THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

**Reportable**
Case No: 072/2015

In the matter between:

**COMPENSATION SOLUTIONS (PTY) LTD** **APPELLANT**

and

**THE COMPENSATION COMMISSIONER** **FIRST RESPONDENT**

**THE DIRECTOR-GENERAL, DEPARTMENT OF LABOUR** **SECOND RESPONDENT**

**THE MINISTER OF LABOUR** **THIRD RESPONDENT**

**Neutral citation**: *Compensation Solutions (Pty) Ltd v The Compensation Commissioner* (072/2015) [2016] ZASCA 59 (13 April 2016)

**Coram:** Maya AP, Cachalia, Pillay, Petse and Dambuza JJA

**Heard:** 4 March 2016

**Delivered:** 13 April 2016

**Summary:** Contempt of court – repeated failure by the Compensation Commissioner to comply with a settlement order of which he was aware – settlement order has the full force of a court order – commissioner not establishing reasonable doubt that his non-compliance was not wilful and mala fide – appellant proved requisites for civil contempt of court and the commissioner's committal to prison therefor.

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ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

(a) The appeal is upheld with costs including the costs of two counsel.
(b) Paragraph 1 of the order of the court a quo is set aside and replaced with the following:
'1 The first respondent, Mr Shadrack Shivumba-Homu Mkhonto, is declared to be in contempt of paragraphs 1, 2, 5 and 6 of the court order of 31 July 2009 under case number 35047/2009.
2 The first respondent is accordingly sentenced to undergo three months' imprisonment suspended for a period of five years on condition that he is not convicted of contempt of court committed within this period.
3 The first respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel where employed, the costs reserved on 20 August 2013, 5 September 2013, 12 and 18 February 2014 and the costs of attending a meeting in Johannesburg on 7 August 2014.'

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JUDGMENT

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**Maya AP** (Cachalia, Pillay, Petse and Dambuza JJA concurring):

[1] This is an appeal against portion of the judgment of the Gauteng Division of the High Court, Pretoria (Hughes J) which declared the Compensation Commissioner, Mr Shadrack Shivumba-Homu Mkhonto and the first respondent herein (the

commissioner), not to be in contempt of paragraphs 1, 2, 5 and 6 of its order dated 31 July 2009 in case number 35047/2009. The appeal is with the leave of the court a quo.

## Background

[2] Section 22 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)[1] entitles employees who are injured on duty (COID patients)[2] to

[1] The section makes provision for the right of employees to compensation as follows:
'(1) If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in this Act.
(2) No periodical payments shall be made in respect of temporary total disablement or temporary partial disablement which lasts for three days or less.
(3) (*a)* If an accident is attributable to the serious and wilful misconduct of the employee, no compensation shall be payable in terms of this Act, unless –
(i) the accident results in serious disablement; or
(ii) the employee dies in consequence thereof leaving a dependant wholly financially dependent upon him.
(*b*) Notwithstanding paragraph *(a)* the Director-General may, and the employer individually liable or mutual association concerned, as the case may be, shall, if ordered thereto by the Director-General, pay the cost of medical aid or such portion thereof as the Director-General may determine.
(4) For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer, if the employee was, in the opinion of the Director-General, so acting for the purposes of or in the interests of or in connection with the business of his employer.
(5) For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment.'

[2] The COIDA defines an 'employee' in s 1(xix) as 'a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes –
(*a*) a casual employee employed for the purpose of the employer's business;
(*b*) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;
(*c*) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;
(*d*) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;
but does not include –
(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;
(ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;
(iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;
(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;
(v) a domestic employee employed as such in a private household'.

claim compensation, which includes reasonable costs incurred by them or on their behalf in respect of medical aid[3] necessitated by an accident[4] or an occupational disease,[5] not from their employers,[6] but from the Compensation Fund established under s 15 of the COIDA.[7] These employees consult a wide range of medical practitioners who are entitled to recover their consultation fees, payable in accordance with a tariff of fees[8] determined from time to time by the second respondent, the Director-General of the Department of Labour,[9] from the commissioner to whom the Director-General has delegated this function.

[3] In terms of s 6A of the COIDA, the commissioner's office administers the processing and payment of all claims arising from the provision of compensation and

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[3] Defined in s 1(xxiv) of the COIDA as meaning 'medical, surgical or hospital treatment, skilled nursing services, any remedial treatment approved by the Director-General, the supply and repair of any prosthesis or any device necessitated by disablement, and ambulance services where, in the opinion of the Director-General, they were essential'.

[4] The term 'accident' is defined for purposes of COIDA in s 1(i) thereof as meaning 'an accident arising out of an employee's employment and resulting in a personal injury, illness or the death of the employee'.

[5] Defined in s 1(xxix) of the COIDA as 'any disease contemplated in section 65 (1) (*a*) or (*b*)' thereof.

[6] The employers are, however, required to register with the commissioner in terms of Chapter IX of COIDA to whom they are liable to pay a levy, which becomes part of the assets of the Compensation Fund for the purpose of enabling payment of compensation to or on behalf of employees who have been injured or killed or contracted a disease in the course of their employment, and who become entitled to compensation in terms of COIDA.

[7] The section provides the following:

**'Compensation Fund**

15(1) There is hereby established a fund to be known as the compensation fund.

(2) The compensation fund shall consist of

(*a*) any moneys vested in the compensation fund in terms of subsection (3);

(*b*) the assessment paid by employers in terms of this Act;

(*c*) any amounts paid by employers to the Director-General in terms of this Act;

(*d*) any penalties and fines imposed in terms of this Act other than by a court of law;

(*e*) any interest on investments of the compensation fund and the reserve fund;

(*f*) any amounts transferred from the reserve fund;

(*g*) the payments made to the Director-General in terms of section 88;

(*h*) any other amounts to which the compensation fund may become entitled.

(3)*(a)* The accident fund established by section 64 of the Workmen's Compensation Act shall, as from the commencement of this Act, cease to exist, and all amounts credited to the accident fund immediately before such commencement, shall as from such commencement vest in the compensation fund.

*(b)* All liabilities and rights, existing as well as accruing, of the accident fund shall devolve upon the compensation fund as from the commencement of this Act.'

[8] In terms of s 76(1) of the COIDA and the amounts published annually in the *Government Gazette* by the Minister of Labour.

[9] The Director-General is responsible for the implementation and administration of the COIDA and may delegate the day-to-day performance of her or his duties to the commissioner who is appointed by the Minister in terms of s 2(1)*(a)* of the COIDA.

medical services to affected employees and their dependants, and any refunds to employers where applicable.[10] The claims must be lodged in the manner and form stipulated by the COIDA and the regulations promulgated thereunder.[11] According to the parties, this is often a time-consuming and onerous task for the medical practitioners. The result is that claims often do not conform to the relevant requirements. This hampers the ability of the commissioner to consider and adjudicate the claims and render due payment.

[4] It is in this context that the appellant, Compensation Solutions (Pty) Ltd, which trades under the name and style of CompSol, renders services to, inter alia, medical practitioners[12] who provide medical services to COID patients, in respect of the administration of medical aid accounts for services and consumables they dispense to the patients for submission to the commissioner. It does this by concluding contractual arrangements with the medical practitioners in terms of which it purchases the right, title and interest in medical aid account claims against the commissioner in respect of the services they have rendered to COID patients, at a discount. The appellant thus

[10] Under s 6A of the COIDA in terms of which:
'the commissioner shall –
(a) receive notices of accidents and occupational diseases, claims for compensation, medical reports and accounts, objections, applications, returns of earnings and payments due to the compensation fund;
(b) by notice in the *Gazette* prescribe the rules referred to in section 56 (3) (c), as well as the forms to be used and the particulars to be furnished in connection with notice of occupational injuries and diseases, claims for compensation or any other form or matter which he or she may deem necessary for the administration of this Act.'

[11] In terms of s 43 of the COIDA which provides:
'(1) *(a)* A claim for compensation in terms of this Act shall be lodged by or on behalf of the claimant in the prescribed manner with the commissioner or the employer or the mutual association concerned, as the case may be, within 12 months after the date of the accident or, in the case of death, within 12 months after the date of death.
(*b*) If a claim for compensation is not lodged as prescribed in paragraph *(a)*, such claim for compensation shall not be considered in terms of this Act, except where the accident concerned has been reported in terms of section 39.'

[12] A 'medical practitioner' is defined in s 1(xxv) of the COIDA as 'a person registered as a medical practitioner in terms of the Medical, Dental and Supplementary Health Service Profession Act, 1974 (Act 56 of 1974)'.

acquires the right to submit claims to the commissioner and receive payment thereof for its own account.

[5] The system worked well initially. But inordinate delays taken with the processing, validation and payment of these claims gradually set in resulting in severe backlogs. After various unsuccessful efforts to rectify the situation, the appellant ultimately resorted to litigation, in June 2009. It sought certain declaratory orders and a mandamus against the commissioner to address the inefficiencies of his office. Pursuant thereto, the parties concluded a settlement agreement which the commissioner personally signed on his own behalf and in respect of his co-respondents. On 31 July 2009 this was made an order of court (the settlement order) in terms of which the parties agreed, inter alia, that:

'1. The [commissioner] shall process medical accounts submitted to him in relation to medical aid provided to employees by medical practitioners, as envisaged in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("the Act") within a reasonable time from the submission of such accounts.

2. In respect of the submission of a medical account relating to a claim which has been accepted (ie the [commissioner] has accepted liability for the claim), and in respect of a medical account submitted after such acceptance, a reasonable time for the [commissioner] to process, validate and effect payment of such validated medical accounts is within 75 days of the acceptance of a claim, or where this occurs after acceptance of the claim, the date of submission of such accounts. For avoidance of doubt, it is recorded that in respect of medical accounts submitted before acceptance of a claim, the 75 days will be calculated from the date of acceptance of the claim.

3. The [commissioner] shall process the backlog of medical accounts . . . by 30 October 2009.

4. The [commissioner] shall pay the [appellant] interest at the current legal rate of interest (being 15.5 per cent per annum) on all currently outstanding medical accounts to which the letter of demand dated 25 March 2009 relates, from such date of demand to the date of payment of each such respective account.

5. The [appellant] will submit a compact disc to the [commissioner] on a fortnightly basis containing a list of claims, and the [commissioner] shall thereupon provide the status of each claim, and where the claim has been accepted, the date of such acceptance, to the [appellant] within 7 (seven) days of receipt of the compact disc.

6. The parties record their mutual commitment to a functional process in relation to claims and medical accounts submitted by the [appellant], and a good working relationship in that regard. Accordingly to resolve any queries, dispute or discrepancies in relation to medical accounts submitted for payment, the [appellant] and the [commissioner] (or his designated representatives) shall meet weekly at the latter's Port Elizabeth offices.

7. This agreement shall apply equally to the [Director-General] as the party principally responsible for compliance with the obligations and performance of the functions set out in the Act.

8. The Respondents shall pay the party and party costs of this application, as taxed or agreed, including the costs of two counsel.

9. The Respondents consent to this agreement being made an order of court.

10. The parties accept the above undertakings in settlement of the above application.'

[6] A mere two months after the settlement order, the commissioner had failed to comply with his obligations in terms of its provisions. The appellant's demand for a meeting in terms of paragraph 6 of the order also went unanswered. As a result the appellant launched three action proceedings against him for three separate claims in the court a quo which were all defended. The appellant applied for summary judgment in respect of each of the actions and, in the absence of bona fide defences, judgments were granted against him. However, the commissioner's office still failed to process and pay validated claims within the 75 day period decreed by the settlement order and incorrectly rejected proper medical accounts. This prompted the appellant to launch two successive contempt proceedings against the commissioner, in November 2009 and in February 2010, seeking a declaratory order that he was in wilful contempt of the settlement order. Both proceedings were duly settled upon the commissioner's undertaking to pay the amounts due and the costs thereof. Yet, despite all these

proceedings in which the commissioner had ultimately admitted liability and settled the amounts in issue, submitted claims were still not processed in accordance with the settlement order. As at 15 July 2013 an amount of R95 639 044.85 was outstanding for longer than 75 days.

**Proceedings in the court a quo**

[7] The commissioner's failure to pay this amount prompted the current proceedings which were launched in July 2013. The appellant sought an order (a) declaring the commissioner to be in contempt of paragraphs 1, 2, 5 and 6 of the settlement order; (b) imposing such punishment upon the commissioner for such contempt as the court may deem meet, payment of the sum of R93 903 293.08 and ancillary relief. The commissioner opposed the application. But even though he was sued in his personal capacity, he did not depose to the answering affidavit. Instead it was deposed to by Mr SM Masalesa, a Senior Practitioner in the Medical Payments section of the Compensation Fund. An unsworn statement apparently meant to stand as the commissioner's opposing affidavit, after he was specifically given an opportunity by the court to file a supplementary affidavit deposed to by him personally, was rightly struck out of the record.

[8] According to Mr Masalesa, the commissioner was not in contempt of the settlement order as he had tried his best to adhere to its terms. His commitment to abiding the settlement order and fulfil his statutory obligations, so it was contended, was evidenced, for example, by the very fact that he had agreed to the settlement order, the engagement of entities such as Siemens Business Systems and then EOH Holdings Limited and its subsidiary, Medical Services Organisation South Africa (Pty) Ltd t/a MSO (MSO) to assist with the processing of the medical accounts and to implement the automation of the management of the medical account system in a bid

to eliminate the backlogs. Any non-compliance with the settlement order was therefore neither wilful nor mala fide but was caused by unavoidable challenges. These challenges included disputes regarding what was owed; the Advance Payment Agreement scheme concluded by the parties meant to facilitate advance payment of unverified medical accounts to relieve the appellant's cash flow pressures, whose lawfulness had been questioned by the Auditor-General; inadequate human resources and an ageing information technology system which was ultimately replaced and decentralised to all the provinces to improve the turnaround time in processing claims.

[9] After the filing of the replying affidavit the parties concluded yet another detailed agreement on the future conduct of their dealings, which was also made an order of court, in terms of which they agreed as follows:

'1. The [appellant] and the [commissioner] shall nominate at least two representatives each who shall meet as from Monday the 24th of February 2014 during office hours for the purpose of effecting an accounting reconciliation of all the MSO lists submitted by the [appellant] to the [commissioner] up until LIST MSO91 or Batch 122;

2. The parties are directed to use their best endeavours in a spirit of cooperation to reach agreement on such accounting exercise, and to resolve any dispute line items if possible;

3. The parties shall prepare a joint report in relation to the line items upon which agreement has been reached, and such line items upon which no agreement can be reached. This process shall be completed by 16h00 on 24 March 2014. The parties shall file this report by no later than 16h00 on 31 March 2014.

4. At the conclusion of each MSO list referred to in paragraph 1 above, a list of line items upon which agreement has been reached shall be processed by the [commissioner] for immediate payment in the full and precise amount of that list to the applicable CompSol nominated SP bank accounts;

5. In such instances where a given account that is paid in accordance with the aforegoing, is also included in the 5 advance payment agreement lists applicable to the advance payments made, the [appellant] shall repay such accounts by no later than the 10th business day of a calendar month following the payment of the medical account to the [commissioner];

6. Thereafter the parties shall meet for the same purpose and in the same manner on a bi-weekly basis;

7. The matter is postponed sine die;

8. Costs of the hearing on 18 February 2014 are reserved.'

[10] There was no compliance with this order either. No joint report was prepared or filed as ordered until the appellant unilaterally filed an interim report in the form of an affidavit. With the intervention of the court the parties thereafter, on 17 September 2014, concluded a joint report in which they agreed, inter alia that 'the total sum of the accounts included in lists MSO 1-91 … then still unpaid, amounted to R93 903 293.08 … due and payable [which] had not been paid because of logistical problems in the systems of the financial divisions of the [commissioner] to physically effect payment'. The commissioner now admitted liability for the amount claimed despite his previous denial of indebtedness.

[11] Relying on the judgments in *Tasima (Pty) Ltd v Department of Transport & others*,[13] *Johannesburg Taxi Association v Bara-City Taxi Association & others*[14] and *Federation of Governing Bodies of South African Schools (Gauteng) & another v MEC for Education, Gauteng*,[15] the court a quo noted that the commissioner was fully aware of the settlement order as he was a signatory thereto and made the following findings. It held however that there was no basis for the contempt proceedings because the settlement order did not impose obligations towards the court. This was so because in making the parties' agreement an order of court it had merely noted a 'contract between the parties in respect of the terms thereof' which did 'not in any way place the court in the position of instructing or commanding the parties'. In the court's view,

[13] *Tasima (Pty) Ltd v Department of Transport & others* 2013 (4) SA 134 (GNP) paras 51, 71, 147 and 151.
[14] *Johannesburg Taxi Association v Bara-City Taxi Association & others* 1989 (4) SA 808 (W) para 8.
[15] *Federation of Governing Bodies of South African Schools (Gauteng & another v MEC for Education, Gauteng* 2002 (1) SA 660 (T).

even if it was wrong in this conclusion, the commissioner's non-compliance was neither wilful nor mala fide because 'the disobedience must be contemptuous of the court and not as between the parties', as here. There could therefore 'be no contempt towards the court as no obligation exists between the non-complier and the court'.

**Proceedings on appeal**

[12] The issues on appeal were those determined in the court a quo and we were asked to determine the status of the settlement order and whether the commissioner acted wilfully and mala fide in failing to comply with its provisions. The gist of the commissioner's argument was that the settlement order was one *ad pecuniam solvendam* (for the payment of money) and that the consequence of non-compliance therewith was therefore execution, not committal for contempt of court. Moreover, the settlement order lacked the characteristics of 'a true court order or a court order *stricto sensu*' because all its terms were dictated by the parties and were not imposed by the court on its own motion. It was a mere recordal of such terms and did not 'constitute a direction by the court for a litigant to do, or refrain from doing something'. Thus its breach could not found contempt proceedings. And, in any event, there was no evidence showing beyond reasonable doubt that the commissioner's non-compliance was wilful and mala fide.

[13] Regarding the nature of the settlement order, it is indeed so that an order for the payment of money in accordance with an order of court cannot found an order for committal for contempt of court unless such order was made in relation to a

matrimonial[16] or a maintenance[17] suit. And contempt proceedings are limited to the case where the court has ordered the respondent to do a certain thing and has indicated the manner in which it should be done.[18] But these principles bear no relevance here because the terms of the settlement order plainly went beyond requiring payment of money. Paragraph 1 thereof ordered that the commissioner 'shall process medical accounts submitted to him … within a reasonable period of time from the submission of such accounts'. Paragraph 2 stipulated that a reasonable time for the respondent to process, validate and effect payment of such accounts would be within 75 days from the various dates described therein. These orders are couched in specific and imperative terms and are clearly *ad factum praestandum* (for the performance of or abstinence from performing specific acts).

[14] Equally wrong is the court a quo's view, supported by the respondents, that the settlement order merely served to rubberstamp the parties' agreement. The Constitutional Court described the status of a settlement order as follows in *Eke v Parsons* (paras 29 and 31):[19]

'Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. …

[Its] effect is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to

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[16] *Slade v Slade* (1884) 4 EDC 243; *Hawkins v Hawkins* (1908) 25 SC 784; *Swanepoel v Bovey* 1926 TPD 457 at 458*; Gillies v Gillies* 1944 CPD 157; *Cf Naidu v Naidoo* 1993 (4) SA 542 (D) at 545G-I where the court held that a committal order would not be granted to compel a litigant to pay costs on an attorney-and-client scale. See also the remarks of Sachs J in *Coetzee v Government of the RSA*; *Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC) paras 61-62. Also see Andries Charl Cilliers, Cheryl Loots & Hendrik Christoffel Nel *Herbstein and Van Winsen*: *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 1106-1109.

[17] *Mulligan v Whitehorn* 1922 EDL 81; *Bold v Bold* 1934 NPD 278; *Hughes v Hughes* 1936 WLD 98; *Williams v Carrick* 1938 TPD 147 (in which many of the older cases are collected and referred to); *Manley v Manley* 1941 CPD 95; *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O). See also *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* [2002] ZACC 31; 2003 (2) SA 363 (CC) which dealt with contempt proceedings for the enforcement of children's maintenance, a fundamental right contained in s 28 of the Constitution.

[18] *Hankin v Hankin* 1932 WLD 190 at 192.

[19] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC) paras 29, 31 and 53; See also *Brookstein v Brookstein* (20808/14) [2016] ZASCA 40 (24 March 2016); *Simon NO & others v Mitsui & Co Limited & others* 1997 (2) SA 475 (W); *York Timbers Limited v Minister of Water Affairs & Forestry & another* 2003 (4) SA 477 (T).

the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order.' (Footnotes omitted)

The settlement order therefore had the full force of a court order and nothing precluded the appellant from seeking to enforce it through contempt proceedings as it has done. Its breach was not merely 'as between the parties" and the commissioner was bound to obey it as long as it had not been set aside by a court of competent jurisdiction.[20]

[15] The question which then arises is whether the appellant proved that the commissioner's failure to comply with the settlement order amounted to civil contempt of court, beyond a reasonable doubt to secure his committal to prison.[21] An applicant for this type of relief must prove (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and mala fides beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and mala fide.[22]

[16] Here, requisites (a) to (c) were always common cause. The only question was whether the commissioner rebutted the evidentiary burden resting on him. As indicated above, the court a quo gave the commissioner an opportunity to file a supplementary affidavit which would have enabled him to deal with the joint report which demonstrably established his breaches of the settlement order and all the issues raised by the appellant in the various affidavits. But he opted not to avail himself of

[20] *Clipsal Australia (Pty) Ltd & others v GAP Distributors (Pty) Ltd & others* 2010 (2) SA 289 (SCA) para 22; *Tasima (Pty) Ltd v Department of Transport* (792/2015) [2015] ZASCA 200 (2 December 2015) paras 16 and 17.
[21] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA (SCA) para 30.
[22] *Ibid* para 42; *Tasima (Pty) Ltd* para 18.

the opportunity to personally place facts before the Court as to why his non-compliance with the settlement order should not be construed as contempt of court. His only attempt to explain his conduct was to serve and file an unsigned 'confirmatory affidavit' without the court's leave.

[17] Interestingly, in an affidavit dated 11 May 2011 filed by the commissioner in one of the proceedings between the parties, he said:

'146. It must never be forgotten that apart from the "COMPSOL" claims the Fund receives on a daily basis claims from medical practitioners as well.

147. The flood of COMPSOL's claims and because priority has to be given to them, the claims submitted by other medical practitioners suffer. I have suggested earlier that what COMPSOL seeks to impose, is unconstitutional. COMPSOL seeks preferential treatment and that breaches the equality clause in the Bill of Rights.

148. When the Minister of Labour, the DG and I committed ourselves to the [settlement order] it was not revealed to us just how many claims will be submitted at a time nor did we anticipate that the flood of claims would be a hindrance to the obligations assumed in the court order.'

[18] The appellant's contentions in its founding affidavit that these comments reflected the attitude of the commissioner and his co-respondents towards its claims and that the commissioner therefore failed, intentionally, to pay them despite the settlement order because they were seen as a hindrance, were not denied in Mr Masalesa's answering affidavit in these proceedings. They were merely noted. The reason for this is not hard to find. The meaning of the comments, which I find startling in view of the fact that the appellant processes claims, for which the commissioner is liable under the law, and accordingly submits them to the commissioner for payment, is quite plain. The respondents clearly viewed the appellant's claims as a nuisance and the settlement order itself one which they could ignore because the obligations it imposed upon them regarding the manner in which the appellant's claims were to be

paid were unlawful. But then court orders must still be obeyed even if they are considered to be wrong.[23]

[19] The respondents advanced an unsubstantiated and unmeritorious allegation, on an application of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[24] that there were disputes of fact which could not be resolved on the papers. They also brought a counter-application challenging the lawfulness of the Advance Payment Agreement and claiming the repayment of the amounts paid to the appellant. Not surprisingly, they withdrew this application and were, yet again, mulcted with the wasted costs.

[20] This narrative starkly shows the commissioner's persistent and unexplained breaches of the settlement order and the flouting of the court a quo's directives in the various proceedings. It shows the utter disdain of the commissioner, a senior state official entrusted with a vitally important social welfare responsibility and vast public funds (unnecessarily wasted by his persistently contemptuous conduct), for the court, its procedures and its orders. The worst affront to the court is that he could not even be bothered to explain himself why he repeatedly failed to comply with its order. Thus, he placed no facts before the court a quo establishing reasonable doubt that his non-compliance with the settlement order was not wilful and mala fide. I can only agree with the appellant that the commissioner's conduct was scandalous and deserving of the strictest censure possible. It proved its case warranting his committal to prison beyond reasonable doubt.

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[22] *Tasima (Pty) Ltd*, (note 20, above) para 17; *Minister of Home Affairs v Somali Association of South Africa* (note 20 above) para 20.
[24] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

[21] Accordingly, the following order is made:

(a) The appeal is upheld with costs including the costs of two counsel.

(b) Paragraph 1 of the order of the court a quo is set aside and replaced with the following:

'1 The first respondent, Mr Shadrack Shivumba-Homu Mkhonto, is declared to be in contempt of paragraphs 1, 2, 5 and 6 of the court order of 31 July 2009 under case number 35047/2009.

2 The first respondent is accordingly sentenced to undergo three months imprisonment suspended for a period of five years on condition that he is not convicted of contempt of court committed within this period.

3 The first respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel where employed, the costs reserved on 20 August 2013, 5 September 2013, 12 and 18 February 2014 and the costs of attending a meeting in Johannesburg on 7 August 2014.'

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MML Maya

Acting President

**APPEARANCES**

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|---|---|
| Appellant: | PG Robinson SC (with GW Amm) |
| | Instructed by: |
| | Quiryn Spruyt Attorneys, Port Elizabeth |
| | Honey Attorneys, Bloemfontein |
| Respondents: | SK Hassim SC (with MA Dewrance) |
| | Instructed by: |
| | State Attorney, Pretoria |
| | State Attorney, Bloemfontein |