IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number 867/2023

In the matter of:

PETUNIA MTHIMKULU **APPLICANT**

And

HEAD OF DEPARTMENT: DEPARTMENT OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT **FIRST RESPONDENT**

MEMBER OF EXECUTIVE COUNCIL: DEPARTMENT OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT **SECOND RESPONDENT**

CORAM: **NAIDOO, J**

HEARD ON: **27 MARCH 2023**

DELIVERED ON: **17 APRIL 2023**

JUDGMENT

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[1] This matter came before me as an urgent application in which the applicant sought an order, *inter alia*, declaring the first respondent to be in contempt of court and committing him to prison for six months, suspended on certain conditions. The applicant's reason for moving this application on an urgent basis was that the order from which this application emanates was granted as an urgent order. The application was opposed by the first respondent. Adv (Mr) MS Mazibuko represented the applicant and Adv (Mr) B Masihleho represented the first respondent. The second respondent did not participate in these proceedings.

[2] The applicant sought an order in the following terms:

"1 That the applicant's non-compliance with the prescribed requirements pertaining to form, service and time periods be condoned and that this matter be heard as one of urgency as envisaged in Rule 6(12) of the Uniform Rules of Court;

2 That the first respondent be declared and/or found to be in contempt of the order of this Court granted by Justice Loubser under case number: 867/2023 on 28 February 2023;

3 That the First Respondent be committed to prison for a period of six (6) months, which sanction will be suspended on such terms and conditions as the Court may deem appropriate, or alternatively a fine in the amount determined by this Court as appropriate be imposed on the First respondent;

4 That the first Respondent be ordered to pay the costs of this application on the scale of attorney-and-client."

[3] The order dated 28 February 2023 was granted by Loubser J in the following terms (the Loubser order):

"1. The Respondents shall, within 3 (three) days of the granting of this order, enter and/or update the applicant's employment status on the Personnel and Salary Management System (PERSAL) used for, amongst others, the administration of the public service payroll, and shall carry out all necessary administrative processes to ensure that all the applicant's employment benefits are in place effective from I February 2023, in accordance with the undated letter of appointment by the First Respondent which has been attached to the founding affidavit as annexure "FA2" and accepted by the Applicant in writing on 4 January 2023 (hereinafter "the appointment letter");

2. Save for the above orders, this order does not in any way deprive the parties of any of their rights and does not constitute an abandonment or waiver of any of their rights arising from the appointment letter, whether or not such rights have been raised in these proceedings or form the subject matter thereof.

3. The Second Respondent in his official capacity, as cited herein, shall pay the costs of the application, excluding the wasted costs occasioned by the postponement of the application on 24 February 2023".

[4] By way of background, the Department of Agriculture, Land Reform and Rural Development (the Department) advertised a vacancy for the post of District Director in the Thabo Mofutsanyana District. The applicant applied for the post and was informed that her application was successful. At the time, she was employed by the national Department of Agriculture, Land Reform and Rural Development She was furnished with an undated letter of appointment which she accepted in writing, and which she alleges occurred on 4 January 2022. Shortly thereafter on 26 January 2022, the applicant was called to a meeting with officials of the Department and was advised that she had misled the Department by indicating in her curriculum vitae (CV) that she held the post of Head of Office, when in fact she held the post of Control Resource Auditor. There were also certain other misrepresentations that she allegedly made, which only later came to the attention of the Department.

[5] She was advised that when her application was considered, the Department was under the impression that the position she held with her former employer was at Deputy Director level, which is the level that the Department was looking for. The post that she had held at the time was at the level of Assistant Director, which was not the level the Department was looking for. She was asked to withdraw from the post, which she refused to do, as she was of the view that she met the requirements stipulated in the advertisement. Subsequent interactions with the Departmental officials were not successful, leading to the application in respect of which Loubser J granted, on 28 February 2023, the order that I set out earlier.

[6] It is not in dispute that the respondents were legally represented and that officials from the office of the first respondent were present at court when the Loubser order was granted. The applicant contends that the first respondent ought to have complied with the latter mentioned order by 3 March 2023. Her legal representative directed a letter to the State Attorney, who was representing the respondents, on 6 March 2023 enquiring if the later had complied with the order Loubser order. She received no response and asserts that at the time of launching this application, the order had still not

been complied with. The applicant correctly set out in her Founding Affidavit the requirements for granting the relief sought in this matter, namely, the existence of the order, notice of the order to the respondent and non-compliance with the order. It is not in dispute that the order was granted after certain negotiations between the legal representatives of both parties in court. It is also not in dispute that the first respondent had not complied with the order by 3 March 2023. Once notice of the order on the respondent is proved, the onus would then shift to the first respondent to prove that such non-compliance was not wilful or *mala fides*. What is in dispute is service of the order on the first respondent personally, as the applicant seeks an order for the first respondent to be found guilty of contempt of court, and sentenced accordingly.

[7] The first respondent, in Answer, set out the legal prescripts relevant to the recruitment and appointment of officials in the public service sector. He asserts that after the letter of appointment, relied upon by the applicant, was furnished to her, the respondents discovered the misrepresentation I referred to earlier. This was before the legally prescribed contract of employment was signed. The matter was then referred to the second respondent (the MEC) to invoke his powers in terms of the Regulation 67(9)(a) of the Public Service Regulations, which require the MEC, before making an appointment or filling a post, to satisfy herself or himself that the candidate qualifies in all respects for the relevant post and that all claims made by the applicant in his or her application have been verified. Such verification is required to be in writing. The applicant was informed, in January and February 2023, of this step taken by the first respondent, but she persisted in launching the application which resulted in the Loubser order.

[8] The first respondent alleges that on the day the Loubser order was taken, he was telephoned by his legal representative and advised "*on how they intend to best deal with the matter*", and expected that he "*would be favoured with a copy of the end product*". I take this latter assertion to refer to a copy of the court order, which he asserts that he only received on 10 March 2023, after it was sent to him by his secretary, via electronic mail (email). The latter only received the email on 9 March 2023, due to a network malfunction since 6 March 2023.- The first respondent avers that he was not aware of the order

prior to 10 March 2023. The current application was served on his secretary on 15 March 2023.

[9] The first respondent explained that pending the decision of the MEC regarding the employment of the applicant, and after receipt of the Loubser order, Ms Lombaard, the acting Chief Director for Corporate Services in his office, attempted to comply with the order, but experienced difficulties as a result of procedures to be followed in relation to the Personnel and Salary Management System (PERSAL). He explained that each national and each provincial department has its own unique code on the PERSAL system and only specific users have access thereto. In the present matter, a two-phase procedure was necessary. Phase 1 required the releasing department to release the applicant from the system of the national department and phase 2 would entail the Department completing the transfer of the applicant by uploading her details onto the provincial PERSAL system. Ms Lombaard's first attempt was unsuccessful, and her second attempt on 13 March 2023 bore fruit. The transfer of the applicant was completed on 15 March 2023, the same day that this application was served on the first respondent.

[10] Ms Lombaard advised the applicant's legal representative on 15 March 2023 of the steps that had been taken in respect of compliance with the Loubser order and that the applicant would receive the outstanding benefits due to her on 23 March 2023, via a supplementary salary run to be initiated on 20 March 2023. Ms Lombaard confirmed her actions in this matter by way of a confirmatory affidavit annexed to the Answering Affidavit. The first respondent therefore asserts that he had fully complied with the Loubser order on 15 March 2023.

[11] With regard to urgency the first respondent asserts that the applicant failed to show that the court order was served on the Department. He also complained that although the applicant obtained the court order on 28 February 2023, she only galvanised into action ostensibly from 6 March 2023, and in so doing, placed the respondents under extreme time constraints in respect of filing answering papers. Hence, any urgency she claims is self-created. In view of his compliance with the Loubser order and the lack of urgency in the matter, the first respondent sought an order dismissing the application, with costs on the attorney and client scale.

[12] In Reply, the applicant was at pains to refute that the first respondent only became aware of the Loubser order 10 March 2023 and to point out that he would have had knowledge of the order on the day that it was granted, as he indicated that his legal representative had a discussion with him about the order on that day. She also pointed out that Ms Lombaard "strangely" only acted on receipt of the order on 9 March 2023, by contacting the national department at which she was employed, allegedly even before the first respondent became aware of the order. The applicant also appeared to refute the first respondent's version that the Department's network malfunctioned between 6 and 9 March 2023, pointing out that the document attached in support of this allegation is not proof thereof. She did not herself rely on any documentation or other evidence to refute the first respondent's version in this regard. The applicant reiterated that the first respondent was in wilful default and acted in bad faith by not complying with the court order and persisted in the relief she sought.

[13] In my view, the issue for this court to decide is whether the first respondent acted wilfully or in bad faith in not complying with the court order by 3 March 2023. His assertion that he only became aware of the court order on 10 March 2023 seems, at first blush, to be somewhat strange as, by his own admission, he was aware that an order was taken or being taken. Having said that, it is not clear what the exact nature of the discussion between him and his legal representative was, but he appears to have known that some action was called for on the part of the Department. His legal representative advised him on how they intend to best deal with the matter. It is also unclear as to when on that day this discussion took place – before or after the order was granted. While two officials from his office were present in court when the order was granted, there is nothing to suggest that they either participated in the discussions between the legal representatives of the parties, or that the content of the order was either made known to them or read out in open court.

[14] Not much reliance can be placed on their knowledge of the content of the court order. Without any specific averments to this effect or other evidence in respect of these matters, it is unwise to speculate about what, in fact, happened. As I indicated earlier, it seems that the first respondent may have

been aware that some action was required on the part of the Department. However, I am constrained to dismiss his version that the actual order and contents thereof only came to his attention on10 March 2023. Given Ms Lombaard's position, she too must have been aware that some action was required on the part of the Department and acted as soon as she received the order on 9 March 2023.

[15] While it is so that the document attached as proof that SITA confirmed downtime in respect the Department's network is in fact email communications between what appears to be Departmental officials, there is mention in that string of communication that the network was down and that it was reported to SITA. It is also true that it does not reflect the date of the communication, but the first respondent has indicated under oath that the network was down between 6 and 9 March 2023, and in the absence of evidence refuting this, I am unable to simply reject it out of hand. I cannot also hold, against the first respondent, what is either an oversight or an act of carelessness on the part of those drafting the Answering Affidavit, in incorrectly referring to the annexure as a communication from SITA. However, I take into account the time constraints under which the Answering Affidavit was drafted.

[16] In deciding whether the first respondent wilfully and in bad faith, failed or refused to comply with the Loubser order, it is necessary to consider the surrounding facts relevant to this matter. The first respondent's version that he discovered, after the letter of appointment was furnished to the applicant, that certain serious misrepresentations were made in the applicant's application for the relevant post, is not disputed. She agrees that she was called to a meeting where this was drawn to her attention and that she refused the request for her to withdraw her application. The prescribed employment contract had not been signed at that stage, and as a result, the first respondent followed prescribed procedure and referred the matter to the MEC for a decision, which he is statutorily empowered to make.

[17] A legal opinion and decision by the MEC were still awaited when the application, which served before Loubser J, was issued, in spite of the applicant being informed that the matter was referred to the MEC for a decision. In the public interests and in the interests of good governance, the

recruitment, appointment, transfer and dismissal of public service employees is regulated by statute and the regulations thereto. Compliance with such statutory provisions is mandatory, as it was in this case. On receipt of the court order, the Department acted and secured the transfer of the applicant onto its system by 15 March 2023. The legal representatives of the applicant were informed of this and given specific dates by when the process of paying the applicant will be initiated and when she would be paid, namely 20 March 2023 and 23 March 2023, respectively.

[18] The applicant had on that same day served this application on the first respondent. This matter was heard on 27 March 2023, some four days after the date that the applicant was promised payment.

She made no mention whatsoever either in Reply or in the oral argument in court that she had received the letter from the first respondent's attorney dated 15 March 2023 or any benefits at all. When the court pointedly asked this of Mr Mazibuko, he stated that not all the benefits were uploaded. The court pursued the matter further and enquired of him if all the benefits were uploaded, whether it was the attitude of the applicant that the first respondent still had to be punished. He stated that those were his instructions and added that it goes beyond the parties and is a matter of public interest if there is non-compliance.

[19] As I alluded to earlier, the first respondent disputes service upon him of the order against him in his personal capacity, but admits that after receipt of the email he received on 10 March 2023, he was part of the initiatives instituted by Ms Lombaard to comply with the Loubser order. The prescribed procedure was followed in referring the matter to the MEC, and such was brought to the attention of the applicant, prior to the launch of the application on which the Loubser order is based. Similarly, the applicant was advised on 15 March 2023 that her details were uploaded onto the Department's PERSAL system and that she would receive her benefits on the date I alluded to earlier. The applicant failed to mention that such benefits were in fact received by her and proceeded with this application on the basis that the letter of the Loubser order was not strictly followed. Her attitude, as communicated by Mr Mazibuko, is not only to use the process of court to obtain maximum benefit for herself but to punish the first respondent.

[20] In my view, even if the first respondent was aware of the existence of the order, there is no evidence before me that he was aware of the exact terms of the order. His evidence that he only became aware of the content of the order on 10 March 2023 cannot be refuted, and the steps taken by the first respondent in order to address the issues that had arisen in this matter are not indicative of contempt of the Loubser order, or that such actions were taken in bad faith. In my view, the applicant has failed to establish all the elements necessary for the grant of an order for contempt of court.

[21] In respect of urgency, while I agree with the submissions of the first respondent in this regard, I nevertheless decided to hear the matter, in the interests of justice, as the expeditious resolution of the matter would be in the public interest.

[22] With regard to costs, the applicant was aware on 15 March 2023 that her details were uploaded onto the Department's PERSAL system, and that she would receive payment of benefits due to her, a week later. Her Replying Affidavit was deposed to and filed on 22 March 2023, a day before she was due to receive payment of her benefits. At that stage, she was aware that paragraph 1 of the Loubser order had been complied with, and instead of reconsidering her position and avoiding incurring and unnecessarily escalating costs, she simply proceeded full steam ahead with this application, arguing vociferously for the relief that she sought. Her claim that the public interest demands the grant of the relief she seeks rings hollow in the face of her own conduct and, in my view, there is no reason for the first respondent to be mulcted in costs either in his personal or official capacity.

[23] In the circumstances I make the following order:

23.1 The application is dismissed with costs, such costs to include the wasted costs of 17 March 2023

S NAIDOO J

On Behalf of the Applicants: Adv MS Mazibuko

Instructed by: Matlho Attorneys

2nd Floor Metropolitan Building
96 Henry Street
Bloemfontein
(Ref:MD Matlho/MTH1/0001)

On Behalf of the Respondent: Adv B Masihleho

Instructed by: T Moleko
State Attorney
11th Floor, Fedsure Building
49 Charlotte Maxeke Street
Bloemfontein
(Ref: 701/202300175/P5M/tem)