THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1031/15

In the matter between:

HARRY ARTHUR GUNN **Applicant**

and

CHRISTIAAN FREDERICH HOOGENGYK **First Respondent**

JOHANNES HOOGENDYK **Second Respondent**

Heard: **2 February 2022**
Delivered: **8 February 2022**
Edited: **6 May 2023**

Summary: Contempt proceedings – reinstatement order – failure to report. Contempt proceedings are aimed at protecting the integrity of Court orders. Court orders prescribe after 30 years. Before 30 years, a Court is obliged to issue a contempt order if non-compliance with a valid Court order is proven. *Numsa and another v Aircycle Engineering CC and others*[1] not followed. SA Timber (Pty) Ltd was ordered by Commissioner Naniso on 30 November 2011 to reinstate the applicant on the same terms and conditions that existed before his dismissal. On 21 July 2015, the Labour Court made the arbitration award issued by Naniso an order of this Court. This order was not complied with since its issuance. The directors of SA Timber are obliged to ensure compliance with the Court order. Failure to do so amounts to contempt of Court. Held: (1) The

[1] [2021] 12 BLLR 1244 (LC).

respondents are held to be in contempt of the Court order dated 29 July 2015. Held: (2) Both respondents are fined an amount of R100 000.00 each; payment thereof is suspended in whole on condition that the respondents comply with the Court order within 15 days of this Court order. Held: (3) The respondents to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Compliance with Court orders is not a matter for the parties involved in the litigation process but it has everything to do with the integrity of the Court as a constitutional institution. Until a Court order is complied with, a party liable to ensure compliance remain in contempt unless that party can demonstrate that the order is complied with. The application before me involves an order made by this Court on 29 July 2015 *per* the late Steenkamp J. Since that time, the applicant was never reinstated as ordered. Owing to that non-compliance, the applicant launched the present application. The respondents, the directors of SA Timber (Pty) Ltd (SA Timbers), duly oppose the present application. This Court was ready with its judgment when it came to its attention that the respondents had actually filed an answering affidavit. Such an affidavit was not available in the Court file. Efforts were ultimately made to retrieve it and this Court recalled its earlier judgment, which was already availed to the parties, in order to take into account, the answering affidavit. This judgment takes into account the evidence of the respondents.

Background facts

[2] This dispute has a chequered history. This is a sombre episode of an individual in pursuit of justice and fairness. One of the stated purposes of the LRA is to advance social justice. On 28 February 2011, the applicant,

Harry Arthur Gunn (Gunn), commenced employment as a sales representative at SA Timbers. On 22 July 2011, Gunn was dismissed for gross negligence. Aggrieved by his dismissal, Gunn referred a dispute to the CCMA and alleged that SA Timbers had unfairly dismissed him. On 21 November 2011, Commissioner Sello Naniso (Naniso) arbitrated the dispute alleging unfair dismissal. On 30 November 2011, Naniso issued an arbitration award in terms of which, he found that (a) the dismissal of Gunn is substantively unfair; (b) S A Timbers was ordered to reinstate Gunn on the same conditions and terms that existed before dismissal; (c) to pay Gunn an amount of R33 500.00 as back-pay; (d) the amount ordered to be paid by 31 December 2011; and (e) Gunn to report for duty on 21 December 2011 at 07h00.

[3] SA Timbers was displeased with the arbitration award. On or about 21 December 2011, SA Timbers launched an application seeking to review and set aside the arbitration award. It suffices to mention at this point that one Mr Alwyn Petrus Hoogendyk (Hoogendyk), who stated that he was the General Manager of SA Timbers, deposed to the affidavit in support of the review application. In the supporting affidavit, Hoogendyk testified that SA Timbers employed Gunn as a Sales Representative at a monthly salary of R6 700.00 per month. Gunn duly opposed the review application.

[4] On 30 September 2014, my brother Cele J in a written judgment dismissed the review application and made no order as to costs. Although SA Timbers launched the application, Maestro Housing (Pty) Ltd (Maestro) was mentioned as the applicant in the judgment of Cele J. as it shall later be demonstrated nothing turns on this. Of significance, the review application seeking to set aside the arbitration award was dismissed. An application for leave to appeal was launched, seeking leave to appeal the whole judgment and order of Cele J. On 13 February 2015, Cele J in a written ruling dismissed the application for leave to appeal with no order as to costs.

[5] On 29 July 2015, as indicated above, the arbitration award was made an order of this Court. It is apparent that on 21 January 2016 a variation ruling was issued; which ruling was later rescinded on 12 February 2016. It is unclear as to what was being varied because the arbitration award was made an order already. Nevertheless, on 2 August 2016, there was partial compliance with the Court order when an amount of R36 540.95, which included interests, was paid to Gunn. Interestingly, one Hester Potgieter of SA Timber Group dispatched proof of payment of such an amount.

[6] On 11 September 2019, Gunn tendered to report for duty effective 1 October 2019. On 1 October 2019, he reported at 2nd Street Welkom Industria, and SA Timber directed him to Maestro to report for duty there. On or about 18 October 2019, Gunn launched an application for contempt and cited SA Timber and Maestro as respondents but sought a relief that the directors of both SA Timbers and Maestro be held in contempt. The application was enrolled to be heard by this Court on 29 November 2019. On this day, the matter was removed from the roll since it became opposed. On 14 February 2020, my brother Van Niekerk J removed the matter from the roll and directed the parties to re-enroll the matter for argument on a date determined by the Registrar. The Registrar enrolled the matter on the opposed roll of 20 November 2020. On 20 November 2020, the learned Acting Justice Mabaso dismissed the contempt application with no order as to costs. Reasons for such an order were not made available to this Court.

[7] Nevertheless, on 27 November 2020, Gunn launched another application and cited the current respondents as parties. The application was enrolled for 12 February 2021. On this day, the matter was struck off the roll on the basis that the application was already dismissed. This Court at the time did not notice that the application was against different

respondents. The application was re-enrolled on 7 May 2021. On this day the learned Acting Justice Nkosi, made an order extending a non-existent rule to 15 October 2021.

[8] On 15 October 2021, being the return date, it was observed by the Court that no *rule nisi* was issued by the Court. Accordingly, a *rule nisi* was issued calling upon the present respondents to appear before Court to show cause why they should not be held in contempt. The matter came before me on 2 February 2022. The two respondents had not filed any affidavit to show cause. Instead, on the day, counsel Roux made an appearance and filed heads of argument. He argued that reliance is placed on the affidavit deposed to by Sterrenberg Albertyn Pretorius (Pretorius), the director of SA Timber on 12 December 2019.

[9] The cause shown by Pretorius is that the award had prescribed and became unenforceable in law from 1 December 2014. He testified that the order of 29 July 2015 was made against Maestro and not SA Timber. He testified further that the directors were not personally cited. He confirmed that the respondents before me are directors of SA Timber. Thus, this Court does not have a version of Christiaan Frederich Hoogendyk and Johannes Hoogendyk, whom this Court ordered on 15 October 2021 to provide an explanation to the satisfaction of this Court why they should not be found guilty of contempt.

Submissions in Court.

[10] As indicated above, this Court sought an explanation to its satisfaction. The respondents had an option to provide an explanation of their conduct by way of an affidavit. They chose to send counsel to Court to present their explanation. They were not excused to be present in Court. It is however unclear whether they were present in Court when their appointed counsel provided an explanation. Withal, the day before the

hearing of the application, Mr Roux submitted heads of argument on behalf of the respondents. In addition, he favoured the Court with a copy of the judgment of Cele J, which was already in the Court's file.

[11] The principal submissions made by Mr Roux are that (a) the order allegedly not complied with was made against Maestro and not SA Timbers; (b) an attempt to vary the order of Steenkamp J was dismissed on 19 July 2019 by the learned Acting Justice Khosa; (c) the contempt application against SA Timber was dismissed on 20 November 2020; and (d) Gunn failed to tender his services within a reasonable time and on authority of *NUMSA and another v Aircycle Engineering CC*[2], the present application must be dismissed with costs.

Evaluation

[12] It is important to note that in truth in a contempt application the complainant becomes the Court and not a party who brings the application. For the integrity of its orders, a Court, so jealously guards the probity of its orders, to a point that civil disobedience is not countenanced. One of the requirements of the civil offence of contempt is that there must be a deliberate and intentional violation of the Court's dignity, repute or authority. A mere disregard of a Court order does not amount to contempt.[3]

[13] The submission that the order of 29 July 2015 was made against Maestro and not SA Timber is made in hollow. It is true that *ex facie* the written Court order, there appears Gunn and Maestro. However, what the document records as ordered is that the arbitration award of Commissioner Naniso was made an order of Court. It is without a shadow of doubt that Naniso ordered SA Timbers and not Maestro to reinstate Gunn.

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[2] *Ibid* fn 1.

[3] *SA Fakie N.O v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

[14] Section 158 (1) (c) of the LRA affords the Labour Court discretionary powers to make any arbitration award an order of the Labour Court. On 29 July 2015, my late brother Steenkamp J exercised the discretionary powers. Section 163 of the LRA provides that any order of the Labour Court may be enforced as if it were an order of the High Court. As pointed out above, what is to be protected in this matter is the probity of the order of Steenkamp J[4]. The order is lucid and clear. SA Timber is to amongst others reinstate Gunn on the same terms and conditions that operated before his dismissal. It is undoubted that SA Timber failed to comply with the order to reinstate Gunn.

[15] SA Timber as a legal entity is incapable of complying with the order. The directors of SA Timber are obliged to ensure that SA Timber complies with Court orders. Again, it is undoubted that the respondents before me are the directors of SA Timbers. They are obliged to ensure compliance with the order of Steenkamp J. To this day, they did not. It is now 7 years after the order was made. In *Secretary of the Judicial Commission* case, the Constitutional Court made it clear that:

> "[37] As set out by the Supreme Court of appeal in *Fakie* and approved by this Court in *Pheko II*, it is trite that an applicant who alleges contempt must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established."

[4] See *Secretary of the Judicial Commission of Enquiry into allegations of State Capture v Zuma and others* 2021 (5) SA 327 (CC).

[16] The position extrapolated above sums up the law with regard to applications of this nature. In *casu*, an order was made against SA Timber to reinstate; the directors of SA Timber have knowledge of the order; and SA Timber failed to comply with the order. As pointed out above, the directors of the contemnor – SA Timber are to ensure that the order is complied with. They failed to do so. Therefore, this Court must presume that they are being willful and *mala fides*. On 15 October 2021, this Court afforded them an opportunity to show reasonable doubt. They failed to do so. Axiomatically, Gunn has established contempt. The respondents must be found guilty of civil obedience of contempt.

The principle in NUMSA v Aircycle Engineering CC

[17] Mr Roux passionately argued that since Gunn has failed to tender his services within a reasonable time, as held by my Sister Prinsloo J, the application must fail. On the facts of this case, SA Timber was to reinstate Gunn and he was to report for duty on 21 December 2011. Before that can be done, he was duly informed that SA Timber does not accept the order to reinstate him and it was seeking a review. The review application was dismissed and SA Timber sought leave to appeal. Having exhausted its appeal rights, it was incumbent on SA Timber as a law-abiding entity to call upon Gunn to report for duty as ordered. Instead, SA Timber remained mum and when Gunn reported for duty in 2019, SA Timber informed him that Maestro employed him and only Maestro was ordered to reinstate him. This was not true at all.

[18] Prinsloo J concluded that on the *dicta* of *Kubeka and others v Ni-Da Transport (Pty) Ltd*[5] there exists an obligation on an employee who was awarded reinstatement to tender his services within a reasonable time and for the employer to accept such tender. She further concluded that for the applicants to succeed with a contempt application they had to show that they indeed, within reasonable time, tendered their services to

[5] [2021] 42 ILJ 499 (LAC)

the respondents in compliance with the terms of the arbitration award and that the respondents refused to accept their tender of services.

[19] With considerable regret, I do not agree with Prinsloo J. As set out above, the Constitutional Court in *Secretary of Judicial Commission* has neatly espoused the requirements of a contempt application. *Kubeka* dealt with a breach of contract claim where the reinstated employees were seeking to be paid arrear wages following their reinstatement order. In line with the *Hendor* judgment, the LAC concluded that in order to succeed in a contractual claim, the employees must first be reinstated and if not reinstated by the employer as ordered to seek a contempt.

[20] Prinsloo J reached a conclusion that the *onus* is on the applicants to prove beyond reasonable doubt that the respondents are in willful default and *mala fides* disobedience. Again, I disagree. It was mentioned by the Constitutional Court that once it is established that there is an order, which is known to the contemnor, and there is no compliance, willfulness and *mala fides* is presumed. The evidentiary burden is on the contemnor to create the reasonable doubt.

[21] In my view, where an employer takes steps to reverse a court order, once it exhausts all those steps, it must behave like a law-abiding citizen and call upon the employee in whose favour the order was made to resume employment. I do agree that based on the principles of contract, in order for an employee to be paid any remuneration, that employee must render service or tender to render the services. In contempt applications, as pointed out above, what is to be protected is the authority of the Court and not of Gunn in this instance. It was made clear that seeking a contempt is consistent with vindication of the rule of law.

[22] Accordingly, in my view, a tender of services has nothing to do with civil disobedience. In terms of the Prescription Act, a Court order prescribes

after 30 years. It is only after 30 years that SA Timbers can successfully argue that it is not obliged to comply with an order. Until then, SA Timber remains legally obliged to do so. It is one thing for SA Timber to argue that Gunn has waived and or abandoned his right to be reinstated; it is another thing for SA Timber to comply with the Court order. In my considered view, the duty to comply, which duty attracts civil disobedience, lies with SA Timber and its directors as opposed to Gunn.

[23] A Court cannot countenance disobedience of its orders on the basis that a person in whose favour the order was made decides to do nothing. Once the Court is informed, by any person for that matter, that its orders are ignored, a Court is entitled to frown upon that anytime and any day, for as long as its order is still valid in law.

[24] One must imagine a situation where a woman is raped and she decides to not report the crime of rape. Such failure to report the crime does not convert a crime of rape into no longer a crime. It is civil crime for anyone to disobey a Court order. Disobedience breeds contempt order.

[25] For all the above reasons, I take a view that the judgment of Prinsloo J is wrong in that regard and on application of the *stare decisis* principle; I am not bound by it. Accordingly, I am not to follow its reasoning that because Gunn did not tender his services within reasonable time, then he must fail in a contempt application.

[26] For all of the above reasons, the application must succeed. In order to comply, all what SA Timber must do is to reinstate Gunn. During argument, Gunn indicated that he has since reached a retirement age. It is up to SA Timber to obtain an appropriate legal advice on this indication by Gunn. However, as matters stand, there is disobedience.

The issue of costs.

[27] Inasmuch as this Court has no qualms with the law as laid down by the Constitutional Court in respect an award of costs in the Labour Court, I take a view that where contempt of orders of the Labour Court is involved, the complainant is the Labour Court. Had the respondents complied with the order of Steenkamp J, Gunn would not have been obliged to bring this disobedience to the attention of this Court. The respondents were wholly unreasonable in raising technical defences against a clear case of non-compliance with a Court order. The Constitutional Court in *Secretary of Judicial Commission*, before mulcting Zuma with costs, had the following to say:

> "[136] …Let it be known that she or he who abandons all ethical standards in pursuit of a cause must prepare to meet this Court's reproach, and the award of punitive costs that naturally follows."

[28] Equally, let it be known that those who disobey orders of this Court must be prepared to meet this Court's reproach. It is a waste of judicial resources to expect judges to make orders and still make another order for the orders to be complied with. A cost order in such circumstances is warranted and as the Constitutional Court aptly puts it, the award follows naturally.

[29] In the results the following order is made:

<u>Order</u>

1. Christiaan Frederich Hoogendyk (ID NO [...]) and Johannes Hoogendyk (ID NO [...]) are guilty of contempt of the Court order issued by Steenkamp J on 26 July 2015.
2. They are fined an amount of R100 000.00 each, payable to the office of the registrar of this Court situated at no 86 Juta Street, cnr Juta and Melle, Arbour Square 6th Floor, Braamfontein, which

fine is wholly suspended on conditions that they comply with the order of Steenkamp J within 14 days of this order.

3. The respondents are to pay the costs of this application.

G. N. Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In Person.

For the Respondents: Mr LA Roux.

Instructed by: Mr N Olivier of Maree Gouws Attorneys, Welkom.