

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO: 4353/16

In the matter between:

ERIC ZOLILE TONISE

APPLICANT

and

**THE DIRECTOR GENERAL FOR
THE DEPARTMENT OF LABOUR**

RESPONDENT

and

CASE NO: 3250/17

In the matter between:

IGNATIUS WILLEM KRITZINGER

APPLICANT

and

**THE DIRECTOR GENERAL FOR
THE DEPARTMENT OF LABOUR**

RESPONDENT

JUDGMENT

D VAN ZYL DJP:

[1] This judgment deals with two applications wherein the applicants (conveniently referred to as **“the applicants”** or as **“Tonise”** and **“Kritzinger”** respectively), request that the Director-General of the Department of Labour (the respondent and the Department respectively) personally be held in contempt of court, and that he be sentenced to a term of imprisonment.

[2] The applications were instituted pursuant to the failure of the respondent to comply with the orders of this Court directing him to consider and decide upon the two applicants' claims for the payment of compensation in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (the Act). The orders gave the applicants 30 days in which to comply with the order. It is common cause that both the orders have since been complied with.

[3] In the original notices of motion in both applications, orders were sought against the Director-General in his official capacity, that is, in his capacity as **“the official who, in terms of section 4 (of the Act), is obliged to adjudicate claims for compensation brought in terms of the Act, and responsible for the proper performance of the compensation commission functions.”** The applicants subsequently applied for, and was granted leave to join the incumbent in the position of Director-General, Mr Thobile Lamati (**“Lamati”**) as a party to the applications in his personal capacity.

[4] In terms of section 1 of the Act the Minister responsible for the administration of the Act, is the Minister of Labour. In terms of section 4(1)(c) the adjudication of claims in terms of the Act is a function of the Director-General of the Department. Section 2(1)(a) mandates the Minister to appoint an officer called the Compensation Commissioner (the Commissioner) to assist the Director-General. The assistance contemplated in section 2 is given effect to in section 3, in terms whereof the Director-General may delegate any of his powers, or assign any of his duties to the Commissioner.

[5] In his affidavit filed in the proceedings, Lamati explained the organisational structure of the Department, his position and the functions of the different role players in the administration of the Act. In order to fulfil his statutory responsibilities and duties, Lamati had delegated to various officials, the functions assigned to him in the Act. The Department comprises of various district offices across the Republic. The office of the Director-General is based at the head office of the Department in Pretoria. According to Lamati, he is the administrative head of the Department. He is based in Pretoria and does not personally deal with any claim for compensation lodged in terms of the Act, or with any litigation that may arise therefrom. The functions and the authority to deal with such matters lie with the Commissioner and the officials based in the various districts.

[6] Further, all matters of a legal nature that concern the Department are dealt with by its legal services section. This includes all legal matters and court applications against Lamati in his official capacity. The authority to decide whether or not to oppose any legal proceedings and to instruct the State Attorney, vests in the legal services section to whom that authority has been delegated.

[7] A claim for compensation in terms of the Act is lodged with the Commissioner to whom Lamati had delegated those functions. As a consequence, all documentation in respect of a claim for compensation are received and held by the Commissioner. It is also the function of the particular Commissioner to deal with any litigation that may arise in relation to a claim for compensation.

[8] The Department also performs functions other than the administration of the Act. Any litigation that involves a section in the Department that is for matters arising from the implementation of the Act, will be channelled to that section by the legal services section. To this extent, according to Lamati, the legal services section would liaise with the relevant Commissioner with regard to litigation that emanates from the administration of the Act, and involves the exercise of that Commissioner's functions. It is standing procedure in the Department that all court orders against the Director-General in relation to his statutory duties in terms of the Act would be referred to the Commissioner in question to ensure that that the court order in question is complied with within the prescribed period.

[9] The position, according to Lamati, is therefore, that while the overall oversight and accountability remains with him, he does not personally deal with compensation claims in terms of the Act, and will ordinarily not have personal knowledge of individual claims, or of any legal proceedings that may arise therefrom.

[10] The requirements for contempt of court are the following: (a) the existence of the order of the court; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d)

the non-compliance must be wilful and *mala fide*. If the contempt order sought is committal, as in the present matter, the criminal standard of proof beyond a reasonable doubt would apply. (*Matjhabeng Municipality v Eskom* 2018 (1) SA 1 (CC) at para [73].) (*Matjhabeng*) Once an applicant in contempt proceedings has proved the requirements in (a), (b) and (c), the respondent bears an evidentiary burden in relation to wilfulness and *mala fides*. Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and *mala fide*, contempt will have been established beyond reasonable doubt. (*Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* [2015] (2) SA 413 (SCA) at para [16].) (*Meadow Glen*)

[11] Before dealing with the merits of the application, there is the matter of the objection raised by the applicants in their replying affidavits, to the late filing of the answering affidavits. The said affidavits were filed outside the time periods stipulated in earlier court orders. The position is that subsequent to the granting of the said orders, and after notices to oppose were filed, the two applications were postponed on several occasions before it was firstly enrolled for hearing. As correctly pointed out by counsel for the respondent, the postponement of the matters was clearly with the view of affording the respondent time to file his answering papers. It is indicative of the applicants not holding the respondent to the stipulated time lines.

[12] There was further no obvious prejudice that has resulted from the late filing of the affidavits, and none has been suggested. Another relevant consideration is the nature of these proceedings, and the fact that the relief that is asked for, affects the respondent's right to freedom. The court has a wide discretion to condone the late filing of the affidavits, and a formal application is not an indispensable condition for the

exercise of the court's discretion. (Erasmus, Superior Court Practice, Volume 2 D 1 – 321) The failure of the respondent to comply with the time limits in the relevant court order is accordingly condoned.

[13] The question whether the four requirements for contempt have been established must be determined on the papers filed of record. The approach to be adopted in this regard is the one set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) (at 634 E to 635 C). A party who seeks final relief in motion proceedings must, in the event of conflict, accept the version set up by his opponent, unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or clearly untenable, that the court is justified in rejecting them merely in the papers. This approach to the determination of issues in motion proceedings is unaffected by the burden of proof that may arise in any particular matter. (*Ngqumba en 'n Ander v Staatspresident en Andere & 2 Other Cases* 1988 (4) SA 224 (A) at 258 H – 263 D; *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) at 194 F.)

[14] The first and third requirements are not in dispute. With regard to the second requirement, the applicants are relying on the service of the order in accordance with the Rules of Court. In both instances the orders were served on an official in, what the deputy sheriff described as, the legal department of the Director-General of the Department of Labour. The returns rendered by the sheriff accordingly, do not provide evidence that the respondent had personal knowledge of the orders, or that it must have been brought to his notice. In both the applications the respondent only acquired personal knowledge of the matters involving the two applicants after the relevant Commissioner had complied with the order to consider the claims of the two applicants. The manner in which the Department is structured, and the delegation of

functions to the relevant functionaries within the section of the Department tasked with the administration of the Act, lends support to Lamati's evidence that he did not have personal knowledge of the orders, or the failure of the Commissioner to timeously comply therewith. Lamati's denial is therefore not unsubstantiated, and cannot simply be rejected on the papers.

[15] I am further of the view that the fourth requirement for contempt has similarly not been established. As stated in *Matjhabeng supra* (at para [76]) **“In order to give rise to criminal contempt, an official's non-compliance with a court order must be wilful and mala fide. In general terms, this means that the official in question, personally must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply.”**

[16] There is no evidence that Lamati personally, as the Director-General knowingly and deliberately defied the orders. In fact, it was not the applicants' pleaded case that he personally defied the orders. The general rule is that the applicant in motion proceedings must make out his case in his founding affidavit. There is no allegation supported by any facts that the respondent was personally responsible for the wilful default in complying with the court orders. (*Meadow Glen supra* at para [20].) The applicant's case is, on a reading of the respective founding affidavits filed in support of the applicant, that the Director-General as the official responsible for the overall administration of the Act, should be held in contempt for the failures of the relevant functionaries to comply with the court orders. The applicants have accordingly failed to make out a *prima facie* case for the relief claimed, and the application can on that

ground alone be dismissed. (*Pearson v Magrep Investments (Pty) Ltd and Others* 1975 (1) SA 186 (D) at 187 C – E).

[17] Lamati's explanation for the failure to comply with the court orders in any event dispels any notion that the failure was deliberate and *mala fide*. He explained that the Department deals with thousands of claims in terms of the Act, and that at the relevant time, it did not have the capacity to deal therewith expeditiously. As a consequence, a backlog occurred, that necessitated the procurement of a new system to enhance service and the turnaround time in finalising claims. In the Eastern Cape there was, what he describes as “**an unexpected surge**” in the number of claims in 2016, and that the available resources could not cope therewith. It unfortunately adversely affected the applicants' claims, and steps have since been taken to address the problems that led to the situation that presented itself at the time.

[18] Insofar as the position of the two applicants are concerned, according to Lamati, when he personally received the order joining him in the proceedings and the *rule nisi* issued in the contempt proceedings, he raised his concerns about the situation. He convened a meeting with the relevant officials in the legal services section, and was assured that the matter would receive priority attention and be dealt with expeditiously. Counsel for the applicants instead urged this court in argument to consider as evidence of *mala fides* and a deliberate defiance of the court orders, what he contended was the taking of obvious wrong decisions by the respondent, when the applicants' claims were eventually adjudicated. This, according to counsel was nothing more than a stratagem to defy compliance with the two court orders.

[19] There is no merit to this argument. What this requires is a finding on the correctness or otherwise of the decisions taken by the Commissioner on the applicants' claims for compensation. This Court is not equipped to decide that issue. The reason being that it was effectively only raised in reply without having afforded the respondent an opportunity to deal therewith. A further obstacle is that, as Lamati stated, the adjudication of compensation claims in terms of the Act are made by the Commissioner who received the claim, and not by him personally. It may be added, that counsel confirmed that in other similar matters the decisions taken by the Commissioner in response to court orders were correct, and that it led to the applications for contempt being resolved. To isolate two wrong decisions as constituting a deliberate stratagem as contended, can simply not be accepted.

[20] Counsel for the respondents further suggested in argument, that should this Court not be prepared to use committal as a remedy, it must consider granting alternative relief. For the reasons stated earlier the applicants have not made out a case for holding the respondent in contempt. Further, what the alternative form of the relief is that must be granted, was not stated. In *Matjhabeng supra*, the Court said that the purpose of relief in civil contempt proceedings is to compel parties to comply with a court order. (at para [54]). As stated, the two orders of this Court that form the subject matter of the two contempt applications, have been complied with. The concerns raised by the applicants are now rather focused on the correctness of those decisions. The present proceedings are not an appropriate vehicle to determine the issues that arise in that context.

[21] That leaves the question of costs. Ordinarily the party in contempt will be ordered to pay the costs of the proceedings. In the present matters however, the

applications for contempt were totally defective from its inception. The attempt to rectify that by the joinder of Lamati was unsuccessful without having alleged that he had personal knowledge of the orders, and that he wilfully and maliciously failed to comply with the court orders. The result was that unnecessary issues were raised, which in turn unnecessarily caused the volume of the papers filed in the applications to exceed 250 pages in each case. I am accordingly of the view that the costs should follow the result.

[22] In the result it is ordered that:

“The applications under case numbers 4353/2016 and 3250/2017 are dismissed with costs.”

D VAN ZYL

DEPUTY JUDGE PRESIDENT

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