



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J890/17

In the matter between:

TASIMA (PTY) LTD

Applicant

and

ROAD TRAFFIC MANAGEMENT CORPORATION

First Respondent

DEPARTMENT OF TRANSPORT

Second Respondent

DIRECTOR GENERAL:

DEPARTMENT OF TRANSPORT

Third Respondent

MINISTER OF TRANSPORT

Fourth Respondent

EMPLOYEES LISTED IN ANNEXURE

“A” TO THE NOTICE OF MOTION

Fifth to Eighty Fourth Respondents

MAKHOSINI MSIBI

Eighty Fifth Respondent

Heard: 11 January 2018

Delivered: 17 January 2018

Summary: Urgent contempt of court proceedings – writ of execution is the correct procedure to enforce a court order sounding in money.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The applicant (Tasima) is unfortunately approaching the Court on urgent basis by way of contempt of court proceedings for the third time seeking to enforce the order by Steenkamp J against the first respondent, the Road Traffic Management Corporation (RTMC) and its Chief Executive Officer, the eighty fifth respondent (Mr Msibi).
- [2] On 25 May 2017, Steenkamp J made the following Order in favour of the Tasima:

‘63.1 It is declared that, with effect from 5 April 2017, the contracts of employment of the 5th to 84th respondents transferred automatically from the applicant (Tasima (Pty) Ltd) to the first respondent (the Road Traffic Management Corporation) in accordance with the provisions of section 197 of the Labour Relations Act (Act 66 of 1995)

63.2. The RTMC is directed to pay the 5th to 84th respondents from 5 April 2017 to the date of the final determination of the order in subparagraph 1 above:

63.2.1 on a monthly basis on or before the 25th of each month, the amounts set forth under the column headed “Monthly CTC excl 13th cheque, annual bonus, overtime, standby allowance, birthday voucher and night shift allowance” as set out in Annexure “C” to Annexure “FM 11.6” to the founding affidavit of Fannie Lynen Mahlangu; and

63.2.2 on an annual basis, any additional amounts making up the column headed “Annual Total CTC” as set forth in that schedule.

63.3 The confidentiality regime set out in paragraph 107 of the founding affidavit applies.

63.4 The RTMC is ordered to pay the costs of this application, including the costs of two counsel, and including the costs of 5 May 2017.'

[3] On 2 June 2017 the applicant approached the Court on an urgent basis, seeking declaration of contempt of court against RTMC and Mr Msibi after their failure to comply with the Order by Steenkamp J (Steenkamp J Order). At that time, RTMC had sought leave to appeal and submitted that its application for leave to appeal suspended the Steenkamp J Order in its entirety. Saloojee AJ found that the payment obligations in terms of the Steenkamp Order are operative despite the application for leave to appeal or appeals against paragraphs 63.1 and 63.2 and as such RTMC was in breach of the Steenkamp J Order. RTMC was ordered to pay all employees the amounts in respect of May 2017 as per the Steenkamp J Order. However, Saloojee AJ was of the view that a contempt of court order was inappropriate.

[4] On 6 June 2017, Steenkamp J granted the first respondent leave to appeal his order, save for that part of the order pertaining to the relief in paragraph 63.2. The first respondent then sought leave to appeal the order by Saloojee AJ as well as petitioning the Labour Appeal Court (LAC) to grant leave to appeal paragraph 63.2 of the Steenkamp J Order.

[5] Tasima launched yet another urgent application and RTMC also launched a counter-application. On 3 July 2017, Rabkin-Naicker J, seized with the matter, held that:

'However an application in contempt proceedings is by its nature urgent as the Practice Manual in this Court recognizes. There had been no breach of the order in respect of the May salaries when the application was brought, as referred to above. Steenkamp J's Order in respect of first respondent's obligations was to pay the salaries, including those for April, to the individual employees. The first respondent has not made any payment in this respect. I

declare the first respondent to be in contempt of this part of the Steenkamp J order i.e. the payment of the April salaries.¹

[6] Rabkin-Naicker J also issued a stern warning to RTMC that it must be rest assured that this Court 'will be less than appreciative to deal with this matter again' and hoped that RTMC 'will not cause any further breaches of the Steenkamp Order given that the substantive matters will be dealt with in the LAC.'

[7] Notwithstanding, Tasima approached the Court on urgent basis once more, in these proceedings, seeking an order in the following terms:

'1...

2. Directing the first respondent, within 5 hours of the time this order is handed down, to make payment of the amounts set out in columns titled "*annual 13th cheque*" and "*annual bonus*" in the schedule annexed to the founding affidavit of Fannie Lynen Mahlangu dated 29 December 2017, ...

3. Declaring that the first and eight fifth respondents be in breach and wilful contempt of the order of the honourable Mr Justice Steenkamp handed down on 25 May 2017... ("**the Order**");

4. Ordering that:

4.1 that immediately upon handing down of this order, *alternatively* if there is a breach of any part of the orders in paragraph 2 or 3 above, the eighty fifth respondent be committed to imprisonment:

4.1.1 for a period of 30 days;

4.1.2 *alternatively*, until paragraphs 2 above has been complied with in full;

4.1.3 further *alternatively*, for such period as the Court deems appropriate;

4.2 should, at any time, there be a breach of the Order by the first and or eighty fifth respondent, the eighty fifth respondent be

¹ Judgment handed down on 13 July 2017 at para 10.

committed to imprisonment for a period of 30 days; alternatively, until such breach has been rectified; further alternatively for such period as the Court deems appropriate;

4.3 a warrant of committal is to be issued as a matter of extreme urgency by the Registrar of this Honourable Court, on the same papers, duly supplemented as necessary, to ensure that the committal orders in paragraphs 4.1 and 4.2 are implemented.

5. Directing that the eighty fifth respondent in his personal capacity, *alternatively*, first respondent and eighty fifth respondents in his personal alternatively official, capacity, jointly and severally, together with any other party that opposes this application, be ordered to pay the costs of this application, on the scale as between attorney and own client including the costs of two counsel.'

Brief historical background

[8] In a nutshell, from 2002 to 2007 Tasima developed the electronic national traffic information system (eNaTIS) for the Department of Transport (the DoT) in terms of an agreement with the government (the agreement). The Constitutional Court ordered Tasima to hand over the services and eNaTIS to the Road RTMC consequent to a lengthy bellicose litigation pertaining to the lawfulness of the extensions of the agreement and contempt orders by various Courts.

[9] The crisp issue before Steenkamp J was whether the transfer and handover of eNaTIS to RTMC constitute a transfer of a business as a going concern in terms of section 197 of the LRA and that all Tasima's employees would automatically be transferred to the RTMC. Steenkamp J concluded as follows:

'I am satisfied that the handover of the services and the electronic National Traffic Information System to the Road Traffic Management Corporation in terms of the order of the Constitutional Court of 9 November 2016 is a

transfer of a business as contemplated by s 197 of the LRA. The consequence is that the new employer (the RTMC) is automatically substituted in the place of the old employer (Tasima) in respect of all contracts of employment in existence immediately before the transfer, i.e. on 5 April 2017.²

- [10] In terms of paragraph 63.2, the Steenkamp Order provides that RTMC shall pay, *inter alia*, the annual amounts set out in paragraph 63.2.2 which cross references columns titled “*annual 13th cheque*” and “*annual bonus*” in the schedule annexed to the founding affidavit of Fannie Lynen Mahlangu dated 29 December 2017 as “AS6”. Tasima argued that annual amounts are payable to the employees in respect, and by the end, of each calendar year. The amounts include the annual 13th Cheque, payable in the month of December, and annual bonus due in 2016.
- [11] When the individual employees who are listed in annexure A to the Notice of Motion and cited as the fifth to the eighty fourth respondents (the affected employees) were still in its employ, the payments were normally made by 15 December of each year to ensure that funds are available ahead of the new year and festive break from 16 December. On 16 November 2017, 15 and 22 December 2017 Tasima addressed letters to RTMC reminding them of its obligation to pay the 13th cheque and annual bonuses in December 2017. When RTMC failed to meet the deadline of 22 December 2017, it was given a final deadline of 27 December 2017. RTMC did not favour Tasima with a response in all instances.
- [12] Tasima then launched this application on 29 December 2017. On 3 January 2018, it was heard for the first time by Rabkin-Naicker J and was postponed at the instance of RTMC. On urgency, Tasima argued that breach of an order of Court, particularly where specific time periods have been directed for performance and ignored, is manifestly urgent and contempt, by its very nature is urgent.

² Judgment handed down on 25 May 2017 at para 58.

[13] On the other hand, RTMC is challenging the grant of the order sought by Tasima by raising two point *in limine* in that the matter was not urgent and that contempt proceedings are irregular since Tasima seeks to enforce an order sounding in money.

13.1. On urgency, RTMC argued that there is no justification for Tasima to approach the Court on such extremely urgent basis for an order for payment of remuneration and to find the respondent in contempt of Court.

13.2. That the order Tasima seeks to enforce is for payment of money and as such Tasima ought to have enforced the Steenkamp J Order by writ of execution and not contempt proceedings.

[14] RTMC argued further that it is not in contempt of the Steenkamp J Order since that neither the 13th cheque or bonus was due and payable. Acting on legal advice which it accepted, RTMC did not pay the 13th cheque and bonus because the annual year would end only on 5 April 2018, a year after the transfer of eNaTIS.

Analysis

[15] Tasima clearly approached the Court by way of contempt proceedings seeking, primarily, a *mandamus* order as a judgment creditor in terms of the Steenkamp J Order. Also, the Court is asked to find RTMC and Mr Msibi in contempt of Court and immediate committal of Mr Msibi, alternatively, in the event of persistent contempt.

[16] RTMC does not dispute that the Steenkamp J Order enjoins it to make payment of annual 13th cheque and annual bonus to the affected employees in whose interest this application is launched. It is also not in dispute that the Steenkamp J Order is an order sounding in money, as argued by RTMC. In fact, the schedule referred to in the Steenkamp J Order consists of apparent amounts in respect of the 13th cheque and annual bonus for each affected employee.

- [17] I also note that RTMC did not challenge the computation, eligibility and due date for the payment of the 13th cheques and annual bonuses when notified by Tasima that the payments were due and payable in December 2017 in a correspondence preceding the launching of these proceedings. However, belatedly and with a view to resist a contempt order, RTMC asserts in its answering affidavit that the amounts are not due and that the annual bonus is discretionary. Nothing turns on these submissions at this stage of the inquiry as I understood them to be made as an alternative in the event RTMC's points in *limine* are dismissed.
- [18] Tasima's argument that the point in *limine* that a court order sounding in money cannot be enforced by way of contempt proceedings is *res judicata*. In my view, this argument is untenable. Mr Franklin, counsel for Tasima, conceded that Rabkin-Naicker J never pronounced on this point. Even if both Saloojee AJ and Rabkin-Naicker J accepted the enforcement of the Steenkamp J Order by way of contempt proceedings, they did so in exercise of a judicial discretion and as such that cannot fetter this Court's discretion. By the same token, Tasima's submission that over ten courts have heard its contempt applications against RTMC and/or DoT where a relief similar to the one sought in these proceedings was ordered is misconceived.
- [19] It is clear that the genesis of all the contempt proceedings in the High Court was the order by Mabuse J issued under case number 44095/2012 and handed down on 17 October 2012 which granted the application for an interim order to maintain the *status quo* and also directed the DoT to comply with its obligations in terms of the agreement (including the extended agreement) pending the finalisation of the dispute resolution proceedings. Over and above payment of money, DoT was directed to perform specific obligations. The converse is true in this case as the only obligation in terms of paragraph 63.2, pertinently 63.2.2, is payment of amounts identified as monthly and annual earnings.

[20] Even though Tasima concedes that it could have enforced paragraph 63.2.2 of the Steenkamp J Order by way of issuing a writ of execution, it oddly argued that it takes a substantial amount of time to execute a writ given the provisions of the State Liability Act (SLA).³ Clearly, Tasima is oblivious of the Constitutional Court judgment in *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another*,⁴ which led to the amendment of the SLA. In essence, the Constitutional Court, in declaring section 3 of the SLA unconstitutional, sought to avoid situations such as the one in this case and pertinently stated that:

'In regard to the possibility of contempt proceedings being instituted against state functionaries, one must bear in mind that these proceedings would have to be instituted by the judgment creditor once the relevant state functionary fails to pay the monies owed. The judgment creditor would have to obtain a *mandamus* order and if the state functionary does not comply with the *mandamus* then he or she would be held in contempt of court. This process is a tedious one which places an onerous burden on the judgment creditor and does not translate into money in the pocket for the judgment creditor. Once a litigant is in possession of a judgment debt, he or she should not be expected to pursue the payment thereof *ad infinitum*. One cannot expect the creditor who has already gone to a great deal of trouble, and spent both time and money in litigation, to launch contempt of court proceedings against the defaulting state official in the knowledge that such proceedings are unlikely to ensure that the debt is ultimately paid. This is too onerous a burden to place upon a successful litigant. The state needs to take responsibility for its employees and ensure that defaulting state officials are subject to the disciplinary action as envisaged in the legislation and regulations'. (Footnotes omitted)

[21] In *Wenum v Maquasi Hills Local Municipality and Another*,⁵ referred to ardently by RTMC, similarly, the applicant sought to enforce a court order that ordered the respondent to pay his remuneration until the reserved judgment is delivered. When the respondent failed to pay his January

³ Act 20 of 1957.

⁴ [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 75.

⁵ (2016) 37 ILJ 1488 (LC).

salary, he approached the Court on urgent basis seeking an order holding the respondent to be in contempt of court. Prinsloo J, dismissing the contempt application states the following:

'The purpose of contempt proceedings is to enforce a court order and compel compliance where the performance of an act is ordered. Where the court ordered the payment of an amount of money, the court order can be given effect by following the process associated with obtaining a writ of execution.

The registrar of the Labour Court can issue a writ of execution where the request to issue a writ is accompanied by a court order that orders payment of money and specifies the amount or an affidavit setting the amount claimed has been quantified.'⁶

[22] I endorse the above findings.

[23] In this case, Tasima seems to be discounting the issuing of the writ of execution as the process provided for in the SLA is prolonged and would cause substantial financial hardship to the individual employees. It is not surprising, however, that these averments are bald and unsubstantiated. It is not the affected individual employees who are telling the Court exactly the nature of the financial hardship they would suffer if a writ of execution is issued. The information given by Tasima is generic and it describes virtually what all litigants, pertinently State employees, enforcing court orders sounding in money go through.

[24] In any event, it is immaterial whether the writ of execution is issued in terms of the SLA. Truly, the issuing of the writ of execution is applicable in this instance and it is the appropriate and adequate remedy to enforce a judgment sounding in money. In fact, this case is a typical of ineffectiveness of contempt of court proceedings as a means of ensuring that the judgement debt is ultimately paid, despite it being an onerous burden. The Court has

⁶ Ibid at paras 17 and 22 respectively.

been approached by way of urgency on three different occasions in order to enforce the Steenkamp J Order.

Conclusion

- [25] Tasima, as judgment creditor, ought to have availed itself to the appropriate, adequate and cost effective machinery of issuing writ of execution, especially given the history of this matter. For that reason, this application must fail.

Urgency

- [26] Albeit that contempt of court proceedings could be instituted on urgent basis, facts upon which urgency is pegged must be placed before the Court with specificity. All the same, urgency should not detain the Court in the light of the finding above and the fact that Tasima had previously instituted contempt of court proceedings against RTMC and/or DoT in various Courts on urgent basis with great success. I accept that it is not farfetched of Tasima to expect to still be heard on urgent basis even in this instance.

Costs

- [27] Even though Tasima is unsuccessful, I am of the view that it is equitable that each party pay its own costs. Tasima was not *mala fide* in instituting these proceedings and, perceivably, despite arguing that Tasima ought to have issued a writ of execution, RTMC has failed to make any undertaking, even on contingent basis, to satisfy the judgment debt.

- [28] In the circumstances, I make the following order:

Order

1. The urgent application is dismissed with no order as to costs.
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P Nkutha-Nkontwana
Judge of the Labour
Court of South Africa

Appearances:

For the applicant:

Advocate Franklin SC with
Advocate AT Rowan

Instructed by:

Webber Wentzel Attorneys

For the first and eighty fifth respondents:

Advocate Redding SC

Instructed by:

Dexter Selepe Attorneys