Of interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J 564/15

In the matter between:

THE PREMIER, NORTH WEST PROVINCIAL GOVERNMENT, THE HONOURABLE MR SUPRA OBAKENG MAHUMAPELO	**First Applicant**
THE MEC FOR THE DEPARTMENT OF FINANCE, NORTHWEST PROVINCIAL GOVERNMENT, MADAM WENDY NELSON	**Second Applicant**

In re:

MPHO BOGACWE AND OTHERS	**Applicants**

and

THE PREMIER, NORTH WEST PROVINCIAL GOVERNMENT, THE HONOURABLE MR SUPRA OBAKENG MAHUMAPELO	**First Respondent**
THE MEC FOR THE DEPARTMENT OF FINANCE, NORTHWEST PROVINCIAL	**Second Respondent**

GOVERNMENT, MADAM WENDY NELSON

HEAD OF DEPARTMENT – MR ISRAEL KUNENE, THE PROVINCIAL DEPARTMENT OF FINANCE **Third Respondent**

CHIEF DIRECTOR CORPORATE SERVICES – MRS MATSHIDISO JANSEN: THE PROVINCIAL DEPARTMENT OF FINANCE **Fourth Respondent**

DIRECTOR GENERAL – MR MASHWAHLE DIPHOFA: THE NATIONAL DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION **Fifth Respondent**

Heard: 24 May 2018

Delivered: 25 May 2018

Summary: (Urgent application to excuse applicants from attending court hearing of contempt application despite existing court order – application dismissed – principles underpinning attendance of alleged contemners in court for contempt proceedings discussed)

JUDGMENT

LAGRANGE J

Background

[1] This is an urgent interlocutory application to excuse the two applicants from attending a contempt hearing ('the main application') scheduled to be heard on 1 June 2018, which will consider whether or not they are in contempt of a court order handed down by the Honourable Voyi AJ, on 31 July 2015. That order made an arbitration award handed down on 6 June 2014 an order of court.

[2] The upshot of the award which was made an order of court was that, clause 18.1 of Resolution 1 of 2012 adopted in the Public Service

Coordinating Bargaining Council could not be affected in a staged or staggered way that differentiated between categories of employees, more particularly between core and corporate services employees. The award also found that the Department of Public service and Administration must apply the clause "…indiscriminately to all the employees whose posts on 1 August 2012 were graded on salary levels 10 and 12 and to appoint and remunerated them accordingly on salary levels 10 and 12 respectively." Clause 18.1 clarified the application of a previous resolution 3 of 2009 as follows: "clause 3.6.3.2 of PSCBC 3 of 2009 is hereby amended to allow employees whose posts were graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively."

[3] The applicants in the main application claim that the award which was made an order of court was not complied with by the Provincial Government in the Northwest Province in respect of certain employees. Because compliance with the order entails not merely the payment of a fixed sum of money but giving effect to appointments and ongoing remuneration which are acts *ad factum praestandum*, compliance with the order cannot be enforced by means of issue of a writ, but must be done by way of contempt proceedings.

[4] The Premier of the North West Province, as he was until his resignation the day before the interlocutory application, and the MEC for Finance are required to answer to the charge of contempt in their respective official capacities they held at the relevant time of the alleged failure of the Province to comply with the order. They are also required to defend themselves against ancillary charges of contempt for their failure to attend previous hearings of the main contempt application.

[5] The order issued on the last occasion of the postponement contempt hearing on 23 February 2018 reads:

> IT IS ORDERED THAT:
>
> 1. The contempt application in respect of the first and second respondents' failure to appear in court on 24 November 2017 is postponed or to 1 June 2018.

2. Further, the first and second respondents ("respondents") ordered to appear in the Labour Court on the 1 June 2 018 to show cause why they should not be found guilty of contempt of court for failing to appear in court on 23 February 2018 and why they should not be found guilty of contempt of not complying with the court order of this court handed down on 31 July 2015 attached as Annexure "A".

3. The respondents may explain their conduct in respect of their nonappearance on 24 November 2017 and 23 February 2018 by way of affidavit to be filed on 15 May 2018. The respondents are nonetheless required to appear on 1 June 2018.

4. In the absence of providing an explanation to the satisfaction of the court, or failing to appear in court despite being properly served, respondents may be found guilty of contempt and:

   4.1 the respondents may be incarcerated for such period as the court deems appropriate;

   4.2 the respondents may jointly and severally the find in an amount the court deems appropriate; or

   4.3 the court may order other alternative relief including the issue of a writ of arrest.

5. Service of this order must be affected personally on the respondents.

6. The first and second respondent shall pay the applicant's wasted costs of today's proceed on an attorney-client scale jointly and severally, the one paying the other to be absolved.

(emphasis added)

[6] In essence, the two applicants asked to be excused from attending the proceedings on the basis that they have already provided an explanation by way of affidavit and no further purpose could be served by their attendance at court. Their counsel, *Mr D Mtsweni*¸ contended that the order was similar to a subpoena issued to a witness to come and give evidence in court proceedings. As they have supposedly provided such evidence that they wish to lead in their defence by way of answering affidavits, there is no need for them to attend. He was reluctant to admit that there might be another purpose for the emphasised portions of the above order, which requires the parties who are called upon to answer the

charge of contempt to attend proceedings even if they have elected to set out their defence on affidavit.

[7] An additional consideration was advanced that, given the senior government positions held by the two applicants, the court ought to reconsider whether persons in such positions should be required to attend proceedings where they have furnished an explanation by way of affidavit for the conduct they are called upon to defend. In this regard, I was referred to the Constitutional Court decision in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1] in which the court dealt with the considerations which ought to be taken into account when subpoenaing the State President to give evidence in court.[2] The considerations which apply to calling a person in that office to testify are not analogous in my view to the situation where the person in question is called to answer charges of contempt, though naturally a court would consider how the demands of high office might necessitate accommodations at times. I do not see that judgment as providing a basis for a general argument of 'executive exceptionalism' for holders of public executive office, which might undermine the principle of equality before the law.

[8] It appears that perhaps, the nature of the proceedings has possibly escaped the applicants in the interlocutory application. Although the order they allegedly are in contempt of is an order of a civil court, the consequences of been found guilty of contempt are criminal in nature. In *Fakie NO v CCII Systems (Pty) Ltd*,[3] the SCA inter-alia said the following in explaining the nature of the offence:

> Contempt of court
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> [6] 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. The offence has, in general terms, received a

[1] 2000 (1) SA 1 (CC)

[2] At 106-107, paras [240] – [245].

[3] 2006 (4) SA 326 (SCA).

constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.

[7] The form of proceeding CCII invoked appears to have been received into South African law from English law and is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.

[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law. [4]

[9] The potentially serious consequences of been found guilty of contempt are set out in paragraph 4 of the order. The presence of the two applicants in the interlocutory application at their contempt hearing is not merely for the purposes of any further clarification they might wish to provide on their defence to the charges. The reason for still requiring the presence of accused parties in contempt proceedings, in my view, essentially relates to the criminal character and consequences of those proceedings. In criminal proceedings, it is a fundamental principle that an accused person must be present at the trial. This principle is embodied in section 158 of the Criminal Procedure Act, 51 of 1977, which states:

158. Criminal proceedings to take place in presence of accused

[4] At 332-333.

> (1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.

[10] The authors of *Du Toit: Commentary on the Criminal Procedure Act* pertinently observe that "(t)his principle is based upon the consideration that the court must be placed in a position to enable it to arrive at the truth, and the accused can properly conduct his defence only if he is present."[5] That consideration applies as much to the determination of any sanction flowing from a finding of contempt, when that sanction is criminal in nature. It is a rule of court procedure that is plainly designed to ensure the protection of the interests of the accused because of the potentially serious consequences of conviction and sentencing. The applicants might have a sanguine view of the merits of their defence to the charge of contempt and the likelihood of a sanction of incarceration being imposed in the event they are unsuccessful. Nonetheless, the course of court proceedings can be notoriously unpredictable and it is undesirable that the alleged contemners should not be present in court to ensure that every aspect of their defence is properly conducted, including if necessary issues of sentencing. It is not for this court to second guess the outcome of the contempt hearing based on the defence offered by the two applicants to determine if their presence is really needed. It would be premature of this court to consider the merits of their defence in weighing up whether the order should be varied to excuse their attendance.

[11] There may be circumstances where an alleged contemner's presence might nevertheless be partially excused, for example where preliminary points have to be dealt with before the merits can be entered, or where proceedings have commenced, or where the court is satisfied that there are sufficient safeguards established in the conduct of the proceedings, to ensure that no prejudice could be suffered by them on account of their non-attendance. But that is a matter for the court hearing the application and it is undesirable for the issue to be decided *in abstracto* in advance of such proceedings.

[5] Jutas ed, RS 52, 2014 ch4-p1

[12] In the circumstances, I am not satisfied that the reasons advanced by the applicants in this interlocutory application are sufficient to excuse their non-attendance at the contempt proceedings in advance of those proceedings.

Costs

[13] The applicants argued that the respondents had no interest in opposing the application because the application was a matter between the applicants and the court. That is difficult to understand. The respondents have been engaged over a considerable period to get the applicants to court so the contempt application can proceed. The basis for the application was slender and arguably was not urgent, but the respondents did not dispute the question of urgency. The respondents could hardly be indifferent to an attempt to effectively amend an important component of the court order. There is no reason why costs should not follow the cause in this matter.

Order

[1] The application was dealt with as one of urgency and non-compliance with the rules of court pertaining to time limits for filing pleadings and the like are condoned.

[2] The application is dismissed.

[3] The first and second applicants in this interlocutory application are jointly and severally liable for the costs of this application, the one paying the other to be absolved.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Adv. D. Mtsweni instructed by the State Attorneys
RESPONDENTS:	Mr. Sebola for Nchupetsang Attorneys