THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J547/22

In the matter between:

ECCAWUSA OBO KELVIN MOYO **Applicant**

and

SUPER SPAR - POLOFIELDS **First Respondent**

MAGNUS LOUBSER **Second Respondent**

Heard: **3 August 2023**
Delivered: **4 August 2023**
Edited: **1 December 2023**

Summary: Contempt proceedings – where an order is not complied with contempt proceedings are competent. The requirement of service of the order or bringing the order to the attention of the contemnor implies knowledge and or awareness of the order. It remains a technical defence to state that an applicant has not pleaded as to how it brought the order to the attention of the contemnor. Of importance is having knowledge of the order since lack of knowledge of the order is a valid defence. In *casu*, it was common cause that

the order allegedly offended had come to the knowledge of the contemnor. The contemnor then must and has failed to show that he did not wilfully, obstinately and contemptuously ignore the order. Thus, failing to rebut the presumption of wilfulness and *mala fide*s. Contempt of Court proven. Costs – a party opposing contempt proceedings with full knowledge that an order has not been complied with acts unreasonably. Such conduct warrants a cost order. Held: (1) The second respondent is held in contempt and fined, which fine is suspended on condition he purges his ways by complying with the order. Held: (2) The respondents must to pay the costs of this application jointly and severally, the one paying absolving the other.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is one of those matters which epitomizes and give credence to the statement out there that employers generally treat arbitration awards with disdain and utter contempt. The epitome gets compounded when legal practitioners aides and abates the contempt by seeking to advance technical arguments in Court. This application concerns contempt proceedings in terms of which the applicant seeks an order to hold the director of Super Spar – Polofields (Spar) Mr Magnus Loubser (Loubser) to be in contempt of an order of this Court, in a form of a certified award, ordering Spar to reinstate Mr Kelvin Moyo (Moyo). Instead of either legally challenging the order, Spar and Loubser channelled their entire energy in opposing the present application on what this Court considers to be flimsy technical grounds.

Background facts

[2] After being dismissed, Moyo referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged unfair dismissal. The learned CCMA Commissioner Mr. Johann Pretorius, after hearing evidence, concluded that the dismissal of Moyo was unfair. He published an arbitration award to that effect on 08 March 2022. Amongst others he ordered Spar to reinstate Moyo. He further ordered Moyo to tender his service on 9 March 2022.

[3] Indeed, on 9 March 2022, Moyo tendered his services but Spar refused to reinstate him. Owing to that refusal, Moyo commenced a certification processes at the CCMA. Resultantly, on 28 April 2022, the arbitration award was certified in terms of the provisions of the Labour Relations Act, 1995 (LRA). Despite repeated requests directed to Loubser, Spar continuously refused to comply with the certified arbitration award. Specifically, on 9 March 2022, Mr K Boice, a union official of Entertaining Catering Commercial Allied Workers Union of South Africa (ECCAWUSA) informed Loubser of the following; (a) the existing arbitration award; (b) that Moyo tendered his services and was turned back; (d) a demand to comply with the certified arbitration award failing which contempt proceedings would be launched. Loubser simply ignored all those demands.

[4] On or about 22 May 2022, ECCAWUSA on behalf of Moyo launched the present proceedings on an *ex parte* basis as provided for in the Practice Manual of this Court. On 29 July 2022, Acting Justice Snyman issued an order calling upon Spar and Loubser to show cause why an order sought today must not be made. On the day to show cause, the 11th November 2022, the matter was removed from the roll by my sister Phehane J with an order that ECCAWUSA and Moyo must pay the wasted costs. An attempt was made to appeal Phehane J's order; which attempt was foiled when leave to appeal was refused. Ultimately, the matter emerged before me as an opposed motion.

Evaluation

[5] 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)*[1] 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*.

[6] The only technical defence, pursued with sufficient vigour by counsel for the respondents was that the applicants failed to make, what she submitted is necessary, an allegation as to how the offended order was served or brought to the attention of the contemnor. That being the case, the applicants failed to satisfy the second requirements of the contempt order, so went the argument. This Court categorically states that the defence is technical and actually flimsy. As a departure point, an allegation was made in the founding papers that the offended order was sent to Spar on 9 March 2022. The letter that was send was availed and it clearly records an email address of Loubser. It is important to note that this allegation is not disputed by Loubser. What he chose to explain to this Court was that the arbitration award came to his knowledge on 3 October 2022. It is important to state that the requirements set out above are to exist in order for a Court to grant a contempt order. As at the time this Court was asked to issue the contempt order, there was clear and unequivocal evidence that Loubser as the director seized with the responsibility to ensure

[1] 2015 (5) SA 600 (CC)

that Spar as a corporate entity complies with Court orders was aware of the offended order.

[7] On his own version, amongst the flimsy reasons why he did not ensure that the order is complied with, laid a reason that he only became aware of the arbitration award that directed reinstatement when the *ex parte* contempt order and application was served on him. This version is at odds with the undisputed version that on 9 March 2022 the arbitration award was brought to his attention. On application of the *Plascon-Evans* principle, this version must be rejected as being far-fetched and false. Even if this Court were to accept that he only became aware of the order in October 2022 as opposed to 9 March 2022, the cardinal question is, what did he do after that awareness and knowledge to ensure compliance. He is completely mum on that cardinal question. Instead, when the Court raised the question with Ms Nortje, counsel for Spar and Loubser, this Court was told of some invisible review application. This invisible review application had not been launched at the time of hearing the present application. I pause to mention that Spar became aware of the arbitration award in March 2022. A party has six weeks after becoming aware to launch a review application. As to why Spar did not launch a review application six weeks after 3 October 2022, it remains a mystery.

[8] Returning to the awareness requirement, Loubser and Spar were fully aware of the order, as at the stage this Court was considering to make the contempt order. The evidence is overwhelming that as at the time Loubser was afforded an opportunity to explain himself as ordered by Snyman AJ, he was fully aware of the offended order. It must be so that during the certification process, the award to be certified must have been brought to the attention of Spar and Loubser. Accordingly, this Court is satisfied that (a) there is an order; (b) the contemnors (Spar and Loubser) have full knowledge of the order; and (c) the contemnors are not complying with the order. Therefore, a presumption that has not been rebutted exists that the contemnors are wilful and *mala fide* in their conduct. The contemnors had sufficient opportunity to purge their conduct.

When the order of Snyman AJ was received, it became clear to the contemnors that they are required to comply with the arbitration award which was certified. As evidence of contumaciousness and disobedience, even after being called upon to show cause, the contemnors continued to disobey and treat the arbitration award deemed to be an order of Court with recalcitrance. There is absolutely no *bona fide* reason advanced by the contemnors, other than the technical and flimsy reason of lack of allegation of awareness, as to why there is no compliance. The contention that the involved Human Resources Officer (HRO) was aware and later resigned is flimsy and unconvincing to explain the admitted non-compliance. Ultimately, Loubser as the director bears the responsibility to ensure that Spar as a legal entity complies. The suggestion that the resigned HRO carried the responsibility is feeble and unacceptable.

The issue of costs

[9] This Court does not hesitate to loudly state that the opposition of the present application is frivolous and vexatious. The contemnors came to this Court, sadly duly assisted by their counsel, with flimsy and feeble technical defences. At a point, during the submissions in Court, this Court afforded their counsel an opportunity to submit to Court any authority for the proposition that failure to make an allegation of personal service of the order, leads to a refusal of a contempt order even in the face of uncontested evidence of awareness of the offended order. This the Court did because lack of knowledge of an order is a perfect defence to refuse a contempt order. Instead, counsel presented authorities dealing with exceptions. As indicated above, the requirements of notice or knowledge of an order must be present before a Court may make a contempt order. As at the time when that submission was pursued, there was sufficient evidence that Loubser was, already a year ago, aware of the order. Even, as at 3 August 2023, the contemnors had not complied with the well-known order.

[10] The conduct of the contemnors is one that suggest harassment of Moyo, who is armed with a valid and enforceable order, for fatigued and flimsy reasons. This Court cannot countenance a situation where a party is allowed the space to hoist technical defences in order to avoid compliance with Court orders. As a mark of displeasure, this Court shall not hesitate to make costs orders when such conduct is unabashedly flaunted. In *African Farms and Townships Ltd v Cape Town Municipality*[2], 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. Similarly, an unsustainable defence is vexatious and tantamount to an abuse.

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

Order

1. **Magnus Loubser** in his capacity as a director of Super Spar – Polofields, is found guilty of the civil offence contempt of Court by his conduct of continuously failing to ensure that Super Spar – Polofields complies with the arbitration award issued by Commissioner Johan Pretorius under case number GATW12762-21 dated 8 March 2022 which has been certified in terms of section 143 of the Labour Relations Act 66 of 1995 on 28 April 2022.

2. **Magnus Loubser** is imposed with a fine of an amount of **R1 000 000.00** (one million rand) payable to the office of the Registrar of the Labour Court at Arbour Square, 6th Floor Labour Courts, 86 Juta Street, Braamfontein.

3. The fine so imposed is wholly suspended on condition that **Magnus Loubser** ensures that Super Spar – Polofields complies with the arbitration award set out in 1 above within 30 days of this order.

[2] 1963 2 SA 555 (A)

4. **Super Spar – Polofields** and **Magnus Loubser** are ordered to pay the costs of this application jointly and severally, the one paying absolving the other.

G. N. Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr K P Mputle.

Instructed by: Melford Manwa Attorneys, Johannesburg.

For the Respondents: Ms. N Nortje.

Instructed by: M L Schoeman Attorneys, Pretoria.