IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 43830/13

17/12/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

17/12/14

DATE SIGNATURE

In the matter between:

COMPENSATION SOLUTIONS (PTY) t/a COMPSOL	APPLICANT
and	
THE COMPENSATION COMMISSIONER	1st RESPONDENT
THE DIRECTOR GENERAL, DEPARTMENT OF LABOUR	2nd RESPONDENT
THE MINISTER OF LABOUR	3rd RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 17 December 2014

Heard on: 11 & 12 November 2014

HUGHES J

1. This is an application where the applicant seeks the following relief:

1.1 The first respondent is declared to be in contempt of paragraphs 1,2,5 and 6 of the order of the above court granted against him on 31 July 2009 under case number 35047/09;

1.2 That the court imposes such punishment upon the first respondent as the above honourable court my deem meet;

1.3 The first respondent is ordered to make payment to the applicant of the amount of R145 243 086.77, alternatively R97 893 584.70 within fourteen days from date hereof;

1.4 The first respondent is ordered to pay interest on the aforesaid amount/s at the legal rate of 15.5% per annum a tempore morae, calculated from the date of the order to date of payment;

1.5 The first respondent is furthermore directed to make payment to the applicant of the amount of R6 152 943. 02, within fourteen days from date of this order;

1.6 The first respondent is ordered to pay interest on the aforesaid amount at the rate of 15.5% per annum a tempore morae from the date of the order to date of payment;

1.7 The first, second and third respondents be ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the application on an attorney and client scale, including the costs reserved on 20 August 2013, 5 September 2013, 12 February 2014 and 18 February 2014 and the costs of attending a meeting in Johannesburg on 7 August 2014, such costs to include the costs of senior counsel where used.

2. These contempt proceedings emanate from the first respondents contemptuous behaviour towards a consent order granted on 31 July 2009. Such order encompassed a settlement agreement that was signed by the first respondent

and a representative of the applicant. Due to the first respondent's failure to comply with the periods and payment provisions set out in paragraphs 1, 2, 5 and 6 of the order, the applicant seeks the payment of R93million, which was due, and costs.

3. At the commencement of these proceedings the respondents requested sometime to settle the matter. This proved fruitful in that the monetary aspect sought in the order, which is set out in paragraphs 1.3, 1.4, 1.5, and 1.6 above, was resolved.

4. BACKGROUND

The applicant launched an application sometime in July 2009 and as a result, the parties concluded a settlement agreement duly signed by the first respondent. On 31 July 2009, the settlement agreement ("the 75-day agreement") *"by consent"* was made an order of court. In terms of the settlement agreement, the parties undertook the following:

"*(a)* *The first respondent "shall process" claims within a reasonable period of time;*

(b) *The first respondent "shall process medical accounts" to pay within 75 days after acceptance of the claims or where it occurred after acceptance then it would be within 75 days of the date of submission of such accounts;*

(c) *The first respondent "shall process" the backlog of the medical accounts referred;*

(d) *The applicant "will submit" a detailed CD fortnightly;*

(e) *The parties "shall" hold meetings on a regular basis to resolve any queries, disputes or discrepancies in relation to the medical accounts submitted for payment.*"

5. The application for the relief sought commenced on 17 July 2013 on a semi-urgent basis. Due to the late service of the application upon the respondents, the applicant granted the respondents an extension to file their opposition and answering affidavit. The respondent filed its opposition on 29 July 2013 without filing an answering affidavit. The matter was on the roll for 20 August 2013 and was dispensed with an order directing periods for the filing of the answering and replying affidavits, with the matter being postponed to 3 September 2013.

6. On 3 September 2013, the respondent's had not filed their answering affidavit as per the order of 20 August 2013. This led to an order being granted by agreement postponing the matter with costs and directing the first respondent to pay a capital amount of R127 152 278.00 to the applicant by no later than Monday 16 September 2013 16h00.

7. The applicant filed a further supplementary affidavit and simultaneously enrolled the matter on 17 December 2013. The date provided by the registrar for this matter to be heard was 12 February 2014. On 13 February 2014, the respondents eventually filed their answering affidavit together with a counter-application. On the very same day, the respondents also filed a supplementary answering affidavit. The applicant filed its replying affidavit on 16 February 2014 and the matter was in court on 18 February 2014. On the latter date, an agreement was concluded, which was reduced to an order of court. For easy reference the terms of the order are set out below:

"*...by agreement between the parties, it is ordered:*

1. *The Applicant and the First Respondent shall nominate at least two representatives each who shall meet as from Monday the 24th of February 2014 during office hours for the purpose of effecting an accounting reconciliation of all the MSO lists submitted by the Applicant to the First Respondent up until LIST MSO91 or Batch 122;*

2. *The parties are directed to use their best endeavours in a spirit of cooperation to reach agreement on such accounting exercise, and to resolve any dispute line items if possible;*

3. *The parties shall prepare a joint report in relation to the line items upon which agreement has been reached, and such line items upon which no agreement can be reached. This process shall be completed by 16H00 on 24 March 2014. The parties shall file this report by no later than 16:00 on 31 March 2014.*

4. *At the conclusion of each MSO list referred to in paragraph 1 above, a list of line items upon which agreement has been reached shall be processed by the First Respondent for immediate payment in the full and precise amount of that list to the applicable CompSol nominated SP bank accounts;*

5. *In such instances where a given account that is paid in accordance with the aforegoing, is also included in the 5 advance payment agreement lists applicable to the advance payments made, the Applicant shall repay such accounts by no later than the 10th business day of a calendar month following the payment of the medical account to the First Respondent;*

6. *Thereafter the parties shall meet for the same purpose and in the same manner on a bi-weekly basis;*

7. *The matter is postponed sine die;*

8. *Costs of the hearing on 18 February 2014 are reserved."*

8. There was no compliance with the above order concerning the filing of the joint report. The applicant caused an interim report in the form of an affidavit to be filed on 3 July 2014. The Deputy Judge President (DJP) of this division set out periods for the each party to file their answering and replying affidavits, which culminated in the parties concluding a joint report on 17 September 2014. The highlight of this joint report reads as follows:

"5. *At the meeting, the parties reached agreement that the total sum of the accounts included in lists MSO1-91 (or batches 1-122) then still unpaid, amounted to R93, 903,293.08 and that this amount was due and payable. This is set out in annexure "JR1" hereto. The only reason why the amount had not been paid was because of logistical problems in the systems of the financial division of the First respondent to physically effect payment".*

9. The first respondent did not pay within 75 days as agreed on 31 July 2009 which agreement he had personally signed. As a result an amount of R95 639 044.00 was outstanding in excess of the 75 days on 15 July 2013. The applicant tried to convene a meeting as per the 75-day agreement and the first respondent did not respond to the applicant's request. The respondent's deny the aforesaid beach but do not advance any explanation. This is in contrast to the joint report of 6 August 2014 where the respondents admit that they owe the applicant R93 903 293.08.

THIS APPLICATION

10. The applicant in its founding affidavit sets out blow-by-blow the conduct of the first respondent that they allege amounts to contemptuous behaviour. The first respondent was in breach of Para 2, 3, and 4 two months (October 2009) after the 75-day agreement was made an order of court. As a result, the applicant instituted three actions against the first respondent who defended these actions. The applicant applied for summary judgment in all three actions, and these applications were set down for 19 January 2010. The result was that the parties reached an agreement in each action and these were made orders of court. These orders are in favour of the applicant, the first respondent admits "*liability for substantial amounts*" in these orders.

11. The first respondent deposed to an affidavit in an application brought by the applicant that pertained to another matter. In that affidavit the first respondent states:

"148. When the Minister of Labour, the DG and I committed ourselves to the order in July 2009 it was not revealed to us just how many claims will be submitted at a time nor did we anticipate that the flood of claims would be a hindrance to the obligation assumed in the court order."

12. The applicant alleges that the order referred to in the preceding paragraph is the order of 31 July 2009 that encompasses the 75-day agreement. The applicant submits that the first respondent is well aware of the order and that the first respondent wilfully and intentionally breached the order. The first respondent attempted to file an unsigned affidavit on 13 February 2014, without the leave of the court, which was struck off from the record by presiding Jansen J, thus there is no affidavit on behalf of the first respondent, himself, before this court.

13. Mr Selby Lethabo Masalesa, Senior Practitioner: Medical Payments in the office of the Compensation Fund, deposed to the answering affidavit on behalf of the first respondent. He stated that the first respondent was not in contempt of the 75-day agreement. He stated that at all times the first respondent tried as best it could to adhere to the said agreement. However, there had been a few challenges along the way some of which are set out below:

(1) There were disputes as to what was in fact owed and some led to litigation which was settled at less than what was claimed;

(2) The Advance Payment Agreement ("APA") between the parties was in fact unlawful and should be set aside. The APA forms the basis of the counter-application of the first respondent;

(3) During the period 2011/2012 the fund was unable to fulfil its legislative mandate optimally due to inadequate human resources and external factors;

(4) 2011/2012 also saw the introduction of a new IT system as the old system affected the turnaround time in processing claims and service delivery; and

(5) The decentralisation project implemented to all nine provinces with the aim of being more accessible and improve turnaround time had an effect on the commission.

14. The first respondent states that at all times it has been committed to forefeeling its legislative mandate and this is evident from the 75-day agreement. In addition, the applicant on numerous occasions launched contempt proceedings against the first respondent, in respect of this 75-day agreement. In some instances, the first respondent filed a defence, these matters were concluded at less than what was in fact claimed by the applicant, and in other instances, the applicant did not pursued the matters any further. Thus, the contention that the first respondent wilfully and intentionally breached the 75-day agreement is not correct. The first respondent submits that it has been continuously implementing measures to ensure that payments are made within a reasonable period. This is illustrated by the employment of companies such as Medical Services Organisation South Africa (Pty) Ltd ("MSO") and EOH Holdings Limited ("EOH") to eliminate the backlog in processing medical accounts.

15. The first respondent argued that reasonable measures were adopted to comply with the 75-day agreement, in addition to that implemented above. The first respondent went further to appoint Siemens Business Systems ("Siemens") to assist with the automation of the management of the medical accounts system.

WHAT CONSTITUTES CONTEMPT

16. *"[9] 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 the infraction. Even a refusal to comply that is objectively unreasonable may be bone fide (though unreasonableness could evidence lack of good faith).*
[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 is 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 requites of contempt (the order; service of the notice; non-compliance; and wilfulness and mala fides) beyond a reasonable doubt.
(d) But, once the applicant has proven 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 a reasonable doubt.
(e) A declaratory and other appropriate remedies remain available to a civil application on proof on a balance of probabilities.
Application to facts: did CCII show beyond a reasonable doubt that the Auditor-General's non-compliance was wilful and mala fide? " refer to **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** at Para [9] and [42] respectively.

APPLICATION OF THE LAW

17. It is evident that the first respondent was well aware of the order of 31 July 2009, having been a signatory to the 75-day agreement which constituted the order. Having establish this one needs to look to the order to establish if the order is *inter partes* (between the parties) or between the party who has not complied and the Court, as contempt proceedings are between the non-complainant party and the Court. Refer to **Federation of Governing Bodies of Southern African Schools (Gauteng) v MEC for Education Gauteng 2002 (1) SA 660 (T)** at **673(D-E).**

18. The use of the word *"shall"* in the 75-day agreement where it pertains to the first respondent to my mind is of importance. This denotes *"expressing a strong assertion and intention; expressing an instruction or command"*, see **Concise Oxford English Dictionary 11th Edition Revised.** Thus from this word the first

respondent was commanded and /or instructed to perform that which is required, as per the 75-day agreement.

19. Having said so, that which was said in **Tasima v Department of Transport 2013 (4) SA 134** at **Para [51]** must be born in mind. This is that the court's intention is ascertained from the language of the judgment or the order as construed according to the usual well-known rules:

"[51]...Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such a case not even, the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But, if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it... If, despite that, the uncertainty persists, other relevant extrinsic facts or evidence is admissible to resolve it." **Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)** at **304D-H.**

20. In this application the order, which needs to be interpreted was taken by consent. In addition, this order encompassed an agreement reached between the parties. To this end, no reasons are to be expected from Makhafola J who was instrumental in making the agreement between the parties an order of court, by consent.

21. I align myself with what was stated in **Tasima** at **Para [71]**

"In my view the approach is that the provisions of each court order which makes reference to an agreement between the parties must be examined in light of the principles in Firestone South Africa Ltd v Genticuro AG supra to determine whether the order, properly interpreted, imposes obligations towards the court, and, if so, what the contents of those obligations is.".

22. As in **Tasima's** case above all that the court did was make the agreement between the parties an order, thereby noting it in the proceedings. This is akin to noting a contract between the parties for the compliance of the parties in respect of the terms thereof. It does not in any way place the Court in the position of instructing or commanding the parties. See **Johannesburg Taxi Association v Bara-City Taxi Association and Others 1989 (4) SA 808 (W)** at **810H** which was cited in **Tasima:**

"When the parties reached agreement, the Court was informed and an order was issued in the terms as requested by the parties. I still see no component of the Court regarding its order as a matter of the Court as an instance of legal authority requiring the respondents to desist. It merely orders a contract between the parties to have binding effect. It is no different from "an order in terms of" a contract to pay."

23. In doing so to my mind there can be no doubt that when the order is read as a whole the applicant "*commanded or instructed*" the first respondent to perform in terms of the 75-day agreement. It is not the Court that requires performance but rather the applicant. As such the order is then categorised as one which is *inter partes* (between the parties) and as was stated in **Federation of Governing Bodies of Southern African Schools (Gauteng)** above, contempt proceedings are between the non-compliant party and the court and not between the parties themselves. Thus no contempt proceedings can be initiated in these circumstances.

24. If I am wrong in this conclusion, I proceed to examine whether the applicant has proven the requites of contempt (the order; service of the notice; non-compliance; and wilfulness and mala fides) beyond a reasonable doubt. The first three aspects to my mind are evident from the evidence. The issue that I need to examine from is 'whether the first respondent's non-compliance was *wilful and mala fides* '.

25. **Fakie NO** has alluded to the fact that in civil contempt proceedings, the non-complying party enjoys the protection of motion proceedings. However, the threshold to succeed is one, which is, governed by the criminal standard of beyond a reasonable doubt. In this case, the applicant seeks a declaratory order. The duty lies with the first respondent to show that non-compliance was not wilful and mala fide. The threshold of proof is now on a balance of probabilities see **Fakie NO Para [12]**.

26. In the current application, what is evident to me is that the applicant required of the first respondent to perform specific tasks in terms of the 75-day agreement. What is common cause is that the first respondent did not perform these tasks in terms of the 75-day agreement within the specified period. Was the first respondent's failure wilful and mala fide to amount to contempt of the order made by court? To me the answer is a resounding no. I say so because one has to go back to what constitutes contempt of a court order. It is trite that contemptuous behaviour is between the non-complier and the Court. This disobedience must be contemptuous of the Court and not as between the parties. Once it is between the parties one cannot be said to have been disobedient toward the Court and, if it is so, there can be no contempt towards the Court, as no obligation exists between the non-complier and the Court.

27. Yet again, on the second approach I come to the same conclusion that the order is *inter partes,* there is no obligation imposed towards the Court and as such no obligation is created between the party who has not complied and the Court, to amount to contempt, as contempt proceedings are between the non-complainant party and the Court.

THE COUNTER-APPLICATION

28. The first respondent sought to have this application withdrawn, however the applicant, who is the respondent in counter-application, did not consent to it.

29. The basis of the counter-application is that the 75-day agreement between the parties, the APA, is in fact unlawful and falls to be set aside. In my view, this is now academic. I say so because the first respondent complied with the APA

when it made the payment to the applicant during the cause of these proceedings of this application.

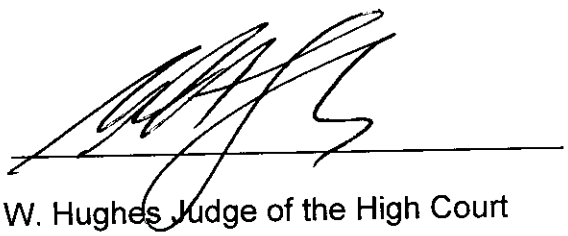
30. In the circumstances, I see no reason why I cannot accede to the request to order that the counter-application be withdrawn. It makes sense that this should attract a cost order against the first respondent, the first respondent having made payment in term of the same APA, which was sought to be declared unlawful.

31. I make following order:

31.1 The application to declare the first respondent in contempt of the order by consent, of the 31 July 2009, is dismissed with costs;

31.2 The counter-application of the first respondent is withdrawn with costs;

31.3 The costs in both applications are to include, the costs of the employment of senior counsel, where used.



W. Hughes, Judge of the High Court

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