

HELD AT MASERU

In the matter between:

MANTŠEPI MOFIHLI-MONTŠI

APPLICANT

And

**MINISTRY OF PUBLIC
WORKS AND TRANSPORT
TAEMANE SERIBETSO
ATTORNEY GENERAL**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT**

JUDGMENT

Hearing Date: 24th October 2013

Application for committal and punishment for contempt of Court. Applicant claiming wilfulness and mala fides on the part of 1st Respondent. 1st Respondent claiming ambiguity of the order being enforced. Court finding that the order being enforced was ambiguous. Court further finding that failure to seek clarity on the order amounts to wilful and mala fide refusal to comply with the said order. Court directing 1st Respondent to take all reasonable measures to comply with the arbitration award within 30 days, failing which 2nd Respondent is to be detained for 3 months. No order to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for committal and punishment for contempt by 2nd Respondent for failing to comply with the Directorate of Dispute Prevention and Resolution (DDPR) arbitration award in referral A0578/2008. It was heard on this day and judgment was reserved for a later date. Applicant was represented by Adv. Ntaote, while Respondent was represented by Adv. Sekati. The matter was opposed and both parties were in attendance.

2. The background of the matter is that Applicant had referred a claim for payment of wages while on suspension, with the DDPR. An award was issued in her favour wherein the 1st Respondent was ordered to make payment in the sum of M75,960.00, to Applicant as her lost wages while on suspension. The learned Arbitrator had further made an order in the following,
*“a) The respondent is ordered to reinstate the applicant in terms of section 73 of the labour Code Order no. 24 of 1992;
b) If reinstatement is impracticable in the light of the circumstances, the respondent is ordered to take appropriate action to remedy the situation the applicant was subjected to since 1994;
c) This amount should be paid at the offices of the DDPR in Maseru within 30 days of receipt of this award.”*
3. Thereafter, the 1st Respondent only complied with the said arbitration award in so far as payment of the wages while on suspension was concerned and not the reinstatement aspect thereof. It is Applicant's, on the one hand, that Respondent has wilfully and *mala fides* refused to obey the learned Arbitration's order to reinstate her or to take appropriate action to remedy the situation, if in the light of the circumstances reinstatement is impracticable. It is Respondent's case, on the other hand, that it did not wilfully refuse to obey the said arbitration award. In the light of this background, the submissions of parties and Our judgment is recorded in the following.

SUBMISSIONS AND ANALYSIS

4. It was Applicant's undisputed case that subsequent to the issuance of the DDPR arbitration award, Applicant presented herself at the offices of the 1st Respondent, with the object of being reinstated. However, She was returned by the 2nd Respondent on the ground that the matter was being taken up with relevant authorities. Thereafter, Applicant was never called for feedback, until she again presented herself at the offices of 1st Respondent. This time she was told by the 2nd Respondent that from then onwards, the matter would only be dealt with through court processes.
5. It was submitted that the behaviour and attitude of 1st Respondent, through its Human Resources Manager, clearly

demonstrated its wilful and *mala fides* refusal to comply with the arbitration award to reinstate Applicant. It was added that this amounts to contempt of Court. The Court was referred to the cases of *Namane Zacharia Khotle v Security Lesotho (Pty) Ltd LC 44/1998*; and *East London Transitional Council v MEC for Health, Eastern Cape & others 2001 (3) SA 1133*, in support. It was added that even assuming that reinstatement was impractical, 1st Respondent ought to have at least attempted to remedy the situation by offering compensation to Applicant *in lieu* of reinstatement, as the award had directed. Further that, if this aspect of the award was not clear, they ought to have approached the learned Arbitrator for interpretation, rather than to wilfully fail to comply with same.

6. It was Respondent's case that Applicant was employed under the project called LB04/B204. Further that Applicant was suspended sometime in March 1994. Sometime in April 1994, and during the suspension of Applicant, the project lapsed. As a result of the lapse of the project, reinstatement of Applicant into her former position then became impracticable. It was added that this explains why the arbitration award went further to give direction in the event that reinstatement was not practical.
7. It was submitted however, that the direction given was not clear. It was argued that if the arbitration award had intended compensation in the place of reinstatement, it ought to have said so. Further that in failing to specifically provide for compensation as alternative, the award clearly had something in mind other than compensation, which was not known to 1st Respondent. It was added that 1st Respondent merely failed to comply due to lack of understanding of the award, which can only be shed by the learned Arbitrator who made the award. It was concluded that at worst, 1st Respondent can only be ordered to seek the interpretation of the said order, rather than for any punitive order to be made.
8. It is not in dispute that Applicant was suspended as far back as in 1994. A simple arithmetic calculation of time shows that at least a period of about 19 years has lapsed since the suspension. This is the very same suspension that the award being enforced seeks to cure through an order for

reinstatement or appropriate action. It is therefore without doubt that it would be unreasonable to expect that the position that Applicant occupied as far as in 1994, remains open to this date. We are therefore drawn by circumstances to conclude that reinstatement is no longer practical.

9. According to the award, in the event that reinstatement is not practical, *“the respondent is ordered to take appropriate action to remedy the situation the applicant was subjected to since 1994.”* We are in agreement with the 1st Respondent this order is not clear as We also cannot place any interpretation to it. Not only is not clear, it cannot be interpreted to mean that Respondent must pay to Applicant compensation *in lieu* of reinstatement, as Applicant suggests. We say this because compensation *in lieu* of reinstatement, is a remedy that flows from section 73 of the *Labour Code Order 24 of 1992*. It is a remedy that is availed to parties in respect of claims for dismissal.

10. The above position is clear from section 73 of the *Labour Code Order (supra)*, which provides as follows,

“(1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee

(2) If the Court decides that it is impracticable in the light of the circumstances for the employer to reinstate,... the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement.”

This is not the case *in casu*, as Applicant was only suspended.

11. We therefore agree with 1st Respondent that it may have not been able to appreciate the meaning of the alternative award to reinstatement. However, when an order has been made it is binding on all parties concerned and both parties bear certain rights and obligations. By this We mean that it is the obligation of the party against whom the order has been made to comply with same, with an attendant right to challenged that order if they so wish (see *Namane Zacharia Khotle v Security Lesotho (supra)*). Similarly, it is the right of the party in whose favour an order has been made, to enforce it. The obligation to comply includes the responsibility to put in place all reasonable measures that will enable one to comply with the given order.

12. *In casu*, 1st Respondent claims not to have understood the meaning of the alternative order made by the learned Arbitrator. This being the case, it was the responsibility of the 1st Respondent to seek clarification on that order from the Arbitrator who made it. This is has been suggested to 1st Respondent by Applicant and no explanation had been proffered to explain the failure to do so. We are therefore led to the conclusion that the 1st Respondent elected not to take reasonable measures to enable it to comply with the order of the DDPR.
13. In essence, 1st Respondent's failure to seek the clarification of the order of the DDPR and to comply with same was therefore wilful and *mala fides*. We say this because, clearly they chose to hide behind the defect in the order to avoid compliance. This is a clear demonstration of both *mala fides* and wilfulness to avoid compliance. There is an array of remedies available to parties in law, where there is defect of this nature in the order made. Among such remedies is the right to seek an interpretation. This Court cannot countenance the attitude of the 1st Respondent in these proceedings, as that would set a very ruinous precedent in Our legal jurisprudence.
14. In terms of Our law, arbitration awards of the DDPR carry the same effect as orders of this Court. This position is reflected under section 228E(5) of the *Labour Code Order (supra)*, as follows,
"An award issued by the arbitrator shall be final and binding and shall be enforceable as it if was an order of the Labour Court."
15. It is Our attitude that the behaviour of 1st Respondent, through 2nd Respondent, is contemptuous as it involves both a wilful and *mala fide* refusal to obey an arbitration award, which by virtue of section 228E(5) above, is an order of this Court. Our attitude finds support in the case of *East London Transitional Council v MEC for Health, Eastern Cape & others 2001 (3) SA 1133 at 1137 H-I*, where in the Court had the following to say,
"It had been held by our Courts, in a long line of decisions, that contempt of court is the wilful and mala fide refusal to comply with an order issued by the Court."

16. In terms of section 24(2)(j) of the *Labour Code Order (supra)*, where this Court has determined that contempt has been committed, as We have, it has the power to
“to commit and punish for contempt any person who disobeys or unlawfully refuses to carry out or to be bound by an order made against him or her by the court under the code.”
17. The discretion to elect either of the two options, contained in section 24(2)(j) of the *Labour Code Order (supra)*, must be exercised judiciously. The concept of judicial discretion was unpacked by the Labour Appeal Court in the case of *Tsotang Ntjebe & others v Lesotho Highlands Development Authority and Teleng Leemisa & others v Lesotho Highlands Development Authority LAC/CIV/17/2009*, as follows,
A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the Court.”
18. Given the peculiar circumstances of this matter, wherein the order to be complied with is not clear, We find that it would be inappropriate to readily commit 2nd Respondent to jail for failure to comply. It would be ideal to first seek the interpretation of the order and to provide an allowance on the part of 1st Respondent to comply. It is only when the ambiguity in the order has been cleared, and 1st Respondent continues with its contemptuous behaviour, that We will be in a position to impose the punishment of committal.

AWARD

We therefore make an award in the following terms:

- a) That the 1st Respondent to take all reasonable measures to comply with the award of the DDPR, within a period of 30 days of delivery of this judgment;
- b) Failure to comply with prayer (a) with result in the imprisonment of the 2nd Respondent for three months; and
- c) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF DECEMBER 2013.

**T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO**

**Mrs. THAKALEKOALA
MEMBER**

I CONCUR

**Mrs. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANTS:
FOR RESPONDENT:**

**ADV. NTAOTE
ADV. SEKATI**