THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1292 / 2006

In the matter between:

IMATU obo K C JOUBERT **Applicants**

and

MODIMOLLE LOCAL MUNICIPALITY **First Respondent**

THE MUNICIPAL MANAGER:

MODIMOLLE LOCAL MUNICIPALITY **Second Respondent**

Heard: 5 August 2016

Delivered: 18 November 2016

Summary: Contempt of Court – principles of contempt stated and considered

Contempt of Court – compliance with Court Order – issue of payment following arbitration award – not a matter concerning compliance with Court Order – applicants must pursue execution

Contempt of Court – compliance with Court Order – nature of award and accompanying Order – issue of compliance no longer competent

Practice and procedure – no case for contempt made out – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This is once again a case where the imperative of the expeditious resolution of employment disputes is entirely undermined. The case dates back to 2005, and now, more than a decade later, it comes before me on the basis of a contempt of court application brought by the applicants in 2016.

[2] The point of origin of this matter is an arbitration award issued by an arbitrator of the South African Local Government Bargaining Council ("SALGBC') in favour of the individual applicant and against the first respondent, on 15 March 2006. The dispute concerned an unfair labour practice committed by the first respondent against the individual applicant. This arbitration award was later made an order of court, and the applicants now seek to enforce this order. The respondents have opposed the application for contempt.

[3] When the matter came before me on 5 August 2016, and after it was argued, I indicated to the parties that I required further information in deciding the matter, and made an order to the effect that further affidavits had to be filed by both parties. This was then done by the parties, placing me in the position to now finally and properly decide this matter.

The relevant background

[4] As touched on above, this matter arose out an arbitration award issued by arbitrator L S Mankgabe of the SALGBC on 15 March 2006, under case number 100504 ('the award'). The award was issued pursuant to an unfair labour practice dispute pursued by the applicants against the first respondent, to the SALGBC. The dispute was referred to the SALGBC on 18 October 2005.

[5] A reading of the award shows that the unfair labour practice dispute pursued to the SALGBC was in effect one of promotion. That this was indeed the case has been confirmed by the applicants in their recent replying affidavit. The individual applicant contended that she should have been appointed into the position of administrative clerk that had become vacant, and which she applied for. As stated, this appointment would be a promotion.

[6] The individual applicant had been employed by the first respondent as a salary clerk on the basis of a written fixed term contract of employment, commencing on 16 May 2005 and terminating on 15 November 2005. No other employment contract had ever been concluded between the parties.

[7] The individual applicant applied for the vacant position of administrative clerk at the beginning of September 2005. She was interviewed on 7 September 2005, and according to the individual applicant she was then told on 8 September 2005 that she would be appointed in that position. Her case was that despite being the best candidate for the position, the municipal manager refused to appoint her, by way of a letter given to her on 7 October 2005.

[8] The first respondent admitted that the individual applicant applied for the position and was interviewed, but disputes that the individual applicant was ever verbally told that she would be appointed following the interview. The first respondent points out that the applicants have not even said who the person was that had made this statement to her. According to the first respondent, the only outcome of the interview process is that which was conveyed in writing to her on 7 October 2005, to the effect that she was not successful.

[9] I may add the abovementioned version of the individual applicant is not supported by what is contained in the award. Her case, as recorded in the award, was that one of the officials congratulated her after the interview. Then, and the next day, she was told by the municipal manager that she was the best candidate but she could not be appointed in the post because she could not speak Sotho and the post was earmarked for a councillor's wife. The case of the individual applicant as recorded in the award was thus never that she was told she was appointed.

[10] As stated above, the arbitrator found in favour of the individual applicant. The actual award made, in terms of what is recorded in the award, reads:

> 'I award in favor of the Applicant and order the Respondent to appoint the former retrospectively in an Admin Clerk position. My award is informed by the fact that this position is still vacant to date.' (sic)

[11] The first respondent challenged the award by way of a review application to the Labour Court. But then, as is regrettably often the case where review applications are brought by employers in the public sector, the application was not properly prosecuted to finality. The applicants brought an application, only on 12 December 2012, to dismiss the review and to make the award an order of court, which application came before Gush J on 1 December 2015. Gush J then granted an order on 1 December 2015, in terms of which the first respondent's review application was dismissed and the award was made an order of court.

[12] Following the granting of this order, the applicants then demanded from the first respondent on 18 December 2015 that the individual applicant be appointed into the position of administrative clerk in terms of the award as made an order of court, retrospectively to 1 October 2005. The first respondent did not adhere to this demand, giving rise to the current contempt application brought by the applicants on 7 April 2016.

[13] The contempt application came before Van Niekerk J on 29 April 2016, and an order was granted to the effect that the respondents had to appear in court on 5 August 2016 to show cause why they should not be held to be in contempt of court for failing to comply with the order of Gush J as referred to above. This is how this matter then came before me on 5 August 2016, and I must now decide whether the respondents have shown such cause.

<u>The issue of contempt</u>

[14] As stated above, the matter now before me is one where the respondents must show cause why they are not in contempt for failing to comply with the order of Gush J of 1 December 2015.

[15] In deciding an issue of contempt of court, it must be reiterated that the existence of contempt of Court must be established beyond reasonable doubt.[1] The actual test to determine whether contempt indeed exists was dealt with in *Fakie NO v CCII Systems (Pty) Ltd*[2] where the Court said:

> '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 infraction. Even a refusal to comply that which is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). 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, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'

[16] The Constitutional Court recently in *Pheko and Others v Ekurhuleni Metropolitan Municipality and Another*[3] dealt with the ratio in *CCII Systems* and then summarized the position where it comes to considering whether contempt of court exists, as follows:[4]

> 'Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal

[1] See *National Union of Metalworkers of SA and Another v Total Service Station and Others* (2002) 23 ILJ 1835 (LC) at para 18; *Building Industry Bargaining Council Cape of Good Hope (Boland Area) v Hatlin t/a the Homestyles Co* (2001) 22 ILJ 1143 (LC) at para 17; *Food and Allied Workers Union and Others v Scandia Delicatessen CC and Another* (2001) 22 ILJ 1781 (SCA) at para 40; *Ntombela v Herridge Hire and Haul CC and Another* (1999) 20 ILJ 901 (LC) at para 24; *SA Forestry Co Ltd v Africa Wood and Allied Workers Union and Others* (1999) 20 ILJ 1928 (LC) at para 14.
[2] 2006 (4) SA 326 (SCA) at para 22.
[3] [2015] JOL 33198 (CC).
[4] Id at para 28.

offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.'

The Court then concluded:[5]

'The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour.'

[17] I had the opportunity to deal with the issue of contempt of court in *South African Municipal Workers Union and Others v Thaba Chweu Local Municipality and Another*[6] and said:

'Therefore, and in terms of the ratio in *CCII Systems*, for this Court to be satisfied that a respondent in a contempt application is indeed in contempt of Court, the Court must be satisfied, beyond reasonable doubt, that: (1) there was a refusal to comply with the Order; (2) this refusal was willful (deliberate); and (3) the deliberate refusal to comply must be mala fide, in other words there must be a complete absence of any kind of bona fide justification for the refusal to comply (even if this justification relied on is ultimately found to be objectively unreasonable or unsustainable). Crystalized down to its simplest terms, a respondent is in contempt where the respondent knows and understands the terms of the order and what is required to be done to comply with the order, but then without any cause or justification deliberately does not comply. This is what the Labour Court in fact held in *National Union of Mineworkers and Others v B K H Mining Services CC t/a Dancarl Diamond Mine and Others*[7] where it was said: '…. What must be proved according to that standard is: (a) that an order of court was granted against the

[5] Id at para 30.
[6] [2015] JOL 32840 (LC) at para 27
[7] (1999) 20 ILJ 885 (LC) para 4.

respondents, (b) that the respondents were aware of the order and its terms, (c) that the respondents were in fact in breach of the order and, if so, (d) that their failure to comply with the order was wilful.''

[18] In the context of employment dispute resolution specifically, the issue of contempt of court most often arises in the cases where employers fail to comply with arbitration awards issued by the CCMA or bargaining councils, were it is required that an employer takes positive action pursuant to a finding of unfair dismissal or unfair labour practice against the employer. A prime example is where an employer must reinstate an employee in terms of an arbitration award, but does not do so. These arbitration awards are then made orders of court, but even after service of the court order on the employer concerned, the required positive action is still not taken. In my view, and in these kind of contempt cases, the focus of the contempt proceedings is primarily aimed at compelling and ensuring compliance with the underlying arbitration award.[8] After all, the employee does not benefit out of the dispensing of punishment to the employer for disrespecting the court. This court, in these kind of contempt proceedings, must strive to ensure that the employee enjoys the fruits of his or her victory, which is after all why the employee pursued the matter in the first place, which punishment being a secondary consideration.

[19] Applying the aforesaid principles to the matter now before me, and especially considering the order already granted by Van Niekerk J on 5 August 2016, there can be no argument where it comes to the issues of the respondents having proper knowledge of the order, understanding what it means and what action must be taken to comply with it. It is equally clear that there exists non compliance with the order as it stands (as read with the award). Therefore, and all that remains is to decide is whether this failure to comply is *mala fide*, wilful (deliberate) and without any kind of *bona fide* justification for the refusal or failure to comply. I will now turn to this issue hereunder.

Analysis

[8] See *Orthocraft (Pty) Ltd t/a Advanced Hair Studios v Musindo and Another* (2016) 37 ILJ 1192 (LC) at para 27.

[20] Deciding whether the failure to comply with the order is without any kind of *bona fide* justification and *mala fide* entails, firstly, a consideration and interpretation of the order itself. In the case where the order makes an underlying arbitration award an order of court, the arbitration award itself must similarly be considered and interpreted.[9] The purpose of this consideration is to establish beyond reasonable doubt what action must be taken to comply with the order (and award).

[21] In this instance, the underlying dispute, as stated, was one of an unfair labour practice based on promotion. It is clear from the award that what the first respondent needed to do, to comply with the award, was to appoint the individual applicant into the position of administrative clerk effective 1 October 2005, as a promotion. Critically, this is not the situation of a case where the individual applicant had been dismissed and must be reinstated following a finding of unfair dismissal. The importance of this distinction will become apparent later in this judgment.

[22] An unfair labour practice dispute, and then the obtaining relief as a result of pursuing same, contemplates a continued existence of an employment relationship between the parties. In short, unfair labour practices are only available to employees.[10] Where the employment relationship comes to an end, prior to the relief afforded under the unfair labour practice dispute being implemented, then that relief may well be rendered incompetent. As a simple example, where an arbitration award directs that an employer promotes an employee, but the employee then resigns before this promotion is effected, that is simply no need or purpose to still promote the employee. Therefore, and once the employment relationship has terminated, an employer cannot be expected to thereafter take positive action in the form of promoting the employee, reversing a demotion, subject the employee to training, reverse a final written warning and the like, being the kind of relief flowing from unfair

[9] See *Public Servants Association of SA on behalf of Members v Gwanya NO and Another* (2015) 36 ILJ 1275 (LAC) at para 25 where the Court dealt with a settlement agreement that had been made an order of court and said: '… once the agreement has been made an order of court, it becomes an order of court and may be enforced by way of contempt of court proceedings if it is breached. However the court should still consider the nature of the settlement that was made an order of court …'.

[10] See *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 248 (LAC) at para 47.

labour practice arbitration awards. In short, circumstances have overtaken the relief, rendering compliance incompetent.

[23] It must however be reiterated that the situation is different where it comes to relief afforded in the form of the payment of money or compensation. This kind of relief can also be awarded by an arbitrator in an unfair labour practice matter. The obligation to comply with these kind of awards survive termination of the employment relationship, because these awards sound in the payment of money. To illustrate by way of an example – an award prescribes that an employee be promoted with a commensurate increase in salary, with retrospective effect. The employee then resigns and leaves employment before this award can be implemented. However, the retrospective date of promotion in terms of the award precedes the employee leaving employment by some months. Even if termination of employment means that actual promotion is no longer competent, the employee can still claim the difference in salary brought about by the promotion under the award until the date of termination of employment. The same kind of consideration would apply to the difference in salary in the case of a demotion reversed in an unfair labour practice arbitration award.

[24] The situation in the case of unfair dismissal is different. An award of reinstatement restores the employment relationship as if the termination of employment has not taken place. In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11] the Court said:

> 'The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. ... It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. …'

Applying this *ratio*, the Court in *Themba v Mintroad Sawmills (Pty) Ltd*[12] said:

[11] (2008) 29 *ILJ* 2507 (CC) at para 36. See also *Coca Cola Sabco (Pty) Ltd v Van Wyk* (2015) 36 ILJ 2013 (LAC) at para 16.
[12] (2015) 36 ILJ 1355 (LC) at para 22.

> '… Reinstatement means the restoration of the status quo ante. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on (or as from) the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as existed at the time of dismissal of the employee.'

[25] Therefore, compliance with such an award of reinstatement, based on what must surely be logical and common sense, cannot in any way be compromised by the fact that the employment relationship had terminated, as it is such very termination that gives rise to such an award. But an award of promotion in an unfair labour practice dispute cannot have the same consequence. It does not restore the employment relationship. It can only contemplate action having to be taken by an employer within the employment relationship whilst it still exists.

[26] By way of comparison in respect of related issues, the Court in *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd*[13] held that it was not competent to ask for a declaratory order that a strike by employees was unprotected, in the case where employees had already been dismissed by the time the relief was sought.

[27] Another comparison is the judgment of *Booysen v Minister of Safety and Security and Others*[14]. The Court in that matter dealt with the interdicting of a disciplinary hearing against an employee. By the time the matter had come before the Labour Appeal Court, the employee had already been dismissed, and the issue of this dismissal was subject to legal challenge. Because the relief the employee was seeking related to conducting of the disciplinary hearing, and with the employee already being dismissed, the Court said:[15]

> 'the relief sought by the appellant in this court has become moot. A finding in favour of the appellant will not have the effect of the SAPS being obliged to proceed with the disciplinary enquiry because the appellant is no longer its employee …'

[13] (2015) 36 ILJ 1261 (LAC) at para 35.
[14] (2011) 32 ILJ 112 (LAC).
[15] Id at para 32.

The point is that circumstances happening after the fact may have the result that the relief sought could have become incompetent, or 'moot' as the Court called it.[16] In my view, this would certainly be the case where an employee is dismissed prior to the conclusion of unfair labour practice proceedings relating to promotion or demotion.

[28] In *Myers v National Commissioner of the SA Police Service and Another*[17] the Court dealt with a change in circumstances at the employer resulting in the post the employee was reinstated to being restructured, and held:[18]

> 'In my view, SAPS has not complied with the order of the SCA. That order contemplated that Myers be reinstated into the post he would have occupied had he not been unfairly dismissed. That post, as presently restructured, is that of commander of the Cape Town Dog Unit (or K9 Unit) at Maitland. But the SAPS's non-compliance was not wilful or mala fide. It is not in contempt of court.'

[29] The Court in *Abdullah v Kouga Municipality and Another*[19] dealt with a situation where there existed a court order uplifting the suspension of an employee. But before that order could be effected for the employee to return to work in terms thereof, the employee was dismissed. The employee contended that notwithstanding the dismissal, the order uplifting his suspension stood, should be given effect to, and he should still return to work. The Court said:[20]

> 'It might well be the case, as counsel for the applicant contended, that the strategy of dismissal was a cynical response to the order lifting his suspension. However, even though both the suspension and the termination have the effect of keeping the applicant away from the workplace, it is wrong in law to conclude that the respondent's act of dismissal might have been in contempt of the interim order. … In any event, suspension can only take place in the context of an ongoing employment relationship. Conversely, lifting of a suspension can only be enforced in a continuing employment relationship. If

[16] See also *City of Cape Town v SA Municipal Workers Union on behalf of Jacobs and Others* (2009) 30 ILJ 1983 (LAC) at para 31.
[17] (2014) 35 ILJ 1340 (LC).
[18] Id at para 24.
[19] (2012) 33 ILJ 1850 (LC).
[20] Id at para 14.

> the relationship is terminated for whatever reason no suspension can continue, nor can a lifting of a suspension persist. Suspension and the remedies for unlawful suspension are logically contingent on the continuity of the employment relationship.'

The above *dictum* is in my view apposite *in casu*, especially considering that the issue of suspension is also encapsulated under the unfair labour practice jurisdiction[21] and if successfully pursued by an employee, would compel the employer to take positive action by taking the employee back into work. The Court in *Abdullah*[22] then concluded as follows, which in my view is also of equal application *in casu*:

> '… the act of termination was not an act in breach of the interim order, but one that had the effect of rendering it legally inoperative. Contempt of the court's interim order does not arise as an issue.'

[30] This judgment being permeated by the examples referred to above, let me conclude with one final one, to practically illustrate the point made. An employee applies to be promoted but is not successful and refers the dispute to the CCMA as an unfair labour practice. Two months after the CCMA referral the employee is dismissed for theft, and does not challenge that dismissal. Two months after the employee's dismissal the unfair labour practice is set down for arbitration in the CCMA, and 14 days later the arbitrator makes an award that the employee should have been promoted into the post he applied for. Does this now mean that the employee must be reinstated so that he can then be promoted? Surely not. The award relating to promotion cannot have that effect or consequence.

[31] This brings me to the matter at hand. The individual applicant applied for promotion, but was informed on 7 October 2005 that she was not successful. The individual applicant referred an unfair labour practice dispute to the SALGBC on 18 October 2005 as a result. The individual applicant's employment terminated on 15 November 2005 based on the expiry of her fixed term contract of employment, and she actually left work at that time.

[21] Section 186(2)(b) defines an unfair labour practice as including: 'the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee'.*
[22] Id at para 16.

There is no evidence that the individual applicant ever challenged this termination of employment on 15 November 2005 as an unfair dismissal. Only on 15 March 2006 is the arbitration award then issued directing that the individual applicant be promoted. But by this time her employment had long since terminated.

[32] The applicants are in effect contending that compliance with the award entails the reinstatement of the individual applicant into the position of administrative clerk. But, and as I have illustrated above, this does not follow. It is not competent to demand the reinstatement of the individual applicant so she can be promoted. That is simply not contemplated as constituting action required from the first respondent in order to comply with the award. Accordingly, and by not reinstating the individual applicant, the first respondent has not acted in contravention of the award, and consequently the court order of Gush J. The unfortunate reality for the individual applicant is that circumstances overtook her unfair labour practice dispute, these circumstances being her termination of employment on 15 November 2005. If this has the effect of negating her award and relief in respect of her unfair labour dispute, then that is unfortunately so.

[33] The above considerations thus clearly indicate that the first respondent did not behave in a wilful and *mala fide* manner. Compliance being the primary objective of the contempt proceedings in this matter, there is in effect nothing that it can be expected the first respondent must comply with, in terms of the award. The first respondent's failure to reinstate the applicant is *bona fide* and reasonably justified. No contempt of court thus exists in this instance.

[34] It may well be that the individual applicant has a claim for any difference in salary, if it exists, between the date of 1 October 2005 when she was appointed into the administrative clerk position in terms of the award, and her termination of employment on 15 November 2005. But this is a claim sounding in money, and it is not competent to enforce such a claim by way of contempt proceedings. The claim must be quantified, and then pursued by normal execution proceedings. As said in *Wenum v Maquassi Hills Local Municipality and Another*[23]:

[23] (2016) 37 ILJ 1488 (LC) at paras 16 - 17.

> 'If the judgment is one ad pecuniam solvendam, namely one in which the court orders the debtor to pay a sum of money, it is appropriate to seek its enforcement by means of a writ of execution. When the judgment is one ad factum praestandum, namely an order to perform some act for example to pass transfer or vacate premises, the judgment creditor cannot seek its enforcement by the levying of a writ and his or her remedy lies in contempt proceedings. …
>
> The purpose of contempt proceedings is to enforce a court order and to compel compliance where the performance of an act is ordered. Where the court ordered the payment of an amount of money, the court order can be given effect to by following the process associated with obtaining a writ of execution.'

[35] The applicants have accordingly failed to show that the first respondent is in wilful and *mala fide* disregard of the order of Gush J of 1 December 2015. The relief afforded by the award which was made an order of court has become incompetent as a result of the termination of the employment of the individual applicant. The application for contempt of court falls to be dismissed.

[36] This only the question of costs. Even though the applicants have failed, I do not believe it would be appropriate to further burden the applicants with a costs order. I do consider that the first respondent did not timeously prosecute the review application, resulting in the applicants having to apply to have it dismissed. Also, the individual applicant did have an award in her favour, and it was due to intervening circumstances that the relief in terms thereof had become incompetent. The question of law raised in this matter was in my view fairly novel and complex. Applying the wide discretion I have in terms of Section 162(1) of the LRA, I shall make no order as to costs.

Order

[37] For all of the reasons as set out above, I make the following order:

1. The applicants' contempt of court application is dismissed.

2. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants: Mr P De Beer – Union official

For the Respondents: Adv W H Mugwambane

Instructed by: Malumbete and Makhubele Attorneys