

**IN THE INDUSTRIAL COURT OF SWAZILAND**

Case No 251/19 (d)

In the matter between:

**YUSI MKHALIPHI**

Applicant

And

**CHAPELAT (SWAZILAND) (PTY) LTD t/a  
MONDELEZ INTERNATIONAL**

1<sup>st</sup> Respondent

**MANDLA SHONGWE**

2<sup>nd</sup> Respondent

**FOLOBI AWUJOBI**

3<sup>rd</sup> Respondent

**SICELO BANGEKHO DLAMINI N.O.**

4<sup>th</sup> Respondent

**Neutral citation:** Yusi Mkhaliphi v Chapelat (Swaziland) (Pty) t/a Mondelez and Two Others (251/19 (d)) [2020] SZIC 71 (07 October, 2021)

**Coram:** **NGCAMPHALALA AJ**  
*(Sitting with N. Dlamini and D.P.M Mango,  
Nominated Members of the Court)*

**Date Heard:** 21 July 2020

**Date Delivered:** 07 October, 2021

***SUMMARY: Failure to comply with Court Order-requirements of contempt - whether conduct willful, deliberate and ma/a fide.***

***Held - Respondent's conduct does not meet the minimum standard for conviction on Contempt of Court-Guilt of Respondents not proved beyond a reasonable doubt-application fails.***

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**JUDGMENT**

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- [1] The Applicant is an adult LiSwati male of Manzini area in the District of Manzini Eswatini.
- [2] The 1<sup>st</sup> Respondent is Chapelat (Swaziland) (Pty) Ltd trading as Mondelez International, a company duly registered and incorporated in terms of the Companies Act 2009 of Eswatini carrying on business at Matsapha.
- [3] The 2<sup>nd</sup> Respondent is Mandia Shongwe Dlamini, an adult male Liswati and Human Resources in the First Respondents, a position also called Acting Plant People Lead.
- [4] The 3<sup>rd</sup> Respondent is Folabi Awajobi a Nigerian national who is employed by the First Respondent as its Managing Director, also known as Plant Lead.

[5] The 4<sup>th</sup> Respondent is Sicelo Bangekho Dlamini N.O whose full and further particulars were not provided by the Applicant.

### **BRIEF BACKGROUND**

[6] This matter has a history before the above Honourable Court ever since the Applicant was subjected by the first Respondent to disciplinary proceedings on various charges of misconduct. On the 28<sup>th</sup> of August, 2020, a judgment was delivered by this Court, directing that the Applicant be accorded an opportunity to submit oral and written submission in disciplinary proceeding. This application is the consequence of the judgment issued.

[7] It is alleged by the Applicant in this application that in total disregard of the Court Judgment the Respondents, took a decision to dismiss him from his employment without hearing his mitigating factors and personal circumstances. Such was done in defiance of the Court order issued by the Court, directing that the Applicant be afforded an opportunity to submit written and oral mitigating submissions. This was done by the Respondents in total disregard of the Court order, and such conduct constitutes a deliberate disregard of the power and authority of the Honourable Court and as a result the Respondents are in contempt.

[8] The Applicant has now approached the Court, seeking an order in the following terms:

*"8.1 That the Respondent be and are hereby called upon to show cause, within seven (7) court days, why they must not be held to be in contempt of the court judgment in case number 251/2020 (C) in particular Order (ii) dated and delivered on the 28<sup>th</sup> August, 2020 and that the Respondent be committed to jail sixty (60) days for such contempt or until such time that they purge the contempt of Court.*

*8.2 Pending finalization of this application, the Respondent's decision of terminating the Applicant's employment, as embodied in the letter dated 19<sup>th</sup> October, 2020 (annexure VM 4) be stayed and/or suspended.*

*8.3. Costs of application*

*8.4 Further and/or alternative relief"*

[9] The Applicants' application is opposed by the 1st Respondent on whose behalf an answering affidavit was duly filed and deposed thereto by Mandla Shongwe, who stated therein that he is the People Experience Advisor at the 1<sup>st</sup> Respondent's establishment. The Applicant thereafter filed their replying affidavit.

[10] The 2<sup>nd</sup> Respondent, 3<sup>rd</sup> and 4<sup>th</sup> Respondent have not. filed any papers before Court.

- [11] The matter came for arguments on the 9<sup>th</sup> December, 2020, the Court accordingly reserved judgment in the matter.
- [12] It is common cause that judgment was entered by this Court in favour of the Applicant on the 23<sup>th</sup> August 2020, in open Court. In terms of the order granted the 4<sup>th</sup> Respondent was directed to continue with the disciplinary hearing, allowing the Applicant to submit oral and written mitigating submissions. It is the Applicants averment that on the 3<sup>rd</sup> September 2020, he received a letter from the 2<sup>nd</sup> Respondent advising him to submit oral and written mitigating submissions to the chairman (fourth Respondent) and to make such submissions on or before the 3<sup>th</sup> September, 2020 failing which the 'chairperson would proceed and issue a recommendation.
- [13] Applicant argues that the letter was vague, in that it was his view that the chairperson would issue out an invitation for the hearing of oral and written submissions. It was his submission that he did not know where the chairperson worked or where he was resident, further he avers it was not explained to him why a formal hearing was not being convened by the Respondents, and this left him in an invidious position. Applicant further submits that while still waiting for the Chairman's invitation, he was called by the 1<sup>st</sup> Respondent on the 21<sup>st</sup> October, 2020 wherein he was given two documents, one being the outcome of the disciplinary hearing and the other being a dismissal letter.

[14] Applicant avers that the action by the Respondents was in deliberate disregard of the Court Judgment, as he was not afforded an opportunity by the Respondents to submit his mitigating factors and personal circumstances. The conduct of the Respondent therefore constituted a deliberate disregard of the power and authority of the Court and Applicant submitted that the Respondents are therefore in contempt. The Applicant cited the case **of FAKIE NOV CCII SYSTEMS (PTY) LTD 2006 (4) SA 326 (SCA) AT 332.**

[15] The Respondents in their defense argued, that after the Court issued its judgment 23<sup>th</sup> August, 2020, the Applicant was issued with correspondence on the 3<sup>d</sup> 9<sup>f</sup> October, 2020 inviting him to submit his oral and written mitigation before the 4<sup>th</sup> Respondent on/or before the 3<sup>th</sup> of September, 2020. The correspondence was further forwarded to his attorney. It is the Respondents submission that the Applicant did not heed to the request, neither **did** he write to the 1<sup>st</sup> Respondent to seek clarity if the correspondence was not clear to him.

[16] The 2<sup>nd</sup> Respondent further averred that upon receiving no response from the Applicant, he called the Applicant granting an extension of three days for the Applicant to act in accordance with the correspondence dated the 3<sup>rd</sup> September, 2020, to no avail. There being no response forthcoming from the Applicant, coupled with the failure to submit himself before the 4<sup>th</sup> Respondent for purposes of filing his submission, on the 19<sup>th</sup> October, 2020, 1<sup>st</sup> Respondent terminated the Applicants services.

[17] The Respondents stated that the Applicant did not at any point contact the office of the 1<sup>st</sup> Respondent to enquire about the status of his case, nor seek clarity as to the letter issued to him on the 3<sup>rd</sup> September, 2020. Therefore, the Applicant cannot submit that the letter addressed to him was vague, in circumstances where he did not seek clarity from the office of the 1<sup>st</sup> Respondent.

[18] The Respondents submitted that an order for imprisonment will be made by a Court for the willful failure to comply with an order, only if the order not complied with is an order *ad factum praestandum* (orders to do, or abstain from doing a particular act, or to deliver a thing). The Respondents cited the case of **SHAUN EVANS AND ANOTHER V YAKUB SURTEE AND THREE OTHERS SUPREME COURT OF ZIMBABWE CIVIL APPEAL NO.278/10** where the Court stated:

*"While it is trite that disobedience by a litigant of an order ad factum praestandum is punishable by committal to goal, it is also true that the disobedience must be willful and malafide.*

*Willfulness' and ma/a fides will normally be inferred upon proof that the order sought to be enforced was brought to the attention of the respondent and that he has either disobeyed the Order or neglected to comply with it. The onus then shifts to the respondent to rebut the inference on a balance of probabilities "*.

[19] The Respondents argued that there has been no willfulness and /or *mala fides* in the conduct of the Respondents to disregard the judgment of the Court, as the Applicant was invited to submit his mitigation before the 4<sup>th</sup> Respondent, which the Applicant failed to heed of his own accord. The Respondents argued that on this basis the application lacks merit and ought to be dismissed.

[20] **BURCHELL AND MILTON PRINCIPALS OF CRIMINAL LAW 2ED (JIJTA, CAPE TOWN 1997)**, defined contempt of Court as;  
*"Contempt of Court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it"*.

[21] In **FACIE NOV CCII SYSTEMS (PTY) LTD 2006(4) SA 326 (SCA)**, the Supreme Court of Appeal dealt with the prerequisites for committal in respect of contempt of court where it states,

*"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the noncompliance may genuinely, albeit mistakenly believing him or her to act in the way claimed to constitute the contempt. In such cases good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)"*.



[22] Against the legal framework set out above, I now consider the facts that culminated in this application, which are mainly disputed. Following the Judgment of the 28<sup>th</sup> August, 2020, the Respondent averred that the Applicant was issued with a letter dated 3<sup>rd</sup> October, 2020, calling upon him to submit his oral and written mitigation before the chairman on or before the 8<sup>th</sup> of September, 2020. The Applicant failed to heed to the request, neither did he indicate to the 1<sup>st</sup> Respondent if he was not conversant as to the contents of the correspondence, so as to be guided accordingly. The 4<sup>th</sup> Respondent receiving no correspondence and the Applicant further failing to appear before him on the 8<sup>th</sup> September, 2020, proceeded with the hearing, and subsequently the Applicants services were terminated by the 1<sup>st</sup> Respondent on the 19<sup>th</sup> October, 2020.

[23] The Applicant acknowledges in his own papers that indeed he received the correspondence of the 3<sup>rd</sup> October, 2020, but alleged that same was vague as he had anticipated an invitation form the Chairperson. From evidence adduced before the Court no evidence was submitted by the Applicant, that an attempt was made by himself to seek clarity from the 1<sup>st</sup> Respondent on the contents of letter, or to the 2<sup>nd</sup> Respondent who advised that he had

personally called the Respondent and advised him of an extension of three days, who further is in the Human Resources department.

[24] The question that this Court must answer is whether the conduct by the Respondent could have been said to have been deliberate, willful and mala fide disobedience of the Court Order given on the 28<sup>th</sup> August, 2020. Willfulness' and mala fides will normally be inferred upon proof that the order sought to be enforced was brought to the attention of the Respondents, and that the Respondents have either disobeyed the order or neglected to comply with it. The onus then shifts to the Respondents to rebut the inference on a balance of probabilities.

[25] From the evidence adduced before the Court the conduct of the Respondents cannot be said to be willful and/or *mala fides*. The 4<sup>th</sup> Respondent in accordance with the judgment of the Court invited the Applicant to submit oral and written mitigating submissions, and he failed to submit himself before the chairperson (4<sup>th</sup> Respondent).

[26] The Court cannot therefore say on a balance of probabilities the Respondents are in contempt of Court, because there has been no

disobedience to the Court Order which directed that the 4<sup>th</sup> Respondent afford the Applicant to submit oral and written mitigation submission. It is on this backdrop that the Court finds that this present application falls short of meeting the threshold for and order for contempt, the Respondent having successfully rebutted the inference of willfulness and *malafides*.

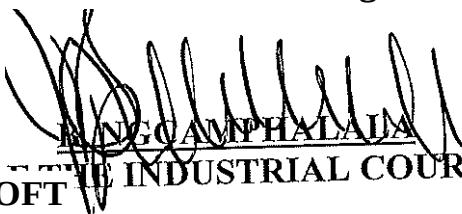
### CONCLUSION

[27] After considering all aspects of this case, taking into account all the circumstances of the case, the interests of justice, fairness and equity, the present application cannot succeed and is hereby dismissed.

### ORDER

- (i) **The application is ismised.**
- (ii) **There is no order as to costs.**

**The Members Agree.**

  
M. N. CAMPHALALA  
ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

**For Applicant:** Mr. S. Simelane (S.M. Simelane & Company).

**For Respondent:** Mr. H. Magagula (Robinson Bertram)