



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 287/16

In the matter between:

MOKONYANE WILLIAM MOSOMA

Applicant

and

ZERBATONE MINING (PTY) LTD

First Respondent

P MOHUBA

Second Respondent

MANAMALALA PHASHA

Third Respondent

Enrolled: 8 September 2020 (Decided on the Papers)

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 12 October 2020 at 11:00

JUDGMENT

TLHOTLHALEMAJE, J

- [1] The applicant brought an *ex parte* application, seeking an order that the second and third respondents, who duly represents the first respondent, are in contempt of Court for refusing and/or failing, or neglecting to comply with the Order of this Court granted by Nkutha-Nkontwana J on 30 April 2018. In terms of the Order, the dismissal of the applicant was by the first respondent was found to be both substantively and procedurally unfair, and the first

respondent was ordered to reinstate the applicant retrospectively with full back pay.

- [2] The above order followed the dismissal of the applicant and the subsequent referral of a dispute to this Court by way of a Statement of Claim on 15 June 2016. In the absence of a Statement of Response within the prescribed time limits, the applicant had sought a default judgment, which was then obtained before Nkutha-Nkontwana J as mentioned above.
- [3] The applicant in his founding affidavit averred that upon receipt of the Court order, he had presented himself at the first respondent's premises on 4 June 2018, and was informed by one of its managers that its attorneys were to be consulted over the matter. The applicant averred that he had heard nothing since then, and that the first respondent had not applied for rescission of the default judgment, hence this application
- [4] The *ex parte* application was brought before the Court on 30 January 2020. Ordinarily with such applications, it is expected that they would be set down on an *ex parte* basis and for an interim order to be first issued, and thereafter for the sheriff to serve the order on the respondent party, and for a proper return of service to be filed. The interim order would ordinarily afford the respondent party an opportunity to show cause by way of affidavit, as to why the interim order should not be confirmed, and also be required to appear in court on a particular date.
- [5] In this case however, without the above process having been followed, the respondents had filed an answering affidavit on or about 27 August 2020 to oppose the contempt application. The applicant had equally filed an a replying affidavit. In terms of paragraph 13.4 of the Practice Manual of this Court, where a defence is raised by the respondent in an *ex parte* application, the court may either hear the matter on the date on which respondent was ordered to appear in court or postpone the matter to the convenience of the court. To this end, and further for reasons as shall be illustrated below, clearly a final order in these proceedings would be inappropriate.

- [6] In the answering affidavit, the respondents denied that they were in contempt of the Court, contending that a rescission application was filed on 31 August 2018, and served on the applicant. They further contend that the applicant had opposed the rescission application, and that they were waiting for a notice of set down from the office of the Registrar of this Court.
- [7] In the replying affidavit, the applicant insisted that there is no rescission application pending before the Court since the first respondent has not complied with the Practice Directives and Rules of this Court, and further since condonation for the late filing of that rescission application had not been granted. The applicant had further averred that the respondents have displayed no intention to prosecute both the applications for rescission and condonation, which in any event have no prospects of success.
- [8] The principles applicable in contempt proceedings are established. The applicant must demonstrate that the existence of a court order; which was served on the other party; that there was non-compliance with the terms of the order; and lastly, that such non-compliance was wilful and *mala fide* beyond reasonable doubt. Once the applicant had demonstrated these requirements, the respondent bears an evidential burden in relation to wilfulness and *mala fide*¹.
- [9] The applicant contended that he had presented the Court order to the first respondent's manager on 4 June 2018 and was advised that the matter was to be referred to the first respondent's attorneys who would revert to him. He further averred that on 26 June 2018, his legal representatives had sent a

¹ See *Compensation Solutions (Pty) Ltd v Compensation Commissioner* (2016) 37 ILJ 1625 (SCA) at para 15; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 42 and also at para 22 where it was held;

'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and *mala fide*. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). These requirements - that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'

copy of the Court order to the respondents and advised them that should there be no compliance with the order, this Court would be approached for a contempt order. The respondents' attorneys of record had responded on 29 June 2018 taking note of the Court order. On 2 July 2018, a further copy of the Court order was sent to the respondents.

- [10] In the answering affidavit, the respondents raised two points *in limine*. The first related to their contention that there was a rescission application pending before this Court, and the second related to the merits of the applicant's claim. Both points lack merit in that the first relates to whether there was wilfulness and *mala fide* in regards to non-compliance, whilst the second relates to the merits of the claim leading to the default judgment being obtained.
- [11] In the answering affidavit, the respondents merely noted the applicant's averments in regard to service of the Court without adding anything of substance, other than to confirm that the matter was referred to their current attorneys of record, and a decision was taken to seek a rescission of the default judgment. It can therefore be accepted that the respondents were well aware of the Court which was served on them on no less than three occasions.
- [12] To the extent that the applicant was not reinstated and paid backpay, it can further be concluded that there was non-compliance with the Court order. The only issue that remains is whether the non-compliance was wilful and *mala fide*.
- [13] As to whether there was wilful and *mala fide* non-compliance has to be determined within the context of whether there is a proper application for rescission before Court. Thus flowing from *Kare Sheet Metal Products (Pty) Ltd v Breytenbach*², I accept that the application for rescission of a default judgment suspends the operation of the Court order pending the determination of that application.

² (2018) 39 ILJ 603 (LC) at paras 12 - 20

- [14] The mere bringing of an application for rescission on its own however does not imply that an application for contempt should fail, as it remains for the respondents to demonstrate that there was a proper and timeous application for rescission before the Court, and further that there was no wilfulness or *mala fide* on its part in failing to comply with the Court order.
- [15] The application for rescission, in which the respondents sought condonation for its late filing, was filed on 31 August 2018. The applicant had filed a Notice to Oppose the application on or about 27 September 2018, and an answering affidavit was duly filed on or about 20 October 2018. He contends that since the filing of the rescission application, the respondents have not taken any steps in expediting its determination. He further contends that both applications would fail on their merits.
- [16] Given the unusual manner with which the contempt application is presently before the Court, and further in the light of the disputes arising as to whether there is a proper application for rescission of the default judgment pending before the Court, it is my view that the interests of justice dictate that only an interim order be granted, and for the application for rescission to be properly ventilated before the Court.
- [17] In the circumstances, the following order is deemed appropriate:

Order:

1. The Second and Third Respondents, who duly represents the First Respondent are in Contempt of Court for failing and or refusing or neglecting to comply with the Order of this Court granted by Nkutha-Nkontwana J on 30 April 2018.
2. The order above shall operate interim, pending the return date on 6 November 2020, on which date a final determination will also be made in respect of the rescission application pending before the Court.
3. The parties are granted leave to file and serve written heads of argument by no later than close of business on 3 November 2020.
4. The costs of this application shall be determined on the return date.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:

Grovè Attorneys

For the Respondents:

PMK Tladi & Associates

LABOUR COURT