IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/13/2013**

In the matter between:

MAKHOBOTLELA NKUEBE **APPLICANT**

And

NKAU MATETE **1st RESPONDENT**
METROPOLITAN LESOTHO LIMITED **2nd RESPONDENT**

JUDGEMENT

Date: 21st May 2013 to 9th July 2013
Application for contempt and committal to jail. Court finding that Respondent has complied with the order of this Court and therefore not in contempt. Further, that it is neither unlawful nor uncommon for parties to reach settlement over an order of court. Furthermore, that a settlement reached by parties is final and binding upon them. Moreover, that once a settlement agreement has been complied with, it puts an end to the matter and that no party may revert to enforce the original order of Court. Application for contempt and committal to jail being refused and no order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for contempt and committal to jail. Applicant had lodged an unfair dismissal (operational requirements) claim with this Court in LC/79/2006. Judgment was delivered in his favour on the 1st December 2009 in the following,

   "(i) Retrenchment of applicant on 7th July 2006 with effect from 19th June 2006 was procedurally and substantively unfair.
   (ii) The respondent is ordered to reinstate applicant to the position of Regional Manager Central retrospectively to the date of acceptance of the package offered for the post i.e. 7th July

2006 without loss of remuneration, seniority or other entitlements or benefits.
(iii) The respondent shall pay applicant salary he would have earned from the position from 7th July 2006 to date of reinstatement less the mitigated losses of M31,000-00 which applicant said he received as Director's fees amounting to M2,000-00 and Project Management fees of M24,000-00.
(iv) There is no order as to costs."

2. It is this judgement that Applicant seeks to enforce through contempt proceedings. Specifically, Applicant seeks the following order,
" … Respondents to show cause (if any) why:
a) The first and second respondents shall not be ordered to purge their contempt failing which to show cause (if any) why they shall not be committed to prison for contempt of court.
(b) The respondents herein shall not be directed to pay the costs of this application in the event of opposing same.
(c) Granting applicant such further and/or alternative relief."
The matter was opposed and having heard the submissions of both parties, Our judgment is in the following.

SUBMISSIONS

3. Applicant's case is that subsequent to the judgment of this Court in LC79/2006 (Annexure NK1), parties commenced negotiations on how to execute the said judgment. During the negotiations, it transpired that the position in issue had since been filled by someone else. As a result, Applicant was offered the position of Regional Manager – Lesotho Brokers by Respondent. Reference was made to annexure NK3. It is Applicant's argument that this position offers less benefits than the initial position of Regional Manager - Central and as such he rejected the offer. Reference was made to NK4 and NK5 to highlight the difference in the benefits of the two posts.

4. The rejection notwithstanding, Applicant went and worked in the rejected position. His explanation for working in this position was that he was trying to avoid appearing defiant. He submitted that while working in this position, he continued to negotiate the package that he was offered under the new position. Reference was made to annexure NK2. Ultimately, the negotiations with Respondent failed and he then insisted on

the terms of the order of this Court (annexure NK1), with the Respondent.

5. It was submitted that having failed to comply with the said judgment, the Respondent was contemptuous. The Court was referred to the case of *Motlalentoa & another v Tlokotsi C of A (CIV) 28 of 1991*, wherein the Court cited with approval the case of *Fakie N.O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA),* for the requirements in an application for contempt. It was argued that the requisites are stated as thus,
   - the existence of the order of court,
   - service or notice of the order of court,
   - non-compliance with the order
   - wilful and *mala fide* defiance of the order.

6. It was argued that in terms of the above requisites, all that an applicant party must do is to establish the existence of the order, service or notice of same to the respondent party and that it has not been compliance with. It was added that once an applicant party has satisfied these requirements, the Respondent then bears the evidential burden to establish that failure to comply was not wilful and *mala fide*. The Court was referred to the case of *Fakie N.O v CCII Systems (Pty) Ltd (supra)* in support of the proposition.

7. The Court was further referred to the case of *Namane Khotle v Security Lesotho (Pty) Ltd LC/44/1998,* where the Court stated that in determining whether or not a party has been contemptuous, the Court can look at the conduct of the parties. The Court was furthermore referred to the case of *Blandina License v Lerotholi Polytechnic LAC/CIV/05/2009,* in support of the same proposition. It was argued that the conduct of Respondent is clearly one that is demonstrative of both wilfulness and *mala fide* failure to comply with the order.

8. It was further argued that if Respondent was of the view that reinstatement was not possible, it ought to have raised same with the Court. Having failed to do so, this is no longer an issue as the order made must then be executed as it is. It was argued that having made a decision, the Court cannot change it. The Court was referred to the case of *Naidoo v Naidoo (1948 (3) SA 1178*, which was cited with approval in High Court of

Lesotho judgment in *Ntoi v Ntoi CIV/T/29/2009*. Further reference was made to the case of *Retail Motor Industry Organisation v Minister of Water & Environment Affairs ZASCA 70 (23 MAY 2013),* in support.

9. It was further submitted that as far as the emoluments that were awarded to Applicant were concerned, Respondent used the wrong formula to compute them. It was argued that the proper formula is as appear under annexures NK6, NK7 and NK8. It was prayed that Respondent be ordered to comply with the original order of this Court, failing which, to be found to be in contempt and be committed to jail.

10. Respondent's answer was that after the judgment in LC/79/2006, parties commenced negotiations on how to best put the judgment into effect. This was after it had become apparent that Respondent would not be able to place Applicant in the position that he was initially. Out of the negotiations was a settlement agreement which was reached on the 20th September 2010. In terms of the settlement agreement, Applicant accepted to be placed in the position of Regional Manager – Lesotho brokers, with a condition that he be given some form of compensated by Respondent for the low level of commission in the new position.

11. Notwithstanding the fact that the condition of the reinstatement agreement had not been met, Applicant resumed duties on the 1st November 2010 as agreed. On the 16th November 2010, Respondent communicated its position to Applicant that its offer to reinstate him was final and that it was not willing to consider any compensation, over and above the lost wages paid, as he had sought. In reaction, Applicant then threatened to institute legal proceeding to enforce the original judgment of this Court. However, such proceedings were never instituted. Rather, Applicant continued to work in the same position of Regional Manager – Lesotho Brokers until he retired on 3rd August 2012. It was only after about 7 months from the time of his retirement, that he proceeded with this application.

12. Respondent argued that Applicant clearly elected to be reinstated as he was and cannot therefore be heard in law to

claim not to have been reinstated. The Court was referred to the case of *Chamber of Mines of South Africa v National Union of Mine Workers & another 1987 (1) SA 668 (A),* where the following was said,

"… He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. … If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the electing having taken place."

13. It was submitted that the facts before Court clearly demonstrate that the moment Respondent indicated its position not to give any form of compensation to Applicant, over and above that paid, he was faced with an option to either proceed to enforce the original order or to accept the offer as made. Rather, Applicant in the end elected not to proceed to enforce the original order but to accept the offer by Respondent. It was added that in so doing he abandoned his right to take the dispute further. The Court was referred to the case of *Qhoboshiyane N.O v Acusa Publishing 2013 (3) SA 315 (SCA) at 318E to 319A,* in support.

14. It was added that on the basis of the narrated facts, Respondent has not been contemptuous at all. It was argued that the test for contempt was pointed out in the case of *Lerotholi Polytechnic & another v Blandina License C of A (CIV) 25 of 2009,* as being whether a breach was committed deliberately and *mala fide*. It was submitted that *in casu*, it cannot be said that Respondent either acted in deliberate and *mala fide* disobedience of the decision of this Court as Applicant was reinstated to the position which he accepted and was also paid arrears which Respondent believed were due to him. It was concluded that none of what Respondent did constituted contempt and that the application be dismissed with costs, as being frivolous.

ANALYSIS

15. We wish to confirm that the requirements in a claim for contempt and committal to jail are as the Applicant has put. It is important at this stage to highlight that these requirements

must all be satisfied in order for such a claim to succeed. We further wish to note that there is no doubt, as the facts reveal, that there is an order of Court which has been brought to the attention of the Respondent. What therefore remains in dispute, and for determination, is whether the Respondents failed to comply with the said order and whether their failure to do so was deliberate and *mala fide*.

16. The evidence *in casu*, establishes that the order of the Court in issue was not complied with. We say this because the order was specific that Applicant must be reinstated in the position of Regional Manager – Central, whereas he was reinstated into the position of Regional Manager – Lesotho Brokers. This is a clear flaunt of the order of Court as it falls short of the specific directive given. In essence, this requirement has also been successfully established by Applicant.

17. On the issues of both deliberate and *mala fide* defiance, We wish to start by stating the correct position of the law. In law *"he who makes a positive assertion is generally called upon to prove it with the effect that the burden of proof generally lies on the person who seeks to alter the status quo. Thus he who asserts the positive is the one with the burden of proof"(see Schwikkard, Principles of Evidence, 2nd Ed. At page 538).* As a result, it is not accurate that once an applicant party has satisfied the first three requirements, then a respondent party bears the evidential burden to establish that failure to comply was not wilful and *mala fides.* We wish to further comment that this is also not a stated requirement in *Fakie N.O v CCII Systems (Pty) Ltd (supra).* In law one cannot be expected to prove the negative.

18. The evidence before Us has shown the complete absence of both wilfulness and *mala fide* in the conduct of Respondent. We say this because, rather than to enforce the judgment as it was, parties decided to attempt to settle the matter, the result of which was the acceptance of Applicant to take the alternative position of Regional Manager – Lesotho Brokers, which as We have already said was different from the position awarded by the Court. This is essence demonstrates the absence of contempt on the part of Respondent, as the requirements are short of the latter requirement.

19. It is Our view that failure to comply with the original order was borne by a shared view that parties had to consider an alternative placement for Applicant. This cannot be said to be either deliberate, wilful and/or *mala fide* flaunt of the Court order. Parties clearly believed that they were right in taking this approach. Supportive of Our view is the decision in *Fakie N.O v CCII Systems (Pty) Ltd*, where the Court had the following to say,
"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 such a case, good faith avoids infraction. Even a refusal that is objectively unreasonable may be bona fide …"

20. Rather, in Our view, it is the conduct of Applicant that illustrates *mala fide* in that he did not only accept the position of Regional Manager – Lesotho Brokers, but continued to work in that position unlit his retirement. He was at all material times fully conscious of the position of Respondent in relation to his reinstatement as well as payment of his lost wages (emoluments). It is also Our view that not only has Respondent not been contemptuous, but that the matter has been finalised by settlement. It is neither uncommon nor is it wrong for parties to agree in a direction that is different from that prescribed by the Court. This in Our view is what the parties did *in casu*.

21. We wish to comment further that having elected to be reinstated under the conditions of Respondent, Applicant cannot in law turn back to claim the enforcement of the initial order. We are in agreement with Respondent that, in accepting to work under the terms of Respondent until his resignation, Applicant by conduct, not only demonstrated his acceptance that the matter had been finalised, but that he also abandoned his right to enforce the original order of this Court. Applicant was at that stage, i.e. when he made the election, aware that the benefits of the new position were less favourable than those of the former position. The authorities cited above, and specifically in *Blandina Lisene v Lerotholi Polytechnic (supra)* and *Qhoboshiyane N.O v Acusa Publishing (supra),* are supportive of this view.

22. We agree with Respondent that Applicant is therefore fully bound by the election that he made (see *chamber of Mines of South Africa v National Union of Mine Workers & another (supra).* In Our view, the situation would have been different had Applicant proceeded to enforce the original Court order in the subsistence of his employment with Respondent rather than to wait until after his retirement. It took him from the 16th November 2010 until about 7 months after his retirement, which retirement was on the 3rd August 2012, to approach this Court for relief. In Our view, Applicant's timing reduces his claim to no more than an afterthought and fortifies the argument that the matter was finalised by settlement.

23. We further wish to comment that We are in agreement with Applicant that Respondents ought to have pleaded impracticality of reinstatement during the initial hearing. Having failed to do so, this Court becomes *functus officio* that issue, as Applicant has put. Supportive of Our view is the authority cited by Applicant, in *Retail Motor Industry Organisation v Minister of Water & Environment Affairs (supra).* In explaining the doctrine of *functus officio*, the Court relied on the quotation from the book of *Daniel Malan Pretorius 'The Origins of the Functus Officio Doctrine (2005) 122 SALJ 832* at 832, as follows,

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. The result is that one such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive."

24. However, the Respondent's defence *in casu* is not that reinstatement is not practical but rather that it has complied with the order of this Court. If the impracticality of reinstatement was the defence of Respondent, then this Court would readily declare itself *functus officio* that issue. Respondent claims to have reinstated Applicant in terms of a settlement agreement reached between them and that it also paid him his lost wages. Consequently, this point does not advance Applicant's case for contempt.

COSTS

25. Both parties have prayed for costs but neither has attempted to motivate their claim, at least to Our satisfaction. We have often held before, that this is a Court of equity and fairness and that costs do not automatically follow suit. Parties must motivate their claims for costs, which motivation must in clear and explicit terms, demonstrate either frivolity or vexatious conduct in the proceedings. As We has said, no such motivation has been made before Us. As a result, We consequently decline to award costs to either of the parties.

AWARD

We therefore make an award in the following terms:

a) That Respondents are not in contempt;
b) That this application fails; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 6th DAY OF MAY 2014.

T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

Mr. L. MATELA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. RAFONEKE**
FOR RESPONDENTS: **ADV. WOKER**