



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 847/11

In the matter between:

PSA obo M BOTHA & J M KOTZE

Applicant

and

**MEC FOR HEALTH: NORTH WEST
PROVINCIAL GOVERNMENT**

First Respondent

**DEPARTMENT OF HEALTH, NORTH
WEST PROVINCIAL GOVERNMENT**

Second Respondent

**HEAD OF DEPARTMENT,
DEPARTMENT OF HEALTH, NORTH
WEST PROVINCIAL GOVERNMENT**

Third Respondent

Heard: 19 October 2012

Delivered: 31 October 2012

Summary: Application for contempt of court arising from settlement agreement made order of court. Factual dispute over implementation of collective agreement. Referred to oral evidence in terms of rule 7(7)(b).

JUDGMENT

STEENKAMP J

Introduction

- [1] This is an application to hold the respondents in contempt of an order of this court. Certain factual disputes have arisen, and along with those, the question whether application proceedings were appropriate; and if not, whether the application should be dismissed or whether the dispute should be referred to oral evidence in terms of rule 7(7(b)).
- [2] The applicant, the Public Servants Association of South Africa (PSA), represents two of its members, nurses M Botha and JM Kotze. They argue that the respondents are in contempt of a court order of 4 August 2010. That order made an arbitration award an order of court. The arbitration award, in turn, purported to give effect to a settlement agreement of 7 August 2009. And the agreement attempts to settle a dispute relating to the interpretation and application of a collective agreement based on a document known as “the Matrix”. The respondents are the Member of the Executive Committee (MEC) for Health in the North West Provincial Government; the Department itself; and the Head of Department.
- [3] The relief sought by the applicant is that the respondents be held in contempt of court and that the MEC and the Head of Department be committed to prison for 15 days; alternatively, that the respondents be ordered to implement the court order and give effect to the settlement agreement of 4 August 2010.

Background facts

- [4] Botha and Kotze are nurses who were employed as facility managers – also referred to as team leaders of mobile clinics – by the Department.
- [5] The trade union parties – including the PSA – and the employer (ie the State) entered into a collective agreement known as Resolution 3 of 2007 on 10 September 2007 under the auspices of the Public Health and Social Development Sectoral Bargaining Council. The Department is bound by that resolution.

[6] The resolution embodies an agreement on the implementation of an occupation specific dispensation (OSD) for nurses. The intention of the resolution was, inter alia, to –

6.1 attract and retain nursing professionals;

6.2 introduce differentiated salary scales for the various nursing categories; and

6.3 incorporate into salaries the scarce skills allowance payable to specialty nurses.

[7] On 8 December 2008, the trade union parties in the Bargaining Council – including the PSA – referred a dispute over the interpretation and application of the collective agreement to the Bargaining Council. The parties reach a settlement agreement and it was made an arbitration award in terms of section 142A(1) of the Labour Relations Act¹ on 7 August 2009. That award was made an order of this court on 4 August 2010.

[8] According to the OSD for nurses incorporated in the collective agreement –

8.1 all nurses that meet the requirements of the OSD had to “translate” to an appropriate salary scale based on the duties they performed as at 30 June 2007; and

8.2 according to the applicant, team leaders in mobile clinics should have translated as operational managers as they did the same functions regardless of their physical environment.

[9] An integral part of the settlement agreement was referred to as “the matrix” (apparently without any ironic reference to the motion picture of the same name). Clause 3.19 of the matrix states the following in the left hand column under the heading, “area of dispute”:

“Misunderstanding on the translation of team leaders in mobile clinics.

They translate as operational managers in PHC/Specialty as they do same functions regardless of the physical environment that differs.”

¹ Act 66 of 1995 (“the LRA”).

- [10] In the right-hand column of the matrix, under the heading, “remarks”, the following remarks appear:

“Parties agree that all nurses that meet the requirements of the OSD must translate to the OSD based on the duties they performed as at 30 June 2007.

Parties agree that there may be a need where applicable to translate team leaders of mobile clinics, where these clinics are not part of a health facility, to posts of operational managers.

Parties also agree that the mobile clinic service may differ from province to province, or even from one district to another within the same province.

Parties therefore agree that where applicable, the translations would be dealt with on a case-by-case basis.

The matter is no longer in dispute.”

- [11] Unfortunately, the remark that “the matter is no longer in dispute” proved to be neither prescient nor correct. The parties are in dispute as to whether Botha and Kotze should have been “translated” to the positions of operational managers. They were not. The applicant says that they should have been and, by not “translating” them to those positions, the respondents are in contempt of the court order that compelled them to give effect to the settlement agreement. It argues that the employer had no discretion: Botha and Kotze were team leaders in mobile clinics; *ergo*, they had to translate as operational managers.

The respondents’ case

- [12] Mr *Brassey*, for the respondents, argued that the applicant’s argument suffered from the fallacy of the excluded middle. He pointed out that, pursuant to the remarks in the right-hand column of the matrix, “there may be a need where applicable to translate team leaders of mobile clinics, where these clinics are not part of a health facility, to posts of operational managers.” This implies that the employer has a discretion whether or not to translate those incumbents where the clinics are not part of a health facility. That does not mean, of necessity, that the employer has no discretion where clinics are part of a health facility. In the case of Botha

and Kotze, their mobile clinics were part of a health facility; in these circumstances, the argument went, the employer retains a discretion whether or not to translate them and it had to be dealt with on a case-by-case basis. In this case, the MEC exercised his discretion not to translate them.

- [13] The respondents argue, in short, that they are not in contempt of court. As a preliminary point, though, they argue that the applicant should have anticipated a dispute of fact over whether the agreement had the effect for which it contends. Therefore, the respondents say, the applicant should have proceeded by way of trial and not motion proceedings.

Evaluation / Analysis

- [14] The requirements for contempt of court are well known. In *SAOU v Head of Department, Gauteng Department of Education (2)*² this court applied the same principles that the Supreme Court of Appeal summarised in *Fakie NO v CCII Systems (Pty) Ltd*:³

“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

² (2011) 32 ILJ 1427 (LC).

³ 2006 (4) SA 326 (SCA) para [42] (per Cameron JA).

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 on a balance of probabilities.”

[15] In the present case, the respondents argue that they have not breached the terms of the settlement agreement embodied in the court order; or, at the very least, they have not acted wilfully or *mala fide*.

[16] In order to assess the parties’ conflicting contentions, though, the court has to have regard to the disputed facts. The respondents say that, factually, the MEC had a discretion whether or not to translate Botha and Kotze. That question, and the further questions whether the MEC exercised such a discretion; and if so, on what factual basis, can only be decided by reference to oral evidence.

[17] The respondents argued that the application should be dismissed for this reason alone, relying on the *dictum* of Murphy AJ⁴ in *Singh v Adam*.⁵

“In her answering affidavit the respondent contends that because the applicant not only anticipated but accepted that there was a sharp dispute of fact relating to the central issue she is not entitled to relief, whether interim or otherwise, and that the relief sought in effect is final. Although the applicant does not say as much, I understand her submission to include the assertion that the application ought to be dismissed solely on the ground that it is inappropriate to proceed on notice of motion where the applicant realizes when launching an application that a serious dispute of fact, incapable of resolution on the papers was bound to develop - see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1153 (T) at 1162...

In my opinion, an application on this basis amounts to an irregular proceeding. Having anticipated a material dispute of fact that could not be resolved on the papers it was inappropriate for the applicant to seek a final interdict by way of notice of motion. The relief sought falls within the jurisdiction of the Labour Court by virtue of the provisions of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) conferring

⁴ As he then was.

⁵ (2006) 27 ILJ 385 (LC) paras [14] and [16].

concurrent jurisdiction on the Labour Court to hear and determine any matter concerning a contract of employment. Considering that a dispute of fact was anticipated, the final interdict should have been sought by means of a statement of claim in terms of rule 6 of the Labour Court Rules ...

[18] I agree that, in this case, there is a dispute of fact – indeed, it was pertinently raised by the respondents in their answering affidavit. However, I do not agree that the application should be dismissed on that ground alone. The applicant may not have anticipated the dispute of fact before it was raised in the answering affidavit. It relied on Resolution 3 of 2007 and the settlement agreement that was made an arbitration award and subsequently an order of court. There is no dispute over the existence of the agreement or the fact that it was made an order of court. The dispute relates to the interpretation of the agreement; the question of a discretion; and, more importantly, how that discretion (if it exists) was exercised by the MEC.

[19] Rule 7(7)(b) of the Rules for the Conduct of Proceedings in the Labour Court makes provision for exactly this scenario. It provides that:

“The court must deal with an application in any manner it deems fit, which may include –

(b) referring a dispute for the hearing of oral evidence”.

[20] This is a prime example of a dispute where the court should invoke this subrule. The applicant instituted contempt proceedings by way of motion proceedings in terms of rule 7. This was not irregular in itself. It did not anticipate a material dispute of fact at that stage. Now that a dispute of fact has arisen on the papers, the court cannot resolve the dispute without hearing oral evidence. It will have to be referred to hear oral evidence and costs may be decided by the court hearing that evidence.

Order

[21] This dispute is referred for the hearing of oral evidence. The affidavits filed in this application may serve as pleadings in the trial. Costs are to be determined at the end of the trial.

Steenkamp J

APPEARANCES

APPLICANT: FJ van der Merwe

Instructed by Bouwers Inc, Roodepoort.

RESPONDENTS: MSM Brassey SC (with him KD Ramolefe)

Instructed by the State Attorney, Mahikeng.