THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: P 116/ 2023

In the matter between:

NEHAWU obo H X LUFUTHA **Applicant**

and

THE DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS **First Respondent**

THE MINISTER OF THE DEPARTMENT OF HOME AFFAIRS **Second Respondent**

Heard: **14 March 2024**

Delivered: **18 March 2024**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be on 18 March 2024.

JUDGMENT

PRINSLOO J

History

[1] Mr Lufutha, represented by the Applicant, his trade union, was employed by the Department of Home Affairs (Department), Mthata, in 2011 as a chief administration clerk. He was charged with misconduct in May 2022 and after being found guilty, Mr Lufutha was dismissed on 2 March 2023. The Applicant subsequently referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council (GPSSBC) and on 4 September 2023, an arbitration award under case number GPBC584/2023 was issued in favour of Mr Lufutha. The Department was ordered to reinstate Mr Lufutha retrospectively and to pay him backpay.

[2] On 9 November 2023, the CCMA certified the arbitration award in terms of section 143(3) of the Labour Relations Act[1] (LRA).

[3] The Department filed an application for review under case number JR 2553/2023 in December 2023. The said application was served on the Applicant between 11 and 21 December 2023. In the Department's notice of motion, filed with the Labour Court on 22 December 2023, condonation is sought for the late filing of the review application, as well as an order to review and set aside the arbitration award issued under case number GPBC584/2023. On 31 January 2024, the Applicant filed a notice to oppose the review application. On 16 February 2024, the Registrar issued a notice in terms of Rule 7A(5) of the Labour Court Rules[2]. In terms of the provisions of the Practice Manual[3], the Applicant has 60 days to file the record, which period has not yet expired.

[4] The Applicant filed an *ex parte* contempt of Court application on 11 December 2023 and one Mr Damoyi deposed to an affidavit in support of the contempt application. It is evident from the affidavit that it was very

[1] Act 66 of 1995, as amended.
[2] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.
[3] Practice Manual of the Labour Court of South Africa effective 2 April 2013.

sketchy and contained almost no information to make out a case for contempt. The application was enrolled for hearing on 2 February 2024, when it was postponed to 9 February 2024, to afford the Applicant an opportunity to address the issues raised by the Court. In argument, Mr Witbooi for the Applicant confirmed that another affidavit was deposed to and filed with this Court on 7 February 2024, to address the issues raised by the Court on 2 February 2024.

[5] The application before me concerns the contempt of Court application that the Applicant filed on 7 February 2024 and wherein Mr Lufutha deposed to an affidavit in support of the contempt application on 6 February 2024. The matter was heard on an *ex parte* basis on 9 February 2024 when an order was issued for the Respondents to appear in Court on 15 March 2024 to show cause why they should not be incarcerated, alternatively be fined, for being in contempt of a certified arbitration award.

[6] The Respondents opposed the application and instructed their attorneys to present their case in Court. They have filed explanatory affidavits in compliance with the Court order issued on 9 February 2024. It was evident from the affidavits filed by the Respondents that a review application in respect of the arbitration award issued under case number GPBC584/2023 was pending and that security was put up in accordance with the provisions of section 145(7) and (8) of the LRA.

[7] After perusing the aforesaid affidavits, I was concerned about the fact that a contempt of Court application was filed, when there was a review application pending and on 8 March 2024, I instructed my secretary to address a directive to the parties to explain why a contempt of Court application was persisted with in view of the pending review application and to indicate whether this fact was disclosed in the *ex parte* application. In response to the Court's directive, the Applicant did not address the issues raised and effectively insisted that the contempt application should proceed.

[8] It is evident that the said *ex parte* contempt of Court application and the

affidavit deposed to on 6 February 2024, were filed and deposed to after the Applicant had filed a notice to oppose the Department's review application on 31 January 2024. Evidently, at the time of filing said *ex parte* application and affidavit, the Applicant and Mr Lufutha were aware that the same arbitration award they sought to enforce by way of contempt proceedings was the subject of a pending review application.

[9] It is trite that a party in an *ex parte* application has a duty to disclose to the court all relevant facts that might impact the application. A selective assertion of only the facts favourable to the applicant is unethical, especially where the non-disclosure may impact the relief sought. *In casu,* the Applicant, notwithstanding the fact that they were aware of the pending review application and the fact that the operation of the arbitration award was suspended because security was furnished, did not disclose those facts to the Court. The pending review application, of which the operation was suspended, would no doubt have an impact on the relief sought on an *ex parte* basis. It was unethical not to disclose those facts to the Court and it was nothing but an attempt to mislead the Court to grant the Applicant the relief it sought. This is not conduct that is welcome or encouraged in this Court when a party brings an application on an *ex parte* basis.

Contempt of Court: general principles

[10] In *Bruckner v Department of Health and others*[4]*,* the Court dealt with the requirements for contempt and it was held that:

> 'It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:
>
> (a) that the order was granted against the respondent;
>
> (b) that the respondent was either served with the order or informed of the grant of the order against him and could

[4] (2003) 24 ILJ 2289 (LC) at para 26.

have no reasonable ground for disbelieving the information; and

(c) that the respondent is in wilful default and mala fide disobedience of the order.'

[11] In *Anglo American Platinum Ltd and another v Association of Mineworkers and Construction Union and others*[5], the Court has held that:

'The principles applicable in an application such as the present are well-established. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt committal is a 'peculiar amalgam' since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see para 8 of the judgment). The court summarized the position as follows at para 42:

"To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice;

[5] [2014] ZALCJHB 60; (2014) 35 ILJ 2832 (LC) at para 4.

non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."'

[12] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*[6] *(Matjhabeng)* the Constitutional Court confirmed the requisites for contempt of court as follows:

> 'I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*. It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof − beyond reasonable doubt − was applicable.'

[13] The Applicant has to prove the aforesaid requisites beyond reasonable doubt and I will deal with them in turn.

[14] Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden to adduce

[6] [2017] ZACC 35; 2018 (1) SA 1 (CC) at para 73.

evidence to rebut the inference that the non-compliance was not wilful and *mala fide*. If the respondent fails to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.[7]

[15] To establish non-compliance requires more than a failure to comply with the order. In *Matjhabeng,*[8] the Constitutional Court affirmed that contempt of court does not consist of mere disobedience of a court order, but of "*contumacious disrespect for judicial authority*". The requirement of wilfulness and *mala fides* means that contempt is committed not by a mere disregard of the court order, but by the demonstration of a deliberate and intentional violation of the court's dignity, repute or authority.[9]

Analysis

Existence of the order and service

[16] *In casu,* the existence of the certified arbitration award is not disputed. Service or knowledge thereof is however disputed.

[17] The Applicant has to show that the Minister and the Director General (DG) were personally served with the certified arbitration award, alternatively that they had personal knowledge thereof.

[18] The Applicant's version in Mr Lufutha's founding affidavit is that the certification arbitration award was served on Mr B Zulu, the Respondents' Labour Relations Official and he attached a copy of an email to Mr Zulu to notify him that the award was certified.

[19] Mr Zulu is not cited as a respondent in this contempt of Court application.

[20] In the Applicant's own papers, there is no proof whatsoever that the Applicant served the certified arbitration award on the First (DG) or the Second (Minister) Respondent. At best, it was sent to the Labour Relations

[7] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 42.
[8] *Matjhabeng supra* at para 65.
[9] *Dibakoane NO v Van den Bos and Others; Van den Bos and Others v Gugulethu and Others* [2021] ZAGPJHC 652 (17 August 2021) para 29.5.

Official.

[21] There is not a single averment in the Applicant's founding affidavit that the certified arbitration award was served on either of the Respondents, that they were notified or that they had personal knowledge thereof.

[22] The Minister filed an explanatory affidavit wherein he stated under oath that there was no personal service of the certified arbitration award upon him or on the office of the Minister. He made it clear that in his capacity as Minister, he does not engage in the routine operations of the Department and he had no knowledge of the certified arbitration award.

[23] The DG also filed an affidavit wherein he confirmed that there was no personal service of the certified arbitration award nor that it was brought to his knowledge.

[24] Mr Zulu too deposed to an affidavit, confirming that he is the responsible official who dealt with the arbitration proceedings under case number GPBC584/2023 and stating that he did not notify the Minister or the DG of the certified arbitration award.

[25] The Applicant has to show, beyond reasonable doubt that the certified arbitration award was duly served on or brought to the notice of the Respondents.

[26] In argument, Ms Witbooi presented a version that was not pleaded, but which must be addressed. She submitted that the Respondents delegated some of their powers to Mr Zulu, and as such they are guilty of contempt of Court. This is an untenable argument and displays a lack of understanding of the applicable principles and authorities. In *Matjabeng,* the Constitutional Court held that:

> 'The next issue for determination is whether the non-compliance on the part of Mr Lepheana was wilful and mala fide. The reason for these requirements lies in the nature of the contempt proceeding and its outcome. In order to give rise to contempt, an official's non-compliance

with a court order must be "wilful and mala fide". In general terms, this means that the official in question, personally, must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply. As the Supreme Court of Appeal has held –

> "there is no basis in our law for orders for contempt of court to be made against officials of public bodies nominated or deployed for that purpose, who were not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings".'[10]

[27] The Applicant dismally failed to satisfy the very first requirement for contempt of court.

[28] On the Applicant's own version, the certified arbitration award was emailed to Mr Zulu, who is not cited as a respondent. This does not show, beyond a reasonable doubt, that the Respondents were notified or aware of the certified arbitration award, nor does it constitute service on the Respondents and their knowledge of the certified arbitration award cannot be inferred or accepted on the strength of some unknown delegation, it must be proved beyond reasonable doubt.

[29] The Applicant did not prove beyond reasonable doubt that the certified arbitration award was served on the Respondents and it follows that they cannot be in wilful default of an award they were not aware of.

[30] The Applicant fails at the very first requirement for contempt and it should be the end of this matter. However, there are pertinent issues raised by the Respondents, and in view of the Applicant's approach and understanding of contempt proceedings, I view it necessary to deal with those issues.

[31] The Respondents also raised the issue of mandamus, but in view of my

[10] *Matjabeng supra* at para 76.

findings in this matter, I do not deem it necessary to deal with the question.

Non-compliance with the Court order

[32] The next consideration is whether the Respondents are in wilful and *mala fide* disobedience of the Court order, which the Applicant must also prove beyond reasonable doubt.

[33] The Applicant's founding affidavit is very sketchy on this aspect. Mr Lufutha did no more than to make a very vague averment that "*the respondent has throughout continued to keep me in limbo or in suspense. I have been kept in suspense against my endless demand for timelines and other".*

[34] The Applicant must prove, beyond reasonable doubt that the Respondents acted in wilful and *mala fide* disobedience of the Court order. Apart from the fact that no such an averment is made in the founding affidavit, the reality is that the Respondents filed an application to review the same arbitration award the Applicant seeks compliance with in these contempt proceedings.

[35] For the Applicant *in casu* to succeed with its contempt of Court application, they must show, beyond reasonable doubt, that the Respondents are in wilful and *mala fide* disobedience of the certified arbitration award. The mere fact that there is non-compliance with the certified arbitration award is not sufficient – more is required. The courts have confirmed that contempt of court does not consist of mere disobedience of a court order, but of "*contumacious disrespect for judicial authority".*

[36] *In casu,* the Respondents filed a review application and furnished security in terms of the provisions of section 145(8) of the LRA. As a consequence, the operation of the arbitration award is suspended pending the determination of the review application. The purpose of contempt proceedings is to compel compliance – this Court cannot compel compliance with an arbitration award, of which the operation had been suspended by a statutory process.

[37] Based on the facts placed before this Court, the Applicant failed to prove beyond reasonable doubt that the Respondents are in wilful default and *mala fide* disobedience of the certified arbitration award.

[38] As a result, this application has to fail. The threshold to find the Respondents in contempt of Court is high and the onus to do so is on the Applicant, which it was unable to discharge.

Costs

[39] This Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[40] I invited the parties to make submissions on the issue of cost.

[41] Ms Witbooi submitted that the Respondents should be ordered to pay the costs.

[42] Mr July, for the Respondents, submitted that the expectation was that the Applicant would withdraw the contempt application after the Respondents' affidavits were received, but instead, the Applicant persisted with this application. He argued that the Applicant was informed that the Respondents were not served, which was the first requirement to succeed with this application, but the Applicant persisted with this application.

[43] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[11], the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[44] This is a case where the Court has to strike a balance, considering the requirements of law and fairness.

[11] (2018) 39 ILJ 523 (CC) at para 24.

[45] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and* Others[12], it was emphasized that:

> '...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

[46] *In casu,* the application was wholly misguided and meritless. The Applicant dismally failed to satisfy the requirements for a contempt application. I cannot ignore the conduct of the Applicant in failing to disclose relevant facts to this Court in an *ex parte* application. In my view, this application was brought and persisted with without any consideration of the requirements that the Applicant had to satisfy, the onus of proof, the law or the applicable authorities. The Applicant had an opportunity to pause and reconsider this application when it received the Respondents' affidavits, yet it did not do so. The Applicant had another opportunity to consider its position when it received a directive from this Court on 8 March 2024, but instead of pausing and reconsidering, the Applicant made it clear that it was persisting with an application which clearly had no merit.

[47] The Applicant's conduct was irresponsible and caused the Respondents to incur unnecessary costs to defend this application.

[48] The Respondents had to defend a meritless application and fairness dictates that it cannot be expected to endure enormous costs defending litigation that ought not to have been brought in the first place, alternatively

[12] [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

where pursuing the application had to be seriously reconsidered and halted. This is more so where the Applicant is a well-established and experienced trade union and the costs incurred by the Respondents are paid from public funds. The taxpayers of this country should not be burdened to pay the costs of defending meritless applications.

[49] In the premises, I make the following order:

Order

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms T Witbooi from NEHAWU

For the Respondents: Mr S July from Werksmans Attorneys