THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA95/2023

In the matter between:

THE ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**First Appellant**
AMCU MEMBERS	**Second Appellant**
and	
PIET WES CIVILS CC	**First Respondent**
WATERKLOOF SKOONMAAKDIENSTE CC	**Second Respondent**
HENDRIK DIEDERICK PIETERSE	**Third Respondent**
BRUCE GALLET VAN ROOYEN	**Fourth Respondent**
ELIZABETH BARINDINA PIETERSE	**Fifth Respondent**
SEANI TSHIELA MPHAPHULI	**Sixth Respondent**
WILLIAM TEBOGO GOMBA	**Seventh Respondent**

Heard: **28 May 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the hand-down is deemed to be 16 October 2024.**

Coram: **Savage ADJP, Jolwana *et* Govindjee AJJA**

JUDGMENT

JOLWANA, AJA

Introduction

[1] This matter is one of three pertaining to the same parties. Central to all of the matters is an order for the reinstatement of unfairly dismissed employees. The first two matters reached finality in that there are no pending appeals. All three matters are inextricably intertwined and arose from the same factual matrix. For that reason, I consider it necessary to first introduce each matter by way of a brief background to give context as I will be referring to each one of them throughout this judgment.

Background

[2] On 17 January 2017, Steenkamp J granted an order in favour of the first appellant's members who are the second appellants herein (the employees) directing the first and second respondents to reinstate the affected employees. The court directed that the said employees were to be reinstated in terms of section 189A (13) of the Labour Relations Act[1] (LRA) until the first and second respondents complied with a fair

[1] Act 66 of 1995, as amended.

procedure (Steenkamp J order).[2] All attempts by these respondents to appeal against that court order in this Court and to the Constitutional Court were unsuccessful.

[3] Despite all possibilities of appeal having been exhausted, the first and second respondents still did not reinstate the employees. As a result, the appellants instituted contempt of court proceedings. The contempt of court matter served before Nkutha-Nkontwana J (as she was then) who delivered a judgment in favour of the appellants on 1 October 2021 (Nkutha-Nkontwana J order) and issued an order finding the first, second, third and fifth respondents (collectively, the respondents) in contempt of court and directing them to comply with the Steenkamp J order in the following terms:

> '1. The first, second, third and fifth respondents are held in contempt of the court order of Steenkamp J, dated 13 January 2017.
>
> 2. The first, second, third and fifth respondents shall purge the contempt within 10 days from the date of the judgement.
>
> 3. Should the first, second, third and fifth respondents fail to comply with the order in paragraph 2 above, they shall pay a fine of R100 000.00 (Hundred Thousand Rand) jointly and severally, the one paying the other to be absolved payable at the office of the Registrar of this Court by not later than 29 October 2021.
>
> 4. The third and fifth respondents shall pay the costs of this application.'

[4] The respondents did not purge their contempt of the Steenkamp J order as directed by Nkutha-Nkontwana J in that they did not reinstate the employees. For various reasons, the fine of R100 000.00 was only paid on 16 March 2023. Instead of purging their contempt of the Steenkamp J order by reinstating the employees, these respondents embarked on further unsuccessful attempts to appeal against the Nkutha-Nkontwana J order. The failure to reinstate the affected employees led to further contempt of court proceedings. That matter served before Van Niekerk J (as he then

[2] Section 189A (13) provides as follows:
'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –
(a) compelling the employer to comply with a fair procedure;
(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
(c) directing the employer to reinstate an employee until it has complied with a fair procedure;
(d) make an award of compensation, if an order in terms of paragraph (a) to (c) is not appropriate.'

was) who handed down a judgment dismissing the further contempt of court application. It is the Van Niekerk J's judgment and orders that are the subject of this appeal.

The passing of the third respondent

[5] At the commencement of the hearing of this appeal, the Court was informed by the counsel for the appellants that the third respondent has since passed away. Therefore, the appellants only pursued the appeal in respect of the fifth respondent. It is not in dispute that the third respondent held 49% membership interest in the first respondent and 32% membership interest in the second respondent. There is evidence, uncontroverted I should add, that the third respondent concluded a transaction with the fourth respondent for the purchase and sale of the fourth respondent's 51% membership interest in the first respondent. Therefore, with the third respondent having acquired the entire membership in the first respondent and with his unfortunate demise, these contempt proceedings are now only in respect of the fifth respondent who had no membership interest in the first respondent.

Before the Labour Court

[6] The relief sought in the Labour Court was that the respondents be found guilty of contempt of court for their failure to comply with the Steenkamp J order and/or the Nkutha-Nkontwana J order. In the event of the respondents being found in contempt of court, the appellants sought an order for the incarceration of the third and fifth respondents for a period that would be deemed appropriate by the court. Some of the appellants' contentions were that the respondents wilfully disregarded, and therefore showed utter contempt for the Nkutha-Nkontwana J order. It was submitted that they were obstructive, contemptuous and embarked on dilatory conduct manifested by their endless but stillborn attempts to appeal against the said court order and failed to comply with the Steenkamp J order and/or the Nkutha-Nkontwana J order.

[7] The appellants contended that the fact that the respondents had already been found guilty of contempt of court for their non-compliance with the Steenkamp J order did not mean that they could not again be found in contempt thereof and an appropriate

sanction for such further contempt imposed. It was submitted that in order for the respondents to purge their contempt of the Steenkamp J order and for the authority of the court and therefore the rule of law to be vindicated, the third and fifth respondents must be sanctioned appropriately by being imprisoned.

[8] The third and fifth respondents' case before the Labour Court was that the third respondent held a 49% membership interest in the first respondent and a 32% interest in the second respondent. The fourth respondent (against whom no relief was sought) held the remaining 51% membership interest in the first respondent. The third respondent was married to the fifth respondent and the latter held a 17% membership interest in the second respondent. The fifth respondent did not have any membership interest in the first respondent. The sixth and seventh respondents, against whom no relief was sought held a 30% and 21% membership interest respectively in the second respondent. As I understood the argument, the third and fifth respondents' case was that they held minority membership interests in both the first and second respondents. Therefore, it was impossible for them to comply with the Steenkamp J and Nkutha-Nkontwana J orders without the cooperation of the other respondents which was not forthcoming. There was also an acrimonious relationship between the third and fifth respondents on the one hand and the fourth, sixth and seventh respondents on the other hand which also resulted in non-compliance with the court orders. The other respondents were not sought to be held in contempt of these court orders.

[9] It was further contended that the Nkutha-Nkontwana J order definitively and finally dealt with the contempt of court relating to the non-compliance with the Steenkamp J order. Absent any appeal, that matter was *res judicata*. Therefore, the contempt of court in respect of the Steenkamp J order could not be revisited. Nkutha-Nkontwana J imposed a sanction in the form of a fine of R100 000.00 payable at the office of the registrar of the court not later than 29 October 2021 thus definitively and finally dealing with the contempt of the Steenkamp J order. In sanctioning the respondents with payment of that fine, Nkutha-Nkontwana J gave the respondents an opportunity to purge their contempt and did not order compliance with the Steenkamp J order after the payment of the fine. It was argued that it would therefore amount to double jeopardy and offend against the basic principle that a person cannot be

sanctioned twice for the same offence, were the respondents to be found guilty of contempt again and subjected to punishment.

[10] The contempt of Nkutha-Nkontwana J's order can only arise in the event of wilful and *mala fide* non-compliance with that part of the order in terms of which they were required to pay the fine by 29 October 2021. For various reasons, the third and fifth respondents could only pay the fine of R100 000.00 on 16 March 2023. The delay in the payment of the fine was due to the appeal processes against the Nkutha-Nkontwana J order which only reached finality on 21 June 2022 and due to administrative delays in obtaining the banking details from the office of the registrar. There was therefore no wilful and *mala fide* non-compliance in their failure to pay the fine timeously by the 29 October 2021. To the extent that they were also required to comply with the Steenkamp J order by reinstating the affected employees, it was submitted that the third and fifth respondents were still unable to comply with the order in this respect due *inter alia* to the dormancy of the first and second respondents.

The Labour Court's judgment

[11] The Labour Court rejected the respondents' contention that the acrimonious relationship among the members of the first and second respondents resulted in the third and fifth respondents' inability to make decisions. The Court *a quo* upheld the third and fifth respondents' defence of *res judicata* and found that on a proper construction of the Nkutha-Nkontwana J order, the respondents were in contempt. They were given an opportunity to comply with the Steenkamp J order within 10 days failing which they were to pay a fine of R100 000.00 by 29 October 2019. The Labour Court found that the Nkutha-Nkontwana J order was silent on the issue of ongoing contempt and it did not order compliance with the Steenkamp J order post the payment of the fine. The respondents' contempt of court in respect of the Steenkamp J order was therefore found to have been purged by the payment of the fine in terms of the Nkutha-Nkontwana J order which, it concluded, was both coercive and punitive. The Court thereupon dismissed the application.

Discussion

Was the Nkutha-Nkontwana J order both coercive and punitive?

[12] The appellants' primary contention on appeal was that despite the payment of the fine, the respondents remained in contempt of the Steenkamp J order. Therefore if the respondents were allowed merely to pay the fine, this would render the Steenkamp J order nugatory resulting in the flouting of the law.

[13] In *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*[3] (*Zuma*), in discussing the distinction between coercive and punitive orders, the Constitutional Court stated:

> '… As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are "marked and important". A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: A sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.'

[14] On a proper construction of Nkutha-Nkontwana J's judgment, it is plain that the court sought to coerce the respondents to purge their contempt within 10 days, failing which a fine would be payable. Timeous compliance with the reinstatement order of Steenkamp J would therefore avoid the payment of the fine. On the authority of *Zuma*, the risk of payment of the fine was intended to coerce compliance with the court order.

[3] [2021] ZACC 18; 2021 (5) SA 327 (CC) at para 47.

The court *a quo* therefore erred in finding that the Nkutha-Nkontwana J order was both coercive and punitive. It was clearly purely coercive. In the circumstances, the defence of *res judicata* as raised by the respondents is unsustainable.

The importance of compliance with court orders

[15] The submission by the respondents that, because the Nkutha-Nkontwana J order said nothing about the ongoing nature of the contempt and what would happen if its own order was not complied with, therefore they cannot be found guilty for its non-compliance is, at best, circuitous and equally unsustainable. Similarly, the finding by the court *a quo* that because the Nkutha-Nkontwana J order was silent on the ongoing nature of the contempt, the payment of the fine absolved the respondents from having to comply with the Steenkamp J order by reinstating the employees was erroneous. The reason is not far to seek. It is simply that a court does not have to spell out the consequences for non-compliance with its order.

[16] Orders are issued daily in our courts on the constitutional principle that absent appeal processes which may suspend them, they are binding and must be complied with forthwith. By its very nature, once the order is brought to the attention of the respondent and the time allowed for compliance has passed, continued non-compliance is contemptuous with presumed wilfulness and *mala fide* until proven otherwise. Non-compliance with any court order cannot in any event be without consequence or be committed with impunity where the non-compliance is brought to the attention of a court. In this regard, our rich jurisprudence is clear and consistent.

[17] The importance of court orders and the ghastly consequences of disobeying them with impunity was recently eloquently explained by the Constitutional Court in *Municipal Manager, O.R. Tambo District Municipality and Another v Ndabeni*[4] in which the Court said:

> '[23] Trite, but necessary, it is to emphasise this Court's repeated exhortation that constitutional rights and court orders must be respected. An appeal or review

[4] [2022] ZACC 3; 2023 (4) SA 421 (CC) at paras 23 - 24 and 26.

– the latter being an option in the case of an order from the Magistrates Court – would be the proper process to contest an order. A court would not compel compliance with an order if that would be "patently at odds with the rule of law". Notwithstanding, no one should be left with the impression that court orders – including flawed court orders – are not binding, or that they can be flouted with impunity.

[24] This Court in [*Zuma*] reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are... not nullities. They are not void or nothingness, but exist in fact with possible legal consequences. If the Judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.

…

[26] Court orders are effective only when their enforcement is assured. Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow. Effective enforcement to protect the Constitution earns trust and respect for the courts. This reciprocity between the courts and the public is needed to encourage compliance, and, progressively, common constitutional purpose.'

[18] The fifth respondent went to great lengths explaining why she did not comply with the Nkutha-Nkontwana J order, which required her to comply with the Steenkamp J order. The court *a quo* correctly found that Nkutha-Nkontwana J rejected the respondents' explanations for their failure to comply with the Steenkamp J order. Some of their explanations were repeated with some embellishments here and there in this Court as if they negate Nkutha-Nkontwana J's findings, which have not been successfully challenged on appeal. More about some of those explanations later.

Can a minority member of a close corporation be held in contempt of court?

[19] With all of the above being considered, I turn now to look at the fifth respondent's culpability for contempt of court. It is common cause that the fifth respondent holds only 17% membership interest in the second respondent. The rest of the membership

interest is held by the third, sixth and seventh respondents at 32, 30 and 21% respectively. As a 17% membership interest holder in the second respondent, the fifth respondent is, by definition, a minority member as a consequence of which her real influence might have always been severely limited. There are, however, two considerations that are of some significance, as a matter of law, that come to mind. The first relates to section 42 of the Close Corporations Act[5] which provides that a member of a close corporation shall stand in a fiduciary relationship to the corporation. The fiduciary duty to act in the interests of the close corporation, broadly speaking, surely must include the responsibility to ensure that court orders are complied with. I just don't see how a close corporation can trade or function, absent compliance with court orders as and when they are issued. The fifth respondent did nothing to ensure that her fiduciary duty in this regard was honoured.

[20] The fifth respondent had a readily available remedy provided for in section 50 of the Close Corporations Act regarding the non-cooperation of the other members of the second respondent if this was a real impediment in ensuring compliance. I am fortified in this view by the sentiments expressed in *De Franca v Exhaust Pro CC (De Franca Intervening)*[6] (*De Franca*), in which, dealing with a member's lack of *locus standi,* Nepgen J had this to say:

> '… It is quite clear that what is provided for in s 50 of the Act is that a member of a close corporation may institute proceedings on behalf of the close corporation in respect of another member's or a former member's liability to the close corporation where such liability arises on account of a breach of the duty flowing from the fiduciary relationship that exists or existed. Without going into any great detail in this regard, there can be little doubt that the comment in Cilliers and others *Close Corporations Service* para 4.21 that the remedy provided by s 50 of the Act to enable proceedings to be instituted on behalf of a close corporation against fellow members was devised in order to provide for a simple and effective means to protect the interests of the close corporation, thus avoiding 'the uncertainty inherent in the common law derivative action and the time-consuming and risky procedure envisaged by s 266 of the Companies Act'. (See

[5] Act 69 of 1984.
[6] 1997 (3) SA 878 (SE) at 890F - 891C.

generally in this regard Celliers and others *Corporate Law* 2nd ed at 292 para 19.7, 295 para 19.13-303 para 19.28). Clear indications of what was intended by s 50 of the Act are to be found in ss (2) and (3) thereof, where there is specific reference to 'institution of such proceedings'; 'a withdrawal of the proceedings'; a 'settlement of the claim'; and to 'the defendant in question'. The statutory authority with which a member is vested where the provisions of s 50 of the Act are applicable is not unlimited authority. It is authority provided for the specific purpose of instituting the proceedings contemplated by s 50 of the Act. In my judgment the provisions of s 50 of the Act cannot, by any stretch of imagination, be interpreted in such a way that they vest a member of a close corporation with authority to oppose an application for its liquidation merely because another member, who is applying for its liquidation, has acted contrary to the duty arising from his fiduciary relationship and has thereby caused the close corporation to suffer a loss which in turn has resulted in him being liable to the close corporation therefor.'

[21] While the issue of the fifth respondent's minority membership interest was raised before the Labour Court, that court did not deal with it. It has now again been raised on appeal. The fifth respondent did not, however, in the papers, deal with efforts, if any, she might have made to reach out to the other members so that the possibilities of compliance subsequent to the Nkutha-Nkontwana J order could be explored. On the authority of *De Franca*, she clearly had *locus standi* to institute court proceedings in which she could have sought a *mandamus*, compelling the recalcitrant members to provide the necessary cooperation to ensure that the court orders were complied with. She lamentably contented herself with remaining supine.

The test for contempt of court

[22] The test for contempt of court as succinctly set out in *Fakie NO v CCII Systems (Pty) Ltd*[7] (*Fakie*) is whether the contemnor has established a reasonable doubt that her or his contempt was wilful and mala fide. In *Fakie,* the court said:

[7] [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paras 9 - 10 and 12.

'[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.

…

[12] These observations bear directly on the main question of principle in the appeal, on which our approach to the facts it presents must depend. This is whether civil contempt can be established when reasonable doubt exists as to any of the requisites of the crime. The pre-constitutional approach to proof was that, once the enforcer established that the order had been granted, and served on or brought to the alleged contemnor's notice, an inference was drawn that non-compliance was wilful and *mala fide*, unless the non-complier established the contrary. The alleged contemnor bore the full legal burden of showing on a balance of probabilities that failure to comply was not wilful and *mala fide*.'

Has the fifth respondent established absence of wilfulness and *mala fides*?

[23] It is common cause that the respondents did not comply with the Steenkamp J order. That led to the contempt of court proceedings and the Nkutha-Nkontwana J order. The respondents did not purge their contempt of the Steenkamp J order despite being ordered to do so by Nkutha-Nkontwana J. They reasoned that the payment of the fine exonerated them from ever having to comply with that order. This was simply incorrect

and could not possibly be the case as I demonstrate hereunder. The Nkutha-Nkontwana J order, properly interpreted in the context of the whole judgment in accordance with the principles of interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8], required the respondents to reinstate the dismissed employees as the primary object. Payment of the fine did not mean that the employees did not have to be reinstated. It is necessary to emphasize that the *fons et origo* of the proceedings which served before Steenkamp J and therefore his order was the reinstatement of the employees. The respondents, having failed to comply with it, the proceedings which served before Nkutha-Nkontwana J were not about punishing the respondents for their infraction. They were about the reinstatement of the employees with the threat of punishment being a means to that end.

[24] The question then is, what of the fifth respondent's rationale for non-compliance especially as it relates to her understanding of the Nkutha-Nkontwana J order that payment of the fine absolved her from ensuring reinstatement of the employees? As things stand, both court orders, that of Steenkamp J and Nkutha-Nkontwana J, have still not been complied with several years later which is, as it must be, extremely concerning. The payment of the fine did not purge the contempt as I said before. It would send a wrong message if compliance with court orders could be bought at a price – the payment of a fine by those with deep pockets in our society which would be an affront to the rule of law. That surely cannot be the case, especially in respect of clearly coercive court orders. In this respect, the sentiments expressed by Nicholls JA in *S v S.H*[9] are apposite. The learned Judge of Appeal eloquently said:

> 'All South Africans have a duty to respect and abide by the law. As the Constitutional Court stated in [*Zuma*], courts 'unlike other arms of the State …

[8] [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18 where the court set the principles of interpretation as follows:
'…Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document….'
[9] (771/21) [2023] ZASCA 49 (13 April 2023) at para 17.

rely solely on the trust and confidence of the people to carry out their constitutionally mandated function' which is to uphold, protect and apply the law without fear or favour. Disregard of court orders is an attack on the very fabric of the rule of law.'

[25] However, there is no basis for suggesting that the fifth respondent's belief that the payment of the fine absolved her from complying with the Steenkamp J order was not honest. At worst, it could be unreasonable, which even if true, is simply not enough. On the authority of *Fakie*, her honest belief that non-compliance was justified or proper in the circumstances, does not accord with the deliberate intentional violation of the court's dignity, repute or authority.

[26] Additionally, the relief sought by the appellants in their notice of motion was the incarceration of the contemnor respondents. The Constitutional Court, not so long ago, clarified the issue of the standard of proof that it is proof beyond reasonable doubt. The Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[10] (*Matjhabeng*) said:

'…[O]n a reading of *Fakie, Pheko II*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, or differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie.* On the other hand, there are civil contempt remedies – for example, declaratory relief, *mandamus,* or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is

[10] [2017] ZACC 35; 2018 (1) SA 1 (CC) at para 67.

Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.'

This would mean that the appellants would have to show that the fifth respondent's non-compliance with the Steenkamp J order was, beyond reasonable doubt, wilful and *mala fide*. This, they have failed to do as the fifth respondent has discharged the evidentiary burden of establishing reasonable doubt as to whether her non-compliance was wilful and *mala fide*.

The dormancy argument and the impossibility of compliance

[27] The fifth respondent resuscitated the dormancy argument in respect of the second respondent in her written submissions on appeal. As is evident from the pleadings, the parties agree on the issue of the dormancy of the second respondent. The controversy is about whether the circumstances in which the second respondent found itself in were such as to render it incapable of reinstating the unlawfully dismissed employees. That dispute of fact is apparent from the pleadings. In their founding affidavit, the appellants made the point that, according to the CIPC report, the second respondent was in the process of deregistration but had not yet been deregistered and that deregistration should not preclude the Court from declaring the fifth respondent in contempt of court. In her answering affidavit, the fifth respondent annexed a CIPC report in respect of the second respondent which showed that indeed, at the time of its filing, the second respondent was in the process of being deregistered. I understand the appellants' case to be based on the hypothesis that the fifth respondent, being aware of the Steenkamp J and Nkutha-Nkontwana J orders, was wilful and actuated by *mala fides* in her non-compliance. Therefore, she should be held in contempt and incarcerated.

[28] The fifth respondent not only says that the second respondent has been dormant since December 2016 but goes much further to say that it did not have any employment positions in which to reinstate the employees, which has been the case since January 2017. This was because the cleaning services contract between the second respondent and Exxaro Coal (Pty) Ltd (Exxaro), its sole client, as a result of which the employees were employed, was terminated in November 2016. That being the case, the restoration

of the normal employment relationship between the second respondent and its employees to its pre-dismissal position had become impossible. She explained that it had been two years since the termination of employment and the dismissal of the second respondent's application for leave to appeal by the Constitutional Court. The second respondent's financial position had become more precarious resulting in the second respondent having no money to pay any back pay consequent upon reinstatement and was unable to comply with any monetary component of a reinstatement order or any statutory financial obligation to the employees as part of a section 189 and 189A process. With all of this, the fifth respondent contends that compliance with the Steenkamp J order was, in the circumstances, impossible and non-compliance therewith was not wilful and *mala fide*. The appellants did not accept that compliance with that court order was impossible which is why they sought her incarceration as the sanction for the infraction. That dispute of fact on whether reinstatement was still a viable proposition must, to my mind, be resolved in favour of the fifth respondent on the *Plascon-Evans* rule.

[29] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[11], Heher JA explained the *Plascon-Evans* rule as follows:

> '[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers….
>
> [13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed….'

[30] It does appear that the second respondent did run into troubled waters, financially, possibly to the extent that there may not have been any possibility of reinstatement of the employees by the time appeal processes were finalised. The

[11] [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paras 12 - 13.

allegations put up by the fifth respondent in that regard do not appear to be far-fetched or untenable such as to be rejected out of hand. Therefore, the dormancy situation, which is already indicative of a business that is in some difficulty, coupled with the impossibility of compliance due to the second respondent's financial woes, the fifth respondent has succeeded in rebutting the evidentiary burden of establishing reasonable doubt as to whether the failure to reinstate the employees was wilful and *mala fide*. This, in my view, is an additional basis for dismissing the appeal as it appears that reinstating the employees may not have been possible.

[31] In *Matjhabeng*[12], the court concluded that wilfulness and *mala fide* had not been established beyond reasonable doubt. What is clear from that matter is that where compliance with a court order – reinstatement in this case – may not have been possible or practicable, if properly pleaded, this cannot be ignored. In fact, it must be examined quite closely and a proper determination made as to whether the explanation proffered by the contemnor does create reasonable doubt about the contemnor's wilfulfulness and *mala fide* in such circumstances.

[32] While the fifth respondent erred in assuming that she was no longer required to comply with the Steenkamp J order of reinstatement subsequent to the payment of the fine as ordered by Nkutha-Nkontwana J, she has however, succeeded in negating the presumed wilfulness and *mala fide* on her part for the non-compliance. Therefore, it would be inappropriate for her to be held in contempt of court.

Conclusion

[33] In all the circumstances, and while the court *a quo* erred in its reasoning for the order it made for the dismissal of the application, the appeal stands to be dismissed albeit for very different reasons. It follows that the order of the Labour Court must stand.

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

[12] *Matjhabeng supra* at para 85.

Order

1. The appeal is dismissed.
2. There is no order as to costs.

Jolwana AJA

Savage ADJP and Govindjee AJA concur.

Appearances:

For the Appellants: Adv Hollander

Instructed by LDA Incorporated Attorneys

For the Respondents: Adv Groenewald

Instructed by Cavanagh & Richards Attorneys