THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C387/24

In the matter between:

NEHAWU obo M DENNER AND 1 OTHER **Applicant**

and

THE DIRECTOR GENERAL: AGRICULTURE LAND REFORM AND RURAL DEVELOPMENT CAPETOWN
MR RAMASODI MOOKETSA **First Respondent**

DEPARTMENT OF AGRICULTURE LAND REFORM AND RURAL DEVELOPMENT CAPETOWN **Second Respondent**

Heard: **22 November 2024**

Delivered: **11 December 2024**

Summary: Contempt of court application in respect of a certified award. Respondents resisting the order sought on the grounds that they intend to challenge the award on review. Wilfulness and mala fide proved, and order granted.

JUDGMENT

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GANDIDZE, AJ

Introduction

[1] The applicant, NEHAWU, on behalf of Mr Denner and 1 Other,[1] seek a final order of contempt of Court against the Director General of the Department of Agriculture, Land Reform and Rural Development, the first respondent, and the Department of Agriculture, Land Reform and Rural Development, the second respondent, for failing to implement the order in terms of a certified arbitration award that:

> 'The Respondent, the Department of Land Reform and Rural Development. incorrectly translated the applicant, Michelle Denner, under OSD as a Control Survey Technician, in terms of the provisions of Resolution 5 of 2009. It is ordered that the respondent translate the applicant in terms of the provisions of Resolution 3 of 2008 under the workstream of Professional Surveyor as Chief Professional Surveyor, retrospectively from 1 July 2009. This is to be done within 30 days from the date of this arbitration award.'

[2] The respondents oppose the application, contending that a decision was taken to launch a review application challenging the award, and therefore, there can be no talk of being in contempt of Court for failing to comply with the certified arbitration award.

Background facts as set out in the founding affidavit

[3] The award is dated 30 April 2024 and was certified by the Commission for Conciliation, Mediation and Arbitration (CCMA) on 4 July 2024. It was served on the first respondent on 12 July 2024, under cover of an e-mail explaining that the award should have been complied with within 30 days of the issue date. There was another follow-up e-mail to the first respondent on 29 July 2024 requiring clarity on the stance of the second respondent as NEHAWU *'don't want to assume that you are in defiance of the enforced (sic) award*'.

[1] The applicant is cited as NEHAWU obo M Denner and 1 Other as the dispute was referred to the SSSBC on behalf of two employees, and later the other employee withdrew his claim, leaving only Denner as the only applicant before the Commissioner.

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[4] On 11 August 2024, the first respondent wrote to NEHAWU in the following terms:

> 'Based on the previous correspondence and history of engagements on the matter, I referred this matter to Employee Relations.'

[5] The applicant filed an *ex parte* contempt of Court application on 16 September 2024, and on 22 October 2024, this Court issued an interim order, returnable on 22 November 2024.

[6] On 21 November 2024, the respondents filed an answering affidavit outside the period set out in the Court Order of 22 October 2024 and sought condonation. The explanation for the delay is that the respondents only became aware of the contempt of Court application and the Court order on 8 November 2024, after which it took steps, on specified dates, to ensure that answering papers were filed by 21 November 2024. Taking that explanation into account, condonation for the late filing of the answering affidavit is granted.

[7] The applicant also filed a replying affidavit on 21 November 2024.

[8] The first respondent was in attendance at the hearing of the matter on 22 November 2024.

Respondent's answering affidavit

[9] The respondents submit that their '*bona fide'* defence to the contempt application is that the arbitration award has not been accepted and that it will be taken on review in terms of section 145 of the Labour Relations Act[2] (LRA). It is further their case that the applicant was informed of this intention in June 2024 and October 2024. Then, the following submissions are made:

> '17. Therefore, it is indisputable that the arbitration award is not enforceable yet, as it is not a final order on the matter between the parties, as it is still to be reconsidered by the Labour Court.

[2] No 66 of 1995.

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18. It is trite that to succeed in contempt proceedings, the applicant must satisfy the court that the court order relied upon is final and not subject to appeal or review by the respondent.

19. It is evident from an exchange MR2 referred to hereinbelow that the respondents have taken a decision to challenge the arbitration award in the Labour Court.

21. It is submitted that the respondents have disclosed a *bona fide* defence against the relief sought by the applicant in this matter. And the respondent's defence has reasonable prospect of success in opposing this application. (sic)'

[10] The argument was further developed to say that the respondents have '*legal reasons*' not to comply with the award, which '*is being challenged by the department, has not been 'acquiesced with, and does not constitute a final order between the parties*'. For those reasons, the contempt application was said to be incompetent and premature.

[11] Thereafter, the affidavit sets out steps taken since 9 May 2024, when the respondents received the arbitration award, until 27 September 2024, when the relevant officials at the second respondent signed the memorandum to take the award on review. Therefore, the submission went, '*The Department had taken all the necessary steps to ensure that the decision to challenge the arbitration award is ready to be implemented as indicated to the applicant in June 2024 already*'. The conclusion of the submission is that the applicant failed to show that there was any *mala fid*es on the part of the respondents in not complying with the arbitration award.

[12] The respondents accuse the applicant of abusing the Court process by filing the contempt application when it is aware of the second respondent's intention to challenge the award on review. According to the respondents, the applicant should have put them on terms calling upon them to file the review application as promised instead of applying to have the award certified, pretending not to know about the respondent's intention to challenge the award on review. According to the respondents, the applicant must have

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sought a *mandamus* compelling the respondents to file the review application instead of filing a contempt of Court application.

[13] The submission is further that had the applicants informed the Court on 22 October 2024, when the *rule nisi* was granted, that the respondents intended to challenge the award on review, the Court would not have exercised its judicial discretion and granted the *rule nisi* because it would have been clear that '*the purported contemnor has decided to challenge the court order which he is sought to be declared to be in contempt of.*' Therefore, according to the respondents, the applicant withheld material facts from the Court, and the applicant ought to have withdrawn the contempt application on receipt of the 3 October 2024 communication that the respondents would be reviewing the award.

[14] There is also a complaint that the affidavit filed in support of the contempt application '*has no citation of me, [first respondent] in my personal capacity*' and that the applicant tried to sneak in the name in the interim Court order of 22 October 2024 to have the first respondent incarcerated.

[15] The Court was urged to '*discharge the rule nisi forthwith to show its censure against the applicant's unbecoming conduct'* and for the applicant to be ordered to pay the costs.

Replying affidavit

[16] The applicant pointed out that no review application had been filed yet and sought costs against the respondents.

Legal principles

[17] Applicants in contempt of court applications are required to establish (a) that a Court order was granted, (b) that the respondents were served with the Court order or had knowledge of the order, and (c) that there is non-compliance with the Court order. Once these requirements have been proved, wilfulness and *mala fides* will be presumed unless the respondent establishes reasonable

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doubt. A respondent who fails to establish reasonable doubt will be guilty of contempt.[3]

[18] It is also trite that contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary and that a disregard for an order of this Court requires the Court to intervene.[4]

[19] Section 143(1) and (143)(3) of the LRA provides as follows:

> 'Section 143 Effect of arbitration awards
>
> (1) An arbitration award issued by a commissioner is final and binding, and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued unless it is an advisory arbitration award.
>
> (2) ….
>
> (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).'

[20] A party aggrieved by an arbitration award can apply in this Court in terms of section 145 of the LRA seeking to review and set the award aside.

Analysis

(a) Existence, awareness and non-compliance with the Court Order

[21] The existence of the arbitration award, certified by the CCMA, is not in dispute. There is also no dispute that the respondents were served with the arbitration award. On their version, the respondents admit that they have not complied with the award.

[22] Since existence, awareness and non-compliance are not in dispute, willfulness and *mala fides* are presumed unless the respondents establish

[3] See: *Secretary, Judicial Commission of Inquiry Into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) para 37.
[4] Ibid at para 27 and 61 of the judgment.

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reasonable doubt. Whether the respondents have established reasonable doubt depends on their reasons for not complying with the Court Order.

(b) That the arbitration will be taken on review

[23] The respondents contend that they have a '*bona fide'* defence to the contempt application in that they intend to take the award on review and, therefore, do not have to comply with its terms until the Court determines the review application. In argument, I inquired from Mr Titus whether there was any case authority or legislation he relied on to support his client's contention, and he responded that this is in terms of the common law. The Court cannot consider this submission beyond this.

[24] Crucially, when the contempt application was argued, the respondents had still not filed the review application.

[25] Even if such a review application had been filed, this did not absolve the respondents from complying with the certified arbitration award. The operation of the award will be suspended only if the condition specified in section 145(7) of the LRA is complied with; alternatively, if the respondents sought and obtained an order to stay the enforcement of the arbitration award pending the outcome of the review application.

[26] Sections 145(7) provides as follows:

> '(7) The institution of review proceedings does not suspend the operation of an arbitration award unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).'

[27] Subsection (8) sets out the amounts to be put up as security depending on the relief granted in terms of the arbitration award.

[28] In this matter, the respondents have neither filed a review application with security nor applied to stay the enforcement of the arbitration award. Therefore, the award is enforceable against them.

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[29] The applicant's knowledge of the respondent's intention to challenge the award on review does not change the legal position, which is that the arbitration award remains enforceable unless one of the two conditions set out above is met. Even if the applicant had informed the Court on 22 October 2024 about the respondents' intention to file a review application, that fact would not have been an obstacle to granting the *rule nisi*.

(c) That the arbitration award is not final and binding

[30] The answer lies in section 143 of the LRA, which provides as follows:

> 'Section 143: Effect of arbitration awards
>
> (1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.
>
> (2) ...
>
> (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
>
> (4) If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.'
>
> (Own underlining)

[31] Therefore, a party in whose favour an award has been issued has a final and binding award, which the other party must comply with. Once that award is certified by the CCMA as contemplated in section 143(3), such an award can be enforced as if it were an Order of Court.

[32] Failure to comply with such an award has the consequence that a contempt of Court application can be brought against the party that has not complied with it. Therefore, a contempt of Court application is competent when a certified

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award is not complied with, subject to what I have stated above regarding instances when the operation of the arbitration award is suspended. Filing that application does not constitute an abuse of process or a drastic remedy, as argued by the respondents.

[33] The applicant did not have to put the respondents on terms before bringing the contempt application, nor was the applicant required to bring an application to compel the respondents to bring the promised review application. Once again, Mr Titus was unable to refer the Court to any case authority or legislation requiring the applicants to bring the application to compel the filing of the review application before filing a contempt application. There is no such requirement.

[34] The respondents have failed to establish reasonable doubt that their non-compliance with the award is not wilful and *mala fide*. They are in contempt of Court, and a final order will be granted.

(d) *The alleged non-citation of the first respondent in the founding affidavit*

[35] The founding affidavit cites the first respondent by referring to his position as Director General and his name, Mr Ramasodi Mooketsa. The Court Order of 22 October 2024 cites the parties as recorded in the contempt application. There is no substance to the complaint that the first respondent's name was sneaked into the Court order of 22 October 2024.

Relief

[36] The applicant sought an order finding the respondents in contempt of court, coupled with an order incarcerating the first respondent for a period, alternatively, an order that the respondents pay a fine, and in the further alternative, any other alternative relief. In my finding, the respondents must be given an opportunity to comply with the certified arbitration award, which is enforceable as if it were an Order of this Court, failing which the suspended fine will have to be paid.

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Costs

[37] Both parties submitted that costs must follow the result. I agree, especially taking into account the defences put up by the respondents to resist the contempt application. One only needed to peruse a few sections of the LRA to establish the legal position, and this was not done in this matter. Instead, creative and flimsy defences which could not be backed up by any law were put up. What is worse is that the respondents accused the applicant of unbecoming conduct for filing the contempt application when, in truth, it is the respondents' conduct in resisting the contempt application on baseless grounds that this Court should censure. The respondents must bear the applicant's recoverable costs on a party and party scale.

[38] In the premises, the following order is made:

Order

1. The first and second respondents are guilty of contempt of court.
2. The first and second respondents are directed to pay a fine in the amount of R100 000,00 to the Registrar of the Cape Town Labour Court within fourteen (14) calendar days of this order, which fine is suspended on condition that they comply with the terms of the certified award on or before the expiry of the 14 days.
3. If payment of the fine in accordance with paragraph 2 above is made, it does not absolve the first and second respondents from complying with the terms of the certified award, which they are still required and obliged to do.
4. The first and second respondents are ordered to pay the applicant's costs jointly and severally on a party and party scale.

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T Gandidze

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant	:	Mr Maluleke
Instructed by	:	NEHAWU Official
For the Respondents	:	Advocate Madoda Titus
Instructed by	:	The State Attorney

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