



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 183/2017**

In the matter between:

**CLEOPAS S. DLAMINI**

Applicant

**And**

**AVENG INFRASET SWAZI (PTY) LTD**

1<sup>st</sup> Respondent

**DECEMBER MAVIMBELA**

2<sup>nd</sup> Respondent

In re:

**CLEOPAS S. DLAMINI**

Applicant

**And**

**AVENG INFRASET SWAZI (PTY) LTD**

Respondent

**Neutral citation:** *Cleopas S. Dlamini v Aveng Infraset Swazi (PTY) LTD (183/2017) [2018] SZIC 15 (March 02 , 2018)*

**Coram:** N. Nkonyane, J  
(Sitting with G. Ndzinisa and S. Mvubu  
Nominated Members of the Court)

**Heard submissions :** 22/02/18

**Delivered judgement:** 02/03/18

**Summary : Labour Law---Application for contempt of Court---Factory Manager arguing that he is not in wilful default but that he has no executive authority to implement the Order of the Court.**

**Director of a Company---Powers of---Failure to comply with Court Orders---A Director who has knowledge of an order of Court against the company causes the company to disobey the order is himself guilty of contempt of Court---No evidence that the Directors were served with the Court order---Wilful and reckless disregard of the Court order must be proved.**

**Factory manager---Authority to make decisions---Factory manager arguing that he has no executive authority to enforce the Court order as he only act on orders from the Directors in South Africa.**

**Dispute of fact whether or not Factory manager has the authority to comply with the Court order---Dispute referred to oral evidence.**

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**RULING**

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1. On 22. 09. 2017 this Court delivered judgement in favour of the Applicant. In terms of that judgement the termination of the Applicant was set aside and the 1<sup>st</sup> Respondent was directed to start the disciplinary hearing de novo before a new chairperson.
2. The 1<sup>st</sup> Respondent did not comply with the Court Order. The Applicant thereafter instituted legal proceedings under a certificate of urgency seeking an order inter alia, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be held in contempt of Court and that a rule nisi be issued calling upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to show cause why the 2<sup>nd</sup> Respondent should not be committed to gaol for a period of thirty days for contempt of Court. The Court delivered its Ruling on the matter on 15.12.2017. The Court issued a Rule Nisi calling upon the Respondents to show cause on 07.02.2018 why the Respondents should not be held in contempt of Court for their failure to comply with the Court Order issued on 22.09.2017; why the 2<sup>nd</sup> Respondent should not be committed to gaol for a period of thirty days and why an order in terms of prayer 2, 3 and 6 should not be made by the Court.
3. On the return day on 07.02.18, the 2<sup>nd</sup> Respondent did not appear personally before the Court, but he filed an Explanatory Affidavit. The Applicant thereafter filed an affidavit in response thereto. The 2<sup>nd</sup> Respondent also filed an affidavit in response.
4. In his Explanatory Affidavit the 2<sup>nd</sup> Respondent stated, inter alia, that;

- 4.1 *He has no executive powers and that all decisions in running the company are taken by Management in Midrand, South Africa.*
- 4.2 *He does not have any financial control over the affairs of the company.*
- 4.3 *The company (1<sup>st</sup> Respondent) is just a branch of a multinational corporation whose affairs are controlled in Midrand, South Africa.*
- 4.4 *For the above stated reasons, it is therefore impossible for him to implement the Court Order.*
- 4.5 *He was never a party to the proceedings when the initial Court proceedings were launched.*
5. The 2<sup>nd</sup> Respondent pointed the picture that he is a powerless employee who only takes orders from Head Office in Midrand, South Africa. The Applicant in its response to the 2<sup>nd</sup> Respondent's arguments stated the following ;
- 5.1 *In the Explanatory Affidavit that he filed in Court, the Applicant stated that he is the Factory Manager and is charge of the Swaziland Branch. As a factory manager he has control over the operations of the 1<sup>st</sup> Respondent.*

5.2 *The evidence before the Court revealed that when the 2<sup>nd</sup> Respondent dismissed the Applicant he never indicated that he was merely acting on instructions from South Africa. If, therefore, the 2<sup>nd</sup> Respondent was able to issue a dismissal, he has the powers to re-instate the Applicant.*

5.3 *The evidence revealed that the 2<sup>nd</sup> Respondent did re-instate the Applicant after the Chairman of the internal appeal hearing set aside his dismissal. Further, the 2<sup>nd</sup> Respondent put the Applicant on suspension with full pay after the dismissal had been set aside by the internal appeal Chairman. It is therefore clearly not correct that the 2<sup>nd</sup> Respondent has no authority and that he merely implements orders from South Africa.*

6. The High Court dealing with a similar application in the case, of ***Umgcwembe Wabobabe (Pty) Ltd V Swaziland Sugar Association*** and ***Mike Matsebula, case number 3688/2008*** sought reliance on the case of ***Haddow V Haddow, 1974 (2) SA 181 (R)*** where it was stated that;

“Where an application in proceedings to commit the Respondent for contempt of Court, in that he has disobeyed an Order of Court of a nature justifying such punishment, has proved that the Respondent has disobeyed the order of Court which was brought to his notice, then both willfulness and mala fides will be inferred. The onus is then on the

Respondent to rebut the inference of mala fides or willfulness on a balance of probabilities.”

7. The evidence before the Court is not in dispute that the 2<sup>nd</sup> Respondent is aware of the Court Order. His defence is that he has no authority to do what the Court Order says because he has no executive powers.
8. It was also argued on behalf of the 2<sup>nd</sup> Respondent that he is not complying with the Court Order because he was not cited in the initial proceedings before the Court. The cases of the Minister of Health and *The Director General of the Department of Health V Christelle Bruckner, case number JA 11/04, (Labour Appeal Court of South Africa)*; and that of *The Government of Swaziland V Swaziland National Association of Government Accountancy Personnel case number 05/2017 (ICA)* were relied on in support of this argument. In the **Minister of Health case**, the Labour Appeal Court of South Africa found that the contempt of Court proceedings were not properly conceived because it was The Department of Health that was cited and ordered to reinstate Christelle Bruckner, and that, no order was made against the Minister or the Director – General.
9. Similarly, in the **Government of Swaziland case**, the Industrial Court of Appeal upheld the appeal against an order that the Acting Accountant General Ms E.N. Matsebula be held in contempt of Court because it found that there was no clear and unequivocal order by the Court aquo directed at the Acting Accountant General to carry out a specific action or course of action.

10. In casu, however, the proceedings are not against the Government but against a private company which was cited as the employer of the Applicant. The 2<sup>nd</sup> Respondent is not the employer of the Applicant, he is also an employee of the 1<sup>st</sup> Respondent. There was therefore no need to cite the 2<sup>nd</sup> Respondent when the Applicant first launched the legal proceedings against his employer the 1<sup>st</sup> Respondent. Addressing this issue **McCall AJA** in the **Minister of Health case** made the following remarks which are pertinent in the present case in paragraph 47.

*“.....In any event the order in this case was against the State, which distinguishes the case from one in which an order is granted against a company. There is no provision such as the State Liability Act which is available to protect a director of a company against proceedings for contempt of Court for failure to obey an order against the company.”*

11. Further, dealing with the issue of liability of a director of a company, the Court in the case of ***Twentieth Century Fox Films Corporation & Others V Playboy Films (Pty) Ltd and Another 1978 (3) SA 202 (W)*** the Court stated the following;

*“A director of a company who, with knowledge of an Order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act, or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a Court would have difficult in ensuring*

*that an order ad factum praestandum against a company is enforced by a punitive order. Vide Halsbury 4<sup>th</sup> Edition Volume 9 at 75.”*

In casu, it is not the director of the 1<sup>st</sup> Respondent that is before the Court. There was no evidence that the Court Order was served on any director of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent stated in his affidavit that he is an employee of the 1<sup>st</sup> Respondent and he has no executive powers.

12. The Applicant in his papers disputed the 2<sup>nd</sup> Respondent’s argument that he has no authority to do anything at the 1<sup>st</sup> Respondent’s place except when acting on the instructions of management. The Court is unable to solve this dispute on the papers as they appear. Before a person can be found guilty of contempt of Court, it must be shown that there is a wilful or reckless disregard of the Court Order. **(See: Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition at 819. )** If the 2<sup>nd</sup> Respondent has no authority to do what the Court Order requires him to do, it cannot be said that he is acting in wilful and reckless disregard of the Court Order.

13. In the circumstances of this case, the Court will make the following order;

a) *The matter is referred to oral evidence to resolve the issue of the authority and extent of such authority, if any, of the 2<sup>nd</sup> Respondent at the 1<sup>st</sup> Respondent company.*

b) *There is no order as to costs.*



14. The members agree.

A handwritten signature in black ink, consisting of a circular loop on the left containing the letters 'NN', followed by a series of connected, fluid strokes extending to the right.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

*For Applicant* : *Mr. L.M. Simelane*  
*(Attorney at L.M. Simelane Attorneys)*

*For Respondent:* *Mr. P.K. Msibi*  
*(Attorney at Dlamini Kunene Associated)*