IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: **3895/2018**

In the matter between:

DR YAK VAHED Applicant

and

HOD: FREE STATE DEPARTMENT OF HEALTH 1st Respondent

MEC: FREE STATE DEPARTMENT OF HEALTH 2nd Respondent

CORAM: DAFFUE, J

HEARD ON: 19 SEPTEMBER 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 14 NOVEMBER 2019

I INTRODUCTION

[1] The parties to this application, previously involved in an employer/employee relationship, are at loggerheads with each other. Two applications have to be considered, to wit the main application involving contempt of court proceedings having been initiated against the Head of Department ("HOD") and Member of the Executive Council ("MEC") of the Department of Health, Free State Province, as well as a counter-application wherein relief is sought to either rescind or vary the order of 10 August 2018, the root of the contempt of court proceedings.

II THE PARTIES

[2] Applicant is a medical doctor, formerly employed at the Department of Health, Free State Province ("the Department") in his capacity as Clinical Manager, Forensic Pathology Services in Welkom

[3] First respondent is the HOD of the Department in his official capacity. The current incumbent in this position is Dr David Matau.

[4] Second respondent is the MEC of the Department. The current incumbent in this position is Dr Tsiu.

[5] Applicant was represented by Adv MC Louw, instructed by Kruger Venter Attorneys, whilst the respondents were represented by Adv BS Mene SC, instructed by the State Attorney.

III THE RELIEF CLAIMED IN THE MAIN APPLICATION

[6] On 15 July 2019 applicant obtained urgent relief in terms whereof the respondents were ordered to comply with an order issued by Hefer AJ on 10 August 2018. They also requested that the respondents be called upon to appear before the court on 22 August 2019 in order to show cause why it should not be declared that they are in contempt of the order of 10 August 2018 and shall not be committed to incarceration, alternatively that such sanction as the court may deem fit, be imposed. Costs on an attorney and client scale are also sought.

[7] Mhlambi J issued an order as requested[1].

IV THE COUNTER-APPLICATION

[8] On 13 August 2019 the respondents filed their counter-application and a notice to oppose the main application, requesting that the counter-application be heard simultaneously with the main application.

[9] Further relief is applied for, *inter alia* that the order of 10 August 2018 be rescinded, alternatively be varied, that implementation of the order of 10 August 2018 be stayed pending finalisation of the rescission and/or variation application and that applicant be

[1] Record, pp 75 & 76

ordered to pay an amount of R967 471.71, being the amount paid to him since the order of 10 August 2018.

V UNDISPUTED EVIDENCE

[10] The following evidence is not in dispute:

10.1 Applicant, a medical doctor, was employed as a Clinical Manager: Forensic Pathological Services by the Department based in Welkom.

10.2 During July 2017 applicant submitted a temporary incapacity leave form, applying for temporary incapacity leave. Both he and his doctor who completed the forms indicated that applicant was incapable of performing his duties as a result of ill-health. It is evident from the completed temporary incapacity leave form that applicant was diagnosed with idiopathic Parkinson's disease in 2009 and as a result of his illness he *inter alia* had problems with forensic dissection, writing and examination of patients. The disease was indicated as a progressive generative condition which is incurable[2].

10.3 The Department referred the application for investigation to the Health Risk Manager who found that the applicant should be retired on grounds of ill-health[3].

[2] Record pp 87 & 88 para 7 & 8
[3] Record p 89 para 10

10.4 The Department considered the findings of the Health Risk Manager and decided to terminate applicant's services effectively from 1 July 2018, whereupon his salary was stopped.[4]

10.5 Consequently applicant approached the court on an urgent basis and obtained the following order by agreement on 10 August 2018:

"**IT IS ORDERED THAT: (By agreement)**

1. The applicant's non-compliance with the Uniform Rules of the above Honourable Court in regard to forms, service, time periods and processes is condoned and dispensed of so that this application is heard as one of urgency.

2. The applicant's non-compliance with the provisions of Section 35 of the General Law Amendment Act 62 of 1955 is condoned and the time period of seventy-two (72) hours is dispensed with.

3. Pending the final adjudication of **any appeal**, referral of a dispute **and** review application to the relevant forum/s the Free State Department of Health is ordered to:

    3.1 Immediately remunerate and restore the applicant's salary and remuneration package as per his contract of employment;

    3.2 Within 30 (thirty) days of the date of this order provide the applicant with a declaration on his current status of employment including written reasons for the decision; and

[4] Record p 89 para 12

4. Each party shall pay its own costs."[5] (emphasis added)

10.6 As a result of the order the Department carried on paying the salary of the applicant.

10.7 During November 2018 applicant lodged a dispute for unfair dismissal at the Bargaining Council who dismissed the application due to lack of jurisdiction.[6]

10.8 Consequently, the Department stopped paying applicant's salary whereupon he approached the court for the relief eventually obtained on 15 July 2019 referred to above.

VI DISPUTED ISSUES

[11] The following issues are in dispute:

11.1 Whether the respondents are in contempt of court, and if so, the appropriate sanction to be imposed.

11.2 Whether respondents have made out a case for rescission or variation of the order granted on 10 August 2018.

11.3 Whether the respondents are entitled to repayment of the amount claimed as alleged in the counter-application.

[5] Record pp 22 & 23
[6] Record p 93 para 25 and annexure "MMT 2" at p 113

11.4 Who is to be responsible for payment of the costs of the applications?

VII EVALUTION OF THE EVIDENCE WITH REFERENCE TO THE PARTIES' SUBMISSIONS AND THE LAW

[12] When I referred to the relief claimed in the counter-application, I deliberately did not quote what is sought by the Department in the alternative to rescission of the order of 10 August 2018 as I intend to deal with it at this stage of the judgment. The Department wants the order to be varied as follows:

> "3. Pending the final adjudication of either the internal appeal **or** review of the decision of the Respondents to terminate the employment of the applicant to the Labour Court in terms of Section 158(1)(h) of the Labour Relations Act No. 66 of 1995 as amended **or** the referral of a dispute to the relevant Bargaining Council, the Department of Health is ordered to immediately remunerate and restore the Applicant's salary and remuneration package as per his contract of employment." (emphasis added)

[13] According to the Department this variation is in line with the instructions given by the MEC for the settlement of the previous application. I shall deal with those instructions and matters relating thereto *infra*.

[14] In order to refresh the minds of the readers hereof, the relevant part of paragraph 3 of the order of 10 August 2018 reads as follows:

> "3. Pending the final adjudication of **any appeal**, referral of a dispute **and** review application to the relevant forum/s the Free State Department of Health is ordered to:……" (emphasis added)

[15] When I received the file for preparation of the opposed motion, I was immediately struck by the strange wording of paragraph 3 of the order. I wondered whether the reference to "any appeal" could and/or should be read to mean any appeal, even to the Constitutional Court. When I enquired from Mr Louw during argument, he submitted that the intention was to include an appeal to the Labour Court only. His answer did not make sense in light of the fact that a decision of the Bargaining Council is taken by the dissatisfied party on review to the Labour Court. A further aspect that concerned me was the use of the word "and." As the order of 10 August 2018 could mean that salary payments had to be made to applicant pending adjudication of any appeal, referral of a dispute and review application to the relevant forums, I confronted Mr Louw with this during argument. He tried to explain the meaning that the parties, according to him, attached to the wording. I am not persuaded as it is apparent that the order may lead to total confusion.

[16] I was held in *Eke v Parsons*[7] pertaining to a settlement agreement having been made an order of court, that it should not be objectionable, meaning that its terms must accord both with the Constitution and the law. The principle that "a settlement agreement between litigating parties can only be made an order of court if it conforms to the Constitution and the law" has been confirmed in *Airports Company SA v Big Five Duty Free (Pty) Ltd*[8].

[7] 2016 (3) SA 37 (CC) para 26
[8] 2019 (2) BCLR 165 (CC) at para 13

[17] I accept that no separate settlement agreement was entered into by the parties and made an order of court on 10 August 2018. However, it is apparent, for the sake of the argument, that the parties agreed on the terms of the notice of motion which were then encapsulated in the order. How is the order to be interpreted? There can be no dispute about the correct approach. The following summary in *Endumeni Municipality*[9] has been referred to with approval in many judgments:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

[18] Mr Louw argued that it is clear from the Department's case in the counter-application that its officials and office-bearers merely tried to escape the consequences of the court order of 10 August

[9] Natal Joint Municipal and Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18 and see also Airports Company loc cit at para 29

2018. In order to adjudicate the matter, I intend to deal with the counter-application first.

[19] The language used in the order, which is that which the applicant imposed on respondents whereupon the court granted the order, has more than one meaning. Therefore issues such as the context in which the terms were drafted, the apparent purpose to which these were directed and the material known to the parties must be considered. A sensible meaning is to be preferred to one that leads to irrational, unreasonable and/or "unbusinesslike" results.

[20] The relief sought in applicant's founding affidavit deposed to on 2 August 2018 in support of the initial application is not in line with the notice of motion. In paragraph 7 of that affidavit applicant intended to ask that a rule *nisi* be issued in terms whereof the Department be ordered to continue paying his salary pending "7.1.3 the final adjudication of any appeal / dispute and/or review application referred to the relevant bargaining council and/or the Labour Court." (emphasis added) There can be no doubt that this wording has not find its way to the notice of motion and the court order eventually granted.

[21] I accept that, generally speaking, however material a mistake, the mistaken party will not be able to escape from the contract if his/her mistake was due to his/her own fault.[10]

[22] It is also not a defence to rely on the lack of authority of the attorney to enter into an agreement with the opposition. Cachalia

[10] Botha v RAF 2017(2) SA 50 SCA at para 11, quoting from Christie with approval

JA dealt with the issue as follows in *MEC for Economic Affairs Environment and Tourism vs Kruizenga and another*[11] as follows:

"The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way, it matters not whether the attorney acting for the principal exceeds his actual authority, or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority, and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents did, that the attorney who is attending the conference clothed with an 'aura of authority' has the necessary authority to do what attorney's usually do at a rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes the State Attorney quite clearly had apparent authority."

[23] The Department's application for rescission of what is customary known as a "consent judgment" must also be adjudicated based on the principle that if one of the parties was under a mistaken belief in regard to the terms of the agreement, that agreement or *transactio* will remain binding on the parties. The dissatisfied party cannot justifiably complain that he/she laboured under an erroneous belief.

[24] The authorities quoted by Mr Mene are not all directly in line and can be properly distinguished. However, that does not mean that the Department's counter-application is bound to fail. I shall return to some authorities quoted.

[11] [2010] 4 All SA 23 (SCA) para 20

[25] Unlike as Mr Louw submitted, respondents did not launch the application solely based on rule 42(1) of the Uniform Rules of Court. In fact, they did not mention the rule at all. It would be within the court's powers to consider the application in terms of either rule 42(1) if that is deemed apposite, or the common law. In terms of the common law a judgment may *inter alia* be rescinded based on justice and fairness.[12]

[26] It is respondents' version as set out in the affidavit of the MEC that an internal appeal procedure was to be followed. This version is corroborated by the letter annexed as annexure F13 to the first application.[13] Dr Khoali of the Department reiterated that applicant was not to be allowed into the Welkom mortuary as from 30 July 2018 pending finalisation of applicant's appeal by the Legal Team of the Department. This letter was written and received before the application papers in the 1st application were prepared.[14] In my view this serves as sufficient proof that an internal appeal was anticipated or foreseen.

[27] If applicant had in mind an appeal to the Labour Court only, the notice of motion and the eventual order should have made this clear. It is incomprehensible that provision could have been made for both appeal and review procedure. It must have been either the one or the other. If it was anticipated that appeal procedure may follow after referral of the dispute to the Bargaining Council, or after the Labour Court reviewed the matter, I would have expected the reference to "appeal" to be more

[12] De Wet & others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1039H – 1043A
[13] Record of 1st application, p 109
[14] Ibid, p 111

precise instead of referring to "any appeal"; also in such event "appeal" would have been inserted at the end of the sentence and not as the first step in the process. The placement of the words "any appeal" is in line with respondents' version. I would also have expected the parties to limit the right of appeal to a specific forum and not as open-ended as the words reflect.

[28] The wide ambit of the order of 10 August 2018 must therefore be considered. As indicated, according to the ordinary language of the order, applicant would be entitled to proceed with "any appeal" and this means all appeal procedures until the Constitutional Court is eventually reached. Surely, this is "unbusinesslike", unreasonable to the extreme and illogical. Such procedure may take years. In the meantime the Department must carry on paying for a person who cannot and does not deliver any services to it. The question to be considered is whether the Department could reasonably be held responsible for the payment of a salary to a person who has been found to be incapacitated and who on his own initiative applied for incapacity leave due to his failure to fulfil his functions.

[29] I agree with Mr Mene that the Department has a duty to protect the *fiscus* and act reasonable when realising that there is a possibility of fruitless and wasteful expenditure in the process as *inter alia* held by Pakati J in the matter between *LB Saffy NO & others v The Minister of Public Works & others.*[15]

[15] Case number 1227/2018 at para 63 (Northern Cape High Court), a judgment delivered on 30 August 2019 and still unreported

[30] I also agree with the following *dicta* of the Supreme Court of Appeal in *PM obo TM and Road Accident Fund*[16] and I quote "As the full court in this matter held, a court cannot act as a mere rubber stamp of the parties… Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds." In my view the parties and the judge who granted the order of 10 August 2018 should have asked themselves what would be the consequences of the order. Did the parties really agree to any appeal to whichever forum and that applicant could have exercised all the options set out? The answer must be a resounding "No."

[31] I am satisfied that, based on the principles set out in judgments such as *Eke v Parsons* and *PM obo TM v Road Accident Fund,* the Department has made out a proper case for rescission of the orders of 10 August 2018. Not only is there an ambiguity as indicated which cannot be resolved due to the factual dispute, but the Department is entitled to rely on rescission in the absence of a valid agreement between the parties to support the orders. *Iusta causa* or lawful ground justifies an order for restitution.[17] Therefore, even if the order of 10 August 2018 could be interpreted to read that the Department bound it to pay applicant his salary until such time as all and any appeal procedures – even to the Constitutional Court have been finalised - notwithstanding his inability to work, such agreement and consequent consent order would be unlawful.

[16] Case No. (1175/2017) [2019] ZASCA 97 at para 33
[17] Kruizenga loc cit , p 37

[32] I am accordingly satisfied that the Department has met the criteria for rescission of the order of 10 August 2018. A reasonable explanation has been provided. Furthermore, I am satisfied about the bona fides of the HOD and the MEC in bringing the counter-application and that a *bona fide* defence on the merits has been raised. The order should be rescinded.

Repayment of salary

[33] The last issue to determine in respect of the counter-application is whether the Department is entitled to successfully claim back the amount of R967 471.71 it paid to applicant as salary for the period since the order of 10 August 2018 until the ruling of the Bargaining Council. No provision has been made in the order for such an eventuality. The applicant did not deliver any services to the Department during this period and the principle of "no work, no pay" may come into play. Public monies have been spent which may be regarded as wasteful and fruitless expenses. However, this amount has been paid by agreement and in terms of the order granted on 10 August 2018. *Prima facie* I am of the view that rescission of that order does not detract from the fact that the Department, on its own version of the agreement, agreed to carry on paying the salary at least until the matter is finalised in the Bargaining Council. This aspect may be dealt with in a different forum and perhaps once action procedure has been instituted, but I am not prepared to grant relief as requested

Contempt of court proceedings

[34] Even if I mistakenly found that the Department is entitled to rescission of the court order of 10 August 2018, the question that still remains to be answered is whether applicant has made out a case for contempt of court.

[35] The following should be taken into consideration. It is doubtful whether the applicant has complied with the requirements set out in *Matjhabeng Municipality v Eskom*[18] insofar as the HOD and the MEC in their personal capacities have not been joined as parties to the proceedings. The court found in *Matjhabeng* that no court may make a finding adverse to a person's interest if he/she has not been joined as a party in the proceedings.[19]

[36] *E*ven if applicant acted procedurally correct, I have serious doubt whether the fourth requirement to establish contempt of court has been met. In my view reasonable doubt has been established as to whether the non-compliance was wilful and *mala fide*.

[37] An applicant who seeks an order for contempt of court must rely on a court order which is clear and unambiguous in all aspects. If the order is ambiguous and there is a difference of opinion as to the meaning thereof, the party who allegedly did not comply and raises ambiguity, should get the benefit of the doubt.

[38] I explained above that a party is in principle bound by the agreement entered into by his/her legal representative on his/her behalf. It would not be sufficient to state that the legal

[18] 2018(1) SA 1 (CC)
[19] Ibid at para 33

representative carried out the instructions incorrectly. However, when the wilfulness and *mala fides* of a party is to be considered for purposes of a finding of contempt of court, I am of the opinion that such party's explanation of a misunderstanding between him/her and the legal representative becomes relevant. More so, as *in casu* where the agreement embodied in the court order is ambiguous and to the disadvantage of the *fiscus*.

[39] Applicant has put up different versions as to his health and ability to work. In the first application he stated that he was still rendering his services and the "respondents are still getting their monies worth."[20] In the second application he has a totally different version. In paragraph 8.1 of the replying affidavit dated 14 July 2019[21] he expressly relies on his serious medical condition and the version of his expert, Dr Wolpe, that he "was not suitable for employment." In applicant's own words "I suffer from a serious illness, which is permanent, progressive and incurable." In his answering affidavit of 30 August 2019 applicant avers out of the blue, based on a report of Dr Page of March 2018 that he was "a high-functioning individual." He makes this averment in order to hopefully persuade the court to believe that no internal appeal process was available, as the MEC indicated, insofar as he was unfairly dismissed and his employment not terminated based on ill-health.

[40] In my view the two office-bearers, the HOD and the MEC, have put up a proper defence to the contempt of court application and the applicant's application should be dismissed. The HOD stated in his affidavit of 12 July 2019 that there was no legal obligation

[20] Para 47 p 19
[21] Record p 64

on the part of the respondents to keep on paying applicant's salary after the Bargaining Council ruling "as the Applicant was no longer in the employ of Respondents."[22] Clearly, applicant's employment was terminated from 1 July 2018 due to ill-health as *inter alia* set out in the affidavit of the MEC.[23] Based on applicant's admitted illness and permanent incapacity, the MEC's explanation[24] as to her instructions to the HOD relating to settlement makes sense and prevents any possibility that a finding of wilfulness or mala fides can be made. Surely, it cannot be expected of the Department to carry on spending vast amounts of money on an individual that has been declared unfit to work due to ill-heath and whose services have been terminated as a result. Whether or not there was any unfairness in the process of termination of his employment is a matter for the Labour Court to adjudicate, but the HOD and MEC acted *bona fide* and reasonable to stop further payments which would be nothing else but fruitless and wasteful expenditure.

VIII CONCLUSION

[41] In conclusion, no case has been made out for the main application to succeed. Applicant brought the main application based on an order which the respondents consented to and not only that, abided to by making payments as indicated above. Consequently, I am of the view that the applicant should not be burdened with a costs order against him and therefore each party

[22] Ibid para 15 p 55
[23] Ibid paras 6 -14
[24] Ibid para 18

shall be responsible for their own costs in respect of the main application.

[42] Insofar as the counter-application is concerned, I am satisfied that the order of 10 August 2018 must be rescinded, but that no further relief in terms thereof shall be granted. Mr Mene did not request costs in the event of success in the counter-application.

[43] The parties did not agree about the wasted costs of the postponement on 22 August 2019. It is true that the respondents were called upon to appear in person on that day to provide reasons why they should not be convicted of contempt of court and that they opted to file a notice of opposition and counter-application a few days before that date. This caused a postponement insofar as the applicant wanted to reply to the main application and file an answering affidavit pertaining to the counter-application. The matter was therefore not ripe for hearing on 22 August 2019. I am satisfied that in the light of what I have stated herein in general terms, no costs order should be made in favour of any of the parties in respect of such wasted costs.

IX ORDERS

1. Part B of the notice of motion in the main application is dismissed.

2. The counter-application succeeds to the extent that the court order of 10 August 2018 issued under case number 3895/2018 is rescinded.

3. Each party shall be responsible for the payment of their own costs in respect of both the main as well as the counter-application, including the wasted costs of 22 August 2019.

_____

J P DAFFUE, J

On behalf of Applicant	:	Adv MC LOUW
Instructed by	:	Kruger Venter Inc BLOEMFONTEIN
On behalf of Respondents	:	Adv BS Mene SC
Instructed by	:	State Attorney BLOEMFONTEIN