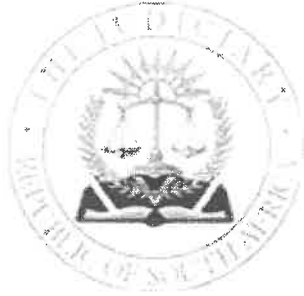



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2018/22296

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
	06/06/2018
	DATE
	
	SIGNATURE

In the matter between:

BAPOO ISHENDRA

Applicant

and

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

First Respondent

**THE PROVINCIAL COMMISSIONER
CORRECTIONAL SERVICES GAUTENG
PRETORIA**

Second Respondent

**THE HEAD OF THE JOHANNESBURG
CORRECTIONAL CENTRE MONDEOR
JOHANNESBURG**

Third Respondent

J U D G M E N T

MABESELE, J:

[1] The applicant approached this court on 21 June 2018, on an urgent basis, for an order (i) declaring the respondents to be in contempt of the order of this court, dated 29 June 2014, and (ii) committing the respondents to prison for such a period and under such terms as this court deems appropriate.

[2] The applicant is an inmate in the Johannesburg Medium 'B' Correctional Centre. He appeared in person.

[3] Subsequent to granting of the aforementioned order the applicant addressed a letter of complaint, dated 9 May 2018, to the head of the Correctional Centre to the effect that soya flour in the bread that he is provided with is triggering atopic eczema he is suffering from, to the extent that the plaques and lesions are now extremely widespread and visible on his face.

[4] He stated in the letter that he was on high dosage of insulin due to his prolonged treatment received for diabetes and is also a cardiac patient.

[5] Due to the fact that the prison offers no facility to reheat rice and potatoes for consumption at supper, he accordingly provided the authorities with the following options:

- (i) Providing him with bread not containing any soya flour;
- (ii) Providing him with alternative source of carbohydrate for dinner, together with the means to reheat it;
- (iii) Permitting his family members to provide him with an alternative bread product free from soya flour.

[6] Since he did not receive any response, he addressed the second letter, dated 29 May 2018, to the authorities alerting them that his health is deteriorating and drew their attention to paragraph 2.1 of the order of the court dated 29 July 2014.

[7] He warned the authorities that failure to respond to his complaint constitutes a breach of the provisions of the Correctional Services Act¹ as well as contempt of the aforementioned order and was left with no option than to bring an application for contempt of court.

[8] The order reads:

¹ 111 of 1998

"2. *The Minister of Department of Justice and Correctional Services, the Commissioner for Correctional Services, Gauteng, and the Head of Johannesburg Correctional Centre, is to:-*

- 2.1 *Provide the Applicant with adequate and proper healthcare to address his health in general as contemplated by section 12(1), (2)(a) and (4)(a) of Act 111 of 1998;*
- 2.2 *Provide on an urgent basis the prescribed medication for the treatment of his chronic illness punctually and to ensure that he receives it on a continuous and uninterrupted basis as contemplated by section 12(1), (2)(a), (4)(a) and regulation 7(1) of the Regulations to the Act;*
- 2.3 *Protect the Applicant's human dignity and accommodating him in a cell with sufficient floor and cubic space to enable him to move freely and sleep comfortably within the confines of the cell as contemplated by section 7(1) of the Act and regulation 3(2)(a) of the Regulations to the Act;*
- 2.4 *Accommodate the Applicant in a safe and well-ventilated cell, free of cigarette and other hazardous smoke;*
- 2.5 *Attend to the unhygienic conditions and in particular the low of sewerage down the wall on an urgent basis;*
- 2.6 *The Applicant is given access to cold² water for washing purposes as contemplated by regulation 3(2)(d)(ii) of the Regulations to the Act;*
- 2.7 *The medical officer concerned at the Johannesburg Correctional Centre assess within 30 days the Applicant's health and chronic illness with the view to detaining and accommodating him separately in a single cell;*
- 2.8 *The Respondents jointly and severally, the one paying the other to be absolved are to pay the costs of this application."*

² sic

[9] The parties, by agreement, handed up a written report of the dietician who have been attending to the applicant's health condition.

[10] The principal issue now is whether the respondents have shown good cause why they should not be held in contempt for not complying with the order of court. It is common cause that the respondents have knowledge of the order.

[11] It is trite that disobedience of an order of court constitutes civil contempt of court. The offence consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it.³ This offence has received a constitutional "*stamp of approval*" as is evident in section 165 of the Constitution⁴ which requires that the dignity and authority of the courts be upheld.

[12] It is so that one of the requirements of contempt of court arising from the failure to comply with an order of court is that the non-compliance should have been wilful and *mala fide*.

[13] Corbett CJ in *Frankel Max Pollack Vinderine v Menell Jack Hyman Rosenberg*⁵ stated that once the application for relief based upon this form of contempt of court has established that the order of the court has been brought to the knowledge of the respondent and the respondent has failed to comply

³ Burchell J, *Principles of Criminal Law* (5th ed) (2016) p 864

⁴ Act 108 of 1996.

⁵ 1996 (3) SA 355 (AD) at 367I-J

with it, wilfulness and *mala fides* on the part of the respondent will normally be inferred and the *onus* will be on the respondent to rebut this inference on a balance of probabilities.

[14] This approach was adopted by the Constitutional Court in the matter of *Pheko and Others v Ekurhuleni City*.⁶ The court in that matter held that the presumption rightly exists that when the elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create doubt as to their existence.

[15] According to the report of the dietician by the name of Memela, the applicant was referred to her by the prison authorities (subsequent to the granting of the order) to address issues relating to his health and diet. Ms Memela is in the employ of the company known as African Global Operations. It appears that this company has concluded an agreement with the respondents to prescribe proper diet to inmates in accordance with their chronic illnesses.

[16] The applicant has been a patient of Memela since 2015 and his dietary prescription is a diabetic diet. This diet is also in line with the applicant's medical conditions which require a limited sodium and cholesterol intake as well as increased fibre.

⁶ 2015 (5) SA 600 (CC) at 621D

[17] Memela stated that the applicant has previously tested positive to multiple allergies, including a soya allergy. She noted that the applicant suffers from severe eczema which had worsened since she last had a consultation with him in 2014. The applicant alerted her to the fact that bread has a high level of soya flour than most other foods and therefore he cannot continue consuming it. She confirmed that indeed all bread contains soya flour as one of the main ingredients and the applicant is diabetic. Therefore his carbohydrate intake cannot be compromised.

[18] She offered to give the applicant an alternative starches in the form of an increased portion of boiled potatoes and rice in place of bread. These alternative starches are also offered to other inmates with similar dietary requirements. The applicant reported to her that he cannot consume these foods at a cold temperature.

[19] Due to the applicant's refusal to accept an alternative starches she and the DCS officials spent some time searching for a supplier for bread, free of soya flour. They have successfully found one and are currently in the process of setting up an appropriate delivery schedule with the supplier.

[20] It is common cause that the bread containing soya flour aggravates the applicant's chronic illness. It was for this reason that an alternative diet was recommended to the applicant. The applicant declined the recommendation on the ground that an alternative diet is served at a cold temperature. It is evident from the report that the prison is unable to serve hot meal at supper.

It is for this reason, in my view, that the prison resorted to plan “B” and secured a supplier to provide bread, free of soya flour. This plan was also suggested to the prison authorities by the applicant, as an option.

[21] During arguments, the applicant stated that his refusal to accept plan “B” was prompted by the fact that there are no time frames stipulated in the report of the dietician with regard to the “*planned schedule*” for the delivery of bread. He argued that without the time frames, delivery of bread may be delayed deliberately to frustrate him and prolong his ill-health.

[22] Notwithstanding plan “B” which was suggested to the authorities as an option, the applicant argued that hot meal should be served to him at supper. In this regard, he relied on the matter of *Participating Management Committee v Minister of Justice and Correctional Services and Others*⁷ and argued that the court in that matter was of the view that the inmates are entitled to hot meal at supper. He referred to the matter of *Rapodile v Minister of Justice and Correctional Services and Others*,⁸ wherein the prison authorities were directed to place a gay inmate in a single cell or same cell with other gay inmates in protection of his dignity, and claim entitlement to same rights.

[23] Ms Magano’s argument on behalf of the respondents is concise, clear and persuasive. She argued that the fact that a dietician offered the applicant an alternative diet to bread with soya, in the form of potatoes and rice, and together with the DCS officials, secured a supplier of bread, free of soya, for

⁷ Unreported, case no: 17/16317 (GP)

⁸ 2016 (2) SACR 413 (GJ).

the applicant, demonstrates clearly, willingness on the part of the respondents to take care of the applicant's health and thus complied with the order of court. She stamped her argument by stating that a rejection by the applicant of the efforts made by the respondents to secure special bread for him, paid for by the public, demonstrates his lack of appreciation.

[24] The applicant's argument centres on a provision of hot meal in the form of potatoes and rice at supper or bread, free of soya flour. He does not deny that bread, free of soya flour, was secured for him within a period of one month⁹ since he had suggested such bread to the prison authorities as an option. In that sense the authorities complied with the provision of section 8(1) and (2) of the Act and accordingly complied with paragraph 2.1 of the order of court which the applicant is concerned about.

[25] Section 8(1) provides: *"Each inmate must be provided with an adequate diet to promote good health as prescribed in the regulations."*

Section 8(2) provides: *"Such diet must make provision for the nutritional requirements of children, pregnant women and any other category of inmates whose physical condition requires a special diet."*

[26] The applicant relied on the matters of *Participating Management Committee*¹⁰ and *Rapodile*¹¹ to argue for contempt of order of this court by the respondents. Since the respondents have complied with the provision of

⁹ a letter to the prison authorities, dated 9 May 2018, requesting bread, and a positive response on 21 June 2018

¹⁰ *supra*

¹¹ *Supra*

section 8(1) and (2) of the Act, it is unnecessary to elaborate on those cases save to say that they are not advancing the applicant's case for contempt.

[27] To sum up, contrary to the applicant's argument that the respondents failed to act in accordance with the order of court, the facts demonstrate that the applicant, in fact, has failed to appreciate the efforts made by the respondents to provide him with an alternative diet to the one that aggravates his health condition and has unreasonably rejected efforts made to secure supplier of special bread, which was recommended by him as an option, and was paid for, by the public.

[28] The respondents complied with the provision of section 8(1) and (2) of the Act which requires that diet provided to inmates must make provision for the nutritional requirements, among others, of the category of inmates whose physical condition requires a special diet.

[29] Compliance with the provision of section 8 of the Act demonstrates that the respondents are considerate of the applicant's chronic illness and are intending to prevent the applicant's health from deteriorating, thus, complying with paragraph 2.1 of the order.

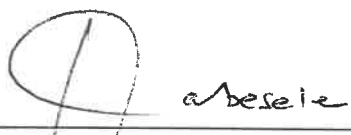
[30] For these reasons it cannot be said that a case for contempt of court has been established against the respondents, nor can it be said that the respondents have not shown good cause why they should not be held in contempt. Having said this, I am of the view that it will be in the interests of

justice to place the third respondent on terms to speed up a schedule for delivery of the bread, free of soya flour, to prison.

[31] In the result, the following order is made:

31.1 The application is dismissed.

31.2 The third respondent is directed to finalise a schedule for delivery of the bread, free of soya flour, to prison within ten (10) days from the date of this order.



M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing	: 21 June 2018
Date of Judgement	: 6 July 2018
For the applicant	: In person
For the respondent	: Adv K. Magano
Instructed by	: State Attorneys, Johannesburg