

SOUTH AFRICA / JUDGMENT

Tshumi and Others v Queensburgh Plastics and Another (D455/97) [1998] ZALC 110 (13 November 1998) [1998] ZALC 110

COURT
Labour Court

BEFORE
A A Landman

CASE / FILE NUMBER
D455/97

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case Number: D455/97

In the matter between

N M Tshumi and 6 Others Applicant

and

Queensburgh Plastics 1st Respondent

K Moodley 2nd Respondent

JUDGMENT

LANDMAN J

- [1] Ntombenhle Mildred Tshumi and six others were employed by Queensburgh Plastics (Pty) Ltd and were dismissed by their employer. They apparently referred their dispute to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) for conciliation. The matter could not be conciliated and their dispute was referred to this Court under case number D455/97. The applicants sought an order for their reinstatement.
- [2] The matter came before this Court on 28 May 1998. Queensburgh Plastics was in default and an order was granted re-instating the applicants with retrospective effect to 7 November 1997, and ordering the first respondent, Queensburgh Plastics, to pay costs.

- [3] After this order had been granted and issued by the Registrar of the Labour Court, the applicants went to the premises of Queensburgh Plastics, on 8 June 1998, and furnished the Court order to one Mr Bala, the manager, who received the document on behalf of the company. It is alleged in the applicants' papers that he read it and faxed it to Mr Krish Moodley, the second respondent, who, the employees were told, was in Port Shepstone. A few moments later Mr Bala told the applicants that Mr Krish Moodley had said that he had no work for them.
- [4] The applicants went to their attorney of record, who gave them a letter to take to the company. This letter, inter alia, warned the director of Queensburgh Plastics to comply with the order and warned that failure to do so would place the company in contempt of Court. A copy of the order was attached to that letter.
- [5] The applicants returned to the premises of the company and presented the attorney's letter, dated 8 June, to Mr Bala. It is alleged that he again contacted Mr Krish Moodley, and that Mr Bala then told them that the company's lawyers would contact the applicants' lawyer.
- [6] On 18 June 1998 the applicants again went to the workplace and were again told by Mr Bala that there was no work for them. The company's lawyers have not contacted the applicants' attorney.
- [7] It is alleged in the applicants' papers that Mr Krish Moodley is the director and the owner of the first respondent and that he is in charge of the day to day activities of the company. It is also said that Mr Moodley is the alter ego of the company, and that he is the mind that directs all the transactions and, indeed, all the acts and omissions of the company. The affidavit also states that Mr Moodley is the director who is de facto in charge of directing the business affairs of the company. The applicants allege that the company has wilfully defied an order of this Court and that the company continues to do so.
- [8] An order is sought in terms of the notice of motion calling upon Mr Moodley to show cause why he should not be committed to prison for a period to be determined by this Court for contempt of Court by reason of his failure to comply with the order of 28 May 1998 under Case No. D455/97, and praying that the company and Mr Moodley be ordered jointly and severally to pay the costs of this application on an attorney and client scale.
- [9] Neither the company nor Mr Moodley have filed any affidavit. However, when this matter was called on 11 November 1998, a certain Ricky appeared in this court and said that he was a friend of Mr Moodley. He said that Mr Moodley was engaged in consultations with his advocate, Advocate Moosa, regarding the liquidation of the company and that he was unable to attend the proceedings in this court.
- [10] I should point out that Mr Ngcobo, the applicants' attorney, has informed me that Advocate Moosa has his chambers in Smith Street, which is a few blocks away from where this courthouse is situated.

- [11] The appearance by the person referred to as Ricky indicates that the notice of application has come to the attention of the company and Mr Moodley, although it was not served personally on Mr Moodley.
- [12] Ricky also handed up several documents to this Court. They include documents relating to the sale in execution of the property of the company, a notice of motion brought by Boland Bank, and a summons relating to rates and taxes. Now the question is, is Mr Moodley in contempt of court?
- [13] To consider whether a person such as Mr Moodley is in contempt of court it is imperative that an applicant must prove:
- a) that an order was granted against the respondent;
 - b) that the respondent was either served with the order or was informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and
 - c) that the respondent is in wilful and mala fide disobedience of the order.

See *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (6) BCLR 683 (E) at 691B-C. In that case, Pickering J also dealt with the question of the constitutionality of summary proceedings for contempt of Court and, in particular, the question of the onus. He concludes, at 693D-E:

In my view, therefore, insofar as the summary procedure by way of notice of motion places an onus upon the offender and requires proof of guilt only upon a balance of probabilities it is in conflict with the Constitution Act and such conflict is neither reasonable nor justifiable in terms of section 36. I am in the circumstances satisfied that in motion proceedings the guilt of the offender must be proved beyond reasonable doubt and in this regard the principles contained in ... in *S v Fouche* 1974 (1) SA 96 (A) at 101F-102A, are, in my view, apposite ...

- [14] The question then is whether the applicants have shown beyond reasonable doubt that Mr Moodley is in defiance of an order of this Court. The order of Court was not granted against Mr Moodley. It was granted against the company of which he is a director. However, as pointed out by King AJ in *Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another* 1978 (3) SA 202 (W) at 203C-D:

A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order.

- [15] So the question is, did Mr Moodley have notice of the order? I am told that the order was handed to Mr Bala, the manager, and that he faxed it to Mr Moodley. This is hearsay. I am not convinced on these papers, certainly not beyond reasonable doubt, that the order was, in fact, faxed to Mr Moodley.
- [16] The reply which was made by Mr Bala is also hearsay. No affidavit from him has been placed before this Court. As far as the letter which was written by the applicants' attorneys is concerned, that was also presented to Mr Bala, and it has not been proved beyond reasonable doubt that that came to the attention of Mr Moodley. Although it may be that the Court order did, in fact, come to his knowledge, that has not been proved beyond all reasonable doubt. Because that has not been proved beyond reasonable doubt, it has not been proved that Mr Moodley is in wilful defiance of an order of this Court.
- [17] I cannot, therefore, grant this order, and the application must be dismissed. But the fact of these proceedings now means that Queensburgh Plastics (Pty) Ltd and Mr Moodley are presently aware of this Court's order. No doubt the applicants will be advised by their attorney to request them, once again, to comply with this order, and if they should fail to do that they may be indicted for contempt of Court.
- [18] I have considered whether I should make an order of costs against the first respondent, but where a case has not been made out against them I do not think that it would be proper for me to do so.
- [19] In this case, the best course would be simply to dismiss the application and make no order as to costs.

A A LANDMAN

Judge of the Labour Court

DATE OF HEARING: 11 November 1998

DATE OF JUDGMENT: 13 November 1998

For the Applicant: Mr Ngcobo of IBG Ngcobo & Partners

For the Respondent: No appearance

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