

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO. JA11/04

In the matter between:

THE MINISTER OF HEALTH

FIRST APPELLANT
(Second Respondent in Court *a quo*)

**THE DIRECTOR GENERAL OF
THE DEPARTMENT OF HEALTH**

SECOND APPELLANT
(Third Respondent in Court *a quo*)

and

CHRISTELLE BRÜCKNER

RESPONDENT
(Applicant in Court *a quo*)

J U D G M E N T

McCALL AJA

- [1] The respondent in this appeal is a graduate pharmacist who, until 24 March 1998, was employed as the Deputy Director: Medicines Registration in the Department of Health (“the Department”). Because there have been different respondents at various stages of the proceedings leading up to this appeal, she will be referred to, for convenience, as Ms Brückner.

- [2] Ms Brückner and her immediate superior in the Department, Professor J. Schlebusch (“Prof. Schlebusch”), who held the position of Director: Medicines Administration and Registrar of Medicines in terms of s. 12 of the Medicines and Related Substances Control Act, No. 101 of 1965, were removed from their respective positions on 24 March 1998.
- [3] This removal followed the submission to the then Minister of Health of a report by a “**Review Team**” which had been appointed by the Minister to review the existing process for the regulation of medicines in South Africa and to make recommendations on this and related issues.
- [4] The report had concluded that the process of reform would be facilitated if Prof. Schlebusch and Ms Brückner were “**released to undertake other tasks in the health sector**”. This was apparently because “**in the restructured organization presented in the review team’s report, their present positions no longer exist**”. The review team also concluded, for reasons which it is not necessary to repeat here, that Prof. Schlebusch and Ms Brückner were not suitable for any posts to be created in the new organization.
- [5] The insensitive and degrading manner in which Prof. Schlebusch and Ms Brückner were deprived of their posts after many years of service to the Department is regrettable.

- [6] Prof. Schlebusch and Ms Brückner initially decided not to accept certain severance packages which they were offered and, for a period of five and a half months, they were effectively suspended from their posts. After the intervention of the Public Servants' Association and its attorneys, they were given positions different from their original positions and which had been specially created for them. Although these posts were at the same salaries and with the same benefits which applied at the time of the removal, they were not of equal status and importance.
- [7] Prof. Schlebusch and Ms Brückner initiated proceedings in terms of Item 2(1)(b) of Schedule 7 of the Labour Relations Act, No. 66 of 1965 ("the LRA") alleging that their removal from their positions had constituted unfair conduct on the part of the Department relating, *inter alia*, to their demotion.
- [8] The dispute was referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The arbitration proceedings commenced on 8 July 1999. On 26 November 1999 the Commissioner, Advocate J. Hiemstra ("the Commissioner"), having heard evidence over a period of months, handed down his arbitration award. Implicit in that award is a finding by the Commissioner that Prof. Schlebusch and Ms Brückner had been unfairly demoted.
- [9] A summary of the evidence led in the arbitration and the conclusions reached by the Commissioner appear from his award which has been

reported under the heading *Public Servants Association obo Schlebusch and Another v Director General: Department of Health* (2000) 21 ILJ 706 (CCMA) and I shall refer to them only where necessary for the purposes of this judgment.

- [10] Although the Commissioner apparently accepted evidence that Ms Brückner's position had been abolished, he said (734):-

“No reason has, however, been suggested why it cannot be restored.”

The Commissioner proceeded to make the following award:-

“The Department of Health is ordered:-

- 1 To reinstate Mr J. Schlebusch as Director: Medicines Registration and Registrar of the Medicines Control Council.**
- 2 To reinstate Ms C. Brückner as Deputy-Director: Medicines Registration.**
- 3 To pay the costs of Mr Schlebusch and Ms Brückner at the scale applicable in the Labour Court of South Africa.”**

- [11] The Department instituted review proceedings in the Labour Court in an attempt to have the Commissioner's award set aside. Prof. Schlebusch and Ms Brückner, on the other hand, applied to have the arbitration award made an order of the Labour Court in terms of s 158(1)(c) of the LRA.

- [12] The only basis upon which the Department opposed the application to have the award made an order of Court was that Prof. Schlebusch and Ms Brückner did not have *locus standi*, in that they were not cited as parties to the proceedings and it was not pleaded by their trade union that the application was being brought on their behalf.
- [13] The presiding Judge in the Labour Court, Pillay J, dismissed the application for review of the award, with costs, and granted the application for the Commissioner's award to be made an order of the Labour Court, with costs. Her judgment was handed down on 6 August 2001. The Department did not seek leave to appeal against the judgment and order of the Labour Court.
- [14] A settlement was reached with Prof. Schlebusch but Ms Brückner required the Department to comply with the order of court. It is common cause that Ms Brückner has never been reinstated to the position of Deputy Director: Medicines Registration which she held prior to 24 March 1998.
- [15] On 6 September 2001 Ms Brückner's attorneys wrote to the Director-General of the Department recording that Ms Brückner had not yet been reinstated to her former position (incorrectly described in the letter as "**deputy director, medicine administration**" instead of "**Deputy Director: Medicines Registration**"), and pointed out that the Department was in contempt of the order of the Labour Court. The attorneys called upon the Director-General to ensure that there was full compliance with the court order and said that should this not occur within seven days they would have no option but to file an application

in the Labour Court for **“an order directing that the Honourable Minister of Health be incarcerated pending compliance with the court order”**.

[16] On 1 October 2001 the Department, through the offices of the State Attorney, responded, saying:-

“Kindly be advised that the Department of Health will comply with the Court Order herein and Ms Brückner will be reinstated to the position she previously occupied.”

[17] On 2 October 2001 the Director-General wrote to Ms Brückner, as follows:-

“I hereby inform you that you have been re-instated in a post of Deputy Director in the Cluster: Medicines Regulatory Affairs with immediate effect. Please report for duty in consultation with Ms Matsoso.”

Attached to the letter was a job description of the post, in which the post is designated “Deputy Director: Medicines Administration and Document Control.” It described the “Job purpose” of the position as being:-

“To provide administrative support for the registration of medicines prior to the marketing to ensure their safety, quality and efficacy.

Manage and co-ordinate the activities of the subordinates within the Sub-directorate: Medicines Administration and Document Control.”

The first of a number of duties listed under the **“Duties attached to the**

post” is **“Professional control of the medicines database”**.

- [18] Ms Brückner contends that the job description attached to the said letter contained mostly administrative tasks which she had previously carried out in addition to her main functions as Deputy Director: Medicines Registration. In her founding affidavit in the proceedings giving rise to this appeal (**“the contempt of court application”**), she said:-

“In my former position I headed all activities related to the medicine registration process and some control functions. In the alleged reinstatement, my functions are mainly of an administrative and supportive nature.”

- [19] To this Ms Matsoso, the Chief Director: Medicine Regulatory Affairs of the Department, who deposed to the answering affidavit on behalf of the Department, the Minister and the Director-General, responded as follows:-

“Save to deny that the Applicant’s functions would be of administrative and supportive nature and to state that the creation of the position of Deputy Director: Medicine Administration and Document Control was only proposed to the Applicant during our consultations, the contents of this paragraph are admitted.”

Because Ms Brückner refused to accept the newly created post, she remained in the inferior position that had previously been created for her, namely that of Deputy Director: Pharmaceutical Expenditure.

- [20] Ms Brückner’s complaint is articulated by her counsel, in his Heads of Argument, as follows:-

“The principal issue is that Ms Brückner had, in her former position, been responsible to manage and control the process of clinical evaluation of applications for registration of medicines, *inter alia* managing and co-ordinating the professional staff who had to screen and evaluate applications. Data control, the focus of the new position, was a minor adjunct to the former position.”

[21] It is common course that on 14 October 2001 the Department caused an advertisement to be published in a Sunday newspaper for the position of Director: Medicine Evaluation and Research. Ms Brückner contends that the duties specified in the advertisement are substantially the same duties which she carried out before she was removed from her post. The only difference was that the position advertised was that of Director, whilst the position she had previously held was that of Deputy Director. Ms Matsoso, in her answering affidavit, denies that the two positions were substantially the same. Ms Brückner applied for the position of Director: Medicine Evaluation and Research, but her application was unsuccessful. The position was subsequently filled by one Mr Frank Hlangwane, who was formerly one of her subordinates.

[22] After an exchange of correspondence between Ms Brückner’s attorneys and the State Attorney, in which the latter alleged that the Department had complied with the order of the Labour Court, Ms Brückner, on 16 April 2002, instituted proceedings in the Labour Court, by way of notice of motion, to, *inter alia*, commit the Minister and the Director-General to gaol for contempt of court.

In the case heading in the contempt of court application, the Department of Health is cited as first respondent, the Minister of Health as second respondent and the Director-General: Department of

Health as third respondent. However, in her founding affidavit in the contempt of court application, Ms Brückner says:-

“3.3 The second respondent is MANTO TSHABALALA-MSIMANG, the Honourable Minister of Health who has been cited in these proceedings as the Minister of State to whom the executive functions of the first respondent have been assigned, in terms of section 92 of the Constitution of the Republic of South Africa Act 108 of 1996...”

3.4.1 The third respondent is AYANDA NTSABULA, the Director-General of the first respondent, whose principal place of office is situate at Civitas Building, Cnr. Andries & Struben Streets, Pretoria. The third respondent has been cited in the proceedings in his capacity as the head of the first respondent in terms of section 7(3)(a) as read together with schedule 1 of the Public Service Act, 1994.”

These averments were admitted by Ms Matsoso in her answering affidavit.

[23] In her founding affidavit Ms Brückner alleged that the first respondent (“the Department”):-

“has purposefully gone out of its way to avoid compliance, despite the numerous communications from my attorneys which recorded that I was left with no alternative but to approach the above Honourable Court for the relief set out in the notice of motion”.

[24] She further alleged:-

“26. The second respondent is the Minister of State to whom the executive powers and functions regarding the first respondent have been assigned. The third respondent is the head of the department. He is the accounting officer of the department. The second and third respondents are the functionaries who are responsible to ensure compliance by the first respondent, with the court order”.

The contents of this paragraph were admitted, without qualification, by Ms Matsoso in her answering affidavit.

[25] The relief sought by Ms Brückner in the Notice of Motion was an order in the following terms:-

- “1. Declaring that the first respondent has failed to comply with the court order dated 6 August 2001 which is annexed to the founding affidavit marked “CB2”.**
- 2. Declaring that the second and third respondents are, jointly and severally, in contempt of the court order in failing to reinstate the applicant to her former position of Deputy-Director, Medicine Registration or a similar position.**
- 3. Directing that the second and third respondent (sic) be imprisoned for a period of thirty (30) days or such other period as the court deems appropriate.**
- 4. Directing that the period of imprisonment of the second or (sic) third respondents be suspended for a period of thirty (30) days pending compliance with the court order.**
- 5. Directing that the respondents be ordered to pay the costs of this application,**

jointly and severally, the one paying the other to be absolved.

6. Further and/or alternative relief.”

[26] In her answering affidavit Ms Matsoso says that she is authorized to depose to the affidavit on behalf of the respondents (that is to say all three respondents). A supplementary affidavit was deposed to by Dr Ayanda Ntsaluba, who was then the Director-General of the Department and the third respondent in the contempt of court application. At the hearing of the appeal, it was common cause that Dr Ntsaluba had ceased to be the Director-General of the Department in August or September 2003 and is now the Director General of the Department of Foreign Affairs.

[27] The contempt of court application was heard by the Labour Court on 27 March 2003 and, in a judgment handed down on 20 October 2003, Francis J. held that:-

“(1) The second and third respondents are found guilty of contempt of the Court order of 6 August 2001 and are committed for a period of fifteen days’ imprisonment.

(2) The order of imprisonment is suspended for sixty days to enable the second and third respondents to make such arrangements as might be necessary to reinstate the applicant to her former position in terms of the Court order of 6 August 2001.

(3) The respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.”

- [28] The Minister and the Director-General sought leave to appeal against the whole of the judgment of the Court *a quo*, including the order for costs. The Department did not seek leave to appeal despite the fact that it had been ordered to pay the costs of the contempt of court application, jointly and severally with the other two respondents in that application. The heading in the documents relating to this appeal is incorrect and should have referred to the Minister of Health as the first appellant and the Director General of the Department as the second appellant.
- [29] Francis J granted leave to appeal on 25 March 2004. In his judgment granting leave he recorded that a new ground of appeal was raised in the appellants' heads of argument. It was that the State Liability Act No. 20 of 1957 ("the State Liability Act") precluded the granting of paragraphs 3 and 4 of the Notice of Motion in the contempt of court application, and that the Court was accordingly precluded from making the orders in paragraphs 1 and 2 of the order made by the Court *a quo*. The learned Judge further recorded that Mr Barrie, counsel for Ms Brückner in this appeal, had contended that since the first and second appellants were cited in their personal capacities, as opposed to their official capacities, the provisions of sections 2 and 3 of the State Liability Act were not applicable. He said that counsel had advanced other reasons why another court would not follow the decisions in *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (T) ("the *York Timbers case*") and *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another*

[2003] 2 All SA 223 (SCA) and 2004 (2) SA 611 (SCA) (“the *Jayiya case*”). The learned Judge held that there was no substance in Mr Barrie’s contention since it was quite clear that the Minister and the Director-General were cited in their “official capacities”. As it was reasonably possible that another court may find that the Labour Court was precluded from granting the orders it made, in terms of the State Liability Act, he granted leave to appeal.

- [30] In their heads of argument on appeal counsel for the appellants, in addition to dealing with the merits of the findings of the court *a quo*, persisted in their contention that s 3 of the State Liability Act had precluded the Court *a quo* from granting the relief in paragraphs 1 and 2 of the order which it made relating to contempt of court. Mr Barrie, in his heads of argument, referred to the fact that the defence based on s 3 of the State Liability Act was raised for the first time in the application for leave to appeal. He indicated that in the event of the Court finding that s 3 of the State Liability Act presented a bar to the relief which the Court *a quo* had granted to Ms Brückner, she intended to apply for an order that the said s 3 be declared to be contrary to the Constitution and invalid and that a notice to this effect had been delivered. It emerged that such a notice in which the Minister and the former Director-General were, for the first time, cited in the case heading by name, and which was dated 6 October 2004, was telefaxed to the State Attorney and filed with the Registrar of this Court on 11 November 2005, six days before the hearing of this appeal. The notice does not cite nor is it directed to the Department,

as such.

- [31] The position is, therefore, that in the award made by the Commissioner, it was the Department which was cited as the employer party and it was the Department, and not the Minister and/or the Director-General which was ordered to re-instate Ms Brückner. It was that award which was made an order of the Labour Court. Although in the case heading in the contempt of court application the Minister and the Director-General were cited as such, counsel for Ms Brückner insisted, in argument before us, that they had been cited in their personal capacities, relying, *inter alia*, on paragraphs 3.3 and 3.4 of Ms Brückner's founding affidavit, reproduced above.
- [32] It will be convenient to deal, at the outset, with the possible effect of the State Liability Act on these proceedings.
- [33] When leave to appeal was granted in the present matter, the *York Timbers and Jayiya cases (supra)* had been decided. Subsequent to the granting of leave to appeal, judgment was delivered, on 21 July 2004, in the case of *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SECLD) ("*Kate's case*"). In *Kate's case* Froneman J analysed the decision in *Jayiya's case (supra)* and counsel for the respondent in the present case relied upon *Kate's case* in support of certain propositions. Before judgment in the present case could be finalized, the appeal against the decision in *Kate's case* was heard by the Supreme Court of Appeal. The judgment on appeal

is now reported as *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) (“*Kate* on appeal”). It contains certain comments about what was said in the *Jayiya* case (*supra*). In addition, on 31 March 2006, the important judgment in *SA Fakie N.O. v CCH Systems (Pty) Ltd* (“*Fakie N.O.*”), now reported in 2006 (4) SA 326 (SCA) was delivered. It deals with the question of the standard of proof in an application for committal for contempt of court.

- [34] In the light of these two judgments, this Court considered it expedient to direct that the parties submit further written heads of argument dealing with matters raised in those judgments. Because of administrative problems, the respondent delivered her additional heads of argument first. After some delay, the appellants’ heads were delivered to which the respondent was, in the circumstances, permitted to reply. The additional heads were very helpful and this court appreciates the trouble taken by counsel in preparing them.
- [35] The applicant in the *York Timbers* case (*supra*) had applied, by way of notice of motion, for, *inter alia*, an order that the first and second respondents, being the Minister of Water Affairs and Forestry and the Director-General of that Department, respectively, be committed to prison for contempt of court for failing to take the necessary steps to comply with certain undertakings which the Department of Water Affairs and Forestry had given to the applicant, as set out in a consent order of court. Southwood J found that the Department and the respondents knew about the consent order and had failed to comply

with certain of their obligations in terms thereof. One of the objections raised by the respondents to the grant of a committal order was that the State Liability Act, and particularly s 3, precluded the grant of a committal order against servants of the State. This argument had been considered in *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) (“Mjeni’s case”), one of a series of cases resulting from the alarming tendency of certain government departments not to comply with judgments and orders of court.

[36] The preamble and relevant sections of the State Liability Act provide as follows:-

“ACT

To consolidate the law relating to the liability of the State in respect of acts of its servants.

1. Claims against the State cognizable in any competent court. – Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

2. Proceedings to be taken against Minister of

department concerned. – (1) In any action or other proceedings instituted by virtue of the provisions of section *one*, the Minister of the department concerned may be cited as nominal defendant or respondent. (2) For the purposes of subsection (1), “Minister” shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.

3. **Satisfaction of judgment.** – No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.”

[37] Jafta J, who delivered the judgment in the *Mjeni case (supra)* said, regarding section 3 of the State Liability Act:-

“The section and indeed the whole Act was not intended to place ministers of State above the law but the intention of the Legislature in promulgating the Act was to prohibit attachment and/or execution against the personal property of the Minister cited or that of the State. It forbids the process normally embarked upon by the sheriff or messenger of the court in order to enforce a court order. The section does not deal with the arrest of Ministers found to be in contempt of court orders.

In my conclusion that Ministers of State and other public officials can be held in contempt of court, I am fortified by the provisions of s 173 of the Constitution.”

Mjeni’s case was followed in a number of other reported judgments referred to in the *York Timbers case (supra)* at 501G.

- [38] In the *York Timbers case (supra)* counsel for the respondents argued that all of these judgments were wrong in finding that committal orders could be made against Ministers of State and other public officials on the grounds of contempt of court. He referred to the Crown Liabilities Act 1 of 1910, the predecessor of the State Liability Act, and to the interpretation of the Crown Liabilities Act in *Minister of Finance v Barberton Municipal Council* 1914 AD 335 (“the *Barberton Municipal Council case*”) and *Schierhout v Minister of Justice* 1926 AD 99 (“*Schierhout’s case*”), neither of which were referred to in *Mjeni’s case (supra)*. The relevant extracts from the judgments in those two cases are quoted in full in the *York Timbers case (supra)* at 502-504 and I do not intend to repeat them here. In the *York Timbers case (supra)* Southwood J found that the interpretation in the *Barberton Municipal Council case (supra)* and *Schierhout’s case (supra)* of the Crown Liabilities Act 1 of 1910 applied equally to the State Liability Act. He said, at 505D-E:-

“I consider this interpretation to be binding on me. I therefore reluctantly conclude that s 3 of the State Liability Act would preclude the execution

of a committal order against a Minister or other public official where the State has deliberately not complied with an order of court. I say reluctantly because I find the reasoning of Jafta J in *Mjeni* (at 452C-453H) and of Ebrahim J in the *East London Transitional Council* case (at 1138C-1140I) compelling”.

[39] Southwood J said that the courts would have to comply with s 3 of the State Liability Act (properly interpreted) until that section had been declared unconstitutional, but there was no application before the court to declare it unconstitutional. He found that although s 3 of the State Liability Act is inconsistent with the provisions of s 195(f) of the Constitution that “**public administration must be accountable**”, it must be declared to be inconsistent with the Constitution and invalid before the court may order the committal of the Minister and the Director-General on the grounds of contempt of court. He found, however, that there was nothing wrong with declaring that the respondents were in contempt of the court orders “**as the primary object of such exercise is to vindicate the rule of law rather than to punish the transgressor**” and accordingly granted such a declaratory order.

[40] In his additional heads of argument, counsel for the respondent submitted that the judgment in the *York Timbers case* (*supra*) was wrong, but on the basis that after the enactment of the Constitution, and, in particular, s 165(5), court orders do bind the State and accordingly State officials whose responsibility it is to see that the State complies with court orders *ad factum praestandum* can be held in contempt of court for their failure to do so. Counsel for the

appellants, on the other hand, argued that the State Liability Act must be given effect to and that, in this regard, the finding of Southwood J in the *York Timbers case (supra)* was correct. They submitted that the finding of Southwood J was supported by the decision in *Jayiya's case (supra)* paragraph [17].

- [41] Much of the confusion about the effect of the State Liability Act and about the interpretation of certain things which were said, *obiter*, by Conradie JA in *Jayiya's case (supra)* have been cleared up by the judgment of Nugent JA in *Kate* on appeal. Regarding *Jayiya's case (supra)* Nugent JA said, at 487G-H:-

“(19) Much of what was said in Jayiya is indeed *obiter* and the ratio in that case was decidedly narrow. Jayiya decided only that the money judgment given against a Provincial Government (which is the construction that was placed on the relevant order) is not enforceable by incarcerating for contempt a defendant who has been cited nominally for the Government if the Government fails to comply with the order.”

He further said, at 492E-H:-

“It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a *mandamus* compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the Provincial Government. If Jayiya has been construed as meaning that the remedy lies against the political head of the Government department, as suggested by the

Court below, then that construction is clearly not correct. The remarks that were made in *Jaiya* related to claims that lie against the State, for which the political head of the relevant department may, for convenience, be cited nominally in terms of s 2 of the State Liability Act 20 of 1957, though it is well established that the government might be cited instead. Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with the ordinary principles, and there is nothing in *Jaiya* that suggests the contrary.”

- [42] The purpose of the Crown Liabilities Act was summarized by Lord de Villiers, CJ in the *Barberton Municipal Council case (supra)* at 345 as follows:-

“The act was intended as a remedial measure to meet the numerous cases in which redress was sought by individuals from the Government for the obtaining of which they had not even the Petition of Rights to fall back upon. The real object of the Act is stated in the first part of the first section, *viz*, **that any claim which would as against a subject be the ground of an action shall be cognizable by the Court if made against the Government.**”

That intention is repeated in section 1 of the State Liability Act. The purpose of s 2 of the State Liability Act, and its predecessor, is to permit a party bringing an action against the State to cite the minister of the department concerned or a member of the executive council of a province as nominal defendant or respondent. This does not mean

that an action may only be brought against the State or a province by citing the Minister of the department concerned or a member of the executive council for, as pointed out by Nugent JA in *Kate* on appeal, the Government itself can be cited as defendant or respondent.

- [43] The purpose of s 3 of the State Liability Act is to provide that where, in actions against the State, a minister (as defined) is cited as the nominal defendant or respondent, and a judgment or order is made against the minister as nominal defendant or respondent, no execution, attachment or like processes may be issued against the minister in his or her personal capacity or against the property of the State.
- [44] The State Liability Act is not a bar to bringing an action against a public official or functionary (including a minister), for an order to compel that official or functionary to fulfill an obligation imposed upon him or her by law. Such an action is an action against the public official or functionary concerned and not an action against the State.
- [45] Finally, the State Liability Act does not prevent the institution of proceedings for contempt of court against a public official or functionary who has been ordered by the court to carry out an obligation imposed upon him or her by law and who has failed or refused to carry out that obligation. The remarks by Southwood J in the *York Timbers case (supra)* to the effect that s 3 of the State Liability Act would preclude the execution of a committal order against a minister or other public official must now be read as only

applying to cases in which action has been instituted against the State, and either the State has been cited or the Minister of the department concerned has been cited as nominal defendant representing the State.

[46] In the present case, the Department of Health was cited as the employer party in the arbitration proceedings and the arbitration award (which was made an order of the Labour Court) ordered that Department to reinstate Ms Brückner. *No order was then made against the Minister or the Director-General*, as being the persons capable of bringing about the reinstatement of Ms Brückner, to do whatever was necessary to achieve that purpose. In my view, what Ms Brückner ought to have done was to have applied for a *mandamus* compelling the Minister and/or the Director-General to take the steps necessary to effect her reinstatement as Deputy Director: Medicines Registration. Without first obtaining such a *mandamus* it was not, in my view, competent for Ms Brückner to seek an order for the committal of the Minister and the Director-General to gaol for contempt of court.

[47] It was argued on behalf of Ms Brückner, however, that contempt proceedings could be brought against the Minister and the Director-General as the “organs of State”, as defined in s 239 of the Constitution, responsible for ensuring that the order was carried out, on much the same basis as a director of a company may be held to be in contempt of an order granted against the company. He referred to *Twentieth Century Fox Film Corporation and Others v Playboy Films*

(Pty) Ltd and Another 1978 (3) SA 202 (W) where King AJ said, at 203C-E:-

“A director of a company who, with knowledge of an order of Court against the Company, causes the Company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the Company to be in breach of the order of Court against the Company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order. *Vide Halsbury 4th Ed Vol 9 at 75.*”

That case is distinguishable on the facts from the present case. The director concerned had said that he would not comply with the order of Court, which the Court took to mean he would not cause the company to comply with the order of Court. He was, therefore, in the Court’s view, guilty of aiding and abetting. In the present case the appellants did not refuse to comply with the Court order, they contended that there had been substantial compliance by the Department.

Counsel also referred to *Höltz v Douglas and Associates (OFS) CC en Andere* 1991 (2) SA 797 (O) at 801D-802E, in which it was held that a person who contributes to the offence of contempt of a court order, can, without being a principal offender, be punishable as an accomplice. That was not the basis on which it was sought to commit the appellants for contempt of court in this case. In any event the order in this case was against the State, which distinguishes the case from one in which an order is granted against a company. There is no provision such as the State Liability Act which is available to protect a director of a company against proceedings for contempt of court for

failure to obey an order against the company.

- [48] Ms Brückner's counsel relied heavily on the fact that in the contempt proceedings in the Court *a quo* the appellants were cited by name in the body of the founding affidavit and upon the admission by the appellants in the court *a quo* of paragraph 26 of Ms Brückner's founding affidavit in which she alleged that:-

“The second and third respondents are the functionaries who are responsible to ensure compliance by the first respondent, with the Court order.”

What Ms Brückner's counsel's submissions overlook is the fact that the citing of the appellants by name first took place in the contempt proceedings. Furthermore, whilst the admission by the appellants that they are the functionaries who are responsible to ensure compliance by the Department with the court order, would obviously have been relevant in an application brought against those parties for a *mandamus*, the admission alone could not have rendered the appellants guilty of contempt of an order which was not made against them personally.

- [49] I am accordingly of the opinion that it was not competent for Francis J in the court *a quo* to find the appellants guilty of contempt of court and to order their imprisonment. It was submitted on behalf of Ms Bruckner that the Court *a quo* should also have granted the declaratory order in par 1 of the order sought in the Notice of Motion.

We were asked to make such an order. We are unable to consider Francis J's failure or refusal to make that declaratory order because Ms Bruckner did not note a cross appeal in regard to it.

[50] Although this appeal must succeed it is still open to Ms Brückner to apply for a *mandamus* against whoever would now be responsible for ensuring compliance by the Department with the Court order for Ms Brückner's reinstatement.

[51] The Department did not appeal the order for costs against it in the Court *a quo*. Therefore the order that the costs in the Court *a quo* be paid by the first respondent in that court must stand. As none of the orders sought against the appellants should have been made, there should have been no order for costs against them in the Court *a quo*.

[52] As far as concerns the costs of appeal, as the appellants have been successful the costs should follow the result and the appellants are therefore entitled to the costs of appeal.

[53] The following order is made:-

A. The appeal
succeeds.

B. The order granted
by the Court *a quo*

is set aside and the
following order is
substituted for it:-

- “1. The application is dismissed.
2. The first respondent is to pay the costs of the
application.”

C. The respondent on appeal is ordered to pay the first and
second appellants’ costs of appeal.

.....
McCALL AJA

I agree :
ZONDO JP

I agree :

COMRIE AJA

Date of Hearing :
Date of Judgment :

17 November 2005
6 December 2006

Appearances

For the appellants :

Adv. MJK Moerane SC and Adv. B
Vally

Instructed by :

The State Attorney

For the respondent :
Instructed by :

Adv. FG Barrie SC
Bowman Gilfillan Inc.