



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 844/09

In the matter between:

IMATU OBO JOHAN DANIEL KAMFFER

Applicant

and

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

First Respondent

**THE MUNICIPAL MANAGER: CITY OF
EKURHULENI METROPOLITAN MUNICIPALITY
(DR IMOGEN MASHANZI N.O)**

Second Respondent

**THE HEAD OF DEPARTMENT: HUMAN RESOURCES
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY
(MS NALEDI MODIBEDI)**

Third Respondent

**THE DIVISIONAL HEAD: LABOUR RELATIONS
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY
(MR XOLANI NCIZA N.O)**

Fourth Respondent

Heard: 14 September 2018

Delivered: 28 September 2018

**Summary: contempt of court – officials not cited in their personal capacity –
no personal service of the *rule nisi* – criminal verdict of incarceration is not**

competent – no wilful contempt – civil remedy in a form of a *mandamus* is untenable.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The applicant, (IMATU) launched these contempt proceedings on behalf of its member, Mr Kamffer seeking an order that that his employer, the first respondent (Ekurhuleni Metro); the second respondent, the Municipal Manager (Dr Mashanzi); the third respondent, Head of Department: Human Resources (Ms Modibedi); and the fourth respondent, Divisional Head: Labour Relations (Mr Ncinza) are in contempt of a court order dated 17 May 2017 and must be committed to prison. For convenience, Dr Mashanzi, Ms Modibedi and Mr Ncinza are collectively referred to as 'officials'.
- [2] The court order dismissed Ekurhuleni Metro's review application and made the award dated 3 March 2009, which was the subject of the review application, an order of court. In terms of the award Ekurhuleni Metro was ordered to place Mr Kamffer in a position of Director: Environmental Health effective from 15 March 2009. The award was a consequence of a successful review application by IMATU. Molahlehi J ruled, *inter alia*, that the position of Director: Environmental Health was not a new position as defined in the Collective Agreement on Placement (Placement Agreement) nor a section 57 position in terms of the the Local Government: Municipal Systems Act¹ (Systems Act).

Historical Background

- [3] The placement dispute between the parties dates back to 2000, the advent of Ekurhuleni Metro as a Metropolitan amalgamating 14 former municipalities. A new staffing structure was approved in July 2002, a product

¹ Act 32 of 2000 as amended.

of extensive consultation with, *inter alia*, labour. A month later, Ekurhuleni Metro concluded the Placement Agreement with trade unions, including IMATU. The Placement Agreement sought to regulate placement of staff in the new structure and provided a dispute resolution process in the event placements are challenged. 'Close matching' of old and new positions was a fundamental principle agreed to and applied in the placement process.

- [4] There were other collective agreements that were concluded at the level of the South African Local Government Bargaining Council (SALGBC) like the TASK Job Evaluation Collective Agreement and the Wage Curve Collective Agreement which aimed at standardising grading systems with the local government sector. According to Ekurhuleni Metro, many senior positions were new roles and its Council had resolved to fix the term of the incumbents' contracts of employment to five years with competitive salaries and benefits. The filling of these positions was done in accordance with the recruitment policy. The positions were advertised and employees had an option of competing for the position or remain in the closely matched position they were already slotted in.
- [5] Most employees, like Mr Kamffer, challenged their placement on the basis that they were not closely matched. The placement disputes were presided over by independent arbitrators who issued final and binding arbitration awards in terms of Clause 4 of the Placement Agreement.
- [6] Mr Kamffer was employed by the disestablished Germiston City Council as a Chief Health Officer. He was placed as a Regional Manager: Environmental Health (Southern Region) with effect from 1 November 2003. He was not happy with his placement and accordingly lodged a dispute. He made a claim to a position of Director: Environmental Health.
- [7] Ekurhuleni Metro disputed that Mr Kamffer could challenge his placement as the position of Director: Environmental Health was a new position as envisaged in the Placement Agreement. On 6 February 2007, the arbitrator upheld the preliminary point. That led to the review application by IMATU.

This Court, as per the order by Molahlehi J, reviewed and set aside the award and remitted the matter back for a *de novo* arbitration.

- [8] The arbitration proceedings were held on 24 February 2009 after they had been postponed twice at the instance of Ekurhuleni Metro. They proceeded in the absence of Ekurhuleni Metro due to its erstwhile attorneys abandoning the proceedings after its application for further postponement was dismissed. The default award rendered by the arbitrator, in essence, directed that Mr Kamffer be placed in a position of Director: Environmental Health with effect from 15 March 2009.
- [9] Ekurhuleni Metro launched a review application wherein it raised, *inter alia*, the issue of non-joinder of Mr Chaka who was appointed in 2004 as the Director: Environmental Health after he had applied for the position and was successful. Well, nothing turns on that review application because it was never diligently prosecuted by Ekurhuleni Metro. As a result, it was dismissed hence the contempt proceedings.
- [10] Ekurhuleni Metro and the officials deny that they are in contempt of the arbitration award. The officials raised two points *in limine* to the effect that; firstly, they could not be prosecuted, convicted and sentence to jail on a charge of contempt of court when they had not been cited in their individual capacities, and secondly, they were not personally served with the *rule nisi* summoning them to appear in Court as directed.
- [11] On the substantive issue, the respondents' defence is that they are not in wilful contempt. They contend that it is impossible to comply with the arbitration award as it stands as the position of Director: Environmental Health is no longer in existence. Ekurhuleni Metro's structure has undergone some changes over the years, so it was further submitted. In the current structure, the close match to the position of the Director: Environmental Health would be those of the Divisional Head positions whose term is also fixed for five years.

[12] In view of that, Mr Kamffer has since been offered the following options which, it was submitted, constitute a substantial compliance with the arbitration award:

- 12.1. Compensation in the amount of R1 066 534.20 which is a difference between salary for the position currently occupied by Mr Kamffer and the salary of positions at the Director level, including Director: Environmental Health, in a five year fixed-term contract.
- 12.2. Three Divisional positions which are five year fixed-term contracts. The Divisional Head: Legislative Compliance Division; the Divisional Head: Environmental protection and Reselie Division; and the Divisional Head: Strategic Planning Environmental Division.

Legal Principles

[13] The following requisites of contempt of court, which are trite, were recently reaffirmed by the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd and others*² and they are:

- 13.1. The existence of the order;
- 13.2. The order must be duly served on, or brought to the notice of the alleged contemnor;
- 13.3. There must be non-compliance with the order; and
- 13.4. The non-compliance must be wilful and *mala fide*.

[14] In *Matjhabeng*³, the Constitutional Court settled the issue of the burden of proof and emphatically stated that in instances where, like in the present case, the relief sought is committal, the criminal standard of proof, beyond

² 2018 (1) SA 1 (CC); [2017] ZACC 35 (CC); 2017 (11) BCLR 1408 (CC) at para 73

³ *Supra*.

reasonable doubt, is applicable.⁴ The Constitutional Court also pronounced on the issue of non-joinder of the officials in their personal capacities and pertinently stated that:⁵

[96] In the present case, not only was a criminal sanction in the offing rather than a civil remedy to ensure compliance, but there is also no legitimate apprehension over the number of parties cited. In each of the present matters there was only one person - Mr Lepheana in Matjhabeng and Mr Mkhonto in Mkhonto - who should have been joined in their personal capacities so that they could properly defend the indictments or charges against them. *Insamcor* is thus no authority for the proposition that a rule nisi can in general be used as a substitute for joinder in contempt proceedings.

[102] When setting aside the Pretoria High Court's order and declaring Mr Mkhonto to be in contempt and sentencing him to imprisonment, the Supreme Court of Appeal took no pains to consider the prejudice that befell Mr Mkhonto - specifically to determine whether he had been personally joined as a party. The Supreme Court of Appeal convicted and sentenced Mr Mkhonto to imprisonment even though he was not a party to the contempt proceedings. In my view, the procedure followed by the Supreme Court of Appeal violated Mr Mkhonto's right "not to be deprived of freedom arbitrarily or without just cause" in terms of section 12(1)(a) of the Constitution.

[103] Bearing in mind, that the persons targeted were the officials concerned - the Municipal Manager and Commissioner in their official capacities - the non-joinder in the circumstances of these cases, is thus fatal. Both Messrs Lepheana and Mkhonto should thus have been cited in their personal capacities - by name - and not in their nominal capacities. They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in the offing. It is thus inconceivable how and to what extent Messrs Lepheana and Mkhonto could, in the

⁴ *Matjhabeng, supra* at paras 60 to 97.

⁵ *Matjhabeng, supra* at paras 96, 102 and 103.

circumstances, be said to have been in contempt and be committed to prison.'

- [15] Turning to the present case, it is common cause that the officials are not cited in their personal capacities and were never served with the *rule nisi* as directed by Whitcher J. Given the fact that IMATU seeks a criminal sanction in a form of committal rather than a civil remedy to ensure compliance, the officials ought to have been joined in their personal capacities so that they could properly defend the indictment against them. Indeed, a *rule nisi* could satisfy the requirement for joinder in contempt proceedings. The converse is true in the present case. The *rule nisi* does not assist IMATU as it was never served personally on the officials. Clearly, these omissions are fatal to IMATU's case.
- [16] Mr Mkhwibiso, IMATU official, was at pains to convince the Court that the officials could still be found to be in civil contempt of court under the further alternative relief prayer in the Notice of Motion and a *mandamus* be ordered. It is logical that a civil relief must be preceded by a conviction that the officials are indeed in contempt.
- [17] IMATU is adamant that the respondents are in contempt of the award that placed Mr Kamffer in a permanent position of a Director: Environmental Health. Mr Mkhwibiso submitted that Molahlehi J ruled that the position is permanent and Mr Kamffer is not interested in any of the fixed-term positions he have since been offered.
- [18] Advocate Fourie SC, counsel for the respondents, submitted that IMATU knew all along that the Director: Environmental Health position was not permanent but fixed-term. The position was advertised in 2003 but Mr Kamffer failed to avail himself to that recruitment process. Obviously, Mr Kamffer wants to enjoy the benefits of the position of Director: Environmental Health without exposing himself to the risks associated with those benefits. As correctly submitted by Advocate Fourie SC, Mr Kamffer wants to 'have his cake and eat it'.

- [19] The mere fact that IMATU concedes that Mr Kamffer had been offered an option to choose a suitable alternative position, albeit on a five-year fixed-term contract, is a testament that the respondents are not in wilful contempt. In fact, Mr Mkhwibiso conceded that all the incumbents in the positions of Divisional Heads, including its members, are on five-year fixed-term contracts.
- [20] The Molahlehi J order did not pronounce on the permanency of the position of Director: Environmental Health nor did the arbitrator in the arbitration award. In my mind, IMATU failed to prove that the position of Director: Environmental Health was permanent. It stands to reason, therefore, that Mr Kamffer's placement would have been subject to a term fixed for five years with effect from 15 March 2009 to 15 March 2014. As such, both the options offered to Mr Kamffer constitute a substantial compliance with the award. Mr Kamffer is not prejudiced in any manner. He can accept the monetary offer and keep his current position; alternatively, avail himself to one of the Divisional Head positions in offer.
- [21] In the light of the fact the options offered to Mr Kamffer amount to substantial compliance with the award, IMATU dismally failed to prove, on the balance of probabilities, that the officials are in wilful contempt.

Conclusion

- [22] In all the circumstances, no case for wilfulness and *mala fides* on the part of the officials in their personal capacities has been made to sustain an indictment of contempt of court. As such, the application stands to be dismissed.

Costs

- [23] The only issue remaining is that of costs. It is trite that costs in this Court do not follow the result, especially if the parties are in a persisting relationship as typified in the present case. Nonetheless, despite the collective bargaining relationship between the parties, IMATU took an intransigent

stance throughout this litigation. When it was clear that its case was about to suffer its demise, IMATU sought to escape a cost order by relying on the relationship that the parties have. I am convinced, therefore, that the present case presents an exception to the rule.

[24] In the premises, I make the following order:

Order

1. The application is dismissed.
2. IMATU is ordered to pay the costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr Mkhwibiso, Official of IMATU

For the first respondent: Advocate G Fourie SC

Instructed by: Tshiqi Zebediela Inc

LABOUR COURT