



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**Reportable**

Case no: JA 58/2019

In the matter between:

**TECHNIFLEX CC**

**First Appellant**

**BEATRICE TONKIN**

**Second Appellant**

and

**ANDREW SELLO MAANASO**

**First Respondent**

**THOKOZANI EMMANUEL ZULU**

**Second Respondent**

**Heard: 10 September 2020**

**Delivered: 13 November 2020**

**Summary:** *Practice and procedure---Contempt of court---- Court to be satisfied beyond reasonable doubt that respondent refused to comply with certified award--- Inconsistencies as to whether employees tendered their service and were turned away resulting in non-compliance----Labour Court erred in finding employer in contempt.*

**Coram: Musi JA, Murphy AJA and Kathree-Setiloane AJA**

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**JUDGMENT**

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KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Raphulu AJ) in which it held the appellants to be in contempt of court for failing to reinstate the first and second respondents. It accordingly made an order reinstating the respondents within 15 days of the date of the order and ordered the appellants to pay each of them R25000.00. The appeal is with leave of the Labour Appeal Court.

Background

[2] The first respondent was employed by the first appellant as a machine assistant and second respondent as an artisan trimmer. On being dismissed by the first appellant on 12 February 2015, they referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA").

[3] On 7 September 2015, the CCMA issued an arbitration award declaring their dismissal to be both substantively and procedurally unfair. In terms of the arbitration award: (a) the first appellant was ordered to reinstate the first and second respondents retrospectively; (b) the first and second respondents were ordered to report for duty on 25 September 2015; and (c) the first appellant was ordered to pay the first and second respondents their arrear salaries in the amounts of R14 400.00 and R15 600.00 respectively within 14 days of the award.

[4] The appellants did not reinstate the respondents and they launched an *ex parte* contempt application against the appellants, in which they alleged that they had reported for work on 25 October 2015 but the appellants, in breach of the arbitration award, refused to reinstate them.

[5] On 4 August 2017, the contempt application came before the Labour Court (Whitcher J) for hearing. The Labour Court issued an order directing the appellants to show cause why they should not be found to be in contempt of court.

- [6] The appellants filed their answering affidavit on 27 November 2017. There was a dispute of fact on the papers on whether the appellants were in wilful default of the arbitration award. The Labour Court, therefore, referred the dispute of fact to trial for determination.
- [7] The first and second respondents testified at the trial. The second respondent's version was that they reported for duty on 25 September 2015 but were prevented from entering the premises by Mr Michael Walker, the first appellant's operations manager. Although he deposed to an affidavit confirming the first respondent's version (in the founding affidavit) that they reported for work on 25 October 2015, he denied having any knowledge of why the first respondent referred to this date in the founding affidavit.
- [8] As to what transpired on 25 September 2015, the second respondent testified that they reported for duty at the first appellant's premises on 25 September 2015. He said that he walked to the premises and met the first respondent there at 06h45. They were stopped, at the gate, by the security guard (Patrick) who informed them that they could not enter the premises. The security guard went into the premises and returned in the company of Mr Walker, who advised them that they were not allowed onto the premises.
- [9] On being put to him in cross-examination that Mr Walker only arrived at work, on the day, at 08h00, the second respondent explained that they waited at the main gate until management arrived. It was then put to him that Mr Kruger, the factory manager, arrives at work at 07h00 in the morning, and that (as their line manager) he, as opposed to Mr Walker, would have been called to the gate to talk to them.
- [10] The first respondent also testified that they reported for duty on 25 September 2015. This version contradicted the version he gave in his founding affidavit, namely that they reported for duty on 25 October 2015. The first respondent's recollection of the events that transpired on that day are as follows: He and the second respondent travelled together to the first appellant's premises. On their arrival at 07h00, both the security guard (Patrick) and Mr Walker were present.

The security guard, as opposed to Mr Walker, informed them that they were not allowed onto the premises.

[11] The first respondent did not deny that Mr Walker only arrived at work at 08h00, and that if he and the second respondent had reported for work on 25 September 2015 at 07h00, then Mr Kruger (who arrived at that time) would have been called to the gate to talk to them.

[12] The appellants steadfastly maintained that: (a) the respondents neither reported for work on 25 September 2015 nor on 25 October 2015; (b) they abandoned or waived their rights to reinstatement; and (c) they were only interested in claiming their arrear salaries as specified in the arbitration award.

[13] Mr Walker, who testified on behalf of the appellants, said that if the respondents had come to the gate on 25 September 2015, the security guard (Patrick), who was aware of their dismissal, would have stopped them at the gate and immediately called Mr Kruger who was their line manager before their dismissal. Mr Walker confirmed he was at work on 25 September 2015, but that he only started work at 08h00. He said that there was only one entrance to the first appellant's premises and that he did not notice the respondents standing at the gate when he arrived. He also denied being called by Patrick on the day, and that he went to the gate as alleged by the respondents.

[14] Mr Walker admitted that the first appellant only paid the respondents their arrears salaries on 18 November 2015; two months after the date of the arbitration award.

[15] Having heard the evidence of the parties on 29 January 2019, the Labour Court held the appellants to be in contempt of court and ordered them to pay each of the respondents a fine of R25000.00.

#### Analysis

[16] The Labour Court erred in finding beyond a reasonable doubt that the appellants were wilfully in contempt of court for two primary reasons. The first being that it was common cause that the certified award had not come to the

knowledge of the appellants until the contempt proceedings were initiated by the respondents.

[17] Secondly, the Labour Court found that the respondents had reported for work on 25 September 2015 and were turned away, despite the inconsistencies and contradictions in their evidence. These are as follows:

- (a) The founding affidavit stated that the parties reported for duty on 25 October 2015 whilst their evidence in court was that they reported for duty on 25 September 2015;
- (b) on the question of whether the respondents travelled to the premises together or separately, the first respondent testified that they travelled together whilst the second respondent stated that they walked to the premises alone and arrived there at the same time; and
- (c) in relation to who exactly turned the respondents away from the first appellant's premises, the second respondent's version was that Mr Walker turned them away. On the contrary, the first respondent's version was that Mr Walker was silent, but it was Patrick, the security guard, who turned them away.

[18] These inconsistencies were crucial to determining whether the respondents reported for duty on 25 September 2015 and whether the appellants in non-compliance with the award turned them away, yet the Labour Court failed to give sufficient weight to them.

[19] The Labour Court furthermore erred in ordering the appellants to pay a fine to the respondents in the amount of R25 000.00 each. Importantly in this regard, the remedies for contempt of court, being incarceration and/or a fine are meant to punish the offender for undermining the judicial authority of the court. Where a fine is imposed, it is payable to the state through the registrar of the court in question and not to the applicants directly. The fine is imposed as a punishment for contempt of court and is not meant as a solatium to the applicant in contempt proceedings. There was accordingly no basis in fact or law for the Labour Court to have ordered that the fines imposed be paid to the respondents.

[20] For all these reasons, the order of the Labour Court falls to be set aside. However, this finding does not absolve the appellants of their obligation to reinstate the respondents, as the arbitration award still stands. Although we have been unable to find that the respondents tendered their services on 25 September 2015 as claimed, they did tender their services in their application for contempt of court. The appellants are accordingly enjoined to reinstate them with immediate effect.

### Costs

[21] I consider it fair and just not to make a costs order against the respondents in the appeal.

[22] In the result, I make the following order:

1. The appeal is upheld with no order as to costs.
2. The order of the Labour Court is set aside and replaced with the following order:
  - “1. The application is dismissed with no order as to costs.
  2. The respondents are ordered to reinstate the first and second applicants with immediate effect.
  3. The respondents are ordered to pay the first and second applicants back-pay from date of service of the application for contempt of court.”

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F Kathree-Setiloane AJA

Musi JA and Murphy AJA concur.

APPEARANCES

FOR THE APPELLANT:

LKA Attorney

Instructed by LKA Attorneys

LABOUR APPEAL COURT