



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J1575/23

In the matter between:

**NEWUYA OBO SOLLY
MODISANE**

Applicant

and

GAP MANAGEMENT

First Respondent

WILLIAM OLIPHANT

Second Respondent

Heard: 28 May 2024

Delivered 6 May 2025

JUDGMENT

MOLOTSI AJ

Introduction

[1] This is an application for Contempt of Court. The applicant is NEMUYA obo Solly Modisane. The first respondent is Gap Management (pty) Ltd, an erstwhile employer of the applicant. The second respondent is Willem Oliphant, the managing director of the first respondent.

[2] The applicant launched this application on 10 November 2023.

Background facts

[3] The applicant was employed by the first respondent on 16 September 2022 as a security supervisor. He was provided with a company vehicle in order for him to execute his duties. The company vehicle was used to travel from home to work and when he was on standby. The applicant's home was situated in Lichtenburg. The applicant worked in various areas which amongst others included Brits, Makapanstad, Jericho and Moretele.

[4] The applicant was issued with a notice to attend a disciplinary hearing. He was charged with abuse of company property and reckless and negligent driving of the company vehicle. He was found guilty and dismissed on 19 June 2023.

[5] The applicant approached the Commission for Conciliation Mediation and Arbitration ('CCMA') claiming unfair dismissal. The CCMA set down a Con/Arb hearing on 21 July 2023. The applicant attended the CCMA proceedings whereas the first respondent failed to attend the proceedings. A default arbitration award was issued by the CCMA on 30 July 2023. The arbitration award was served on the first respondent on 30 July 2023.

[6] The default award concluded that the dismissal of the applicant was substantively unfair. The commissioner ordered the retrospective reinstatement of the applicant. The reinstatement was accompanied with backpay totaling an amount of R12 170.91. The applicant was ordered to tender his services with

the first respondent no later than 7 August 2023 and the backpay to be payable by no later than 14 August 2023.

[7] The first respondent's marketing manager (Mr Nqunyefi) contacted the applicant's trade union representative (Mr Modiselle) for a voluntary separation agreement as the first respondent no longer had any work or position for the applicant. The applicant's position was filled by someone. The applicant's trade union representative drafted a voluntary separation agreement and forwarded same to the first respondent's marketing manager.

[8] The details of the proposed voluntary separation agreement were as follows: payment of the backpay amount as per the arbitration award and a further payment of R25 500.00 as a replacement for the reinstatement order. The proposed voluntary separation agreement was never signed by both parties. However, there was tacit acceptance of the proposal from Mr Modiselle by the first respondent in that there was an initial payment of R 5 100.00. made on 29 September 2023.

[9] On 27 September 2023 the default arbitration award was certified in terms of section 143(3) of the Labour Relations Act¹. An enforcement of the arbitration award in respect of the backpay amount was issued on 27 September 2023 for the sheriff to attach the movable goods of the first respondent.

[10] On 13 October 2023 Mr Modiselle wrote an email to Mr Nqunyefi attaching a revised voluntary agreement to be signed by 16 October 2023 and that should parties fail to sign by 16 October 2023, then both proposals are withdrawn and the applicant will approach this Court for refusal to reinstate the applicant.

[11] On 24 October 2023, Mr Modiselle asked the first respondent to pay the full amount as per the proposed settlement agreement into his personal bank account as the applicant had challenges with his bank account.

¹ Act 66 of 1995 as amended

[12] Mr Modiselle wrote another email to the first respondent on 30 October 2023 to sign the proposed voluntary separation agreement and to make full payment and that failure to sign will result in the withdrawal of the proposed separation agreement and the applicant will approach this Court for enforcement of the arbitration award.

[13] The first respondent made a payment of an amount of R16 285 into the bank account of Mr Modiselle on 31 January 2024. The first respondent made another payment of an amount of R16 285 into the bank account of Mr Modiselle on 20 March 2024.

Submissions by the parties

[14] Mr Hayward on behalf of the respondents submitted a mutual separation agreement received from Mr Modiselle was accepted by the first respondent. A payment of R5 100 was made on 29 September 2023. It was not a full payment. Mr Modiselle requested the outstanding amount to be paid into his personal bank account and he further demanded payment of the outstanding amount.

[15] There was consequently a contract between the parties to replace the arbitration award. The full settlement amount of R37 000 was paid. On 30 October 2023, the applicant withdrew from the contract and stated that he is no longer part of the voluntary separation agreement. The applicant then proceeded to launch the contempt of Court application.

[16] The applicant cannot have it both ways. The applicant requested compliance with the voluntary separation agreement and then later approached this Court for contempt. The applicant received full payment as per the voluntary settlement agreement and there is no contempt of Court as the settlement agreement replaced the arbitration award. The application must be dismissed with costs.

[17] Mr Modiselle on behalf of the applicant submitted that he agreed with the monetary settlement agreement with the first respondent. He proceeded to draft the voluntary separation agreement and the respondent did not accept the terms of the settlement agreement. On 30 October 2023, he wrote to the first respondent demanding payment as per settlement agreement. No such payment was received between 1 November 2023 until 31 January 2024 when payment was received. On 30 October 2023, the applicant withdrew from the voluntary settlement agreement.

[18] The voluntary separation agreement was never signed by the parties. First payment as per the separation agreement was made three months after the withdrawal from the agreement.

Evaluation

[18] The law on contempt of Court is settled. The Apex Court in *Secretary of the Judicial Commission of Enquiry into allegations of State Capture v Zuma and others*², held that:

‘As set out by the Supreme Court of Appeal in Fakie and approved by this Court in Pheko II, it is trite that an applicant who alleges contempt must establish that [a] an order was granted against the alleged contemnor, [b] the alleged contemnor was served with the order or had knowledge of it; [c] the alleged contemnor failed to comply with the order. Once these elements are established, willfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.’

² 2021 (5) SA 327 (CC) at para 37

[19] In order for the applicant to succeed with contempt of Court, he was required to comply with the abovementioned requirements. The applicant was able to establish that the order was granted against the first respondent, the first respondent had knowledge of the arbitration award. The applicant failed to comply with the third requirement i.e. the first respondent failed to comply with the arbitration award.

[20] The applicant was not able to comply with the third requirement because, the parties concluded a voluntary separation agreement. Although the voluntary separation agreement was never signed by both parties, both parties tacitly accepted the existence of the separation agreement and acted in terms of the provisions of the separation agreement.

[21] It is trite that not all agreement must be reduced in writing in order to be binding on both parties. The separation agreement was binding on both parties in that the parties acted in terms of the separation agreement. This is so because:

[i] Mr Modiselle, representing the applicant drafted and forwarded the agreement of the first respondent; [ii] there was an initial payment of R5 100 made on 29 September 2023. This payment was made consequent to the voluntary separation agreement, [iii] Mr Modiselle demanded payment of the outstanding amount and that such payment to be made into his personal bank account, [iv] the payments were made on 31 January 2024 and 20 March 2024 respectively.

[22] It appears that the applicant despite the initial payment made on 29 September 2023, decided to proceed with this application. The so- called withdrawal from the separation agreement on 30 October 2023 was not valid in law. A party cannot simply withdraw from an agreement without approaching a competent Court to terminate the agreement.

[23] Not only did the applicant fail to show that the respondent failed to comply with the arbitration award, the respondents were able to discharge their evidentiary burden and establish a reasonable doubt.

[24] Consequently, the contempt application must fail.

[25] In the premises the following order is made:

1. The contempt of Court application is dismissed.
2. There is no order as to costs.

H Molotsi

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Mr K Modiselle
Instructed by: NEWUYA

For the Respondent: Mr K Hayward
Instructed by: NEASA