



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PR11/20

In the matter between:

UMANDA NJUZE

Applicant

And

VELILE C MAKEDAMA

(cited herein his capacity as the

Municipal Manager for the Second Respondent

And in his personal capacity)

First Respondent

EMALAHLENI LOCALMUNICIPALITY

Second Respondent

Heard: 13 August 2021

Delivered: This judgment was handed down electronically by circulation to the Applicant and the Third Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 15h00 on 19 August 2021.

JUDGMENT

LALLIE J

- [1] This is an application for contempt of court. It is opposed by the respondents. In bringing this application the applicant sought to enforce an arbitration award which was granted in her favour against the second respondent.
- [2] The facts relevant to this application are that the applicant who is an employee on the second respondent applied for the position of Financial Controller (the impugned) which the latter had advertised. Her application was unsuccessful and Mr Sawa (Sawa) was appointed to the impugned position. The applicant challenged the fairness of the second respondent's failure to appoint her at the South African Local Government Bargaining Council (the SALGBC) which in an arbitration award found her non-appointment to constitute an unfair labour practice. It ordered the second respondent to appoint her into the impugned position with effect from 4 February 2019. The second respondent failed to comply with the award. On 9 March 2021 the arbitration award was certified in terms of section 143 of the Labour Relations Act¹ (the LRA). The second respondent persisted with its non-compliance with the award even subsequent to its certification. On 18 May 2021 the second respondent's council took a resolution to comply with part of the award by authorising the first respondent to pay the applicant the amount due to her in terms of the award. The amount has been paid and the second respondent undertook to continue paying the applicant in terms of the award.
- [3] The purpose of contempt of court proceedings is trite. It is the protection of the authority, dignity and effectiveness of court orders the value of which is in their enforcement. In terms of section 143 of the LRA a certified award may be enforced as if it were an order of this court. For this application to succeed the applicant must establish that a certified award was served on the respondents which the respondents deliberately and *mala fide* failed to comply with². It is common cause that the only element that is in dispute is whether the respondents acted *mala fide* in their non-compliance with the certified award. The first respondent submitted that the respondents are not in contempt of court

¹ Act 66 of 1995 as amended.

² *Fakkie No v CC Systems* 2006 (4) SA 326 (SCS).

because their non-compliance with the award is not *mala fide*. The first respondent submitted that in terms of Municipal Systems Act³ (the MSA) a municipal manager has to develop a staff establishment for a municipality. The staff establishment has to provide posts and job descriptions for those posts as well as salaries and conditions of service for employees who occupy the posts. The first respondent submitted that as Sawa has already been appointed to the impugned position and refuses to relinquish it the respondents' compliance with the award would constitute a violation of the MSA. He stated that he can only appoint the applicant when the position is vacant. The respondents' defence therefore is that their compliance with the certified award would constitute a violation of the MSA. The second respondent is already complying with the monetary part of the award as it has already paid the applicant the amount due to her and has undertaken to continue doing so.

- [4] The applicant insisted that the respondents are in contempt of court as they could dismiss Sawa for operational requirements for the second respondent in terms of section 189 of the LRA thus freeing the impugned position and placing itself in a position to comply with award.
- [5] In *Fakkie* (supra) the court referred with approval to *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng*⁴ where the nature of contempt of court was expressed thus:

'Contempt of Court is not an issue *inter partes*; it is an issue between the court and the party who has not complied with a mandatory order of court.'

The purpose of the LRA as stated in its section 1(a) is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South African, 1996.

- [6] Section 23 of the Constitution entrenches the right to fair labour practices. In the certified award which the applicant seeks to enforce through these

³ Act 32 of 2000.

⁴ 2002 (1) SA 660 at 673 D-E

proceedings, the arbitrator found that the second respondent committed an unfair labour practice by overlooking the applicant for promotion. The arbitrator further ordered the second respondent to appoint the applicant into the position of Financial Controller with effect from 4 February 2019. The certified award is final and binding. It is valid until it is set aside.

- [7] The explanation given by the first respondent for the non-compliance with the certified award is a stratagem and an effort to perpetuate the very unfair labour practice which the arbitrator ordered the second respondent to refrain from committing.
- [8] As already stated, contempt of court is an issue between the court and the party who has not complied with a mandatory court order. The certified award is mandatory as it is final and binding. In terms of section 143 of the LRA it may be enforced as if it were an order of this court. The respondents have acknowledged their obligation not to interfere with the functioning of courts in exercising the judicial authority which is vested in them by the Constitution. Their defence, however, appears to be an attempt to interfere with the authority of this court to enforce the certified arbitration award.
- [9] The second respondent, in terms of a binding award, committed an unfair labour practice. In the process it appointed, in terms of the same award, a candidate who did not qualify for the position. By committing the unfair labour practice it acted in violation of the LRA thus violating the applicant's Constitutional right to fair labour practices. Accepting the respondents' defence literally gives the second respondent as an organ of state the liberty not to comply with a certified award or to select the parts of the award it wishes to comply with. The effect would be the destruction of the effectiveness of certified awards. It is impermissible. The second respondent created its difficulty to comply with the certified award. It may therefore not rely on it as a defence. Further, in terms of the section 210 of the LRA, the LRA prevails over any other statute other than the Constitution in the event of a conflict of statutes. When the respondents found that complying with the certified award in terms of the

LRA would conflict with the MSA they, with the assistance of their legal teams knew that compliance with the LRA prevailed.

[10] The first respondent submitted that the applicant will be appointed to the impugned position when it is vacant. The submission expresses the respondent's intention to continue defying the certified award and supports the conclusion that the non-compliance with the certified award is deliberate and *mala fide*. The respondent's defence must therefore fail.

[11] Both the law and fairness require that the applicant should not be out of pocket when asserting her rights in terms of an arbitration award in her favour.

[12] In the premises, the following order is made:

Order:

1. The first and second respondents are in contempt of court for non-compliance with the arbitration award issued by the South African Local Government Bargaining Council under case number ECD041909 dated 9 December 2019 and certified in terms of section 143 of the Labour Relations Act⁵ (the LRA) on 9 March 2021.
2. The first respondent is to be committed to imprisonment for a period of 30 days for contempt of court.
3. The order in paragraph 2 above is wholly suspended for a period of 12 months on the following condition:
 - 3.1 that the second respondent appoint the applicant to the position of Financial Controller with effect from 4 February 2019 in terms of paragraph 18.2 of the certified award within 10 days of receipt of this order.

⁵ Act 66 of 1996 as amended.

4. The second respondent pay the applicant's costs.


Z. Lallie

Judge of the Labour Court of South Africa

LABOUR COURT

Appearance:

For the Applicant:	Mr van der Veen of Wheeldon Rushmere and Cole Inc
For the Respondent:	Advocate Bodlani
Instructed by	Ndzo Attorneys

LABOUR COURT