



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J90/2024

In the matter between:

RAIN MUDADI

Applicant

and

**COENG CONSULTING AND CONSTRUCTION
ENGINEERS (PTY) LTD**

First Respondent

CASIAN DENDERE

Second Respondent

TAKALANI MBEDZI

Third Respondent

WILHEMINA JEMINA SKOSANA

Fourth Respondent

Heard: 19 November 2024

Delivered: This judgment was handed down electronically by emailing a copy to the parties on 17 January 2025. This date is deemed to be the date of delivery of this judgment.

Summary: Application to hold respondents in contempt following failure to comply with a court order dated 30th January 2024. Applicant failed to prove that non-compliance was wilful and mala fides beyond a reasonable doubt. Respondent ordered to comply with paragraph 4 of the court order dated 30th January 2024.

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The Applicant approached the Labour Court seeking an order to hold the second and third respondents in contempt of court for their failure to comply with the court order dated 30 January 2024. The relevant parts of the said order which the applicant seeks to enforce read as follows:

1.1 The disciplinary proceedings against the applicant and any intended application by the applicant to set aside the Resolution authorising his suspension and disciplinary action are stayed pending the finalization of the sale of the shares as set out below.

1.2 The applicant will remain suspended on full pay as an employee pending the sale of shares of the Rain Mudadi Family Trust the 50% shareholder in Coeng Holding (Pty) Ltd (the sale of the shares), alternatively, pending finalisation of the application.

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1.11 If no agreement is reached in respect of the purchase of the shares within 30 days of receipt of the last received valuation and no later than 30 April 2023, the negotiations would be deemed as having failed and any dispute about the value of the shares will be referred to arbitration.

- [2] On 17 October 2024, Seedat AJ issued a rule *nisi inter alia* ordering the second and third respondent to file an explanatory affidavit as to why they should not be found guilty of contempt of court and to appear in court on 19 November 2024. Seedat AJ ordered that the application together with the court order be served personally upon the second and third respondents and further that the respondents must pay the costs of the application for contempt.
- [3] The application together with the court order were personally served on the third respondent who filed an explanatory affidavit on 5 November 2024. The applicant thereafter filed a replying affidavit on 18 November 2024 and the third respondent took an issue with the late filing of the replying affidavit. However, the respondent did not file a notice of objection and instead filed supplementary affidavit alleging that the replying affidavit introduced new facts and evidence.
- [4] The third respondent persisted with his point in *limine* that the replying affidavit is not properly before court, and the applicant contended that the third respondent is not allowed to file a supplementary affidavit without the leave of the court. I then directed that the matter be heard on merits because Rule 58 of the Labour Court Rules which regulates contempt proceedings does not prescribe a period within which a replying affidavit ought to be filed.

- [5] Both parties submitted heads of argument and they were very helpful to the court. The applicant argued that the respondents are in contempt of a court order and must be found guilty of contempt. The third respondent argued that the applicant himself failed to comply with certain terms of the court order and he has since been dismissed from his employment with the respondents.

Background facts

- [6] The applicant was employed by the Respondents as an employee and he was also holding a position of a director. On or during January 2024 he was served with a charge sheet detailing certain allegations of misconduct levelled against him. He then challenged the resolution to charge him on an urgent basis and the parties on 30 January 2024 entered into a settlement agreement which was ultimately made an order of Court.
- [7] The respondents partially complied with the terms of the court order in that the applicant received his salaries from January until June 2024 and he remained on suspension with full pay. However, the respondents did not pay the applicant his salary from the month of July 2024 until the application for contempt was filed.
- [8] The respondent raised a number of defences resisting the application brought by the applicant and alleged that the applicant did not place all the facts before court at the hearing of the application on 30 January 2024, the applicant unilaterally terminated his employment with the first respondent, the applicant refused to sign bank guarantees in his capacity as director of the first respondent which resulted in the first respondent failing to pay salaries for the month of October 2024, the applicant is guilty of contempt in that he failed to return all the assets belonging to the first respondent, he failed to attend board meetings despite being invited, and he attempted to poach work for his new employer, ZAENG Consulting and Construction Engineers, the applicant committed fraud in that his qualifications appear to be fraudulent, he facilitated fraudulent medical payments for his life partner, he caused the respondent to suffer revenue losses and he failed to disclose a vehicle he purchased using

the first respondent's resources and the vehicle remains in his possession despite the order clearly stating that he must return the property belonging to the first respondent. As a result of all these allegations, the respondent then elected to terminate the contract of employment it held with the applicant.

[9] The applicant was removed as a director of the first respondent in terms of section 71(3) of the Companies Act¹ on 17 October 2024 and subsequently dismissed in *absentia* on 1 November 2024.

[10] The applicant contends that the respondents are guilty of contempt in that the defences raised to not disclose a *bona fide* mistake for non-compliance with the court order.

Contempt of court orders

[11] It is trite that compliance with court orders is an issue of fundamental concern for a democratic society that seeks to base itself on the rule of law and supremacy of the Constitution. The leading case dealing with contempt of court is *Fakie NO v CCII Systems (Pty) Ltd*² (hereafter referred to as "*Fakie*") where the Supreme Court of Appeal per Cameron JA held that:

[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.

¹ No. 71 of 2008

² 2006 (4) SA 326 (SCA) at para 6.

[7] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[8] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

[9] 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 offence is committed 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 or proper is incompatible with that intent."

[12] At para 42, Cameron JA (as he then was), succinctly set out the requirements for contempt. The SCA held that an applicant must prove all the requirements for contempt: existence of the order; service of the order; non-compliance; wilfulness and mala *fides*, and all these elements must be proved beyond reasonable doubt. The applicant bears the onus to prove that the respondent

is guilty of contempt. However, once the applicant has proven the existence of the order, service or notice of the order, and non-compliance, then the respondent bears an evidential burden in relation to wilfulness and *mala fides*. If the respondent fails to advance evidence that establishes reasonable doubt as to whether the non-compliance was wilful and *mala fide* then contempt will have been established beyond reasonable doubt.

- [13] The Constitutional Court revisited the issue of contempt of court proceedings in *Pheko and others v Ekurhuleni City*³. The court endorsed the findings in *Fakie*, and confirmed that “civil contempt”, a form of relief sought through civil proceedings, relates to conduct *ex facie curiae apropos* a wilful disregard of order of court. The court also confirmed that because civil contempt is a criminal offence, it may also be determined through criminal proceedings, the object of which would be punitive. The court held that civil contempt may be both punitive and coercive, but usually it is only coercive (upholding the dignity of the court by coercing compliance with the court order).

- [14] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”⁴

- [15] In *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng*⁵ the Court unequivocally held that ‘contempt of

³ 2015 (5) SA 600 (CC).

⁴ *Pheko supra* at para 1.

⁵ 2002 (1) SA 660 (T) at 6730-E

court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of court.'

Analysis

[16] In order to give rise to contempt, a litigant's non-compliance must be 'wilful and *mala fide*'. This means that the second and third respondent must deliberately defy the court order and must have wilfully and maliciously failed to comply with the court order dated 17 October 2024.⁶ The SCA in *Fakie* has already laid down the law that a deliberate disregard of the court order is not enough to establish contempt. The next question is whether the second and third respondents' non-compliance with the order was wilful and *mala fides*?

[17] As stated above, the practice in this Court is that an applicant who seeks an order finding the respondent guilty of contempt must comply with the provisions of Rule 58 of the Labour Court Rules. The Rules require personal service of the order on the responsible respondent (Directors), the respondent to file an explanatory affidavit explaining to the court why he should not be found guilty of contempt and that the respondent despite having filed this affidavit, he must still attend court on the date stated in the court order. The Applicant in this matter has proven these requirements and the burden now shifts to the Second Respondent.

[18] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in *Fakie* (supra) and held in paragraph [36] that the decision creates a presumption in favour of the Applicant in that:

'Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence.

⁶ See: *Matjhabeng Local Municipality v Eskom Holdings Ltd and others* 2018 (1) SA 1 (CC).

Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.

[19] I have had regard to the defences raised by the respondents and although I do not find that the non-compliance is wilful and *mala fide*, I agree with the applicant that the respondents were at all material times aware that they have an option to apply to the Court for a variation of the court order dated 30 January 2024. The non-compliance with the court order was mandatory until the said order is varied or set aside.

[20] I have also taken into account the fact that the respondents have since terminated the contract of employment of the applicant and he has remedies available to him to challenge the said dismissal. As such, it would be futile for this court to enforce the provisions of paragraph 4 of the order dated 30 January 2024 which states that *'the applicant will remain an employee on suspension will full pay pending the sale of shares.'*

[21] The sale of shares held by the applicant through Rain Mudadi Family Trust in the First Respondent is regulated by paragraphs 5, 6, 7, 8, 9, 10 and 11 of the court order. Paragraph 11 unequivocally states that:

11. "If no agreement is reached in respect of the purchase of the shares within 30 days of receipt of the last received valuation and no later than 30 April 2023, the negotiations would be deemed as having failed and any dispute about the value of the shares will be referred to arbitration."

[22] Accordingly, I find that the applicant has not proven beyond a reasonable doubt that the respondents are guilty of contempt of court by failing to comply with the provisions of the court order dated 30 January 2024 and the court order dated 17 October 2024. However, this does not mean that the respondents are entitled to disregard the said orders as such would create a mockery of the justice system and bring the courts into disrepute.

[23] Finally, in determining whether the respondents are guilty of contempt, I have taken into account that in contempt proceedings there is no onus on the respondent, but merely an evidentiary burden to create a reasonable doubt as to the existence of wilfulness and *mala fides*. In this matter, the respondents have discharged the necessary evidentiary burden creating reasonable doubt in respect of their wilfulness and *mala fide* conduct for their non-compliance with the court order dated 30 January 2024.

Costs

[24] Both parties argued that they should be awarded costs against the other based on the manner in which they conducted themselves since the issuing of the court order on 30 January 2024. However, I must express my discontentment regarding the manner in which this matter was conducted by both parties. The applicant knew that his matter was scheduled to proceed on 19 November 2024 but only filed his replying affidavit at the late hour on 18 November 2024. The answering affidavit is voluminous containing some annexures which were not relevant to the application before me.

[25] I have had regard to section 162 of the LRA which empowers this court to award costs in accordance with the requirements of the law and fairness. Both parties failed to comply with Rule 29 (3) of the Labour Court Rules and I do not believe that it is in the interests of justice and fairness that I award a costs order against the other. I am therefore of the view that it is just and equitable to make an order that each party must be burdened with their own costs.

[26] Section 158(1)(a)(iii) of the LRA provides that the Labour Court may make any appropriate order, including an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA.

[27] Accordingly, the following order is made:

Order

1. The rule nisi issued on 17th October 2024 is discharged in its entirety.
2. The second and third respondents are ordered to pay the Applicant his unpaid salaries from July 2024 until 30 November 2024 within thirty (30) days of receipt of this order.
3. There is no order as to costs.

G. C. Phakedi
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv F Storm
Instructed by: Naude Dawson Attorneys

For the Respondent: Adv T Masvika
Instructed by: EMG Attorneys