IN THE LABOUR COURT OF LESOTHO

CASE NO LC 44/98

HELD AT MASERU

IN THE MATTER OF:

NAMANE ZACHARIA KHOTLE APPLICANT

AND

SECURITY LESOTHO (PTY) LTD RESPONDENT

JUDGMENT

This is a contempt application. The application follows the judgment of this Court dated 9th June 1999, and delivered on the 21st June 1999, in which the applicant's prayers in the Originating Application had been granted as follows:

> **"(a) applicant's dismissal on or about 1st April 1998 is declared unfair;**
> **"(b) applicant is reinstated in his former position;**
> **"(c) respondent shall reimburse applicant the amount of M1010-00 withheld by the respondent as surcharge for the items allegedly stolen by the applicant."**

On the 18th August 1999, the applicant filed an application on notice to the respondent to move the Court on the 20th August 1999 at 8.30 a.m. for an order in the following terms:

> **"1. A rule nisi issue returnable on a date and time to be determined by this Honourable Court calling upon respondent to show cause (if any) why:-**
> **"(a) A warrant shall not be issued for the apprehension of respondent so as to be brought before the Court to be dealt with in accordance with the law;**

"(b) Respondent shall not be committed to jail for contempt of an order of court issued on 21st June 1999 as contained in the judgment of the above Honourable Court in LC44/98 until it has complied with the said order of court;
"(c) Respondent shall not be ordered to pay the costs hereof;
"(d) Applicant shall not be granted further and/or alternative relief."

On the 19th August the respondent filed its intention to oppose. On the 22nd August no one was at court to move the grant of the rule as such it was never issued. The merits of the application were argued on the 26/05/99. In brief the applicant's case is that the respondent has failed to abide by the decision of this court despite the copy of the judgment of this court having been served on respondent's legal representatives and the applicant himself having presented himself to the officers of the respondent armed with the copy of the judgment.

The respondents in their Answer raised basically two points in defence namely;

(a) The applicant fraudulently obtained the judgment while the parties were negotiating a settlement.
(b) **The applicant has misconceived his claim in law in as much as he has proceeded by way of contempt in a judgment *ad pecunium solvendum.***

With regard to the first defence, we are not at all persuaded that the applicant obtained this judgment fraudulently. The letter written by respondent's counsel dated 2nd July 1998, annexed to applicant's Replying Affidavit makes it unambiguously clear as to which issues the respondent wished to negotiate on. Paragraph 3 of that letter reads:

> ***"First of all we wish to point out that as per client's instructions we are willing to negotiate as regards prayer 9.3 of your originating application. We wish further to find out as to how you came to the total of M9363-52…..as indicated in prayer 9.4."***

Accordingly therefore, prayers 9.1, 9.2, 9.5 and 9.6 were not part of the settlement negotiations.

Furthermore, if at all the respondent's understanding was that all the issues were a subject of settlement discussion (which is rendered highly improbable by the letter quoted above), it was the duty of the respondent to have informed the court accordingly. As it were, they merely filed an Authority to represent and said no more. Even when the applicant moved the Court for the grant of default judgment the respondents were duly informed of the date of hearing, but they never came to Court to explain that as far as they were concerned the case was being sought to be settled out of Court. For these reasons respondent's claim that judgment was fraudulently obtained cannot possibly be true it is accordingly dismissed.

With regard to the second defence, Mr. Mosito on behalf of the respondents referred us to a Court of Appeal decision to support the proposition that failure to comply with an order *ad pecunium solvendum* cannot constitute a ground for committal. (See Caroline Ntseliseng Masechele Khaketla .v. Mamohau Malahleha and 7 others C. of A. (CIV) No.30/1991 at pp. 13-15.

He submitted further that whilst a superior court of record possesses inherent powers to punish a person who commits contempt against that court, the Labour Court does not. He referred to the decision of Basson J in Coyler .v. Essack N0. (1997) 9BLLR 1173 also reported in (1997) 18 ILJ 1385 H-I where the learned judge stated;

> ***"A court of law usually has the inherent jurisdiction to summarily deal with and punish a person who commits contempt of court against such court or presiding judge. The Labour Court certainly has such jurisdiction as the Act provides that it is a 'superior court' that has "inherent powers and standing" in relation to matters under its jurisdiction, equal to that of a division of the High Court (in relation to matters under its jurisdiction). Accordingly specific empowerment to find a person guilty of contempt of court and to punish such person is unnecessary. Not so in the case of a tribunal which is not a court of law. Specific statutory empowerment is required before a presiding officer will be able to exercise such power."***

It is worth noting that the foregoing quotation relates to the Labour Court of South Africa which is on a completely different footing in law to our Labour Court. The Lesotho Labour Court is according to the decisions of the Court of Appeal of this country a Tribunal exercising a judicial function (see Attorney General .v. Lesotho Teachers Trade Union & Others C. of A. (CIV) No.29 of 1995 at pp. 22-23). Section 24(1)(P) of the Labour Code Order 1992 (the Code) gives the court the power "to commit and punish for contempt any person who disobeys or unlawfully refuses to carry out or to be bound by an order made against him or her by the court under the Code." Mr. Mosito argued that this paragraph does not confer upon the Labour Court the jurisdiction to punish for contempt in cases of disobedience of orders *ad pecunium solvendum.*

We are in agreement with Mr. Mosito that as a general rule failure to comply with orders *ad pecunium solvendum* is not enforceable by a committal for contempt. There is of course a well-known exception to this rule. That is the orders for payment of money for the maintenance of wives and children, which though they are orders *ad pecunium solvendum* are enforceable by way of committal for contempt apart from being enforceable by the ordinary methods of execution. (See Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th Edition at pp.820-822.) Quite clearly, failure to comply with an order for the

payment of wages is not one of the exceptions to the rule. This was the view also held by Ackermann J.A. in Masechele Khaketla's case supra at p.13.

This much was conceded by Mr. Nthloki on behalf of the applicant. He however, argued that Mr. Mosito's argument, which he agreed with, would only apply to order (c) of the orders of the court which directed that the respondent reimburses applicant the amount of M1010-00 withheld by the respondent as surcharge for the items allegedly stolen by the applicant. Does this therefore mean that the enforcement of that part of the order will have to be done by ordinary methods of execution? Our answer to this question must be in the negative. The Labour Court is a creature of statute. It can therefore, only exercise those powers conferred either expressly or by necessary implication by the statute that establishes it. Nowhere does the Code empower the Labour Court to issue writs of execution for attachment of property to satisfy its judgments.

Clearly therefore, whatever the meaning may be ascribed to Section 24(1)(P) of the Code, that meaning does not *ex facie* the section include the power to commit and punish for contempt, persons who disobeys orders of this court which sound in money *simpliciter*. However, Section 34 of the Code provides;

> ***"where the court has given judgment against a party to pay any sum under a contract of employment or under the provisions of the Code and the party fails to make any such payment within the time specified in such judgment, the President of the Court may, on the application of a party or a labour officer acting on behalf of any person to whom such sums are due, summon such party to appear before the President of the Court to answer why payment has not been made.***
>
> ***If such party fails to satisfy the President of the Court that the failure to make payment was due to no fault on his or her part, the President of the Court may order the party's detention in prison until the payments mentioned in the order are made or for a period of six months, whichever be the shorter period…"***

It follows therefore that a person who fails to comply with an order to pay a sum of money ordered by the court need not first be prosecuted for contempt. He can right away be imprisoned if he fails to explain to the satisfaction of the President why he or she failed to pay the amount of money ordered by the court. This is the section which the applicant ought to have relied upon for the enforcement of order (c) of the orders of the court.

Mr. Nthloki contended that order (b) of the orders of the court concerning reinstatement is an order *ad factum praestandum*, as such it is enforceable under Section 24(1)(P). Mr. Mosito on the other hand argued that the court has reinstated the applicant without ordering the respondent to do anything. He contended that the applicant's remedy lies not in committal proceedings as he has done, but rather

in suing the respondent for payment of his dues for denying him work despite being reinstated by the court.

He argued further that the applicant does not say who has refused to reinstate him. He submitted that in any event as a juristic person the respondent cannot be committed for contempt. He attacked the procedure followed by Mr. Nthloki of seeking a rule nisi to be issued calling on the respondent to show cause why it should not be committed for contempt. He contended that this court has no power to issue such a rule.

Section 73(1) of the Labour Code provide that;

> ***"if the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration seniority or other entitlements or benefits which the employee would have received had there been no dismissal…"***

It is common cause that in his Originating Application, the applicant had sought an order declaring his dismissal unfair and an order reinstating him in his former position. In both these prayers the applicant was successful. The orders were granted against the respondent and it was the respondent who had to see to it that they are implemented. Failure to do so amounted to contempt and the applicant was correct to have pressed contempt proceedings. The fact that the applicant could also sue for payment of his dues for the period that he has not been allowed to work by the respondent despite the reinstatement order, does not preclude the applicant from also persuing contempt of court proceedings with a view to having the respondent committed.

Counsel for both sides are in agreement that civil contempt entails willful disregard and deliberate flouting of the order of the court. (See Motlalentoa & Another .v. Tlokotsi C. of A.(CIV) No.28 of 1991; Makhobotlela Nkuebe & 313 Others .v. LTC & Another CIV/APN/224/98 and Steven Mokone Chobokoane .v. Solicitor General C. of A.(CIV) No.15 of 1984). In order for the court to determine whether there has been willful disregard of its orders by a juristic person, the judgment creditor must disclose on whom he served the order. The status of that person within the organisation has to be disclosed so that it can be ascertained whether he is a person capable of binding the organisation. To this end we agree with Mr. Mosito that the applicant's failure to disclose in his papers to whom he presented himself who allegedly turned him back is fatal. Equally the failure to join such an officer(s) is fatal because a juristic person cannot be committed to prison. We do not think much turns on the attack of the procedure adopted by the applicant, because as Mr. Nthloki pointed out, a rule nisi is merely a way of bringing someone before court. For the above reasons we are of the view that this application cannot succeed. It is accordingly dismissed. Given the extent of success of each party we think it is only fair that each party bears its own costs and it is accordingly so ordered.

THUS DONE AT MASERU THIS 12TH DAY OF SEPTEMBER 2000.

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE
MEMBER **I AGREE**

P.K. LEROTHOLI
MEMBER **I AGREE**

FOR APPLICANT : MR MOSITO
FOR RESPONDENT: MR NTHLOKI