

SOUTH AFRICA / JUDGMENT

Ncube v 4 B Protection Services and Others (J906-20) [2022] ZALCJHB 50 (15 March 2022) [2022] ZALCJHB 50

COURT

Labour Court Johannesburg

BEFORE

T Deane

CASE / FILE NUMBER

J906-20

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case no: J906-20

In the matter between:

MBEKEZELI
NCUBE
Applicant
and
4 B
PROTECTION
SERVICES
First Respondent
TAU
NKOMO
Second Respondent
PAUL
KOFFLER
Third Respondent

Heard:

11 February 2022

Delivered:

15 March 2022

JUDGMENT

DEANE, AJ

Introduction

[1] This is an opposed contempt of court application to place the Second Respondent, Tau Nkomo (Nkomo), the owner of the First Respondent (collectively the Respondents), in contempt of court for his failure to comply with a settlement agreement[1] (Settlement Agreement) under case number GAJB1005-19, dated 22 May 2019 and certified on 19 August 2019.

Background

to the Dispute

- [2] The Applicant was employed by the First Respondent as a security guard until 7 May 2019, which was his last day of service.
- [3] The Applicant claimed that he was unfairly dismissed, and the matter was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 7 May 2019.
- [4] A Settlement Agreement was entered into between the parties on 22 May 2019 and that the Applicant would be reinstated on 2 August 2019.
- [5] Nkomo agrees that there is a Settlement Agreement but that the non-compliance thereof is not wilful.

Legal Principles and Analysis

- [6] 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'[2]. In *Fakie v CCII Systems (Pty) Ltd*[3] (Fakie), the Court stated that for contempt to be proven, 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[4]. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[5]
- [7] 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, in 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[6]. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[8] Regarding reinstatement of the Applicant, in the most recent authoritative judicial exposition on the law of contempt, the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd And Others*[7] (*Matjhabeng*) reiterated the basic test for contempt as set out in *Fakie NO v CCII Systems (Pty) Ltd*[8], viz:

'It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites... have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction

need only lead evidence that establishes a reasonable doubt.'

[9] The Constitutional Court also noted the constitutional objective underlying contempt proceedings as being the preservation of the court's authority by ensuring that its orders are complied with:

'[48] To ensure that courts' authority is effective, s 165(5) [of the Constitution] makes orders of court binding on 'all persons to whom and organs of state to which it applies'. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority.'

[10] In this case, it is clear that the reason why the Applicant could not continue tendering his services with the First Respondent was as a result of the security services contract which the First Respondent had with Amnesty International not being renewed[11]. The service level agreement was a fixed term contract, for the duration of 12 months commencing on 22 April 2018 and terminating on 23 April 2019[12].

[11] There was an option for renewal of the contract, however, the reason for the non-renewal of the contract was as a result of Amnesty International becoming aware that the Applicant who was employed on the site, did not possess the necessary documentation to be legally in South Africa and he was not registered under the Private Security Industry Regulations Act[13] (PSIRA).[14]

[12] Since the First Respondent had employed the Applicant specifically for the site with Amnesty

International, the First Respondent upon non-renewal of the contract with Amnesty International did not have other security work in which to place the Applicant in[15].

- [13] At the Arbitration proceedings, it is unchallenged that Nkomo explained to the Commissioner that the Applicant had not been dismissed but that the First Respondent's contract through which the Applicant was contracted for, had been terminated and therefore the First Respondent did not, at that time, have any more work where they could place the Applicant[16]. Indeed, despite the Applicant claiming that he was dismissed, according to his founding papers he states "I was dismissed on 7 May 2019, after the contract with the client ended in April 2019 and I when I returned I was requested to return my uniform" [17].
- [14] In response thereto, the Commissioner accorded the Respondents a period of three months until 19 August 2019 to attempt to find an opening for the Applicant to place work for him. The Commissioner indicated that after three months the parties were to report back on the progress of trying to place the Applicant.[18]
- [15] It was under the aforementioned conditions that the Settlement Agreement was signed. It was clear
- that there was at the time of the Settlement Agreement no site that the Applicant could be placed at for him to work immediately.
- [16] In terms of the Settlement Agreement, it is clear that it was not retrospective in nature and it mandated the Applicant to report for duty on 19 August 2019. There was also no monetary award or retrospective payment agreed to as there was no dismissal but due to operational reasons, the contract of the Applicant was terminated.
- [17] It also appears from the Settlement Agreement that the spirit and intent of this agreement was that the Applicant, despite the wording of the agreement, "that he should report for duty at the First Respondent", should be understood in terms of how the Settlement Agreement was intended to be concluded. The mandate to "report for duty" did not translate to the fact that there would be work for the Applicant. It should be interpreted as that on 19 August 2019 when the Applicant reported for duty the First Respondent would have tried to place the Applicant at a suitable site, failing which attempts were to be made to place the Applicant within a period of three months. Nothing more is said about the consequences of a failure to do so, except that the First Respondent was to report back on this situation within three months.
- [18] When the Applicant reported for duty on 2 August 2019, the First Respondent indicated that they could not place the Applicant as they had no site at that time which needed security services. He was however advised to continue making enquiries about the availability of a site. However the Applicant, unbeknownst to the Respondents, opted to return to the CCMA to certify the Settlement Agreement.

- [19] During the period of November 2019, Nkomo attempted to make enquiries[19] as to when they could report back to the Commissioner as agreed to at the Arbitration. In an e-mail dated 6 November 2019[20], Nkomo enquired about the status of the matter. It would seem that in casu the Respondents genuinely assumed that the matter would be resumed before the Commissioner and that he was in compliance with the Settlement Agreement.
- [20] In addition, from the communications with the CCMA and after having been told that the matter was settled, and the file closed, Nkomo interpreted this as meaning that the matter had died a natural death. This was not an unreasonable conclusion to have come to, seeing that the First Respondent had not managed to place the Applicant, in terms of the Settlement Agreement, due to the First Respondent not having a contract at that time in which the Applicant could be employed.
- [21] Nkomo submits that when he received a call in May 2020 to appear before the Labour Court for contempt he was surprised and that only upon arriving at Court did he become aware that the Settlement Agreement had been certified.
- [22] Nkomo's defence, that he was labouring under a mistake regarding the application and extent of the Settlement Agreement and that he tried his utmost to place the Applicant but could not due to it not receiving any security services work during the period in question, is reasonably acceptable under the circumstances. The Applicant could not be placed at that point in time. Nkomo also had a legitimate expectation that he would be called back to the CCMA to update the Commissioner on the progress of finding work for the Applicant.
- [23] Nkomo further submits that had he known that he was meant to re-instate the Applicant even though it does not have a place or work to place the Applicant he would not have agreed to the Settlement Agreement in the form in which it was crafted because its performance was an impossibility. This too is an acceptable explanation, seeing that the contract with Amnesty International, for which the services of the Applicant was contracted for, was not renewed. In addition, there was no evidence of an unfair dismissal having taken place.
- [24] Having regards to the requirements for contempt of court in terms of the applicable legal principles
- discussed above and taking into account the factual considerations herein, it cannot be said that the Respondents' failure to comply with the court order was a deliberate and intentional violation of the Court's dignity, repute or authority[21]. Nkomo had an honest belief that non-compliance is justified or proper and therefore such a belief is incompatible with that intent.
- [25] In addition, in the case of Sepoa v Imperial Cold Logistics[22], the employer, after the original position was no longer was available, attempted to have the employee placed in an alternative

position and the Labour Court dismissed the contempt application effectively finding that it is not always required that there be exact compliance with an award or order.

[26] The legal principles are therefore clear and to be held in contempt the employer must have acted mala fides.

[27] In this case the First Respondent under the circumstances as mentioned above shows no evidence that there was any deliberate or mala fides conduct by the First Respondent and for that matter on the part of the Second Respondent, which would justify a contempt ruling against them.

Conclusion

[28] The Applicant's contempt application ought to be dismissed and that the rule nisi ordering the Respondents to appear, is discharged.

[29] In the premise the following order is made:

Order

1. The First and Second Respondents are found not to be in contempt.
2. The rule nisi of 22 October 2021 is discharged.
3. There is no order as to costs.

T. Deane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M. Ncube

For the Respondent: T. Nkomo

[1] See: Annexure A.

[2] See: Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) at 367H-I (Frankel) and Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004 (2) SA 611 (SCA) at paras 18 and 19.

[3]

[2006] SCA 54 at para 42c.

[4] See: Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 (C) 524D as applied in Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 691C.

- [5] Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 692E-G per Botha J, rejecting the contrary view on this point expressed in Consolidated Fish v Zive (above). This Court referred to Botha J's approach with seeming approval in Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 368C-D.
- [6] See the formulation in S v Beyers 1968 (3) SA 70 (A) at 76E and 76F-G.
- [7] 2018 (1) SA 1 (CC).
- [8] 2006 (4) SA 326 (SCA).
- [9] Matjhabeng at para 62.
- [10] Ibid at para 48.
- [11] See: Annexure T7.
- [12] See: Replying Affidavit, pg. 5 at para 14.
- [13] Act No. 56 of 2001.
- [14] See: Replying Affidavit, pg. 5 at paras 14-16.
- [15] See: Replying Affidavit, pgs. 4-5.
- [16] See: Replying Affidavit, pg. 5 at para 18.
- [17] See: Affidavit in support of Contempt of Court Application at para 9.
- [18] See: Replying Affidavit, pg. 6 at para 20.
- [19] See: Annexures T8.1-T8.8.
- [20] See: Annexure T8.5.
- [21] See the formulation in S v Beyers 1968 (3) SA 70 (A) at 76E and 76F-G.
- [22]
- [2018] 39 ILJ 1146 (LC).

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