REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case No: P549/09

In the matter between:

ANTON RONALD SWART Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES First Respondent

THE HEAD OF DEPARTMENT OF

CORRECTIONAL SERVICES Second Respondent

Heard: **27 January 2015**

Delivered: **24 March 2015**

Summary: **Contempt of court proceedings. Interpretation of court order. Principles restated.**

Illegality. Doubtful whether court of equal jurisdiction can set aside its own order, even if alleged to be tainted with illegality. Orders of a competent court must be obeyed unless and until a court of higher or appeal jurisdiction sets that order aside. Semble: There may be instances where cases of blatant illegality preclude a court of equal jurisdiction from enforcing the terms of its own orders. However, this is not such a case. Declaratory order granted.

JUDGMENT

EUIJEN AJ

Introduction

[1] These are contempt of court proceedings in which the applicant seeks the incarceration of the respondents pending full compliance with the terms of two orders made by this Court on 22 February and 24 October 2012 under the above case no. In addition, he seeks a declaratory order in lofty terms that the respondents' failure to ensure full compliance with these orders of this Court "constitutes an ongoing violation of their duties under the Constitution."

[2] The precise meaning of those orders is the subject of this dispute, but in neutral terms, order that the applicant be promoted by the Department of Correctional Services ("the Department") to the position of Assistant Director: Case Management Administration Eastern Cape, with effect from 2006.

[3] At the time this application was launched, on 25 June 2013, it is common cause that there had been no compliance at all with the terms of this Court's orders. It is further common cause that the applicant was eventually formally appointed to the designated position after the filing of the supplementary affidavit in this matter on 9 September 2013. Respondents' counsel fairly conceded that whatever the result, the applicant is at least entitled to his costs up until that point.

[4] After the promotion of the applicant, a dispute arose whether his appointment could be on probation; whether the applicable salary scale at which the applicant is to be remunerated is level 9 or level 10; and the period from when the promotion took effect. The parties are agreed that the only outstanding issue remaining in dispute is the salary scale at which the applicant is to be remunerated in the designated post and that is what this Court must decide.

[5] There are also interlocutory applications for the reception of a further answering affidavit which is opposed; a striking out application in the event it is received; and an application for condonation for the late filing of certain documents. I shall refer to these applications, insofar as is necessary, in the course of dealing with the merits during the course of this judgment.

Interpretation of the Court Orders

[6] The first order of this Court dated 22 February 2012, was made in terms of section 158(1)(c) of the Labour Relations Act, no. 66 of 1995 ("the LRA"). It converts an award of a Bargaining Council Commissioner made in the General Public Service Sectoral Bargaining Council under case no. PSGA 482/07/09 on 21 August 2009, without elaboration, into an order of this Court. The second order, made on 24 October 2012, is an enforcement of the first and does not take the interpretation issue any further.

[7] The primary document which must be interpreted in this matter is thus the award of the Bargaining Council Commissioner made on 21 August 2009, in resolution of the dispute referred to it by the applicant in terms of section 186(2)(a) of the LRA. The order made at the end of the award reads as follows:

> "That the Applicant, Mr Anton Ronald Swart, is entitled to the relief sought and such relief is hereby granted."

[8] The relief sought by Mr Swart in the form required by Regulation to initiate arbitration proceedings in terms of section 191(5)(a)(iv) of the LRA was:

> "That Mr A Swart be promoted."

[9] It is well established that in interpreting any written document, including a judgment or award such as in this case, the primary source is the language contained in the document itself, read in its entirety. If on that reading, the meaning is clear and unambiguous, no extrinsic evidence is permissible to contradict such meaning. In cases of uncertainty or ambiguity, one attempts to

ascertain the intention of the author of the instrument, taking account of the reasons given in the award as a whole. In undertaking this task, one may have regard for the nature of the problem that was sought to be addressed. In so doing one may also examine the surrounding circumstances leading up to and surrounding the making of the order. (*Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304 D-H*; Administrator Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715 F-I*; ABSA Bank Ltd t/a Volkskas Bank v Page and Another* 2002 (1) SA 617 (SCA) at 622*; Engelbrecht and Another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) at 32-33).

[10] The terms of the Bargaining Council Commissioner's order say nothing about the scale at which the promotion of Mr Swart is to take place. Both counsel submitted that this is to be found within the terms of and the reasons supplied in the award itself. The problem arises because the arbitration proceeded by default and the Department was not represented and took no part in the proceedings.

[11] It was submitted on behalf of the applicant, that it is clear from the reasoning of the Commissioner in his award that the applicant had throughout the arbitration proceedings claimed to be appointed to the post at the same level as the person who was appointed to such post, namely, Ms Matomela. It is common cause, that Ms Matomela was appointed at level 10 because she was already on that scale prior to her appointment (a horizontal transfer). In support of this contention applicant's counsel referred me to two portions of the Commissioner's reasons which read:

> "The witness stated that he functions in the post for over 10 years and requested promotion to ASD salary level 10 viz. the same salary and benefits afforded to Matomela when he (sic) was appointed during 2006." and
>
> "The Applicant sought as relief promotion to the post effective from the date Matomela was appointed viz. from 2006-08-20 with the same salary and benefits. In the instance of this matter I am persuaded to grant the requested relief by the Applicant."

[12] On the other hand, the respondents' counsel submitted that the applicant has always framed his claim with reference to the post and not Ms Matomela's terms and conditions of employment. He submitted that it is clear from the above that at best for Mr Swart the reference to Ms Matomela's terms and conditions of employment refers only to the date from when the promotion was claimed. As far as the salary scale itself is concerned, the claim was for the salary scale attached to the post. In support of his contention he referred me to the portion of the Commissioner's reasons where the relief sought by the applicant is summarised as:

> "That the relief it (sic) seeks is that the Applicant must receive the same salary and benefits dated back to 2006-08-20 which is the date on which Ms Matomela was appointed to the post, which he would have received if it was not for the unfair labour practice."

[13] I pause at this point to note that on the face of it, the portions of the Commissioner's reasons cited above, do appear to support the contention advanced on behalf of the applicant that the Commissioner understood the applicant's claim at all times to be for his appointment to be at level 10 and that is what he granted. However, in favour of the respondents, I assume that the last portion of the Commissioner's reasons cited above casts some uncertainty upon the matter. I proceed then to examine the surrounding circumstances to which I have been referred by the respondents and in particular the applicant's referrals of the matter to conciliation and arbitration.

[14] As far as the referral to arbitration is concerned, it is correct that there is no mention of Ms Matomela's appointment and the applicant's dispute and relief is framed with reference to the (unspecified) rank attached to the post. As already noted above, the precise rank required is not stated in the relief requested in the referral to arbitration. In the referral to conciliation, the dispute is described by the applicant as:

> "Mr Swart was appointed as DH Disposal, this name was then changed to DH Case Management Administration, whilst he was in the post (it was not vacant) it was advertised and another employee appointed to

> that post. The post which was upgraded in the advertisement would have been a promotion for Mr Swart."

[15] The outcome sought was:

> "Mr Swart who is still in the post (which he was appointed to prior to it being advertised) be given that post together with the rank and compensation."

[16] It appears from the Commissioner's reasons that Mr Swart did in fact apply for the post as advertised but was not short listed or appointed. After Ms Matomela was appointed to the post, he referred a dispute for resolution in terms of section 191 of the LRA. Hence submitted respondents' counsel, his claim was for the advertised post, which was advertised at a salary scale of R 146 685 per annum or level 9, which is the salary currently paid to the applicant.

[17] Mr Dyke, who appeared with Ms Ah-Shene for the applicant, contended that the advertisement is irrelevant and unnecessary since the applicant was already in the post, and merely required the salary translated in accordance with the upgraded level attached to such post. In other words, that the applicant certainly was not required to re-apply for the post.

[18] Whether the Commissioner's award is correct or not is, of course, not the issue presently before this Court. The question is whether this was how the applicant saw and formulated his case, which was granted in its entirety by the Commissioner. In my view, there is nothing in either the referral to conciliation or arbitration which tends to suggest that the applicant limited the relief sought to the advertised amount. On the contrary, he is at pains to point out that despite his application, the post was not, in his view, vacant.

[19] I accordingly hold that read as a whole, and even taking into account the surrounding circumstances of the referrals to arbitration and conciliation, that the applicant sought to be appointed to level 10 at the arbitration proceedings and that is what the Commissioner ordered. As I have stated, whether he was entitled to this relief or not, is not an issue which I need decide. This

conclusion renders it unnecessary to consider the other surrounding circumstances to which I was referred in support of the applicant's case.

Illegality

[20] Mr Kroon, who appeared with Mr Voultsos for the respondents, submitted that in the event that I should reach the conclusion which I have reached regarding the salary scale applicable to the applicant's appointment, then the Commissioner's award is illegal and contrary to the Public Service Act, 1994 (PSA) and the Regulations promulgated in terms thereof. Ordering compliance with such orders would be ordering the respondents to commit a criminal offence in terms of the Public Finance Management Act, no. 1of 1999 (PFMA). In terms of that legislation, so it was submitted, Mr Swart is only entitled to be appointed to the starting notch at level 9, as advertised. The respondents contend that this renders the award illegal and a nullity and that it would be contrary to public policy and the interests of justice for this Court to enforce compliance with it. In support of this proposition, reliance was placed on the recent decision of the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC).

[21] The first difficulty which I have with this submission is that this is not the correct time or place to raise these issues. It is not the correct time, in my judgment, in contempt proceedings, after the respondents have abandoned and hence exhausted their remedies of rescission and review of the arbitration award now sought to be enforced, to challenge the correctness of that award. The interests of justice in securing finality in legal proceedings requires that a line be drawn at some point when the debate about the merits of the order is closed. If the respondents are of the view that the award of the Commissioner is tainted with illegality, then they ought to have persisted with this contention in their rescission and/or review applications, or, at the latest, raised this as a defence during the application to have the award made an order of court in terms of section 158(1)(c) of the LRA.

[22] It is not the correct place, because I do not have the power to alter or set aside an order of this Court. Nor am I called on to pronounce on the

reasonableness, correctness or otherwise of the Commissioner's order; merely to discern the correct interpretation thereof in order to enforce compliance, if necessary. Indeed, the position has always been that orders of any Court should be obeyed unless and until overturned by a Court of higher jurisdiction, regardless of the parties' view of their correctness or legality. (*Kotze v Kotze* 1953 (2) SA 184 (C) at 187F*; Culverwell v Beira* 1992 (4) SA 490 (W) at 494 A-C; *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229*; Jee Bhai v Minister of Home Affairs and Another* 2007 (4) SA 294 (T) at 312, paras 51-52.)

[23] On behalf of the respondents it was contended that nonetheless where there is a patent defect in a Court order, such as the present alleged illegality, this renders it a nullity, and it may simply be ignored without the necessity of setting the underlying award aside on review and raised at any stage during the enforcement proceedings. In support of this contention, I was referred to *Van Zijl v Von Haebler* 1993 (3) SA 654 (SECLD) at 659 G-J; *Kruger v Municipal Employees Gratuity Fund and Another* (1998) 19 ILJ 1319 (PFA) at 1326 C-E*; and Nonzamo Cleaning Services Co-Operative v Appie and Others* [2008] 9 BLLR 901 (Ck) at para [9].

[24] In my judgment, none of the cases to which I have been referred by respondents' counsel support this submission. None of them concern enforcement of Court orders (let alone contempt) proceedings after all avenues of appeal and review on the merits have been exhausted, as in this case. *Van Zijl's* case was an application to make an arbitration award made in terms of the Arbitration Act no. 42 of 1965, an order of the High Court in terms of section 31 of that Act. In other words, it is akin to section 158(1)(c) proceedings in this Court. The Court there held that it was permissible to raise a jurisdictional point in those proceedings, despite this not having been raised at the arbitration nor in an application under section 33 of the Arbitration Act. As I have stated earlier, that would have been a more appropriate time to raise this point than in these proceedings. Similarly, in the matter adjudicated by the Pensions Fund Adjudicator, who is of course not a Court, the Pension Funds Adjudicator ignored an arbitration award made in terms of the

Arbitration Act, on the grounds that the Arbitrator's award exceeded his terms of reference and permitted an employer to make deductions from pension benefits which are expressly prohibited in terms of section 37A of the Pension Funds Act 1956. In the *Nonzamo Cleaning Services* matter, the full bench of the Eastern Cape Division of the High Court held that it was permissible to raise a jurisdictional issue which had been abandoned in the Court *a quo* again on appeal.

[25] The difference between the cases to which I have been referred by respondents' counsel and the present, in my judgment, is that all those cases say is that during proceedings before a Court with the power to alter or otherwise pronounce upon the correctness of a judgment or order, or an award of an arbitrator, then a strictly legal point about the legality or jurisdiction of the body which made the order or award may be raised for the first time at a late stage, even if it had previously been abandoned. In the present proceedings, the order which the respondents wish declared illegal is now an order of this Court. Self-evidently, I have no power to interfere with the substance of the orders made by this Court, merely to interpret them and enforce compliance with their terms, as I have found them to read.

[26] Respondents' counsel also referred me to the unreported judgment in the South Gauteng High Court, sitting in Johannesburg in the matter between *Lujabe Matsheliso Xoliswa and Marutona Shibishi Samual (case no. 35730/2012)* delivered on 5 April 2013 in support of the proposition that this Court would still ignore its earlier order if satisfied that it is illegal. Although the South Gauteng High Court proceedings were also for contempt of court, all that was held there was that the terms of the earlier order were so vague and imprecise as not to amount to an order *ad factum praestandum* at all. (at para 21]) In other words, the order was merely found to be unenforceable for vagueness. I have already found that is not the case here.

[27] The Constitutional Court case of *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), also does not, in my view, take the above propositions any further. That case also concerned an application to have an arbitration award made an order of Court in terms of section 31 of the Arbitration Act. In

those proceedings in the High Court, Ms Hubbard raised the point about the alleged illegality of the award being contrary to the Housing Consumers Protection Measures Act, no. 95 of 1998. Although the High Court found against her, her defence was upheld both by the Supreme Court of Appeal and the Constitutional Court. Again, that case is akin to section 158(1)(c) proceedings and not contempt of court.

[28] Indeed, even in this Court, apart from the bald allegation in the answering affidavit that it would be unlawful to pay the applicant above the advertised rate, the factual material for the respondents' illegality argument, namely the precepts of the Personnel Administration Standards (PAS) promulgated in terms of the PSA and its Regulations is only contained in the supplementary answering affidavit, in respect of which there is a further interlocutory application for its admission.

[29] I do not consider that there is any justification for the admission of the supplementary answering affidavit. The papers in this matter are already far too voluminous and the issues could have been dealt with by both parties' legal representatives far more succinctly. More to the point, the new matter and documentation attached to the applicants' replying affidavit which the supplementary answering affidavit purports to deal with, is irrelevant, since it relates to events that occurred after or were disconnected from the arbitration award itself. It could thus have been safely ignored and did not warrant the extensive pleading over, which also lays the factual allegations for the illegality argument for the first time.

[30] There may doubtless be an occasion where blatant illegalities in the enforcement of court orders which would otherwise occur, may persuade even a court of equal jurisdiction to decline to do so. There are rare examples in the criminal law where illegal punishments have not been enforced. However, I do not consider that this is such a case. The provisions in the PSA and its Regulations as well as the PFMA to which I have been referred by Mr Kroon, contain constraints on the powers of State officials in regard to the appointment of employees in the Public Service. I do not consider that these provisions render the terms of the Commissioner's order illegal. The

Commissioner's powers to make the order he did stems from the provisions of section 138(9) of the LRA, which reads as follows:

> "(9) The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award-
>
> (a) that gives effect to any collective agreement;
>
> (b) that gives effect to the provisions and primary objects of this Act;
>
> (c) that includes, or is in the form of, a declaratory order."

[31] In terms of section 199 of the LRA, contracts of employment may not disregard or waive collective agreements or arbitration awards. It provides:

> "(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not-
>
> (a) permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;
>
> (b) permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award; or
>
> (c) waive the application of any provision of that collective agreement or arbitration award.
>
> "(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid."

[32] Section 209 of the LRA makes its provisions applicable to the State. Section 210 provides that in the event of a conflict between the LRA and any other law, save for the Constitution, the provisions of the LRA take precedence.

[33] Similarly, the provisions of the PFMA which allegedly render compliance with the terms of this Court's orders a criminal offence, relate to non-budgeted or unauthorised expenditure. In my judgment, whoever is required to ensure that the applicant is paid at level 10 has sufficient authority to do so on the strength of the orders of this Court. Secondly, on this individual scale, budgetary matters are flexible and can be altered to suit changing circumstances. Indeed, if the applicant was horizontally appointed into the position, the budget would have to be found for the appointment, as occurred with Ms Matomela's appointment. Thirdly, level 10 is a permissible (and hence ostensibly legal) grade for the post, as conceded by Mr Kroon; the complaint is, rather, that it is an opportunistic level for the applicant, since ordinarily he would have been appointed at the advertised rate of level 9.

[34] In summary, I am not persuaded that this is a case where enforcement of the terms of the award, through this Court's order, results in any obvious illegality, or indeed any illegality at all.

Incarceration

[35] It remains to consider whether the applicant has made out a case for the incarceration of the respondents. The current leading decision on applications for the punishment of persons alleged to have disobeyed court orders, is the decision of the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). There, Cameron JA (for the majority) said the following (at para 42 (c)-(d)):

> "(c) 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.
> (d) 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 non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt'.

[36] In my view, the applicant fails at the first hurdle in this application. There has not been personal service of the order or the application on either of the respondents. It appears that the order was served on administrative staff in the offices of the respondents and this application served on the State Attorney. In those circumstances, there is no evidence that either of the respondents is aware of either this Court's orders or this application. It follows that I cannot be satisfied on any basis, let alone beyond reasonable doubt, that the first element of contempt has been established in these proceedings. On this ground alone the prayer for the incarceration of the respondents must fail.

Conclusion

[37] It follows from the above that I have not had regard to the supplementary answering affidavit sought to be filed by the respondents (or the affidavits that followed in its wake) and I do not consider that there is any justification to seek its admission. That application must accordingly be dismissed with costs. Such costs will exclude the costs of the supplementary replying affidavit as a mark of this Court's displeasure at the prolixity of the papers.

[38] Although the applicant has not secured the incarceration of the respondents, he has nevertheless achieved substantial success in these proceedings and is entitled to his costs. Both parties were represented by two counsel at the hearing. In my view this was warranted given the importance of the case to both parties and the issues involved. The heads of argument on behalf of the applicant were drafted by Ms Ah-Shene on her own.

[39] Even after the appointment of the applicant at the disputed level, this matter has limped along and was postponed on four occasions last year for the filing of even more paper and heads of argument. On each occasion costs were reserved. This wastes the limited resources of this Court and prevents other deserving litigants from acquiring a place on the roll. A matter ought to be enrolled only once for hearing, save in unforeseen circumstances. It seems to me that both parties are, more or less, equally to blame for this state of affairs.

In the circumstances, I deem it fair to exercise my discretion in respect of the reserved costs and not make any order as to costs.

Order

[40] In the premises the following order is made:

40.1 The respondents' application for the reception of the supplementary answering affidavit is dismissed with costs. Such costs will exclude the costs associated with the supplementary replying affidavit.

40.2 It is declared that the respondents' failure to ensure that the applicant is paid at salary level 10 in compliance with the orders of this Court dated 22 February and 24 October 2012 under the above case no. constitutes an ongoing violation of his Constitutional rights.

40.3 The respondents are to pay the applicant's costs of this application, including the costs of two counsel, where employed, jointly and severally, the one paying the other to be absolved.

40.4 As far as the reserved costs are concerned, there is no order as to costs.

TMG Euijen

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Advocate B Dyke and Advocate LA Ah-Shene
Instructed by:	Brown Braude and Vlok
For the Respondents:	Advocate P Kroon and Advocate L Voultsos
Instructed by:	McWilliams and Elliott Inc