

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 12810/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 31/1/2024

SIGNATURE

In the matter between:

WILLIAM HLOPHEKA MALULEKA

Applicant

and

**NATIONAL COMMISSIONER OF
SOUTH AFRICAN POLICE SERVICES**

1ST RESPONDENT

**DIVISIONAL COMMISSIONER, CRIME
INTELLIGENCE SERVICES**

2ND RESPONDENT

JUDGMENT

HF JACOBS, AJ:

[1] This is an application for interdictory relief aimed at compelling the respondents to comply with the provisions of the consent paper which was made an order of court and for a declaratory order holding the first and second respondents in contempt of court. During address I was informed by counsel for the applicant that he would not move for an order for committal of the respondents or any of them at this stage. Mr Maluleka, a Sergeant in the South African Police Service says that he was deployed by the South African Police to

perform special duties at the National Conference of the African National Congress which was held at Mangaung. He was not the only person so deployed and there were other civilians who were not attached to the police service at all (they were members of the public) who were funded by the South African Police for the purchasing of food and provided with accommodation at the expense of the State. At that time Mr Maluleka was promised “*by the Respondents that after completion of [his] duties at the conference [he] will be promoted to the rank of Lieutenant Colonel*”. No particulars are given which of the respondents made the promise to Mr Maluleka. The civilians mentioned above were appointed and employed by the South African Police and enlisted in the Police Service and promoted to the rank of warrant officers and the South African Police as their employer promised to rent safe houses for them as members of a new unit in the division of Crime Intelligence of the South African Police Service titled Rapid Deployment Intelligence Division and that vehicles would be purchased for all the members so employed. During 2013 the safe houses were rented on behalf of the persons appointed as aforesaid and vehicles were bought for all those members (including Mr Maluleka).

[2] During 2013 the South African Police disbanded the unit it established for crime intelligence a year earlier and the members were posted to their original positions.

[3] Mr Maluleka then brought an application to the High Court against sixteen respondents including the respondents in this application. On 28 March 2019 Mr Maluleka (who appeared in person) concluded an agreement that was taken up in a draft order and made an order of court by Mdalana-Mayisela J. It is this order that Mr Maluleka alleges the respondents are in contempt of and failed to adhere to. The order reads as follows:

“Having Heard the parties and by agreement between the parties in this application on 28 March 2019,

It is ordered as follows:

1. *That the Respondents undertake to discuss Bonafide, with the applicant, a placement program, mutually agreeable between the parties, in a chosen work environment, by the applicant as of 01 May 2019.*
2. *The Respondents are ordered further to facilitate all employment projections that would put the applicant in a favourable scenario, taking in mind, the projections, that would equate to that position with erstwhile colleagues, in his position, and status, mindful of the period 2013 to date.*
3. *That the respondents are ordered to guarantee to the applicant that they take responsibility for any enquiries associated with his placing, in his position of choice, to be agreed upon.*
4. *The Respondents are ordered to pay all outstanding medical aid fees, and housing allowances, as well as the outstanding 2016 salary to the applicant, including the Long Services (20 years) award payment.*
5. *The Respondents are further ordered to pay costs relating to the above case number on a party and party scale.”*

[4] Counsel for Mr Maluleka informed me during address that the respondents complied with paragraphs 4 and 5 of the order but are and have been in contempt of paragraphs 1, 2 and 3 of the order. The respondents challenge the factual averments made by Mr Maluleka. I must mention my concern about the jurisdiction of this court to have entertained the application at the conclusion of which the consent paper was made an order of court. This court would not have had jurisdiction over the dispute the applicant has with his employer if it falls under the Labour Relations Act of 1996 and the exclusive jurisdiction of the Labour Court. The particular aspect was not ventilated in the proceedings before me and I will deal with the relief sought in the notice of motion.

[5] Mr Maluleka was promoted from the rank of Sergeant to the rank of Warrant Officer by the respondents on 9 June 2021. This is also evident from the correspondence addressed by Mr Maluleka to the respondents under his own hand. Counsel for the respondents submitted that Mr Maluleka's true compliant is that he had not been promoted to the rank of Lieutenant Colonel as promised at Mangaung and this lies central to the litigation against the respondents.

[6] The draft order that was made an order of court on 28 March 2019 contain, in my view, nothing more than a *pactum de contrahendo* (an agreement to negotiate or contract). The respondents did negotiate with Mr Maluleka and even promoted him from the rank of Sergeant to that of Warrant Officer. It is quite correct that the respondents did not comply with and/or satisfied all the demands of Mr Maluleka, including his promotion to the rank of Lieutenant Colonel.

[7] The basic rules for interpreting a judgment or an order of court are no different from those applicable to the construction of written instruments. The intention must be ascertained primarily from the language of the order as construed according to the well established rules of interpretation.¹ A contextual interpretation of the consent paper shows that there exists or existed a difference of opinion and view about Mr Maluleka's promotion and conditions of employment between him and his employer and that the parties to the consent paper "*undertook to discuss*" that and to reach a position that is "*mutually agreeable*" in a *bona fide* manner. The provisions of paragraphs 1, 2 and 3 of the consent paper are, in my view, not definite and certain and cannot constitute an executive part of a judgment to measure the respondents' conduct against to determine whether they complied with their obligations imposed by those paragraphs as Mr Maluleka contends for.

[8] The object of contempt proceedings is the imposition of a penalty in order to vindicate the courts honour consequent upon the disregard of its order

¹ See *Engelbrecht v Senwes Ltd* 2007 (3) SA 29 (SCA) at par 32; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

and/or to compel performance in accordance with the order when an unlawful and intentional refusal or failure to comply with an order of court is found to exist.²

[9] An applicant in contempt of court proceedings must show, in order to succeed with an order of committal, that: (1) An order was granted against the respondents; (2) That the respondents were either served with the order or informed of the grant of the order and could have no reasonable ground for disbelieving that information; and (3) The respondents have either disobeyed the order or neglected to comply with it.³

[10] In the present proceedings it is common cause that an order was granted by agreement between the parties and taken up in the consent paper. It was not challenged by the respondents that they were informed and had knowledge of the content of the consent paper.

[11] Once an applicant has proved the order, notice of its content by the respondents and non-compliance, the respondents bear the evidential burden in relation to wilfulness and *mala fides* and should the respondents then fail to advance evidence that establishes reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.⁴

[12] A reading of the consent paper does not, in my view, yield an interpretation that affords Mr Maluleka anything more than that what the respondents are prepared to agree to. If he has a clear right of the kind that would entitle him to an order against the respondents to which they are not prepared to consent to, he is at liberty to litigate for the relief in that connection against the respondent. The consent paper is not “open ended” and does not afford Mr Maluleka the right to enforce as claimed in documents attached to the papers, how, where and on what terms he would like to be employed. In my

² See Herbstein and Van Winsen, the Practice of the High Court of South Africa, 5th Edition Vol 2 page 1100

³ See *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 344

⁴ See *Fakie NO* (supra) at par [42]

view the evidence does not show that the respondents have either disobeyed the order or neglected to comply with it. They did so but consensus was not reached. Even if it is assumed that the applicant has discharged the onus to show the requirements of contempt of court mentioned above, I am of the view that the respondents have discharged the evidential burden in relation to wilfulness and *mala fides* and there exists reasonable doubt whether they are in contempt of the consent paper.

[13] There is no reason in law that I can find in these papers that they were obliged to do more than what the evidence shows they had done. I am of the view that the respondents were not in contempt of the order as alleged by Mr Maluleka and he does not have a clear right to the order sought in paragraph 1 of the notice of motion.

[14] Under the circumstances the application is dismissed with costs.

H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 26th January 2024.

APPEARANCES

Applicants' counsel: Adv L R Modiba

Applicants' attorneys: Mmowane Attorneys

Respondent's counsel: Adv M S Phaswane
Adv M M Mabotja (Kgwale)

Respondent's attorneys: State Attorney Pretoria