IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case Number: D359/97

In the matter between

M H Ntombela Applicant

and

Herridge Hire & Haul CC 1st Respondent

J Herridge 2nd Respondent

JUDGMENT

LANDMAN J

[1] Mboneni Harry Ntombela was employed by Herridge Hire & Haul CC, to which I shall refer as "the CC". Mr Ntombela was dismissed by the CC on 4 July 1997. He was dissatisfied

with his dismissal and referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). I assume the dispute was not resolved at conciliation because it was set down for arbitration before a senior commissioner of the CCMA, Mr Y Shaik.

[2] The CC was aware that the matter was to be arbitrated on a specific date. This is evident from two facts. First, a manager of the CC phoned Mr Shaik to communicate certain information to him and to say that the CC would not be attending the arbitration proceedings. Mr Shaik pointed out that if the CC wished to place information before him, they should attend the arbitration hearing. Notwithstanding this intimation, the CC did not attend the arbitration proceedings. Second, a letter was sent to Mr Shaik by the CC stating that they would be unable to attend the arbitration. The arbitration went ahead and on 27 October 1997 the commissioner handed down an award.

[3] The award reads:

I make the following award:

1. That the dismissal of the Applicant on the 4th April 1997 was unfair both procedurally and substantively;

2. That the Applicant be reinstated into the employ of the Respondent on the same terms and conditions as existed prior to his dismissal;

3. That the Applicant be paid the sum of R5 640,00, being wages he would have earned between the period 5th April to 7th July 1997, the date the matter was first set down for a hearing.

[4] Thereafter an application was made to this Court on notice to the CC to make the commissioner's award an order of Court. The application came before this Court on 16 April 1998 and the award was made an order of Court.

[5] Thereafter Mr Ntombela sought to enforce the order. His efforts to do so have now resulted in two applications serving before me. The first application is one brought by the CC and a member of the CC, Mr John Herridge, to condone the late filing of an application to rescind the order of the Labour Court which was given on 16 April 1998. If condonation is granted, then an application is also made for rescission of that Court order, in terms of section 165 of the Labour Relations Act 66 of 1995 ("the Act"), and for review of the award of commissioner Shaik, in terms of section 145 of the Act.

[6] The second application is one brought by Mr Ntombela, praying that this Court find the member, Mr John Herridge, guilty of contempt of court and impose a suitable sentence. It is convenient for me to deal first with the first application and then proceed to deal with the second application.

[7] The first application by the CC deals firstly with the question of condonation for the late filing of an application for review. Although the papers refer to section 158(1)(g) of the Act, in this particular instance only section 145 of the Act applies.

[8] Section 145 permits an application to be made to review an order of the CCMA if it contains a defect as defined in that section. In terms of section 145(1), any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the CCMA may apply to this Court for an order setting aside the arbitration award within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption. In this particular instance it is not alleged that the defect involves corruption.

[9] I do not know when the award was served upon the CC and Mr Herridge. Certainly it would have been served on them as part of the application to make it an order of Court. That would have taken place by registered post to the CC at P O Box 304, New Germany, 3630, on 13 November 1997. I will accept that the six weeks began to run from this date. This is an

assumption I make which is in favour of the CC and Mr Herridge.

[10] So although the award may only have been served on the respondent in November of 1997, it is quite clear from the facts which I have set out above, and from the affidavit which has been filed by Mr Herridge, that the CC was aware of the arbitration proceedings. I may assume that the CC and Mr Herridge were aware that an award could follow as a result of those proceedings and that it would go one way or the other. They took no steps to determine the outcome of the arbitration.

[11] The review application was only filed on 11 May 1998. It is clearly out of time. This Court has the power to condone the late filing, but only, I assume, if good cause is shown.
[1]

[12] If I have regard to the other application pending before me, then it appears that on 19 June 1998 at least, Mr Ntombela arrived at the CC's place of business and spoke to Mr Herridge. He told Mr Herridge about the Court order and that, of course, means that he also told him about the arbitration award which had in the meantime been made an order of Court.

[13] There is no acceptable excuse set out in the papers filed by the CC or Mr Herridge as to why condonation should be granted in regard to their dilatoriness in applying for a review, save that it has now become imperative to do so as Mr Ntombela is asking for the committal of Mr Herridge. There is the question of prospects of success to be taken into account, and I will get to that hereafter. But first I turn to the question of the rescission of the judgment of this Court.

[14] Mr Beall, who appeared on behalf of the CC and Mr Herridge, relied on s165 of the Act. This section provides that the Labour Court, on the application of any affected party, may vary or rescind a decision, judgment or order on one of three grounds.

[15] The first ground is that it was erroneously sought or erroneously granted in the absence of any party affected by that judgment. This does not seem to be the case here. It was not erroneously sought, nor was it erroneously granted. But certainly it was granted in the absence of a party.

[16] The Court may also exercise its powers where there is an ambiguity in the award, an obvious error or omission, but only to the extent of that ambiguity, error or omission. This is clearly not applicable here. Lastly, the Court may rescind the order granted as a result of a mistake common to the parties to the proceedings. That is not applicable here.

[17] But in addition to s165, the CC and Mr Herridge could have relied upon the common law or, indeed, upon Rule 16(A) of the Rules of this Court, but have not done so. Nevertheless I will consider whether there was an explanation as to why the application was granted in default.

[18] The case made out for the CC and Mr Herridge is that the application to this Court to make the award an order of Court was sent by registered post. The notice of set-down of the hearing was also sent by registered post. The respondents argue that while the documents were sent to the correct box address (P O Box 304), they were sent to New Germany at the code 3630, whereas the post office address of the applicant is Westville, 3630.

[19] It is clear, according to a letterhead which is attached to the papers, that the correct address of the applicant is P O Box 304, Westville, 3630, 9 Otto Volek Road, New Germany, 3630. The original papers in this matter were sent to P O Box 304, New Germany, 3630, which is the correct code, but wrong place name. The notice of set-down was also sent there and the notice of set-down of the present application, with which I am now dealing, was also sent to that address. This last document has apparently come to the knowledge of the CC and Mr Herridge, for they were represented at this hearing yesterday.

[20] The conclusion that I reach from all of this is that the registered letter did, in fact, reach the CC and Mr Herridge and that there is no merit in their explanation that they were unaware that an application had been served upon them relating to the conversion of the arbitration award into an order of this Court.

[21] I turn now to the question of the merits of the review. It is quite clear that the CC had no objection to the arbitration proceedings. There were some facts that they wanted to place before the arbitrator, but they had the opportunity to do so. The opportunity was not utilised. Thereafter it came to the notice of the CC that Mr Ntombela was in other employment at the time when the arbitration award was granted. That, however, does not prevent the making of an arbitration award. Nor does it prevent the making of the arbitration award an order of Court. An employee is obliged to mitigate his losses, and if he does so by working for someone else, there is nothing wrong with that. That does not constitute a ground for interfering on review with the award made by the CCMA.

[22] In the consequence, the CC's and Mr Herridge's application must be dismissed with costs. I now return to consider the application as to whether or not contempt of court has been committed and, if so, what should be done about it. Mr Ntombela has applied that Mr Herridge, as director and owner of the CC, and in his personal capacity, be committed to prison for a period to be determined by this Court for contempt of court by reason of his failure to secure compliance with the order of this Court made on 17 April 1998 under Case No D359/97.

[23] First of all it is necessary to say something about contempt of court. This Court is a Court of law. It is unacceptable that orders of this Court should be flouted. If orders of a Court of law are flouted, the law is brought into disrepute, as is the Court, and the administration of

justice in this country will suffer. Therefore it is important that proper attention be given to an allegation that a party is guilty of contempt of court.

[24] In order for an applicant to prove that there has been contempt of court, the applicant must show:

a) that an order was granted against the respondent;

b) that the respondent was either served with the order or was informed of the grant of the order against him or her and could have no reasonable ground for disbelieving the information; and

c) that the respondent is in wilful and *mala fide* disobedience of the order.

See **Uncedo Taxi Service Association v Maninjwa and Others** 1998 (6) BCLR 683 (E) at 691B-C.

[25] It is also important to refer to the *dictum* of King AJ in the matter of **Twentieth Century Fox Film Corporation and Others v Playboy Films and Another** 1978 (3) (SA) 202 (W) at 203C-D. He said:

A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order.

[26] These considerations also apply to a close corporation. See **Höltz v Douglas & Associates (OFS) CC en Andere**, 1991 (2) SA 797(O).

[27] Mr Ntombela, in his affidavit, says that Mr Herridge is the director *de facto* in charge of, and directing the affairs of, the CC. The letterhead which was put up as part of the record by the CCMA indicates that Mr Herridge is one of the members of the CC.

[28] Mr Ntombela says that on 19 June 1998, after he had received the Court order, he went to the CC's premises and presented himself with the Court order. An Indian male at the office of the CC received the order on behalf of the CC and on behalf of Mr Herridge, who was not present at the time. The Indian male informed Mr Ntombela that Mr Herridge would contact him. No contact was made and three weeks went by.

[29] Mr Ntombela then went to report to his attorneys, I B G Ngcobo & Partners, on 8 July 1998. He was given a letter to take to the CC. This letter is addressed to the manager of the CC. The body of the letter reads as follows:

Our client came to your offices with a letter dated 19/06/98 enclosing a Labour Court Order. The seven days have expired and we are now advising you to comply with the Order attached herewith by reinstating our client immediately and pay (sic) him compensation to the sum of R5640-00.

Please be advised that should you fail to comply with the Order you will be in contempt of court. We will therefore proceed with an application to the Labour Court on Friday (10/07/98).

Mr Ntombela says that a copy of this letter was telefaxed to the respondents. He attaches proof of such transmission.

[30] He returned to the premises of the CC on the same day and presented the letter dated 7 July 1998 to Mr Herridge, who, he says, is the owner of the CC. He says that Mr Herridge told him he should go and seek employment and money from his attorney. Mr Ntombela then went back to his attorneys and informed them of what Mr Herridge had said.

[31] Mr Ntombela goes on to say that it is clear that the CC is aware of the terms of the Court order and, despite its knowledge, remains in wilful and defiant breach of the Court order in that it refuses to reinstate him and to pay him his compensation.

[32] He also says that Mr Herridge is the director and owner of the CC and is in charge of the day to day activities of it, and that he is the alter ego of the CC and is the mind which directs all the transactions and, indeed, all the acts and omissions of the CC. Mr Ntombela, therefore, prays for relief against Mr Herridge.

[33] Mr Herridge appears to have put up two affidavits, one in each of the applications with which I am dealing. He says in his affidavit of 19 October 1998 in paragraph 18:

I acknowledge that Applicant did attend upon me; but I do not have any accurate recollection of the date, but (sic) deny that the Applicant presented to me a copy of Annexure “B”. All the applicant said to me was that he wanted his money and said no more. Having only read the Order of the above Honourable Court Annexure “A” when receiving these papers, I noted that it contained an Order directing the First Respondent to pay the Applicant an amount of money and re-instate the applicant. The Applicant made no mention of his re-instatement not (sic) did he indicate that he was presenting himself for employment. As I was not aware of the Court order, I thought that the Applicant's claim was a fabrication and elected to dismiss it as such. Besides, I thought it most inappropriate that the Applicant endeavoured to execute a judgment.

[34] He goes on to say that he is not a director of the first respondent, that he is not the owner of the first respondent, and that while he is involved in certain day to day activities of the first respondent he is not the alter ego of the first respondent and that his is not the mind that directs all the transactions.

[35] He thinks the relief sought by Mr Ntombela is inappropriate and beyond the usual methods of execution of a judgment and he says that to call for the imprisonment of one of the members of a close corporation and to hold him jointly and liable for the obligations of that close corporation is frivolous and vexatious in the extreme, unfounded in its allegations that the body corporate is the alter ego of its members and ill-considered as a method of executing

an order of this Court.

[36] He disputes that there is any personal liability for close corporation debts. I may add at this stage that this application is not concerned with the monetary debt. It is concerned with the order *ad factum praestandum*, namely that the close corporation re-instate Mr Ntombela.

[37] Mr Herridge says that if Mr Ntombela wishes to enforce performance of an order of this Court, the machinery exists elsewhere. He continues:

I verily believe that this application is illfounded (sic), badly considered as a process of execution of an Order of this Court, wasteful of the Court's time, frivolous and vexatious and that a punitive order for costs should be made against the Applicant. I verily believe that the Applicant has been ill advised and that such punitive order for costs should be made de bonis propiis.

[38] And he concludes by saying:

As regards performance, I reaffirm the statements made by me above, that the First Respondent has authorised me to make the payment to the Applicant of the sum of R5 640,00, which will be given to the Attorneys representing the Applicant. As regards reinstatement of the Applicant I repeat the dilemma that faces the First Respondent in so far as it finds it impossible to understand how the Applicant seeks reinstatement when he is currently employed upon terms and conditions no less favourable than those that would apply to employment by the First Respondent. The applicant has lost nothing.

[39] In a replying affidavit, filed to support an application for condonation for the late filing of an application for review, signed on 9 November 1998, Mr John Herridge says the following:

3.1 Mr Ntombela [wrongly referred to in the affidavit as first respondent] is emphatic that I

came to know about the Court Order on 19 June 1998 when he alleges that he called at the [CC]'s place of business and met with me.

3.2 The nature of my employment keeps me office bound and I am not personally acquainted with all the employees of the [CC]'s business.

3.3 Therefore, I am not readily able to recognise any one person to be one of its employees.

[40] And he says he would not be able to recognise Mr Ntombela. That, he says, is no disrespect. It is a mere reality. Then he says:

I do recall a person calling at the [CC]'s place of business at a date at or about 19 June 1998 and I do recall that person asking to be paid an amount of money, but he did not ask for his job back, nor was there any talk of reinstatement and I certainly have no recollection of refusing to reinstate [Mr Ntombela]. This person did make reference to a document, alleging that he had a letter from a lawyer. He showed me a letter which in turn purported to refer to a court order. I was immediately suspicious. I had no knowledge of the attorneys, and my understanding is that if a Court makes an Order, the execution of that Order is not carried out by the Execution Creditor but rather by the Sheriff of the Court. Secondly, in this time of rampant crime, plus the locality of the [CC]'s business, and the fact that the [CC] is frequently being approached for donations, exhorted to give gifts, join some get rich quick syndicate, or associate itself with some central African government which is looking for joint venture partners in South Africa, plus there is many an occasion when people call at the [CC]'s business carrying letters of introduction and representing themselves as having a legitimate purpose but on enquiry it is found that their declared purpose is a ruse. In short, one is always on guard and suspicious that a caller could be a confidence trickster.

If, as [Mr Ntombela] alleges, it was him and the document he brandished before me was a copy of the Court Order of this (sic), then I beg the pardon of the above Honourable Court as I meant absolutely no disrespect whatsoever. I am certain that if the Sheriff had executed the

Order I would have understood it as being an order of Court and would have accorded it the respect it deserves and would have acted insofar as I am capable in ensuring that the [CC] honoured its obligations in terms thereof.

(Original underlining)

[41] It is now clear that under the Constitution of the Republic of South Africa, 1996, whatever the position may have been previously, the onus of proof rests on an applicant in cases involving contempt of Court and the guilt of the offender must be proved beyond reasonable doubt. See **Uncedo Taxi Service Association v Maninjwa**, *supra,* at 693D-H.

[42] The question, then, is whether it has been shown beyond reasonable doubt that Mr Herridge is guilty of contempt of Court. It is clear that the Court order was granted against the respondent and that Mr Herridge is a member of the CC. It is also clear that Mr Herridge was served with an order insofar as it was handed over to him by Mr Ntombela. It was also reinforced by a letter emanating from Mr Ntombela's attorney. A reading of the Court order and of the letter to which it was attached would have served to inform Mr Herridge that he was being presented with a Court order.

[43] Can it be said that he could have any reasonable ground for disbelieving the information? He has set out in his second affidavit as to why he did nothing to comply with the order. However, the order was in his possession. He could have phoned the Registrar of the Labour Court to verify it. He could have phoned Mr Ntombela's attorney to verify the letter and in turn be put in touch with the Registrar. He didn't do so. He had all the information available before him, and he simply decided to ignore it. I do not think that his action was reasonable. In my opinion, it was clearly unreasonable and indicative of the attitude which he expressed in his first affidavit, that he was not prepared to accord the Court order the respect that it deserved.

[44] The next question is, is Mr Herridge in wilful and *mala fide* disobedience of the order?

Having received the order, having had the opportunity to verify it, to find out what it meant, he was in a position to obey it. It is quite clear that he regarded the award as ridiculous and its incorporation in the Court order as not being something which should be complied with because it conflicts with his views on what the law should be. He does not believe that someone should be reinstated if they were in employment at the date the arbitration award was granted. There is clearly a refusal to reinstate Mr Ntombela in his employment with the CC.

[45] In my opinion, on all the facts before me, Mr Herridge is guilty of contempt of this Court. Nothing has been said in mitigation. The opportunity was there to put forward further evidence that might impact upon the severity of the sentence that I should hand down. Nothing has been placed before me and I must decide this matter on the facts as they appear in the application.

[46] What then is a suitable punishment? It is quite clear to me that the punishment for contempt of Court must be more than a monetary punishment. If a monetary punishment were to be imposed on employers, most employers would be able to comply with that. And, having complied with that, it would not lead to the reinstatement of the employee in question.

[47] It seems to me that what must be done in this case, in the first instance, is to mark the Court's disapproval of the disrespect of Mr Herridge and, in the second, to ensure that whatever sanction is imposed is one which will encourage and compel him to comply with the order of this Court.

[48] It is therefore ordered:

2. That the combined application of the respondents for condonation, review and rescission,

is hereby dismissed with costs;

3. That the second respondent is guilty of contempt of this Court;

2.1 That the second respondent is to pay a fine of R5000,00 or be committed to prison for 25 days;

2.2 That the second respondent is sentenced to 15 days in prison, without the option of a fine, suspended on condition that the applicant is reinstated with the first respondent, on the same terms and conditions of employment as previously governed his employment, within 7 court days of this judgment.

4. That the first and second respondents are to pay the costs of the application for contempt, jointly and severally, the one paying the other to be absolved.

A A LANDMAN
Judge of the Labour Court

DATE OF HEARING: 12 November 1998

DATE OF JUDGMENT: 13 November 1998

For the Applicant: Mr Ngcobo of IBG Ngcobo & Partners

For the Respondent: Mr Beall of Beall, Chaplin and Hathorn