

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/226/ 2018

In the matter between

MAKOBELI LIMPHO KABANE

APPLICANT

AND

PRINCIPAL SECRETARY

1ST RESPONDENT

MINISTRY OF POLICE AND PUBLIC SAFETY

2ND RESPONDENT

PUBLIC SERVICE COMMISSION

3RD RESPONDENT

MINISTRY OF PUBLIC SERVICE

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

Neutral citation: Makobeli Kabane vs Principal Secretary & 4 others [2022]
LSHC 147 Civ (17 June 2018)

CORAM : M.P. RALEBESE J.

HEARD : 24 MAY 2022

DATE OF JUDGMENT: 17 JUNE 2022

SUMMARY

Contempt of court – Application not opposed - Party not properly cited – Notice of Motion not addressed to anyone - Elements of Contempt – facts relied upon not proving contempt– facts alleged supporting ad pecuniam solvendam – applicant failed to discharge burden – no contempt proven beyond reasonable doubt – no order as to costs.

ANNOTATIONS

CITED CASES:

LESOTHO

National Executive Committee of Lesotho National Olympics Committee and Others v Morolong (2000-2004) LAC 450

Marabe v Maseru Magistrate's Court and Others (CC No 18/2020) [2021] LSHCONST 51 (07 June 2021).

President of the Court of Appeal v The Prime Minister and Others (C of A (CIV) No 62/2013) [2014] LSCA 1 (04 April 2014).

Ramoholi v Principal Secretary Ministry of Education and Another 1991-1996 LLR 916

Rat'siu v Principal Secretary Ministry of Forestry and Another (C of A (CIV) 9 of 2017) [2018] LSHC 28 (07 December 2018)

SOUTH AFRICA

Bayat and Others v Hansa and Another 1955 (3) SA 457

Chairman Board on Tariffs and Trade v Brenco Inc 2001(4) SA 511

Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA)

STATUTES:

The Constitution of Lesotho 1993

High Court Rules No.9 of 1980

BOOKS:

Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa, 4th Edition.

JUDGMENT

BACKGROUND AND FACTS

1. This is an unopposed application for contempt of court against 1st respondent relating to an order of court granted by **Moiloa J.** on 30th October 2018.
2. Before going into the background of the matter, let me note in passing but with concern the citation of 1st respondent merely as ‘**Principal Secretary**’ in the heading of the notice of motion and founding affidavit. It is a notorious fact, of which I take judicial notice, that all government ministries in Lesotho have Principal Secretaries, hence the importance to identify the particular **Principal Secretary** against whom these proceedings have been instituted. It is only in paragraph 2.1 of the founding affidavit that applicant mentions that 1st respondent is the **Principal Secretary for Ministry of Police and Public Safety**. It is my considered view that parties should be named with particularity in headings of the pleadings for ease of their identity. Proper citing of a party is even more critical in *casu* where there is a prayer for committal of 1st respondent to jail for contempt. It will be a challenge for anyone to execute an order of committal against “**Principal Secretary**” as that could be any of the number of **Principal Secretaries in the Government of Lesotho**.
3. I also noted that the notice of motion is not addressed to anyone contrary to **Rule 8(2) of the High Court Rules No.9 of 1980** which provides that:

*“When relief is claimed against any person, or where it is proper to give any person notice of such application, the notice of motion **shall** be addressed to both the Registrar and such person, otherwise it shall be addressed to the Registrar only.”(my emphasis)*

While non-compliance with the prescribed forms of processes for parties instituting or defending proceeding to comply with the terms of processes as prescribed it is important the Rules, it will not necessarily result in the proceedings being a nullity that cannot be condoned by the court, (See **Herbstein and Van Winsen, The civil Practice of the Superior Courts in South Africa, 4th Edition**¹).

4. The background to the instant proceedings is that in July 2018, applicant instituted mandamus proceedings (the main application) in terms of which she sought, amongst others, an order directing and compelling the 1st and 2nd respondents to afford her a fair hearing on the workplace grievances that she had duly filed in terms of the **Grievance Code 2005** and the **Public Service Act, 2005**.

5. At all material times prior to institution of the mandamus proceedings (main application), applicant was serving in the 2nd respondent Ministry as a **Senior Accountant** at salary Grade F. She was appointed to act as a **Financial Controller** at salary Grade G on 3rd February 2014. On 3rd May 2016, pursuant to some re-organisation by 3rd respondent, applicant’s substantive position of Senior Accountant was re-designated as **Assistant Finance Officer**; and the position of **Financial Controller** to which applicant was still acting, was re-designated as **Finance Officer**. At the

¹ At page 351 (2)

time of institution of the main application, applicant's acting appointment had not been terminated.

6. Applicant's grievance which triggered the main application is contained in Annexure **LK-8** to the founding affidavit (in the main application) and it reads (relevant parts only):

"Dear Sir/Madam.

Grievances

With this letter I stand to raise my grievance, and I request your intervention on the following issues;

- 1. Acting appointment effective 02/02/2014. Regulatory timeframe is three (3) month with an extension of three (3) months. I am still drawing allowance. I request to know the implication given the scenario.*
- 2. I was designated to a position of Assistant Finance Officer effective 03//05/2016. I also need clarity on this issue.*
- 3. My request is to be confirmed on this position given my experience."*

7. The gist of applicant's grievance as elaborated in the founding affidavit to the main application was that: Firstly, while she was still being paid the acting allowances, her acting appointment had endured beyond the regulatory timeframe of three months and she wanted to know the implication thereof; secondly, she deemed her re-designation as **Assistant Finance Officer** from **Senior Accountant** as being tantamount to a demotion in terms of seniority from being a 'senior' to being 'assistant'; and thirdly, she alleged that following the re-designation of her position, there were four senior vacant positions above her substantive one, (**Finance Officer, Assistant Finance Manager, Finance Manager and Director of Finance**) which practically meant that she was doing the work of all those vacant positions, as she was even reporting directly to

the **Principal Secretary** of the 2nd Respondent Ministry; on that basis, she requested that she be confirmed on the position of **Finance Officer** on which she was still acting at the time of institution of the main application.

8. The main application was not opposed but on 24th October 2018, the parties signed a deed of settlement which, on 30th October 2018, was turned into an order of court by consent. Paragraphs 3 and 4 of the deed of settlement read:

“3

The Applicant to withdraw the action filed under CIV/APN/226/2018 in pursuit of an out of court settlement as agreed.

4

1st and 2nd Respondents afford a fair hearing to the Applicant on her grievance filed”

9. After the deed of settlement was turned into an order of court by **Moiloa J.** on 30th October 2018, the respondents on two occasions constituted a panel to hear applicant’s grievance. On both occasions, applicant raised objections relating to composition of the grievance panel. Her objection was that **the Principal Secretary of the Ministry of Police and Public Safety** had to be part of the grievance panel as her immediate supervisor.

ISSUE FOR DETERMINATION

10. The issue that the court should determine is whether applicant has made out a case for contempt of court against 1st respondent.

THE LAW ON CIVIL CONTEMPT

11. The foundation for contempt proceedings with a prayer for committal to jail is enshrined in section 3 of the 1993 Constitution of Lesotho which reads:

“Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorized by law in any of the following cases, that is to say-

(a)

(b) in execution of the order of court punishing him for contempt of that court or of a tribunal.

(c) in execution of the order of court made to secure the fulfilment of any obligation imposed on him by law.”

In **Marabe v Maseru Magistrate’s Court and Others**² **Sakoane J.** relying on the case of **Fakie NO v CCII Systems (Pty) Ltd**³ concluded that after the constitutional dispensation, the following elements of civil contempt should no longer be established on a balance of probabilities but beyond reasonable doubt:

(a) the order must exist;

(b) the order must have been duly served on, or brought to the notice of the alleged contemnor;

(c) there must have been non-compliance with the order; and

(d) the non-compliance must have been wilful or mala fide.

² (CC No.18/2020) LSHCONTS 51 (07/June 2021)

³ 653/04 [2006] 52; 2006 [4] SA 326 (SCA)

APPLICATION OF THE LAW TO THE FACTS

12. The existence of a court order premised on a deed of settlement signed by the parties' legal representatives is unquestionable.
13. The contempt application has specifically been instituted against the 1st respondent. The question is whether the 1st respondent was aware of the existence of the court order. The answer to this question is contained in Annexure **MLK-2** to the founding affidavit in the instant contempt proceedings. This is a letter dated 14th December 2018 written by the **Principal Secretary Ministry of Police and Public Safety** (1st respondent) to the applicant and it reads in part:

*“This letter serves to inform you that your grievance hearing in **view of the attached court order** will be held on 24th December 2018 at the Ministry of Police and Public Safety Boardroom at 9:00am (my emphasis).”*

It is apparent from **MLK-2** that 1st respondent was aware of the existence of the court order now the subject matter and was through that letter, taking steps towards compliance with the said order.

14. The next question is whether 1st respondent failed to comply with the court order now in issue. The order as endorsed by the Registrar and **Moiloa J.** simply reads:

“The Deed of Settlement between the Parties dated 24th October 2018 is hereby made an order of Court by agreement of the parties.”

The relevant part of the Deed of Settlement in this regard is to the effect that 1st and 2nd respondents shall afford a fair hearing to the applicant on her grievance as filed.

15. As already alluded to, on two occasions (24th December 2018 and 4th January 2019) 1st respondent constituted a panel to hear applicant's grievance. In terms of the records or minutes of the grievance proceedings that are attached to the founding affidavit as annexures **KLM -4** and **KLM-5**, on both occasions, applicant raised objections on constitution of the grievance panel which did not include her immediate supervisor per the law governing grievances. Her objections were, in both proceedings noted as the proceedings were on both occasions adjourned in view of the objections. The question is whether these proceedings sufficed as 'fair hearing' as per the court order.

16. It should be noted that neither the Deed of Settlement nor the court order particularised details of the fair hearing that was to be afforded the applicant. Applicant's founding papers do not prescribe details of a fair hearing that she anticipated pursuant to the deed of settlement that was turned into the court order. There are no averments whatsoever in applicant's founding papers how the grievance proceedings organised by 1st respondent on 24th December 2018 and 4th January 2019 failed to comply with the fair hearing anticipated in the court order.

17. It is trite that the applicant in motion proceedings stands and falls by her founding affidavit. As **Herbstein and Van Winsen, The civil Practice of the Superior Courts in South Africa, 4th Edition** put it

“The general rule which has been laid down repeatedly is that an applicant must stand and fall by his founding affidavit and the facts

alleged in it, and that although sometimes it is permissible to supplement the allegations contained in the affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or deny...

See also: **National Executive Committee of Lesotho National Olympics Committee and Others v Morolong** where **Ramodibedi JA** said:

“Indeed it requires to be stressed that in motion proceedings, as in this case, it is to the founding affidavit to which the court will look to determine what the complaint is. As a general rule, an applicant must stand or fall by his petition and the facts alleged therein. The court is confined to resolving the dispute on the issues raised in the founding affidavit and must not have regard to extraneous issues and unproved facts.”

18. In *casu*, applicant bears the burden to prove beyond reasonable doubt that 1st respondent has not complied with the court order. This onus, applicant failed to discharge as she has not alleged any facts to prove that 1st respondent failed to afford her a fair hearing pursuant to the court order.

See **Bayat and Others v Hansa and Another** where Caney J said:

*“...an applicant for relief must (save in exceptional circumstance) make his case and produce all the evidence he desires to use in support of it in his affidavits filed with the notice of motion, whether he is moving **ex parte** or on notice to the respondent ...”*

19. Fair hearing (or *audi alteram partem*) as a principle is very broad and it was upon applicant to allege facts to prove that the principle has not been complied with in her case. This is more so when it is apparent that 1st respondent on two occasions constituted a panel to hear applicant’s grievances. In **Chairman Board on Tariffs and Trade v Brenco Inc Zulman JA** said:

“There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts.”

This view was reiterated by **Maqutu J.** in **Ramoholi v Principal Secretary Ministry of Education and Another** wherein he stated:

“This audi alteram partem principle is a flexible one which has to be exercised within the inherent constraints imposed by a particular situation.”

Brand AJA in **President of the Court of Appeal v The Prime Minister and Others** also said:

“...procedural fairness (component of a fair hearing) is a highly variable concept which must be decided in the context and the circumstance of each case and...the one-size-fits all approach is inappropriate...” (My emphasis)

20. It is imperative to analyse the facts upon which applicant seems to rely for an allegation that 1st respondent is in contempt. These facts appear in the founding affidavit to the contempt application. In paragraph 7.2 thereof, applicant alleges that:

*“Thereafter I personally made several attempts to enforce the Order of Court to operate in my favour...The allowances that had become the subject of my concern, which triggered me to file a mandamus court action in this Honourable Court under case number CIV/APN/266/2018, were now being paid, but were stopped halfway without any good cause shown. The allowance payments were made during the financial years **2013/2014 – 2020/2021** and were not fully paid aforesaid. I have avoided annexing the proof of payments of allowances because that will create document. I will do so in the event the 1st Respondent may so*

require. On many occasions I demonstrated to the Human Resource, Deputy Principal Secretary and ultimately to the 1st Respondent, that there was no reason why I ought not be paid all my acting allowances. I also did calculations myself of inconsistent payments of my acting allowance which have come to the shortage in the amount of EIGHT THOUSAND MALOTI (M8,000.00). The latter constitutes an outstanding balance that is due and payable to me. I did however instruct my counsel to write letters of demand on my behalf to the 1st Respondent through his legal representative in the Attorneys Office, being **Advocate Thakalekoala**, but they were still ignored. The Honourable Court is referred to annexure “**MLK-6**” and “**MLK-7**” appended hereto for ease of reference.” (My emphasis)

21.**MLK-6** is a letter dated 20th January 2022 from applicant’s counsel addressed to the **Attorney General** for the attention of **Advocate Thakalekoala** and in part it reads:

“We once more bring your attention to an outstanding matter that relates to a Deed of Settlement which has been made an order of court. Pursuant to the latter your client failed to adhere to the terms thereof, instead client has been paid insufficient acting allowances. Client on doing a verification exercise discovered that there was a deficit in the amount of M8,206.62...

Over and above this figure there is an outstanding issue of costs which our client avoided to address.

Indicate Counsel when we should have the matters addressed without issuing court process.” (My emphasis).

22.The foregoing quoted excerpts constitute facts which applicant relied upon to found her case for contempt of court against 1st respondent. These sentiments have been reiterated by applicant’s counsel, both in the written and oral submissions. On page 3 paragraph 2.1 of the heads of argument **Advocate Mathe** submitted:

“The Applicant’s claim in an action for Mandamus that was filed against the 2nd Respondent on the 11th July 2018 has been for inconsistent payments of acting allowances from 4th February 2014 against the position she had been appointed to act upon.” (my emphasis)

In paragraph 2.4.1 he stated:

“It is submitted that the stopping of the full payment of acting allowances was deliberate and clear intention not to comply with the court order. It is further submitted that the actions of the 1st Respondent are willful and mala fide in the circumstance not to comply with the order of court. It is submitted again that the 1st Respondent’s continuance to ignore and to disobey the order of court exhibits and constitutes unequivocal contempt of court” (My emphasis)

23. In his oral submissions in court, **Advocate Mathe** confirmed that what prompted the contempt application was underpayment of applicant’s acting allowances as reflected in **MLK-6** and **MLK-7**.

24. As already indicated, the essence of the court order now the subject matter was that 1st and 2nd respondents had to afford applicant a fair hearing of her grievance. The court never ordered payment of any acting allowances to the applicant. In any case The court could not have ordered payment of any acting allowances as none of applicant’s prayers in the notice of motion in the main application (mandamus) related to non-payment of allowances.

25. Even supposing the court had ordered payment of acting allowances to applicant, that order could not be enforced through contempt proceedings as per the decision of **Mokhesi J** in **Rat’siu v Principal Secretary Ministry of Forestry and Another** that orders *ad pecuniam solvendam* are not enforceable by means of contempt proceedings.

26. I have already found that applicant failed to discharge the burden of proving

that 1st respondent failed to afford her a fair hearing regarding her grievance and thus in contempt of the court order. Even if applicant would have proven that 1st respondent failed to comply with the court order, the next issue would be whether the non-compliance was wilful or *mala fide*. Upon perusal of applicant's founding papers, it appears that the respondents fulfilled one aspect of applicant's grievance, being a demand for confirmation on the position of **Financial Controller** (Grade G) which was later re-designated to **Finance Officer** (Grade G) in which she had been acting. In terms of annexure **MLK-1** to applicant's founding affidavit in the instant contempt proceedings, applicant was promoted to the position of **Finance Officer** (Grade G) effective from 01st October 2019. **MLK-1** is a letter from the **Principal Secretary for Police** addressed to applicant and it reads (in relevant parts):

*“As per the **Public Service Commission** resolution, 8969th Minutes, Item 1824/19 dated 6th September, 2019; I have a pleasure to inform you that you have been appointed on promotion to the position of **Finance Officer**, in the Grade G scale in the **Ministry of Police and Public Safety** with effect from 01st October, 2019.”*

Applicant's promotion in that regard partly addresses applicant's written grievance dated 23rd April 2018 (annexure **LK-8** to the founding affidavit in the main application) which in item 3 reads:

“My request is to be confirmed on this position given my experience”.

27. Premised on that apparent part fulfilment of applicant's grievance, and in the absence of any indication whatsoever by applicant of the effect of the

promotion on her grievance, the court could infer that the promotion vitiated

the need for a fair hearing on her grievance. This would lead to a finding that

1st respondent's failure to afford applicant a fair hearing on her grievance, (had it been proven) would not have been wilful and *mala fide* in the circumstances, as such hearing would be moot and therefore futile.

DISPOSITION

28. Though there is an order of court dated 30th October 2018 which respondent was well aware of, applicant failed to prove beyond reasonable doubt that 1st respondent failed to comply with it. I therefore find that 1st respondent is not in contempt and the following order is made:

- (a) The application for contempt of court is dismissed.
- (b) There is no order as to costs.

M.P RALEBESE J.

JUDGE

For applicant: Advocate Mathe

For respondents: No appearance