In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 8781/10

In the matter between :

A M Ndlovu Applicant

and

The Mangosuthu University of Technology 1st Respondent

The Government Employees Pension Fund 2nd Respondent

Judgment

Lopes J

[1] In this application the applicant seeks an order that the first respondent be held to be in contempt of court for disobeying an order handed down by Mokgohloa J on the 7th December 2010.

[2] The history of this matter may be summarised as follows :-

a) Professor Ndlovu (the applicant) was employed by the University of Zululand from approximately 1977 until the end of 1996 and during his time at the university was a member of the Associated Institutions Provident Fund;

b) from the 1st January 1997 he was appointed to the position of principal and vice-chancellor of the first respondent and became a member of the Government Employees Pension Fund. The amount standing to the credit of the applicant with the Associated Institutions Provident Fund was transferred to the second respondent for his ultimate benefit;

c) on the 30th December 2009 on his 65th birthday, the applicant reached pensionable age and retired from his employment with the first respondent. At the time of his retirement his pensionable income was R2 202 120 per annum entitling him to a gratuity of R4 883 421 and a monthly pension payment of R110 107. These figures appear from an application brought before Mokgohloa J by the applicant during December of 2010. The amounts in question are not disputed in the answering affidavits put up on behalf of the first respondent in those proceedings. The parties in the application before Mokgohloa J were the same parties in this application;

d) the applicant and the first respondent resolved their differences in the application before Mokgohloa J and on the 7th December 2010 an order by consent between the parties was granted in the following terms :

"It is ordered

1. That the 1st Respondent is directed to complete and sign the

"Withdrawal from Fund" document (Form Z102) on or before 10th December 2010 and to sign any further documents as may be required to effect payment to the Applicant of his pension interest in and to the second Respondent (Member's No. : 61068974).

2. That the 1st Respondent is directed to pay the costs of the application.
3. That the Applicant is to pay the amount of R90 000.00 for purchase of the 2006 Jaguar XJ with registration letters and numbers NUR3996 currently in his possession and the 1st Respondent shall do all things necessary to ensure that the Applicant is reflected as the title-holder and registered owner of the aforesaid motor vehicle.
4. That the only amount to be deducted from the Applicant's benefits in and to the 2nd Respondent in terms of ss 21 (3) and (4) of the Government Employees Pension Fund Laws, 1996, is the aforesaid amount of R90 000.00;"

e) The part of that order which gives rise to this application was the requirement that the first respondent complete the form referred to as Z102 and to sign such further documents as may have been required to ensure the payment to the applicant of his pension interest in and to the second respondent;

f) during the employment of the applicant in the first respondent, he had, from time to time, received salary increases. Those increases had become the subject of an action between the parties under case number 3941/2010. The first respondent had instituted an action against the applicant for repayment of the sum of R6 652 625,39 (together with interest) which amounts it claims were overpaid to the applicant. The basis of the first respondent's action was that by reason of the applicant's position and influence he unlawfully persuaded employees of the first respondent to agree to salary payments which were not due to him in terms of his contract of employment;

g) in its action the first respondent alleged that the applicant was only entitled to have been paid a salary which was much lower than that which he was in fact paid. The pensionable amounts which had been deducted from the applicant's salary from time to time and the income tax which the applicant paid were calculated on the basis of the higher amounts – i.e. what he was actually paid;

h) the first respondent purported to comply with the order of Mokgohloa J by completing the form Z102 and forwarding it to the second respondent to enable the applicant's pension benefits to be calculated and paid out by that party;

i) however, when the first respondent's employees filled out the Z102 they entered the salary scales which they believed the applicant was entitled to be paid – i.e. corresponding with the allegations in case number 3941/2010;

j) the upshot of the aforegoing is that the applicant contends he is only being paid slightly over half of what he is entitled to receive as pension benefits from the second respondent;

k) the applicant views the first respondent's conduct as a deliberate and mala fide attempt by the employees of the first respondent to frustrate his right to receive pension benefits based on the actual income which he was receiving when he was employed in the first respondent.

[3] In assessing whether or not any of the employees of the first respondent were in contempt of court, I have considered what was said regarding contempt proceedings by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at page 332, para 6 ff where he stated :-

"[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'

…

[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself

entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

…

[42] To sum up :

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential 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 was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof of a balance of probabilities."

(footnotes omitted)

[4] What remains for me to consider then is whether or not the facts as demonstrated by the affidavits provide a sufficient basis for any of the employees of the first respondent to be held in contempt of court.

[5] There are a number of disputes which arise on the papers as follows :-

a) whether there was required to be, or was in fact, service of the order.

In my view where an order is taken by consent between the legal representatives present at court, service generally becomes superfluous. In any event, there is no doubt that the order reached the attention of the first respondent and its legal representative. The applicant's attorneys admit that a copy of the order was faxed to them on the date on which the order was made. The first respondent's deponents do not contend that failure to serve the order resulted in its contents not coming to their notice. In those circumstances any suggestion that the order did not come to the attention of the first respondent or its legal representatives cannot be sustained;

b) the reason why the service of the order was raised as a dispute was perhaps because the applicant avers that the order of court had to be complied with by the 10th December 2010, and it is common cause that it was not complied with by that date. That that was required is clear from paragraph 1 of the order of Mokgohloa J. However, in its opposing affidavits the first respondent's representatives allege that an agreement was concluded between the legal representatives in terms of which the order would be complied with by the 15th December 2010. The first respondent alleges that there was proper compliance by no later than the 12th January 2011. As there seems to be no prejudice to the applicant as a result of this particular non-compliance, and because it appears that the applicant's attorneys were on Christmas vacation for much of the intervening period, nothing arises from this period of non-compliance;

c) a further dispute between the parties was whether it was necessary for the applicant to attach to the Z102 forms the information regarding transfer of the applicant's service period, whilst he was in the employ of the University of Zululand between 1977 and 1996, to the second respondent. The allegation is made in the respondent's opposing affidavit that the applicant's attorney informed the respondent's attorney that that information was eventually given to the second respondent by the applicant, and that it should no longer concern the first respondent. In addition there is no indication on the Z102 form that this information is required.

[6] Deciding on these disputes of fact as I have done, I have applied the test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 H – 635 C.

[7] What remains for me to consider is whether the first respondent complied with the court order, and if not, whether its employees acted wilfully and mala fide.

[8] It is clear that the first respondent used the salary scales which, in its view, were those to which the applicant was entitled. It did not use the salary scales which had actually been paid to the applicant during his last years of

employment. Was the first respondent entitled simply to complete the form in such a way that it complied with the first respondent's own view of what the applicant was entitled to earn?

[9] In argument before me, Mr *Quinlan,* who appeared for the first respondent, maintained that the first respondent was obliged to use the salary scales contained in its action, because to do otherwise would mislead the second respondent. This could lead to an incorrect computation of the pension fund benefits applicable to the applicant, and could have resulted in the second respondent subsequently proceeding against the first respondent to recover any overpaid amounts. This could occur in circumstances where the first respondent was successful in its action against the applicant.

[10] The real problem which arises is that nowhere in the application papers before me does it emerge that the applicant or his representatives addressed their minds to the salary scales applicable when the consent order was discussed between the parties' legal representatives prior to the 7th December 2010. Had that been discussed and had it been made clear to the first respondent that what it was expected to provide in the Z102 form was the salary scales which had actually been paid, the consent order would probably not have been taken. All that the order required was that the first respondent complete and sign Z102 form on before the 10th December 2010 together with any further documents as may be required 'to effect to the applicant the payment of his

pension benefit in and to the Second Respondent'.

[11] What the first respondent did was fill in the form in accordance with what its employees believed were the appropriate salary scales. Both parties were, of course, aware of the fact that the action under case number 3941/2010 had already been instituted. This should, perhaps, have alerted the applicant and his legal representatives to articulate more fully the requirements of the consent order.

[12] The first respondent's representatives appear to have assumed that because the action had been instituted by it, the applicant's representatives would understand that those were the salary scales contended for by the first respondent, and therefore those were the salary scales they would use. The applicant, on the other hand, steadfast in his intention to claim what he viewed as his rightful entitlement, expected his actual salary payments to be reflected in the Z102 form.

[13] Because of the lack of any evidence which deals with this aspect I am unable to decide, even on a balance of probabilities (which I appreciate is not the test), that the first respondent has not complied with the terms of the order of the 7th December 2010. Even were I to be so persuaded, there is no basis on the papers before me from which I could conclude that such actions of the first respondent were mala fide or made with the intention to frustrate or ignore the

order of court.

[14] In those circumstances the application to hold the first respondent's employees in contempt of the court order of the 7th December 2010 cannot succeed.

[15] I have considered the question of costs. Whilst they would normally follow the result, I believe that the problem arose as a result of a misunderstanding on the part of both parties. With a little more goodwill and co-operation between the parties this application could, and should, have been avoided. In those circumstances I believe that it would be just and equitable were each party to bear their own costs.

[16] In the result I make the following order :-

1) the application is dismissed.
2) Each party is pay their own costs in the contempt application, such costs to include the costs of the Application to Strike Out, the Notice of Irregular Proceedings in terms of Rules 30 and the reserved costs of the previous hearing.

Date of hearing : 24th October 2011

Date of judgment : 28th October 2011

Counsel for the Applicant : R Padayachee SC (instructed by Nompumelelo Radebe & Company)

Counsel for the Respondent : P Quinlan (instructed by Jafta Incorporated)