



REPORTABLE

CASE NO: SA 26/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TEACHERS UNION OF NAMIBIA

Appellant

and

NAMIBIA NATIONAL TEACHERS UNION

First Respondent

SIMEON KAVILA

Second Respondent

BASILIOUS HAINGURA

Third Respondent

Coram: SHIVUTE CJ, SMUTS JA and HOFF JA

Heard: 24 March 2020

Delivered: 7 May 2020

Summary: The appellant and the first respondent are both trade unions operating in the public service. Both unions compete for members (teachers). Members would regularly resign from one union to join the other. When a member resigns, the union from which the member resigns is expected to cease deductions of membership fees from the salary of the concerned former member.

Appellant claimed that the first respondent had deliberately been failing to stop deductions from the salaries of teachers who had resigned from it and had joined the appellant despite having been made aware of the resignations. As a consequence, the appellant instituted proceedings in the Labour Court against the first respondent to resolve the dispute. The parties reached a settlement agreement that was later made an order of court. Due to what appellant perceived to be a blatant refusal by the first respondent to comply with the court order, the appellant brought an application in the Labour Court on notice of motion for an order, amongst others, convicting the second and third respondents (who were responsible for the administrative functions in first respondent) of contempt of court and for the imposition on them of an 'appropriate criminal sanction.' The respondents opposed the application and claimed that the members whose dues they failed to stop deducting from their salaries had not resigned from the first respondent in compliance with constitutional and administrative procedures effecting a valid resignation. The appellant's response to respondents' averments was to generally deny that the factual issues were correct, without offering an alternative construct, if any.

Both parties sought condonation from the court for the late filing of the bond of security; the power of attorney and the heads of argument on the part of the appellant, an application for condonation was made on behalf of the appellant. The respondents failed to file the power of attorney on behalf of the second and third respondents on time and the condonation application for the neglect was moved from the bar only after the omission was brought to the attention of the respondents' legal practitioner.

On appeal, the Supreme Court, applying the principles set out in *Fakkie v CCII (Pty) Ltd* 2006 (4) SA 326 (SCA), had to decide whether the appellant has proved the elements of contempt of court beyond reasonable doubt and whether the respondents have shown that they were not wilful and *mala fide* in disobeying the court order.

Held, as the abridgement of the notice of set down in this matter may have contributed to the lapse in the proper observance of the rules of court, condonation for the failure to comply with the various rules of court without having to consider the principles ordinarily applicable to applications for condonation for the failure to comply with court rules should be granted.

Held, this exceptional dispensation, however, is not intended to be a precedent nor should it be misconstrued as such. It cannot be emphasised enough that the rules of court are important mechanisms for the smooth running of the court and it is imperative that legal practitioners intending to practice at the Supreme Court should study the rules thoroughly to ensure that they apply them correctly. After all, there are only a few key rules that the practitioner should be familiar with and observe to file an appeal in the Supreme Court correctly thereby avoiding costly and sometimes fatal consequences for non-compliance.

Held, there is reasonable doubt whether the non-compliance of the settlement agreement was wilful and *mala fide*.

Held, it is reasonable to infer that the decision not to comply with the court order was either taken on legal advice or at any rate was based on a different understanding or interpretation of the agreement.

Held that, contempt of court has not been established beyond reasonable doubt and that the court below was correct in its dismissal of the application.

APPEAL JUDGMENT

SHIVUTE CJ (SMUTS JA and HOFF JA concurring):

Introduction and preliminary issues

[1] This matter was set down for hearing following the withdrawal of the appeal that was initially set to be argued on 24 March 2020. The legal practitioners on both sides indicated that they were ready to argue the appeal at short notice. It is therefore not surprising that in an effort to ensure that the matter is argued as undertaken, a number of non-compliances with the rules of court were observed on both sides. On the appellant's side, the bond of security was filed late; the power of attorney was filed late, and the heads of argument were also filed late. An application for condonation for these infractions was subsequently filed. The respondents did not fare better either. They failed to file the power of attorney on behalf of the second and third respondents on time and the condonation application for the neglect was moved from the bar only after the omission was brought to the attention of the respondents' legal practitioner. It is also not surprising that none of the applications for condonation has been opposed by either side.

[2] As the abridgement of the notice of set down in this matter may have contributed to the lapse in the proper observance of the rules of court, we should grant condonation for the failure to comply with the various rules of court without having to consider the principles ordinarily applicable to applications for condonation for the failure to comply with court rules. This exceptional dispensation, however, is not intended to be a precedent nor should it be misconstrued as such. It cannot be emphasised enough that the rules of court are important mechanisms for the smooth running of the court and it is imperative that legal practitioners intending to practice at the Supreme Court should study the rules thoroughly to ensure that they apply them correctly. After all, there are only a

few key rules that the legal practitioner should be familiar with and observe to file an appeal in the Supreme Court correctly thereby avoiding costly and sometimes fatal consequences for non-compliance.

Background

[3] With the applications for condonation having been disposed of in this fashion, the brief facts of the appeal should be presented next. The appellant and the first respondent are both trade unions operating in the public service. The second respondent is the President of the first respondent while the third respondent is its Secretary-General. The two officials are said to be responsible for the administrative functions in the first respondent. As trade unions operating in the same sector, targeting principally educators, the appellant and the first respondent naturally compete for members. Members would regularly resign from one union to join the other. When a member resigns, the union from which the member has resigned is expected to cease deductions of membership fees from the salary of the concerned former member. It is obviously also in the interests of the new union and its newly acquired member that the latter deducts the fees for the former from his or her salary. The cessation of deductions by the union resigned from is also in the best interests of the former member for this additional reason: the failure to do so on time may result in the deductions being made by two unions, including the one the member has resigned from, to the obvious disadvantage of the member concerned.

[4] The appellant claimed that the first respondent had deliberately been failing to stop deductions from the salaries of teachers who had resigned from it and had joined the appellant despite having been made aware of the resignations. As a consequence, the appellant instituted proceedings in the Labour Court against the first respondent to resolve the dispute. The parties reached a settlement

agreement that was subsequently made an order of court. The salient terms of the settlement agreement were recorded as follows, and they are quoted verbatim:

- '(a) Each union will stop deductions from the salaries of teachers who resigned within two months from receiving such notification;
- (b) Each union will compile a list of resignations and membership applications and deliver the same to the other union at the end of each month;
- (c) Each union will cause a copy of the list received from the other union to be date stamped and returned which copy shall then serve as proof of delivery;
- (d) Each union shall act in good faith and shall not unduly delay the cancellation of membership deductions once notified; and
- (e) This agreement shall be made an order of court and shall be binding upon the parties.'

[5] The appellant alleged that despite the delivery of the termination of membership notices on the respondents, the respondents simply acknowledged receipt of the notices, date stamped them but they never cancelled the deductions of the 'resigned' former members. Later, the respondents flatly refused to accept the notices of termination and continued to deduct membership fees from the salaries of the affected members. The first respondent also ignored repeated demands from the appellant to stop making deductions from the salaries of persons who, in the understanding of the appellant, had resigned from the first respondent. As a result of what the appellant perceived to be a blatant refusal to comply with a court order, the appellant brought an application in the Labour Court on notice of motion for an order, amongst others, convicting the second and third

respondents of contempt of court and for the imposition on them of an 'appropriate criminal sanction'.

[6] The application was opposed by the respondents. In the principal answering affidavit deposed to by the third respondent, it was contended in relation to the allegation that the respondents had failed to comply with the court order, that the relationship between the first respondent and its members was regulated by the first respondent's constitution. Membership in the first respondent could terminate by way of a written notice given to the respondent. With respect to the termination of membership, it was contended that 'administratively and for purposes of authentication, the first respondent requires the member terminating his or her membership in the first respondent to furnish the first respondent with his or her identity document (or a certified copy thereof); his or her pay slip (or a certified copy thereof), and a sworn statement speaking to an intention to terminate his or her membership'. It was maintained that the respondent could only entertain a termination of membership effected in line with its constitution and administrative procedures and that the settlement agreement did not provide otherwise.

[7] In its replying affidavit, the appellant did not, in any meaningful way, respond to this factual issue. It simply denied the content of the paragraphs containing the allegations of how membership in the first respondent may be terminated and argued that it was the first respondent's responsibility to stop deducting money from the resigned members' salaries. It also argued that the first respondent's constitution could not trump a court order. The consequences of the

failure to deal with pertinent allegations in the first respondent's evidence will be dealt with later in the judgment. For now, it is opportune to briefly present the legal position on 'civil' contempt of court.

The law on contempt in civil proceedings

[8] 'Civil contempt' occurs where a party to a civil case against whom a court has given an order, intentionally refuses to comply with it.¹ The procedure for bringing proceedings is that in the event of non-compliance with a court order, a private litigant who had obtained a court order against an opponent re-approaches the court in another civil proceeding to obtain a further court order declaring the non-compliant party in contempt of court and imposing a criminal sanction on such party. In the hands of a private party, the application for committal for contempt of court has been described as 'a peculiar amalgam', because it is a civil proceeding that seeks a criminal sanction.² The form of proceeding has however been accepted and hailed as a valuable mechanism whose primary purpose is to serve the broader public interest in ensuring that court orders are not disregarded, as doing so 'sullies the authority of the courts and detracts from the rule of law'.³

[9] In South African common law, the pre-constitutional test as to whether disobedience of a court order constituted contempt of court had traditionally been whether the breach was committed 'deliberately and *mala fide*'.⁴ As to the proof of contempt, the pre-constitutional approach in that jurisdiction had been that once

1 CR Snyman *Criminal Law* 6 ed (2014) at 325.

2 *Fakkie v CCII (Pty) Ltd* 2006 (4) SA 326 (SCA) para 8.

3 *Id.* Para 7.

4 *Jayiya v Member of the Executive Council for Welfare, Eastern Cape & others* 2004 (2) SA 611 (SCA) para 18.

the person seeking to enforce a court order established that the order had been granted and served on or brought to the contemnor's notice, wilfulness and *mala fide* would normally be inferred.⁵ The onus was on the alleged non-complier to rebut this inference on a balance of probabilities.⁶ The majority in *Fakkie v CCII*, developing the common law in line with the new constitutional ethos, held that constitutional values did not permit a person to be put in prison to enforce compliance with a civil order when the elements of the crime were established only on a balance of probabilities as opposed to the criminal standard of proof beyond reasonable doubt.⁷

[10] Cameron JA, speaking for the majority, reasoned that this was so because of considerations of liberty and coherence. On liberty, the learned judge of appeal opined that it was a fundamental tenet of the constitution that a person should not be deprived of liberty - even if the purpose is to ensure compliance with a court order - when the requisites are established only preponderantly and not conclusively.⁸ As to coherence, whatever the applicant's motive in bringing contempt proceedings may be, committal for contempt of court serves a high public purpose of maintaining the rule of law. As such, this noble objective should be pursued only if there is no reasonable doubt that contempt has been established.⁹

⁵ *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) at 367-368.

⁶ *Id* at 367J.

⁷ Para 19.

⁸ Para 20.

⁹ *Id*.

[11] Accordingly, the court held as follows: that the civil contempt procedure was a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny; that the respondent in such proceedings is not an accused person, but he or she is entitled to analogous protections appropriate to motion proceedings; the test for contempt of court is that an applicant must prove the elements of contempt of court beyond reasonable doubt; once the 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.¹⁰

[12] The legal practitioners of the parties in this case did not take issue with the approach adopted in *Fakkie*. On the contrary, each counsel submitted that it represents a correct restatement of the law on 'civil' contempt. It is to be noted that the approach adopted by the majority in *Fakkie* was applied by our courts, in this matter and also by the High Court in a matter referred to in the judgment of the court below. Cameron JA's insightful exposition of the law is a paradigm shift from the position where a respondent in a civil contempt proceeding could prove the non-compliance with a court order on a balance of probabilities in circumstances where the respondent faced a real threat of a criminal sanction.

¹⁰ Para 42.

[13] I respectfully agree that this approach did not accord sufficient protection to the alleged contemnor. The new approach that fully takes into account the reality that civil contempt has the characteristics of both the civil and the criminal law and that it should therefore be fully compliant with the constitutional provisions of a fair trial is to be preferred. The approach adopted in the majority judgment - rendered with characteristic clarity of thought and forceful reasoning - resonates with the values set out in our constitution, and also with Article 12 thereof. As such, it is a sound approach that should be followed by our courts.

Application of the law to the facts

[14] In line with the approach in *Fakkie*, the appellant has shown that the order of court the respondents are said to have violated was made; that such order was known by the first respondent as it was party to its making, and that the first respondent did not comply with the order. These facts were established beyond reasonable doubt. It follows that the respondents bore the evidential burden in relation to the requisites of wilfulness and *mala fide*. Should the respondents fail to advance evidence establishing a reasonable doubt as to these elements, contempt of court will have been established beyond reasonable doubt. It is necessary therefore to return to the consideration of how the parties have dealt with the factual matrix of the dispute.

[15] It will be recalled that on the crucial question whether the non-compliance was wilful and *mala fide*, the respondents' position, in effect, was that the members whose dues they failed to stop deducting from their salaries had not resigned from the first respondent. This, so they contended, was because the

purported resignations did not comply with constitutional and administrative procedures in effecting a valid resignation. They further maintained that the correct procedure for resignation was communicated to the appellant on 1 June 2018. The appellant's response to these averments was to generally deny that the averments were correct, without offering an alternative construct, if any. It was not pointed out, for example, that a particular former member had resigned from the first respondent without following the structures alleged by the respondents or that the agreement that was made a court order had somehow contemplated or provided for a different procedure.

[16] It is understandable that the appellant could not contend that the settlement agreement had provided for a different procedure as the agreement in question although using the words 'resign' and 'resignation', does not define them. The agreement does also not provide that notwithstanding the provisions of the unions' constitutions, 'resign' and 'resignation' meant something different, if the intention was possibly to override the procedure of resignation set out in the first respondent's constitution and its administrative protocols. Counsel for the appellant argued that the termination of membership clause in the first respondent's constitution does not reflect the procedure alleged in the answering affidavit. That may be so, but the real difficulty at least from the appellant's point of view, is that the relevant allegations in the answering affidavit address a factual position that has not been traversed in reply.

[17] The appellant did not seek to refer the specific factual dispute to oral evidence nor did it call for the cross-examination of the deponent to the answering

affidavit on the issue. The respondents' version is also not clearly untenable or so far-fetched that it can be rejected on the papers alone.¹¹ In those circumstances, there is a reasonable doubt whether the non-compliance was wilful and *mala fide*. It is reasonable to infer that the decision not to comply with the court order was either taken on legal advice or at any rate was based on a different understanding or interpretation of the agreement. It would follow that contempt of court has not been established beyond reasonable doubt and that the court below was correct in its dismissal of the application.

Costs

[18] The costs issue is to be addressed at two levels: first, the court order made in the Labour Court and last the costs of the appeal. The Labour Court made a costs order against the appellant. Section 118 of the Labour Act 11 of 2007 provides that 'despite any other law in any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous and vexatious manner by instituting, proceeding with or defending those proceedings'.

[19] There was no finding in the judgment of the Labour Court that the appellant acted in a frivolous or vexatious manner in instituting or maintaining the proceedings. Indeed, there can be no basis for such a finding. Therefore, the costs order appears to have been made inadvertently and ought to be corrected. As to the costs in this court, my understanding is that s 118 of the Labour Act is not of application to proceedings in the Supreme Court. Moreover, as there is no good

¹¹ On the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA (A) approach to motion proceedings, it must be accepted.

reason why the costs should not follow the result, the appellant should be ordered to pay the costs of the appeal.

Order

[20] In the event, the following order is made:

(a) The application by the appellant for condonation for the late filing of its bond of security, power of attorney and heads of argument is granted.

(b) The application for condonation by the second and third respondents for the late filing of their power of attorney is granted.

(c) The order of costs made in paragraph [30] (a) of the judgment of the Labour Court is set aside and substituted for the following order:

‘No order as to costs is made.’

(d) The appeal is dismissed with costs, such costs to include the costs of one instructing legal practitioner and one instructed legal practitioner.

SHIVUTE CJ

SMUTS JA

HOFF JA

APPEARANCES

APPELLANT:

S Rukoro

Instructed by Kanguuehi

and

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RESPONDENTS:

A W Boesak

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