IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS282/14

JS208/14

In the matter between:

ZITHA BONGANI MICHAEL	**First Applicant**
PHUMZILE MLENZANA	**Second Applicant**

and

PHAKISA TECHNICAL SERVICE (PTY) LTD	**First Respondent**
CHRISTO PIERRE NOLTE	**Second Respondent**

Heard: **12 August 2016**

Delivered: **07 March 2017**

JUDGMENT

TLHOTLHALEMAJE J

[1] By agreement between the parties, the matters under the two above case numbers were consolidated during these proceedings. The applicants in both matters seek the same relief from the same employer. The disputes emanate from similar facts, and the parties are represented by the same set of legal representatives in both matters.

[2] The first and second applicants seek an order that the respondents be found to be in contempt of orders obtained from this Court on 24 February 2016 and 27 October 2015 respectively. Under case number JS282/14, Golden AJ on 24 February 2016 had found that the dismissal of the first applicant, Mr Bongani Michael Zitha (Mr Zitha) was procedurally and substantively unfair. The first respondent, being in default, was ordered *to reinstate the applicant with immediate effect on the same terms and conditions applicable prior to his dismissal*.

[3] Under case number JS208/14, Steenkamp J found also in the absence of the respondents that the dismissal of the second applicant Mr Phumzile Mlenzana (Mr Mlenzana) was procedurally and substantively unfair, and the first respondent was ordered to— *"reinstate the applicant from 2 November 2015 on the same terms and conditions governing his employment prior to his dismissal".*

[4] The above-mentioned orders were issued in circumstances where the first respondent had not opposed the applicants' statements of claim following from what they had deemed to have been the unfair termination of their contracts of employment. It was further common cause that the first respondent is a Temporary Employment Service (TES) employer, and its business is to place temporary employees with its clients. One of those clients is a company known as Wekeba, where Mr Zitha and Mr Mlenzana were placed prior to the termination of their services.

[5] It was common cause that both the above court orders were served on the first respondent and flowing from that, Mr Zitha and Mr Mlenzana had presented themselves for reinstatement, Mr Zitha was sent home on the basis that there was no alternative post available for him after Wekeba had restructured, and that he would be contacted soon once clarity was obtained on his position.

[6] In respect of Mr Mlenzana, at a meeting held on 13 November 2015, the first respondent's position was that there were no vacancies at Wekeba where he could be placed. An alternative position was offered to him to perform garden duties whilst a suitable position was still to be found, but he had declined it. He was nevertheless paid his remuneration. On 23 February 2016, Mr Mlenzana approached the Court by way of *ex-parte* proceedings. On 11 March 2016, a *rule nisi* was issued in terms of which the respondents were to appear in Court on 20 May 2016 to show cause why they should not be found to be in contempt of the court order issued on 25 October 2015. It was then removed from the roll by Molahlehi J since it had not been properly enrolled.

[7] On 12 April 2016, Mr Zitha similarly approached the Court by way of *ex-parte* proceedings. The matter was set-down for a hearing on 13 May 2016 and was postponed *sine die* after it became opposed.

[8] In his answering affidavit, Mr Louis Strydom Froneman, the first respondent's counsel in *casu*, and who also acts as its Head of Legal Services, confirmed various discussions, meetings and correspondence exchanged between the parties, and in particular, the applicants' attorneys of record. The nub of the respondents' defence is that in view of the restructuring that took place at Wekeba, Mr Zitha and Mr Mlenzana could not be placed back at that site, and were thus offered alternative positions at other sites which they had rejected. It was only after they had persistently refused to report for duty at the alternative sites that their remuneration was stopped.

[9] It was further common cause that on 15 April 2016, Mr Zitha and Mr Mlenzana were given copies of contracts of employment and further informed to report for duty on 18 April 2016 at a site in Jetpark. They had nonetheless refused to sign the contracts without first discussing the matter with their attorneys. Their attorney's response on 18 April 2016 was that for full compliance with the court order, they had to be reinstated at his original site, Wekaba and in the same positions they had occupied prior to the dismissals.

[10] On 20 April 2016, the respondents forwarded an e-mail to the applicants' attorney, advising that the applicants had not reported for duty as instructed via 'sms', and that action would be taken for their failure to report for duty as instructed. Another e-mail followed in which the respondents advised the applicant's attorneys that their salaries would be stopped as they had failed to report for duty as instructed.

[11] It was submitted on behalf of the respondents that they had complied with the court order as the applicants were reinstated without their terms and conditions of employment being altered; that the applicants could not be accommodated at Wekeba as work had declined at that site, which had resulted in other employees being reduced on that site. It was further contended that the placement at another site in terms of the new contract did not affect the applicants' original terms and conditions of employment; and that it was part of the employees' contract that they could be transferred to any available site, which transfer they had not argued was unreasonable.

[12] In his replying affidavit, Mr Zitha averred that the salary that he had received whilst the respondents looked for another position was less than the current applicable rate, and that the receipt of a salary on its own did not imply that he had been restored to the position he had occupied prior to his dismissal. He denied that he had failed to report for duty, and that efforts to employ him were contrary to the court order, as his terms and conditions were changed, and that the respondents' attitude in view of the contract of employment presented to him was that he was to start on a clean slate, ignoring the fact that he had been in the respondent's employ since January 2008. He had pointed out that the respondent sought to secure alternative employment for him on different terms and conditions at the level of Grinder Operator in Jetpark with the commencement date as 18 April 2016, and these terms and conditions were not in compliance with the court order.

[13] The principles applicable to contempt proceedings are well-known. Thus, the following elements need to be established on a balance of probabilities viz, (a) there must be order in existence; (b) the order must have been duly served

on, or brought to the notice of, the respondent party; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or *mala fide.*[1] In *Fakie NO v CCII Systems (Pty) Ltd,*[2] Cameron JA (as he then was) summarised the applicable principles as follows:

> "To sum up:
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> 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;
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> b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
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> 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.
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> d) But, once the applicant had 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 of a balance of probabilities."

[14] In this case, it was not in dispute that there was a court order that was properly brought to the attention of the respondents. It was further common cause that the respondents had made attempts to reinstate the applicants, *albeit* at different sites and different positions. Central to this dispute, however, is whether the applicants were reinstated as required by the respective orders, it further being the applicants' contentions that

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[1] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC); 2015 (5) SA 600 (CC) at para 32.

[2] 2006 (4) SA 326 (SCA) para 42.

reinstatement as per the court orders ought to have been in line with the principles set out in *Equity Aviation Services (Pty) Ltd v CCMA and Others,*[3] in the sense that the applicants were to be placed back at Wekeba, and paid retrospectively from the date of their dismissals.

[15] As to whether the respondents have complied with the court orders, or whether they had wilfully failed to comply with those orders needs to be established within the context of a variety of factors, including the contents of the orders themselves. The starting point is that it was not contested that the first respondent was a TES, meaning that its placement of its employees at the clients' sites depended on availability of work at the sites.

[16] A second factor is that the order in respect of Mr Zitha was that he was to be *reinstated with immediate effect on the same terms and conditions applicable prior to his dismissal.* In respect of Mr Mlenzana, he was to be *"reinstated from 2 November 2015 on the same terms and conditions governing his employment prior to his dismissal".* In both orders, Steenkamp J and Golden AJ had not exercised a discretion within the meaning of section

[3] 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC); 2009 (2) BCLR 111 (CC); (2008) 29 ILJ 2507 (CC) at para 36 where Nkabinde J held that—

> "The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly." (Footnotes omitted.)

193(1)(a) of the Labour Relations Act[4] to order that the reinstatement be retrospective.

[17] On the facts, and particularly in view of the respondents' intention and willingness to reinstate the applicants *albeit* at different sites, it cannot be said that there was *mala fides* or wilful intention on their part not to comply with the court order. Accordingly, there is merit in the respondents' contention that that the orders of this reinstatement were not retrospective, and were merely to place Mr Zitha back in its employ, on the same terms and conditions applicable to his employment, whilst Mr Mlenzana's reinstatement was to be effective from 2 November 2015.

[18] There is further merit in the respondents' contention that in the light of the undisputed fact that Wekeba had undergone restructuring, and that the applicants could not be placed back at that site, despite willingness and clear intention to reinstate on the same terms and conditions as ordered by the court, there was impossibility of performance, as the applicants could not be placed back at Wekeba.

[19] It is trite that the defence of impossibility though readily available, will not avail where the impossibility is as a result of the respondent's fault.[5] In this case however, the impossibility cannot in any manner be attributable to the respondents' fault. On the contrary, genuine attempts were made to place the applicants at different sites, which placement would not have affected their other terms and conditions.

[20] Given the nature of the first respondent's business, and further in view of Wekeba not being in a position to take back the applicants, the only

[4] 66 of 1995. Section 193(1)(a) provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal."

[5] See *R v Close Settlement Corp Ltd* 1922 AD 294 at 300.

reasonable option available was to place them at another site, as long as this would not have impacted on their other conditions of service, particularly pertaining to remuneration and other benefits. I did not understand the applicants' case to be that alternative placement would have resulted in their other terms and conditions being degraded. On the contrary, for the applicants to have simply insisted on reinstatement at Wekeba when they were informed that positions at that site were no longer available was indeed unreasonable in the extreme.

[21] It further needs to be pointed out that contrary to allegations of the respondents having acted *mala fide*, despite not being in a position to place the applicants immediately, they had with clear intention to comply with the court orders, offered them alternative placing at different sites, and had immediately after they had presented themselves for reinstatement, paid them their remuneration whilst looking for alternative placing. The respondents had correctly stopped paying them their salary as they had unreasonably refused to take up alternative positions. The conduct of the respondents in the circumstances can hardly be construed as *mala fide*.

[22] Having had regard to the circumstances and the facts of this case, I am satisfied that there is no basis in law or fact, upon which a finding can be made that the first and second respondents were in contempt of the orders of this Court dated 24 February 2016 and 27 October 2015 respectively. On the contrary, it is found that the applicants had rebuffed any attempts made by the respondents to reinstate them in compliance with those court orders.

[23] It is understandable that the applicants could have acted in the manner they did upon legal advice, which was based on an incorrect interpretation or different understanding of the provisions of section 193 of the LRA as elucidated in *Equity Aviation*. In the light of this consideration, and the fact that as at the hearing of this matter, the respondents were still willing, and intended to reinstate the applicants, *albeit* in different positions or at different sites, it is my view that a finding that the respondents were not in contempt should not in any event prejudice the applicants' prospects of employment on

account of their different understanding of the court orders. Consequently, the court orders issued on 24 February 2016 and 27 October 2015 stand, and ought to be given effect to, with due consideration to the constraints faced by the first respondent, and in particular, to place the applicants back at Wekeba. I have further had regard to considerations of law and fairness, and conclude that a cost order is not warranted in this case.

Order

[24] Accordingly, the following order is made:

1. The first and second respondents are found not to have been in contempt of the court orders issued by this Court on 24 February 2016 and 27 October 2015 under case numbers JS282/14 and JS208/14.
2. The *rule nisi* issued on 11 March 2016 under case number JS208/14 is discharged.
3. The first and second applicants are to report for duty at the first respondent's premises and to be reinstated in accordance with the court orders as mentioned above within 14 days of the date of this order.
4. The first and second applicants shall however not be entitled to any remuneration between 20 April 2016 and the date upon which they report at the first respondent's premises in compliance with (3) above.
5. There is no order as to costs.

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E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Mr. FP Phamba of Sineke (WW) Attorneys
For the Respondents:	Adv. L S Froneman
Instructed by:	Erasmus Attorneys