



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J904/2024

In the matter between:

NATALIE GOVENDER

Applicant

and

DEPARTMENT OF ROADS AND TRANSPORT

First Respondent

DR THULANI MDADANE

Second Respondent

Heard: 22 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 implement arbitration award which has been certified. Applicant failed to prove beyond reasonable doubt that respondents' failure to comply with the award was wilful and mala fides. Application dismissed.

JUDGMENT

PHAKEDI, AJ

Introduction

- [1] The Applicant approached the Labour Court seeking an order holding the Second Respondent in contempt of a court order for his failure to comply with the arbitration award dated 24 July 2023 under case number GPBC 1729/2018 certified on 04 September 2023 in terms of section 143 of the Labour Relations Act¹ (LRA) (hereinafter “the award”).
- [2] On 17 October 2024, Seedat AJ issued a rule *nisi inter alia* ordering the second respondent to file an explanatory affidavit as to why he should not be found guilty of contempt of court and to appear in court on 22 November 2024. Seedat AJ ordered that the application together with the court order be served personally on the second respondent, Dr Thulani Mdadane and further that the respondents must pay the costs of the application for contempt.
- [3] The second respondent filed his explanatory affidavit on 22 November 2022 but did not appear in court. Counsel for the Applicant took an issue with the second respondent’s non-appearance since the court order together with the application were served personally on him and he was aware that he was required to attend court on 22 November 2024. The non-appearance confirms that the second respondent does not respect court orders and he must be found guilty of contempt for refusing to comply with the award and attending court.
- [4] Counsel for the second respondent submitted that in terms of the Labour court rules, attendance in court is only necessary when the respondent has not filed his explanatory affidavit. This view is incorrect as the Rules for the conduct of proceedings in the Labour Court clearly provides that the filing of an explanatory affidavit does not excuse the respondent from being present in

¹ No. 66 of 1995 as amended.

court.² The Applicant argued that the respondents are in contempt of a certified award and must be found guilty of contempt.

Background facts

[5] The Applicant referred a dispute of unfair dismissal to the General Public Service Sectoral Bargaining Council under case number GPBC 1729/2018 and the Commissioner issued an award dated 24 July 2023 and found that:

5.1 The dismissal of the Applicant was procedurally fair but substantively unfair;

5.2 The respondent is ordered to reinstate the Applicant with effect from 1 September 2018 with back pay amounting to R120 400.00 x 1 month salary;

5.3 The Applicant is ordered to report for work on 01 September 2023 at the normal time of reporting; and

5.4 The respondent is ordered to comply with the award by 15 August 2023.

[6] On 30 August 2023 the Applicant was informed that the First Respondent intends to file a review application and she must not report for duty. On 04 September 2023 the applicant certified the award in terms of section 143 of the LRA.

² Rule 58(2)(a) provides that:

An application which seeks for the court to make a finding that a party is in contempt of an order of the court must be made *ex parte* by way of a notice of motion accompanied by a founding affidavit. The notice of motion must seek an order in the following terms: (a) that the respondent, [chief executive officer / head of department / owner / proprietor / municipal manager of the respondent] (full names) appear in the Labour Court on (date) of (month) (year) at 10h00 to show cause why he/she should not be found guilty of contempt of court for failing to comply with the order of this court dated (date) that the respondent may explain its conduct by way of affidavit filed prior to the date of hearing, although this will not excuse him/her from being present in court my underlining).

- [7] On 07 September 2024 the First Respondent served a review application on the Applicant under case number JR1736/2023 but failed to plead for the stay of the arbitration award nor file security. On 17 October 2023 the First Respondent filed security in terms of section 145(7) of the LRA. The applicant informed the First respondent's legal representatives that the purported security does not comply with the provisions of section 145(7) of the LRA.
- [8] On or about 21 December 2023 the Registrar in terms of rule 7A(5) of the repealed Labour Court rules informed the respondents that the Bargaining Council had filed the records and same should be collected within seven days. The respondent was also informed that failure to file the records within sixty days will lead to the review application being deemed withdrawn. The respondent failed to file the record within the prescribed period and the review application was deemed withdrawn on 20 March 2024.
- [9] On 26 March 2024, the respondents filed an application to stay or suspend the operation of the award and sought a declaratory order that their undertaking and/or guarantee dated 19 October 2023 be accepted as sufficient security in accordance with section 145(8) of the LRA. This interlocutory application is yet to be set down for determination by the Honourable Court. The record was then served on the applicant on 02 August 2024.
- [10] The applicant reported for duty on 2 September 2024 but she was denied entry into the workplace by an employee of the respondent, Amande Matiwane.
- [11] On or during September 2024 the respondent filed an application to reinstate the lapsed review application. Ramji AJ granted the following order on 7 November 2024:

11.1 The review application issued under case number JR1736/23 is reinstated.

11.2 The late filing of the record of the arbitration proceedings in the review application is condoned.

11.3 The respondents are directed to file any answering affidavit within 10 days of services of this order.

11.4 There is no order as to costs.

[12] The respondents argued that they are not in contempt and the applicant has failed to satisfy the requirements for contempt. The application by the applicant is an abuse of court processes in that the applicant was made aware that the review application has been reinstated but persisted with its application for contempt.

Contempt of court orders

[13] It is trite that compliance with court orders is an issue of fundamental concern for democratic a society that seeks to base itself on the rule of law and supremacy of the Constitution for the Republic of South Africa, 1996. The leading case dealing with contempt of court is *Fakie NO v CCII Systems (Pty) Ltd*³ (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.

³ 2006 (4) SA 326 (SCA).

[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."

[14] 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.

- [15] The Constitutional Court revisited the issue of contempt of court proceedings in *Pheko and others v Ekurhuleni City*⁴. 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 court by coercing compliance with the court order). The Court held that:

“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.”⁵

Analysis

⁴ 2015 (5) SA 600 (CC).

⁵ *Pheko and others* at para 1

- [16] It has become fashionable in this Court for executives to simply disregard court orders which require their presence in court. This practice must be frowned upon by the court because it is mostly senior government executives who simply disregards court orders and make a mockery of judicial authority. In *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng*⁶ the Court unequivocally held that '*contempt of 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.*'
- [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 second respondent (Head of Department), 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, 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] In order to give rise to contempt, a litigant's non-compliance must be 'wilful and *mala fide*'. This means that the second respondent must deliberately defy the court order and must have wilfully and maliciously failed to comply with the court order dated 17 October 2024.⁷ 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 respondent's non-compliance with the order was wilful and *mala fide*?
- [19] The Second respondent was personally served with a court order dated 17 October 2024 and he was fully aware that he has to attend court on 22 November 2024 even if he had filed an explanatory affidavit. However, the Second respondent did not attend court and the explanation for his absence

⁶ 2002 (1) SA 660 (T) at 6730-E

⁷ See: *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC).

provided by his counsel was that the rule 58 of the Labour Court Rules does not require his presence at court once the explanatory affidavit is filed. As stated above, the counsel's views are incorrect, the filing of an affidavit does not excuse the respondent from attending court proceedings. I therefore accept that the reason for the second respondent's absence on 22 November 2024, although mistaken, he held a *bona fide* view that his attendance was not required in terms of rule 58.

[20] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in *Fakie* (supra) and held that the decision creates a presumption in favour of the Applicant in that⁸:

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

Review application does not suspend the operation of the award

[21] The Applicant's counsel correctly argued that the filing of the review application does not suspend the operation of the arbitration award especially where security has not been furnished to the satisfaction of the court. Section 145(7) of the LRA provides that:

'The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).'

[22] It is common cause between the parties that the review application was instituted and it is yet to be finalized. The Applicant's counsel confirmed that

⁸ *Fakie* in para 36.

at the time of filing the contempt application, the review application was deemed withdrawn. However, Applicant the has now been served with a court order issued on 7 November 2024 which reinstated the lapsed review application and directed that the Applicant file her answering affidavit in the review application within ten days. These new developments occurred when the contempt application had already been issued.

- [23] Counsel for the respondents argued that the second respondent has filed security in terms of section 145 (8) of the LRA and an application to stay the operation of the award could not be prosecuted while the review application is deemed withdrawn. I was referred to a document dated 10 October 2023 with the subject '*provision of security in terms of section 145(7): Department of Roads and Transport v Natalie Govender*' which the respondent argued that it will be relying on during argument in support of the application in to stay enforcement of the award at a later date to be arranged with the registrar. The application to stay the enforcement of the award is not before me as such the court dealing with the matter shall exercise its discretion accordingly.

Costs

- [24] Both parties argued that they should be awarded costs against the other. The applicant avers that she is entitled to costs because the current application was necessitated by the sluggish manner in which the respondents dealt with the review application and failure to provide security as envisaged in section 145 (7) and (8) of the LRA. On the other hand, the respondents argued that they ought to be awarded costs on a punitive scale because the applicant was made aware that the contempt application is premature since the review application which was deemed withdrawn has been reinstated and the respondents have furnished security to stay the enforcement of the award.
- [25] I have considered submissions by both parties and came to the conclusion that both parties failed to take reasonable steps to ensure that this matter is resolved without a need for a hearing. The respondents only served their opposing affidavit a night before the hearing date and the applicant could not

prior to receiving the opposing papers make an election as to whether to brief counsel to proceed with arguments or not. Rule 58 (4) provides that if a defence is raised by the respondent, the court may either hear the matter on the date on which the respondent was ordered to appear in court, or postpone the matter.

[26] 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. 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.

Conclusion

[27] 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*.

[28] In this matter, the applicant has failed to prove beyond a reasonable doubt that the non-compliance with the certified award was wilful and *mala fide*. I am therefore convinced that the respondents have discharged the evidentiary burden in creating reasonable doubt as to the wilfulness and *mala fides* of their default to perform in terms of the court order dated 17 October 2024.

[29] Accordingly, the following order is made:

Order

1. The rule nisi issued on 17 October 2024 is discharged in its entirety.
 2. There is no order as to costs.
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GC Phakedi
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv M Mudimeli
Instructed by : Makula Attorneys

For the Respondent: Adv M Tshivhase
Instructed by : State Attorneys Johannesburg