

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J204/17

DATE: 2018-02-16

In the matter between

UNTU

First applicant

SATAWU

Second applicant

and

PRASA

First respondent

LINDIKAYA ZIDE

Second respondent

PEARL MUNTHALI

Third respondent

EX TEMPORE JUDGMENT

STEENKAMP, J:

This is an application by the second applicant, SATAWU, to find the first respondent, the Passenger Rail Agency of South Africa (PRASA), as well its officials, who are cited as the second and third
5 respondents, in contempt of an order of this court granted on 8 August 2017. All that that court order does is to make a settlement agreement between UNTU, SATAWU and PRASA an order of court. The application today is brought by SATAWU.

The application merely makes the suggestion that PRASA
10 has not complied with the court order, and hence with the

settlement agreement, which comprises 19 different issues, without specifying with any particularity which of those issues the union alleges that PRASA has not complied with. But before I get to the merits of that argument, Mr *Kutumela*, for the respondents, has
5 raised two preliminary points. The first is that the settlement agreement itself comprises a dispute resolution mechanism in which it says, in badly drafted terms:

“Any dispute about the interpretation or
application of this agreement must be resolved
10 [by way] in terms of the provisions of PRASA
Bargaining Forum Constitution.”

That constitution itself provides for the way in which to resolve disputes, and as Mr *Kutumela* quite correctly pointed out, the choice to follow a particular dispute resolution process is a
15 choice which, as long as it is voluntarily made, should be respected by the courts, as confirmed by the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at 219. For that reason alone I agree with Mr *Kutumela* that the application should be dismissed. I will,
20 however, deal with the other contentions as well.

The second preliminary point raised is that the court order itself, which, as I have said, comprises the settlement agreement, does not impose obligations on the parties that are enforceable. In this regard Mr *Kutumela* referred to *Thutha v Thutha* 2008 (3) SA
25 494 (TkH), where the relevant principles were discussed, and it was

pointed out that an order cannot be enforced where the compliance therewith is left to the discretion of the people who are bound thereby.

That is exactly what we are dealing with here. The
5 agreement leaves it to the parties to have further meetings to address certain specific issues that are outlined, these being the notorious 19 issues that both parties have referred to, and arising from that, the parties have indeed had further meetings. The remaining dispute is whether PRASA has complied with each of the
10 19 issues or not. For that reason also I agree with Mr *Kutumela* that, strictly speaking, the order does not appear to be enforceable; However, and more importantly, even if I am wrong on both these contentions, I will deal with the merits.

The principles relating to contempt orders have been very
15 eloquently set out by Cameron JA in *Fakie NO v CC11 Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). He usefully sums it up in paragraph [42] as follows:

“To sum up:

(a) The civil contempt procedure is a
20 valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

25 (b) The respondent in such proceedings is

not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

5 (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

10 (d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a
15 reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

20 (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

In this case, firstly, on the evidence before me the union has simply not shown non-compliance. PRASA sets out in detail in a
25 very comprehensive answering affidavit how it has complied with

each one of the 19 issues raised, even though the union did not set out with any particularity which of those issues it alleges PRASA has not complied with. It must be said that the answering affidavit was filed at the eleventh hour. I only received it by email late
5 yesterday afternoon, and a signed copy was only filed at court this morning. Be that as it may, the matter is not so urgent that the union could not have asked for time this morning to reply thereto if it wished to do so. It did not make use of that opportunity and I am bound by the evidence before me. On that evidence, firstly, it
10 appears, at least *prima facie*, that PRASA has complied; but more importantly, it shows beyond a reasonable doubt that there was no wilful and *mala fide* non-compliance by PRASA. The respondents set out in detail a whole range of meetings that have been held with SATAWU, and it goes further by pointing out a number of occasions
15 when the union has not been cooperative and has not made it possible for talks to progress. In a nutshell, though, the application simply does not meet the threshold set out in *Fakie*.

That leaves the issue of costs. This court is enjoined to take into account the requirements of both law and fairness in
20 deciding whether or not to order costs. In normal circumstances where an applicant has had to go to court in order to enforce either an agreement or a court order, even if it is unsuccessful but its application has had some merit and perhaps has had the salutary effect of ensuring compliance with the court order, this court would
25 not order costs against an unsuccessful applicant.

In this case, though, the matter should never have come to court. The union should have availed itself of the dispute resolution mechanisms it itself agreed to in the settlement agreement. Secondly, when it did approach the court, and at least
5 by the time PRASA had filed its comprehensive answering affidavit, setting out how it had complied in each respect, it should have reconsidered the necessity of desisting with the application.

Mr *Kutumela*, in his argument on costs, also pointed out that the union has not played open cards in setting out all the relevant
10 information in its application, contrary to the principles set out by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC); 2009 (1) SA 141 (CC); 2009 (3) BCLR 309 (CC). For all those reasons I am persuaded that this
15 is a matter where a costs award is warranted. In conclusion:

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ORDER

The application is dismissed with costs.

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25 STEENKAMP J
JUDGE OF THE LABOUR COURT

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APPEARANCES

5 First applicant: Wayne Hutchinson

Instructed by Fluxmans Inc.

Second applicant: Frans Dubula of SATAWU (union official).

10 Respondents: Lebogang Kutumela

Instructed by Bowman Gilfillan Inc.