



IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: BISHO]

CASE NO.: 299/2022

In the matter between:

MONDE AUSTIN SHUDE

APPLICANT

and

THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF EDUCATION

1ST RESPONDENT

THE HEAD OF THE DEPARTMENT,
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE

2ND RESPONDENT

JUDGMENT

MTSHABE AJ

[1] Section 2 of the Constitution¹ provides as follows: “***Supremacy of Constitution:*** *This Constitution is the supreme law of the Republic; law or*

¹ Constitution of the Republic of South Africa, 1996

conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled”.

- [2] Further, section 165(5) provides as follows: *“An order or decision issued by a court binds all persons to whom and organs of state to which it applies”.*
- [3] Further, section 239 of the Constitution defines organ of state as: *“(a) any department of state or administration in the national, provincial or local sphere of government”.*
- [4] The above provisions bear mention, and my view is that they are relevant to these proceedings.
- [5] The applicant is a retired educator, who retired on 31 January 2014. He approached this court on 20 January 2022 under Case No. 782/18. He was granted an order by the Honourable Court which reads as follows:
 - 1. *“The condonation is granted in respect of the late filing of the Respondent’s answering affidavit.*
 - 2. *That the applicant’s application for the amendment, the notice of motion is granted, and the notice of motion is amended accordingly.*
 - 3. *The Respondents are hereby directed to take such administrative or other steps as maybe necessary to collaboration with the Government Employees Pension Fund and to the latter’s satisfaction so as to give recognition to the applicant’s uninterrupted pensionable service, calculated from 1 February 1974 to 31 January 2014 and to deliver to the applicant’s attorneys and to the registrar of this Court proof of dispatch of such documents forwarded to the Government Employees Pension Fund and of the latter’s receipt thereof.*
 - 4. *The Respondents are directed to pay the cost of the application jointly and severally, the one paying the other to absolved.”*

[6] The above Court order was served upon the respondents' attorneys on 1st February 2022 and to the first and second respondents on 23 March 2022 respectively².

[7] To prove that the Respondents received the court order, they sent an acknowledgement of receipt on 24 March 2022 and the letter reads as follows:

"I advise that we are attending to comply with the court order and Mr Dalisile will revert with progress herein."

[8] On 23 March 2022, the Applicant's attorneys wrote a letter to the Respondents which reads as follows:

"Monde Austin Shude- Compliance with Order Granted in Case No.782/18."

Our clients report that you have not complied with attached order and that our client's pension benefits remain unfulfilled.

We wrote to your attorney on 1 February 2022 attaching a copy of the order. You were represented at the hearing by the State Attorney who instructed Advocate Mayekiso and presumably received a copy of court order as far as back as 20 January 2022.

Please note that if we have not been provided adequate proof that paragraph 3 of the order has been complied with within 10 days, we will be obliged to launch further proceedings."

[9] On 24th March 2022 the Acting Director-Legal Services for Department of Education, East London, namely, Ligaseree Pillay wrote an email, which reads as follows: *"I advise that we are attending to comply with the court order and Mr Dalisile will revert with progress herein"*.

[10] Mr Dalisile never reverted to the applicant's attorneys.

² See: Letters marked MS2 and MS3 attached to the founding affidavit

[11] On or about 13 May 2022, almost 5 months after the order of 20 January 2022 was granted, the applicant brought the present proceedings under Case No. 299/2022, applying for an order along the following terms:

1. *“Directing that the Respondents’ failure to comply with the order granted by this Honourable Court on 20 January 2022 in Case No. 782/18 directing that they take appropriate administrative action in collaboration with the Government Employees Pension Fund to give recognition to the Applicant’s uninterrupted pensionable services, calculated from 1 February 1974 to 31 January 2014 and to delivered to the Applicant’s attorneys and to the Registrar proof of dispatch of such documents, constitutes an ongoing variation of their duties under the Constitution of the Republic of South Africa, 1996.*

2. *Ordering, the Respondents:*

- 2.1 *To take all the administrative and other steps necessary to ensure that the Eastern Cape Government complies with the order referred to in paragraph 1 above within 10 days as from the date of service of the further order granted herein by taking the aforementioned administrative steps; and*

- 2.2 *To deliver a report in writing to the Registrar of this Honourable Court and to the Applicant’s attorneys within 10 days of the matter and extent of their compliance with the order in paragraph 2.1 above.*

3. *Directing that if Respondents failed to comply with the order referred to in paragraph 2 above, the Applicant is given leave to supplement his Notice of Motion and founding affidavit and to enrol this application for a further hearing on and determination of such further relief and complaints of contempt of court as the Applicant might then seek.*

4. *Directing that this order be served by fax or email.*

5. *Granting such further and/or alternatively relief as the above of Honourable court may see meet.*

6. *Directing that the First Respondent pay the Applicants costs”.*

[12] The Respondents on 20th September 2022 filled a Notice to Oppose the application under Case No. 299/2022. A compliance affidavit was filled by Ms Nozibele Xhoseni who a Chief Personal Officer is and stationed at Chris Hani West District with offices at Cacadu, Lady Frere. In paragraph 4 of the said affidavit the following is stated by her:

“I hereby confirm that I have duly complied with the court order in that I have completed the pension forms and resubmitted them to the Government Employees Pension Fund as required”.

Paragraph 5 reads as follows: *“As proof thereof I attach a copy of an email communication from the Government Employees Pension Fund which confirms receipt of the said mention claim forms and the same is marked MX1³.*

[13] On 19th October 2022, the Applicant served an affidavit read headed: **“APPLICANT’S SUPPLEMENTARY AFFIDAVIT.”** The Applicant states in paragraph 2 of the affidavit that the Respondents have delivered a compliance affidavit she purports to record compliance with the Honourable Court’s order. The supplementary affidavit informs that the Respondents have not complied with the court order, and they have not delivered an answering affidavit. I must mention that the delivery of the answering affidavit is in accordance with the rules of the court, where the Respondent has filed a notice to oppose.

[14] The matter dragged in court and numerous communications ensued the parties, wherein the Applicant continued to assert that the Respondents have

³ Respondent’s compliance affidavit, paragraphs 4 and 5 thereof

not complied with the court order of 20 January 2022. The matter came to court on 26 March 2024 and by that time the Respondents have not complied with the court order dated 20 January 2022. I must mention that at all times the matter applies in court, either for postponement or removal of it the roll the Respondents were ordered to pay costs. I am not going to go over the court orders that were granted against the Respondents to pay costs such appear in papers.

[15] On 26 March 2024 the Honourable Madam Acting Justice Ncalo granted an order along the following terms:

1. *The Respondents' failure to comply with order granted of Court dated 20 January 2022 as per Case No. 782/18, directing that they take such appropriate administrative action in collaboration with the Government Employees Pension Fund to give recognition to the Applicant's uninterrupted pension service, calculated from 1st February 1994 to 31st January 2014 and to deliver to the Applicant's Attorneys and to the Registrar of Court proof of dispatch of such documents, constitutes and ongoing violation of their duties under the Constitution of Republic of South Africa.*
2. *That the Respondents are ordered:*
 - 2.1 *take all administrative and other steps necessary to ensure that the Eastern Cape Government complies with order referred to in paragraph 1 above within 20 days as from the date of service of this order by taking the aforementioned administrative steps; and*
 - 2.2 *To deliver a report in writing to the Registrar of the court and to the Applicant's Attorney within 20 days from the date of service of this Order, of the manner and of the extent of their compliance with the Order referred to in paragraph 2.1 above.*

3. If the Respondents fail to comply with order referred to in paragraph 2 above, the Applicant is given leave to supplement his notice of motion and founding affidavit and to enrol this matter by further hearing on the determination of such further relief and complaints of contempt of court as the Applicant might then seek.

[16] The above court order was served upon the Respondents on 18 April 2024⁴.

[17] In terms of the Court Order dated 26 March 2024, the Respondents were granted 20 days within which to comply with paragraph 2.2 thereof, however, the Respondent's did not comply with the court order.

[18] The Respondents filed an answering affidavit, on 12 July 2024, however there was still non-compliance with order that was granted on 20 January 2022 as well as the order granted on 26 March 2024.

[19] The Applicant, set down the application for contempt of court, seeking the following order:

1. *Directing that the first Respondent being Mr Fundile David Gade and second Respondent being Ms S Maasdorp be committed to imprisonment for such period as to this Honourable Court may seem meet, for failing to comply with the orders granted on 20 January 2022 and 26 March 2024, more particularly paragraph 2 of the latter order.*
2. *Directing that the Respondents pay the Applicants costs."*

[20] On 29th October 2024, the Applicant set down the Application for contempt of court for hearing on Thursday 13th February 2025. I must mention that all the necessary affidavits were filed, and the matter was ready to be held as an opposed application on 13th February 2025.

⁴ Annexures MAS 1 and MAS 2 attached to the supplementary affidavit

[21] The Respondents on or about 27 November 2024 filed an affidavit deposed to by Ms Buhle Mary Mandontsela, who is a Director for Human Resources Administration for the first Respondent, whose offices are situated at Steve Vukile Tshwete, at Zwelitsha. In the Affidavit she informs that the Respondents have complied with the court order and to that extent she has filed a copy of the quotation for the calculation of area contributions including late payment interest accrued which is valid until 30 September 2024.

[22] During the hearing of this matter both Counsel informed me that it does transpire that the affidavit of Marry Mandontsela together with the annexure thereto suffice to confirm compliance with the court orders.

[23] Both of them informed that the issue for determination is the question of costs.

[24] In order to find that the Respondents are liable for the payment of costs I need to establish whether they were in contempt of the court orders granted on 20 January 2022 and 26 March 2024.

[25] In the case of **Attorney-General**⁵ the court stated the following, dealing with contempt of court:

“Probably in the last resort all cases of contempt, whether consisting of disobedience to the decree of the court or the publication of matter tending to prejudice the hearing of the pending suit or of disrespectful conduct or insulting attacks, are to be referred to the necessity for protecting the fount of justice is maintaining the efficiency of the courts and enforcing the supremacy of the law.”

[26] In **Fakie NO**⁶ court stated the following:

⁵ Attorney-General v Crockett 1911 TPD 923 at 925-926

⁶ Fakie NO v CC 11 Systems (Pty) Ltd 2006 (4) SA 326 SCA at 332A

“It is crime unlawfully and intentionally to disobey a Court Order. This type of contempt of court is part of the broader offence, which can take any forms, but the essence of which lies in violating, the dignity, reputé or authority of the Court. The offence held, in general terms, received a Constitutional stamp of approval, since the rule of law-a founding value of the Constitution-requires that the dignity and authority of the Courts as well as their capacity to carry out their functions, should always be maintained”.

[27] In this case, the Applicant obtained two different court orders one on 20 January 2022 and the other on 26 March 2024, requiring the Respondents to take such appropriate administrative action to give recognition to the uninterrupted pensionable service of the Applicant from 1st February 1974 to 31 January 2014. The Respondents did not comply with such orders until the matter was set down for hearing of 13th February 2025.

[28] My view is that if a litigant, in this case the Applicant, has obtained a Court order requiring an opponent to do or not to do something and there is non-compliance, that litigant has a right to approach the Court for a further order declaring the non-compliant party in contempt of court and for the imposition of a sanction which usually, but not invariably, has the object of inducing the non-complier to fulfil to the terms of the previous order.

[29] In this case, the Applicant approach the Court under Case No. 782/2018 and was granted an order, of importance is paragraph 3 which required the Respondents to take administrative or other steps as maybe necessary in collaboration with the Government Employees Pension Fund to calculate the Applicant's uninterrupted pension service form 1 February 1974 to 31 January 2014 and to delivered to the Applicant's Attorneys and to the Registrar of this court proof dispatch of such documents. The order as I I have indicated above was serve upon the Respondents.

[30] The Applicant again approach the Honourable Court under Case No. 299/2022 requesting the Respondents to comply with court order granted on 20 January 2022. Again, under Case No. 299/2022 the Court granted an order in terms of

the Notice of Motion which I have referred to above on 26 March 2024. The said court order was also served upon the Respondents, however, there was another non-compliance by the Respondents with that order.

[31] In the case of **Uncedo Taxi Association**⁷ the court stated the following: “The civil standard of proof has hitherto been applied in applications of this nature. In order to succeed in an application committing an offender to prison for contempt of court the Applicant must prove;

- (a) That an order was granted against the Respondent.
- (b) That the Respondent was either served with the order or was informed on the grant of the order against and could have no reasonable ground for disobeying the information; and
- (c) That the Respondent is in wilful and mala fide disobedience of the order”.

[32] In **Putco Ltd**⁸ the court stated the following: “Once a failure to comply with an order of court has been established, the wilfulness will normally be inferred, and the onus will rest on the person who failed to comply with such order to rebut the inference of wilfulness on a balance of probabilities. This can be done by such person establishing that he did not intentionally disobeying the court’s order.”

[32] My view as far as the case before me is concerned is the Applicant has proved that the orders were served upon the Respondents, and the Respondents have failed to comply with the court orders.

[33] In case of **Secretary Judicial Commission v Zuma**⁹ the court, dealing with contempt of proceedings stated the following referring to the case of **Matjhabeng Local Municipality v Eskom Holdings Ltd and Others 2018 (1) SA (CC)** stated that:

⁷ Uncedo Taxi Association v Maninjwa and Other 1998 (3) SA 417 (E) at 425

⁸ Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd and Other related cases 1985 (4) SA 809 (A)

⁹ Secretary Judicial Commission v Zuma 2021 (5) SA 327 (CC)

“This court explicated the overall scheme of contempt of court in our law. Traditionally, contempt of court has been divided into two categories according to whether the contempt is criminal or civil in nature. These types of contempt are distinguished on the basis of the conduct of the contemnor. Criminal contempt brings the moral authority of the judicial process into disrepute and as such covers a multiplicity of conduct interfering in matters of justice pending for the court. It thereby creates serious risk of prejudice to the fair trial of particular proceedings.... Civil contempt, in contrast, involves the disobedience of court orders. The continued relevance distinction between civil and criminal contempt also seems to lie on occasion, in the ability to settle the dispute and waive the content”. The Court continued to state the following:

‘Civil contempt, which is one strain of the broader offence of contempt, consists in the wilful and the mala fide obedience of civil court or order. It appears to have been received into South African Law from English Law, which characterises civil contempt in the following terms: Civil contempt bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest.’”

[34] Section 237 of the Constitution provides that all Constitutional obligations must be performed diligently and without delay. One of the Constitutional obligations, in my view, lies in Section 165(5) of the Constitution which provides that an order or decision issued by court binds all persons to whom and organs of state which it applies. Further, Section 2 of the Constitution provides that obligations imposed by the Constitution must be fulfilled.

[35] Therefore I am of the view that the court orders of 20 January 2022 and 26 March 2024 should have been complied with by the Respondents without delay. Respondents have failed to perform their Constitutional obligations. In

Khumalo and another v MEC for Education, KwaZulu-Natal¹⁰ the court stated the following:

“Section 237 of the Constitution provides; all Constitutional obligations must be performed diligently and without delay. Section 237 acknowledges the significance of timeous compliance with Constitution prescripts. It elevates expeditious and diligent compliance with Constitutional duties to an obligation in itself. The principle is thus a requirement of legality.”

[36] The Constitutional imperative that constitutional obligations must be performed diligently and without delay, in my view, has as its foundation the necessity for administrative finality and certainty. In this regard, in my view, the conduct of the Respondents in taking so much time to comply with the court order is unacceptable. The Respondents complied with orders after the matter was set down for hearing in the oppose court on 13th February 2025. To that extent, they filed an affidavit which I have referred to it above.

[37] I therefore find that the Respondents were in contempt of the court orders, until the matter was down for oppose court hearing on 13th February 2025, as per notice of set down, which is dated 29 October 2024 and was served upon the office of the State Attorney on 30th October 2024.

[38] As I have indicated above the Respondents filed compliance affidavit on 7 November 2024. The date of 7 November 2024 appears on the affidavit, and I have no reason to assume it was not served on that day, whoever, there is no notice of filing which accompanying the said compliance affidavit. There is also no application for the filing of a further affidavit as the three required affidavits have been filled.

[39] I must mention that costs in civil proceedings are made two scales, that is, the party and scale or the attorney and client scale. Costs awarded on the party and party scale allows the person in favour of whom it is made to recover the

¹⁰ 2014 (5) SA 579 (CC)

costs they have had to incur in bringing the civil suit but to the extent allowed by the set of tariffs designed to keep the coverable costs within the reasonable limits.

[40] It is becoming a norm and in compliance with the rules of court as amended, that when a court is granting costs order it should grant them in accordance with rule 67A of the Uniform Rules of Court read with rule 69.

[41] Rule 67A of the Uniform Rules of Court came to operation on 12th April 2024 and provides as follows; “**67A COSTS.**

(1) *Subject to any order of the court awarding costs, the fees and disbursements as between party and party, which may be included in a bill of costs submitted for taxation, shall be-*

- (a) *For attorneys, in accordance with the tariff in rule 70;*
- (b) *For attorneys, with a right to appear in the Supreme Courts and who appear in the matter in accordance with Rules 69 and 70, where applicable; and*
- (c) *for Advocates, in accordance with the tariff in rule 69: Provided that for services rendered by an advocate referred to in Section 34(2)(a)(ii) of the Legal Practice Act, 2014 (Act No. 28 of 2014), for work which is ordinarily performed by an attorney, the fee for such work shall be in terms of rule 70.*

(2).....

(3)

(4).....

(5) *The taxation of fees as between party and party shall be effected by the taxing master in accordance with rules 69 and 70 and applicable tariffs therein.”*

[42] Rule 67 further provides that a costs order shall indicate the scale in terms of rule 69. In awarding the appropriate scale of costs, the Court is required to have regard to the complexity of the matter, and the value of the claim or the importance of the relief sought. Whilst this matter is not complicated, I am of

the view that the relief sought is very important, particularly that it affects the violation of Constitutional obligations. It will be observed in this matter that the Respondents violated the Constitution of Republic of South Africa. The Respondents are expected at all times to comply with obligations in the Constitution without delay and they should be an example to the general public and show the importance of abiding by the provisions of the Constitution diligently and without delay.

[43] In the matter **Mashavha**¹¹ the court stated the following at paragraphs 16 and 17:

“16. Likewise, the default position set under the rule is that, in the absence of contrary indication, counsel’s costs will be recovered on scale A. Scale A, it seems to me, is the appropriate scale on which to make an award unless the application of the higher scale has been justified by careful reference to clearly identified features of the case that mark out as unusually complex, important or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.

17. In the case presently before me, the issues were uncomplicated. The entire case was determined on the basis of jurisdiction and standing. The merits never became relevant. The hearing lasted well under an hour. The case was competently and ethically pursued by all concerned. The A scale is being applicable.”¹².

[44] Rule 69 of the Uniform Rules of Court deals with tariffs of fees for legal practitioners who appear in Superior Courts. The rule provides that the scale or fees contemplated in subrule (3) of rule 67A shall be scale A R375.00 per quarter of an hour, or part thereof, scale B R750.00 per quarter of an hour or part thereof and scale C R1125.00 per quarter of an hour or part thereof.

¹¹ Mashavha vs Enaex Africa (Pty) Ltd 2025 4 (1) SA 466 (GJ) 22 April 2024

¹² Buhle Waist v MEC of Health, Gauteng and others 2025 (2) SA 163

[45] Despite the introduction of Rules 67A and 69, the position still remains the same, that the award of costs is the matter of wholly within the discretion of the Court. But this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrive at¹³ see also¹⁴.

[46] For the reason stated above I grant the following order.

1. The Respondents are ordered to pay the party and party costs of the applicant.
2. For all legal services pertaining to this application rendered by Counsel after 12 April 2024, the costs of Counsel shall be taxed on Scale C of rule 69(7) of the Uniform Rules of Court.

N.R MTSHABE
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Adv CB Wood
Instructed by : Hutton and Cook
King Williams town

Counsel for the Respondents : Adv M Mayekiso
Instructed by : The State Attorney
East London

Date heard : 13 February 2025

¹³ Jordan v New-Zealand Insurance Company Ltd 1968 (2) SA 238 at 44 –D,

¹⁴ Ferreira vs Levin and Others 1996 (2) SA 621 (CC) at 624

Date delivered

: 03 June 2025