

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Reportable**

Case no: J873/23

In the matter between:

**PUBLIC SERVANTS' ASSOCIATION OF SOUTH AFRICA**  
**OBO LUCKY NHLANHLA MSIBI**

Applicant

and

**DEPARTMENT OF CORRECTIONAL SERVICES**

First Respondent

**MAKGOTHI SAMUEL THOBAKGALE**

Second Respondent

**Heard:** 19 April 2024

**Delivered:** This judgment was handed down electronically by emailing a copy to the parties on 29 April 2024. This date is deemed to be the date of delivery of this judgment.

**Summary:** Application to hold respondents in contempt following failure to implement arbitration award or review it. Applicant failed to prove requirements of contempt. Respondents challenged constitutionality of section 143(4) of the LRA but laid no basis for challenge. Non joinder of Minister of Labour fatal to the constitutional challenge. Application dismissed.

**JUDGMENT**

**DANIELS J**

Introduction

[1] This judgment relates to an application to hold the respondents in contempt for their failure to comply with an arbitration award issued by the General Public Service

Sector Bargaining Council (hereafter the “GPSSBC” or the “Bargaining Council”) under case number GPPBC266-22 (hereafter “the award”).

[2] For ease of reference, the first respondent will be referred to as “the Department” or “DCS” and second respondent will be referred to as “the National Commissioner”. Although the applicant in this matter is the Public Servants Association (the “PSA”) in this judgment “the applicant” refers to the affected member of the PSA, Mr Lucky Msibi.

[3] On 7 September 2023, Baloyi AJ issued a rule nisi *inter alia* ordering the National Commissioner to appear in court on 9 November 2023 to show cause as to why he was not in contempt, as contemplated in section 143(4) of the Labour Relations Act No. 66 of 1995 (the “LRA”). Baloyi AJ directed that the court order (issued on 7 September 2023) be served personally on the National Commissioner, and further ordered that respondents must bear the costs of the application if they opposed it.

[4] On 9 November 2023, the rule was extended to 15 February 2024, with costs reserved.

[5] On 15 February 2024, once again, the rule was extended to 19 April 2024, with costs reserved. The matter came before me on 19 April 2024. On that day, the National Commissioner was in attendance. After argument, the matter was postponed to 14 May 2024, the rule nisi was extended to that date, and judgment was reserved.

[6] In his founding affidavit, applicant seeks an order that he is entitled to his wages from the date of the award to the date when the application is launched. However, no such relief is sought in the notice of motion. In the circumstances, there is no need to determine this issue in this judgment.

#### Material facts

[7] The Department dismissed the applicant, Mr Msibi, for alleged misconduct on or about 28 February 2022. The applicant referred a dispute about the fairness of his

dismissal to the Bargaining Council for conciliation, and, when that failed, he referred the dispute to arbitration.

[8] The arbitrator issued an arbitration award on 9 August 2022 reinstating Mr Msibi with effect from the date of his dismissal. The arbitrator ordered the Department to pay him backpay in the amount of R132 706.25 on or before 26 August 2022.

[9] Upon receipt of the award, on or about 5 September 2022, the DCS Area Commissioner drafted and submitted a memorandum to the DCS Regional Commissioner. In it, the Area Commissioner advised that he and the Regional Coordinator for Legal Services believed there were prospects of successfully reviewing the award. They recommended the review and sought authorisation from the Regional Commissioner to institute the review. The Regional Commissioner accepted their recommendation on 6 September 2022.

[10] On 13 October 2022, following receipt of a further memorandum relating to the award, the DCS Director for Legal Services approved the institution of legal proceedings to review and set aside the award.

[11] On 21 October 2022, the DCS Area Commissioner addressed a letter to the Office of the State Attorney instructing it to launch an application to review and set aside the award.

[12] On 10 November 2022, the Director of the CCMA certified the award in the manner contemplated by section 143 of the LRA.

[13] The papers do not reveal that anything of significance occurred between 10 November 2022 and the end of July 2023.

[14] On or about 1 August 2023, the PSA launched this contempt application. It served the application on the DCS, but only included an unsigned version of the founding affidavit. The PSA states that it did so as a courtesy because the DCS was not entitled to a copy of the contempt application given that clause 13 of the Practice Manual states that contempt applications must be brought on an *ex parte* basis.

[15] As previously mentioned, this court issued an order on 7 September 2023, in which it ordered *inter alia* that the National Commissioner attend court on 9 November 2023. It also ordered the respondents to file answering affidavits explaining their failure to comply with the certified arbitration award. The order stated that, in the absence of the National Commissioner attending court, or the respondents explaining their failure to comply with the award, the respondents would be found in contempt.

[16] The respondents argue that they are not in contempt, and, in any event, the provisions in section 143(4) of the LRA is unconstitutional. When I heard the matter, the respondents had filed an affidavit explaining their non-compliance with the court order (s) and the National Commissioner was in court.

#### *Procedural issues*

[17] In *SA Municipal Workers Union v Minister of Cooperative Governance and Traditional Affairs & another*<sup>1</sup> (hereafter “SAMWU”) Van Niekerk J (as he then was) considered whether Rule 16A of the Uniform Rules of the High Court was applicable in this court. Uniform Rule 16A requires a party who raises a constitutional issue in the High Court to prepare and place a notice on the dedicated notice board at court to alert all persons with an interest in the matter. Van Niekerk J (as he then was) held that this court was governed by its own rules and, while this court may look to the Uniform Rules for guidance, if necessary, this was a matter for the court’s discretion. In *SAMWU*, Van Niekerk J found that Rule 16A need not be applied. I see no reason to take a different approach in this matter.

#### *Constitutional challenge*

[18] In its answering affidavit, and during argument, the second respondent contended that section 143(4) of the LRA is unconstitutional on the following basis:

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<sup>1</sup> (2024) 45 ILJ 595 (LC)

Section 143(4) allegedly impinges several rights in section 35 of the Constitution including: the right to freedom and security of person, the right to remain silent, the right to be promptly informed of the right to remain silent, the right not to be compelled to make any confession or admission, the right to a fair trial, the right to be presumed innocent until proven guilty.

18.1 Section 143(4) allegedly permits the granting of an interim order against a respondent without the knowledge of that respondent.

### *Analysis of the constitutional challenge*

[19] The crime of contempt of court, in the form of scandalising the court, survived early constitutional scrutiny. In *S v Mamabolo*<sup>2</sup> the Constitutional Court, per Kriegler J (as he was then) explained the importance of the institution as follows:

*“...the constitutional position of the judiciary is different, really fundamentally different. In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state.”*

[20] In the pre-constitutional era, under our common law, applicants in contempt proceedings were required to prove the elements of contempt on a balance of probabilities. This has changed with the introduction of our Constitution, our supreme law.

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<sup>2</sup> [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001)

[21] The Supreme Court of Appeal (the “SCA”) in *Fakie NO v CCI Systems (Pty) Ltd*<sup>3</sup> (hereafter “*Fakie*”) with the majority judgment penned by Cameron JA (as he then was) stated:

“[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.’” (Own emphasis)

[22] Unlike public prosecution for a criminal offence, an order of contempt of court usually has, as its primary object, inducing the contemnor to obey the terms of the previous order.<sup>4</sup>

[23] Cameron JA (as he then was) noted that although the respondent in contempt proceedings is not an 'accused person' (as contemplated in section 35 of the Constitution) he or she is still entitled to analogous protections in motion proceedings.

[24] At para 42, Cameron JA (as he then was), succinctly set out the requirements for contempt. The SCA held that an applicant must prove all the requirements for contempt – existence of the order; service of the order; non-compliance; willfulness and *mala fides* – and all these elements must be proved beyond reasonable doubt. The applicant bears the onus but, once the applicant has proven the order, service or notice of the order, and non-compliance, then the respondent bears an evidential burden in relation to willfulness and *mala fides*. If the respondent fails to advance evidence that establishes reasonable doubt as to whether the non-compliance was willful and *mala fide* then contempt will have been established beyond reasonable doubt. The weightier onus marks a significant shift from our common law - which only

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<sup>3</sup> 2006 (4) SA 326 (SCA)

<sup>4</sup> *Fakie* at para 7

required the applicant to prove the elements of contempt on a balance of probabilities.

[25] Accordingly, primarily because civil contempt may lead to loss of liberty, the applicant bears the onus of proving the elements of contempt beyond reasonable doubt. These protections still exist in section 143(4) of the LRA. Civil contempt does not permit the arbitrary deprivation of liberty.

[26] In *Pheko and others v Ekurhuleni Metropolitan Municipality*<sup>5</sup> the issue of contempt was again considered by our Constitutional Court. The court endorsed the findings in *Fakie*, and, seemingly, also endorsed its view that the respondent in civil contempt is not an accused person entitled to the rights under section 35 of the Constitution. The court confirmed that “civil contempt”, a form of relief sought through civil proceedings, relates to conduct *ex facie curiae* apropos a wilful disregard of order of court. The court also confirmed that because civil contempt is a criminal offence, it may also be determined through criminal proceedings, the object of which would be punitive. The court held that civil contempt may be both punitive and coercive, but usually it is only coercive (upholding the dignity of court by coercing compliance with the court order).

[27] Turning to the challenge in this matter, it is important to bear in mind that the Labour Court Practice Manual is binding on the parties and this court.<sup>6</sup>

[28] Clause 13 of the Practice Manual provides for a court order summoning the respondent to court to explain his or her conduct (re non implementation of the award) through an affidavit. The Practice Manual requires personal service of the court order on the respondents. The Practice Manual does not shift the onus, which remains with the applicant – who must prove all the requirements for contempt beyond reasonable doubt (although the burden of proof shifts to the respondent after

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<sup>5</sup> 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015)

<sup>6</sup> See clause 2.2 of the Practice Manual. See *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others* (2014) 35 ILJ 1672 (LC) at para 11, *Ralo v Transnet Port Terminals & Others* (2015) 36 ILJ 2653 (LC) at paras 8 and 9, *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) at para 15, and *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 798 (LAC) at para 22.

the applicant has proven the existence of the order, service of the order, and non-compliance).

[29] The respondents assume that the court order dated 7 September 2023 makes an interim finding that they are in contempt. This is incorrect. The order merely directed the respondents to appear before court and to provide an explanation on affidavit.<sup>7</sup> The order states that *if* the respondents fail to comply with *its* order, they will be found guilty of contempt. Accordingly, the respondents are not simply found guilty of contempt because of their non-compliance with a certified award. Instead, by not complying with an order of this court, after it has been served on them, the respondents' risk being found in contempt of this court.

[30] The respondents assume, without any real foundation or analysis, that the fundamental rights enshrined in section 35 of the Constitution (which appears to relate only to criminal case proper) are also applicable in the context of civil contempt. This is incorrect. While civil contempt has a criminal dimension, it follows the rules of civil procedure.<sup>8</sup> As Cameron JA (as he then was) put it: "the civil process for a contempt committal is an oddity that is distinctive in its combination of civil and criminal elements, and it seems undesirable to straitjacket it into the protections expressly designed for a criminal accused under section 35."<sup>9</sup> (Own emphasis)

[31] Furthermore, while the respondents cry foul because section 143(4) impinges certain rights in section 35 of the Constitution, they do not engage with the limitations analysis required by section 36(1) of the Constitution.

[32] Section 36(1) of the Constitution provides that limitations of fundamental rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors *including*: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. It is

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<sup>7</sup> The affidavit must set out the reasons for non-compliance with the certified award.

<sup>8</sup> *Fakie* at para 11

<sup>9</sup> *Ibid* at para 26

not enough to say that a particular statutory provision impinges on other fundamental rights. Most fundamental rights are limited by statute in some or other manner. The issue is whether the limitation is reasonable and justifiable as contemplated in the Constitution.

[33] It is improper for a party to raise a constitutional challenge by simply stating that the impugned statutory provision limits fundamental rights and to then leave it to the court to conduct the analysis required by section 36(1). The respondents do not attempt to deal with the factors in section 36(1). The respondents do not say why the limitation of the rights in section 35, assuming such rights are applicable in civil contempt, do not pass constitutional muster. On this basis alone, the constitutional challenge falls to be dismissed.

[34] In any event, assuming section 143(4) of the LRA does indeed limit fundamental rights under section 35 of the Constitution, which I do not accept, I believe that the limitation of such rights is reasonable and justifiable in an open and democratic society based on equality and freedom taking into consideration all the factors in section 36(1) of the Constitution. The limitation analysis must begin with the purpose of section 143(4). Section 143(4) of the LRA is essential to the functioning of key dispute resolution processes in the LRA, the rule of law,<sup>10</sup> the effective resolution of labour disputes, and, of course, the constitutional right to fair labour practices – which encompasses the right against unfair dismissal. Given that the respondents do not engage in the limitations analysis at all, it is unnecessary to explore these issues further. The respondents should have explained why they contend that section 143(4) falls foul of section 36(1) of the Constitution. It is not for this court to do the work of the respondents.

[35] As earlier explained, the fundamental rights of an accused person, under section 35 of the Constitution, are not implicated in civil contempt proceedings. Even if I am wrong on this, there are no submissions to the effect that the limitation of such

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<sup>10</sup> Respect for the role and authority of the courts is fundamental to rule of law. See *Burchell v Burchell* (ECJ 010/2006) [2005] ZAECHC 35 (3 November 2005); See also *Fakie* at para 35

rights is unreasonable as contemplated in section 36(1) of the Constitution. For these reasons, the constitutional challenge is misconceived and falls to be dismissed.

[36] During argument, the respondents asked which court or body are the respondents in contempt of? The respondents argued that where the award is certified (but not made an order of court) there can be no contempt of court. With respect, this misses the point. The order is that of this court taken on an *ex parte* basis. The *ex parte* order holds no consequence for the respondents unless they fail or refuse to comply with the order. The respondents can only be found in contempt if they fail to appear in court as directed by this court, or if they fail to provide an explanation (satisfactory to this court) under oath for their failure to comply with the certified arbitration award. By failing to comply with an order of this court a respondent would violate the dignity, repute, or authority of the court.

#### *Contempt of court: general principles*

[37] Disregard of a court order “*not only deprives the other party of the benefit of that order but also impairs the effective administration of justice*”.<sup>11</sup>

[38] As previously mentioned, the applicant in contempt proceedings, must prove the existence of an order, service of the order on the respondents, non-compliance with the order. These requirements must be proved beyond reasonable doubt. Thereafter, the respondents must raise reasonable doubt as to the wilfulness and male fides of their non-compliance. If the respondents cannot do so, the applicant is deemed to have proved those elements beyond reasonable doubt. The onus of showing that the non-compliance was wilful and male fides remains on the applicant, such onus to be discharged beyond reasonable doubt.

#### *Contempt by the first or second respondents?*

[39] The facts demonstrate that the respondents took concrete steps to review the award, and they took such steps within the statutory time periods to launch a review

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<sup>11</sup> Love and Sufrin in The Law of Contempt 3rd Ed (Butterworths London) 1996 at 656

application. Unfortunately, the Office of the State Attorney let them down. The facts demonstrate that the respondents held a bona fide, though mistaken, view that review proceedings had been initiated. Of course, it may be argued that the respondents should have followed up with the State Attorney, but there was no reason for them to believe that the State Attorney had not complied with their instructions.

[40] It is correct that that reviews do not, by themselves, suspend the operation of the award, but the launch of a review application - where security is furnished in accordance with section 145(8) - does suspend the operation of the award. The first respondent, being a government department, has the resources to easily furnish such security. The first and second respondents therefore had every reason to apprehend appropriate security was furnished.

[41] In these circumstances, the applicant cannot prove beyond a reasonable doubt that the respondents' failure to implement the award was deliberate and male fides. The respondents held a bona fide, but mistaken, belief that the operation of the award had been suspended. For this reason, the applicant cannot succeed.

[42] However, although the application falls to be dismissed, the respondents are now aware that the award has not been reviewed nor has the award been implemented. It is a simple matter for the applicant to demand compliance, or to demand the filing of a review application by a specified date, and thereafter (if necessary) to bring a further contempt application based on new facts and circumstances. All is not lost for the applicants who can still enforce the award.

#### *Non joinder*

[43] Unfortunately, though this issue was not raised at the hearing, the non-joinder of the Minister of Employment and Labour (the "Minister") renders a fatal blow to the constitutional challenge. The Minister, the most senior person in the executive who is directly responsible for the administration of the LRA, has a clear interest in any constitutional challenge relating to the LRA and should have been joined. In *Helen*

*Suzman Foundation v President of the Republic of South Africa and others*<sup>12</sup> the Constitutional Court stated:

*“13] Parliament is, however, not to be cited when the substance of a provision is challenged, save under exceptional circumstances, like where Parliament or the provincial legislature itself initiated and prepared legislation as was the case in Premier, Limpopo Province. Ordinarily, it is the executive branch that initiates, prepares and introduces draft legislation in the National Assembly. Only thereafter does Parliament get down to the business of ensuring that constitutionally prescribed procedures are followed in passing Bills into law. For this reason, when the content of legislation is impugned, it is usually only the executive that must be cited.”* (Own emphasis)

### Conclusion

[44] For the reasons set out above, the challenge to the constitutionality of section 143(4) of the LRA must fail.<sup>13</sup> However, even if I am incorrect on my analysis of that section, the constitutional challenge falls to be dismissed on the basis that the respondents failed to join the Minister.

[45] In the circumstances, the applicants have failed to prove all the requirements for contempt beyond a reasonable doubt. They have not proven beyond reasonable doubt that respondents' non-compliance was wilful and male fides. The application to find the respondents in contempt is therefore dismissed. There is no order as to costs, nor is costs awarded in respect of other dates when costs were reserved by this court.

**R Daniels**

**Judge of the Labour Court of South Africa**

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<sup>12</sup> 2015 (2) SA 1 (CC)

<sup>13</sup> When the court asked the respondents representative whether contempt of the CCMA, as envisaged in section 142(8) of the LRA was also unconstitutional, the respondents answered that such section was constitutional because it fulfills an important purpose.

Appearances:

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|---------------------|-------------------|
| For the Applicant:  | Mr Ngomane        |
| Instructed by:      | Ngomane Attorneys |
| For the Respondent: | Adv C Erasmus SC  |
| Instructed by:      | State Attorney    |

LABOUR COURT