



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BISHO)**

CASE NO: 711/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

SINDISWA ALMEIDA PETER

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH, EASTERN CAPE**

First Respondent

**THE HEAD OF DEPARTMENT, DEPARTMENT
OF HEALTH, EASTERN CAPE**

Second Respondent

J U D G M E N T

DREYER AJ

[1] The Department of Health, Eastern Cape terminated the applicant's, Sindiswa Almeida Peter ("Peter"), employment in 1998. After initially

disputing the fairness of her termination, Peter accepted the decision of the Public Health and Welfare Sector Bargaining Council on 8 April 2001, confirming the fairness of her dismissal...

[2] The Department of Health did not submit the requisite Government Employees' Pension Fund ("the GEPF") to facilitate Peter's election that she be paid out her pension benefits on the termination of her employment.

[3] In 2003, Peter instituted review proceedings that the failure by the then Member of the Executive Council for Health's ("the MEC Health"), Mr Bevan Goqwani, to furnish the GEPF with the relevant documents to facilitate the payment of Peter's pension monies, was reviewed and set aside.

[4] On 5 February 2004, this Court, per Judge Van Zyl (as he then was), granted an order ("the 2004 Order") that:

"1. The respondent's administrative action in failing to furnish the Government Employees Pension Fund and the relevant documents necessary to procure the payment of the applicant's pension monies in terms of the Government Employees Pension Law, is directed to be reviewed.

2. The respondent is directed to furnish the Government Employees Pension Fund such documentation as may be necessary so as to procure the payment of the applicant's pension monies.

3. *The respondent is directed to pay the applicant, interest on the applicant's pension monies which may become due, owing and payable to her by the Government Employees Pension Fund at the legal rate of 15.5% calculated as from 1 December 1998 capitalised annually to date of payment."*

[5] On 1 October 2005, Peter received the capital portion of her pension monies due to her in the sum of R18 372.81. The MEC Health, did not pay interest on Peter's pension monies as required in paragraph 3 of the 2004 Order.

[6] The MEC Health's, failure to pay the accrued interest resulted in further litigation. On 4 December 2018, Acting Judge Nqumse granted a further order ("the 2018 Order"). The incumbents Helen Sauls August, as MEC Health and Thobile Mbengashe as HOD Health were cited both in their representative capacity and their personal capacity. The 2018 order required,

- "1. *The respondents take all administrative steps to ensure that paragraph 3 of the order granted on 5 February 2004 under case 4918/2013 is complied with within 20 days as from this order having been served on the respondents.*
2. *The respondents deliver a report in writing to the registrar of the court and to the applicant's attorneys within 20 days of this order having been served on them, of the manner and extent of the respondents' compliance with the order granted in paragraph 1 above.*

3. *If the respondents fail to comply with the order referred to in paragraphs 1 and 2 above, the applicant is given leave to supplement the notice of motion and founding affidavit and to enrol on reasonable notice to the respondents for a further order or on such further relief as the applicant may seek.”*

[7] On 12 March 2021, the Department of Health, through its attorneys of record, the State Attorney, paid Peter the sum of R26 853.61. This amount, on the Department’s calculation fully discharged its indebtedness to Peter in accordance with the 2004 order.

[8] On the Department of Health’s calculation, interest was only payable on the capital portion of the pension money from the due date of payment, namely 1 December 1998, until the actual date of payment namely 1 October 2005.

[9] Peter disagreed that this was the only interest due and payable. Peter contends that she was due payment of an amount of interest calculated from 5 October 2005 until the payment of the interest on 12 March 2021. This dispute gives rise to the current proceedings.

[10] In these proceedings, the relief that Peter seeks in the notice of motion is couched as follows:

- “1. *Directing that the first respondent Nomakhosazana Meth show cause to this court on a date to be determined by this court why she should not be committed to prison for such period as this honourable court may seem meet, on account*

of her contempt of court for failing to comply with the order granted in this matter on 4 December 2018.

2. *Directing that the further order granted herein be served by way of personal delivery by the State Attorney on the said Ms Nomakhosazana Meth.*
3. *Directing that the State Attorney deliver to this court within 10 days of granting of the further order a report in writing certifying that such service has been effected, and that a copy thereof be served on the applicant's attorney of record."*

[11] It is not clear from the notice of motion what relief is actually sought, whether Peter seeks payment of the outstanding interest, if any, or whether what Peter seeks is an order to hold the current MEC, Ms Nomakhosazana Meth, in contempt of court and commit her to a period of incarceration. When this Court posed the question to Peter's legal representative, her answer was "*the relief as set out in the notice of motion*". This answer is singularly unhelpful.

[12] Contempt proceedings are not appropriate relief to compel a functionary to make payment of an outstanding debt.¹ Execution proceedings are.² The Constitutional Court held in *Pheko* 2³ that civil contempt remedies other than incarceration should be considered to compel compliance. None are proposed by the applicant, Peter.

¹ *Hawkin v Hawkin* 1932 WLD 190 @192; *Nyathi v MEC Department of Health, Gauteng* 2008 (5) SA 94 (CC) @ para [76]

² *Swanepoel v Bovey* 1926 AD 457 @ 458

³ *Pheko (2) & other v Ekurhuleni Metropolitan Municipality* 2015 (5) SA 600 (CC) @ para [37]

[13] If the relief that Peter seeks is that Ms Meth, the current MEC, Health is brought before court to give an explanation why she should not be held in contempt of court for failure to pay any interest that may be due in terms of the 2004 order read with the 2018 order then contempt proceedings would be appropriate.

[14] As stated by the Constitutional Court in *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*:⁴

“Contempt of court proceedings exist to protect the rule of law and the authority of the judiciary. As the applicant correctly avers, the authority of the courts and obedience of their laws – the very foundation of constitutional order founded on the rule of law – depends on public trust and the respect of the courts.”

[15] Any disregard of this Court’s order and the judicial process requires this Court to intervene. As enunciated in *Victoria Park Ratepayers Association v Greyvenhouw CC*,⁵ contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution.⁶

⁴ 2021 (5) SA 327 (CC)

⁵ 2004 (3) All SA 623 (E) at para [23]

⁶ *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture* at para [27]

- [16] The test for contempt, a deliberate intentional disobedience of an order of a competent court, is threefold: firstly, an order was granted against the alleged contemnor, secondly, the alleged contemnor was served with the order or had knowledge of it and, lastly, that the alleged contemnor failed to comply with the order.⁷
- [17] Once these elements are established, it is established beyond a reasonable doubt that the contemnor is in contempt of court unless the contemnor establishes reasonable doubt relating both to wilfulness and *mala fides*.⁸
- [18] Contempt is not an issue *inter partes*. It is an issue between the court and the person who has not complied with the order.⁹
- [19] It is trite that, personal service must be effected on the contemnor for the contemnor to be held in contempt of court. Absent personal service, it must be shown that the contemnor has knowledge of the court order.
- [20] The current MEC, Health, Ms Meth, and HOD, Health Dr Wagner, refute that Peter is entitled to any of the relief she seeks. Firstly, they contend, neither the 2004 Order nor the 2018 Order was served on them

⁷ This is the test set out by the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), at para [22], and approved by the Constitutional Court in : *Pheko (No 2) supra*

⁸ *Southey v Southey* 109 ECD 133 at 137, affirmed by *Consolidated Fish Distributors (Pty) Ltd* 1968 (2) SA 517 (C) @ at 522E-H

⁹ *Federation of South African Schools (Gauteng) v MEC Education, Gauteng* 2002(1) SA 660 (T)

personally and, secondly, the debt that Peter seeks to enforce has, in fact, been paid.

20.1 On 2 March 2011, the 2004 order was served on a Ms L Mooi in Legal Services, who accepted service, both for the accounting officer of the Department of Health, Eastern Cape (that is the Head of Department) and the MEC of Health, Eastern Cape

20.2 On 18 December 2018, the 2018 Order was served on a Mrs Z Mephlo, the office manager of the Superintendent General of Health, Dr TD Mbengashe, as the person designated by him to accept service on his behalf in terms of the State Liability Act.

20.3 On 13 December 2018, the 2018 Order was served on a Ms Z Gangana, the person in charge of Shared Legal Services at the office of the Premier, who accepted service on behalf of the MEC for Health, Helen Sauls August and the HOD for Health, Thobile Mbengashe.

20.4 Service in this fashion does not constitute personal service.

[21] These returns of service clearly indicate that there was no personal service of either the 2004 Order or the 2018 Order on the persons occupying either the position of MEC Health, or that of HOD Health,

both in 2011 and in 2018. The current application, which includes both these court orders, was served solely on the State Attorney as the legal representative of the MEC Health and HOD Health. There are no returns of service in the papers evidencing personal service on the current incumbents Ms Meth or Dr Wagner.

[22] There is no evidence on the papers that the current MEC, Ms Meth, has any knowledge of the 2004 Order or the 2018 Order or these current proceedings. Consequently, there is no scope to contend, as Peter does, that the MEC is in wilful disregard of these court orders.

[23] The current HOD, Dr Wagner, gained knowledge of this court order in these proceedings. Dr Wagner is the deponent to the answering affidavit. Her defence is that the court order has been complied with, as the outstanding interest, calculated from date the pension ought to have been paid (that is 1 December 1998) until actual payment (that is 1 October 2005) has been paid.

[24] Peter has only shown the first leg of the test for contempt of court, namely, that an order was granted against the MEC Health on 5 February 2004 and that a further court order was granted against the MEC and HOD Health as well as the incumbents, Helen Sauls August and Dr Thobile Mbengashe, on 4 December 2018.

[25] Peter has failed to meet the second leg of the contempt test namely that there was service of these orders on the current incumbents or that

the incumbents had knowledge of the court orders prior to the institution of these proceedings.

- [26] Whether there is actually any amount payable in terms of the court orders is dispositive of any question of non-compliance with the court orders by both the incumbent MEC Health and the HOD Health, irrespective of the manner of service of the court orders.
- [27] Paragraph 3 of the 2004 Order requires payment of interest on the pension monies capitalised annually. *Euro Blitz 21 v Secena Aircraft Investments CC*¹⁰ recognised that the term “*the capitalisation of interest*” is interchangeable with the compounding of interest.
- [28] Where interest is capitalised, the capitalised interest does not lose its character as interest. It does not become part of the capital amount for the purpose of the *in duplum* rule.¹¹ The *in duplum* rule prevents a creditor from claiming payment of interest in excess of the capital sum. In this instance, the capital sum payable to Peter for her pension benefit was the sum of R18 872.81. Consequently, in accordance with the *in duplum* principle, the maximum amount of interest Peter could claim on this amount is the capital sum, namely, R18 872.81.

¹⁰ [2015] ZASCA 21 (19 March 2005)

¹¹ *Casey and Another v First Rand Bank Ltd* 2014 (2) SA 374 (SCA) at para [7]; *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* [1998] 1 All SA 413 (SCA)

[29] The payment made by the Department of Health on 12 March 2021, in the sum of R26 853.61 was R8 480.80 in excess of the interest that was properly due and payable to Peter. The amount of R8 480.80 was paid to Peter *sine causa*. As the MEC, Health has not instituted a counter application for the repayment of this amount, I say no more regarding this overpayment.

[30] The MEC Health and HOD Health have established reasonable doubt for any failure to comply with the court orders relating both to their wilfulness and *mala fides*. The court orders were fully complied with on 12 March 2021, when the interest on the pension monies was paid. This happened prior to the institution of these proceedings.

[31] Peter has failed to show that the incumbents are in contempt of court.

[32] In the result, I make the following order: the application is dismissed with costs.

DREYER AJ
ACTING JUDGE OF THE HIGH COURT

Representation for applicant

Counsel: Adv Sothenjwa

Instructed by: Hutton & Cook

Representation for respondents

Counsel:	Adv Phashera
Instructed by:	The State Attorney, King William's Town
Date matter heard:	1 September 2022
Date matter handed down:	27 September 2022