



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO:J785/13

In the matter between:

NEHAWU obo MEMBERS

Applicant

and

DEPARTMENT OF PUBLIC WORKS,

ROADS AND TRANSPORT: MPUMALANGA PROVINCE

First Respondent

HEAD OF DEPARTMENT: DEPARTMENT OF

PUBLIC WORKS, ROADS AND TRANSPORT

MPUMALANGA PROVINCE

Second Respondent

MEC FOR THE DEPARTMENT OF PUBLIC WORKS,

ROADS AND TRANSPORT: MPUMALANGA PROVINCE

Third Respondent

Heard: 2 August 2019

Judgment delivered: 6 August 2019

JUDGMENT

VAN NIEKERK J

- [1] This is an application to hold the first and second respondents in contempt of court on account of what the applicant (the union) avers is their failure to comply with an order of this court dated 8 February 2017. The dispute between the parties has its roots in a decision taken in 2009 by the premier of Mpumalanga to merge two departments - public works, and roads and transport. Consequent on the merger, a new structure for the new department had to be determined and those employees engaged in the previously separate departments had to be accommodated in the new structure or elsewhere. The parties commenced negotiations on how this was to be effected, and on 12 October 2009, reached a collective agreement in the form of what is referred to as the 'placement plan'.
- [2] The implementation of the plan did not proceed satisfactorily and was ultimately halted by the provincial executive committee pending guidance from the Department of Public Service and Administration. The applicant, on behalf of 226 of its members, referred the matter to arbitration. The arbitrator was required to

determine whether the first respondent had breached the placement plan, and if so, to determine how the plan ought to be implemented. However, attached to the referral was a list of all the names of only 186 members of the union.

- [3] On 24 June 2011, the arbitrator issued an award which required the respondent to finalise the process of placement of staff as agreed, within 30 days of the date of the award.
- [4] In the course of seeking to comply with the award, the Department embarked on a job evaluation process with the new structure of the Department. The Department avers that at that stage, it was discovered that certain employees had been receiving remuneration at a higher level than what was justified by the posts they occupied. When it was proposed that corrective measures be taken in accordance with the applicable regulations, the union advised its members not to participate in the job evaluation process and accordingly, the respondents averred that the implementation of the agreement in terms of the award could not take place.
- [5] During April 2013, the union filed an application in which it sought to have the arbitration award made an order of court. On 20 August 2014, the arbitration award was made an order of court.
- [6] After the granting of the order, on 29 September 2014, the department said the union a letter in which it stated that it intended to comply with the award and the order of court and that it was in the process of verifying the identified persons and employees on the list of 196 employees, and that once the verification had been done, the department would commence with the job evaluation process. The union responded on 1 October 2014 to the effect that the job evaluation process that the respondent intended to conduct constituted contempt of court since the award made no reference to a job evaluation process. The Department responded by stating that in its view, a job evaluation process was a bit obligatory. After further correspondence, during January 2015, the union filed an application to hold the respondent in contempt of court. After various preliminary

points were raised by the respondent's, that application was withdrawn on 5 March 2015.

- [7] In May 2015, the union filed a second application an application to hold the respondents in contempt of the order. That application culminated in a 'deed of settlement', signed on 8 February 2017. In terms of the settlement, the first respondent undertook to *'implement the Placement Plan, inclusive of clause 9 (the "Parity clause") to all employees affected thereby, in the light of the provisions of the Public Service Act, 1994 and Regulations issued in terms thereof within 8 weeks from the date of this agreement, and adjust their appointments with retrospective effect from 24 June 2011, and finalise the process on or before 1 April 2017'*.
- [8] The respondent concede that they were unable to complete the job evaluation process, adjust the appointments and finalise the process within the eight weeks provided in the court order. The department proceeded to make adjustments to the grades and salaries of the 186 employees before receiving the job evaluation results. This was done ostensibly on the basis of an intention to comply with the court order, and into anticipation of the outcome of the job evaluation. In March 2017, the respondents proceeded to adjust the salary levels of 103 employees who were on the list of 186. The difference is accounted for by exclusions in respect of members transferred to other departments and applications in the list provided by the union. The outcome of this process was called into question when the job evaluation report was received from the office of the premier. The report indicated that the upgrades, adjustments and payments were incorrect and that members were to remain on the same salary levels on which they had previously been engaged. Legal opinions were consequently sought and the respondents were advised that the adjustments and payments that had been made illegal as they had not been preceded by the obligatory job evaluation process and results.
- [9] The union contends that the respondents have failed to comply with the deed of settlement, that they are in breach of the order granted on 8 February 2017, and

that the respondents are accordingly in contempt of court. In so far as the scope of the order is concerned, the union contends that the order is applicable to all affected employees, and not only those whose names appeared on the annexures in the referral to arbitration.

- [10] The principles applicable to civil contempt are well-established. The purpose of contempt proceedings is to compel compliance with orders of court and to vindicate the court's dignity and authority consequent on the disregard of its orders. The principles relevant to contempt were set out by Cameron J in *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). It is a crime unlawfully and intentionally to disobey a court order, the essence of which lies in violating the dignity, repute or authority of the court. The order in question must be one *ad factum praestandum*, the order must have been served on the respondent or the respondent must have been advised of the order in circumstances where there are no reasonable grounds for disbelieving the information, and respondent must have failed to comply with the order. The failure to comply must be both *mala fide* and wilful (see *Fakie NO (supra)*, *Uncedo Taxi Service Association v Maninjwa & others* [1998] BCLR 683 (E) and more recently *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC)). As the Court stated in *Fakie*:

9. The test for disobedience of a civil order constitutes contempt has come to be stated is whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-compliant may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claim to constitute the content. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (although unreasonableness could evidence lack of good faith).

10. These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offences committed and not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.

Honest belief that non-compliance is justified or proper is incompatible with that intent.

- [11] In *Consolidated Fish (Pty) Ltd v Zive & Others* 1968 (2) SA 520 (CPD), the court made the point as follows:

The court will not order the attachment of the respondent for contempt in not complying with the judgement of the court if it appears that the non-compliance is not due to wilful disobedience but rather to a misunderstanding of the true meaning of the judgement.... This seems to be merely another way of stating the rule that, if a respondent can establish bona fide is in relation to his disobedience of the court order, he will not be held to have been in contempt of that order.

- [12] The only issues arising in the present application is whether the respondents refused to comply with the reinstatement order and if so, whether that refusal was deliberate and *mala fide*.

- [13] The parties are in disagreement over the interpretation of the deed of settlement. First, there is a material dispute about the scope of the agreement. The respondents point to the preamble and in particular, to the reference of the dispute to arbitration and the arbitration award dated 24 June 2011 and contend that on this basis, the reference to 'employees affected' in clause 1 of the deed of settlement can only apply to those of the union's members who were party to the arbitration proceeding. In short, the respondents' view is that the members on whose behalf the union acts in these proceedings were never part of the dispute referred to arbitration and that the order of court does not apply to them. The union contests this interpretation and avers that all employees affected by the implementation of the placement plan are entitled to benefit from the deed of settlement. Specifically, the union's view is that the words 'all employees affected thereby' means all employees affected by the parity plan and its implementation. Further, the union contests the respondent's right to exclude from the scope of the agreement those employees who were promoted or transferred out of the department, or who had resigned or been dismissed. More fundamentally however, the parties are in disagreement about the meaning of the qualifier

contained in clause 1 of the agreement which the respondents contained subject the implementation of the agreement to the provisions of the PSA and Regulations. The respondents contend that the deed of settlement is to read subject to these regulatory measures and that provisions preclude them from making any adjustments without any job evaluation.

[14] It is not for this court in these proceedings to determine which of the contested interpretations is correct. It seems to me, for present purposes, that the dispute between the parties is a genuine dispute. A cursory glance at the applicable Regulation makes clear that for any salary level of the post to be changed or upgraded, job evaluation must be performed. Moreover, the regulation makes clear that parity (work of equal value remunerated equally) cannot be applied without reference to job evaluation. It would seem to me, and again limited to present purposes, that the terms of the order require a job evaluation study conducted as part of compliance with its terms. The respondent's version, which I must necessarily accept given that these are motion proceedings, is that the job evaluation results do not support the claim of those union members who were party to the arbitration proceedings and that there is sufficient reason for not implementing the terms of the deed of settlement in respect of those employees. That being so, I fail to appreciate how it can be said that the respondents have breached the court order. Even if they did, in my view, the respondents have established that they have not acted in a *mala fide* manner or conducted themselves in deliberate breach of the order. In short, there is a true misunderstanding as to the nature and extent of the respondents' obligations in terms of the deed of settlement, and no willful disobedience on their part. The application accordingly stands to be dismissed on the basis that all it has not been established beyond reasonable doubt that the respondents are in contempt of the order dated 8 February 2017.

[15] Finally, in relation to costs, the court is a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. It seems to me in the present instance that those requirements are best satisfied

by each party bearing its own costs. There is a collective bargaining relationship between the parties and this court is ordinarily reluctant to make orders for costs that might save to prejudice that relationship. Although the union has not succeeded in the present application, the proceedings were not initiated on a frivolous or vexatious basis.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge

REPRESENTATION

For the applicant: MR M Magoshi, Majang inc

For the respondent: Adv T Skhosana and Adv Tilly instructed by State Attorney