

SOUTH AFRICA / JUDGMENT

SAMWU obo Gwejane and Others v City of Ekurhuleni Metropolitan Municipality (J 646/20) [2021] ZALCJHB 467 (8 February 2021)

[2021] ZALCJHB 467

COURT

Labour Court Johannesburg

BEFORE

Mabaso

CASE / FILE NUMBER

J 646/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case

no: J 646/20

In

the matter between:

SAMWU
obo GWEJANE AND OTHERS
Applicants
and
CITY
OF EKURHULENI METROPOLITAN
MUNICIPALITY
First Respondent
DR
IMOGEN
MASHAZI
Second Respondent

Heard:

20 November 2020

Delivered:

08 February 2021

Summary:

Contempt application

JUDGMENT

MABASO, AJ

- [1] The Applicant, South African Municipal Workers Union Food and Allied Workers Union (the union) acting on behalf of its members (the individual employees), on an ex parte application, approached this Court by way of contempt proceedings seeking an order inter alia that the City of Ekurhuleni Metropolitan Municipality (The Municipality), and Dr Imogen Mashazi (the Municipal Manager)[1] to be found guilty of Contempt of Court for failure to comply with the certified arbitration award(the arbitration award) issued against the Municipality. Furthermore, the Municipal Manager be incarcerated and/or ordered to pay a fine. Further, that the Municipal Manager complies with the arbitration award. On 03 September 2020 this Court issued a Rule nisi in these terms. The Municipal Manager was directed to either explain his conduct by affidavit and /or appear before this Court on a return date.
- [2] The Rule nisi Order was to be served personally on the Municipal Manager by the Sheriff; and on 02 November 2020, the latter served it on one Mrs Naiker, the Personal Assistant of the Municipal Manager. A day before hearing this matter, the Municipality delivered an answering affidavit, deposed to by Mr Xolani Prince Nciza (Mr Nciza), its Divisional Head: Employee Relations.
- [3] The Municipality herein is not disputing that the arbitration award exists, and was served on it. However, Mr Nciza raises twofold defence, on behalf of the Municipality, namely that (a) "there is a court order directing that the review application and Rule 11 application is to be heard together. The Applicant can only proceed with contempt application when this transpires and not prematurely";
- (b) that the Applicant has not proved beyond reasonable doubt the Contempt of Court. According to Mr Nciza, the Application should be

dismissed, and the Applicant must be ordered to pay costs. The Counsel for the Municipality insisted on the latter defence and said no remedial order should be made by this Court herein. In the circumstances, I opine that if this Court were to accept this proposition that would mean the end of the dispute between the parties and the arbitration award will not be complied with; and arbitration awards issued by Bargaining Councils and CCMA will become worthless. So, I do not think is a correct proposition.

- [4] Once a CCMA or a Bargaining Council issues arbitration awards calling upon parties to act in a particular manner, such party must comply with the terms of such arbitration awards. If there is a non-compliance, once the certification processes have been completed, these fora have no jurisdiction to enforce the same arbitration awards. The Labour Relations Act, 66 of 1995 (the LRA), gives this Court powers

to oversee enforcement processes thereof, by contempt proceedings. My view in contempt proceedings, emanating from arbitration awards, this Court is not only required to decide whether a party is guilty or not but to supervise that such arbitration awards are complied with. Because if arbitration awards by institutions (such as CCMA and Bargaining Councils) are not complied, it will cause a "constitutional crisis." [2]

[5] The Constitution of the Republic of South Africa protects employees against unfair labour practice historically caused by the vulnerability flowing from the inequality characterised employment relationship in developing economic systems, as an employer is a bearer of power. [3] So the LRA provides a mechanism to protect the vulnerable. In contempt applications, such as in *casu*, this Court has to provide and monitor mechanisms to compel all parties to comply with CCMA/Bargaining Council arbitration outcomes.

If this Court does not do that, those institutions will become toothless tigers.

[6] The arbitration award was issued and served on Municipality on or about 20 April 2018, and calling upon the Municipality to comply by 30 June 2018. On or about 9 June 2018, the Municipality launched a review application against the same arbitration award. Subsequently, it was certified, and the same was served on the Municipality via Mr Ncinza on 22 August 2018. By 01 July 2019, the Municipality had not complied with the arbitration award because it says because of the review application. Two things to be mentioned in response to this explanation: firstly, section 145(7) of the LRA provides that the institution of review proceedings does not suspend the operation of an arbitration award unless this Court directs otherwise; the enforcement of the terms thereof may be stayed by order of this Court pending the finalisation of a review application lodged in this Court. See section 145(3) of the LRA. Secondly, the same review application does not exist anymore because it is deemed withdrawn as the Municipality failed to prosecute it within 12 months or approach this Court for extension and/or directive relating to its continuation due to non-available of part of the arbitration records. See *AWA Water Management (Pty) Ltd v Radoccia and Others* (JR2847/17) [2020] ZALCJHB 204 (11 August 2020) (*AWA Water Management*) and cases referred therein.

[7] With the preceding, the Municipality is aware of the arbitration award and has not complied with it. The terms of the arbitration award require the Municipality to do something, unlike reinstatement in a dismissal dispute. Is this conduct amount to Contempt, or is there justifiable reasons why this has not been done?

[8] Section 143(3) read with ss (4) of the LRA provides that certified arbitration award by the CCMA that orders performance of an act may be enforced by way of Contempt proceedings instituted in this Court. Section 143(1) of the LRA requires that such an award may be enforced as if it were an order of this Court in respect of which a writ has been issued. It is common cause that the arbitration award in *casu* has been certified. And what was expected from the Municipality was to comply with its terms, because no stay of enforcement order sought and granted.

- [9] Section 165 of the Constitution provides thus, relating to an Order of this Court,
- "165. Judicial authority.—(1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
 - (3) No person or organ of state may interfere with the functioning of the courts.
 - (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
 - (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies. (Own emphasis)
- [10] An arbitration award is full and final, and binding like an Order of this Court. The Municipality as a State has to assist the effectiveness of such arbitration awards. Consequently, failure to comply with arbitration awards amounts to interfering with the functioning of the CCMA/arbitration proceedings. If this interference were to be allowed, the dignity and effectiveness of CCMA processes would result in a constitutional crisis because forums such as Bargaining Council were established by an Act of parliament, the LRA. Since Courts do not have powers to investigate, parties armed with arbitration awards are expected to bring this to the attention of this Court as aggrieved parties, as in *casu*. Furthermore, this Court may *mero motu* join any party who is frustrating compliance with the arbitration award, because it is ceased with the enforcement process, as per provisions of section 143 of the LRA.
- [11] This is a civil contempt. The issue in this matter is about a failure or refusal to comply with the arbitration award. Therefore, what is required from the Applicant is to show that the arbitration award was issued, then certified, and the Municipality is aware of it as it was served. My views relating to contempt proceedings, like herein, is that the disgruntled employee does not want to see their employer being arrested but to compel the employer to comply with an arbitration award issued on his favour, as the Constitutional Court, in *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) 2015 (6) BCLR 711 (CC)*, at paras 28 and 37, said
- "the object of contempt proceedings is impose a penalty that will vindicate the court's honour, consequent upon the disregard of the previous order, as well as to compel performance in accordance with the previous order"
- "...where the Court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief."

My understanding of the above is that the Court is not expected to decide the only guilty verdict, but to take necessary action such as issuing coercing orders. In order to do so, what is required from the defaulting party, the Municipality herein, is to discharge its evidential burden that it is not mala fide and wilful by not complying with the arbitration award.

- [12] The Constitutional Court in *Pheko supra* said each case has to be decided based on its circumstances to determine whether the test is one preponderance of probabilities or beyond a reasonable doubt. This Court also has to consider that in Contempt of Court, it has to be investigated that the conduct is contemptuous disregard of the order/arbitration award. See *Pheko supra*, at para 42.
- [13] Are the Respondents herein in Contempt of Court? The Applicant contends that the Municipality advised them that the reason for not complying with the arbitration award was because it has launched a review application in this Court against the same arbitration award. Per para 18 of the founding affidavit. The Applicant subsequently instituted contempt application against both Respondents in or around September 2018, and it was set down for hearing on 03 May 2019. However, the matter was "postponed sine die by the Labour Court pending the outcome of the review application."
- [14] It is common cause that the Municipality launched the review application on or about June 2018, and by July 2019 records had not been served and filed because the Bargaining Council had not dispatched same to the Registrar of this Court. It trite that failure to prosecute and file all necessary documents in a review application within 12 months of launching the same then is deemed withdrawn. See *AWA Water Management supra* and cases cited therein.
- [15] Despite the review application being deemed withdrawn, the Applicant instituted an application to dismiss same. Understandably so, due to, conflicting judgments of this Court. See *AWA Water Management supra*. Reading the Municipality's answering affidavit, it seems like its officials still believe that the review application is still

pending.[4] So, I conclude that because the Contempt had been postponed sine die to await the outcome of the review application, so as much as the conduct of the Municipality is disobedience of the arbitration award because section 145(7) of the LRA provides that instituting a review application does not suspend the terms of the arbitration award, however, I opine that its conduct is not contemptuous because the Applicant, as stated above, that this Court ruled that the outcome of the said review was to decide the way forward. So the Municipality has provided a reasonable reason why it failed to comply with the arbitration award. Furthermore, the Applicant continued to be involved in reconstructing arbitration records despite the review being deemed withdrawn, which indicates that both the Municipality and the Applicant believed that the review was still alive.

- [16] As indicated above, this Court's duty is not only to decide whether a person is guilty or not but may issue coercive Order, since the review application is deemed withdrawn. Hence, I make order 2 below.

[17] Wherefore, the following Order is made:

1. The First and the Second Respondent are not in Contempt of Court.
2. The Second Respondent as the First Respondent's accounting officer is directed to ensure that the Arbitration award's terms herein are complied with within 15 days of this Order.
3. No order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

For the Applicants:

Mr J. Gwebu

Instructed by:

Madlela Gwebu Mashamba Inc.

For the Respondents:

Adv. Ford

Instructed by:

Tshiqi Zebediela Inc.

- [1] Cited in her official capacity.
- [2] “If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, ...any other party to the award,....enforce it by way of contempt proceedings instituted in the Labour Court”
- [3] Sidumo and another v RustenburgPlatinum Mines Ltd and others [2007] ZACC 22; 2008 (2) BCLR 158 (CC), at para 72.
- [4] Paras 43,44 and 45 of the answering affidavit.

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Prepared on 12 October 2026 · Esheria