

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

CASE NO: 282/2016

In the matter between:

ERNERST BULELANI ELEFU

Applicant

and

LOVEDALE PUBLIC FURTHER EDUCATION

First Respondent

**MINISTER OF HIGHER EDUCATION AND
TRAINING**

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEVELOPMENT OF EDUCATION, EASTERN
CAPE PROVINCE**

Third Respondent

JUDGMENT

MBENENGE J:

[1] This contempt of court application originates from an order granted by this court¹ in terms whereof the court dismissed, with costs, an application that had been launched by the first respondent and wherein an interdict compelling “*[the second and third respondents] to remove the [applicant] from the payroll system of the [first respondent] and not to pay [the applicant] any further salary*” had been sought.

[2] The applicant has, at all times material hereto, been in the employ of the first respondent as Assistant Director: Human Resource Manager. It is common cause that

¹ Per Malusi AJ, on 10 March 2016.

the applicant is presently not receiving any salary and/or emoluments from the first respondent. His current employment status is shrouded in mystery, but that is not a matter that concerns this court. In these proceedings, the applicant seeks an order of committal for contempt against the first respondent. Apart from embodying a prayer for costs and that this Court grant such “*other relief as [it] may deem appropriate,*” the applicant’s notice of motion prays:

- “1. That the First Respondent or its representative be ordered to appear to show cause why should they be not found to be in contempt of the Court Order granted on the 10th of March 2016 by still withholding the salary of the applicant amounting to R1, 158 086.65(one million one hundred and fifty eight thousand and eight sixty rands and sixty five cents) and not reinstate him on the payroll system of the Second and Third Respondent when the application to do so has been dismissed with costs by this Honourable Court under case no. 379/12.
2. That the First Respondent or its representative be ordered to appear to show cause why they cannot pay the salary of the applicant as stated above plus 15.5% per annum of the 15th June 2016 backdated from 16 August 2012 and continue until the appeal is finalised.” Sic.

[3] The view held by the applicant on which this application is predicated is that his success in opposing the application to have him removed from the payroll has had the effect of conferring on him the right to being paid a salary, which he has not received, since 16 August 2012. He furthermore alleges that the conduct of the first respondent is malicious and deliberate.

[4] The applicant’s cause of action is summed up in his founding affidavit as follows:

- “31. I submit that **although the order might have not clearly** stated that I should be reinstated as it has been argued by the first respondent’s lawyers but equally it ... doesn’t provide entitlement to withdraw my salary when the application to do so was dismissed by this honourable Court”²

[5] The first respondent’s opposition to the application is two-pronged. It is contended, in the first place, that because the applicant has since been dismissed by

² My emphasis.

the first respondent and is currently embroiled in a labour dispute justiciable before the labour court, this court lacks the jurisdiction to entertain this application. On the merits it is contended that the first respondent has not disobeyed any court order in as much as the initial order did not direct the first respondent to perform any act.

[6] At the hearing of the application Mr *Notshe*, who appeared for the first respondent, did not persist in the argument that this court lacks the jurisdiction to entertain the application and was content to pin the first respondent's basis of opposition down to contending that, by its nature, the subject order can hardly form the basis of a contempt of court application.

[7] The order allegedly breached by the first respondent was granted by this court; it is therefore inconceivable that the court would lack jurisdiction to vindicate its authority and dignity in the event of the order it granted having been disobeyed. The concession in this regard was correctly made.

[8] It is trite law that an applicant in civil contempt proceedings must prove beyond a reasonable doubt (i) the existence of the order; (ii) service of the order on the respondent; (iii) non-compliance with the order by the respondent; and (iv) wilfulness and *mala fides*.³ Once the applicant proves the existence of the order, service or notice and non-compliance, an evidentiary burden shifts to the respondent to refute the existence of wilfulness and *mala fides*.⁴

[9] There is merit to the submission that the order relied on by the applicant, by its nature, confers not on the applicant the right to seek the relief being sought in these proceedings. There is nothing, from a reading of the order that the first respondent was required to do, which he has not done; the first respondent was not directed to pay the applicant his salary.

[10] In conclusion, therefore, the applicant has not established one of the requisites for the grant of civil contempt namely, non-compliance with an order, with the result

³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (A) at para [14] and the authorities cited therein with approval.

⁴ *Uncedo Taxi Service Association v Mtwla* 1999 (2) SA 495 (E).

that, on this ground alone, the guilt of the first respondent for the alleged contemptuous behaviour has not been proven. This renders it unnecessary for me to consider whether the other requisites for the grant of an order of committal for contempt have been fulfilled.

[11] The applicant resorted to arguing, in the alternative, that the papers do make out a case for the grant of an order directing the first respondent to pay him his salary pursuant to the prayer that this court grant “*other relief it deems appropriate*”. To begin with, that is not the case that the first respondent was called upon to meet in answer. Moreover, such relief may only be granted if it is consistent with the case made out by the applicant in her/his founding affidavit.⁵ In the *Geza* matter the court held that:

“whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed. In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*, Coetzee J described the prayer for alternative relief as being ‘redundant and mere verbiage’ in modern practice adding that whatever a court ‘can validly be asked to order on papers as framed, can still be asked without its presence’ and that it ‘does not enlarge in any way “the terms of the express claim” as pointed out by Trindall JA’ in *Queensland Insurance Co Ltd v Banque Commercial Africaine*”⁶

[12] The applicant has also not made out a case for an order directing the first respondent to pay him his salary in these proceedings.

[13] The first respondent has been victorious in resisting the relief being sought by the applicant, after incurring costs. There is no reason why costs should not follow the result. The fact that the applicant, who was not championing a constitutional cause, was appearing in person can hardly serve as justification for depriving the first respondent of its costs.

[14] In these circumstances, **the application is dismissed with costs.**

⁵ *Geza v Minister of Home Affairs & Another* [2010] ZAECHGHC 15 (22 February 2010) at para [12].

⁶ *Ibid.* Footnotes omitted.

S M MBENENGE

JUDGE OF THE HIGH COURT

Applicant : In person

Counsel for the Respondents : Mr S V Notshe SC

Instructed by : Dyushu Majebe Attorneys
East London
C/O Mlonyeni & Lesele Incorporated
King William's Town

Date heard : 22 September 2016

Judgement delivered : 11 October 2016