letter over to Ncanana.

- [18] The Applicants have to show beyond reasonable doubt that an order or award was granted against Koen, that Koen was served with the order or the award and that Koen is in wilful default and *mala fide* disobedience of the order or award. In the Applicants' founding affidavit no allegation is made to support such a case beyond reasonable doubt against Koen. At best the Applicants described Koen as a production manager and it is not the Applicants' case that Koen was in a position or capacity to execute the order or to ensure compliance with the award or even that the award was served on Koen. On Koen's own undisputed version he is the workshop manager and the Second and Third Respondents are the owners of the business.
- [19] The Applicants could not prove contempt beyond reasonable doubt and failed to satisfy the requirements to prove that Koen was in contempt of Court.
- [20] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the Act to make orders for costs according to the requirements of the law and fairness.
- [21] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*³ it was emphasized that:

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring

³ 2012 33 ILJ 2117 (LC).

that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

[22] Koen had to defend a contempt application where he should not have been cited as a respondent and where the Applicants dismally failed to make out a case for contempt against him and fairness dictates that he cannot be expected to endure costs defending litigation that ought not to have been brought against him in the first place. NUMSA is a well-established trade union quite capable of considering the consequences of instituting litigation against a party where it is unable to prove its case and it had to put in some earnest thought and consideration into the merits of this case before citing Koen as a respondent. The First, Second and Third Respondents were correctly cited and it was sufficient to cite them as respondents and there was no basis or compelling reason to cite Koen and to drag him to Court in these contempt proceedings.

[23] It is for these reasons that I issued the order on 11 August 2017 and awarded costs in favour of Koen.

Connie Prinsloo

Judge of the Labour Court