THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 144/21

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Applicant**

MOHALE AND 1 OTHER **Second Applicant**

and

AIRCYCLE ENGINEERING C **First Respondent**

PIETER VAN HEERDEN **Second Respondent**

DWAYNE PIENAAR **Third Respondent**

Heard: **20 August 2021**

Delivered: **8 September 2021**

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 8 September 2021.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicants approached this Court for an order to find the First Respondent's directors, Mr van Heerden (the Second Respondent) and Mr Pienaar (the Third Respondent) guilty of contempt of Court.

[2] The Respondents opposed the application.

[3] The matter was heard on 20 August 2021 and in accordance with the provisions of the directive issued in respect of access to the Labour Court and the conduct of proceedings during the Covid-19 pandemic, the parties agreed to present arguments virtually via Zoom.

Brief history

[4] The Second and further Applicants (the Applicants) were employed by the First Respondent and they were dismissed on 20 September 2016 for misconduct. Aggrieved by their dismissal, the Applicants referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was arbitrated and on 23 June 2017 an arbitration award was issued in favour of the Applicants.

[5] The Applicants were awarded retrospective reinstatement and the First Respondent was ordered to pay them an amount of R 115 015,95. The arbitration award was certified in terms of the provisions of section 143(3) of the Labour Relations Act[1] (LRA) on 1 July 2019.

[1] Act 66 of 1995, as amended.

[6] On 13 October 2020 the Sheriff attached the First Respondent's goods on the strength of a warrant of execution that was issued after the certification of the arbitration award. On 25 November 2020 the First Respondent effected payment of the sum of money demanded by the Sheriff (R 136 368,34). It is common cause between the parties that the Respondent had complied with the portion of the arbitration award that ordered the payment of a sum of money.

[7] In April 2021 the Applicants filed a contempt of Court application, seeking enforcement of the portion of the arbitration award in terms of which the Applicants were reinstated. The Applicants' case is that the Respondent failed to comply with the arbitration award to the extent that they were not reinstated, notwithstanding the fact that the arbitration award ordered their reinstatement.

Contempt of Court

[8] In *Bruckner v Department of Health and others*[2] the Court dealt with the requirements for contempt and it was held that:

> 'It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:
> (a) that the order was granted against the respondent;
> (b) that the respondent was either served with the order or informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and
> (c) that the respondent is in wilful default and mala fide disobedience of the order.'

[9] In *Anglo American Platinum Ltd and another v Association of Mineworkers and Construction Union and others*[3] the Court has held that:

> 'The principles applicable in an application such as the present are well-established. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt committal is a 'peculiar amalgam' since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an

[2] (2003) 24 ILJ 2289 (LC).
[3] (2014) 35 ILJ 2832 (LC) at para 4.

obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see para 8 of the judgment). The court summarized the position as follows at para 42:

To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and *mala fides*) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

[10] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited (Matjhabeng)* [4] the Constitutional Court confirmed the requisites for contempt of court as follows:

'I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*. It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof − beyond reasonable doubt − was applicable.'

[4] 2017 (11) BCLR 1408 (CC).

[11] The Applicants have to prove the aforesaid requisites beyond reasonable doubt and I will deal with them in turn.

Analysis

Existence of the order and service

[12] *In casu* the existence of the certified arbitration award is not disputed. The Respondents took no issue with service and this Court has no reason to find that the Respondents do not have knowledge of the certified award.

Non-compliance with the certified arbitration award

[13] It is not disputed that the portion of the arbitration award which ordered the First Respondent to reinstate the Applicants has not been complied with. The only issue remaining for this Court to consider is whether the non-compliance with this portion of the award is wilful and *mala fide.*

[14] The main defence raised by the Respondents is that the Applicants did not make a single attempt to report for duty in order to be reinstated. They failed to report for duty since the award was issued in their favour in 2017, notwithstanding the fact that employment was available for them. The Respondents' case is that the Applicants did not report for duty and at no stage have they contacted the Respondents to arrange for them to commence with duty. Furthermore, the Respondents never refused to accommodate them or to reinstate them and compliance with that part of the award was prevented or made impossible by the conduct of the Applicants. The Respondents are not in wilful or *mala fide* non-compliance with the award.

[15] In *Kubeka and others v Ni-Da Transport (Pty) Ltd*[5] the Labour Appeal Court confirmed the principle that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employee, but that it is rather the court directing the employees to tender their services and the employer to accept the tender. If the employee fails to tender his or her services

[5] (2021) 42 ILJ 499 (LAC).

or the employer refuses to accept the tender, there is no restoration of the employment contract. The LAC held that *"an unfairly dismissed employee must elect his or her preferred remedy and, if granted reinstatement, must tender his or her services within a reasonable time of the order becoming enforceable."*

[16] It is evident from the aforesaid *dicta* that there is an obligation on an employee who was awarded reinstatement, to tender his or her services within a reasonable time and for the employer to accept such a tender.

[17] For the Applicants *in casu* to succeed with their contempt of Court application, they have to show that they indeed, within a reasonable time, tendered their services to the Respondents, in compliance with the terms of the arbitration award, and that the Respondents refused to accept their tender of services. It is evident from the Applicants' founding affidavit that not a single averment has been made to the effect that they have tendered their services within a reasonable time and that the Respondents refused such a tender.

[18] In short: this Court has to consider whether the Respondents are in wilful and *mala fide* disobedience of the certified arbitration award when they failed to reinstate the Applicants. The onus is on the Applicants to prove beyond reasonable doubt that that Respondents are in wilful default and *mala fide* disobedience and that they are guilty of contempt.

[19] It is important to consider the explanation tendered by the Respondents when this Court considers whether the Respondents failed to comply with the terms of the certified award.

[20] In their opposing papers the Respondent indicated that they are not in contempt of Court for failing to reinstate the Applicants, as the Applicants never tendered their services.

[21] The Applicants filed a replying affidavit wherein they dispute the Respondents' version and averred that they indeed tendered their services, but that such a tender was refused by the Respondents. It is trite that the Applicants' case should be made out in their founding affidavit and as such the averments to the

effect that they had tendered their services and that such was refused by the Respondents, should have been made in the founding affidavit. That is certainly not a version that could be introduced for the first time in a replying affidavit.

[22] A further difficulty with the version presented in the replying affidavit is that the replying affidavit is deposed to by Mr Shezi, NUMSA's regional legal officer and that any averments made by Mr Shezi as to whether the Applicants reported for duty in accordance with the arbitration award, is hearsay evidence. There is no confirmatory affidavit deposed to by the Applicants and the weight that could be attached to the hearsay evidence introduced in the replying affidavit, is minimal, if any.

[23] The proper approach to determining the facts was set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[6]. Thus, when factual disputes arise in circumstances where the applicant seeks final relief, the relief should be granted in favour of the applicant only if the facts alleged by the respondent in its answering affidavit, read with the facts it has admitted to, justify the order prayed for.

[24] The Applicants in their founding affidavit did not make a single averment to the effect that they had tendered their services, as they were obliged to do if they were serious in enforcing the reinstatement order that they had obtained in their favour as far back as June 2017. The contempt of Court application was filed only in April 2021, which was the first occasion the Applicants deemed it prudent to take steps to compel compliance with an award that reinstated them retrospectively. There is no explanation as to why the Applicants did not bring

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, where it was held: *'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . .'*

the contempt of Court application in 2017, the year when they were reinstated, but instead waited until 2021 to approach this Court for relief, when the relief they now seek, should have been sought much earlier.

[25] What is also concerning is that the arbitration award, which reinstated the Applicants, was issued on 23 June 2017, but certification of the award was only applied for in March 2019, almost two years later. The arbitration award was certified on 1 July 2019, yet contempt proceedings were only instituted in April 2021, another 21 months later. There is not a single averment to show that the Applicants tendered their services within a reasonable time. Further, to wait from 2017 when reinstatement was ordered until 2021 when contempt proceedings are instituted to compel compliance, is not reasonable. Instead, it is an undue delay to seek compliance in circumstances where it was no secret to the Applicants that they had obtained an order reinstating them and retrospectively so in 2017. The certification of the award and contempt proceedings should have been instituted immediately or very soon after it became apparent to the Applicants that the Respondents were not going to comply with the order reinstating them. In fact, there is not an iota of evidence before this Court that the Applicants ever reported for duty and that they made any attempt to restore the employment relationship with the Respondents.

[26] I have to endorse the aim of the LRA namely to resolve labour disputes speedily and without delay. A case like the present one does not promote the interest of justice and it undermines the statutory purpose of expeditious dispute resolution.

[27] Be that as it may, based on the facts placed before this Court, the Applicants failed to prove beyond reasonable doubt that that Respondents are in wilful default and *mala fide* disobedience of the certified arbitration award. As a result, this application has to fail.

Costs

[28] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[29] Ms Pretorius for the Respondents argued that the application should be dismissed with costs.

[30] In *Zungu v Premier of Kwa Zulu-Natal and Others*[7] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[31] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[32] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[8] it was emphasized that:

> '…unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.'

[33] This is a case where the Court has to strike a balance and in my view this is a case where it is appropriate to make a cost order. The Applicants have filed an application for the Respondents to be found in contempt of Court and for them to be incarcerated or fined. However, the Applicants failed to make the necessary averments to sustain a case in terms of which the Respondents could

[7] (2018) 39 ILJ 523 (CC) at para 24.
[8] (2012) 33 ILJ 2117 (LC) at para p 2119 I-J.

be found guilty of contempt. The Applicants waited for four years to approach this Court to compel compliance with an order of reinstatement, when they were expected to report for duty within a reasonable time and to bring a contempt application as soon as it became clear that the Respondents would not comply. A contempt application that is brought four years after the Applicants were supposed to have been reinstated, is opportunistic and is an abuse of process.

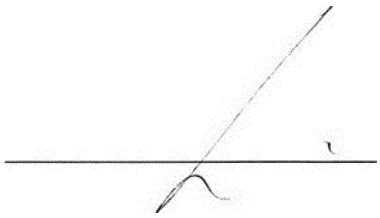
[34] Contempt proceedings are to be instituted expeditiously, as the main purpose is to compel compliance and to ensure that orders are complied with. What purpose could be served four years later, is unclear and to wait that long to take steps to compel compliance in a labour matter, undermines the very purpose of the LRA. NUMSA should have considered the applicable principles, the delay and the prospects of success before instituting this application and the Applicants should have been advised that there was no basis to approach the Court after the reinstatement order was left unattended for many years.

[35] The Applicants failed to make out a case for the relief they seek and the Respondents, on the other hand, were compelled to brief lawyers to oppose a meritless application. I can see no reason why the Respondents are not entitled to a cost order in this instance. The interests of justice will best serve if the First Applicant is to pay the costs.

[36] In the premises I make the following order:

<u>Order</u>

1. The application is dismissed;
2. The First Applicant is to pay the Respondents' costs.
3.



Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants	:	Mr V Shezi of NUMSA
For the Respondents	:	Adv L Pretorius
Instructed by	:	Stroebel Singh Theunissen Inc Attorneys