



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Numbers: J928/2022

J1053/22

J1051/22

J1192/22

In the matter between:

JOSEPH RABBI TSHABALALA & 139 OTHERS

First to Further Applicants

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

First Respondent

THE MUNICIPAL MANAGER

Second Respondent

FUTHULI MOTHAMAHA

Third Respondent

Heard: 22 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date for hand-down is deemed to be on 14 May 2025

JUDGMENT

TLHOTLHALEMAJE, J*Introduction:*

[1] There are four consolidated applications before the Court. They all pertained to orders sought by the individual applicants, to hold the respondents to be in contempt of court for non-compliance with various settlement agreements entered into between the parties dating back from 5 May 2015. Those agreements have since been made arbitration awards which were certified under the provisions of section 143 of the Labour Relations Act (LRA)¹.

The individual applications prior to consolidation:

[2] Under Case Number J928/22 launched in July 2022, the individual applicant sought a contempt finding on the basis of a settlement agreement signed on 5 May 2015 in terms of which the Municipality had agreed to appoint him to post level 4 effective from June 2015.

[3] The basis of the 125 individual applicants' claim under J1053/22 launched in August 2022, is an arbitration award issued in terms of which the Municipality was ordered to pay to them their salaries inclusive of Sundays, public holidays and night shift allowance, in accordance with the SALGBC collective agreement and the provisions of the Basic Conditions of Employment Act (BCEA)². The payments were to be back-dated to October 2015. Against this award and a further settlement agreement, the individual applicants quantified the amounts due to them as equal to R31.5m, which they presented to the Municipality in January 2018 for payment. They had caused a warrant of execution in respect of this amount, which warrant was set aside by this Court under Case Number 57/18 in January 2018.

[4] Some of the individual applicants under Case Number J1053/22 through passage of time are unfortunately since deceased. The respondents had objected to their inclusion in these matters on account of any lack of evidence of authority to act

¹ Act 66 of 1995, as amended.

² Act 75 of 1997

on their behalf by the current legal representative, and further in the absence of proof of executorship. Counsel for the applicants nonetheless argued that their claims remained properly before the Court as those claims were instituted prior to their unfortunate deaths. It would not be necessary for the Court to deal with this preliminary point in the light of the conclusions to be reached below.

[5] Under Case number J1051/22 launched in August 2022, the two individual applicants sought a contempt finding on the basis of an award issued on 12 January 2015. In the award, the Municipality was ordered to 'investigate' the issues giving rise to an alleged unfair labour practice dispute, and that to the extent that unfair labour practices were established, to rectify them and backdate remedies from October 2015. In the same token, the award referred to a settlement agreement entered into in October 2015, and for any payments due to be made.

[6] Under Case Number 1194/22 launched in September 2022, the 13 individual applicants' basis for a contempt finding is a settlement entered into between their SAMWU on their behalf and the Municipality in March 2015, in terms of which the latter agreed to correct or adjust their salaries in accordance with their post levels from April 2015.

The parties' respective cases:

[7] The various settlement agreements and awards followed upon numerous alleged unfair labour practice dispute that were referred to the SALGBC against the first respondent (Municipality). At the core of the disputes were alleged failures by the Municipality to appoint the individual applicants to post level 4 as Sports Officers in the Sports and Culture Directive since June 2015; adjust their post levels and salary scales, and pay them salaries including payments for Sunday and public holiday worked, and shift allowances dating back to 2015. In some instances the disputes pertained to alleged unfair labour practices which the Municipality was simply ordered to investigate and rectify to the extent established. Of course any award from an Arbitrator ordering an employer to 'investigate' alleged unfair labour practices is for all intents and purposes meaningless, as it is not finally determinative

of a dispute. All that such an award does is to create further disputes as evident in this case.

[8] Of importance however from the pleadings, is that it is apparent that notwithstanding having instituted contempt proceedings in which they seek the incarceration of the second respondent, the individual applicants have conceded that the Municipality did in fact act in accordance with the agreements and the award by effecting adjustments of the post levels and salary scales, and also paid to them certain amounts. This issue will be dealt further below in this judgment to the extent that it was the respondent's contention that there was full compliance with the awards and settlement agreements.

[9] The primary complaint however of the individual applicants, is that the Municipality did not act in accordance with the agreements or awards. They contend that despite compliance, this was only with effect from July 2021. They thus claim non-payment for the adjustments to their salaries for the period between 15 July 2015 and June 2021, since they contend that arising from those awards, the payments were retrospective.

[10] In some instance, they also complain that the Municipality did not investigate whether it had committed any unfair labour practices nor rectified them. I have already expressed a view in respect of the latter issue and the nature of award issued in that regard. This is further borne out by the respondents' contention that there was compliance with that award in that investigations were conducted and brought to an end as no alleged unfair labour practices were established. The respondents thus contend that there was nothing to rectify.

[11] The respondents in resisting the contempt applications further contended that they lacked merit and that there had been full compliance with the settlement agreements and awards in any event. It was accordingly submitted that the consolidated applications failed to meet the requirements of contempt. They further raised two preliminary points upon which it was contended that the applications ought to be disposed of.

The Rule Nisi had lapsed and non-service of orders?:

[12] The preliminary point pertaining to the non-service of the orders on the second respondent is an issue which the Court considers appropriate to determine within the context of whether the requirements for contempt were met. Central to the preliminary point is whether the *Rule Nisi* issued in all the consolidated applications had lapsed.

[13] The respondents' contention is that the *Rule Nisi* granted under J928/22 on 2 September 2022 had lapsed. It was issued with the return date of 3 February 2023 and further extended to 19 April 2023. On the latter date, there was no further extension granted by the Court.

[14] It was further submitted that the *Rule Nisi* under Case Number J1053/22 had equally lapsed. This was so in that it was issued on 14 October 2022 with a return date of 17 February 2023. It was then extended to 21 April 2023, when it was removed from the roll without a further extension.

[15] The *Rule Nisi* is also said to have lapsed under Case Number J1051/22 after it was issued on 14 October 2022 with the return date of 17 February 2023. It was submitted that on the return date, the matter was removed from the roll as it was not ripe for hearing, and without the *Rule Nisi* being extended.

[16] The application under Case Number J1194/22 is said to have met the same fate. This was so in that after the *Rule Nisi* was issued, on the return date on 4 May 2023, it was simply removed from the roll without it being extended. A further defect in respect of this application was that the settlement/award forming the subject of contempt proceedings was at no stage certified under the provisions of section 143(3) of the LRA. Accordingly, it was contended that there was no order upon which the respondents could be said to have been in contempt of.

Evaluation of the preliminary point:

[17] The respondents' consolidated heads of argument were delivered on or about 7 May 2024. Notwithstanding the preliminary points raised by the respondents, the applicant did not deem it necessary to supplement their heads of argument which were delivered in March 2024. Effectively, the preliminary points were not addressed by the applicants.

[18] In the proceedings, the arguments in response to the preliminary point on behalf of applicants was that these were opportunistic. The sum-total of the response was that once the respondents had delivered answering affidavits, one could not speak of an existing interim order that needed any extension to be extant and valid. The argument as I further understood it, was that once there are answering affidavits, what was then before the Court was a basis for a final order.

[19] Of course the submissions made on behalf of the applicants lack logic and any legal foundation. It is trite that contempt applications in this Court are brought *ex parte*, and where appropriate, a *Rule Nisi* will be issued directing the respondents or calling upon them to appear in court at a future date to show cause why the *rule* should not be made final.

[20] A *Rule Nisi* does not have an indefinite and independent lifespan as it is interim and conditional upon confirmation by the Court. In *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*³, it was held that the court has no authority to *mero motu* extend the life of a lapsed order, irrespective of whether or not the relief sought is depended on the existence of the *rule nisi*. It has also been held that upon the lapse of the *Rule Nisi*, the respondent party is discharged from the duty of compliance with the terms of that *Rule*⁴, which is to come and show cause why the terms of the *Rule* should not be confirmed.

[21] Effectively, once a return day passes without the *Rule* being extended to a future date by the Court, a mere removal of a matter on the return date or a

³ 2000(4) SA 746(SCA)

⁴ *National Director of Public Prosecutions v Walsh & Others* 2009 (1) SACR 603 T at paras 24-25

postponement without more, invariably implies that the *Rule Nisi* automatically lapses, discharging respondents from the duty of compliance⁵.

[22] In the absence of a revival of the *Rule*, there are no further obligations on the respondents. One cannot therefore speak of a final order merely on the basis of answering affidavits having filed, and when no determination was made either to confirm or discharge the *Rule Nisi*. A mere filing of an answering affidavit in which a respondent shows cause why the *Rule Nisi* should not be made final, does not automatically make that *Rule* final. Only a Court can upon the consideration of the pleadings, make a determination whether the *rule* is final or may be discharged.

[23] In the end, the lapse of a *Rule Nisi* and without its revival is fatal to any future conduct of any application under which the *Rule* was issued. This means that this should be the end of these contempt proceedings, to the extent that despite the raising of this important preliminary point, no attempt was made on behalf of the applicants to either explain why the various *rule nisi* had not lapsed, nor had they sought a revival.

[24] To the extent that it is determined that the various *Rule Nisi* had lapsed, the respondents sought that the applications be dismissed. There is no basis for this Court to accept as the respondents sought, that a lapse of a *Rule Nisi* called for a dismissal of the matter. At most, the Court should remove the matter from the roll with an appropriate cost order, and permit the applicants an opportunity to revive the *Rule*. This in my view would ensure fairness and access to justice. This approach is further based on the principle already alluded to, that a Court cannot *mero motu* extend let alone revive a *Rule Nisi*.

[25] Removing the matter from the roll however does not assist in bringing it to finality in the light of its history dating back to 2015. Furthermore, the interests of justice and convenience will best be served by this Court finally disposing of it. Importantly, the pertinent issues for contempt were fully canvassed in the papers, and all the parties are likely to suffer prejudice if the matter is not finalized.

⁵ See *SAMWU obo Paul Khalamashe and Others v City of Ekurhuleni & and Another*. (Case no:J412/2021. Delivered on 3 May 2023 per Swartz AJ) (Unreported) at pages 19 - 21

The legal approach in contempt applications ,and evaluation:

[26] The principles applicable in contempt proceedings are trite. The central feature of a contempt order is to protect the authority and integrity of the courts. It has been reaffirmed in various authorities that when a party wilfully disobeys an order of court and acts *mala fide* by not taking serious steps to comply therewith, the order holding such a party in contempt is manifestly justified⁶.

[27] The applicable principles were restated in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*⁷ as follows;

“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.” (Citations omitted)⁸.

(i) *The orders and their service:*

⁶ City of Ekurhuleni Metropolitan Municipality and Another v SAMWU obo Gwejane and Others (JA 06/24) [2025] ZALAC 18 (20 March 2025) at para 18

⁷ [2021] ZACC 18; 2021 (9) BCLR 992 (CC); See also *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC).

2017 (11) BCLR 1408 (CC) at para 74 where the Constitutional Court confirmed the requisites for contempt of court as follows:

‘I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*. It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof – beyond reasonable doubt – was applicable.’

⁸ At para 37.

[28] The awards and those emanating from the settlement agreements are not in dispute. Amongst the complaints raised by the Municipality is that to date, there was no personal service of the orders on the second respondent despite two Court orders issued compelling the applicants in that regard. The complaint particularly related to the service of the various *Rule Nisi* flowing from the *ex parte* applications launched by the applicants. In response, it was submitted on behalf of the applicants that personal service could not be effected on the second respondent who is the Municipal Manager, merely on the basis that he was not available.

[29] It is not necessary for the Court to explore whether there is any merit in the applicants' response. All that can be said is that it cannot be an acceptable excuse that an alleged contemnor such as a Municipal Manager, cannot be found for the purposes of a proper service as per a Court order. The applicants' response however fails to appreciate the principal point in contempt proceedings, which is that a party cannot be in contempt of a court order if it was not made aware of that order and what was required of it to the extent that it was said to have not complied with any order. Equally so, a finding of wilfulness or *mala fides* cannot be inferred in circumstances where the alleged contemnor has not been properly served with an order (*Rule Nisi*). Again, the applicants are found wanting in this regard. However, as already indicated elsewhere in this judgment, the approach of the Court is to put an end to this matter as consolidated, notwithstanding the valid preliminary points raised on behalf of the respondents.

(ii) *Alleged non-compliance:*

[30] From the pleadings, and to the extent that the settlement agreements and subsequent arbitration awards were not contested, the respondents' case was that there was compliance flowing from a 'Conclusive Agreement' that was concluded between the Municipality and the representative unions (SAMWU and IMATU). (Incidentally, neither SAMWU nor IMATU are party to these proceedings). The 'Conclusive Agreement' came about resulting from numerous similar disputes that were pending or finalised with the settlement agreements and awards that are the subject of these contempt proceedings. The 'Conclusive Agreement' was therefore meant to resolve all the various disputes.

[31] According to the respondents, the objectives of the 'Conclusive Agreement' were achieved. It was recorded in that agreement that the placement and appointment letters in all the disputes already dealt with through arbitration awards, were to be issued on 28 April 2021, and that the process of any remuneration was to be effected from July 2021. In accordance with that agreement, letters of appointments were indeed issued to the individual applicants, and as at July 2021, adjustments to salary scales of the individual applicants were made.

[32] In reply, the individual applicants either sought to disavow the binding nature of the 'Conclusive Agreement' on various grounds including that it was never made an order of Court, and/or that it could not supersede existing awards which formed the basis of the contempt proceedings. These contentions are in my view not only disingenuous, but displays an approach of approbating and reprobating. The applicants had accepted the payments and letters of appointments and adjustments made to their positions. In accordance with the 'Conclusive Agreement', its effect was to take place from 21 July 2021.

[33] As I understood the applicants' case, they cannot seriously dispute that the terms of the 'Conclusive Agreement' were implemented accordingly, long before they decided to launch these various contempt applications. Their only complaint is that contrary to the settlement agreements and awards, the Municipality failed to retrospectively pay or adjust salaries and positions from July 2015.

[34] Other than the fact that it is impermissible for the applicants to approbate and reprobate, if indeed they disagreed with the interpretation and the implementation of the 'Conclusive Agreement' in terms of which the respondents had acted, that is a separate dispute that does not give rise to any contempt finding.

[35] Other than the above, the applicants' complaint is essentially about non-payment of amounts which would have accrued arising from the retrospective implementation of the 'Conclusive Agreement'. Their underlying cause for the contempt and incarceration of the respondent is the non-payment of retrospective payments arising from the implementation of the 'Conclusive Agreement'.

[36] It is trite that the judgments (court orders) sounding in money may not be enforced by incarceration through contempt proceedings. The legal position is clear that a money judgment is enforced by execution⁹. Accordingly, to the extent that the applicant clearly seeks payment of monies (retrospective payments), the relief sought cannot be obtained through means of incarceration of the second respondents.

[37] To the extent that some of the applicants seek that the Municipality must investigate allegations of unfair labour practices and rectify them, I have already expressed a view on the vagueness of that award. Effectively, on the application of the doctrine of effectiveness¹⁰, it is not clear to the Court as to how it would be able to give effect to such an award. This is particularly so since it is further the respondents' case that some form of investigation was conducted and no unfair labour practices were established. It follows that any payments due could only have been made flowing from a positive investigation that there were indeed unfair labour practices against the two concerned individual applicants under Case Number J1053/ 22. Notwithstanding, adjustments to the positions and salaries of the individual applicants affected by the award were effected in April 2021. The Court cannot take it further than what has already been stated above.

[38] In the end, and to the extent that the respondents had complied with the settlement agreements and award through the implementation of the equally binding 'Conclusive Agreement', there can be no basis for any finding of *wilfulness and mala fides*. This is particularly so where it is evident from the facts of this case, that the Municipality had since the inception of the various disputes, made attempts to settle the dispute with the applicants, which attempts had culminated in the 'Conclusive Agreement' which terms were implemented.

[39] Against the above observations and conclusions, it follows that it ought to be invariably held that the applicants have not established a basis for any contempt

⁹ *Jayiya v MEC for Welfare, Eastern Cape 2004 (2) SA 611 (SCA)* at paragraph [15].

¹⁰ *FIFA v Sedibe 2021 JDR 2021 SCA*

finding to be made against the respondents, and the applications ought to be dismissed.

[40] I have further had regard to the requirements of law and fairness to the extent that the respondents sought a costs order against the applicants. Notwithstanding the fraught working relationship between the parties since 2015, and their non-disclosure of the existence of the 'Conclusive Agreement' in their respective founding affidavits, it is nonetheless my view that any award of costs is not warranted. It follows that each party must be burdened with its own costs.

[41] Accordingly, the following order is made;

Order:

1. The various *Rule Nisi* issued on various dates under Case Numbers: J928/2022; J1053/22; J1051/22 and J1192/22 as consolidated, are discharged.
2. The individual applicants' applications under the above-mentioned case numbers as consolidated for a contempt of court finding against the respondents are dismissed
3. Each party is to pay its own costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the 1st – Further Applicants: Adv. Z Feni, instructed by Qhali Attorneys.

For the 1st – 2nd Respondents: Adv. R Schmidt, instructed by Noge Attorneys.