IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 2031/07

In the matter between:

NATIONAL UNION OF MINEWORKERS **1ST Applicant**

P. A. MOGOLA & 4 OTHERS **2nd and Further Applicants**

and

H & S OPRIGTERS (GK) **1st Respondent**

HERMAN STEYN **2nd Respondent**

REASONS FOR JUDGMENT

LAGRANGE, J

1. When handing down judgment in this matter on 22 June 2010, I advised that brief

written reasons would be provided for my decision. These are set out below.

2. This is an application for an order finding the first and second respondent guilty of contempt for failing to comply with an award issued by the second respondent on 4 April 2007 reinstating the five individual applicants. The award was subsequently made an order of court on 5 December 2007, in a default hearing.

3. In April 2008 the first respondent apply to rescind the court order, but this application has never been heard. Despite a number of written requests by the applicants to the respondents to comply with the award, the respondents did not.

4. Not only is it common cause the first respondent and second respondent were aware of the order, but the first and second respondents were aware of the contempt application. The second respondent attended court on 21 June 2010 and gave evidence in his own and the first respondent's defence.

5. It should be mentioned that it was clarified at the hearing by the respondents' representative, Mr Voyo, that the correct citation of the first respondent is 'H & S Oprigters (GK)' rather than the english trade name 'H & S Erectors'. It was also confirmed in an explanatory affidavit that the sole member of the closed corporation is Mrs J S E Steyn, the second respondent's spouse.

6. In terms of the decision of the Supreme Court of Appeal in ***Fakie NO v CCII Systems (Pty) Ltd*** **2006 (4) SA 326 (SCA)**, once it is established that a court order

exists, which has been served on the alleged contemnor, and it has not been complied with, then an evidentiary burden, but not an overall evidentiary onus, falls on the accused to establish a reasonable doubt that the failure to comply was neither wilful nor *mala fide.*[1] Given that the first three elements had been met *in casu*, only the last two issues need to be addressed.

7. According to the evidence of Mr Steyn, he attended to the day-to-day operations of the business, while his wife, the sole member of the corporation, attended to administrative matters. Steyn performs some managerial functions but is an employee of the corporation. He relied for labour relations advice on a labour consultant who had been engaged by the business since 2000. All correspondence and process he received in the matter were referred to the consultant who said he would handle everything. From time to time Steyn was required to sign affidavits and the like. He could not dispute that he was aware of the contempt proceedings but as a rescission application had been launched and based on the assurances of the labour consultant he was confident the matter was being dealt with.

8. On the evidence available, I cannot say with confidence that Steyn's evidence has not raised a reasonable doubt that he *mala fide* failed to ensure the first respondent complied with the court order. Accordingly, it cannot be said that the applicant has established that the respondents *mala fide* failed to comply with the court order.

9. In the circumstances, the respondents' cannot be held guilty of contempt on this occasion. In any event, as Steyn himself was not a member of the corporation, but his wife, he was also probably not correctly cited in his personal capacity as responsible for ensuring that the order was complied with. However, in the light

1 At 338, par [22] of the judgment.

of my finding on the question of *mala fides*, it is not necessary to decide this.

10. Nevertheless, the first respondent accepted that it had not complied with the order reinstating the individual applicants despite an obligation to do so and undertook through Mr Vuyo, that it would do so, thereby also demonstrating its intention of curing its previous failure in this regard.

11. On the question of costs, Mr Vuyo conceded that an award of costs against the respondent might be appropriate even if the application was dismissed, in view of the respondent's conduct in the contempt proceedings. Had the applicants warned the respondents they would be seeking a punitive cost award, I would have been willing to award the same, but as no special costs award was sought none has been made. However, despite the contempt application been dismissed, the respondents conduct of proceedings and its failure to give effect to the award while taking no steps to expedite its rescission application, leaves much to be desired. Had it not adopted a dilatory approach to the matter, these proceedings might have been brought to a conclusion considerably earlier. For this reason, the applicants should not bear the cost of bringing matters to a head.

12. In passing, I should mention that Mr Faku for the applicants pressed the argument that as the award of the commissioner had been made an order of court, the first respondent's failure to comply with the court order meant that its failure to make payment of the backpay due to the applicant's was a further act in contempt of the court's order. In this regard, I must agree with Mr Vuyo, that it is only orders *ad factum praestandum* that can be the subject of contempt proceedings. All orders which seek enforcement of a judgment debt must be enforced by means of an issue of a writ of attachment, and the consequent procedures leading to a sale in execution. In this case the debt for payment of backpay becomes due and payable

48 hours after the reinstatement of the individual applicants in terms of the award. It is true that it is linked to their reinstatement in terms of the award, but I do not think this robs the obligation to pay backpay of its essential character as a debt owing to the applicants.[2]

13. Should the first respondent fail to comply with its obligations to pay the applicants' backpay in terms of the award, that part of the arbitration award may still be enforced by means of execution of a writ.

Order

14. In the circumstances, the following order was made:

a. The citation of the first respondent in the arbitration award and in this matter is amended to read 'H & S Oprigters (GK)'.

The contempt application against the first and second respondents is dismissed.

b. The first respondent is ordered to pay all the applicants' costs in the contempt application proceedings.

c. The first respondent must reinstate the second and further applicants by no later than 28 June 2010, failing which the applicants may reinstitute contempt proceedings in this matter.

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2 See in this regard ***Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others*** **2006 (5) SA 333 (W) at 344-5, paras [14.3] to [14.5]**