



Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: J 1053/13

In the matter between:

ASHLEY SEOPA

Applicant

and

**IMPERIAL COLD LOGISTICS (PTY)
LTD**

First Respondent

NONNY NKOSI

Second Respondent

JOHAN VAN WYK ROSSOUW

Third Respondent

JOHAN CHRISTIAN DE BEER

Fourth Respondent

Heard: 19 May 2017

Delivered: 09 February 2018

Summary: (Contempt – substantial compliance – absence of mala fides or wilfulness to the extent there was not literal compliance – non-director cannot be cited for contempt on the part of the employer where employer is a corporate entity – no purpose served in pursuing application prior to the hearing – pursuit

of application vexatious in the circumstances - wasted costs ordered against applicant's attorneys.)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is a contempt application which was launched in October 2016. The applicant, Mr A Seopa ('Seopa'), claims that the respondents namely his employer ('Imperial'), its Human Resource Manager, Ms N Nkosi ('Nkosi') and two of its directors Messrs J Van Wyk Rossouw ('Rossouw') and Mr J de Beer ('De Beer') are in contempt of a court order dated 30 June 2016. The court order *inter alia* dismissed a review application which Imperial had brought in respect of an arbitration award and made the award an order of court. The award had been issued on 11 November 2012 and had reinstated Seopa with retrospective effect to his dismissal on 25 July 2012.

Narrative of material facts

- [2] At the time of his original employment on 3 March 2008 and at the time of his dismissal, Seopa was an assistant driver or so-called 'Van assistant'.
- [3] After he presented the court order to Nkosi in mid July 2016, she discussed it with the human resource executive of Imperial, Mr J Kerslake. At the time it was presented, there were no vacant driver assistant positions and they took steps to reinstate him in another position on the same grade and rate of pay and similar job functions. Further payments to be made in terms of the award were effected on 25 August 2016. They further discussed with Seopa an alternative placement in the position of a warehouseman where there was a vacancy and where he would perform similar duties to a van assistant but in a warehouse location.
- [4] Seopa agreed to this arrangement and a contract was drawn up to record his appointment. In terms of the contract, his original date of engagement was recorded as the date on which he was employed, so it reflected his

continuity of service. According to the respondents, when Seopa was issued with the contract he asked for time to consider it and to consult with his attorney for the purposes of discussion and advice. After taking two days leave for this purpose he returned with the signed contract. Seopa agrees he took it to his attorneys and discussed it with them, but denies taking leave for this purpose. However, he does not address the leave records attached to the answering affidavit in support of the contention he took leave for this purpose.

- [5] In his founding affidavit, he merely asserted that the contract amount to re-employment which is not the same as reinstatement and therefore it was not compliant with the court order. It was only in his replying affidavit that he contended that he had advised Nkosi that the contract did not comply with the court order, but she told him that if he didn't sign it he would not receive his salary. He does agree that he went to his lawyers and in discussion with them decided that he had no option but to sign the contract because he needed money. He simultaneously instructed them to launch the contempt application. Notably, his attorneys did not think it advisable to phone Imperial about the alleged difficulty with the contract or to put Imperial on terms that the contract of re-employment did not effectively comply with the the order and to give effect to the order.
- [6] At this juncture, it should be mentioned that even when this application was heard, the primary objection to the contract seem to be a suspicion that somehow it might be relied on by Imperial to undermine the order of reinstatement. Apart from the appointment in a warehouse post and the term 're-employment' being used, in substance there was no material disadvantage flowing from the contract, particularly as it effectively recognised that Seopa's continuity of service would be recognised, that the job functions were similar and the remuneration the same as a van assistant's.
- [7] Kerslake and Nkosi believed that in view of Seopa's consent to the arrangement, they had effectively complied with the court order. They also advised Seopa that if a vacancy became available as a van assistant they

would try and accommodate him. Seopa does not deny this was conveyed to him.

- [8] After a week, Seopa complained about working in the warehouse, which was chilled because perishable goods were kept there. He does not dispute that he knew what working in the warehouse would entail but believed that this was a punishment. He was asked to undergo medical tests to determine whether he was capable of working in that environment and in the meantime was placed in a risk assessment department, which had an ambient environment and involved similar work, pending the outcome of the health assessment.
- [9] The contempt application was initially launched *ex parte* against Imperial and Nkosi on 4 October 2016. It is noteworthy that this was nearly 3 months after Seopa had supposedly instructed his attorneys to proceed with the contempt application and was also launched without any attempt to resolve the apparent complaint about his re-engagement beforehand. The fact that this was the first recourse of Seopa and his attorneys after nearly 3 months of inactivity and his apparent considered acceptance of the terms of reinstatement is indicative that the applicant and his attorneys appeared to have the single-minded objective of pursuing a contempt application for its own sake.
- [10] As it happened, the *ex parte* application came before myself on 28 October 2016. The matter was removed from the roll and Seopa was invited to make amendments to include directors of Imperial as respondents because of Nkosi's non-director status which meant she could not be cited as the human embodiment of Imperial for contempt purposes. Perhaps as a result of this direction, instead of applying to join or substitute the directors, Seopa made an application to amend the notice of motion to include them. Imperial made much of the fact that this might have been an irregular step but nothing much turns on that in these proceedings.
- [11] The amended notice of motion was filed on 14 November 2014 and the order was granted on the same day. Like the initial *ex parte* application it required personal service on Rossouw and De Beer. For reasons which

are not entirely clear the order was reissued on the so-called return date of 24 February 2017 by the Honourable Thlotlhemaje J, and required the respondents to appear on 21 April 2017. It is not disputed that neither Rossouw nor De Beer were actually given a copy of the court order they were accused of being in contempt of. Moreover, the service of the order only occurred a week before the return date. Both Rossouw and De Beer deny personal knowledge of the order prior to that as the human resource department was dealing with the consequences of the reinstatement order and the matter never came before the directors for discussion. At best for Seopa, it can only be said that Rossouw and De Beer had direct knowledge of the order itself shortly before the matter was set down on 21 April 2017. The arbitration award which was necessary to clarify the impact of the order was also not attached to the amended notice.

- [12] By mid-April 2017 a permanent position of a van assistant opened up because of the dismissal for misconduct of various van assistants by Imperial. Seopa was offered one of these posts, which he accepted. In his reply, Seopa claims that there had been casual van assistant posts available for a while but does not say that he would have been prepared to take one of those posts if they had been offered to him, nor did he dispute that the permanent posts only became available in mid-April. In his reply, he maintains that Imperial only complied with the court order in April 2017.
- [13] The day before the matter was set down, the respondents filed their answering affidavit as they were entitled to. The following day, 21 April 2017 the matter came before Thlotlhemaje J again and an order was issued by agreement. The gist of the agreed order was that the matter was postponed to 19 May 2017 and the applicant would file a replying affidavit on 12 May 2017.
- [14] In the most recent authoritative judicial exposition on the law of contempt, the Constitutional Court in **Matjhabeng Local Municipality v Eskom**

Holdings Ltd And Others¹ reiterated the basic test for contempt set out in ***Fakie NO v CCII Systems (Pty) Ltd***², viz:

'It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites . . . have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.'³

- [15] The Constitutional Court also noted the constitutional objective underlying contempt proceedings as being the preservation of the court's authority by ensuring that its orders are complied with:

'[48] To ensure that courts' authority is effective, s 165(5) [of the Constitution] makes orders of court binding on 'all persons to whom and organs of state to which it applies'. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority.'⁴

- [16] This application is not the run-of-mill contempt application heard by the Labour Court. Typically, there is either a flat refusal of the employer to reinstate the employee when he or she presents himself at the employer's premises with the court order, or there are more nuanced responses where the employer tells the employee to come back on another day or to report at other premises as part of a strategy to complicate the re-engagement process in the hope that either the employee will lose hope and give up trying to obtain reinstatement, or that sufficient confusion will be created for the employer to later dispute that there was a tender of services by the returning employee.

¹ 2018 (1) SA 1 (CC)

² 2006 (4) SA 326 (SCA)

³ *Matjhabeng* at 24, para [62]

⁴ at 19, para [48].

- [17] In this case, the employer immediately took steps to reincorporate Seopa in the workplace as best it could at the time, even though it did not retrench another van assistant to accommodate him. Importantly, the contract it presented him with required his consent to take the alternative position on the same salary scale and performing similar duties to his previous position without loss of any service continuity. Even though he gave no indication at the time that he did not accept appointment as a warehouseman, as soon as he complained about the working environment he was removed from it, and given another job with similar tasks whilst his suitability for the warehouse position was assessed. On the evidence he was placed in his original position as a van assistant when the first permanent position became available. The employer had sought his cooperation with the arrangement and he appeared to have agreed to it after taking time to consider the proposal, and having consulted his lawyers.
- [18] His version that he felt coerced to accept the appointment, apart from the fact that he never mentioned it until replying to the answering affidavit, is far-fetched. If that had indeed been the case, it is inexplicable that his lawyers would not have reacted immediately after he meant to consult with them by putting the employer on terms, or at least engaging with it about the perceived difficulties he had with the manner in which he was being re-engaged. They did not even attempt to advise the employer that he reserved his rights to insist on compliance with the court order to the letter, notwithstanding his acceptance of the contract. After returning with the signed contract nearly 3 months elapsed before the application was launched, without any attempt to explore reasonable and less costly ways of ensuring compliance with the order.
- [19] Even then, as previously observed, the proper persons to answer to a charge of contempt at best only received direct knowledge of the order and possibly the underlying award at a stage when Imperial was actually complying with the letter of the original award. The only objective Seopa and his attorneys could have had in pursuing the contempt application after receiving the answering affidavit and knowing that he was employed as a van assistant, which he does not deny was a position he was

promised when it became available, was to try and punish the employer or for not placing him in that position prior to April 2017, and not for the purpose of ensuring effective compliance with the court order.

[20] Even assuming that the court would consider it necessary under these circumstances to mete out some kind of sanction to Imperial for not complying with the letter of the order, the requirements of contempt for the period since Seopa returned to work and his appointment in a van assistant post have to be met. At the contempt hearing, the applicant's counsel, *Mr Khathotshelo*, vigorously defended his client's pursuit of the application on the basis that even if it was not tenable to persist with it against De Beer and Rossouw, Nkosi could not escape the charge of contempt and the contract which Seopa was required to sign was inconsistent with the court order that merely required Seopa to be reinstated.

[21] As regards N1, it is abundantly clear that she tried to give effect to the order, while accommodating Imperial's lack of existing van assistant vacancies at the time Seopa returned to work. Seopa's version that he was coerced to sign the contract was only raised in reply and in any event, as pointed out above, it is extremely hard to believe given the inconsistency between that allegation and his failure to do anything about it for nearly 3 months despite taking legal advice. Moreover, there is the fact that his attorneys failed to even record the slightest murmur of disagreement about the contract. On the record of the affidavits, the only plausible conclusion to draw is that Nkosi assumed that there was no live issue about Imperial's non-compliance with the court order. The founding affidavit in support of the contempt application itself is so lacking in any detail about why the arrangement Seopa had ostensibly agreed to was unsatisfactory, it is understandable that Nkosi would have believed that the arrangement he consented to was sufficient answer to a charge of contempt and lack of wilful disregard of the order or *mala fides* on her part. It must be remembered that initially Seopa did not even allege that he was coerced to sign the agreement. Moreover, the willingness of the respondent to accommodate Seopa further when he complained about the work environment and placing him in his original post at the earliest

opportunity, as well as taking into account that his conditions of service and continuity of service were maintained are not indicative of a party acting in wilful disobedience of the court order, but rather are of a party that believed it had the agreement of Seopa to give practical effect to the order by adopting the measures it did.

- [22] There is another fundamental issue which the pursuit of the contempt application against Nkosi raises. She was not a director of the company and court order was made against the company. It is the directors of a company as the natural persons representing the company, who are directly accountable for non-compliance with a court order against the company and may be held in contempt for the company's non-compliance with the order if the prerequisites for a finding of contempt are established. In the absence of a court order issued against them as individuals, the liability of other employees in the context of contempt proceedings of this kind are very unlikely to have any traction, except perhaps conceivably to the extent that they are shown to be accessories to the contempt committed by the principal officers of the corporate entity. In this case, no attempt was made to characterise Nkosi's actions as knowingly aiding and abetting any of the directors in avoiding compliance with the order. The pursuit of a charge of contempt against Nkosi was a non-starter in the circumstances and it is inexplicable why it was pursued right to the end.
- [23] The only other reason advanced in argument for pursuing the contempt application, aside from apparently wishing to punish Nkosi, was that the reinstatement of Seopa did not require the conclusion of the contract which he signed. In this regard, the applicant could only articulate a suspicion that somehow the existence of the contract might be used against him to avoid compliance with the order *in the future*, bearing in mind that at time the matter was heard he was already working in his former position as a van assistant.
- [24] It was not necessary for Seopa to pursue the contempt application to obtain clarity about the future. Nevertheless, to assist him in that regard, the court asked Imperial to give an undertaking going forward. It must be stressed that this undertaking had nothing to do with whether the contempt

application was a live issue at the time of the hearing and arose purely in the context of minimising the prospect of the status quo being altered. In that regard Imperial's counsel, *Mr Leysath*, was willing to place on record that the respondent would alter the job description in the re-employment contract to that of a van assistant instead of a warehouseman and that he would not be removed from his position as a van assistant, subject to the provisions of the Labour Relations Act, 66 of 1995 and operational requirements. However, these undertakings given are only indirect and quite incidental consequences of the contempt application hearing and did not validate the applicant and his attorneys pursuing the contempt application all the way. All the court could determine was whether the respondents should have been held in contempt of the court order during the period since it was issued and ending on the date of the hearing and there was no basis for such a finding for the reasons discussed above.

Costs

- [25] On the facts of this case, there was absolutely no purpose to be served in proceeding with the application on 19 May 2017. Seopa could not make out his case in reply, and in any event, as mentioned above it is a wholly implausible account of his supposed insistence that the contract did not comply with the court order and that he was coerced to sign it. It should have been apparent to his attorneys that there was no meaningful case to pursue after receipt of the respondent's answering affidavit and that he could not rescue his case by setting it out for the first time in reply. At the very least, the wasted costs of the hearing on 19 May should have been avoided and pursuing the application at that stage was little more than vexatious.
- [26] I am satisfied in the circumstances that Seopa's attorneys were seriously remiss in assisting with the application when no purpose would be served by doing so and that a salutary cost award is in order.

Order

[27] The respondents are not guilty of contempt of the court order handed down on 30 June 2016 under case number J 1053/13 and the contempt application is dismissed.

[28] The applicant's attorneys must pay the wasted costs of the respondents for 19 May 2017 and the costs of preparing for argument.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: M Khathotshelo instructed by Popela Maake
Attorneys

RESPONDENT: L C Leysath instructed by Gishen-Gillchrist
Attorneys