IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C 98/2013

Not reportable

Of interest to other judges

In the matter between:

Marius Stephanus VAN DER WESTHUIZEN Applicant

and

BDM MANAGEMENT (PTY) LTD Respondent

Heard: 20 April 2018

Delivered: 10 May 2018

SUMMARY: Contempt of court. Wilful and mala fide non-compliance not shown. Application dismissed.

JUDGMENT

STEENKAMP J:

Introduction

[1] The applicant, Mr Marius van der Westhuizen, is a boilermaker. He worked at Namakwa Sands but his employer was a labour broker, BDM Management (Pty) Ltd (the respondent).

[2] Van der Westhuizen was dismissed on 16 March 2012. He referred an unfair dismissal dispute to the CCMA. The parties reached a settlement. The agreement was made an order of court. He now claims – six years later -- that BDM is in contempt of the court order and seeks a declaration to that effect, together with ancillary relief.

Background facts

[3] Van der Westhuizen started working at Namakwa Sands as a boilermaker in 1989. He started losing his hearing in 2007, but continued working as a boilermaker. BDM dismissed him on 16 March 2012 after the Mine's occupational health practitioner had tested his hearing and advised the Mine that he may no longer work in a "noise zone". BDM's operational manager, Ms Linda Oosthuyse, addressed a letter to him in the following terms:

> "Marius,
>
> HR Namakwa Sands het my in kennis gestel dat die uitslae van jou gehoortoetse by Dr Nel nie veel verskil van die gehoortoetse wat Dr Marais gedoen het nie.
>
> Albei se bevinding is dat jy nie in 'n geraasarea mag werk nie.
>
> Dit was alreeds so aangeteken op jou mediese verslag van Dr Marais.
>
> Dit spyt my om jou mee te deel dat jou kontrak as Boilermaker[1] vandag, 16 Maart 2012, eindig.
>
> Dis ongelukkig omstandighede buite my beheer, en ek wens ek kon van my kant af iets gedoen het. Maar ek kan ongelukkig nie teen Namakwa Sands se reëls en regulasies gaan nie, en moet my kliënt tevrede stel."

[4] In its answering papers, BDM attached the report of the occupational medical practitioner stating that the employee is physically suitable for the job (as boilermaker) but that he "may not work in noise zone".

[5] The employee referred an unfair dismissal dispute to the CCMA. The parties signed a settlement agreement at the CCMA on 28 May 2012. Unfortunately it is drafted in vague terms. The pertinent part reads:

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[1] *Sic* – 'ketelmaker' in Afrikaans.

> "The ER [employer] will ensure that the applicant [the employee] is given the first available opportunity for re-employment should a suitable vacancy arise soonest".

[6] The agreement does not specify what a "suitable vacancy" is and who should decide whether a vacancy is suitable; it does not refer to the employee's hearing loss and its effect on any jobs at all; and it does not explain to what time period, if any, "soonest" refers.

[7] Be that as it may, BDM did not offer the employee any job at all.

The settlement agreement and court order

[8] Having not been offered a job pursuant to the settlement agreement, the applicant had the agreement made an order of court on 19 April 2013. That did not have the desired effect.

Subsequent inaction by BDM

[9] After the agreement had been made an order of court, BDM still did not offer the applicant a job. Eventually he brought this application to have BDM held in contempt and to have its managing director, Mr Jacques Lombard, committed to prison for a suspended period on condition that he and BDM comply with the court order.

Evaluation

[10] The requirements for contempt have been clarified by the SCA in *Fakie*[2] and by the Constitutional Court in *Matjhabeng Local Municipality.*[3] In *Fakie*, Cameron JA summarised the principles thus:

> ""(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.

[22] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). See also *Robertson Winery (Pty) Ltd v CSAAWU & Ors* (2017) 38 *ILJ* 1171 (LC).

[3] *Matjhabeng Local Municipality v Eskom* 2018 (1) SA 1 (CC).

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

[11] In this case, the applicant has proved the order, service or notice. But has he proven non-compliance? If so, the respondent bears an evidential burden in relation to wilfulness and mala fides.

[12] It is common cause that BDM has not offered the applicant re-employment. On the face of it that may appear to be non-compliance; but BDM says that is because a "suitable vacancy" has not arisen.

[13] BDM says that a "suitable vacancy" can only be that of a boilermaker outside of the noise zone. No such vacancy has arisen, as the boilermakers who have been employed all work inside the noise zone. In reply, the applicant relies on a letter dated 31 December 2013 – well after his dismissal and the settlement agreement -- from one Michael Lau, a "hearing aid acoustician wellness consultant", who expressed the opinion that the applicant "would be able to work"; but that a hearing instrument was strongly recommended. But BDM counters that it continues to act on the advice from the mine's occupational health practitioner that Van der Westhuizen may not work in the noise zone; and that the letter from Lau is nothing more than that, and he does not include a confirmatory affidavit. Lau does not express any opinion as to whether Van der Westhuizen may work as a boilermaker, and more specifically if he could work in the noise zone. The mine's position, on the other hand, is confirmed by Dr Marais in a confirmatory affidavit. Applying the rule in *Plascon-Evans*[4] the position

[4] *Plascon-Evans Paints Ptd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 63 (A).

remains that Van der Westhuizen may not work in a noise zone. Given that all suitable positions to date have been in the noise zone, the applicant has not shown non-compliance.

[14] But even if I were to accept that the applicant had shown non-compliance, BDM has satisfied the evidentiary burden to show that it was not wilful or *mala fide*. It continues to rely on the advice of the mine's occupational health practitioner, Dr Marais. A "suitable vacancy" would be that of boilermaker; and all of those vacancies that have arisen, are in the noise zone. The fact that BDM has not offered Van der Westhuizen re-employment in those circumstances was neither wilful nor *mala fide*

Conclusion

[15] In those circumstances, the applicant has not proven that BDM is on contempt of this Court's order.

[16] With regard to costs, I bear in mind the following reminder by the Constitutional Court in *Zungu*[5] :

> 'The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:
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> "The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court."

[17] Mr van der Westhuizen is an individual who has lost his job through no fault of his own, but rather because of his disability in the form of

[5] *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 *ILJ* 523 (CC); [2018] 4 BLLR 323 (CC) par [24], referring to s 162 of the LRA.

progressive hearing loss. He has attempted to secure employment pursuant to a settlement agreement that is not a model of clarity. In doing so and eventually turning to this Court, albeit unsuccessfully, he has had to incur legal costs of his own. In fairness, he should not be held liable for BDM's costs.

Order

The application is dismissed.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Piet Nel Instructed by Gustav de Vries (Vredendal).
RESPONDENT:	Jan Rhoodie of Bester & Rhoodie (Pretoria).