THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C741/19

In the matter between:

KOOGANASEN THEO PILLAY **Applicant**

and

SANTAM LIMITED **First Respondent**

LIZE LAMBRECHTS **Second Respondent**

Heard: **20 March 2020**

Delivered: **24 March 2020**

Summary: Contempt proceedings – where an order is complied with contempt proceedings are incompetent. Costs – a party launching contempt proceedings with full knowledge that an order has been complied with is a harasser of the other party and an abuser of the justice machinery. Such conduct warrants punitive cost order. Held: (1) The application is dismissed. Held: (2) The applicant to pay the costs of the respondents on a scale of attorney and own client.

JUDGMENT

MOSHOANA, J

Introduction

[1] The history of this matter is meanly avaricious. On 6 June 2017, whilst serving as an Acting Justice of this Court, I handed down a judgment in terms of which, I ordered the reinstatement of the applicant without any loss of benefits. The applicant and the first respondent herein were aggrieved and sought leave to appeal the judgment and order. Leave to appeal was refused. Both parties petitioned the Judge President seeking leave to appeal. The petition was refused. Both parties did not attempt further appeals. Owing to that, the judgment I made became effective and executable. Parties are in dispute as to whether the order I made then was complied with or not. The applicant has filed prolix[1] set of papers and contend that there was non-compliance with the order. In retort, the respondents contend that there was compliance with the order. As a sequel to the dispute, the applicant launched the present application in two parts. The first part was calling upon the respondents to show cause why they should not be held in contempt of the order of 6 June 2017.

[2] The second part was seeking a reinstatement to the position held prior to dismissal; adjustment and upgrade of the position as well as miscellaneous reliefs associated with the resumption of the reinstatement relief sought. On 7 February 2020, my brother Lagrange J issued an order in respect of part A

[1] The founding affidavit and annexures thereto runs into some 400 odd pages.

and part B. On 20 February 2020, having realised that part B was granted in error, my brother amended the order accordingly. The matter comes before me as an opposed motion.

Background facts

[3] After both parties failed to overturn the judgment and order of 6 June 2017, on 18 December 2018, the first respondent addressed a letter to the applicant making certain proposal for his reintegration into its employ in compliance with the order of 6 June 2017. In that letter, it was pointed out to the applicant that due to passage of about three years since his dismissal his former position ceased to exist. The organisation had changed structurally. As a result, a meeting took place on 21 December 2017 to discuss the contemplated reintegration. The applicant opted to respond formally. In his response, he made demands for salary adjustments and payment of bonuses as he verily believed that his old position was 'repositioned' and did not cease to exist. Despite this niggling impasse, parties agreed that the applicant would recommence employment on 15 January 2018.

[4] In the meanwhile, on 19 January 2018, the third respondent formally responded to the demands that created an impasse between the parties. Effectively, the demands of the applicant were rejected. The applicant remained steadfast to his demands. Regard being had to the impasse, the applicant was, on 1 February 2018, informed about available roles and vacancies, which he can apply for, otherwise he would face retrenchment. This seemingly ignited the ire of the applicant and he accused the third respondent of being an obstructionist. This added fuel to the impasse. Ultimately, on 7 February 2018, a formal letter was issued seeking to formalise the applicant's reinstatement to the position of Manager: PMO at JG 5 effective 14 September 2014. After having worked out the applicant's lost benefits, in March 2018 certain payments were effected to the applicant.

[5] After a period of almost two months, the planned reintegration failed. On 24 April 2018, the applicant was formally informed of the section 189 process. He was issued with a section 189(3) notice which aimed at his retrenchment from 30 May 2018. The applicant became recalcitrant and refused to attend the consultation meetings. He unshakeably held a view that the retrenchment process was diametrically opposed to the reinstatement order of 6 June 2017. The first respondent disagreed. Ultimately, on 25 June 2018, the applicant was issued with a termination notice due to the first respondent's operational requirements, effective 30 June 2018.

[6] On 26 August 2018, the applicant referred a dispute alleging unfair dismissal to the CCMA outside the prescribed period. Owing to that, a jurisdictional point was taken by the first respondent. On 8 March 2019, in a formal ruling a CCMA commissioner dismissed the referral for lack of jurisdiction. The chagrined applicant sought a review of the ruling. An application under case number C266/2019 is in the balance.

Evaluation

[7] Where a party ignores the terms of a court order, such a party is guilty of contempt. What then follows is the question: Are the respondents guilty of contempt though? This is the question I am turning to now. The requisites of a contempt order are (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of the contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be willful and *mala fide*. It was held in *Pheko v Ekurhuleni Municipality (No 2)*[2] that while the courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect of judicial authority. All what is required is evidence that the contemnor is obstinately disobedient or rebellious. It ought to be shown that on the balance of probabilities that the non-compliance was born out of willfulness and *mala fide*.

[2] 2015 (5) SA 600 (CC)

[8] The high water mark of the applicant's case is that since his position prior to the overturned dismissal was that Manager: Project Office, otherwise known as Head of Project Management Office or Enterprise Office ("PMO/EPO), he must return to that position even if it does not exist anymore. He takes a view that reinstatement by definition means to be placed back to ones' position. He does not accept, as a fact, that his then position ceased to exist. According to him, the position was simply 'repositioned'. On the papers, this appears to be his position. But during oral submissions, he adopted an ambivalent position, which appeared to be vacillating between two positions.

[9] The power to order reinstatement as a relief emanates from the provisions of section 193 (1) (a) of the LRA. The section employs the term "reinstate". The term has not been afforded any specific definition in the LRA. The dictionary meaning of the word 'reinstate' is to bring back into use or existence, to restore to previous condition or position. When an employee is dismissed, what he or she loses is the job security, hence a dismissed employee becomes an unemployed person. An unemployed person is one who is out of work or jobless. Accordingly, in my view, when the meaning of the term 'reinstate' is considered, it must be considered against the backdrop that only a dismissed-unemployed person would be reinstated. A reinstated employee becomes employed again, in work and with a job. Using the dictionary meaning a person who had lost a job and regains it is reinstated.

[10] *Equity Aviation Services (Pty) Ltd v CCMA and others*[3]*,* did its best by giving an ordinary meaning of the word. That meaning is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. This meaning is not a dictionary meaning *per se* but a meaning adopted from *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court and others*[4]*.* In *Consolidated Frame*, two matters were dealt with. The other matter was *Consolidated Woolwashing Ltd*. It was in the *Woolwashing* matter that Nicholas AJA referred to English

[3] [2008] 29 ILJ 2507 (CC)

[4] 1986 (3) SA 786 (AD)

judgments, which were quoted with approval by Harthorn AJ in *Bramdaw v Union Government*.[5] It was Harthorn AJ who afforded the term 'reinstate' the ordinary meaning adopted in *Equity Aviation supra.*

[11] Effectively, this Court has no qualms with the natural and ordinary meaning of the term. However, in instances where, as it is in this case, the post ceased to exist, the word reinstate must take a different shape owing to that. This was recognised by Nicholas AJA in *Woolwashing,* when he said:

> "One of the objects is to eliminate the disadvantage under which an employee would labour if he were obliged to negotiate against the background of a *fait accompli*. Having regard to this object, it matters not, in a case falling under ss (4) (b) (i), that his post ceased to exist, or that the employer has no work available for him. What is contemplated is that he should be reinstated in his employment, in the sense of the contractual relation between the master and servant…In the case of an employee such as the individual applicants, the contractual relation does not entail that he [occupies] a post or that he should be given work.

[12] It is important to mention that the ordinary meaning as adopted in *Equity Aviation* emanates from a case that was seeking a meaning of the term as employed in section 43 (restoration of the *status quo ante*) of the defunct LRA of 1956. The section contemplated a speedy remedy. Such that the situation as it obtained in this matter three years later was impossible to arise. Section 43(7) of the defunct LRA provided that an employer is deemed to comply with an order of reinstatement if he pays to an employee the remuneration which would have been due to the employee in respect of his normal hours of work had his employment not terminated. I am certain that when the legislature inserted the word *reinstate* in section 193 (1) (a) of the current LRA, the legislature would have been alive to the provisions of the preceding Act. The presumption is that the legislature would keep the same meaning of the word employed in the previous statute, unless the context dictates otherwise.

[5] 1931 NPD 57.

[13] Accordingly, it is my firm view that where an employer put back the contractual relation and pay or offer to pay an employee, such an employer complies with a reinstatement order, even if he does not physically put the employee to his or her old position, particularly, as it is the case herein, where the position ceased to exist. Where a position is declared redundant, it is not uncommon for a Court to issue a reinstatement to a non-existent position. In *Oosthuizen v Telkom SA Ltd*[6], the LAC stated the following:

> [25] The appellant can be reinstated – not in the position which he occupied before he was put in the redeployment pool – but to the position he was in when he was in the redeployment pool…Upon reinstatement the appellant can be dealt with in the same way that was or could have been dealt with when he was in the redeployment pool. That means that, if the appellant can be put in a certain position and he is happy with such position that would be the end of the matter.

Therefore, are the respondents in contempt?

[14] Regard being had to the weight of the authorities examined above, the respondents are not in contempt of the order of 6 June 2017. On 6 February 2018 under the hand of Kevin Wright an offer of reinstatement was made to the applicant. In this manner, the first respondent was complying with the order of reinstatement[7]. Having not accepted the offer of reinstatement, the applicant cannot be heard to be complaining about contempt. It appears to be the applicant's unjustified view that he was not paid his full benefits flowing from his reinstatement. According to him, he is being owed something in the order of R9 499 967.00. The order of 6 June 2017 does not sound in money. Even if an argument may be made that benefits sounds in money, a judgment

[6] [2007] 11 BLLR 1013 (LAC)

[7] Besides by 21 December 2017, the applicant knew that he was reinstated and was placed on leave whilst the reintegration process was on course.

sounding in money is enforced through a *writ* of execution and not contempt proceedings.

[15] Therefore, I come to an irresistible conclusion that the respondents are not in contempt and the application should be refused. Even if this Court were to be tempted for a moment that not returning the applicant to his old non-existent position equates contempt, the element of wilfulness and *mala fides* would be conspicuously lacking. Such simply implies that there exists no reason why the respondents should be held in contempt as my brother Lagrange J sought to enquire as *per* the order of 7 February 2020. Of course the other insurmountable hurdle that stubbornly stands in the way of the applicant is that having been dismissed again, this application is effectively rendered moot. The order that the respondents are in contempt and that they should reinstate the applicant would be rendered ineffective and nugatory by the fact that the applicant is dismissed. That remains so even if the dismissal may *ex facie* be considered unfair.

Part B relief

[16] It is not over until I say something about part B relief. In this part, the applicant astutely attempts to obtain a fresh reinstatement order. This he cannot do. This Court is *functus officio* in this regard. The order seeking to adjust and upgrade the position is nothing but a promotion claim. This Court lacks jurisdiction to entertain claims of an alleged unfair labour practice in relation to promotions. Similarly, the issue of bonuses and related benefits are issues falling under the unfair labour practice jurisdiction. This part is an incompetent relief and is outrightly denied.

<u>The issue of costs</u>

[17] This Court does not hesitate to loudly say that this is a frivolous and vexatious application. Not only is it that, there is absolutely no justification for such a prolix application. The application runs into thousands of pages contained in two lever arch files, with material that is absolutely unnecessary for an

application of this nature. In an application of this nature the issues are simple. They are, (a) there is an order and (b) the other party does not comply. On such a potentially simple application, it is manifestly unfair to lump another party with 400 odd pages to deal with. This is reckless and unwarranted. I do appreciate that the applicant is unrepresented. He has been since 2014 or thereabout.

[18] Individuals who approach this Court with hopeless cases and in a reckless manner like the applicant before me cannot escape an order of costs, simply because they are unrepresented.[8] In *African Farms and Townships Ltd v Cape Town Municipality*[9], it was made clear that an action is vexatious and an abuse of the process of the Court *inter alia* if it is obviously unsustainable. It is disquieting to observe that the respondents have been put to so much trouble by the applicant. It is absolutely obvious to me that the applicant knew or ought to have known that his case is manifestly deficient. It would be unfair to mulct the respondents with the costs of such an unconscionable application. This is a matter deserving of punitive costs. The conduct of the applicant is temerarious to the extreme. I do not hesitate to make an order of costs on the scale of attorney and own client.

[19] In the results, the following order is made:

Order

1. The application is dismissed in its entirety.
2. The applicant is to pay the costs of this entire application on a scale of attorney and own client. Such costs to include the costs of the employment of two counsel.

[8] See *Kabe V Nedbank* Ltd [2018] 39 ILJ 1760 (LC)

[9] 1963 2 SA 555 (A)

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	In Person
For the Respondents:	Advocate A Redding SC with him Advocate P Maharaj-Pillay.
Instructed by:	Werkmans Attorneys, Sandton.