

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

**Case no:
JA42/2003**

In the matter between:-

**NORTH WEST STAR (PTY)LTD
(UNDER JUDICIAL MANAGEMENT)**

APPELLANT

and

**SEROBATSE T
RESPONDENT**

1ST

**MOLUASI J
RESPONDENT**

2ND

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal from a judgement of the Labour Court in a matter in which Pillemer AJ granted an order in the following terms in favour of the current respondents and against the current appellant:

“1. the application for a stay of the order granted by Revelas J on 6 September 2002 is refused.

2. the [appellant] is declared to be in contempt of the said order;

3. John Louis Carter Fourie and Jayant Daji Pema

in their capacities as judicial managers of the [appellant] are hereby directed to do all such things as may be necessary to ensure that the [appellant] complies fully with the said order within 7 days of the service of this order upon them;

4. this order together with a copy of the order granted by Revelas J (to which shall be attached the pages of the arbitration award setting out the award) shall be served upon the [appellant] and upon the said judicial managers personally by the Sheriff;

5. if the Respondent has not complied with this order within 7 days of the service as aforesaid then the [respondents] are granted leave to approach this Court on application as a matter of urgency for an order committing the judicial managers to prison until such time as the [appellant] complies with the order reinstating the [respondents] in their employment or other appropriate relief.

6. the [appellant] is ordered to pay the [respondents'] costs, which shall include their reasonable travelling and other reasonable disbursements."

Subsequently the appellant brought an application in the Court a quo for leave to appeal to this Court which the Court a quo granted.

Factual background

[2] The facts in this matter are largely common cause. The first and second respondents had been employed by the appellant but they were dismissed from the appellant's employ on the 18th December 1998. A dispute subsequently arose between the appellant and the respondents concerning the fairness of the respondents' dismissal. On the 4th March 1999 the

Bophuthatswana Provincial Division of the High Court (**“the High Court”**) granted a provisional order placing the appellant under judicial management. In part the provisional judicial management order stayed **“all actions, proceedings, the execution of all writs, summonses and other process (sic) against the [appellant]”**. The order also provided that no action or proceedings **“be proceeded with without the leave of”** that Court.

- [3] On the 25th March 1999 the respondents referred the dispute (about the fairness of their dismissal) to the Commission for Conciliation, Mediation and Arbitration (**“CCMA”**) for conciliation. On the 14th June 1999 a meeting was held to try and reach an agreement to settle the dispute through the conciliation process but this was to no avail. On the same day the CCMA issued a certificate as required by the Labour Relations Act, 1995 (Act 66 of 1995) (**“the Act”**) to the effect that the dispute remained unresolved. On the 12th August 1999 the High Court granted a final judicial management order in respect of the appellant. The final judicial management order included an order staying all proceedings and actions then pending against the appellant, and, precluding the institution of new ones, without the leave of that Court.

- [4] After the conciliation process had failed and the certificate of outcome had been issued, the unfair dismissal dispute was referred to arbitration under the auspices of the CCMA. The leave of the High Court was not sought. On the 15th May 2000 the appellant and the respondents concluded a pre-arbitration agreement. Clause 1 of that agreement read thus: **“The parties described above have agreed upon the following concerning their forthcoming arbitration.”** Clause 2.1 then said: **“That the CCMA office - North West will designate an arbitrator for this dispute.”**
- [5] Arbitration proceedings subsequently ensued. In due course the CCMA issued an award in terms of which the appellant was ordered, among other things, to reinstate the respondents in its employ in the same positions that they had held before their dismissals on terms and conditions not less favourable to them than those which applied to their employment prior to their dismissal. The appellant was further ordered to compensate the respondents in full for any loss of income that they might have suffered as a result of the unfair dismissal. The compensation amount was to be paid to the respondents within 14 days of them having resumed employment. Any amount due by way of compensation for loss of income was to earn

interest in terms of s143(2) of the Act. The appellant was also ordered to allow the respondents to resume their duties within seven days of receipt of the award. The commissioner also made a certain order of costs against the appellant. The award appears to have been issued around the 19th October 2000.

- [6] The appellant failed to comply with the arbitration award. The respondents then brought an application in the Labour Court in terms of s 158(1)(c) of the Act to make that award an order of that Court so that they could then enforce the award. On the 28th May 2002 the appellant, John Louis Carter Fourie and Jayant Daji Pema (the latter two being the final judicial managers of the appellant), launched a certain review application in the Labour Court. Apart from costs and further or alternative relief, the orders which the appellant and judicial managers sought in that review application in the Labour Court were to:

“1. (r)evue and set aside the act and /or decision which the [commissioner who arbitrated the dispute] took during the period January to October 2000 in the dispute between” the appellants and the respondents **“in allowing the dispute to proceed and all the parties to participate irrespective of the existence of a Judicial Management order ...**

2. review and set aside the relevant

conciliation and arbitration proceedings inclusive of certificates, (if any), of outcome of dispute and the arbitration award apparently dated 19 October 2000”.

[7] It is to be noted that one of the orders that the appellant sought in the review application was an order reviewing and setting aside the arbitration award which the CCMA had issued against the appellant in October 2000. The review application was itself launched on the 28th May 2002. This was about more than one and a half years from the date of the issuing of the arbitration award. The appellant purported to bring the application in terms of s 158(1)(g) of the Act which empowers the Labour Court to review the performance or purported performance of any function provided for **“in the Act “or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.”**

[8] To the extent that the appellant was seeking to have the award reviewed and set aside, it seems that it had brought the application under a wrong section because an application to have a CCMA award reviewed and set aside can only be brought under s 145 of the Act and not s 158(1)(g). Furthermore, when it is brought under s 145, it must be brought within six weeks of the issuing of the award. The appellant’s application was late by more than a year and a half and no explanation was advanced in the

application as to why the appellant took more than a year and a half before bringing that application. In any event even if the review application was competent under s 158(1)(g) of the Act, the delay of over one and a half years seems to have been an unreasonable delay.

[9] The basis of the review application was that the CCMA arbitration proceedings that had resulted in the award and the application that the respondents had brought in the Labour Court to have the award made an order of Court were null and void because they had been instituted without the leave of the High Court. Not surprisingly, that review application was subsequently abandoned by the appellant and the judicial managers.

Contempt of Court proceedings in the Labour Court

[10] On the 7th August 2003 the respondents launched contempt of court proceedings in the Labour Court against the appellant only and did not cite any natural person including any of the final judicial managers. In the founding affidavit in support of that application one of the respondents, Mr Moalusi, stated that the appellant had failed to comply with the order of the Labour Court after it had been duly served on the 9th September 2002. He did not state the manner of service but stated that the return of service was attached to the affidavit as annexure “B”. He said that the period within which the appellant was required to have complied with the order had lapsed without the appellant making any arrangements to comply with the order. Although the

return of service attached to the founding affidavit is not the original return of service, it seems that the return is by a sheriff. The relevant part of the return reads thus: **“On 01 October 2002 at 11h30 at North West Star Lucas Mangope Highway, Mabopane being the work address of North West Star (Pty) Ltd T/A Mmabato Bus(sic) I duly served a copy of the application upon Hendrietta [secretary to Koos Van Zyl] after the original was shown and the nature and contents thereof explained. The said person who is apparently older than sixteen years of age and apparently in charge at the given address accepted copies of the document in the temporary absence of Mr Koos Van Zyl [Rule 4(1)(a)(iii)].”**

[11] The appellant delivered an answering affidavit deposed to by Mr John Louis Carter Fourie, one of the two final judicial managers. In the answering affidavit Mr Fourie made a number of points in support of the appellant’s opposition to the application. In the light of the case argued by Counsel for the appellant on appeal before us it is necessary to refer to only one of those. That is that Mr Fourie took the point that the respondents had failed to obtain the leave of the High Court before instituting conciliation and arbitration proceedings in the CCMA, launching the application to make the award an order of the Labour Court and launching the contempt of court proceedings when they were obliged to have done so. Obviously the appellant’s point in this regard was that, because the respondents failed to obtain the leave of the High Court before instituting all of these proceedings, the appellant could not be guilty of contempt of court.

[12] The learned Acting Judge in the Court a quo found that the defence raised by Mr Fourie based on the fact that the respondents did not obtain the leave of the High Court before referring the dispute to the CCMA for conciliation and arbitration, instituting proceedings in the Labour Court to make the award an order of Court and instituting contempt of court proceedings was no defence because, once a court has issued an order, those on whom it is binding are obliged to comply with it even if they think that it was wrongly granted unless they appeal against the order. As to Mr Fourie's averment that he and his co-judicial manager were not aware of the order of the Labour Court and that, for that reason, they did not intentionally fail to ensure that the appellant complied with such order, the Court a quo took the view that, although that could be so, that would not apply to the period after the judicial managers had become aware of the contempt of court application. The Court a quo said that the judicial managers had become aware of the order of the Labour Court when they dealt with the contempt of court application but had since done nothing to ensure that the appellant complied with the court order. On this basis the Court a quo found the appellant guilty of contempt of court. The Court a quo then made the order that it made as referred to above.

The appeal

- [13] In his written heads of argument on appeal Counsel pursued only one point in his challenge of the decision of the Court a quo. The point related to the respondents' failure to first obtain the leave of the High Court before they referred the dispute to the CCMA, before they launched the application to make the award an order of the Labour Court and before they launched the contempt of court application. In fact Counsel for the appellant also stated in paragraph 7 of the his written heads of argument: **“The crux of this appeal is based on the submission that the judicial management order issued by the High Court does not deprive the Labour Court of its jurisdiction.”** In his written heads of argument Counsel did not submit that the respondents' failure to obtain the leave of the High Court rendered the conciliation and arbitration proceedings, the award and the order of the Labour Court null and void as had been submitted at some stage before the Labour Court. In his written heads Counsel for the appellant specifically stated that that was not his argument. Counsel also submitted that the High Court's judicial management order did not bar the respondents from referring the dispute to the CCMA or from instituting proceedings in the Labour Court. He submitted further that the judicial management order could not deprive the Labour Court of its jurisdiction to deal with a matter falling within its jurisdiction. What then, the question arises, was the effect of the judicial management order of the High Court on the respondents' right to institute proceedings such as those they instituted? Counsel

for the appellant further submitted in his written heads that the order of the High Court prescribing the obtaining of that Court's leave **“merely contains a procedure which must be followed, before an employee is entitled to make a referral, based on an alleged dismissal, to the CCMA.”** Counsel said nothing more in the written heads on why the respondents' failure to follow such procedure would be a defence to contempt of court proceedings.

[15] Despite his stance in the written heads of argument as set out in the preceding paragraph, Counsel for the appellant changed his stance somewhat during argument and reverted to the argument that the respondents' failure to obtain the leave of the High Court rendered the CCMA award and the order of the Labour Court invalid with the result that the appellant was entitled not to obey the order of court. Counsel did not refer us to any authority for this submission.

[16] The submission by Counsel for the appellant is untenable and falls to be rejected. The order in issue in this matter was issued by the Labour Court. In the terms of s 151(2) of the Labour Relations Act, 1995 (Act 66 of 1995) (**“the Act”**) the Labour Court **“is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of provincial division of the [High Court] has in relation to matters under its jurisdiction”**. An application to make an arbitration award an order of the Labour Court is a matter that in terms of s 158(1)(c) of the Act is placed within the jurisdiction of the Labour Court. (**City of Tshwane Metropolitan Municipality v Campella NO & others [2004] 1 BLLR 1 (LAC)**). In the light of s 151(1) and (2) of the Act, the Labour Court is a court that falls

within s 166(e) of the Constitution which recognises courts established or recognised in terms of an Act of Parliament which are **“of a status similar ... to the High Courts...”**

- [17] Section 165(5) of the Constitution reads: **“An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”** In this matter the order of the 6th September 2002 issued by the Labour Court applied to the appellant and was, therefore, binding on the appellant. Mr Fourie and the other co-judicial manager were obliged in their capacities as the appellant’s judicial managers to take the necessary steps to ensure that the appellant complied with that order unless the appellant noted an appeal against such order. If they failed to take such steps and the appellant failed to comply with the order and there was no appeal against the order, the appellant would be guilty of contempt of court.
- [18] The respondents’ failure to first obtain the leave of the High Court before they could refer the dismissal dispute to the CCMA, and, before they could bring the application to make the award an order of court did not invalidate the award or the order and was no valid reason for the appellant not to comply with the order. Upholding the submission made by Counsel for the appellant would make a mockery of the Constitution and the rule of law that forms part of the foundations of our constitutional democracy. It would be a licence for people to disregard orders of courts simply because they do not agree with the Court that such orders should have been

issued. A society that would allow such would in no time be a society of chaos and lawlessness. To do so would sow in society a culture in terms of which people felt free to obey only those court orders with which they agreed or to obey only those laws which they like and to disregard those laws they do not like. I have no doubt in my mind that such a principle has no place in our legal system. The correct principle is that, if a court has issued an order against you and you are unhappy with it, you must take that decision to a court higher than the one that issued such order and which has competent appellate or review jurisdiction and seek to have such order set aside. If there is no such court, for example, where there is no appeal or review available against that court or against such order or if the court which issued the order is the court of final jurisdiction in such matters or is the highest court in the land, then you have no choice but must simply comply with the order. A person cannot say : **“I don’t like this court order; it is wrong; therefore I will not comply with it.”** If we want to deepen our democracy, promote the rule of law, discourage self-help and encourage those who have disputes to take them to the courts of the land and not to seek to resolve them through physical fights or violence, the whole society must frown upon anyone who disobeys an order of court or who, either by word or deed, encourages or incites another or others to disobey an order of Court.

- [19] In the light of all of this I conclude that the respondents’ failure to first obtain the leave of the High Court did not invalidate the CCMA proceedings nor did it invalidate the proceedings before the

Labour Court or its order. I conclude, too, that the respondents' failure to obtain such leave, assuming that they were obliged to have obtained it, did not give the appellant a licence to disobey the order of the Labour Court of the 6th September 2002. Since this was the only point argued before us on why the Court a quo's finding that the appellant was guilty of contempt of court was wrong, my finding in regard to it means that no basis has been shown on appeal for us to interfere with the finding of the Court a quo that the appellant is guilty of contempt of court and with the order it made.

[20] During the hearing of the contempt of Court application in the Court a quo Counsel for the appellant moved an application from the Bar for an order staying the operation of the order of the Labour Court of the 6th September 2002. The purpose of that application was said to be to enable the appellant to appeal against that order. The Court a quo dismissed that application on the basis that too long a period had lapsed since the making of that order without the appellant taking any steps to appeal against it and that, for that reason, a time had long passed when the respondents were entitled to organise their lives on the basis that there would be no appeal against that order. The appellant also appeals against the order dismissing that application.

[21] I cannot think of any reason why the appellant made that application to stay during the hearing of the contempt of court application and from the Bar – and therefore without delivering a proper substantive application – unless the appellant thought that the staying of the operation of that order would help it in the contempt of court application. Such application could not help the appellant at all in the contempt application. The question before the Court a quo was whether the appellant had acted in breach of the order of the Labour Court of the 6th September 2002. The period that was relevant to that question was a period when the order of the 6th September had been operational. Staying the operation of the order after the event could not assist the appellant in any way. In any event, even if it could assist the appellant, I am of the view that the Court a quo's decision to dismiss it was correct and the reasons it gave for its decision in this regard are sound.

[22] In the light of all the above I have no hesitation in concluding that the decision of the Court a quo was correct and that the appeal falls to be dismissed with an appropriate order of costs. However, before I conclude this judgement, I wish to deal with another aspect of this matter. That is the delay in the finalisation of the dispute and the manner in which the appellant's officials and judicial managers have handled this matter.

[23] The respondents were dismissed in December 1998. They were obviously aggrieved by the appellant's decision

to dismiss them. They exhausted the internal procedures including instituting an internal appeal to try and get their dismissal reversed. The appellant did not reverse its decision. They then referred the dismissal dispute to the CCMA for conciliation. That did not produce any result. They then requested that the dispute be arbitrated. The appellant agreed to this and signed a pre-arbitration agreement with them. They went through the arbitration and were successful. The appellant was ordered to reinstate them and pay them compensation. The appellant did not comply with the award of the CCMA, a statutory body whose function is to deal with such disputes. The respondents then made an application to the Labour Court to have that award made an order of Court. They were again successful. The appellant was now ordered by a Superior Court effectively to comply with the award. The appellant once again did not comply. Instead the appellant brought a hopeless application to review and set aside the arbitration proceedings and the award which, not surprisingly, it later abandoned. The Labour Court made the award an order of court. The appellant once again did not comply. The respondents then brought contempt of Court proceedings. The judicial manager who deposed to the affidavit delivered on behalf of the appellant became aware of the order but did not take the necessary steps to ensure that the appellant complied with it simply because he thought that such order should not have been granted because the respondents had not first obtained the leave of the High Court. He did not advance any basis upon which it can be said that the respondents, who were not party to the proceedings that culminated in the order of the High Court, were bound by that order. In the meantime a period of five years has lapsed from the date of the respondents' dismissal and, despite having long obtained an award in their favour for their reinstatement, the respondents have not been reinstated as yet.

[24] The respondents were not legally represented before the Court a quo. They appeared in person. Before us, they were again not legally represented but appeared in person. It would appear that at some earlier stages of this long struggle for their reinstatement, the respondents

were legally represented. I have no doubt that they would have liked to have been legally represented in the Court a quo and in this Court but no longer had funds to pay for legal representation. They have struggled for five long years to seek justice in the courts of the land and in other tribunals against an employer whose handling of this matter has been totally unacceptable.

[25] In his award the commissioner of the CCMA who arbitrated the dismissal dispute also criticised the appellant for the manner in which its officials had handled the matter in the CCMA. He referred to various instances in this regard which demonstrated how badly the appellant had behaved in connection with the arbitration. He said at some stage in his award: **“It is my view that such conduct [on the part of the appellant] was meant to frustrate and further delay the proceedings.”** Those remarks by the commissioner seem to have had no deterrent effect on the appellant or its officials or the judicial managers. On the contrary the manner in which the appellant’s officials including the judicial managers later handled this matter vindicated the commissioner’s view. They seem to have handled this matter with no regard for the respondents’ rights, with no regard for statutory bodies and the Courts and with no regard for the interests of the appellant, its creditors and their responsibilities as judicial managers. A period of more than five years has lapsed since the respondents were dismissed. It is high time that the two employees who are

respondents in this appeal should see justice done. Should the judicial managers fail to ensure that the appellant reinstate the respondents within the time specified in the order of the Court a quo, the respondents must, without any delay, take advantage of the leave that the Court a quo has already granted them to bring an urgent application against the appellant and the judicial managers in the Labour Court for an order committing the judicial managers to prison until they ensure compliance by the appellant with the order of the Labour Court.

[26] I think that the High Court may well wish to inquire into whether the appellant's judicial managers have done their job properly in relation to this matter and, in particular, whether in allowing this matter to drag for so long after the award had been given and thereby increasing the back pay that the respondents are entitled to – without ensuring that the appellant had the benefit of the respondents' services- the judicial managers have acted in the interests of those whose interests they were duty bound to protect and advance, especially when, on the merits of the finding of the commissioner that the dismissal was unfair, there has been no complaint really by the appellant. In the order that I shall make I shall direct the Registrar of this Court to refer this judgement to the Registrar of the Bophuthatswana Provincial Division of the High Court who must bring it to the attention of the Judge President of that Court as the appellant's management is subject to the supervision of that Court for the duration of the operation of the judicial management order.

[27] In the result I make the following order:-

- (1) The appeal is dismissed.
- (2) The appellant is ordered to pay all

reasonable disbursements including travelling expenses incurred by the respondents in connection with this appeal.

(3) The Registrar is directed to forward a copy of this judgement to the Registrar of the Bophuthatswana Provincial Division of the High Court with a request that he or she brings it to the attention of the Judge President of that Court.

Zondo JP

I agree.

Davis AJA

I agree.

Jafta AJA

Appearances

For the Appellant:	Adv E.S.J Van Graan
Instructed by:	Smit Stanton Inc
For the Respondent:	Mr J Moalusi
Date of judgement:	30 April 2004