

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.43/2014
CIV/APN/145/2010

In the matter between:-

THE DIRECTOR OF STATISTICS

1ST APPELLANT

MINISTRY OF FINANCE

MINISTER OF FINANCE AND

DEVELOPMENT PLANNING

2ND APPELLANT

MINISTER OF PUBLIC WORKS

3RD APPELLANT

THE ATTORNEY-GENERAL

4TH APPELLANT

and

MPHO MALEFANE

RESPONDENT

CORAM: SCOTT, A.P
 FARLAM, J.A
 CLEAVER, A.J.A

HEARD: 16 OCTOBER 2014
DELIVERED: 24 OCTOBER 2014

SUMMARY

Contempt order against public servant resulting from claim against Ministry – Whether in circumstances failure to comply with order to purge contempt renders public servant liable to imprisonment.

JUDGMENT

CLEAVER A.J.A

[1] This is an appeal against an order of the High Court in terms whereof the first appellant was sentenced to a period of six (6) months imprisonment, suspended for twelve months on condition that within the period *“she sees to it that she complies with the order of Court.”*

[2] The order, which is an unusual one, will be better understood once the history of the matter is recorded.

[3] In April 2010 the respondent, who had been employed by the Ministry of Finance and Development Planning (“The Ministry”) as a driver, applied on motion to the High Court for an order in the following terms:

1. *Declaring an act of Director of Statistics, Ministry of Finance and Development Planning of dismissing the Applicant from employment as unlawful.*
2. *Declaring Applicant to be permanently employed regard being had to the inordinately long period of time that he has being [sic] employed.*
3. *Directing the Respondents to reinstate Applicant to his job without loss of all his rights.*

4. *Directing the Respondents to pay to Applicant all arrear salaries from date of dismissal to date of reinstatement.*
5. *Directing the Respondents to pay Applicant the outstanding amount of subsistence [sic] allowance in the amount of M30,550 (Thirty thousand five hundred and fifty Maluti) which is due and payable to the Applicant.*
6. *Cost of the application to be granted to the Applicant herein.*

The notice of motion included an alternative prayer which is not relevant to the appeal.

I should mention that in the founding affidavit the respondent avers that his employment was “under the Department of Statistics at Maseru.”

[4] Surprisingly, in view of the fact that both the director of a government department and ministers of the government were cited as respondents, there was no opposition to the application, and on 19 April 2010 the Court granted, by default, the orders sought in the notice of motion, including the prayer for payment of M30,550.

[5] On 7 June 2010 the High Court ordered execution of the judgment of 19 April 2010 to be stayed pending finalization of the

application. This was granted on the strength of an affidavit filed by a legal officer in the employ of the Ministry. After furnishing an explanation as to why opposition to the application had not been entered, she recorded the defence of the Ministry to the respondent's claim. This was to the effect that while the respondent had previously been employed as a driver on an informal basis by the Bureau of Statistics, that employment came to an end in 2006. Thereafter the respondent and other drivers were engaged for successive contractual periods of 6 months until March 2009, whereafter the drivers were not re-employed.

She averred finally that *"Equally worthy of notice is that the order received is impossible to effect because the Respondent is not in the employ of the Bereau [sic] of statistics alleged, this employment terminated in 2006 and consequently he even received his severance pay."*

[6] A replying affidavit was filed by the respondent in which he avers that he was wrongfully dismissed as he had been permanently employed.

[7] Regrettably there was once more no appearance for the appellants when the matter came before the High Court on 7 February 2013. On that day the Court once again made the orders sought in the original notice of motion (See para [3]).

[8] The next step in this sorry chapter of events was an application to the High Court for an order:

- (1) Calling on the 1st and 3rd Appellants to appear before the Court to explain why they should not be committed for being the contempt of the order of 7 February 2013 and
- (2) *“That the respondent herein be found guilty of contempt and be imprisoned for six months, alternatively they be dealt with on such terms as the Honourable Court may deem appropriate.”*

[9] The application was heard by Hlajoane J on 20 November 2013 when the appellants were represented. The learned Judge issued the following order:

“Respondents are Ordered to Purge their Contempt on or before the 5th day of December 2013 failing which 1st respondent is Ordered to appear personally before Court on the 5th December 2013 to show cause why she cannot be committed to prison for contempt of Court.”

Significantly, the first respondent was singled out in the order as the official who was to ensure compliance with the order.

[10] Counsel informed us that on 5 December 2013 the court below, by agreement between the parties, referred the matter for mediation. Mediation failed and the first appellant then belatedly filed her answer to the committal application. Although the first appellant is cited as “The Director of Statistics, Ministry of Finance”, the deponent records that she is employed as the Director of Statistics at the Ministry of Development Planning. She explains that it has always been the intention of the appellants to comply with orders of the Court but avers that in the present case it was impossible to do so and also that it was not in the interests of justice to comply with the Court order.

To explain this stance she amplifies in considerable detail the defence put up the answer to the founding affidavit (See para [5]). The gist of this is that the arrangements in terms of which the respondent had previously been employed as a driver by the Department of Statistics terminated finally on 21 March 2009 and that he had been paid all that was due to him. This would of course have been a perfectly arguable defence to the respondent’s claims had it been put before the court initially in answer to the claim. As to the impossibility to comply with the order, the first appellant says that the respondent cannot be reinstated as the

position he previously occupied does not exist. It would seem that she regards it impossible to comply with the order for payment as there is nothing owing to the respondent, again something which she would have been able to assert had there been an appearance for the appellants at the hearings on 19 April 2010 and 7 February 2013.

[11] In the final paragraph of her affidavit the deponent points out that she is not the Chief Accounting Officer of the Ministry of Development Planning and as such she cannot reinstate the respondent or pay him any monies. By law, only the Principal Secretary has such authority, she contends.

[12] The appellants were given an opportunity to show why they had not purged their contempt but Hlajoane J did not accept the explanation put up by the first appellant when the matter was argued before her and on 12 June 2014 granted the committal order referred to in para [1].

[13] Two grounds of appeal were advanced before us, namely that:

- (1) The first appellant was not wilful or *mala fide* in not complying with the order, and
- (2) The first appellant could not be found guilty of contempt to a claim sounding in money.

[14] In my opinion the appeal must succeed on both of these grounds.

[15] In Fakie No v CCII Systems (Pty) Ltd 2006 (4) SA 326 (A) 333 para 9 Cameron JA explained the test to be applied to ascertain whether disobedience of a court order constitutes contempt of the order as follows:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”
(Footnotes omitted)

The contention of the first appellant that the office which she holds in the Ministry does not provide her with authority either to reinstate the respondent or pay any monies to him appears to be sound in law. It is the Principal Secretary of the department who has authority to perform these acts and not she. Clearly then,

her disobedience of the order cannot be said to have been committed deliberately and *mala fide*.

[16] It is trite that save for an order for the maintenance of one whom the judgment debtor is liable to maintain a judgment for the payment of money cannot be enforced by contempt proceedings, and must be enforced by execution. See Jayiya v MEC For Welfare, Eastern Cape and Another 2004 (2) SA 611 (SCA) at para 15. The appeal must therefore also succeed on this ground.

[17] The fact that the appeal must succeed is not the end of the matter, for the respondent has had a judgment in his favour since 7 February 2013 which has still not been satisfied. That such a sorry state of affairs exists is due to the flagrant and repeated failure by the representatives of two ministries and the Attorney-General to comply with the rules of court. Mindful of this counsel for the Appellants indicated that in the event of the appeal succeeding, he would not seek a costs order. That was a wise and proper decision.

[18] The appeal succeeds and it is found that the first appellant did not deliberately and *mala fide* disobey the order of the High Court.

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree:

D.G. SCOTT
ACTING PRESIDENT OF APPEAL

I agree:

I.G. FARLAM
JUSTICE OF APPEAL

For Appellants : M. Moshoeshoe
For Respondent : K. Metsing

