



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
HELD AT CAPE TOWN**

Case No: **C98/2021**

**PUBLIC SERVANTS' ASSOCIATION  
OF SOUTH AFRICA obo ABIGAIL BOBANI**

Applicant

and

**THE NATIONAL DEPARTMENT OF LABOUR**

First Respondent

**THE CHIEF DIRECTOR OF PROVINCIAL OPERATIONS  
DEPARTMENT OF EMPLOYMENT AND LABOUR:  
MAWELE NTAMO**

Second Respondent

**Date of Set Down: 6 July 2021**

**Date of Judgment:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 7 April 2022.

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## JUDGMENT

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WITTEN AJ

### INTRODUCTION

1. This is an application in terms of which the Applicant seeks to hold the Respondents in contempt of court. The Court order in question arises from the alleged failure of the Respondents to comply with the arbitration award issued by S.M. Bennett ("the Commissioner"), under case number WECT6123-18 (GPBC1459/2016) ("the award"). The award, dated 4 September 2017, was certified in terms of section 143 of the Labour Relations Act 66 of 1995 (as amended) ("LRA") on 10 April 2018.
2. The Applicant seeks an order against the First and Second Respondents in the following terms:
  - 2.1. That the First and Second Respondents be ordered to appear in the Labour Court on a date to be determined by the Labour Court to *show cause* why the First Respondent and/or the Second Respondent should not be found

guilty of contempt of court for failing to comply with the arbitration award that was certified on 10 April 2018.

- 2.2. That the First and Second Respondents may explain their conduct by way of an affidavit on the date of or prior to the hearing (although this will not excuse it/him/her from being present at court).
- 2.3. That in the absence of providing an explanation to the satisfaction of the court or failing to appear in court despite being properly served, the First Respondent and/or the Second Respondent be found guilty of contempt and that it/he/she/they be incarcerated for such period as the court deems appropriate and/or for it/him/her to be fined in an amount the court deems appropriate.
3. The Respondents have opposed the relief sought against them and contend that the Applicant has failed to show beyond reasonable doubt that the First and Second Respondents committed or are in contempt of the arbitration award.
4. The First and Second Respondents have raised a point in limine.

#### **BRIEF FACTUAL BACKGROUND**

5. Pursuant to the Applicant launching a successful unfair labour practice (demotion) dispute, the First Respondent was ordered to reinstate her to the position of Deputy Director: Human Resources Management with effect from 1 October 2017.
6. Aggrieved by the arbitration award, the First Respondent lodged a review application in the above Court under case number C 679/2017.
7. As a result of the First Respondent's failure to file the record in the arbitration proceedings in terms of Rule 7 A (6) read with clause 11.2.2 of the Practice Manual of the Labour Court, the Applicant lodged an application for an order declaring the review deemed to be withdrawn.
8. On 24 August 2018, the Honourable Justice Rabkin-Naicker granted the relief sought by the Applicant.
9. The First Respondent thereafter applied for the review application to be revived.
10. The Application was opposed by the Applicant and argued on 1 August 2019. On 12 November 2019, the Honourable Justice Rabkin-Naicker dismissed the First Respondent's application for the review to be reinstated.
11. Despite the arbitration award and the unsuccessful review application, the First Respondent has failed to reinstate the Applicant to her appointed position as ordered in terms of the arbitration award.

**Point in limine**

12. The Respondents contend that the parties cited in the arbitration award were the Department of Labour (“DOL”) and the Department of Public Service Administration (“DPSA”) respectively and on this basis, the award cites no individual either in his or her personal or representative capacity.
13. The Respondents contend that the award only references the First Respondent, namely the National Department of Labour as the Commissioner found the following at paragraph 19 of the award:  
*“The First Respondent committed unfair labour practice by suspending the Applicant without pay and further, by demoting her.”*
14. The Respondents raise the point that in the Applicant’s founding affidavit at paragraph 5, the Second Respondent is cited as N Sigaba, the acting chief Operations Officer of the Department of Employment and Labour. On this basis, Sigaba cannot, in law, be prosecuted, convicted, and sentenced to jail on a charge of contempt as he was not cited in his personal capacity.
15. As a result of this incomplete citation, the Second Respondent contends that the application for contempt of court appears to be fatally defective and as such should be dismissed.

16. The Applicant in its Replying Affidavit contends that it is not necessary to cite the individuals alleged to be responsible for non-compliance with the court order in circumstances where the employer is a legal entity or organ of state. To the extent that the Second Respondent denies that Sigaba is the person responsible to ensure compliance with the order, the Director-General, Mr. Thobile Lamati and/or M Ntamo, the current Chief Director and accounting officer be joined to these proceedings.
17. In relation to the law of contempt, the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd And Others*<sup>1</sup> reiterated the basic test for contempt set out in *Fakie NO v CCII Systems (Pty) Ltd*<sup>2</sup>, viz:
- 'It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites . . . have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.'*

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<sup>1</sup> 2018 (1) SA 1 (CC)

<sup>2</sup> 2006 (4) SA 326 (SCA)

18. The Constitutional Court also noted the constitutional objective underlying contempt proceedings as being the preservation of the court's authority by ensuring that its orders are complied with:

*"To ensure that courts' authority is effective, s 165(5) [of the Constitution] makes orders of court binding on 'all persons to whom and organs of state to which it applies'. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority".*

19. There is no merit in the point *in limine* raised by the Respondents as section 165(5) of the Constitution makes orders of a court binding on all persons to whom and organs of state to which it applies.
20. The Respondents point *in limine* is accordingly dismissed.

#### **MERITS OF APPLICATION**

21. The question raised in this application is whether the Respondents have committed contempt of court by disobeying a court order.

22. In the case of *Fakie No v CCII Systems (PTY) LTD* 2006 (4) SA 326 (SCA), [2006 JOL 17080 (SCA)-ED] the principles applicable in contempt of court applications were summarised as follows:

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

23. The Court went further on to say:

- a) *“As the civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements;*
- b) *the Respondent in such proceedings is not an accused „person” but is entitled to analogous protections as are appropriate to motion proceedings;*
- c) *In particular the Applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and wilfulness and malafides) beyond reasonable doubt;*
- d) *but, once the Applicant has proved the order, service or notice and noncompliance, the Respondent bears the evidential burden in relation to the wilfulness and malafides; should the Respondent fail to advance evidence that*



*establishes a reasonable doubt as to whether non-compliance was wilful and malafide, contempt would have been established beyond reasonable doubt;*

*e) a declaratory and other appropriate remedies remain available to a civil application on proof on a balance of probabilities.”*

24. The Respondents have not disputed that there is a court order. It also appears that there was proper service effected and all Respondents are opposing the application.
25. What I need to determine further is whether there was non-compliance and if so whether the same was wilful or malafide.
26. It is not in dispute that the Applicant has not been reinstated to the position of Deputy Director: Human Resources Management with effect from 1 October 2017. Hence, there is non-compliance with the court order.
27. The main issue that arises in this application is whether such non-compliance by the Respondents are wilful or malafide.
28. The Respondents have tendered the following explanation in its answering affidavit as the main reasons for failing to reinstate the Applicant to the position she held prior to her demotion.

*“That Ms. Bobani was notified in writing about her demotion on or about 12 August 2016 (see MN2). The Department avers that the position of Deputy*

*Director HRM forms part of the business unit of the provincial operations in the province (see MN3). The Department avers that only one position for the Deputy Director HRM is available on the provincial management structure in the province. The Department also stated that the person who occupies the position of Deputy Director HRM performs a crucial leadership in governance function within the province. This is plain from, amongst others, the job profile, a copy of which is set out in MN4. The Department explains that after Ms. Bobani's demotion this crucial position of Deputy Director was vacant. This vacancy led to numerous challenges within the province for the Department, including but not limited to unresponsive human resources function, lack of leadership in core areas service delivery goals, including low staff morale. To address, amongst others, the above challenges posed by the vacancy referred to, the Director General of the Department issued a rotation directive in terms whereof the positions of management terms of the province were rotated within the province. The Department also stated that during the process for rotation Mr. Lublewana was also rotated to the position of Deputy Director HRM in or during July 2016 or thereafter."*

29. The Respondents have stated that Mr. Lublewana after his rotation in 2016, was appointed to the position of Deputy director HRM and has held that position for a period of more than four [4] years.

30. On this basis, the Respondents submit that the above explanation is sufficient to show that they always acted in a bona fide manner when they dealt with the vacant post.
31. I do not accept this explanation of the steps the Respondents have taken to deal with the vacant post of the Applicant as genuine and in good faith. I say so as the Respondents would have to be aware of the risk that an arbitration award could be handed down in the favour of the Applicant and order her reinstatement.
32. While the position of Deputy Director HRM may perform a crucial leadership in governance function within the Second Respondent's organisation, nothing precluded the Second Respondent from continuing with its rotation policy in respect of this position until the arbitration process was finalised.
33. The Respondents also contend that it is hamstrung by the Applicant's continued refusal to consider the alternative position of Deputy Director: Labour Centre Mitchell's Plain offered to her.
34. I am in agreement with the Applicant's submission that the Respondents should have presented its case during arbitration as to why reinstatement would be practically unreasonable. More so in circumstances where Mr. Lublewana appears to have been appointed to the position of Deputy director HRM during 2016 and has held that position for a period of more than four [4] years.
35. I am in further agreement that in the absence of a review of the order of reinstatement, the First Respondent is obliged to reinstate the Applicant.

36. The word reinstatement was defined in *Equity Aviation Services (PTY) LTD v Commission, Mediation and Arbitration and Others* [2008] 12 BLLR 1129 (CC) at page 36 as follows:

*“The ordinary meaning of the word “reinstatement” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of Section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal.*

37. The principles as set out above have equal application in relation to an unfair labour practice dispute. I accordingly find that the Applicant must be reinstated to the position of Deputy Director Human Resource Management.

38. In the circumstances, I make the following order:

Order

1. The First Respondent and/or the Second Respondent are found guilty of contempt and accordingly fined in an amount of fifty thousand rand (R 50 000.00).
2. The operation of this order be suspended by fourteen days (14) days from the date of this judgment to enable the First and or Second Respondents to reinstate the Applicant to the position of Deputy Director Human Resource Management.
3. That the First and Second Respondents jointly pay the costs of this application including the costs of the Applicant's counsel.



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**L Witten**  
Acting Judge of the Labour Court of South Africa

Representatives:

**For the Applicant:**  
**Instructed by:**

**Adv T Du Preez**  
**MALCOLM LYONS & BRIVIK INCORPORATED**

**For the Respondents:**  
**Instructed by:**

**Adv C Tsegarie**  
**State Attorney**