REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 2035/15

In the matter between:

SACCAWU obo JOHNSON MASINGA & ANOTHER	**Applicant**
and	
NANDOS RIVERSIDE MALL	**1st Respondent**
CHICKENLAND (PTY) LTD	**2nd Respondent**
BROZIN, RC	**3rd Respondent**
RADOMSKY, M	**4th Respondent**

Application heard: 16 March 2018

Ruling issued: 20 March 2018

Reasons furnished: 27 March 2018

JUDGMENT

VAN NIEKERK J

[1] On 20 March 2018, I issued an order to the effect that the respondents were not guilty of contempt of this court, with no order as to costs. These are my brief reasons for that order.

[2] The material facts can be summarised as follows. On 19 December 2013, the CCMA issued an arbitration award that directed the first respondent to reinstate the applicants Masinga and Ncube ('the employees') respectively, with retrospective effect from the date of dismissal, being 4 November 2015. On or about 1 April 2014, the award was certified in terms of s143 (3) of the LRA. The award was made an order of this court on 9 September 2016.

[3] In January 2015, the first respondent paid over certain amounts totalling R 4654.34 to Masinga and R 4607.36 to Ncube. A further amount of R 11 034.09 was paid directly into the trust account of the sheriff of Nelspruit on 20 March 2015. The deponent to the founding affidavit records that according to his calculations, the employees have been paid in excess of the amount to which they are entitled in terms of the award. This is not disputed by the applicants.

[4] These proceedings concern only that part of the award that directed the first respondent to reinstate the employees. The respondents aver that neither of the employees reported for work at any stage following the issuing of the award. This is disputed by the applicants, who state that the employees tendered their services after the award was issued and that their employees refused to accept the tender, and has continued to do so.

[5] On 20 March 2015, more than a year after the award was issued, the union's regional secretary wrote to the manager of the first respondent advising him that the employees would report for duty on 23 March 2015 at 10h00. It is significant

that the applicants do not aver in these proceedings that the employees indeed reported for work in terms of the letter. On the contrary, the deponent of the founding affidavit states that on 9 June 2015, more than two months after the employees stated that they would report for work, a further letter was addressed to the first respondent, this time by a union official, urging the first respondent to comply with the award. The letter makes the averment that the first respondent is indebted to the employees for outstanding salary from the date or which they were required to report for work in terms of the award.

[6] The first respondent replied to the letter on 11 June 2015 stating that it had complied with the award by making payment of the back pay, and that the employees 'had sufficient time to recommence their employment', which they had not done. The letter continues '*they [the employees] undoubtedly expressed their wish to rather be compensated with their provident fund as they did not want to recommence the employment.*' There not appear to have been any response to this letter, nor is there any indication from the applicants that the employees' acceptance of monies due in terms of the provident fund rules (and thus what must at least be an implied intention of not returning to work) was ever denied. In November 2015, the applicants filed an application to have the arbitration award made an order of court. That application was granted almost a year later, as I have indicated, on 9 September 2016

[7] Some 10 months later, on 21 July 2017, the union wrote to the first respondent advising it of the court order and stating that the employees '*will resume their duties on 1 August 2017, as contemplated in the award and the court order and furthermore full payment in respect of the aforesaid minus any monies paid to them is expected to be effected on or before 4 August 2017.*'

[8] on 27 July 2017, the second respondent replied to the letter, advising amongst other things that it had purchased the business of the first respondent and that it intended to comply with the court order.

[9] It is not disputed that the employees attended at the Riverside Mall premises in August 2017 when they were advised to obtain proof that they were previously

employed by the first respondent since the second respondent had no documentation in respect of them. They were further advised that they should report at Nando's Brown Street for the purpose of reinstatement once certain information relating to their employment was made available. The employees say that they presented themselves at Nando's Brown Street so as to meet one of senior managers, but that of the meeting of the took place. This is denied by the respondents, who aver that only a union organiser arrived at the meeting.

[10] On 6 September 2017, the second respondent's attorneys write to the union recording its version of events and in particular, stating that the employees had made no attempt to resume their employment or seek reinstatement at any time after 19 December 2013 up until the union's letter dated 20 March 2015, some 15 months after the date of the award. The second respondent averred that it was self-evident that the employees did not seek nor did they wish to be reinstated and that the first respondent had offered them reinstatement, which they declined. Further, it is recorded that the employees advised that they wished to be paid their provident fund monies, which monies were subsequently paid to them and given that the redemption of provident funds are made only in circumstances with the contract of employment has come to an end, this election was clearly inconsistent with any intention to report for work. Further, the letter specifically recorded that neither of the employees reported for work on 23 March 2015, despite the union's advice to that effect made in its letter of 20 March 2015. Rather, on 9 June 2015, a further letter was addressed by the union to the first respondent making a further demand for the payment of money. In short, the respondents contended that there was no basis either in fact or in law for the employees to be reinstated or paid any further amounts in respect of arrear emoluments.

[11] This version was placed in dispute by the union in a letter addressed on 7 September 2017 to the second respondent's attorneys. In particular, the union disputed that its members had elected not to be reinstated.

[12] 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 dignity and 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. 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)). As the Court stated in *Fakie*:

> 9. The test for disobedience of a civil order constitutes contempt has come to be stated is whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-compliant may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claim to constitute the content. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (although unreasonableness could evidence lack of good faith).
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> 10. These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offences committed and not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified war proper is incompatible with that intent.

[13] In *Consolidated Fish (Pty) Ltd v Zive & Others* 1968 (2) SA 520 (CPD), the court made the point as follows:

> The court will not order the attachment of the respondent for contempt in not complying with the judgement of the court if it appears that the non-compliance is not due to wilful disobedience but rather to a misunderstanding of the true meaning of the judgement…. This seems to be merely another way of stating the rule that, if a respondent can establish bona fide is in relation to his disobedience of the court order, he will not be held to have been in contempt of that order.

[14] The only issues arising in the present application is whether the respondents refused to comply with the reinstatement order and if so, whether that refusal was deliberate and *mala fide*.

[15] The is an obvious and material dispute of fact as to whether or not the employees tendered their services in terms of the order of reinstatement, and whether the respondents refused to accept that tender. It is significant that the applicant's founding papers contain no allegation that the employees performed any services for the first respondent after the date of the arbitration award, or that they tendered to do so. Their case is confined to the three letters attached to the founding affidavit and referred to above. The first, written on 25 March 2015, 16 months after the reinstatement order was issued, stated no more than that of the employees 'will report for duty at Nando's Riverside Mall on 23 March 2015 at 10h00'. There is no allegation on that letter or in any of the subsequent correspondence or in the affidavits filed in these proceedings that the employees had, prior to 23 March 2015, performed any work for the first respondent, or attempted to do so, or tendered to do so. There is also no allegation that the employees in fact reported for duty on 23 March or at any date thereafter. Instead, on 9 June 2015, some three months later, a further letter was addressed by the union to the first respondent where again, there is no averment that in the period between 23 March and June 2015, either of the employees had reported for duty or attempted to do so. As I have indicated above, the letter of 9 June 2015 appears to be primarily directed to demand that the employees be paid what they contended to be the outstanding salary for a period during which they

had performed no work whatsoever (i.e. the period December 2013 to June 2015). Some two years later, on 21 July 2017, the applicant addressed a further letter to the first respondent and this time the first respondent was advised that the employees 'will resume their duties on 1 August 2017'. Again, neither the letter nor the founding affidavits raise any averment that in the period June 2015 to July 2017, either of the employees had reported for duty or attempted or tendered to do so. The letter again contains a demand that the employees be paid a salary for the period December 2013 to July 2017, even though they had not performed any work pursuant to the reinstatement order.

[16] To the extent that the applicants rely on the content of the correspondence referred to establish the fact of a tender to return to work in terms of the award, here is nothing in that correspondence to suggest that the employees had reported for duty, or performed any work, or tendered to perform any work at Nando's Riverside Mall since the date of the arbitration award. On the contrary, the correspondence contains no more than a series of stated intentions to return to work, none of which on the applicant's version were ever realised. To the extent that the applicants have denied the respondents' averments that the employees never tendered their services after the award was issued, the applicants face two insurmountable difficulties. The first is that they are obliged to make that case in the founding affidavit, which they failed to do. The second is that in evaluating the evidence on the papers, the court is bound to follow the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - 635B. The court may only find in favour of the applicant *"if the facts as stated by the first respondent together with the admitted facts in the applicant's affidavits justify such an order...".* The court is therefore, in effect, bound by what the respondents state in their affidavit, unless it is *"so far-fetched or clearly untenable that [he] is justified in rejecting them merely on the papers"* (*Plascon-Evans, supra* at 634 – 635).

[17] The failure by the applicants to establish that the employees reported for duty and that their tender was refused is fatal to their attempt to hold the respondents

in contempt. In my view, the applicants failed to establish that there has been any breach by any of the respondents of the obligations which the order of reinstatement imposed on them. In these circumstances, it is not necessary for me to consider the second stage of the enquiry into *mala fides* and wilfulness. There being no breach of the order, the respondents are entitled to an acquittal on the charge of contempt of court.

[18] Insofar as costs are concerned, this court is a broad discretion in terms of s 162 of the LRA to my course for costs according to the requirements of the law and fairness. This court is traditionally reluctant to make orders costs in matters that concern collective both partners, with the effect of the order may be to prejudice the relationship between them. In this matter, it seems to me that some resolution of the dispute between the parties is desirable and that in order for costs may prejudice that prospect. For that reason, there is no order as to costs.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Union official

For the respondents: Adv. A Oosthuizen SC, instructed by Ashersons Attorneys