



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J419/23

In the matter between:

NEHAWU

Applicant

and

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION

1ST Respondent

**DEPARTMENT OF PUBLIC SERVICE AND
ADMINISTRATION**

2ND Respondent

MINISTER FOR HEALTH

3RD Respondent

DEPARTMENT OF HEALTH

4TH Respondent

EASTERN CAPE PROVINCIAL DEPARTMENT OF HEALTH

5TH Respondent

LIMPOPO PROVINCIAL DEPARTMENT OF HEALTH

6TH Respondent

NORTH WEST PROVINCIAL DEPARTMENT OF HEALTH

7TH Respondent

DEMOCRATIC NURSING ASSOCIATION OF SA (DENOSA)

8TH Respondent

POLICE AND PRISONS CIVIL RIGHTS UNION (POPCRU)

9TH Respondent

SOUTH AFRICAN POLICE UNION (SAPO)

10TH Respondent

PUBLIC SERVICE COORDINATING BARGAINING COUNCIL

11TH Respondent

**HEAD OF DEPARTMENT: DEPARTMENT OF PUBLIC SERVICE
ADMINISTRATION**

12TH Respondent

Heard: 31 January 2025

Delivered: 20 February 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] Before me is an application for contempt of court wherein the Applicant seeks the First, Second and Twelfth Respondents (the Respondents) to be found guilty of contempt of court, for their failure to comply with an order of Thlotlalemaje J of 21 November 2023.

[2] On 29 August 2024, Thlotlalemaje J ordered the Respondents to:

2.1 The 1st Respondent (Mzamo Buthelezi) and the Twelfth Respondent (Yoliswa Makhasi) are to appear in the Labour Court on 11 October 2024 at 10:00 am to show cause why they should not be found guilty of contempt of court for failing to comply with the Labour Court order granted by Thlotlalemaje J on 21 November 2023, under case number J1625/23;

2.2 The 1st Respondent (Mzamo Buthelezi) and the 12th Respondent (Yoliswa Makhasi) are to explain their conduct and that of the 2nd Respondent

by way of an affidavit on the date of hearing or, preferably, before that date (although this will not excuse the 1st and 12th Respondents from being present in court);

2.3 In the absence of providing an explanation to the court's satisfaction, or failing to appear in court despite being properly served and notified, the 1st Respondent (Mzamo Buthelezi) and the 12th Respondent (Yoliswa Makhasi) are to be found guilty of contempt of court, and an order be made in terms of which:

2.3.1 The 1st Respondent (Mamo Buthelezi) and the 12th Respondent (Yoliswa Makhasi) are to be incarcerated for such period as the court deems appropriate; and/or

2.3.2 The 2nd Respondent is to be fined in an amount which the court deems appropriate; and/or

2.3.3 Other appropriate and/or alternative relief be granted.

2.4. Service of the order and the entire application be effected personally on the 1st and 12th Respondents as well as the State Attorney, insofar as the 2nd Respondent is concerned;

2.5 The 1st, 2nd and 12th Respondents are to show cause, on the return date, why they should not be ordered to pay the costs of this application, jointly and severally, the one paying, the other to be absolved, on scale C, and as between attorney and client.

[3] The order was duly served on the 1st, 2nd, and 12th Respondent as per the order.

[4] On 10 September 2024, the 1st and 2nd Respondents filed a notice of intention to defend.

[5] On 3 October 2024, the 1st, 2nd and 12th Respondents filed their answering affidavit.

[6] As a result of the filing of opposing papers, this matter has become fully opposed.

Relief Sought

[7] The Applicants seek the First, Second and Twelfth Respondents (the Respondents) be found guilty of contempt of court, for failure to comply with an order of Tlhotlhemaje J.

[8] The Applicants further seek costs on an attorney and client scale.

Nature of dispute

[9] The applicants argued that the Respondents failed to comply with or implement the court order granted by Tlhotlhemaje J on 21 November 2023, under case number J419/23, in terms of which this court made a settlement agreement, concluded between the parties an order of this court in terms of Section 158 (1)(c) of the Labour Relations Act¹ (LRA).

[10] The crux of the matter is that in terms of paragraph 1.3 of the settlement agreement, a positive obligation was created on the respondents to positively deal with tabled proposals.

[11] The Applicant's case is that the Respondents failed to positively deal with the tabled proposals.

[12] On the other hand, the Respondents contend that they complied with the court order as they positively dealt with the proposals.

[13] The legal requirements set for a contempt application to succeed are clearly set out below:

13.1 There is an order;

13.2 The Respondents are aware of the order;

13.3 There is non-compliance with the order; and

13.4 The non-compliance is deliberate/wilful and *mala fides*.

¹ Act 66 of 1995, as amended.

[14] The Respondents contend that they complied with the court order and the application should be dismissed with costs.

Material background facts

[15] On 6 March 2023, NEHAWU and some of its members employed in the public sector embarked on a national strike action.

[16] On 14 March 2023, NEHAWU, DENOSA, POPCRU, SAPO and DPSA representing the government entered into a settlement agreement under the auspices of the PSCBC in respect of the dispute under case number PSCBC251-22/23, which gave rise to the strike and another dispute under case number PSCBC186-22/23.

[17] On 16 March 2023 the Applicant and Respondents agreed that on 22 November 2018, the Third Respondent was granted an interdict by this honourable court.

[18] The Applicant on 16 March 2023 tabled its residual demands at the PSCBC as follows:

- 18.1 Re-open 2022/23 wage negotiations;
- 18.2 Augment the 3% implemented in 2022 by 4% backdated to 1 April 2022;
- 18.3 Give all employees in the bargaining unit a R2500.00 housing allowance;
- 18.4 Review PSCBC Resolution 7/2015, clause 4.5.6.5.3 by allowing employees who resign and who are dismissed to cash out the savings meant to promote home ownership;
- 18.5 Start negotiations on 1 April 2023 on Minimum Service Level (MSL) agreement and conclude an MSL within six (6) months;
- 18.6 Start negotiations on the Government Housing Scheme (GEHS) by the last week of March 2023.

[19] The Respondents submitted that on 17 March 2023 they responded to the above demands by saying the following:

19.1 That they supported the demand for an MSL. DPSA tabled a draft MSL at the PSCBC.

19.2 The demand to amend Resolution 7 of 2015 clause 4.5.6.5.3 to allow for those who resign or are dismissed to be entitled to receive their accumulated savings was not supported as it does not support the government's effort to promote home ownership;

19.3 The offer already tabled, cost the fiscus 47.4 Billion. The additional demands are unaffordable. If agreed to would add the following additional cost to the fiscus:

19.3.1 The demand of R2500.00 housing allowance would cost an additional R10.5 Billion;

19.3.2 The demand for a 4% augmentation of 3% would cost an additional R19 Billion;

19.3.3 The total cost for a year would be R66.9 Billion.

19.3.4 The total cost over 3 year period would be R198 Billion.

[20] DPSA pointed out that for 2022/23, they implemented a 3% increase plus a non-pensionable monthly cash allowance paid to all employees.

[21] The Respondents further submitted that during negotiations with unions in February 2023, they offered a 3.3% increase plus a non-pensionable monthly cash allowance that amounted to a 4.2% increase on the baseline, making the cost of the increase to the employer amount to 7.5% on the baseline for 2023/24.

[22] The Respondents further argued that the majority of unions accepted that offer on 31 March 2023.

[23] The Respondents further argued that the offer accepted was as follows:

23.1 The state as an employer offered the translation of the non-pensionable once off cash payment into a pensionable salary increase, in addition to the 3.3% Cost of living allowance (COLA).

23.2 They further argued that the above offer had the effect of making cash allowance pensionable. That resulted in increasing the bottom-line wage of every employee. The value of the allowance was added to the bottom

line salary, pension and all other benefits enjoyed by every employee. A reference to that effect was made to annexure AA1 on page 224 of the updated index bundle.

[24] In this regard, the Respondents argued that the State complied with the court order.

[25] They argued further that the 31 March 2023 agreement with the majority unions in the PSCBC amounts to compliance with clause 1.3.3 of the settlement agreement.

[26] They argued further that after the agreement of 31 March 2023 at the PSCBC, the Applicant never complained that they never complied with the 14 March 2023 agreement nor did it take any further steps under the LRA to enforce that agreement.

[27] That they heard about the non-compliance for the first time through the media, which prompted them to reply indicating that they complied with the Court Order.

[28] On 21 November 2023, the above settlement agreement was made an order of court by Tlhotlhemaje J.

[29] On 25 July 2024, the Applicant launched an *ex parte* contempt proceedings seeking an order that the 1st, 2nd and 12th Respondents be found guilty of contempt of court for failing to comply with the order of Tlhotlhemaje J dated 21 November 2023.

[30] The Applicant argued that the Respondents failed to comply with clause 1.3.3 of the settlement agreement.

‘1.3.3 The employer commits that residual and substantive matters emanating from 2022/23 wage dispute related to COLA, shall be tabled, positively dealt with and concluded as part of 2023/2024 wage negotiations.’

[31] The Applicant argued that the Respondents were duly served with the order of Tlhotlhemaje J, together with the settlement agreement but they failed to comply with the court order and the same constituted contempt of court.

[32] The Applicant submitted that this is despite knowledge of their obligations in terms of the said order, they deliberately and wilfully/*mala fide* refused to comply with the court order.

The Issue of Contempt and Its Analysis

[33] In deciding an issue of contempt of court, it must be reiterated that the existence of contempt of court must be established.

[34] I wish to state that the existence of an order is not in dispute. However, the Respondents deny that they failed to comply with the court order.

[35] The Respondents argued that the then Minister and DPSA became aware of the settlement agreement which has been made an order of court through media on 29 August 2024.

[36] The Respondents further submitted that the DPSA Director General and the current Minister only became aware of the contempt application and order in September 2024.

[37] The Applicant argued that the Respondents flatly refused all the tabled proposals made by the Applicants, thereby failing to positively deal with those issues.

[38] I am therefore required to make a determination to establish compliance with the court order.

[39] The Applicant averred that they seek a coercive order, should I find the Respondents guilty of contempt of court.

[40] During the hearing of this application, I tried to inquire if the Applicant's understanding of clause 1.3.3 meant that the Respondents are supposed to give in to their tabled proposals. Counsel for the Applicant argued that they were not expected to agree but to positively engage instead of just a flat refusal on all the tabled proposals.

[41] It is common cause that all residual matters were tabled for discussion on 16th March 2023 and were responded to on 17 March 2023 where some were granted with counter offers/proposals.

[42] It is further common cause that what was proposed by the State/DPSA was accepted by the majority of unions at the bargaining unit.

[43] The test to determine whether contempt indeed exists was dealt with in *Fakie NO v CCII Systems (Pty) Ltd*² where the court said:

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

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 offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces.'

² 2006 (4) SA 326 (SCA); [2006] ZASCA 52 at paras 9 - 10.

[44] The Applicant correctly draws this court's attention to the case of *General Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others*,³ where the court re-emphasised the test for contempt of court, at paragraph 37 of the judgment the court held that:

'As set out by the Supreme Court of Appeal in *Fakie*, and approved by this Court in *Pheko II*, It is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.'

[45] As held in *Pheko II*—

'the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create a reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.'

[46] The Constitutional Court recently in *Pheko and Others v Ekurhuleni Metropolitan Municipality and Another*⁵ dealt with the ratio in *CCII Systems* and then summarized the position when it comes to considering whether contempt of court exists, as follows:

'Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience

³ 2021 (5) SA 327 (CC); [2021] ZACC 28.

⁴ *Pheko v Ekurhuleni City (Pheko II)* 2015 (6) BCLR 711 CC at para 28.

⁵ 2015 JOL 33198 (CC).

of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.'

[47] The court then concluded:⁶

'The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour.'

[48] In the context of employment dispute resolution specifically, the issue of contempt of court most often arises in cases where employers fail to comply with arbitration awards issued by the CCMA or bargaining councils, where it is required that an employer takes positive action pursuant to a finding of unfair dismissal or unfair labour practice against the employer. It can also occur when an employer or party fails to comply with an order of court.

[49] In the matter *in casu*, the Applicant argued that the Respondents failed to comply with an order of this court in that they failed to positively engage them as outlined in the court order.

[50] My understanding of a positive obligation to 'positively engage the Applicant' simply means that parties must engage in good faith and this view was equally supported by both the legal representatives of the parties herein including that of the Applicant.

⁶ See para 30.

[51] The Respondent argued that all employees from the lowest paid to the highest earning employee were given an increase in cost of living allowance (COLA) adjustment amounting to between 7.5% and 11.5% which is way higher than what the Applicant proposed.⁷

[52] However, the Applicant argued that even if the offer was implemented at that percentage, it did not address the tabled proposal of the Applicant as the offer was only implemented effective 1 April 2023, whereas the Applicant wanted it to be effective from 1 April 2022.

[53] I should state that the Applicant conceded that the implementation was effected and their members benefited from same at the time of its implementation.

[54] If that is the case, where did the Respondents fail to comply? if any. From the reading of the papers and arguments before me. It is clear that, even if the majority of unions in the bargaining unit did not accept the offer from the Respondents, it is clear that the Respondents engaged the Applicant in good faith.

[55] Now that the Respondents' offer was accepted by the majority of unions, the contempt of court application should not have been launched as it stands to fail. I say so because the Respondent positively engaged the Applicant. Moreover, the Applicant should have been aware that they are bound by the decision of majority of unions as the principle of majoritarianism should prevail.

[56] It is important to state that the principle of majoritarianism is not defined in the LRA, but the Constitutional Court has explained that it merely means that the will of the majority will prevail over that of the minority.⁸

[57] In essence, the principle of majoritarianism states that the majority's will prevails over that of the minority.⁹ This is reflected throughout the LRA.¹⁰ In *Kem-Lin*

⁷ See page 224 of the updated bundle.

⁸ *Transport and Allied Workers Union of South Africa v Putco Ltd* 2016 4 SA 39 (CC); [2016] 6 BLLR 537 (CC) at para 61.

⁹ *Kem-Lin Fashions CC v Brunton and another (Kem-Lin Fashions)* 2001 22 ILJ 109 (LAC); [2000] ZALAC 25 at para 19.

Fashions, Zondo JP underscored that majoritarianism resulted from a conscious policy choice made by the Legislature when formulating the LRA.¹¹

[58] When a majority union enters into a collective agreement with an employer which identifies and binds non-parties, such agreement will be binding upon minority unions. According to Baskin and Satgar,¹² the LRA is profoundly majoritarian.

[59] The Respondent in my view positively engaged the Applicant in line with clause 1.3 in that majority if not all tabled proposals of the Applicant were responded to even though some of them were not favourably considered due to the reasons adumbrated in paragraph 19 *supra*.

[60] In my view, clause 1.3.3 of the settlement agreement only created a positive obligation on the Respondent to continue with the consultations, obviously in good faith. It would therefore be unfair to expect that the Respondent was supposed to accept all the tabled proposals even if it was financially impossible for them. Same would have been against the spirit of collective bargaining.

[61] Pursuant to the above, I am not convinced that the Respondents failed to comply with the court order.

Conclusion

¹⁰ The LRA affords majority trade unions a number of benefits. See, for example, section 14(1) (the right to appoint trade union representatives); section 16 (the right to information); section 18 (the right to establish thresholds of representativeness); section 26(2) (conclusion of agency shop and closed shop agreements); and sections 80 and 81 (establishment of workplace forums and choice of members from its elected representatives to serve on the trade union forum) See further section 23(1)(d), which allows the extension of collective agreements to employees that are not members of a majority trade union.

¹¹ In *Kem-Lin Fashions* case where, the same court reiterated that the majoritarianism system was a policy decision chosen by legislatures which is good not only for collective bargaining but also good democratisation of the workplace. The Court further pointed out the Constitutional case of *Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others* [2017] 7 BLLR 641 (CC); (2017) 38 ILJ 831 (CC), where the Court in essence held that majoritarianism is part and parcel of the LRA. As mentioned above the majority union enjoys certain privileges and the court stated that in order to enhance these privileges, the majority union may enter into a collective agreement with an employer, which was done by NUM and UASA and which is being disputed by AMCU as the sought to set the collective agreement aside. The Act defines what a collective agreement is and in the definition it provides that the agreement which concerns terms and conditions of employment or any other matter which is matter of mutual interest, and this collective agreement binds parties to the agreement, and non-parties to the agreement.

¹² Baskin and Satgar 2019 *South African Labour Bulletin* 12.

[62] Having considered the submission by the parties I find that the Respondents complied with the Court Order.

[63] Succinctly put, the Applicant failed to make out a case for contempt of court and their application stands to fail.

[64] The application was egregious and meritless. The Applicant failed dismally to convince this court that the Respondents failed to comply with the court order.

Costs

[65] The Applicant's conduct was irresponsible and caused the Respondents to incur unnecessary costs to defend this application.

[66] I have had regard to the requirements of law and fairness in considering costs and having done so, I am of the view that a cost order is warranted in this matter.

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

Order

1. The application is dismissed with costs.

N Tshisevhe

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv G. Fourie SC

Adv N. Deeplal

Instructed by: Scholtz Attorneys

For the Respondent: Adv T. Bruinders SC

Instructed by: C.N. Phukubje Inc. Attorney