



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 4129/2021

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

In the matter between:

DR. SHATALEGOLO EPHRAIM KGOETE

APPLICANT

and

MEMBER OF THE EXECUTIVE DEPARTMENT
OF HEALTH, LIMPOPO PROVINCE

FIRST RESPONDENT

THE CHIEF EXECUTIVE OFFICER, VAN VELDEN

SECOND RESPONDENT

N.E RAMODIKE N.O.

THIRD RESPONDENT

HEAD OF THE DEPARTMENT OF HEALTH,
LIMPOPO PROVINCE

FOURTH RESPONDENT

DEPUTY DIRECTOR-GENERAL: CORPORATE SERVICES,
LIMPOPO DEPARTMENT OF HEALTH

FIFTH RESPONDENT

In Re:

DR. SHATALEGOLO EPHRAIM KGOETE

APPLICANT

and

THE MEMBER OF EXECUTIVE COUNCIL

FIRST RESPONDENT

FOR THE DEPARTMENT OF HEALTH, LIMPOPO PROVINCE

*THE CHIEF EXECUTIVE OFFICER,
VAN VELDEN HOSPITAL*

SECOND RESPONDENT

N.E RAMODIKE N.O.

THIRD RESPONDENT

JUDGMENT

NAUDÈ AJ:

- [1] This is an application for contempt of court in terms whereof the Applicant applies that the Respondents be declared to be in contempt of the Court Order granted on 25 June 2021 and be sentenced to a period of six (6) months imprisonment or period the court may deem appropriate for such contempt, which period of imprisonment to be suspended on conditions deemed appropriate by this court. In the alternative to imprisonment, the Applicant applies for an order imposing a fine of R500 000.00 for each of the Respondents or any other amount this court may deem appropriate for such contempt.
- [2] The Applicant launched an application for an urgent review. The following orders were made against the First, Third and Fifth Respondents on 25 June 2021:-
- "1. The Applicant's non-compliance with rules relating to form, services and time frames is condoned.*
 - 2. The Applicant is granted leave to bring and treat this matter as one of urgency.*
 - 3. The First Respondent's decision to terminate the Applicant's employment contract is declared unlawful, invalid and of no force and effect.*
 - 4. The decision to terminate the Applicant's employment contract is reviewed and set aside.*
 - 5. The First Respondent is ordered to pay costs of this application."*

[3] According to the Applicant, the above orders were read out by Judge MG Phatudi in the presence of all parties, including counsel for the First, Third and Fifth Respondents, as well as a candidate attorney of the State Attorney. The original hard copy of the orders were handed down on 25 June 2021.

[4] The Applicant submits that during the evening of the 25th of June 2021, his attorneys of record wrote a letter to the Respondents wherein the following was stated:-

"We refer to the urgent application launched by our client, Dr. Kgoete which was heard on the 22nd June 2021 and 25th June 2021.

As you are probably aware, the aforesaid application was granted in favour of our client.

Please find a self-explanatory copy of the Court Order delivered by the honourable Justice MG Phatudi on the 25th June 2021.

As a result of the aforesaid Court Order, our client will be reporting for duty with effect from Monday, 28 June 2021 as he never ceased to be an employee of the department stationed at Van Velden Hospital.

Therefore, you are requested to ensure compliance with the Court Order and attend to:

Restore ALL benefits due to our client as of date of termination of employment, 1st March 2021. Such benefits includes but not limited to, activation of our client's persal, pensions etc. Please provide our client with all facilities and assistance in order for him to render his services as he is required to do.

We hereby request for your corporation and compliance with the Court Order.

We are of the view that it is in the best interests of both parties that a meeting be convened for purpose of discussing this matter so as to ensure practical and proper compliance with the court order. In so doing the members of the public benefits will continue to benefit from our client's services.

You are at liberty to contact our office for any assistance and corporation in the implementation of the Court Order.

We trust you shall find the above to be in order."

- [5] According to the Applicant, he tendered his services to the First Respondent at Van Velden Hospital under the control of the Second Respondent on 28 June 2021. Upon his arrival at the hospital premises, he visited the office of the Second Respondent who told him that he must go back home as he has not received any communication form the First Respondent's office. According to the Applicant he informed the Second Respondent that he came to render services as required by his contract of employment and court order.

- [6] The Applicant submits that during a morning meeting with other doctors, a security guard and a one Mr. Ngobeni approached him and asked that he should leave the hospital premises until the First Respondent has communicated with the Second Respondent. According to the Applicant, he was instructed to leave the premises despite having shown the security guard and Mr. Ngobeni a copy of the court order.
- [7] The Applicant further submits that the Respondents, despite having knowledge of the court order, refuses him to render services. The Respondents have furthermore failed to pay the Applicant his salary and benefits since March 2021 due to the unlawful termination of his contract of employment by the Second Respondent and the Hospital Human Resource Officials. The Applicant submits that he is unable to meet his financial obligations which includes maintaining his household, wife and children.
- [8] According to the Applicant the Respondents are in flagrant, willful and *mala fide* contempt of the court order. The Applicant submits that he has attempted to avoid bringing this application and tried to exhaust internal remedies as he was of the view that this matter can be resolved, without any success.

- [9] In opposition, the Respondents submit in their answering affidavit that they intend on applying for leave to appeal against the order of 25 June 2021 and have proceeded to request reasons from Judge MG Phatudi.
- [10] According to the Respondents, their intention to apply for leave to appeal in terms of **Section 18 of the Superior Courts Act, 10 of 2013** has the effect that the order is suspended pending the appeal. **Section 18(1) and (2) of the Superior Courts Act, 10 of 2013** states as follows:-
- "18. Suspension of decision pending appeal.*
- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal, is not suspended pending the decision of the application or appeal."*
- [11] **Section 18(5) of the Superior Courts Act, 10 of 2013** stipulates as follows:-

“(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”

- [12] The Respondents submit that in the circumstances, the Applicant's application for contempt of court is premature and ill-advised, bearing in mind that the execution of the judgment is automatically suspended upon the noting of an appeal, with the result that pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with leave of the court which granted the judgment.
- [13] The Respondents' opposition to the application for contempt of court is solely based on the fact that the Respondents intend on appealing against the order made on 25 June 2021. It however needs to be stated that the Respondents' counsel at the hearing of this application confirmed that there is no appeal pending, nor an application for leave to appeal.
- [14] In a supplementary affidavit filed by the Applicant, the Applicant submits that after the request for reasons for the order granted on 25 June 2021 was delivered by the Respondents, he took the liberty to transcribe the records of the proceedings of

the 25th of June 2021. The transcribed records were served on the Respondents on 12 August 2021.

- [15] The Applicant further submits that Judge MG Phatudi, through his secretary or registrar responded to the Respondent's request for reasons notice in terms of Rule 49(1)(c) on 7 September 2021, which response reads as follows:-

"I have been directed by the Honourable Judge MG Phatudi who heard the application to respond to your notice as follows:

- 1. The application was heard on the 22nd June 2021 during which occasion the proceedings were mechanically recorded.*
- 2. The ruling in respect of prayers 1, 2, 3, 4 and 5 of the Notice of Motion was deferred to the 25th June 2021 for determination thereof.*
- 3. On the return date, the court handed down judgment ex tempore in which the reasons for the order/s made were circumscribed.*
- 4. A party seeking the reasons is therefore requested, at own costs, to obtain a transcript of the record of the judgment from whence the reasons sought, would appear. This record shall assist in the intended leave to appeal, if any."*

- [16] To date of hearing of this application for contempt of court, there was no notice to apply for leave to appeal against the judgment of 25 June 2021 filed by the Respondents and furthermore, the time within which the Respondents ought to

have delivered its notice of application for leave to appeal, has lapsed. The argument and defense raised by the Respondents are therefore without any merit.

- [17] In addition to the above, the Respondents' Counsel at the hearing of this application raised a *point in limine* that the Applicant has failed to join, alternatively cite the relevant parties in their personal capacities. According to the Respondents, the Fourth and Fifth Respondents were neither cited as parties in the main application, nor do they appear as parties in the Court Order dated 25 June 2021. It is thus contended that they are mis-joined in this contempt of court proceedings.
- [18] The Respondents' counsel argued that it is common cause that the Applicant has cited the Respondents in their official capacity, and not in their personal capacity in this application for their committal to prison.
- [19] It was argued by the Respondents' counsel that **Section 2 of the State Liability Act, Act, 20 of 1957**, provides how a process against a department must unfold and provides as follows:-
- "Proceedings to be taken against Executive Authority of Department concerned,*
2(1) In any action or any other proceedings instituted against a Department, the

Executive Authority of the Department concerned must be cited as nominal Defendant or Respondent.”

- [20] In the present matter, neither the Fourth, nor the Fifth Respondents were parties to the main application and court order. The Applicant furthermore failed to allege and prove in the contempt of court application on what grounds the Fifth Respondent is to be held in contempt of court. It is however clear that the Fourth Respondent, despite having knowledge of the court order and as Head of the Department of Health fails, alternatively refuses to allow the Applicant to resume his duties in that the Fourth Respondent wrote a letter to the Applicant's attorneys of record on 29 June 2021 which states as follows:-

“The above matter refers.

The department is in receipt of your letter dated 25th June 2021 attaching Court Order of the Limpopo High Court under case number 4129/2021 regarding the above-named.

Kindly be informed that the department intends appealing the said court order. (judgment) and you and your client will be served with the papers in due course.

Take notice further that given the intention to appeal, your client, Dr. Kgoete will not be required and allowed to report on duty until the matter is heard by the appeal court.”

- [21] To ensure that courts' authority is effective, **Section 165(5) of the Constitution** makes orders of court binding on "all persons to whom and organs of state to which it applies". The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. (See **S v Mamabolo 2001 (3) SA 409 (CC)**). Discernibly, continual non-compliance with court orders imperils judicial authority.
- [22] It "is a crime unlawfully and intentionally to disobey a court order". (See **Fakie N.O. v CCIL Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA)** at para 6). The crime of contempt of court is said to be a "blunt instrument". (See **Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality [2014] ZASCA 209; 2015 (2) SA 413 (SCA)** at para 35)) Because of this, "[w]ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence". (See **Pheko v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC)**) All contempt of court, even civil contempt, may be punishable as a crime.
- [23] In determining whether the Respondents are guilty of contempt of court the following requirements as set in **Compensation Solutions (Pty) Ltd v Compensation Commissioner [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA)** should be proved:-

“The question which then arises is whether the appellant proved that the Commissioner’s failure to comply with the [consent order] amounted to civil contempt of court, beyond a reasonable doubt to secure his committal to prison. An applicant for this type of relief must prove (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and mala fides beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and mala fide. Here, requisites (a) to (c) were always common cause. The only question was whether the Commissioner rebutted the evidentiary burden resting on him.”

[24] In **Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mokhonto and Others v Compensation Solutions (Pty) Limited** [2017] ZACC 35, the Nkabinde ADCJ at para 67 held as follows:-

“Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have

material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

- [25] In this matter the onus to prove contempt of court remains on the Applicant seeking a finding of contempt. The Respondents bear an evidentiary burden in relation to willfulness and *mala fides* and had to adduce evidence to rebut the inference that their non-compliance was not wilful and *mala fide*. As the Applicant applied for imprisonment, the standard of proof applicable is beyond reasonable doubt.

- [26] It is not in dispute that there was a court order granted on 25 June 2021, nor that the Respondents had knowledge of the court order. It is further not in dispute that the Respondents refuse the Applicant to resume his duties and have not paid him his salary since March 2021.
- [27] The question however, to be answered in the present matter, is whether the Applicant has shown that the Respondents are in contempt of the court order and the specific provisions of the court order granted on the 25th of June 2021 by refusing the Applicant to resume his duties and the payment of his salary.
- [28] In order to determine whether there was non-compliance with the court order, the court order and provisions contained therein will have to be interpreted. The principles which apply to the interpretation of court orders are well-established. **Trollip JA** observed in **Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 304; [1977] 4 All SA (A) at 604** that the same principles apply as apply to construing documents. Thus,
- '..(T)he court's intention is to be ascertained from the language of the judgment or order as construed according to the usual, well-known rules... Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention.'*

- [29] The starting point, it was held in **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and others 2013 (2) SA 204 (SCA) para [13] [2012] ZASCA 49.**, is to determine the manifest purpose of the order. This was endorsed by the Constitutional Court in **Eke v Parsons 2015 (11) BCLR 1319 (CC) para [29]**. The Supreme Court of Appeal, in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para [18]**, described the process of interpretation as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible interpretation is to be preferred to one which undermines the purpose of the document or order.
- [30] In the present matter, when the judgment or order is considered, the reasons for the order must be considered as well, as a whole. The reasons for the order given by the presiding Judge on 25 June 2021 states as follows:-
- “Turning back to this case. This court has heard on 22 June 2021 extensive arguments regarding the, whether the matter is urgent and whether a case has been made for the setting aside of the decision of the tribunal and the fairness of that process was also considered. Now I am of and I am of the view that having heard counsel in this matter and having read the documents filed of record and considered the matter the draft order handed up in which:*

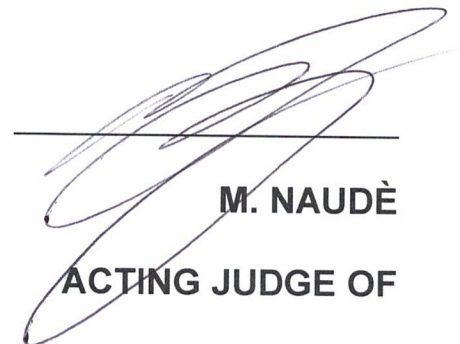
1. *The Applicant's non-compliance with rules relating to form, services and time frames is condoned.*
2. *That the Applicant is granted leave to bring and treat this matter as one of urgency.*
3. *The First Respondent's decision to terminate the Applicant's employment contract is declared unlawful, invalid and of no force and effect.*
4. *The decision to terminate the Applicant's employment contract is reviewed and set aside.*
5. *Further that the First Respondent is ordered to pay costs of this application on party and party [scale]. The order is granted."*

[31] Although short reasons, it is clear from the reasons given and order handed down by Judge Phatudi, that only the decision of the tribunal to terminate the Applicant's service agreement and the fairness of the process followed in doing so, were considered, nothing more and nothing less. The court order only deals with the review and setting aside of the decision to terminate the Applicant's employment contract, which termination is declared unlawful, invalid and of no force and effect. The court order does not deal with the specific performance of the employment agreement between the parties, nor does it state that the Applicant must resume his duties and the Respondent must allow him to do so and pay his salary.

- [32] In my view, the Applicant in the present application attempts to enforce specific performance in terms of the employment agreement by the Respondents through this contempt of court application. The Applicant as grounds for their contempt of court application only states that he was refused to resume his duties and his salary has not been paid. The court order does not state by any interpretation thereof that the Respondents must allow the Applicant to resume his duties or that his salary must be paid. The fact that in terms of the agreement the Applicant must render certain services and in turn be paid a salary for such services rendered, are consequences flowing from the employment agreement between the parties and not the court order. The Applicant in order to compel the Respondents to comply with the terms and conditions set out in the employment agreement, should have instituted proceedings for specific performance and not contempt of court proceedings.
- [33] In the result, the Applicant has failed to show how the Respondents are in contempt of the court order of 25 June 2021. The application therefore stands to be dismissed.
- [34] The only issue remaining is the issue of costs. The general rule is that costs should follow the event. In the present matter there is no reason to deviate from the general rule and no grounds were advanced by Counsel in this regard either.

[35] I therefore make the following order:-

1. The application is dismissed with costs on a party and party scale.



M. NAUDÈ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES:

HEARD ON: 28 OCTOBER 2021

JUDGMENT DELIVERED ON: 15 NOVEMBER 2021

For the Applicant: Adv. T.M Malatji

Instructed by: Maloka Sebola Inc.

C/o Maloka Thulare Attorneys

Polokwane

For the Respondents: Adv. L.M. Nkoana

Instructed by: The State Attorney

Polokwane