

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2485/12

In the matter between:

TP MTHETHWA

Applicant

And

**DEPARTMENT OF HEALTH:
GAUTENG PROVINCE**

First Respondent

THE HOD OF THE DEPARTMENT

Second Respondent

Heard: 21 June 2019

Delivered: 25 June 2019

JUDGMENT

MOLAHLEHI ADJP,

1. This is an application for the commitment of the second respondent, for contempt of court. The order sought is consequent to the alleged failure to implement court order/s issued against the first respondent requiring the reinstatement of the applicant.
2. The matter has a protracted history dating back to 2012 when the respondent dismissed the applicant. After his dismissal the applicant referred a dispute concerning an alleged unfair dismissal dispute to the bargaining

council. He was unsuccessful and being unhappy about that outcome, instituted review proceedings against the commissioner's arbitration award in this court.

3. The applicant was successful in the review proceedings. The arbitration award was accordingly reviewed and set aside and substituted with an order reinstating the applicant into his previous employment.
4. The order reinstating the applicant which was made by Boda AJ on 15 January 2015 essentially ordered the reinstatement of the applicant without loss remuneration and benefits.
5. The reading of the papers reveal that various problems confronted the applicant in seeking to enforce the order. The first concern the dispute between the parties about the order read into the record in the *extempore* judgment and the typed one, signed by the Registrar.
6. During November 2015 the applicant sought the enforcement of the court order by means of contempt proceedings. The matter served before Baloyi AJ who postponed it and directed that Boda AJ be "approached to vary one of the documents (referring to the *extempore* judgment and or the typed order) or give clarity whether retrospective pay back is from the date of the dismissal was indeed intended by his judgment."
7. The order made by Benjamin AJ on 4 March 2016 in which the respondent was directed to pay the applicant the amount of R1 325 283.56 did not resolve the issue between the parties. The court further on that occasion ordered the reinstatement of the applicant from the date of his dismissal and corrected his salary adjustment. Attached to the order is a spread sheet which tabulated various figures, totalling the said amount of R1 324 283.56. The figures tabulated in the schedule include amongst others; notch increased and received," "basic salary received," "Housing subsidy received," "services bonuses received," "employment medical contribution received," "GEPF contribution received, . . ."

8. Another order was made on 12 January 2017 by Lagrange J who ordered the reinstatement of the applicant and further consultation between the parties to reconcile all monies due between the parties and reversing the lump sum payment if necessary. The order further required correction of the applicant's Persal account to reflect all salaries, benefits and deductions as if he had not been dismissed.
9. On 2 June 2017, Witcher J made another order in which the parties were directed to meet by 16 June 2017 and discuss a possible settlement of the matter.
10. Turning to the present application the applicant seeks an order in the following terms:
 - "1. The Respondent(s) is found guilty of contempt of Court by failing to abide by orders of this Court.
 2. The Respondent pays the Applicant the amounts of R 179 563.10 for outstanding capital and interest from 16 January 2015 on the arrears within 2 weeks of the date of this order.
 - 3 The Respondent pays over to the Pension Fund the arrears on the employer's contribution during the period the Applicant was dismissed until he was reinstated again within 2 weeks of the date of this order. The amounts mentioned in 2 above may be utilised for this purpose. . . ."
11. There seem to be no dispute that the amount of R1 324 283.56 was paid to the applicant in compliance with the order of Benjamin AJ.
12. There is also no dispute that the amount of R33 000,00 is due to the applicant. In this regard Counsel for the respondent gave an undertaking that the respondent would pay that amount.
13. The main issue between the parties concerns the amount of R179 563.10, which the applicant contends is due and owing to him in terms of the court

order/s. The respondent on the other hand contends that the applicant was paid everything that is owing to him. It is further alleged that the applicant was, in fact over paid.

14. The issue about the above amount seems to be concerning payment of arrears in pension contribution by the first respondent to the Government Employee Pension Fund (the GEPF). The applicant contends that the respondent has failed to pay for the arrears on its contribution to the GEPF for the period whilst he was out of the employment of the respondent due to his unfair dismissal.
15. The respondent on the other hand contends that the above amount which was paid to the applicant is the amount which he ought to use to settle the arrears in the pension fund.

Elements of contempt

16. The following requirements of a contempt order are well established in our law:
 - 16.1 The existence of a court order;
 - 16.2 That the respondent had service or notice of the court order;
 - 16.3 Non-compliance by the respondent with the court order; and
 - 16.4 That the respondent acted wilfully (intentionally) and *mala fide* in transgressing the court order.
17. In *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) the Court held that:

“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 ordinary principles. However, it must be clear beyond reasonable doubt that the official in question is the person who has wilfully and with knowledge of the court order failed to comply with its terms.”

In Member of the Executive Council for Health, Gauteng v Lushaba (1) SA 106 (CC); 2016 (8) BCLR 1069 (CC) the court held:

“Contempt of court proceedings can only succeed against a particular public official or person if the order has been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order but he wilfully and contemptuously refuses to comply with the court order.”

18. In the initial contempt proceedings which were instituted on 22 November 2016, Dr B Selebalo was cited as the second respondent, being the public official responsible for ensuring implementation of the court order. He was subsequently dismissed by the respondent and thus can no longer be said to be the person responsible for implementing the provisions of the court order/s. He thus cannot be held liable for failing to implement the order against the first respondent. The person responsible for implementing the provisions of the court order/s is the incumbent.
19. In the present matter, the applicant has cited the second respondent as "THE HEAD OF THE DEPARTMENT." The applicant has failed in its papers to identify the official responsible for implementing the order/s since the dismissal of Dr Selebano. The incumbent in the position of the head of the department has not been identified in the applicant's papers. Put in another way, the applicant has failed to join the person occupying the position of the head of the department in these proceedings.
20. Mr De Viliers for the applicant conceded during the debate that the applicant's papers were for the above reason defective. The applicant has thus failed to identify or specify the official who it alleges failed to implement the order and accordingly the applicant's application stands to fail.

Order

21. In the premises, the applicant's application is dismissed with no order as to cost.

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Acting Deputy Judge President of the
Labour Court

Representation:

For the Applicant: Mr De Villiers

Instructed by: Ricki Anderson Attorneys

For the Respondent: Adv. TJ Machaba

Instructed by: Ndlovu Sedumedi Attorneys.