

SOUTH AFRICA / JUDGMENT

Ntsimane and Others v Memela (JA25/2020)
[2021] ZALAC 27; (2021) 42 ILJ 2400 (LAC);
[2021] 12 BLLR 1202 (LAC) (6 September 2021)
[2021] ZALAC 27

COURT
Labour Appeal Court

BEFORE
Waglay, Coppin, Kubushi

CASE / FILE NUMBER
JA25/2020

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IN THE LABOUR APPEAL
COURT OF SOUTH AFRICA, JOHANNESBURG
Not reportable
Case no: JA 25/2020
In the

matter between: MOEKETSI
 NTSIMANE First
 Appellant
 CITY
 OF TSHWANE METROPOLITAN MUNICIPALITY Second
 Appellant
 DIALE MOGASHOA
 ATTORNEYS Third
 Appellant
 And
 NONTIBEKO
 MEMELA Respondent
 Heard: 19
 August 2021
 Delivered: Deemed
 to be on 06 September 2021
 Coram: Waglay
 JP, Coppin JA, et
 Kubushi AJA

JUDGMENT

COPPIN JA

- [1] This appeal is against the orders of the Labour Court (Prinsloo J) which found the first appellant (Mr Ntsimane) guilty of contempt of a court order made by Whitcher J and finally ordering the third appellant (Diale Mogashoa Attorneys), the attorneys of record of the appellants, to pay the costs of the contempt proceedings de bonis propriis, i.e in their personal capacity, on the scale as between attorney and client. Leave to appeal was granted on petition to this Court.
- [2] The issues in this matter are, essentially, whether Mr Ntsimane was correctly convicted of being in contempt of the court order of Whitcher J and whether it was regular and appropriate to mulct the attorneys personally with the costs of the contempt proceedings that were brought by the respondent.
- [3] No heads of argument were submitted on behalf of the respondent. Shortly before the hearing we were informed by the appellants' attorneys , through the Registrar that the respondent was no longer legally represented and was not likely to make any submissions in respect of the appeal, despite all applicable notices having been served upon her and her awareness of the appeal date.

Re: the Factual matrix

- [4] On 30 November 2018, the former city manager of the second appellant ("the municipality"), on behalf of the municipality, suspended the respondent in terms of clause 16 of The South African Local Government Bargaining Council Collective Agreement ("the disciplinary code") on allegations of financial misconduct.
- [5] In terms of clause 16 of the disciplinary code, the suspension could be for an initial three month period, which could be extended for another three month period pending the finalisation of investigations into the alleged misconduct.
- [6] On 28 February 2019, the municipality, through Mr Masola, extended the initial three month period of suspension for another three months. This was permissible in terms of the disciplinary code.
- [7] However, being of the view, albeit mistakenly, that this further suspension was unlawful, the respondent unsuccessfully sought the intervention of the Labour Court, inter alia, for a declarator that the extension was impermissible.
- [8] After expiry of the six month suspension period, the respondent again approached the Labour Court alleging that her continued suspension was unlawful and in breach of her employment contract.

- [9] In response, the appellants purported to extend the suspension by yet another three months. This was clearly not permissible in terms of the disciplinary code. On 20 June 2018, Whitcher J found accordingly and made the following order: “1. The continued suspension of the applicant is unlawful and the respondents are to immediately uplift same; 2. The [municipality] must pay the applicant’s costs.”
- [10] On 24 June 2019, the appellants delivered an application for leave to appeal the order of Whitcher J, the effect of which was to suspend its operation, and on 11 July 2019 Whitcher J granted the appellants leave.
- [11] A day before the grant of the leave to appeal, the respondent had brought an application in terms of section 18 of the Superior Courts Act[1] for an order directing the immediate implementation of the order made by Whitcher J pending the outcome of the application for leave to appeal, or any future appeal that is to be noted by the appellants against that order.
- [12] The section 18 application was heard by Prinsloo J on 5 September 2019, and was dismissed on 11 September
2019. The court made no costs order in respect of that application, having found, in essence, that since the appellants had done nothing further to prosecute the appeal after having been granted leave to appeal by Whitcher J, the appeal had lapsed, and that, in effect, a section 18 order was not appropriate as the order of Whitcher J had become operative again and that the appellants had to comply with it.
- [13] A letter from the respondent’s attorneys to the appellants’ attorneys informing them that, in light of the judgment in the section 18 application the respondent would be returning to work, prompted the appellants (through their attorneys) to contemplate delivering an application in terms of which they sought condonation for the late delivery of the notice of appeal (i.e. in their appeal against the order made by Whitcher J). They accordingly informed the respondent’s attorneys that they would not allow the respondent to return to work pending the finalisation of the contemplated condonation application.
- [14] The respondent’s attorneys contested the implied assertion by the appellants that the delivery of the contemplated condonation application could have the legal effect of suspending the operation of the order of Whitcher J and asserted the respondent’s right to return to work pending the grant of the contemplated condonation application.
- [15] By letter dated 12 September 2019 the appellants’ attorneys informed the respondent’s attorneys (at the time) that the municipality had filed its notice of appeal in respect of the order made by Whitcher J and contended that such filing would have the effect of suspending that order, and that the respondent could not rely on it to return to work. The letter also informed the respondent, through her attorneys, that the disciplinary hearing against her was to commence “in the next week or two” and that she would be served with a charge sheet by 17 September 2014.

- [16] The respondent's attorneys took issue with the views expressed by the appellants' attorneys and in the letter dated 12 September 2019 proffered the view that unless and until condonation for the late filing of the notice of appeal had been granted, the order of Whitcher J "was operational and must be given effect to."
- [17] The dispute escalated, when, a reply to the respondent's attorneys, dated 13 September 2019, the appellants' attorneys intimated that the municipality would not accept the respondent's tender of services pending the finalisation of the disciplinary proceedings against her.
- [18] In their response, the respondent's attorneys pointed out that any further suspension of the respondent (i.e. in excess of the six-month period allowed by the disciplinary code) would be unlawful.
- [19] Despite such intimation, on 16 September 2019, a letter signed by Mr Moeketsi Ntsimane, then acting city manager of the municipality, was delivered to the respondent, yet again extending the respondent suspension for another three months. According to the letter, this came about because the allegations of misconduct against the respondent had not been finalised. The letter also advised that the disciplinary charges would be served on the respondent before the end of September 2019, and informed the respondent, inter alia, that "all conditions previously set down in the initial suspension, [are] still valid and in force."
- [20] After the appellants refused to heed a demand from the respondent that they withdraw this further suspension letter, the respondent brought the application in the Labour Court for an order holding them in contempt, in particular, for the failure of the municipality to comply with the order of Whitcher J, and because of the letter of Mr Ntsimane extending the respondent's suspension yet again despite that order.
- [21] The court a quo (per Prinsloo J) rendered two judgments in the contempt matter. The first dealt to the merits and costs, and the second with the issue of costs only. In the first, which was handed down on 29 November 2019, Mr Ntsimane was found to have been in contempt of the order of Whitcher J and was committed to imprisonment for a period of three months, suspended on condition that he complied
- with that order, and Mr Ntsimane and the appellants' attorneys (Diale Magashoa Attorneys) were (provisionally) held to be jointly and severally liable for the costs of the application, de bonis propriis and on the scale as between attorney and client. They were given seven days within which to make submissions why the provisional costs order was not to be made final.
- [22] The rationale for the costs order in the first judgment being provisional is apparent since both Mr Ntsimane and the attorneys had not been cited originally in the contempt application. Originally, the former city manager, Mr Moeketsi Mosola had been cited with the municipality, as respondents.

[23] Submissions were duly made on behalf of Mr Ntsimane and the attorneys, respectively, to stave off the provisional costs order. The second judgment was then rendered in which the court a quo held the following in respect of Mr Ntsimane:

“[22] In the submissions filed, it was explained that Mr Ntsimane was oblivious of the fact that the appeal record had not been filed and that the appeal was consequently deemed to have been withdrawn until the date of the contempt hearing. Until then, Mr Ntsimane was under the impression that that appeal was being prosecuted and that pending the appeal, you are not required to implement the court order granted on 20 June 2019.

[23] It was further submitted that Mr Ntsimane had the bona fide belief that the appeal was pending, which later turned out to be deemed to have been withdrawn because the municipality’s

attorneys failed to file the record. This should not attract a personal cost order against Mr Ntsimane, who was merely acting in the position for a period of three months.

[24] I accept that, at the time when Mr Ntsimane had issued the suspension letter to the applicant, he was bona fide in his belief that the noting of the appeal suspended the execution and operation of the court order that ordered that the continued suspension of the applicant was unlawful and which ordered the upliftment of the applicants suspension with immediate effect.

[25] However, this position had changed on 7 October 2019, when the deal became deemed to be withdrawn. Based on the submissions filed, it seems as if Mr Ntsimane only learned of this fact on 22 November 2019 and that this state of affairs was not caused by Mr Ntsimane’s conduct, but rather by his belief that the appeal was prosecuted in circumstances where the attorneys failed to file the record.

[26] The municipality appointed attorneys to prosecute the appeal and in circumstances where they failed to do so, Mr Ntsimane should not be burdened with an order for costs. As it is, Mr Ntsimane has been found guilty of contempt as a direct result of the attorneys’ failure to prosecute the appeal in accordance with the rules of the LAC.

[27] In my view it would not be fair to burden Mr Ntsimane with a personal cost order in these circumstances.”

[24] The portion of the second judgment was quoted in full because the findings therein beg the question how Mr Ntsimane was found to have been in contempt of the order of Whitcher J in the first place, given the circumstances which the court accepted existed. And more particularly, how a wilful and mala fide disregard of the order of Whitcher J on the part of Mr Ntsimane could be said to have been established, given that the establishment of the same, beyond a reasonable doubt, was essential before Mr Ntsimane could be committed to imprisonment for being in contempt of the order.[2]

- [25] It was not disproved that Mr Ntsimane was acting city manager for a brief period; that he was oblivious of the fact that the necessary documents were not delivered by the appellants' attorneys and that he had bona fide belief that the order had been suspended when he wrote the letter purporting to further suspend the respondent. Mr Ntsimane only became aware of the true state of affairs subsequently and as a result of the contempt hearing.
- [26] Mr Ntsimane's conduct was clearly not proved beyond a reasonable doubt to have been wilful and mala fide in disobedience of the order of Whitcher J, and he should therefore not have been found to have been in contempt of it and to have been committed to a term of imprisonment. Accordingly, his conviction and sentence cannot stand given the circumstances that were accepted by the court a quo in the second judgment.
- [27] Turning to the costs order made against the attorneys - the order is premised on the fact of Mr Ntsimane's alleged contempt. Significantly, the court a quo did not find the municipality itself guilty of contempt, but assigned the blame for the municipality's failure to comply with the court order and to prosecute the appeal to the attorney's failure to adhere to the rules and procedures relating to appeals, aspects which an attorney could reasonably be expected to have been very familiar with.
- [28] In the second judgment, the court a quo was justifiably dismissive of the submissions made by the appellants' attorneys in which they sought to exonerate themselves of all blame. They, inter-alia, argued that there was no factual or legal basis for the costs order to have been made against them and, surprisingly, contended that it was instead their client, the municipality, that had to be burdened with the costs.
- [29] Needless to say, the excuses made by the attorneys for their failure to comply with the rules are patently unacceptable. They were engaged for their supposed expertise and professionalism, and the municipality could reasonably have assumed that all the procedural aspects would be competently and timeously attended to.
- [30] If it were not for the fact that contempt had not been established, one would have had no hesitancy to leave the court a quo's punitive costs order intact. However, and fortunately for the attorneys, since the contempt application itself cannot be said to have been successful, the stated rationale for justifiably penalising them is absent. Therefore the costs order against them cannot stand.
- [30] Taking all of the circumstances into account, it would have been fair and appropriate in the circumstances to make no costs order, instead of burdening the respondent with the costs of the appellants' opposition to the contempt application.
- [31] The appeal against the order made by Whitcher J was not pursued in the end and the matter before us only related to the contempt application (the first and second judgments of Prinsloo J).
- [32] In the result:

1. The appeal against the orders of the court a quo is upheld;
2. The orders of the court a quo are set aside and are substituted with the following: “1. The application (for contempt) is dismissed; 2. There is no costs order.”
3. There is no costs order in respect of the appeal.

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kubushi AJA concur in the judgment of Coppin JA.

APPEARANCES: (There was a virtual hearing via Teams)

FOR THE APPELLANTS: JL Basson and I Hlalethoa

Instructed by Diale Mogashoa Attorneys

FOR THE RESPONDENT: No appearance and no heads submitted

[1] Act 10 of 2013.

[2] See, inter alia, Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and others v Compensation Solutions (Pty) Limited 2017

(1) BCLR 1408; 2018 (1) SA 1 (CC) (26 September 2017) paras 46-61 and 76; Fakie NO v CCII Systems (Pty) Ltd

[2006] ZASCA 52; 2006 (4) SA 326 (SCA).

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Prepared on 9 October 2026 · Esheria