

IN THE HIGH COURT OF LESOTHO

In the matter between:

MPHO MALEFANE

Applicant

and

**THE DIRECTOR OF STATISTICS
MINISTRY OF FINANCE**

1st Respondent

MINISTER OF FINANCE AND DEV. PLANNING
Respondent

2nd

MINISTER OF PUBLIC SERVICE
ATTORNEY - GENERAL

3rd Respondent

4th Respondent

JUDGMENT

Coram:

Hon. A. M. Hlajoane

Date of Hearing:

**9th July, 2010, 7th February, 2013, 21st
November, 2013, 30th May, 2014.**

Date of Judgment:

12th June, 2014.

Summary

Applicant having been granted default judgment twice after 1st rescission application. Respondents having failed to file opposing papers and time for filing same having lapsed – Respondents having failed to comply with the order at Court but raising defence in the answering papers which were filed long after default judgment had been granted – Respondents having failed to purge her contempt and given a suspended sentence with a condition to comply within period of suspension.

Annotations

Statutes

- 1. Herbstein and Van Winsen, The Civil Practice of the High Court of South Africa 5th Edition Vol.2**

Books

Cases

- 1. Consolidated Fish Distributors (Pty) Ltd v Zive 1968 (2) S.A. 517 at 522**
- 2. Fikile No v CCII Systems (Pty) Ltd 2006 (4) S.A. 326 at 333 and 334**
- 3. Witham v Holloway (1995) ALR 401 (Australian High Court)**
- 4. Minister of Water Affairs and Forestry v Stilfontein GM Co. 2006 (5) S.A 333 at 353**

[1] Applicant instituted application proceedings with prayers couched in the following manner:-

- (a) Declaring the act of 1st respondent of dismissing applicant from employment as unlawful.
- (b) Declaring applicant to be permanently employed regard being had to the inordinate long period of time that he has been employed.
- © Directing the respondents to reinstate applicant to his job without loss of his rights.
- (d) Directing the respondents to pay applicant all arrear salaries from date of dismissal to date of reinstatement.
- (e) Directing the respondents to pay applicant the outstanding amounts of subsistence allowance in the amount of M30, 550.00 which is due and payable to the applicant.
- (f) Costs of this application.

ALTERNATIVELY

- (a) Directing the 1st respondent to comply with circular Savingram MPS/TRG/OP1.
- (b) Granting applicant further and / or alternative relief.
- (c) Costs of this application.

- [2] The Application was filed on the 17th March, 2010. The return of service shows that the respondents were served on the 18th March, 2010 and that is also evidenced by their date stamp impressions on the original copy of the Application.
- [3] The respondents were allowed 14 days within which to notify the applicant of their intention to oppose. The respondents failed to show their intention and on the 19th April, 2010 applicant approached Court for a default judgment. Default judgment was accordingly granted.
- [4] The final Court Order was made and served on all the respondents on the 23rd April, 2010. On the 31st May, 2010 the respondents filed an application for rescission of judgment. Counsel on both sides appeared before Court on the 9th July, 2010 to deal with the application for rescission.
- [5] Counsel for respondent did not oppose the application for rescission, though they had filed intention to oppose. The application for rescission was thus by agreement of both sides accordingly granted.
- [6] The respondents in the main application after having been granted the rescission did nothing from 9th July, 2010 till 2013. The applicant then filed a notice of set down which was served

on the respondents. The respondents despite service of the set down for 7th February 2013 made no appearance. The set down was served on respondents as far back as 19th June, 2012.

- [7] The Court granted the order of default judgment for the second time as respondents had failed to file any opposing affidavits. This effectively meant that the initial order was reinstated. This order was served on the respondents during March, 2013.
- [8] On the 5th August, 2013 the applicant filed contempt of Court proceedings. The papers were served on the respondents on the 8th August 2013 notifying them to appear before Court on 26th August 2013.
- [9] The matter was set down for hearing on 21st November, 2013 to argue the contempt issue. On that day counsel for applicant showed that the respondents were in contempt and indeed counsel for the respondents agreed with him that his clients were in fact in contempt of the order of the Court which had ordered them to pay and reinstate applicant.
- [10] The respondents were however allowed some two weeks within which to purge their contempt. After that parties tried to go for mediation which however failed.

[11] It was only on the 20th January 2014 when respondents sought to file notice of intention to oppose and answering affidavit. As it could be seen the two were way out of time and misplaced. We had long passed that stage in 2013. What respondents were left with was to comply with the final order of this Court.

[12] Parties were however allowed to file their heads on the issue of contempt. The issue being whether 1st respondent is to be committed to prison for contempt and having failed to purge her contempt.

[13] As applicant put it the order to purge contempt is like a mitigating factor as a party would be given a chance to mitigate. A party will not be committed to prison if he has purged his contempt, and the fact that he will have purged will safe him from going to prison.

[14] The background of this application being that the applicant was employed on temporary basis as a driver under the 2nd respondent on 1st February, 2002. His employment was terminated by a letter dated 9th May 2009. He was duly paid his severance pay. When applicant was so employed in 2002 he was deployed and or transferred to Thaba-Tseka and later in 2004 transferred to Maseru. During 2009 he was transferred to Qacha's Nek.

[15] It has been the applicant's case that during the census in 2006 he together with other employees were made to sign an agreement which he considered as a fixed contract. That again in 2007 were presented with the same paper for their signatures. The document is attached to his papers as CENSUS. The document was for period 1st April 2008 to 30th September 2008. But this could not be so as it was for a fixed period.

[16] Applicant considered himself to have been permanently employed as when he was engaged in 2002 he was never made to sign any contract. He also referred to Annexure "CS" at page 13 of the record which is a circular savingram from Ministry of Public Service, addressed to Directors and Human Resource Managers.

[17] The savingram notified Ministries as a reminder of **Public Service Circular 18 of 2008**. They were notified of coming into effect of Public Service Regulations 2008 from 2nd June 2008. The **Regulations at 8 (12)** provided for the terms of all serving officers appointed in the Public Service on temporary and non-pensionable terms before the coming into operation of the Act that their terms shall be varied to permanent and pensionable.

[18] It detailed also those who qualified and those who did not qualify. And those who did not qualify were supposed to be those whose length of service would be less than ten (10) years continuous service when they attained age 60 years.

[19] Based on the above the applicant lodged the present Application. The issue here being whether the 1st respondent has wilfully and *mala fide* failed to comply with the order of this Court, such that she should be held to be in contempt.

[20] In their heads of argument respondents argued for the dismissal of the Application on the ground that it is impossible and not in the interest of justice to comply with the Court's order. Their reason being that the applicant was never dismissed but that his contract had expired.

[21] Respondents argued further that it is impossible and not in the interest of justice to pay the applicant any money as he is not owed anything. Also that 1st respondent is not the Chief Accounting Officer.

[22] The respondents gave a definition of contempt of Court by referring to the case of **Consolidated Fish Distributors (Pty) Ltd v Zive**¹ that it is,

¹ 1968 (2) S.A. 517 at 522

“the deliberate, intentional disobedience of an order granted by a Court of competent jurisdiction.”

And that for the application for contempt to succeed must show that;

- (i) the order was granted against the respondent.
- (ii) the respondent was served personally with the order or was informed of the granting of the order and had no reasonable ground for disbelieving the information.
- (iii) lastly that the respondent has disobeyed the order or has failed to comply with it.

[23] Respondents therefore showed that if the above requirements have been met willfulness will be inferred and respondent bears the onus of establishing whether non-compliance was wilful and *mala fide*.

[24] I quite agree with respondents' argument that mere failure to comply would not amount to contempt but respondents will have to explain their reasons for non-compliance so that the Court would decide whether it was wilful or not.

[25] Respondents have pleaded impossibility and when one looks at the reasons why they say was not possible they come up with defences which they ought to have put forward in their answering papers which they never filed but when they so

decided to file were way out of time and was already after the granting of the Court's Order.

[26] It is a requirement for the Court order to be clear, definite and unambiguous before it may provide a basis for contempt. The respondents never complained about clarity or ambiguity of the order of this Court but have, like I said earlier put up their defence out of time.

[27] The Judge in **Fikile No v CCII Systems (Pty) Ltd**² showed that the offence is committed not only by a mere disregard of a Court's order, but also by the deliberate and intentional violation of the Court's dignity, repute and authority. Again in **Witham v Holloway**³ said,

“Proceedings for breach of an order or undertaking have the effect of vindicating judicial authority as well as a remedial effect.”

[28] On the facts of this case it has become clear that the Court has twice granted the order by default after all the respondents have been served with the papers. Enough time had been allowed for them to file their necessary papers but failed to do so.

² 2006 (4) S.A. 326 at 333 and 334

³ (1995) ALR 401 (Australian High Court)

[29] The respondents have not furnished any reasons why they failed to file the necessary papers. After the order had been granted they are coming up with their defence which I considered to be out of time. They pleaded impossibility and never advanced what that impossibility to comply with the order was safe to advance their belated defence. From their behavior intention and willfulness of non-compliance with the order is inferred.

[30] The respondents were allowed time to purge their contempt and have shown unwillingness to comply as the reasons they gave are by way of challenging the order that was given.

[31] As said in **Herbstein and Van Winsen**⁴ the object of proceedings that are concerned with the unlawful and intentional refusal or failure to comply with an order of Court is the imposition of a penalty in order to vindicate the Court's order consequent upon the disregard of its order and / or to compel performance in accordance with the order, **Minister of Water Affairs and Forestry v Stilfontein GM Co**⁵.

[32] The 1st respondent is found to be in contempt of the Court's order and has failed to purge her contempt even after she had been allowed some time to purge the contempt. She is thus sentenced to a period of six (6) months imprisonment the whole

⁴ The Civil Practice of the High Court of South Africa 5th Edition Vol.2

⁵ 2006 (5) S.A 333 at 353

of which is suspended for a period of twelve months on condition that within the period of suspension she sees to it that she complies with the order of Court. We are in June and the twelve months will end on the 11th June 2015.

A. M. HLAJOANE
JUDGE

For Applicant: Mr Metsing

For Respondents: Mr Moshoeshoe