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(1) REPORTABLE: ~~YES~~/NO.
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(3) REVISED.

29/08/2025
DATE

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1679/23

In the matter between:

PSA OBO J SHANMUGAM AND 14 OTHERS **Applicant**

and

MINISTER OF LABOUR **First Respondent**

ACTING DIRECTOR-GENERAL FOR THE DEPARTMENT OF LABOUR: DR ALEC MOEMI **Second Respondent**

Heard: **28 February 2025**

Delivered: 29 May 2025

Summary: Opposed application – contempt of court

JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter, the applicants (the employees) initially sought an order declaring the second respondent to be in contempt of court. The second respondent was at some stage the Acting Director-General of the Department, whose Executive Authority is the first respondent (the Department).

[2] The dispute arose out of a settlement agreement that was made an arbitration award in terms of section 142A of the Labour Relations Act,[1] which award was in turn made an order of court in terms of section 158(1)(c) of the Labour Relations Act.

[3] The issue is whether the employees have established their claim of contempt of court.

Relevant facts and evidence

[4] From 27 November 2002, the Department had several entities providing IT services to it through a Private Public Partnership agreement. The last entity to provide these services to the Department was EOH Managed Services PS (Pty) Ltd (EOH).

[5] Upon the termination of the Private Public Partnership agreement in 2013, it was agreed that the ninety-nine officials who were involved in providing IT services to the Department at EOH would transfer to the Department in terms of section 197 of the Labour Relations Act, with effect from 1 December 2013.

[6] A migration framework was supposed to be established, in terms of which the transferred employees were to be placed into positions on the organogram of the Department. Thereafter, job profiles were to be developed and the employees from EOH were to be placed in positions on the Department's organogram.

[7] Disputes arose regarding the grading of salaries of some of the employees who were transferred from EOH to the Department. on the respondents' own version, extensive engagements were entered into between the Department and the employees on the issue of salaries, but these engagements did not yield any resolution. The employees ultimately referred a dispute to the GPSSBC on 4 August 2016, which led to a settlement agreement being concluded on 15 March 2017.

[8] The terms of the settlement agreement were the following:

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[1] Act 66 of 1995, as amended.

'1) The Respondent will table the migration framework at the Bargaining Chamber.

2) All affected employees will be placed within the new structure by no later than 30 June 2017. These employees will also receive their appointment letters and job profiles as required by the applicable legislation.

3) Should there be excess employees not compatible in the structure the process (placement) will be finalised by 30 August 2017.

4) Therefore all affected employees will receive their appointment letters and official job profiles by the latest 30 August 2017.

5) This agreement is in full and final settlement of the dispute. Should the agreement not be complied with by either party, this agreement may be made an arbitration award i.t.o section 142A of the LRA and enforced accordingly.'

[9] On 24 September 2017, the settlement agreement was made an arbitration award, in terms of section 142A of the Labour Relations Act. The award was then certified in terms of section 143 of the Labour Relations Act on 16 April 2018, which meant that it could be enforced as though it were an order of court. Despite this fact, the employees' union applied to make this certified award an order of court, which application was granted by Mabaso AJ on 29 August 2019.

[10] On 20 November 2019, the employees' union wrote a letter to the Department enclosing the Court order of Mabaso AJ of 29 August 2019. This elicited a response from the Department's Director-General dated 11 December 2019, in the following terms:

'We refer to the above matter and your letter dated 20 November 2019.

We advise that the Department of Employment and Labour ("Department") is in receipt of the Court Order and has begun compliance with the various issues as contemplated therein. The Department has in fact already complied with some of the issues.

However, due to the fact that there are other issues that cannot be complied with expeditiously due to its complex nature, such compliance requires a fair amount of time to be complied with. The Department advises that all the issues raised in the Court Order will be complied with by end February 2020. The Department further advises that it is committed to the compliance of the Court Order.

We trust the above is in order.'

[11] On 29 November 2023, the employees' union filed a contempt of court application before this court, alleging that none of the elements of the settlement agreement of 15 March 2017 had been met. Their notice of motion prayed for the following orders, against the second respondent only:

'1. The Second Respondent is ordered to appear in the Labour Court on a date to be determined by the Court to show cause why he should not be found guilty of contempt of Court for failing to comply with an award issued under the auspices of GPSSBC 1564/2016 on 24 September 2017, certified in terms of section 143 of the Labour Relations Act on 16 April 2018 and that was further made an order of court in terms of section 158 (1) of the LRA on 20 November 2019 under case number J2384/18.

2. The Second Respondent may explain his conduct by way of affidavit to be filed at least 5 days prior to the hearing. The Second Respondent is nonetheless required to appear in person on the date of the hearing.

3. In the absence of providing an explanation to the satisfaction of the Court, or failing to appear in court despite being properly served, the Second Respondent shall be found guilty of contempt and that: the Second Respondent may be incarcerated for such period as the Court deems appropriate; or the Second Respondent may be fined in an amount the Court deems appropriate; or other alternative relief.

4. Costs of this application to be paid by all the Respondents jointly and severally.

5. Further and or alternative relief.'

[12] In a five-page affidavit in support of the contempt of court application, the employees' union simply alleged that the requirements of a contempt of court application had been met because: (a) the court order had been granted against the respondents; (b) the respondents were served with the settlement agreement; and (c) the respondents did not comply with the settlement agreement at all.

[13] An answering affidavit was filed opposing the contempt of court application on behalf of both respondents, deposed to by Ms Onke Mjo, the Acting Director-General. The answering affidavit alleged that a migration framework had been established and tabled before the Bargaining Council, as evidenced by a circular of the Director-General dated 25 June 2012. This was clearly prior to the date of the settlement agreement. And this migration framework was not attached to the answering affidavit, nor were the minutes of the Bargaining Chamber proceedings where the migration framework were tabled attached to the answering affidavit.

[14] The answering affidavit alleged that:

> '11. Pursuant to the Migration Framework, job profiles were developed and some employees were placed, however, some salaries of the employees who were previously employed at EOH contrasted with the salaries offered by the Department's posts for the same position did not match. This resulted in the employees raising grievances about the grading of their salaries with the Department.
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> 12. In order to resolve these grievances, the Department engaged extensively with the employees until the settlement agreement was negotiated. Despite the Department's best endeavours, the employees held the view that the Department had not fulfilled the terms of the settlement agreement and decided to proceed legally against the Department.'

[15] The answering affidavit further explained the following:

> '38. The applicants simply attach the settlement agreement which requires certain deliverables, but they make no allegations as to which of those

deliverables they contend have not been fulfilled. In light of the Department's endeavours to fulfil the court order, it is left not being able to discern which portions of the settlement agreement are alleged to be unfulfilled.

39. By way of example the first deliverable of the settlement agreement stipulated that "The Respondent will table the Migration Framework at the Bargaining Chamber". As demonstrated by way of annexure "AA3", this deliverable was completed.

40. The second deliverable which reads that "all employees will be placed within the new structure by no later than 30 June 2017. These employees will also receive their appointment letters and job profiles as required by the applicable legislation" was also substantively fulfilled.

41. In this regard:

41.1 Fourteen of the applicants were placed in the structure in 2018 after it was approved and one was placed in an available position;

41.2 Five of the applicants, namely, Y Madende; EH Cronje; HM Botha; J Shanmugam (the first applicant); and C van der Heever were given placement letters. These letters are attached as a bundle marked "AA6".

41.3 Nine of the applicants were not given placement letters in 2018 because it was impossible at the time due to their EOH salaries being out of adjustment in that they were nine times higher than the Department's posts. The challenge was that the structure of the ICT Department could not accommodate those who were earning higher salaries than that of the Department's posts. Be that as it may, the Department made its best attempts to resolve the issues by utilising the Department's other financial reserves to match their EOH salaries and ensure that the applicants were not financially prejudiced by the migration.

41.4 The last applicant, namely ZS Dlamini, was earning a lower salary at EOH and was accordingly upgraded and back paid from February 2015 after her migration into the Department.

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44. With regards to the job profiles, these were indeed formulated.'

[16] The answering affidavit accepted the contents of the Department's letter of 11 December 2019 quoted above. It was alleged that the second respondent, Dr Alec Moemi, was not the Director-General at the time when the court order of Mabaso AJ was served on the Department, as he only became the Acting Director-General from November to December 2023.

[17] No replying affidavit was filed by the employees.

[18] A day before the hearing of this matter, on 27 February 2025, two of the employees withdrew from this matter, namely E. H. Cronje and Z. S. Dlamini.

[19] During argument at the hearing of this matter, the employees sought to extend the orders prayed in their notice of motion to include orders of contempt against the Department, which orders they argued would be covered by their prayer of "*further and or alternative relief*" in the notice of motion.

Analysis

[20] In my view, the employees' request to include orders against the Department whose Executive Authority is the first respondent is covered by the prayer for "*further and or alternative relief*" in the notice of motion, as it is consistent with the statement of facts and the terms of the expressed claim in the founding affidavit. The employees do not seek to rely on a new cause of action – they seek to enforce the court order in their favour against both respondents, and both respondents have opposed the application by filing an answering affidavit. My approach is in line with the interests of justice and the speedy resolution of

this matter, and I rely on the authority of *Queensland Insurance Co Ltd v Banque Commerciale Africaine*,[2] where the Court held the following:

> 'In regard to the judgment for £2, 450, in my opinion, the plaintiff was not entitled to claim it on the action as framed. The action is based on the policy; the claim for £2, 450 is based on the compromise arising from the acceptance of the tender in the alternative pleas. The prayer for alternative relief does not help the plaintiff over the difficulty. It is unnecessary to consider whether the practice of including such a prayer is derived from the Roman-Dutch or the English practice. In the Roman Dutch practice, according to van Leeuwen RDL5.15.8, this prayer (the so-called *clausule salutaire* asking for such other relief as the court may deem best for the plaintiff) is of such effect that every right to which the plaintiff may in any way be entitled upon the allegations in his claim, is thereby considered to be included in the prayer. See also Voet 2.13.13 and Van der Linden Jud Pract 2.3.7 vol 1 at 147. The effect of the prayer for 'such further or other relief as the nature of the case might require' in the English practice seems to be the same. See Cargill v Bower 10 ChD502 at 508, in which Fry LJ pointed out that the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things.
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> The fact, however, that the plaintiff could not properly get judgment for £2 450 on his action as framed does not necessarily entitle the defendant to have the judgment set aside. Mr Horwitz contended that if an application for an amendment of the declaration had been made at the trial, the learned Judge should have and would have granted it, and he asked that, if this court upheld the defendant's point based on the form of the action, it should now allow the necessary amendment. The terms of the reasons of BLACKWELL J in addition to what I have stated above, also lead one to infer that the point that the form of the action disentitled the plaintiff from getting judgment for £2 450 was not taken before him. Be that as it may, I can find nothing in his reasons which bears out the argument on behalf of the defendant that, if an amendment had been applied for, the learned Judge would have refused it. And I think that in the interests of justice this court should now allow the necessary amendment, which would take the form of an alternative claim alleging that, if the chemicals

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[2] *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286.

> in question were not harmless, but dangerous and liable to catch fire spontaneously, and in consequence the policy was voidable and the defendant elected to avoid it, any concealment or misrepresentation by the plaintiff as to the nature of the goods insured was innocent and the plaintiff is entitled to a refund of the premium paid; and a prayer for judgment for £2 450. It seems to me that such an alternative claim would validly have been included in the original declaration.'

[21] The requirements of a contempt of court order are trite. In the context of this current matter, first, there must be an order granted in favour of the employees against the Department as their employer. Second, the order must have come to the attention of the respondents. Third, there must be non-compliance with the order by the respondents. Once these requirements are met, then it is presumed that the respondents acted wilfully and *mala fide* in failing to comply with the order, and the burden is on the respondents to rebut this presumption.

[22] The first requirement is met, in that the employees secured an order in their favour against the Department.

[23] The order came to the attention of the Department represented by the office of the Director-General, which acknowledged receipt of the order on 11 December 2019. The said acknowledgement confirmed that the order had not been fully complied with due to the complex nature of the work that had to be done, and there was an undertaking to achieve full compliance by the end of February 2020.

[24] It seems the office of the Director-General has been occupied by different officials in an acting capacity in recent years. The employees cannot be expected to change the citation of the parties every time there is a change in the incumbent of the Director-General position. The bottom line is that the office of the Director-General is aware of the court order and its duty to comply with the court order. The prayer for "*further and or alternative relief*" covers the employees once again in this regard, in that the all the incumbents of the position of Director-General during the period after the order was brought to the attention of that office should be held to be in contempt of court if it is proved that they were aware of the court order and they failed to comply with the court

order. It is clear from the answering affidavit in this matter that Ms Onke Mjo is aware of the court order of Mabaso AJ. Thus, the second requirement is met.

[25] I am not convinced that the third requirement of non-compliance with the court order is met. The employees alleged that all the requirements of the court order were not complied with, without substantiating this averment, which was simply untrue if one has regard to the answering affidavit. The employees have not attached to the founding affidavit the referral form in terms of which they referred their dispute to the Bargaining Council, which led to the settlement agreement that has been made an order of this court. This referral would have assisted the court to understand the complaint that the employees had, which would give context to the settlement that was reached at the Bargaining Council.

[26] The employees have also not explained the importance of tabling the migration framework before the Bargaining Chamber in 2017, despite the respondent's answering affidavit explaining that the migration framework had already been tabled before the Bargaining Chamber in 2012. Without an explanation as to why the migration framework would have to be tabled again before the Bargaining Chamber after the 2017 settlement agreement, it is not apparent why the tabling of the migration framework in 2012 would not constitute at least substantial compliance, despite such tabling having pre-dated the conclusion of the settlement agreement in 2017. The employees should have done more in their founding affidavit to explain the purpose of this requirement of tabling the migration framework, for the court to assess whether its tabling in 2012 was insufficient to meet the requirement of the settlement that was reached in 2017. As no replying affidavit was filed, it is not in dispute that the migration framework that was tabled before the Bargaining Chamber in 2012 is the same migration framework that the settlement required to be tabled before the Bargaining Chamber in 2017.

[27] There is undisputed evidence from the answering affidavit that employees were placed in the new structure of the Department and that they were given both appointment letters and job profiles. If the employees were of the view that not all of them were given appointment letters or job profiles, then this averment

should have been made, and they should have specified the employees who had not received these documents. The employees have failed to indicate in their founding affidavit whether there was anything inadequate about the appointment letters and job profiles that were issued to them by the employer. The employees' averment that none of the requirements of the settlement were met and their failure to file a replying affidavit responding to the respondents' pointed averments means that I have to accept the respondents' version as it appears to be more credible and probable, it being supported by evidence. Indeed, to the extent that the employees were required to prove their case of non-compliance beyond a reasonable doubt, they have failed to do so. All they have done in their founding affidavit is to quote the settlement reached and to allege that none of the elements of that settlement have been fulfilled, in circumstances where there appears to be at least significant compliance by the respondents. It is as though the employees simply wanted to cast the net as wide as possible by saying there was no compliance at all, in the hope that they would catch something.

[28] In the absence of proof of non-compliance with the award, the respondents are not guilty of contempt of court, and the employees' application based on the scant information provided in their founding affidavit cannot succeed.

Costs

[29] The principles of law and fairness require that there should be no order as to costs.

[30] In the premises, the following order is made:

Order

1. The applicants' application in terms of their notice of motion dated 28 November 2023 is dismissed.

2. There is no order as to costs.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Adv C Mathonsi
Instructed by	:	L Khumalo Attorneys
For the Respondents	:	Adv J Chanza
Instructed by	:	Office of the State Attorney