REPUBLIC OF NAMIBIA REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-GEN-2021/00006

In the matter between:

SHOPRITE NAMIBIA (PTY) LTD **APPLICANT**

And

NAMIBIA FOOD AND ALLIED WORKERS UNION **1st RESPONDENT**
SHOPRITE NAMIBIA (PTY) LTD'S STRIKING EMPLOYEES WHOSE NAMES APPEAR IN ANNEXURE "A" ATTACHED TO THE NOTICE OF MOTION **2nd RESPONDENT**
THE LABOUR COMMISSIONER **3RD RESPONDENT**
INSPECTOR-GENERAL OF THE NAMIBIA POLICE **4th RESPONDENT**

NAMIBIA FOOD AND ALLIED WORKERS UNION **APPLICANT**

And

SHOPRITE NAMIBIA (PTY) LTD **1st RESPONDENT**
PAULUS JOSHUA MALAN **2nd RESPONDENT**
WILLEM PIENAAR SCHALK **3RD RESPONDENT**
CHRISSTOFFEL JOHANNES LABUSCHAGNE **4th RESPONDENT**
CORNELIUS KOMOMUNGONDO **5th RESPONDENT**

Neutral citation: *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and Others* (HC-MD-LAB-MOT-GEN-2021/00006) [2020]

5 NALCMD (15 February 2021)

Coram: PARKER AJ
Heard: **26 January 2021**
Delivered: **15 February 2021**

Flynote: Contempt of court – Compliance with court orders – Court held that it is in the interest of due administration of justice and rule of law that court judgments and orders are obeyed – Party in whose favour judgment is granted has the right to approach the court to get the judgment obeyed by declaration – Disobedience may lead to a charge of contempt of court – Court held that further for the disobedience to be wilful to attract the charge of contempt it must be not casual, accidental or unintentional.

Summary: Contempt of court – Compliance with court orders – Court granted judgment ordering respondents not to violate statutory provisions governing strikes and not to breach terms of an agreement on strike rules concluded by the employer respondents and the employee counter-applicant – Respondents found to have disobeyed the judgment of the court – Court finding further that the disobedience was wilful as respondents placed no evidence before the court to establish that the non-compliance was casual or accidental or unintentional – Accordingly, court concluding that disobedience was wilful – Consequently, court determining that contempt has been proved and court convicting respondents.

ORDER

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1. It is declared that respondents are in contempt of the court's judgment and order made on 8 January 2021 under Case No. HC-MD-LAB-MOT-GEN-2021/00001 for the period 16H00 on 8 January to 15H00 on 13 January 2021.
2. Respondents are convicted of contempt.
3. Sentencing to stand over for consideration of evidence or statements in mitigation of sentence.
4. Costs to stand over for argument during the hearing of evidence or when considering of statements on mitigation.

5. The matter is postponed to 18 February 2021 at 9H00 for status hearing to enable the court to determine the further conduct of the matter.

JUDGMENT

PARKER AJ

[1] Before this court is a matter concerning an industrial action in the form of a strike, allegations and counter-allegations of the other party's non-compliance with applicable statutory provisions governing the proper conduct on the part of employers and their striking employees during a strike and strike rules agreed by the employer and the employer's striking employees; and a charge of contempt by the striking employees against the employer for the employer's disobedience of a court order granted previously. The employed instituted the application. The employees' trade union moved to reject the application and instituted a counter-application.

[2] The employer is Shoprite (Pty) Ltd and the employees are members of the Namibia Food and Allied Workers Union ('the Union') who are represented by the Union. The present counter-application is an ingrown proceeding in the application brought by Shoprite (applicant) wherein Shoprite prayed for some interdictory relief and an order directed at the Union to ensure that its striking members obeyed some aspects of the relief sought, and for the matter to be heard on urgent basis. I shall refer to these important facts in due course.

[3] In the application Shoprite is the applicant, and the Union the first respondent, the striking employees' second respondent, the Labour Commissioner third respondent, and the Inspector General of the Namibian Police fourth respondent. In the counter-application, the Union is applicant, and Shoprite is first respondent, Paul Joshua Malan second respondent, Chrisstoffel Johannes Labuschagne fourth respondent, and Cornelius Komomungondo fifth respondent.

[4] In the counter-application, applicant Union prays for an order in the following terms:

1. Declaring the respondents to have been in contempt of this honourable court's order handed down on 8 January 2021 under Case No: HC-MD-LAB-MOT-GEN-2021/00001 for the period of 8 January 2021, 16H00 to 13 January 2021, 15H00;
2. Convicting the respondents of contempt of this honourable Court;
3. Sentencing the second to fifth respondents to a fine each, or such other punishment as the honourable court may deem fit;
4. Ordering the first respondent to pay the costs of this application on a scale as between legal practitioner and client;

[5] At the commencement of the hearing of the matter, Mr Muhongo, counsel for applicant (in the application) first respondent (in the counter-application) and second to fourth respondents in the counter-application, submitted to the court that applicant in the application was withdrawing the application. The withdrawal having been accepted, Mr R Ketjiere, counsel for the GRN respondents withdrew his appearance from the proceedings, so did Mr Marcus, counsel for first and second respondent in the application.

[6] At the commencement of her submission, Ms Katjipuka-Sibolile, counsel for the counter-applicant, submitted that it was her information that fifth respondent was no longer a director of first respondent, and so, the counter-application has been withdrawn against him. Furthermore, counsel submitted that counter-applicant was no longer pursuing with paras 8-15 of the replying affidavit, and so those paragraphs should be considered as excised from the replying papers. Counsel proceeded to deal with two preliminary points raised by first respondent, namely, non-joinder of certain persons and urgency.

Urgency

[7] The respondents contend that the counter-application was not urgent, but the application was urgent. I fail to see the logic and sense in such contention. If an applicant prays the court for the court's indulgence that the application should be heard on urgent basis, it flies in the teeth of fairness and reasonableness for applicant to turn round and argue that the counter-application should not be heard on the basis of urgency. Indeed, it would not be fair or just, and neither would it be in the interest of due administration of justice if the court were to decide to hear an

application on urgent basis and decide that the counter-application should be heard in the ordinary course, when, as I have said, the counter-application is an ingrown proceeding in the application proceeding. What is good for the goose must be good for the gander!

[8] I accept Ms Katjipuka-Sibolile's submission that the issue of urgency ought to be considered – in a matter as the present – within the context of the application which led to the counter-application; and the application against which the counter-application was brought; and the applicant was brought as a matter of urgency. Furthermore, in a similar situation, the court in *Alexander Forbes Group Namibia (Pty) Ltd v Heinz Werner Ahrens* Case No. LC 75/2010, para 3, stated:

> "In the instant case the applicant has approached the court for the court to enforce its own judgment. In such a case, where therefore is some prima facie evidence supporting the applicant's allegation that the respondent has breached and continues to breach a valid order of the court different considerations should apply; as they should where the applicants basic human right guaranteed to him or her by the Namibian constitution has been violated or is being violated and threatened… it is always in the interest of the proper administration of justice and the dignity of the court, and, indeed, of the practicalization of the notion of the rule of law of the notion of the rule of law, which is one of the triadic ideals which nourish the very life and soul of the Namibian nation, to hear such application as a matter of urgency…"

[9] For these reasons and on the facts and in the circumstances of the case, I incline to reject respondent's challenge on urgency as I do.

Non-Joinder

[10] The bone marrow of respondents' contention is that counter-applicant did not join and serve second to fifth respondents, who were not parties to the proceedings that gave rise to the order which is the subject matter of the counter-application. According to Mr Muhango, counter-applicant 'has merely cited the second to the fifth respondents' in the counter-application.

[11] As I have said previously, the respondents in question should be the first to the fourth. It should be remembered, in the application, applicant cites only one applicant, which is an artificial person. Applicant did not see then the need in law to

include the directors of the applicant as co-applicants. It becomes necessary to cite the directors (second to fourth respondents) in the counter-application because they, as natural persons are responsible for the workings of first respondent, and the counter-application concerns contempt.

[12] As a matter of law, it was first respondent who could be in contempt through its directors. If first respondent is cited and served, in my view, it is not a good argument to say that all the directors should also have been cited and served. It is therefore not surprising, as counter-applicants' counsel submitted, that due to technical difficulties with e-justice, the directors could not be joined as respondents to the application; but they were served. Respondents have not pointed to any evidence to contradict counter-applicant's version. I hold, therefore, that second to fourth respondents are, like first respondent, properly before the court as respondents in the counter-application and they have been duly served, in any event. This holding disposes of the non-joinder challenge, which is also rejected. I now proceed to consider the substance of the counter-application.

The declaratory relief

[13] The relief the counter-applicant seeks is a declaration (in para 1 of the notice of motion: counter-application) paragraphs 2 and 3 are logical consequences of para 1. Para 1 is declaratory relief. In *Kennedy v Minister of Safety and Security* HC-MD-CIV-MOT-GEN-2017/00393 [2020] NAHCMD 291 (16 July 2020), the court stated as follows as respects declaratory orders:

'[17] The power of the court to grant declaratory orders is found in s 16 of the High Court Act 16 of 1990, and it provides that the court has the power-

(d)… in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[My emphasis]

[18] Thus, s 16 of act 16 of 1990 contains the power by which the court may grant a declaratory order and the requirements which the applicant must satisfy in order to succeed. 'The important element in this section is that the power of the court is limited to a question concerning a right.' (Government of the *Self-Government Territory of Kwazulu v*

Mahlangu 1994 (i) SA 626 at 634B, per Ellof JP) The crucial element in s 16 of Act 16 of 1990 is that the exercise of the court's power is limited to the question concerning a right-existing, future or contingent – which the applicant claims.'

[14] On the facts, I find that counter-applicant has the constitutional right to have a judgment granted in its favour obeyed and implemented; and it is such a right which ought to be protect by declaration; and the relief claimed would not be unlawful or inequitable for the court to grant (see *Kennedy* para 19). The counter-applicant, as I say, has the right to have court orders granted in its favour not rendered inoperative or disobeyed.

'Judgments, orders, are but what the courts are all about. The effectiveness of a court lies in execution of its judgments and orders. You frustrate or disobey a court order you strike at one of the foundations, which established and founded the State of Namibia. The collapse of a rule of law in any country is the firth of anarchy. A Rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded and protected'.

[15] On the papers, the facts are there for all to see that first respondent, through its directors, disobeyed the court's order of 8 January 2021. Doubtless, it is in the interest of due administration of justice and rule of law that court judgments and orders are obeyed (see *Sikunda v Government of the Republic of Namibia and Another* (2) 2001 NR 86 (HC)).

[16] I have said that the relief claimed will not be unlawful or inequitable for the court to grant. But Mr Muhongo submitted that owing to 'the seriousness of contempt orders, the adjudication in relation thereto must observe the rights of parties to be afforded sufficient time to place matter(s) engaging the requirements of the contempt of court' before the court. I agree: This is an important consideration. But in the instant matter, respondents would be behaving disingenuously if they said that they had not been afforded 'sufficient time to place matter(s) engaging the requirements of the contempt of the court' before the court. They were given sufficient time to do so in terms of the rules of court but they chose – which is their right – not to take advantage offered by the rules of court.

[17] It will not be unlawful and inequitable to grant the declaration despite the fact that respondents have noted an appeal against the order of the court which, as I have said previously, gave rise to the counter-application. The purpose of the rule (i.e. r 121(2) of the rules of court) is, as stated by Cobett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), this:

It is today accepted common law rule of practice in courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal… 'the purpose of this rule as to suspension of a judgment on the noting of the appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment or in any other matter appropriate to the nature of the judgment appealed from.' (Underlining in original text)

[18] The use of the word 'generally' by the court is instructive. It is a rule of procedure and is cast in general terms. It cannot be applied mechanically, overlooking considering the facts of the particular case without being a *reductio ad absurdum*. Take, for instance, a case where **X** institutes review proceedings to challenge **X**'s unlawful arrest and detention and torture while in such detention. The court reviews and sets aside the arrest, detention and torture on 8 January 2020. The respondent failed or refused to release **X** or desist from torturing **X**; and respondent notes an appeal against the judgment granted on 13 January 2020. Respondent argues, as does Mr Muhango, that the noting of the appeal has suspended the judgment. The upshot of this is that, in our illustration, respondent was at liberty to continue to detain **X** unlawful and torture her while she was in the unlawful detention, pending the appeal, because the judgment cannot be carried out and no effect can be given to it, except with the leave of the court that granted the judgment.

[19] Doubtless, the rule maker did not intend such harsh and unlawful consequences. Indeed, this is an appropriate matter where the purpose of the rule ought to be taken into account in interpreting and applying r 121 (2) of the rules. As I have said, the purpose of the rule is to prevent irreparable damage from being done to the intending appellant. In that regard, it is my view that it is in the interest of due

administration of justice and the promotion of rule of law to determine the counter-application even if an appeal has been noted. I do not think an irreparable damage will be done to respondent because respondent can appeal the judgment this court grants, and the execution of the judgment can be suspended until the Supreme Court determines the appeal.

[20] Such route is sensible and reasonable, because the respondents may decide not to pursue the appeal that they have noted; and if that happened and this court had not heard the counter-application, then respondents would have gone scot-free. Indeed, the court has jurisdiction to determine the instant matter on the basis of it's inherit jurisdiction (*Haindongo Shikwetepo v Khomas Regional Council* Case No. A364/2008) because dictates of real and substantial justice require it. (*Witvlei Meat (Pty) Ltd v Agricultural Bank of Namibia and Another* 2014 (1) NR 22 (HC)) In the instant matter, dictates of real and substantial justice require that the counter-application be heard. We are dealing with crucial issues of vindication of a constitutional right and promotion of rule of law.

[21] As I have found previously that those respondents did disobey the court order of 8 January 2021 and set it at naught in the period between 8 January 2021 is put beyond debate and contestation. But that is not the end of the matter. One of the important elements of contempt application is that the party to be held in contempt must be in wilful disobedience to a lawful court order.

[22] The application before the court (*Coram* Ueitele J) was argued fully by both counsel and a full and reasoned judgment was delivered, as Ms Katjipuka-Sibolile submitted. Counsel for respondents were in court to take the judgment; and so, in the absence of contrary evidence, I am satisfied that respondents have notice of the judgment, and they understood it, but they chose – without any justification – to disobey the order made then. Respondents breached the order and continued to do so, at least in the period set up by counter-applicants. In civil contempt, the form of contempt can only be committed intentionally; and the intention is constituted by the wilful breach, without more, of an order of the court; and 'wilful' means 'not casual or accidental or otherwise unintentional'. (*Alexander Forbes Group Namibia (Pty) Ltd v Heinz Werner Ahrems* Case No. LC 75/2010, para 6) No evidence is placed before

the court tending to establish that the breach was ‘casual or accidental or otherwise unintentional’.

[23] It was said by Shivute CJ in *Teachers Union of Namibia v Namibia National Teachers Union and Others* Case No SA 26 /2019, para 11 that –

‘The test for contempt is that an applicant must prove the elements of contempt beyond reasonable doubt; once applicant has proved the order, its service or notice to the respondent as well as non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides. Should the respondent fail to advance evidence establishing a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. A declarator and other remedies are still available to a civil applicant on a balance of probabilities.’

[24] In the instant case, I have found that the counter-applicant has proved the order, notice to the respondents, and non-compliance on the part of respondents. Respondents have not discharged the evidential burden cast on them in relation to wilfulness and mala fides. They have not placed evidence tending to establish that the non-compliance was ‘casual or accidental or unintentional’ (see *Alexander Forbes Group Namibia (Pty) Ltd* loc cit); and so, in my judgment, the contempt has been established beyond reasonable doubt. Consequently, the counter-applicant is entitled to the declarator sought in para 1 of the notice of motion: counter-application which concerns the respondents being found in contempt.

[25] In the result I order as follows:

1. It is declared that respondents are in contempt of the court’s judgment and order made on 8 January 2021 under Case No. HC-MD-LAB-MOT-GEN-2021/00001 for the period 16H00 on 8 January to 15H00 on 13 January 2021.

2. Respondent are convicted of contempt.

3. Sentencing to stand over for consideration of evidence or statements in mitigation of sentence.

4. Costs to stand over for argument during the hearing of evidence or when considering of statements on mitigation.

5. The matter is postponed to 18 February 2021 at 9H00 for status hearing to enable the court to determine the further conduct of the matter.

C Parker

Acting Judge

APPEARANCES:

APPLICANT:	T Muhongo with K Haraseb Instructed by LorentzAngula Inc. Windhoek
1st & 2nd RESPONDENT:	U Katjipuka-Sibolile with N Marcus Instructed by Nixon Marcus Public Law office Windhoek