



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: J198/13

Reportable

Of interest to other
judges

In the matter between:

SETSHEDI RANKGAKGATA JUSTINIUS

Applicant

And

MINISTER SIBUSISO NDEBELE

First Respondent

**NATIONAL DEPARTMENT OF CORRECTIONAL
SERVICES**

Second Respondent

Heard: 12 March 2014

Delivered: 12 March 2014

Summary: contempt of court elements not proved; order not served on the Minister personally. Dictum in *Minister of Health v Bruckner* not applicable where there is a court order directing the Minister to perform a specific act. Minister ultimately accountable for acts of officials in his department.

JUDGMENT

NGCUKAITOBI AJ

1. A contempt of Court order, it has been said, constitutes the most effective mechanism of ensuring compliance with Judgments of this Court.¹ Its purpose, however, is not only punitive; it is aimed at ensuring compliance with court orders. To convict a person for contempt of court, it must be proved that they were personally aware of the court order. There are difficulties ensuring personal service when it comes to senior government officials and government ministers because of the nature of government bureaucracy, which insulates senior government officials and ministers from direct personal interaction with sheriffs responsible for giving effect to service. This case illustrates those difficulties. Despite these difficulties, it remains the duty of this court to ensure that effective remedial action is taken to ensure compliance with its judgments.
2. On 27 November 2012 the General Public Service Sectoral Bargaining Council (“GPSCBC”) delivered an arbitration award against the Department of Correctional Services (“the Department”) in terms of which the Department was ordered to reinstate the Applicant and pay him all the relevant emoluments. That award was to be implemented by 31 December 2012. Regrettably, as we sit today, 12 March 2014, the award is yet to be implemented. The Applicant is yet to enjoy the benefit of his reinstatement.
3. Because of the non-compliance with the arbitration award the Applicant applied to this Court in terms of Section 158(1)(c) of the Labour Relations Act to make the arbitration award an order of this Court. That Application was granted by Prinsloo AJ on 19 November 2013. The Respondents in the Section 158(1)(c) Application were the Minister of Correctional Services, Mr. Sibusiso Ndebele and the Department. It appears that there was no appearance on behalf of either the Minister or the Department. Notwithstanding the granting of the arbitration award as an order of this Court, there was still no compliance by the Respondents. The Applicant was not reinstated.

¹ Ntombela v Herridge Hire & Haul CC & Another (1999) 20 ILJ 901 (LC).

4. This impelled the Applicant to again approach this Court on an *Ex Parte* basis seeking an order by way of a rule *nisi* which would direct the Minister to appear in Court and show cause why he should not be found guilty of contempt of Court for failing to comply with the Court Order of 19 November 2013. It will be recalled that the order of 19 November 2013 was against the Minister specifically and required compliance with the arbitration award referred to above.
5. On 7 February 2014 Van Niekerk J granted the Application in the form of the rule *nisi*. He directed that Minister Ndebele should appear in Court on 12 March 2014 to show cause why he should not be held guilty of contempt of Court. In addition Van Niekerk J ruled that the Minister could explain his conduct by way of an affidavit submitted on or before 12 March 2014. Absent a satisfactory explanation, the order stated that the Minister would be found guilty of contempt and incarcerated for an appropriate period or fined an appropriate amount. The last portion of the order required the order to be served personally on Minister Ndebele.
6. By the date of the hearing of this application, 12 March 2014 there was still no compliance with the order of this Court granted on 19 November 2013 and the Minister was not present in Court as directed. Nor did he submit an explanatory affidavit to resist the inference of contempt. Instead the legal representatives of the National Department of Correctional Services appeared in Court with an affidavit deposed to by Mr. Reuben Johnson Mbuli, who is the Director of Legal Services of the Department of Correctional Services. In his affidavit Mr. Mbuli says that he is "*duly authorised to depose to this affidavit on behalf of the Respondent*". He does not say which of the two respondents authorised him. Furthermore, Mr. Mbuli says that the Minister cannot be found guilty of contempt of Court because the order was not served personally on him. In support of this averment Mr. Mbuli has attached a copy of the return of service which suggests that service was effected at the State Attorney Office on 11 February 2014. The State Attorney apparently accepted service on behalf of Minister Ndebele.

7. The answering affidavit of Mr. Mbuli traverses other reasons why the Court Order to date has not been complied with. The main explanation is that a review application was launched against the arbitration award. But I must reject this explanation because the review application was launched on 15 February 2013 without any request to stay the enforcement of the award. Furthermore, my colleague, Tlhothlalemaje AJ dismissed the application to stay the execution of the award, which application was in any event brought more than a year after the review application had been brought.
8. It is thus clear that there has been no compliance with this Court's Order of 19 November 2013 made against the Minister of Correctional Services. The case of the Labour Appeal Court in *Minister of Health & Another v Bruckner*² does not avail the Minister. In that case the criticism of the Labour Appeal Court was that there had been no Court Order imposing any obligation on the Minister to comply with a legal obligation. The present case is on a different footing. Here there is a specific order made against the Minister, who has not complied therewith. The Minister was a party to the application to make the arbitration award an order of Court. He was accordingly required to ensure compliance with that order. I do not believe that the dictum of the LAC in *Bruckner* was intended to cover the present situation where an arbitration award is made against the Department, but the application to make the award an order of court is made against the Minister. The court order making the award an order of court created a positive obligation on the Minister directly, as contemplated in *Bruckner*. Accordingly, my view is that the mere fact that the arbitration award is against the Department, not the Minister is of little moment. The court order of 19 November 2013 is against the Minister. The Minister had a duty to ensure that it is complied with.
9. The difficulty however facing the Applicant is that the Respondents denied that the order was personally served on the Minister. As I understood the argument it was said that an official at the State Attorney's office failed to convey the contents of the arbitration award as well as the contents of this Court's Order of 19 November 2013 to the relevant officials in the Department

² (2007) 28 ILJ 612 (LAC).

or indeed the Minister. This explanation is in my view inadequate because it is clear from the answering affidavit that the Department has been aware of this Court's Orders including by Prinsloo AJ, Van Niekerk J and Thlothlalemaje AJ as alluded to above. These orders must have been brought to the attention of the Department by its legal representatives from the State Attorney's offices.

10. It is correct that on the prevailing jurisprudence, I cannot find the Minister guilty of contempt because the order was not served on him personally. But on an overall conspectus, it is clear that there has been a reckless disregard of this Court's Orders and the arbitration award by the officials in the Department of Correctional Services.
11. In terms of the Correctional Services Act 111 of 1998 the Minister is ultimately accountable as executing authority for the performance of functions by officials of the Department. The same applies to the National Commissioner who holds a position equivalent to that of Director General in the Public Service. He is the administrative head responsible and accountable for the performance of functions by employees of the Department. The Orders of this Court, referred to above, were clearly brought to the attention of the Department. This is evident from the answering affidavit of Mr. Mbuli. I reject the attempt by the Department to shift responsibility to the State Attorney's Office. I regard this defence as frivolous and vexatious. It should be noted that Thlothlalemaje AJ has previously described the Department's conduct in this very same matter as constituting abuse the Court's process. In this regard, I debated with counsel for the Respondents whether the costs of this Application should not be borne by the relevant officials in their personal capacities. Although this would have been my preferred approach, it seems there is considerable confusion about where the actual responsibility lay for the implementation of this Court's Order. Accordingly I will be disinclined to issue a *de bonis propriis* costs order.
12. In Court, counsel for the Respondents ultimately tendered compliance with the specific order for the reinstatement of the Applicant, although some

dispute remained about the payment of certain moneys to cover the period of back pay of the Applicant. I do not intend entering the fray in relation to the disputed issues concerning the back pay which may be due to the Applicant. The Applicant has remedies which can be pursued in due course. This also applies to the claims made by the Applicant for benefits such as acting allowances, danger allowance and the special danger allowance. I shall not include these in my order because the object of today's proceedings is to secure compliance with the Order of specific performance relating to the reinstatement of the Applicant. The Applicant is entitled to explore any avenues at his disposal to claim payment of monies which are allegedly due and outstanding.

13. Accordingly, I make the following order:

- [1] The Applicant shall be reinstated to the position he held as at March 2012 with the Department of Correctional Services.
- [2] The Applicant shall report for duty on 13 March 2014.
- [3] The Applicant's reinstatement shall be for a period of five (5) years, unless the contract is terminated on an earlier date by either party on grounds which are permissible in law.
- [4] The Applicant's salary for back pay shall include 37% service benefit contemplated in the applicable PSCBC collective agreement.
- [5] The Respondent's shall pay the costs of this Application on an Attorney and Client scale.
- [6] The *Rule Nisi* granted on 7 February 2014 is hereby discharged

T. Ngcukaitobi

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Adv. MS Mphahlele

INSTRUCTED BY: The State Attorney

FOR THE RESPONDENTS: Mr. TG Mokgara Attorney

LABOUR COURT