



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: J 1502/22

In the matter between:

THABO JERRY NKOSI

Applicant

and

HUHTAMAKI SA (PTY) LTD

First Respondent

RICHARD TRICKETT

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 29 May 2023

JUDGMENT ON COSTS

TLHOTLHALEMAJE, J

- [1] The applicant sought contempt findings against the respondents and obtained a *rule nisi* on 03 March 2023, which was extended on 20 April 2023 to enable him to file a replying affidavit.
- [2] At the core of the applicant's grounds for seeking contempt findings against the respondents was that they failed to comply with the terms of an arbitration award issued by the MEIBC under case number MEGA 57670 dated 26 November 2021. The respondents' stance was consistently that there was compliance with the award, and there was no basis for a finding of contempt, and that the *rule nisi* ought to be discharged.

- [3] In terms of the award which followed upon a referral of an alleged unfair demotion dispute, the MEIBC Arbitrator had found that indeed the applicant was demoted and ordered that he be reinstated to the position of Production Planning Specialist with the associated job description with effect from June 2021. The first applicant was also ordered to pay to the applicant, the difference in salary from June 2021 up to the date of the award, which payment was to be made by 30 November 2021.
- [4] It is not in dispute that indeed the applicant was reinstated to the position with the associated payment being made after he was called to a meeting on 30 November 2021 and issued with a letter of appointment in that regard. It is equally common cause that the applicant was subsequently dismissed from the first respondent's employ, and the dismissal is not the subject of these contempt proceedings.
- [5] Notwithstanding the fact that there was compliance with the award and the fact that the applicant is no longer in the employ of the first respondent, he persists with contempt proceedings on the basis that his correct title and job status is not reflected on the first respondent's Human Resources System called the W2HO. He contends that any individual with access to this System within the first respondent, can establish that his position and status reflects him as still being demoted to the position of Production Co-ordinator, Production Planning Specialist, which according to him means that he was not effectively reinstated to the position as indicated in the award.
- [6] The applicant contends that effectively as a result of the failure to correctly reflect his position and status on the System, he remains demoted. This according to the applicant, infringed upon his constitutional right to dignity, and that it was only upon the first respondent having corrected that error and also on his payslips, that it can be said that it is fully compliant with the award.
- [7] The respondents had refuted the applicant's claims, pointing out that since June 2021, several attempts were made to resolve the dispute and grievances lodged by the applicant regarding his alleged demotion. These included having conveyed its decision to reinstate him to his previous position

notwithstanding the fact that the initial decision to demote him as he had alleged was based on the first respondent's restructuring process resulting in an alignment of positions to suit its operational needs. The respondents contended that there can be no basis for a contempt finding where there was full compliance with the award in the form of reinstating the applicant into the position in question, and where payments were made to him in accordance with the award. It was contended that the applicant had on 30 November 2021 accepted when furnished with the necessary documents, that there was compliance. It was further indicated that the applicant was subsequently dismissed in May 2022 after he was charged for gross insubordination.

[8] The respondents further contended that it was only in March 2023 that the applicant resuscitated the alleged demotion dispute with these contempt proceedings. Again, with an effort to resolve the matter, the first respondent issued to the applicant, copies of his certificate of service, his contract of service, letter of appointment with the correct job description and a corrected printout of the HR System. All these documents properly reflect the applicant's position as that of Production Planning Specialist. Despite all these efforts, coupled with the applicant's clear acceptance that the award was complied with, he persisted with these contempt proceedings.

[9] It is not necessary to elaborate on the principles applicable to contempt proceedings flowing from various authorities including *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*¹ where it was held as follows;

"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 of court 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

¹ [2021] ZACC 18; 2021 (9) BCLR 992 (CC); See also *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*; *Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC); *Samuels v Hlophe* (771/21) [2023] ZASCA 49 (13 April 2023)

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.” (Citations omitted)².

- [10] In this case, and based on the facts stated above, clearly there is no basis upon which a finding of contempt can be made, since there was complete compliance with the arbitration award by the respondents. It follows that the rule *nisi* ought to be discharged and the only issue that remains is whether the applicant deserves to be mulcted with a costs order.
- [11] It is settled that this Court when considering an order of costs, exercises a discretion, upon having regard to the requirements of law and fairness as dictated by the provisions of section 162 of the LRA. In the exercise of the discretion, the Court is required to provide reasons for its departure from the ordinary rule in this Court that costs should not ordinarily be awarded. Furthermore, when a Court makes an adverse costs order, it is required to consider the requirements of fairness and with due regard to the conduct of the parties in the proceedings. This means that the Court must seek to strike a fair balance between not unduly discouraging parties from approaching the Court for relief, and on the other hand, to provide a deterrent against parties who bring frivolous applications before it.³
- [12] The applicant's posture in persisting with these contempt proceedings was wholly unreasonable and perplexing, and the inescapable conclusion to be reached is that the application is utterly frivolous and vexatious in the extreme. Even at these proceedings despite it being impressed upon the applicant and his legal representative that the respondents had gone beyond what the award required of them to fully comply with the award, the applicant would have none of it. Inexplicably, the applicant, despite it having been

² At para 37.

³ See *Zungu v Premier of the Province of KwaZulu-Natal* 2018] ZACC 1 (2018) 39 ILJ 523 (CC); 2018 (6) BCLR 686 (CC); *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC) at para 19; *National Union of Mineworkers obo Masha and Others v SAMANCOR Limited and Others National (Eastern Chromes Mines) and Others* CCT154/20; [2021] ZACC 16; (2021) 42 ILJ 1881 (CC); [2021] 9 BLLR 883 (CC); 2021 (10) BCLR 1191 (CC); *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] 12 BLLR 1173 (CC) at para 33.

demonstrated that even the System was altered to meet his demands, nothing would satisfy him. When the Court pointed out to his representative that in any event, there was nothing in the arbitration award that compelled the first respondent to change its System to reflect the applicant's correct position, the Court was referred to some obscure paragraph in the body of the award where the arbitrator made mention of that System. These arguments were clearly tedious and misplaced. This is so in that for the purposes of compliance, all that the respondents had to demonstrate, which in any event was common cause, was that the essential elements of the award were fully complied with. An applicant in a case such as this, cannot rely on relief or some remedy that is not encapsulated in an award in seeking a contempt finding. Compliance sought must be based within the four corners of that award, and nothing more. In this regard, there was nothing in the arbitration award that required of the respondents to change its HR system.

[13] The facts and background of this case, together with the conduct of the applicant in persisting with an essentially moot especially in the light of the common cause fact that he was no longer in the employ of the first respondent, clearly demonstrates an utter abuse of the Court's process deserving of a sanction as a deterrent for such flagrant abuse. Other than having already unduly caused the respondents prejudice and inconvenience, the applicant despite being implored in Court to reflect on his unreasonable posture, nonetheless failed to appreciate the error of his ways. The persistence in seeking contempt findings in the circumstances had nothing to do with a vindication of the applicant's rights but was also merely meant to cause irritation and undue inconvenience to the respondents. In the circumstances, I am satisfied that the requirements of law and fairness dictate that the applicant be mulcted with the costs of this application.

[14] Accordingly, the following order is made:

Order:

1. The rule *nisi* granted on 3 March 2023 is discharged.
2. The applicant is ordered to pay the costs of this application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:

Mr. K Nonyane of Ronelda van Staden Attorneys.

For the First and Second Respondents:

Mr. S Dube of Bowman Gilfillan INC.

LABOUR COURT