IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE TOWN)

CASE NUMBER: C226/2018

DATE: 20 APRIL 2018

In the matter between:

AFMS GROUP (PTY) LTD Applicant

and

SEAN MARK FRANCIS Respondent

J U D G M E N T

STEENKAMP, J:

This is an application to hold the respondent, Mr Sean Mark Francis, in contempt of Court for fraudulently amending a Court order of this Court dated 23 August 2017 and asking for consequential relief.

The somewhat bizarre background to this application is that my brother Moshoana J gave an *ex tempore* judgment and made an order on 23 August 2017 reading as follows:

"The application for condonation of the late referral of statement of case is hereby dismissed. No order as to costs."

The order referred to an application brought by Mr Francis who was at that stage represented by Parker Attorneys. It appears to be common cause, after both Mr Francis and Mr Parker have given testimony under oath today, that Mr Parker properly informed Mr Francis of that Court order. What is more, Francis then instructed Parker to apply for leave to appeal, which he duly did.

Moshoana J handed down his ruling on the application for leave to appeal on 29 November 2017. He ruled that the application for leave to appeal is refused with costs.

It is also apparent from an email that Francis sent to his erstwhile employer on 15 February of this year that he was well aware of the Court order, as he noted that condonation had been declined. But then, surprisingly -- and this is what led to the current application -- on 2 March 2018 Francis again sent an email to his erstwhile employer and copied in its counsel, Mr *de Kock*, who appeared here today, to say the following:

"Good day.

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Hereby wishes to notify that in accordance with the ORDER issued in the Labour Court South Africa held at Cape Town on 23 August 2017 by the Honourable Justice, I intend to proceed via Legal Aid to represent my case further as stated in item 1 and refers to:

1. Condonation is granted for the late serving and filing of the applicant's statement of case in relation to his automatic unfair dispute to the Labour Court Cape Town.

Please advise your client accordingly."

He attached to that email what purports to be an order of this Court stating that condonation is granted and that the respondent is directed to pay the costs of the application.

Mr *de Kock*, on behalf of AFMS and instructed by Carelse Khan attorneys, brought an *ex parte* application to this Court on 20 March 2018 and an order was granted by my sister Rabkin-Naicker J calling upon Francis to show cause why he should not be held in contempt and either be ordered to pay a fine or be incarcerated.

When the matter was called today, Francis handed up an affidavit and a bundle of documents. He also gave evidence under oath and was cross-examined by Mr de Kock. His erstwhile attorney, Mr Riyaaz Parker, also testified and was cross-examined. What transpired from that testimony is that after Francis had instructed Parker to apply for leave to appeal and after that appeal had been turned down, he wanted to petition the Labour Appeal Court. There appears to have been some difference of opinion between him and his attorney and that culminated in Mr Parker withdrawing and his mandate being terminated. Francis then asked for the contents of his court file which Parker Attorneys couriered to him. That is where things went awry further. It appears from the contents of the court file, that Mr Parker says a candidate attorney in his office prepared and he clearly did not check, that in the bundle of documents that was sent to Francis was a document that was itemised as a “court order” but appears to have been a draft order that Parker had initially prepared in the unlikely event that he was successful in Court.

It is that draft order that Francis then blithely sent out as being an order of this Court. Under oath today Mr Francis says that he did so because he was confused. He does not dispute that he was aware of the initial judgment and order of Moshoana J, and nor can he, as he even unsuccessfully applied for leave to appeal that judgment and order.

What he did do after his rash action of simply sending out that draft order to his erstwhile employer, was to send Parker another email in the following terms:

> "Just a bit confused to why you say that condonation was declined to have the case brought forward to the Labour Court after scrutinising the documents you sent the following statement refers as taken from the page namely:"

and he then quotes the contents of what transpired to be a draft order.

On the same day Parker replied to Francis, saying:

> "You may be referring to the draft order. Do you have the written judgment?"

And Parker responded the next day and said:

> "Hi Sean
> This was a draft order we took with [*sic*] to court should we have been successful."

It appears from the bundle that had been couriered to Francis that the written judgment was indeed included but yet Dr Francis still professes to have been confused.

The appropriate test to be applied in cases like this is by now well known. It was summarised by Cameron, JA in Fakie N.O. v CC2 Systems (Pty) Ltd 2006 (4) SA 326 (SCA). Without repeating his very succinct explanation, I will merely quote from paragraph [6] where he says:

> "It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence which can take many forms but the essence of which lies in violating the dignity, repute or authority of the court."

That has been further expanded upon in the very recent Constitutional Court judgment of Matjhabeng Local Municipality v Eskom Holdings Ltd 2018 (1) SA 1 (CC) when Nkabinde ADCJ deals with the burden of proof in paragraph [60]. She says:

> "In relation to the proper standard of proof applicable in contempt of court proceedings, there are divergent views on which further reflection and clarity are necessary."

And she refers then to the Fakie judgment and clarifies that in paragraph [67]:

> "Summing up, on a reading of *Fakie, Pheko II,* and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies − for example, declaratory relief, mandamus, or a structural interdict − that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof – a balance of probabilities – applies."

The first type of contempt is the type of situation we are dealing with here. If Francis had indeed willingly either tampered with or sent out a fraudulent court order, it deprives the employer of the benefit of the order and it impairs the effective administration of justice and the dignity, repute and authority of this Court.

The Court has grave difficulty with Francis's explanation. For a highly educated person with a doctorate to be confused as to an actual order that was handed down when he was not only aware of that order but had actually applied for leave to appeal against that order, which was also turned down, is to my mind highly improbable.

However, as the Constitutional Court reminds us, the standard of proof in this type of application is a criminal one, i.e. proof beyond a reasonable doubt. On the evidence before me, I must reluctantly find that the employer has not been able to prove beyond a reasonable doubt that Francis is guilty of contempt of court for fraudulently amending a court order.

It now appears clear that he did not amend the court order but that he sent out what turned out to be a draft order. I cannot find beyond a reasonable doubt that he may not have been confused by the badly prepared bundle of documents that a

candidate attorney in Mr Parker's office, apparently acting without proper supervision, had sent to him without checking whether it contained the initial draft order or the actual order that was handed down by Moshoana J.

In those circumstances the high evidentiary hurdle posed by the Constitutional Court in Matjhabeng Local Municipality has not been crossed by the employer. Although a lingering doubt may remain in the mind of the Court, as I said I cannot find beyond a reasonable doubt that Francis is guilty of contempt of court in the terms set out in the notice of motion. I must however sound a cautionary note to him to tread carefully in his further dealings with his former employer and with this Court.

Having made that finding, I can also not, taking into account law and fairness and especially the fact that the applicant has been unsuccessful, make any costs order.

THE APPLICATION IS DISMISSED WITH NO ORDER AS TO COSTS.

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STEENKAMP, J

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