B HILL Fourth Respondent

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO.: J1118/97**

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

10 others **Second and further**

Applicants

and

B K H MINING SERVICES CC t/a DANCARL DIAMOND MINE **First Respondent**

W G BARTHOLOMEW **Second Respondent**

R VIZE **Third Respondent**

GROGAN AJ:

[1] On 17 August 1998 the first respondent entered into a deed of settlement with the applicants in respect of a dispute concerning the dismissal of the second and further applicants. The deed of settlement was made an order of this Court on the same day. It reads as follows:

"1. Without admission of any liability and in a sincere endeavour to settle the dispute, the Respondent agrees to re-employ the individuals listed in annexure A hereto as follows:

1.1. The individuals would be re-employed through labour brokers Project Labour Management (PLM). The respondent records that its weekly paid employees are presently employed through the services of PLM.

1.2. The individual (*sic*) listed in annexure A hereto will be re-employed on the same terms and conditions governing the employment of weekly paid employees referred to in paragraph 1.1 above.

1.3. The individuals listed in annexure A will be so re-employed as follows:

1.3.1. Those listed as numbers 1 - 10 on Tuesday, 1 September 1998;

1.3.2. Those listed as numbers 11 - 20 on Thursday, 1 October 1998;

1.3.3. Those listed as numbers 21 - 30 on Monday, 2 November 1998;

1.3.4. Those listed as

numbers 31 - 40 on Tuesday, 1 December 1998;

1.3.5. Those listed as numbers 41 - 55 on Monday, 11 January 1999.

2. Should any of the individuals listed in annexure "A" fail to report for duty at the Respondent's premises at the aforementioned stipulated date, the Respondent will have no further obligation in respect of such individuals whatsoever.

3. It is specifically recorded that each of the aforesaid individuals are required to report on the stipulated date by not later than 10:00 at the Respondent's offices and to report personally to W F Bartholomew, the Respondent's Mine Manager.

[2] The second and further applicants (referred to hereinafter for convenience as the workers) are the individuals mentioned in clause 1.3.1 of the deed of settlement. It is common cause that they were at all material times members of the first applicant.

[3] The applicants now allege that the respondents have flouted the order of Court dated 17 August 1998 and seek to have them committed for contempt of court.

[4] This Court, being a superior court with powers equal to those of a provincial division of the High Court (see section 151(2) of the Labour Relations Act 66 of 1995) has the power to enforce its orders by contempt proceedings. Such proceedings may, as in the present case, be instituted by the aggrieved party on notice of motion: see, for example, *Ntombela v Herridge Hire & Haul CC & another* Labour Court case no. D359/97 dated 13 November 1998, unreported. That these proceedings are instituted by notice of motion does not alter the fact that the aim is essentially penal: if the second and further

respondents are guilty of contempt of Court, they can be punished by fines or imprisonment, or both. This means that the applicants can only succeed if they satisfy this Court beyond reasonable doubt that the respondents are guilty of the offence: *Uncedo Taxi Service Association v Maninjwa & others* 1998 (6) BLLR 683 (E). What must be proved according to that standard is: (a) that an order of court was granted against the 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.

[5] Before analysing the evidence, it will be convenient to set out the events that gave rise to this application. The workers were dismissed by the first respondent on 4 November 1997 after engaging in industrial action. They referred a dispute to the CCMA in terms of the Act, and subsequently instituted proceedings in this Court. On the day the trial was due to commence, however, they entered into the settlement agreement quoted above. Pursuant to that agreement, the workers reported for duty

at the first respondent s Dancarl diamond mine on 1 September 1998. They were informed by Mr Bartholomew (the second respondent), who is project manager of the first respondent s Dancarl and Riverton operations, that Project Labour Management (PLM) was refusing to re-employ them at Dancarl mine . It is common cause that PLM is a temporary employment service. Bartholomew requested time to sort the matter out. The workers were paid their full salaries from 1 to 9 September 1998, although they did not render service. In the interim, the first respondent began to make arrangements to get the Riverton operation (which is some 70 kilometres from the Dancarl mine) into a state that would enable the workers to commence service there. At that time, the Riverton operation apparently lacked electricity and water. The necessary arrangements were completed by 23 September 1998, and the workers were instructed to report for duty there. However, the workers reported at Dancarl on that day, and refused to go to Riverton when so instructed by Bartholomew. I am informed that the workers are currently working at Riverton on a without prejudice basis.

[6] The central question raised by this application is whether the first respondent complied with the order by taking the workers back into service on full pay, and then transferring them to an operation other than the one in which they were employed before their dismissal. If this question is answered in the affirmative, *caedit questio*. If not, the further question is whether the respondents can be held criminally accountable for their failure to comply with the order.

[7] The answer to the first question depends on the meaning of the deed of settlement that forms the basis of the order. Clause 1 of that agreement clearly states that the Respondent agrees to re-employ the workers. The Respondent referred to in the agreement is BKH Mining Services CC t/a Dancarl Diamond Mine. The obligation to re-employ thus rests on the first respondent. This not only follows by necessary implication from the grammatical construction of clause 1, but also from the fact that only a former employer can re-employ dismissed workers. For this reason, sub-clause 1.1 cannot be a condition

precedent to the obligation assumed in the main clause. The apparent purpose of sub-clause 1.1 is to ensure that the re-employed workers would be placed on the books of PLM, which would presumably henceforth be paid for providing their labour to the first respondent. This is, however, merely an administrative detail. The primary obligation is still to re-employ the workers. And that obligation rests on the first respondent.

[8] The further question is whether the first respondent was obliged by the settlement agreement to re-employ the workers at Dancarl mine. Mr *Cassim*, who appeared for the respondents, argued that the first respondent is a juristic person that happens to own two operations, and that it is free to deploy its workers as it deems fit - or, indeed, not to provide them with work if it so wishes, provided that it pays their wages while they tender service. This may be so. But the issue *in casu* is whether at the time of entering into the deed of settlement the respondents understood, as the applicants were clearly led to believe, that the workers would be re-employed at the Dancarl mine. Having regard to the respondents

papers, this was plainly the case. Thus Bartholomew states that the first respondent was *unable to comply with Clause 1.1. of the Court order* on the basis that PLM had refused to re-employ them at Dancarl Diamond Mine . And in response to the applicants first written protest against the instruction that the workers report to the Riverton operation, the respondents attorney of record stated that [o]ur client has offered a viable and reasonable *alternative* by making *an offer* to re-employ your members at its Riverton Mining Operations with effect from 23 September 1998 . The following statement is also to be found in the respondents answering affidavit: The first respondent saw no reason for the contempt proceedings as it was using its best endeavours to seek a *viable alternative* for its members . Furthermore, the respondents could not have understood that the workers would or could be re-employed at the Riverton project because, on their own version, that site was not operational at the time. It is therefore clear that the respondents were aware that they were not complying with the deed of settlement when they ordered the workers to report to the Riverton operation. In view of

this finding, it is not necessary to determine the factual dispute over whether conditions of employment at Dancarl are the same as those at Riverton.

[9] Were this Court being requested to issue a declarator regarding the true meaning of the deed of settlement, it would have no hesitation in finding that the first respondent was bound to re-employ the workers at the Dancarl mine on 1 September 1998 subject, of course, to its right subsequently to transfer or re-deploy them in accordance with its operational requirements, and subject also to the workers right to declare a further dispute in that regard. However, this Court is being asked to determine whether the respondents are guilty of contempt of court. The only relevance that can accordingly be attached to the above finding is that the respondents failed to carry out the order of court, and that they were aware that they had failed to do so. This leads to the further question whether the respondents can be held criminally accountable for their failure to re-employ the workers at Dancarl on 1 September 1998 or thereafter.

[10] An essential element of the offence of contempt of Court is that the alleged offender s non-compliance must be wilful. This means (a) that he must be responsible for the breach and/or (b) that he must intend to defy the order.

[11] Mr *Cassim* contended that this Court should have regard to the full spectrum of events leading to the arrangement to relocate the workers to the Riverton plant, including, especially, the facts that PLM refused to accommodate the workers, that in consequence thereof the respondent paid them their full wages without requiring them to render service, and that the workers would be given on-site accommodation at Riverton of the same standard as that with which they had been provided at Dancarl mine before their dismissals.

[12] The respondents attribute the events after 1 September 1998 solely to PLM s refusal to comply with the spirit of the deed of settlement. If it were indeed so that the respondents were unable to comply with the terms of the agreement (and order) due to the actions of a third party or other circumstances beyond their control, they could

clearly not be held to have been in wilful contempt of the order. However, on the evidence I am not satisfied that this was the case.

[13] Mr *Maserumule*, who appeared with Mr *Khumalo* for the applicants, contended that PLM was merely an agent of the first respondent, and that the first respondent could and should have instructed PLM to comply with the order. Mr *Cassim* argued that this was not the case, as PLM was an independent juristic *persona* that was not a party to the deed of settlement and accordingly not bound by the order.

[14] There is no evidence before this Court to indicate the nature of the relationship between the first respondent and PLM, or how it arose. Since the respondents have raised PLM s actions as a defence, they should have explained why they were bound to comply with PLM s decision. Be that as it may, it appears by necessary implication from the facts that the first respondent entered into an arrangement with PLM after the dismissal of the workers in terms of which PLM would supply the Dancarl

workforce as a labour broker. Whatever the nature of this arrangement, however, I do not believe it has any bearing on the first respondent s liability under the order. It was in full knowledge of the circumstances that the first respondent entered into the deed of settlement. In terms of that deed of settlement, the first respondent agreed to re-employ the individuals. It must therefore be taken to have assumed responsibility for ensuring that PLM would comply with sub-clause 1.1 of the deed of settlement. That the representatives of the first respondent were confident that they could influence PLM to comply with the terms of the agreement is evident from Bartholomew s founding affidavit, in which he states:

> At the time of signing the deed of settlement, I had no reason to believe that PLM would not co-operate with the re-employment of the Applicant s members. I thought that PLM could easily have transferred a number of its staff to other contracts which it manages in order to make space for the re-employed members of the Applicant. I was sadly mistaken and PLM refused to abide by the

spirit of the deed of settlement and as a consequence I had no vacancies at Dancarl Diamond Mine.

[15] This assertion reflects a degree of confusion on the part of the respondents. The primary obligation assumed by the first respondent was to re-employ the workers. It could not have done so by engaging them through a contract with a labour broker. This is because persons whose services are provided to a client by a labour broker, or temporary employment service as such enterprises are termed in the Act, are employed by the broker, and not by the client: see section 213(2). If, as appears from Bartholomew s affidavit, the first respondent had already taken on a full complement of workers at Dancarl through PLM, that was a problem of the first respondent s own making. It knew, or should have known, that the dismissed workers would bring an action, and that such action could have resulted in their reinstatement or re-employment.

[16] The first respondent certainly knew that it had a complete

workforce at Dancarl at the time the settlement agreement was concluded. Had the workers been reinstated pursuant to a direct order of this Court, the first respondent could not have relied on its arrangement with PLM to avoid the consequences of the order. As it happened, the first respondent itself undertook to re-employ the dismissed workers to ward off the possibility of such an order. Had the first respondent wished to protect itself against the possibility that PLM might not co-operate in giving effect to the deed of settlement, it could have done so. Similarly, it could have reserved for itself the right to re-employ the workers at the Riverton operation. It did neither. The applicants were induced to enter into the deed of settlement, and according to waive their right to pursue their unfair dismissal action, on the understanding that they would be re-employed at Dancarl. In my view, the circumstances upon which the respondents seek to rely do not justify its failure to honour that expectation.

[17] Finally, Mr *Cassim* asserts that the applicants have nothing to gain by this application, as they are being paid

their full wages and have been offered conditions for all practical purposes identical to those under which they would be working at Dancarl. The answer to this submission is that the respondents have either complied with the order or they have not. I have already found that the first respondent has failed to comply with the primary obligation it assumed under the deed of settlement, namely, to re-employ the workers at Dancarl. Its failure to do so amounts, in my view to contempt of the order of court issued on 17 August 1998.

[18] There remains to decide what penalty should be imposed, and upon which of the respondents. Directors of companies who, with knowledge of an order against the company, cause the company to disobey the order are themselves guilty of contempt of court: *Twentieth Century Fox Film Corporation & others v Playboy Films & another* 1978 (3) SA 202 (W). This applies also to the members of close corporations: *Hotz en andere v Douglas & Associates (OFS) CC andere* 1991 (2) SA 797 (O).

[19] Bartholomew states in the founding affidavit that the

fourth respondent disposed of his interest in the first respondent to the third respondent some two years ago. However, there are no confirmatory affidavits in respect of this claim by either the third or fourth respondents. I cannot accordingly make a finding in this regard in respect of the fourth respondent.

[20] Although imprisonment of the second and further respondents is an option, this Court should not lose sight of the fact that all its decisions should be designed to promote the effective resolution of labour disputes. The current dispute between the parties will be resolved by the re-employment of the second and further applicants at the Dancarl Diamond Mine in terms of the order. In my view, the order should be shaped to achieve that end.

[21] It is accordingly ordered that:

The respondents are guilty of contempt of this Court.

The second, third and fourth respondents are

sentenced to 15 days in prison, without the

option of a fine, suspended on condition that the second and further applicants are re-employed by the first respondent within 14 days of the date of this judgment at Dancarl Diamond Mine.

The respondents are to pay the costs of this application, jointly and severally, the one paying, the others to be absolved.

The above orders shall not operate against the fourth respondent if within 14 days of the date of this judgment proof is provided to the satisfaction of a Judge of this Court that the fourth respondent ceased to be a member of the first respondent prior to 17 August 1998.

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GROGAN A J

Acting Judge of the Labour Court

Date of hearing: 15 December 1998

Date of judgment: 13 January 1999

For the applicants: Mr Maserumule (with him Mr Khumalo)
of Maserumule & Partners

For the respondents: Adv Cassim SC, instructed by Leppan Beech.