

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG) CASE NO: J1510/02

In the matter between:

CHRISTEL BRUCKNER Applicant

and

THE DEPARTMENT OF HEALTH
Respondent

First

THE MINISTER OF HEALTH
Respondent

Second

THE DIRECTOR-GENERAL DEPARTMENT OF HEALTH
Respondent

Third

JUDGMENT

Introduction

1. This is a contempt of court application brought by the applicant against the respondents after they had failed to comply with an arbitration award that was made an order of court on 6 August 2001.

Background facts

2. The applicant is a graduate pharmacist. Before 24 March 1998 she was employed as the Deputy Director: Medicines Registration by the first respondent, the Department of Health (“the Department”). She had been in the Department’s employ for 19 years. Her immediate superior in the Department was Professor J Schlebusch who was employed in the position of Director: Medicines

Administration. As an incumbent of this post, Professor Schlebusch also held appointment as the Registrar of Medicines, an appointment in terms of section 12 of the Medicines and Related Substances Control Act, Act 101 of 1965 (“the Medicines Act”).

3. The Directorate of Medicines Administration within the Department was effectively the Secretariat of the Medicines Control Council (“the MCC”), and the governmental agency charged with the enforcement of the Medicines Act. These functions now fall under the Cluster: Medicines Regulatory Affairs within the Department. The MCC is a body of persons appointed by the second respondent, the Minister of Health (“the Minister”) in terms of the Medicine Act. Medicines which are subject to registration in terms of the Medicines Act may not be sold, unless they are registered. The MCC has as its primary function to consider and approve or refuse applications for registration of such medicines.
4. Professor Schlebusch and the applicant were on 24 March 1998 removed from their positions and placed on suspension. Five and a half months later, after the intervention of the Public Servants Association (“the PSA”) and its attorneys on their behalf, they were given positions that were different from their original positions, which positions were specifically created to accommodate them.
5. With the assistance of the PSA, Professor Schlebusch and the applicant initiated

proceedings in terms of item 2(1)(b) of schedule 7 to the Labour Relations Act, Act 66 of 1995 (“the Act”), alleging that their removal from their positions had constituted unfair conduct by the Department relating, *inter alia*, to their demotion.

6. The dispute was referred to the CCMA and arbitration proceedings commenced on 8 July 1999. After a protracted arbitration hearing, advocate J Hiemstra, the commissioner, made an award on 26 November 1999. He ordered the Department:
 - 6.1 To reinstate professor Schlebusch as Director: Medicines Registration and Registrar of the Medicines Control Council;
 - 6.2 To reinstate the applicant as Deputy Director: Medicines Registration.
 - 6.3 The Department was ordered to pay costs at the scale applicable in this Court.
7. The Department instituted review proceedings in this Court against the commissioner’s award. Professor Schlebusch and the applicant, on their part, applied to have the arbitration award made an order of court in terms of section 158(1)(c) of the Act.
8. The review application was dismissed on 6 August 2001 with costs and the award was made an order of court on the same day with costs.
9. Leave to appeal was not sought against the judgment and orders of this Court after the Department had received counsel’s opinion that an appeal had no prospects of success.

10. A monetary settlement was reached with Professor Schlebusch. The applicant, however, required the Department to comply with the Court order. The applicant was not and still has not been reinstated to the position of Deputy Director: Medicines Registration, that she held before 24 March 1998.
11. On 6 September 2001 the applicant's attorneys wrote to the third respondent and stated that the applicant had not yet been reinstated to her former position. The attorneys pointed out that the Department was in contempt of the Court order and threatened to commence civil contempt proceedings against the Minister.
12. On 1 October 2001 the Department, via the office of the State Attorney stated that it will comply with Court order and that the applicant would be reinstated in the previous position that she had occupied.
13. On 2 October 2001 the third respondent wrote to the applicant advising her that she has been reinstated in a post of Deputy Director in the Cluster: Medicines Regulatory Affairs with immediate effect. She was required to report for duty in consultation with a Ms Matsoso. Ms Matsoso was then the Cluster Manager of the Cluster: Medicines Regulatory Affairs and now is the Chief Director: Medicines Regulatory Affairs. A job description was appended to the letter. It described a post designated "Deputy Director: Medicines Administration and Document Control". The job purpose of this position was described as to provide administrative support for the regulation of medicines before the marketing to ensure their safety, quality and efficiency. To manage and coordinate the activities of the subordinates within the Sub-directorate: Medicines

Administration and Document Control. The principal duty attached to the post was described as professional control of the medicine's database.

14. The applicant contends that the job description attached to the letter contained mostly administrative tasks that she had previously carried out in addition to her main functions as Deputy Director: Medicines Registration. She refused to accept the newly created post and remained in the inferior position that had previously been created for her that of Deputy Director: Pharmaceutical Expenditure.
15. The applicant states that in her former position as Deputy Director: Medicines Registration she headed all activities related to the medicine registration process and some control functions. In the new position that she has been reinstated her functions are mainly of an administrative and supportive nature.
16. Ms Matsoso, on behalf of the Department denied that the applicant's functions would be of administrative and supportive nature but that the creation of the position of Deputy Director: Medicine Administration and Document Control was only proposed to the applicant during their consultation. She admitted that the applicant in her former position headed all activities related to the medicine registration process in her former position.
17. The applicant had in her former position, been responsible to manage and control the process of clinical evaluation of applications for registration of medicines, *inter alia* managing and

coordinating the professional staff who had to screen and evaluate applications. Data control, the focus of the new position, was a minor adjunct of the former position.

18. On 14 October 2001 the first responded caused an advertisement to be published in a Sunday newspaper for the position of Director: Medicine Evaluation and Research. The applicant contends that the duties specified in the advertisement were substantially the same duties that she carried out in 1998 and that the only difference was that the position advertised was that of Director, while the position that she had previously held was that of Deputy Director.
19. Ms Matsoso admitted that some duties allocated to the Director: Medicine Evaluation and Research form part of the former position of Deputy Director: Medicine Registration but denied that two positions were substantially the same.
19. The applicant applied for the advertised post on 25 October 2001 in an attempt to resolve the impasse that existed between her and the Department. Her application was not successful. The post was given to a person who had previously been one of her subordinates. He only took office in this position on 1 March 2002.

The parties contentions

19. The applicant contends that the position she has been reinstated in is not similar to her former position. The duties attached to her post have been allocated to various positions created in terms of the restructuring undertaken by the Department. The functions of the position which related to the medicine registration process and some of the control functions were allocated to a newly

created position of Director: Medicine Evaluation and Research.

19. The applicant contends that the respondents have not complied with the Court order of 6 August 2001 and are in contempt of court.
19. The respondents concede that the applicant has not been reinstated to her previous position. Their efforts have been directed at attempting to accommodate the applicant in the newly created structure. The reason given for the respondents failure to comply with the Court order is that the Court order of 6 August 2001 posed a practical problem as it directed the first respondent to reinstate the applicant specifically to the position of Deputy Director: Medicine Registration, which no longer existed. This arose because of restructuring that had occurred within the Department.
19. The respondent contends that upon the Court order being granted and after taking legal advice, it was decided, bearing in mind that the applicant holds the rank of Deputy Director, to appoint her in a position in the newly created structure that closest resembles the previous position of Deputy Director: Medicine Registration.
19. The respondents contended further that they are *au fair* with the facts surrounding the applicant's reinstatement by this Court's order of 6 August 2001. Before the Court order, the Department had undergone a restructuring process during which the position Deputy Director: Medicines Registration had been abolished. The duties formerly performed by the Deputy Director: Medicines Registration was allocated to various positions created in terms of the

restructuring. Because it was felt that activities related to the medicine registration process and some control functions should be allocated to a higher rank, these functions were allocated to a newly created position of Director: Medicine, Evaluation and Research. Most of the remaining functions were allocated to the newly created position of Deputy Director in the Cluster Medicines Regulatory Affairs.

Analysis of facts and arguments raised

19. It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:
- (a) That the order was granted against the respondent;
 - (b) that the respondent was either served with the order or informed of the grant of the order against them and could have no reasonable ground for disbelieving the information; and
 - (c) that the respondent is in wilful default and *mala fide* disobedience of the order.

See in this regard *Uncedo Taxi Service Association v Maninjwa and others* (1998) 6 BCLR 683 (E) at 691 B - C.

27. If it is shown that the respondent was aware of the order and disobeyed it or neglected to comply with it, the onus is on the respondent to rebut the inference that he wilfully disobeyed or neglected to comply with the order. See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) AT 836 D - E. *Dolus eventualis* suffice for purposes of a conviction of contempt of court. The subjective state of mind of a party who has failed to comply with a Court order is seldom capable of direct proof. Subjective foresight, however like any other factual issue, can be proved by inferences drawn from the respondent's conduct and from the circumstances in which the breach of the order was committed. If it is shown that the respondent foresaw the risk of the order being breached, *dolus eventualis* apply and the onus rests on the respondent to negative the

inference of wilfulness. In this regard see *H E G Consulting Enterprises (Pty) Ltd v Siegwart* 2000 (1) SA 507 C at 518 E to 519 A. *Mala fides* as a separate requirement for contempt of court only arises in cases of constructive contempt, i.e. where a party takes action even before the Court's order to evade its consequences. In cases of direct contempt *mala fides* is not a requirement separate from wilfulness.

28. It was held in *De Lange v Smuts & Others* 1998 (3) SA 785 (CC) at paragraph 31 that:

“In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) ‘citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights’”.
29. In *Mjeni v Minister of Health & Welfare, Eastern Cape* 2000 (4) SA 446 AT 459 G it was held that:

“A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of that constitutional duty”.
30. It is trite that this Court is a court of law. It is unacceptable that orders of this Court should be flouted. If orders of a court of law are flouted, the law is brought into disrepute as is the Court, and the administration of justice in our Country will suffer. It is therefore important that proper attention be given to an allegation that a party is guilty of contempt of court.
31. It is clear from the facts that the Court order was granted against the respondents.

The respondents were aware of the Court order of 6 August 2001. The respondents have admitted this.

32. The only issue that must be determined is whether the respondents are in wilful default and *male fide* disobedience of the Court order.
33. The defence raised by the respondents in not complying with the order of this Court is that the Court order posed a practical problem as it directed the first respondent to reinstate the applicant in the position of Deputy Director: Medicine Registration which no longer existed. The respondents have embarked on an extensive, transformation and restructuring since the award was issued. The applicant can no longer be placed back in the same position. After taking legal advice and bearing in mind that the applicant holds the rank of Deputy Director, a decision was taken to appoint the applicant in a position in the new structure that closest resembles her previous position. As the position Deputy Director in the Cluster, Medicines, Regulatory Affairs is entrusted with a substantial amount of the duties that were formerly done by the Deputy Director: Medicines Registration, it was decided to appoint the applicant in this position.
34. The defence raised by the respondents can hardly be said to be a defence. No evidence was placed before this Court when exactly it was that the restructuring exercise began and when it ended. The respondents always knew that the applicant was unhappy about the fact that her position had been abolished. They

knew that there was an application pending before this Court to make the arbitration award an order of court. Despite this knowledge the respondents proceeded to abolish the applicant's post. The arbitration award and order of this Court are clear that the applicant had to be reinstated in the position that she held before it was abolished. The issues that the respondents are now attempting to raise should have been raised either at the arbitration proceedings or when an application was made to make the arbitration award an order of court. It appears however that these issues were raised and were dealt with by both the arbitrator and by this Court in the review application. The respondents did not deem it necessary to appeal against the judgement in the review matter. Raising this issue in these proceedings is therefore not proper.

35. The respondents further defence is that there has been substantial compliance with the court order of 6 August 2001. This was disputed by the applicant who contended that the position that she is currently occupying is different from that which was abolished. I do not believe that this is a defence that can be raised for the reasons stated in paragraph 34 above. Even if the defence raised is permissible, the onus is on the respondents to prove that there was substantial compliance with the order. They have failed to discharge this onus. No evidence was placed before me that shows that there was substantial compliance with the court order. The evidence shows something else.

36. It is clear that the respondents have wilfully and knowingly failed to comply with the Court order

of 6 August 2001. The Department has failed to reinstate the applicant and the first and second respondents have throughout been aware that the Court order had not been complied with. The respondents' failure to reinstate the applicant to her former position is not only wilful, but also *mala fide*. They have done so despite the many letters written by the applicant's attorney, the applicant's recorded objection after the date of the Court's order to the allocation of her duties to another post and despite the applicant having instituted the present application in May 2002.

37. I must say something about the manner in which this case was conducted, both by the officialdom within the Department and by the state attorney. I find it inconceivable that the award which was handed on 26 November 1999 and the order which were given on 6 August 2001, the respondents have not taken steps to comply with the order. I should say something about the public accountability of those whom the state employs to serve the citizens of our country. Harm has been done in this case to the principle whereby the abuse of power should not be tolerated by any instrument of state. Harm has been done to the laudable objective, articulated by the Constitution that guarantee fair labour practices to employees. Harm has been done to the administration of justice and to the requirement that disputes should be speedily and expeditiously resolved, because of the inertia or arrogance of officials who did not bother to reinstate the applicant in her previous position. Harm has been done to the confidence with which the public may accept the reassurance that court orders will be complied with and implemented forthwith. Harm has been done to the applicant, who for almost four years has had to endure the uncertainty whether an unresponsive Department will reinstate her in her previous position. I do not know whether this incident with which I have had to deal is an isolated one. I certainly hope that it is.

Findings

38. I am satisfied that the applicant has discharged the onus to prove that the order was granted against the respondents who have not complied with the order of this

Court.

39. This brings me to the relief that needs to be granted in this application. Mr Barrie who appeared for the applicant urged me to find the first and second respondents guilty of contempt of court and that I suspend the sentence.

40. After a careful consideration of the facts placed before me and the arguments raised, I believe that an appropriate order would be to commit the second and third respondents for fifteen days and to suspend it for sixty days to enable the respondents to make arrangements to reinstate the applicant in her former position.

41. There is no reason why costs should not follow the result.

42. In the circumstances I make the following order:

(1) The second and third respondents are found guilty of contempt of the Court order of 6 August 2001 and are committed to a period of fifteen days' imprisonment.

(2) The order of imprisonment is suspended for sixty days to enable the second and third respondents to make such arrangements as might be necessary to reinstate the applicant to her former position in terms of the Court order of 6 August 2001.

(3)

The respondents are to pay
the costs of this application,
jointly and severally, the one
paying the other to be
absolved.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF THE APPLICANT : F G BARRIE INSTRUCTED
BOWMAN GILFILLAN INC

ON BEHALF OF THE RESPONDENTS : P C PIO INSTRUCTED BY THE
STATE ATTORNEY

DATE OF JUDGMENT : 20 OCTOBER 2003