



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: **J 1806/2017**

In the matter between:

**MAKGOBA M M AND OTHERS**

**Applicant**

and

**MEC FOR HEALTH: LIMPOPO**

**First Respondent**

**HEAD OF THE DEPARTMENT OF HEALTH: LIMPOPO**

**Second Respondent**

**Heard : 16 November 2023**

**Delivered : 28 November 2023**

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**JUDGMENT**

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**NORTON AJ**

## Introduction

1. On 15 November 2021, the Honourable Acting Justice Mr Mangena delivered a judgment in favour of the Applicants with the following orders:
  - “1. *The failure by the first and second respondents to implement clause 18.1 of Resolution 1 of 2012 in favour of the applicants by placing them in their respective correct post levels and salary levels and pay them accordingly is declared unlawful.*
  2. *The first and second respondents are directed and ordered to place the individual applicants whose posts were graded on salary level 10 and 12 as set at the 01 august 2012 on their correct post levels applicable, such placement to apply retrospectively to their respective dates of appointment.*
  3. *The first and second respondents are ordered to deliver a statement to the applicants’ attorneys of record, Sekukuni Attorneys (VTM) 19 b Thabo Mbeki Street First Floor Steyn Building Suite 07, 19b Thabo Mbeki Street, P.O. Box 2979, Polokwane 0700y, Fax: 086541 8933, Email: vtmsek@gmail.com, within a period of 21 days of this order being granted, reflecting the benefits and money owing, and due to each of the applicants.*
  4. *The first and second respondents are ordered to pay such amount found to be due to the applicants directly into their accounts within 30 days off delivery in terms of order 3 above.*
  5. *the amount in order 3 above shall attract interest at a prescribed rate of 7% from the date determined by the respondents up to the date of payment.*
  6. *No order as to costs.”*
2. This judgment accords with the arbitration award handed down by Panelist Matji of the PSCBC under case number PSCB 88 – 13/14. Matji found in favour of employees who argued that particular clauses in Resolution 1 of 2012 should be interpreted and applied such that the implementation of salary adjustments for salary levels 10 and

12 should not take place in a staggered fashion, and that there should be no distinction between different categories of employees.

3. Around the 20 December 2021 the Respondents through the office of the State Attorney, served an application for leave to appeal the judgment. They also sought condonation for the late delivery of the application for leave to appeal. The application was defective in a number of respects, including that the application was not filed with the Registrar of the Labour Court, but with the Constitutional Court.
4. On 11 July 2022 the Applicants served the State Attorney with a contempt application.
5. On 5 August 2022, the Honourable Court issued a rule nisi instructing the Respondents to appear in the Labour Court on 18 November 2022, to show cause why they should not be held in contempt for failing to comply with Mangena AJ's court order.
6. Leave was ultimately declined around 2 September 2022 (after the application had wound its way to the correct court).
7. On 3 November 2022 the Respondents filed a petition with the Labour Appeal Court.
8. On 18 November 2022, on the return date, the Respondent's argued that they had petitioned the Labour Appeal Court and were therefore not in contempt. The *rule nisi* was discharged by order of the Honourable Acting Justice Snyman, persuaded by the Respondent's defence to the contempt challenge.
9. On 30 March 2023 the LAC granted the Respondents leave to appeal. The LAC condoned the late filing of the petition; and ordered the petitioners (ie the Respondents) to deliver the record of appeal within 60 court days of their order. (ie by 28 June 2023).
10. On 20 July 2023, the attorneys for the Applicant (Sekukuni Attorneys) wrote to the state attorney, alerting them to the fact that the 60 court days for the filing of the record had lapsed, and that they had failed to deliver a notice of appeal within 15 days after leave to appeal had been granted (as per Rule 5.1 of the LAC Rules). Sekukuni Attorneys informed the State Attorney that the Appeal had lapsed and concluded their letter with, "*...you are called upon to comply with the judgment of the*

*Labour Court within 14 days...failing which our instruction is to approach the Court for Contempt of Court ...without further notice."*

11. During July and August 2023 the Respondents were in touch with ELT Pro Transcriptions CC to prepare the record for the appeal.
12. On 31 August 2023 the Applicants approached this Court for a *rule nisi*, noting the defects in the prosecution of the matter by the State Attorney, seeking the incarceration of the Respondents, or a fine, for being in contempt of Acting Justice Mangena's court order.
13. On 5 October 2023 the Honourable Acting Justice Mahalelo ordered as follows:
  - "1. *The First Respondent (Dr. Phophi Constance Ramathuba) and the Second Respondent are to appear in the Labour Court 16 November 2023 at 10h00 to show cause why they not be found guilty of contempt of Court for failing to comply with the Court Order per Mangena AJ of 15 November 2021;*
  2. *The Respondents may explain their conduct by way of affidavit delivered 5 days before the aforesaid hearing date (although this will not excuse them from being present in Court on the date of 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 Respondents be held in contempt of Court and the First Respondents be incarcerated for such a period as the Court deems appropriate; or may be fined an amount that the Court deems appropriate;*
  4. *This Court Order must be served on the First Respondent and must be served personally on the Respondents;*
  5. *Costs to be costs in the main application"*
14. On 8 November 2023, the Respondents sought to note an appeal against the judgment under case number JR 1806/2017, referring to Acting Judge Mabaso (presumably an error which should read Acting Justice Mangena). The Respondents have also instituted an application for the late delivery of the Notice of Appeal and the Record be condoned.

15. The matter came before me on the 16 November 2023, both parties were legally represented. I heard the matter and reserved my ruling.

### **The Applicant's arguments in summary**

16. The Applicants argued that there is no appeal against the judgment of Mangena AJ, noting that the record has not been filed, and that the notice of appeal is defective as it refers to Acting Justice Mabaso, and is some 5 – 6 months out of time.
17. The Applicants also draw to my attention that the Respondents did not comply with Rule 5 (17) by seeking consent to an extension of time for the filing of the record either from the Applicants or if that was refused by the Judge President in chambers. The appeal is thus deemed to have been withdrawn.

### **The Respondent's arguments in summary**

18. The Respondents explain that an application for condonation for the late delivery of the application for leave to appeal, and the application for leave to appeal was served by email on the Applicants and to the general office of the Constitutional Court by a candidate attorney on 22 December 2021. The error came to their attention when the Applicants served a contempt application on the State Attorneys office on 11 July 2022.
19. Ultimately the petition for leave to appeal was granted on 31 March 2023. The judgment granting the petition was sent to a Ms Ledwaba in the State Attorney's office, who was on maternity leave at the time. Her matters fell under the responsibility of two candidate attorneys.
20. When Ms Ledwaba came back from maternity leave she instructed ELT Pro Transcriptions CC (in late July / August) to prepare the record.
21. In mid October 2023 it became clear that the record was incomplete. ELT Pro Transcriptions was instructed to prepare a proper record on appeal "*on an urgent basis and this will be served as soon as it is available*".

22. The Respondents have sought condonation for the late delivery of the notice of appeal and the record.
23. The Respondents have always indicated their intention to appeal Acting Justice Mangena's judgment, and they are therefore not in wilful disobedience of the judgment, nor have they acted in a *mala fide* fashion.

### **Legal Considerations**

24. The LRA provides for contempt proceedings in section 143 in circumstances in which a party neglects or refuses to comply with an arbitration award which has been properly certified.
25. Contempt of Court processes must comply with clause 13 of the Practice Manual.
26. There are four main elements to a contempt application:
  - 26.1. A court order;
  - 26.2. Properly served on the Respondent;
  - 26.3. Non compliance with the order;
  - 26.4. Non compliance must be wilful and *malafides*.
27. Once the first three elements have been proved, the onus shifts from the Applicant to the Respondent to establish reasonable doubt that noncompliance is not wilful and *malafides*.<sup>1</sup> It is well known that *malafides* means, "bad faith" or "intention to deceive".
28. In *Anglo American Platinum Limited and another v Association of Mineworkers and Construction Union and others*<sup>2</sup> the Labour Court quoting from *Fakie v CC Il Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) held<sup>3</sup>

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<sup>1</sup> See *Secretary of the Judicial Commission of Enquiry into allegations of State Capture v Zuma and others* 2021 (5) SA 327 (CC) at para 37

<sup>2</sup> [2015] JOL 33118 (LC)

*“... A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court order ...*

*In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*

*... But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether noncompliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.”*

29. Justice Moshwana has recently considered the problem of employers failing to respect court orders, and I refer to his judgment in *Gunn v Hoogendyk* (Case no J 1031 / 15) delivered in February 2022. Justice Moshwana makes the point, that compliance with Court orders “...has everything to do with the integrity of the Court as a constitutional institution”.<sup>4</sup>

## **Discussion and Analysis**

30. The Respondents have managed their litigation in a wholly inept way. Pleadings have been inordinately late, they have been sent to the wrong court, the transcribers have struggled to compile a record because of lost tapes. The State Attorney’s office have not properly supervised candidate attorneys, matters are left in abeyance when attorneys are on leave etc. This is an unsatisfactory state of affairs, and is prejudicial to the Applicants.
31. Nonetheless the Respondents have shown their intention to appeal the November 2021 judgment, and have done so by seeking leave from the Labour Court, and when

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<sup>3</sup> At para 4

<sup>4</sup> Para 1

that failed petitioning the Labour Appeal Court. They have sought condonation for the late filing of the Notice to Appeal and the record.

32. In my view their efforts demonstrate serious intent to appeal that judgment, and do not indicate a party who is in wilful and *malafide* defiance of the judgment or related court orders.
33. The Respondents have discharged the onus of showing “reasonable doubt” in the contempt proceedings. Nonetheless the Respondents must finalise the appeal application diligently and within the usual time constraints in the rules of court. To continue to conduct themselves in a dilatory fashion will prejudice the Applicants and disrespect the judicial processes and *fora*. This must cease.

### **Order**

In the circumstances, the following order is made:

34. The *rule nisi* is discharged.
35. The Respondents are required to ensure that the processes envisaged in the LAC Rules to prosecute the appeal must be adhered to; failing which the Applicants may return to this Court for further relief, and their costs.
36. No order as to costs.

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D Norton  
Acting Judge of the Labour Court of South Africa

### Appearances

For the Applicant	: K Mahlase of Mahlase Khan Attorneys
For the Respondent	: M.S. Mphahlele SC with A Munzhelele
Instructed by	: The State Attorney, Polokwane