

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2472/2015

In the matter between:

PANORAMA PARK RETIREMENT VILLAGE

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

B FROHNAPFEL N.O

Second Respondent

NEHAWU obo SHABALALA ABEL

Third Respondent

Heard: 31 July 2019

Delivered: 21 January 2020

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The question that arises in this review application is whether it is substantively fair to dismiss an employee on allegations of being in contempt of a Court order. The applicant (Employer), sought an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner) dated

11 November 2015. In the award, the Commissioner found that the dismissal of the third respondent (Employee) by the Employer on 6 August 2015 was procedurally and substantively unfair, and had ordered his reinstatement together with an amount of R9160.00 as backpay.

[2] The Employer also seeks condonation for the late filing of the review application; the late filing of the record of the arbitration proceedings, and also the reinstatement of the review application. The Employee as assisted by NEHAWU opposed the applications.

[3] The facts of this case are fairly uncomplicated and may be summarised as follows;

3.1 The Employee was employed as a general worker with effect from 12 September 2011 and was dismissed on 8 August 2015. The Employer provides residence for elderly people and sickbays in Klerksdorp in the North West Province.

3.2 Some 49 employees at the Employer are members of NEHAWU. In early 2015, NEHAWU and the Employer were engaged in negotiations on matters of mutual interests. When conciliation failed, a certificate of outcome was issued, enabling the employees to embark on a protected strike.

3.3 Picketing rules were agreed to between the parties as facilitated by the Commission for Conciliation Mediation and Arbitration (CCMA). On 3 July 2015, the Employer had approached this Court with an urgent application after it complained of acts of intimidation and malicious damage to property perpetrated by the employees. This Court (per Whitcher J) had issued a *Rule Nisi*, returnable on 25 September 2015.

3.4 Of relevance to this dispute is the interim order under 2.3, which provided that;

'Interdicting and restraining the first Respondent as union and the second to 49th Respondents from striking and/or picketing closer than 100 meters from each sides left or right and within fifty meters in front of each entrance

of the entrances (Green and Reg gates) in Best street, Klerksdorp to the Applicant's property".

3.5 On 3 July 2015, NEHAWU addressed correspondence to the Employer, advising that its members will no longer be at the picketing lines as it was pursuing its legal options. The Employer had then during the course of the strike, engaged the services of replacement labour.

3.6 The allegations against the Employee are that on 23 July 2015 and during the course of the strike, he was seen at about 16h00 cycling from town on his way home in Best Street close to the Employer's premises in contravention of the terms of the Court order. The Employee allegedly came across two replacement workers, (Portia and Anna) and stopped to speak to them. The Employee was seen by one of the Employer's assistant managers (Ms Louise Hills) as she was leaving the premises at about 16h00. Hills then informed the Employer's Manager, Mrs Engelbrecht, who in turn advised Mr Burgert Adriaan Botes, who dealt with the Employer's labour matters.

3.7 Botes was the Employer's representative in the arbitration proceedings in his capacity as a board member (co-opted member of the Employer) and managing Director (CEO) of Just Labour Law CC, a labour law consultancy. A Mr William Alfred Botes, who is Botes' son, is also a director of the consultancy.

3.8 Flowing from the above events, the Employer charged the Employee with;

"Contempt of Court:

On Thursday 23rd July 2015 at approximately 16h00 you were observed by the assistant manager of Panorama Aftree Dorp, riding up and down Best Street, Oudorp, passing the Red gate, which is one of the entrances to Panorama Park Aftree Dorp. Your actions ... is contravention of the ruling of the honourable Justice Whitcher's Court order on 2nd July 2015, Case No. J1309/15, paragraphs 2.2 and 2.3, in that you harassed and threatened replacement labour and striking closer than 100 meters from

each side left or right and within fifty meters in front of each gate of the entrances (Green and red gates).... Your behaviour amounts to contempt of a Labour Court order” (Sic)

- 3.9 Having been subjected to a disciplinary enquiry, the Employee was only required to answer to the allegations of contempt of court. The Employer had abandoned the charges related to allegations of intimidation and threatening violence. The Employee was subsequently found guilty and dismissed.
- 3.10 The dismissal having been referred to the CCMA, it came before the Commissioner for arbitration. At those proceedings, the Employer was represented by Adriaan Botes who also testified on its behalf. His testimony was limited to his role in the facilitation of the picketing rules, the fact that an interim interdict was obtained during the course of the strike on 2 July 2015, the viewing of the CCTV footage and the procedure followed leading to the dismissal of the Employee. He was the chairperson of the disciplinary enquiry.
- 3.11 Botes had further confirmed that from 3 July 2015, NEHAWU and its members stopped picketing within 100 meters in compliance with the Court order. When a complaint was received that the Employee had spoken to the replacement workers near the premises in a prohibited area, CCTV footage was viewed to confirm same.
- 3.12 The interim interdict having been issued, Botes’ contention at the arbitration proceedings was that the Court through its order had established a rule to be adhered to, which however the Employee had contravened. This was viewed as insubordination and a serious transgression as the Employee had refused to carry out a legal and lawful instruction from the Labour Court not to be within a radius of 100 meters of the Employer’s gates. According to legal advice the Employer had obtained, a disciplinary hearing was the correct route to follow to deal with the misconduct in question. He confirmed that the

charges related to intimidation and harassment were not pursued against the Employee.

3.13 Botes further testified that in further considering a sanction, it was taken into account that the Employee was issued with a final written warning in 2014 for gross insubordination for failing to carry out a lawful instruction. That final written warning was on record for the rest of the period that the Employee remained employed.

3.14 Under cross-examination, Botes' view was that by being in an area in contravention of the Court order, the Employee was on strike and picketing. It was however put to him that the strike was suspended on 17 July 2015 as an agreement was reached.

3.15 Botes further agreed when it was put to him, that only a Court had the authority to determine whether there was contempt of its orders. He nonetheless denied that the dismissal of the Employee for contempt of court was unfair.

[4] It was common cause that at the arbitration proceedings, only Botes had testified. The parties had agreed after his testimony that there would be no need to call any further witnesses, including the Employee, in the light of the undisputed facts pertaining to the fact that the Employee was indeed seen in the area falling within the restrictions imposed by the Court order; was further observed speaking to the two employees at the time, and further since the charges of intimidation and harassment were not pursued at the disciplinary hearing.

[5] The Commissioner having considered the evidence and the parties' written closing arguments concluded that;

5.1 Only the Courts were empowered to determine whether there was contempt of its orders and if so, what sanction to impose. A court order however could not be said to be an instruction issued by an employer and that disobedience of a court order cannot amount to insubordination within the employment context.

- 5.2 The Employer failed to prove on a balance of probabilities that a workplace rule existed in respect of which it had the power to discipline and dismiss the Employee. In the absence of such a rule related to contempt of court, it could not be said that the Employee was guilty of a breach of a rule.
- 5.3 Even if such a rule existed, it could not be said that the Employee had breached that rule since the Court order did not restrain or prohibit employees from being in the area when they were not picketing and on strike. The Employee as observed in the area was not 'striking or picketing', but was on his way home from town, which was his usual route. He had stopped to speak to the two other employees at the end of their shift, and there was nothing wrong with what he did.

Preliminary issues:

- (i) *Non-compliance with the provisions of section 145(7) of the LRA:*

- [6] A concerning factor needs to be raised with this review application as with other review applications that routinely come before the Court. Other than its late filing, and the late filing of the transcribed record of proceedings, it was only in amended notice of application filed in October 2016 that the Employer had sought an order to be absolved from furnishing security in terms of the provisions of section 145(7) and (8) of the Labour Relations Act (LRA).¹
- [7] In *City of Johannesburg v SAMWU obo Monareng and Another*², it was held that;

"[7] The Labour Court has a discretionary power under section 145(3) of the LRA to stay the enforcement of an arbitration award pending its decision in the review application. It may stay the enforcement of an arbitration award pending finalisation of a review application against the award with or without conditions. It may in terms of section 145(8) of the LRA dispense with the requirement of furnishing security. Properly construed, section 145(3) read with section 145(7) and (8) should be interpreted to mean

¹ Act 66 of 1995 (as amended)

² (2019) 40 ILJ 1753 (LAC)

that where an applicant in a review application furnishes security to the Labour Court in accordance with section 145(8) of the LRA, the operation of the arbitration award is automatically suspended pending its decision in the review application. In other words, the employer need not make an application in terms of section 145(3) of the LRA to stay the enforcement of the arbitration award pending the finalisation of the review application.

[8] However, should the employer wish to be absolved from providing security or to provide security in an amount less than the threshold in subsections (8) (a) and (b), then it is required to make an application to the Labour Court, in terms of section 145(3), for the stay of the enforcement of the arbitration award pending its decision in the review application. The employer must make out a proper case for the stay as well as for the provision of security in accordance with section 145(8) to be dispensed with or reduced.”

[8] Sadly, it has become a practice in this Court for parties seeking a review of unfavourable arbitration awards, to simply file such applications without furnishing the security required, and to only put an obscure prayer somewhere in the pleadings, seeking to be absolved from payment of security. In some instances, reviewing parties do not even make an attempt to be absolved from payment of security, and simply close their pleadings and request a set down date. It is appreciated that opposing parties in review applications can raise non-payment of security as preliminary point in the answering affidavit. Be that as it may, in most instances, as is in this case, it is only after a year or three when the matter comes before the Court, that these preliminary points are addressed. By then, the reviewing party had by default, been absolved from payment of security.

[9] The above practices are an affront on the very purpose of the provisions of section 145(7) and (8) of the LRA, and must come to an end. The purpose of these provisions is to essentially dissuade employers in particular from bringing frivolous review applications with no prospects of success and ensure that they are timeously and expeditiously prosecuted³.

³ *City of Johannesburg v SAMWU obo Monareng and Another* at para 10

- [10] For reasons that are obvious, reviewing parties have taken advantage in the *lacuna* created by the provisions of section 145(7) of the LRA, as it is not specified as to how the payment of security should be made, when and to whom. Furthermore, the provisions of section 145(8) of the LRA do not indicate how and when a reviewing party may approach the Court in order to be absolved from furnishing security. The fact that the provisions of section 145(7) of the LRA makes reference to; “*The institution of review proceedings...*” does not appear to occur to reviewing parties that such security must be furnished at the institution of such proceedings.
- [11] This Court and the Office of the Registrar does not have sufficient resources to monitor whether or not reviewing parties comply with the peremptory provisions of section 145(7) and (8) of the LRA, and is dependent on the practitioners in particular, to comply with statutory requirements when arbitration awards are reviewed, rather than circumventing them. To the extent that the LAC’s decision as above requires a reviewing party to make an application to the Labour Court, either in terms of section 145(3) for the stay of the enforcement of the arbitration award pending its decision in the review application, or to be absolved from payment of security, a proper case in that regards needs to be made out. This in my view implies that a separate application from the review application ought to be made. It is not uncommon for parties to bring separate applications to stay enforcement of arbitration awards, even though this often happens when writs have been obtained. Ordinarily, the provisions of Rule 11 of the Rules of this Court⁴ will be best suited for applications to be absolved from payment of security, so that they can be treated as interlocutory, and be placed on special court rolls, so that

⁴ “**11 Interlocutory applications and procedures not specifically provided for in other rules**

- (1) The following applications must be brought on notice, supported by affidavit:
- (a) Interlocutory applications;
 - (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
 - (c) any other applications for directions that may be sought from the court
- (2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.
- (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.
- (4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.”

they can be dealt with before it can be said that the review application is ripe for a hearing.

[12] It is my view that ordinarily, where the requirements of section 145(7) of the LRA have not been complied with, and where an application under section 145(8) of the LRA has not been made, the opposing party should be in a position to enforce the favourable award, as effectively, the review application is not properly before the Court. My view in this regard is premised on the very provisions of section 145(7) of the LRA, which provides that the institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8) of the LRA. [My underlining]

[13] In this case, the Employer only raised the issue of being absolved from payment of security in the amended notice of motion. Other than contending that it is an old age home and non-profit organisation for the elderly, the Employer further contended that in any event, since the Employee did not seek to enforce the award or report for duty, he effectively condoned the non-furnishing of security in the main review application. The Employer clearly misses the point. It is only the Court in accordance with the provisions of section 145 (8) of the LRA that can make any determination and give direction as to whether or not any security should be furnished upon a proper case being made. The mere fact that the Employee did nothing to enforce the award has no impact whatsoever on whether the peremptory provisions were complied with or not.

[14] In conclusion on this point, and to the extent that the issue of security only came before the Court some three years since the award was issued and when the review application was heard, no purpose would be served by even considering whether the Employer should be absolved or not. This is so in that, if for some reason it is established that a proper case has not been made out why the Employer should be absolved, at most, all that the Court can do is to remove the matter from the roll so that such security can be furnished before the review application is heard. That exercise would not only be

academic but also prejudicial to the Employee, who had waited for over three years to enforce a favourable award.

(ii) *The premature filing of the answering affidavit.*

[15] The review application having been filed and served on 9 February 2016, the Notice of intention to oppose together with the answering affidavit were filed on 7 March 2016. This was obviously prior to the Employer having complied with the provisions of Rule 7A (6) and (8) of the Rules of this Court. In this regard, it was submitted on behalf of the Employer that technically, there was no opposition to the review application in the light of the irregular step on the part of NEHAWU and the Employee.

[16] Inasmuch as I agree that the filing of the answering affidavit in the manner it was done constituted an irregular step, it is my view that this on its own cannot render the whole answering affidavit defective. In any event, the Employer had subsequently filed an amended notice of application, and I did not understand its case to be that it suffered some prejudice as a result of the irregular step. In this regard, I am satisfied that the answering affidavit is properly before the Court.

(iii) *Condonation for the late filing of the review application and the late filing of the record of proceedings:*

[17] The arbitration award having been issued on 11 November 2015, the review application was delivered on 9 February 2016. The Registrar of this Court informed the Employer on 23 February 2016 that the record of the arbitration proceedings was available. The record was only filed on 18 October 2016.

[18] Insofar as the record was filed out of time and the application to review was deemed withdrawn by virtue of the provisions of Clause 11.2.3 of the Practice Manual of this Court, I am satisfied with the explanation proffered by the Employer in that regard, and agree that good cause was shown for the review application to be revived.

[19] In respect of the late filing of the review application, the Constitutional Court in *Steenkamp and Others v Edcon Limited*⁵ reiterated the principles applicable to applications for condonation. Thus, where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court⁶.

[20] In explaining the delay, the Employer's Managing Director, Ms Engelbrecht, averred the award only came to her attention on 11 January 2016 after NEHAWU had sent a letter by email on 6 December 2015, making enquiries about arrangements for the Employee to report for duty and the compensation amount. She averred that she was away on leave from 4 December 2015 until

⁵ 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC)

⁶ At para 26. Also, at para 36 – 37 where it was held;

"Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation."

11 January 2016, and was not at any time aware of the arbitration award. She further averred that a copy of the award could not have been received as the Employer's telephone lines were out of order between 12 and 15 November 2015. She further denied that Botes had received a copy of the award on 13 November 2015.

[21] According to Engelbrecht, the correspondence from NEHAWU was then sent to Botes on the same date. Consultations were then held with Botes on 12 January 2016 in regards to taking the arbitration award on review. Attorneys and Counsel were then consulted and briefed in the matter. NEHAWU had in the meanwhile sought to certify the arbitration award in terms of section 143 of the LRA. It was only on 14 January 2016 after legal opinion was obtained, that instructions were given to the Employer's attorneys of record to proceed with the review application. The pleadings were then settled after 19 January 2016. Engelbrecht however does not give any further explanation as to what had transpired until 9 February 2016 when the review application was ultimately filed and delivered.

[22] In opposing the application for condonation, Mr Galane of NEHAWU in his answering affidavit denied that NEHAWU had sent a copy of the arbitration award to the Employer, and that all that was done was to serve it with the section 143 application with a copy of the award attached to it. He further averred that on 4 December 2015, the Employer addressed correspondence to NEHAWU advising that the Employee should not report for duty on 7 December 2015 as per the arbitration award, as a review application was to be launched in the following week. Galane further pointed out that despite the Employer allegations that it did not receive the award on time were not true, as the Employer had made an application to the Registrar of this Court for a case number in December 2015.

[23] There is something that does not add up with the Employer's explanation for the delay to the extent that Engelbrecht averred that they only became aware of the arbitration award on 11 January 2016. As it was correctly pointed out on behalf of NEHAWU, an organisation called SA (ATEA Employers Association) had made an application for a case number on 10 December 2015. As to how

Botes could have sent correspondence to NEHAWU on 4 December 2015 advising it that the Employee should not report for duty as the matter was to be taken on review is a mystery, and clearly the Employer's contention that he could have done so without having received a copy of the award is nonsensical in the extreme. In the same token, an attempt was made by counsel for the Employer to disassociate Botes from the Employer insofar as steps were taken to secure a case number, and again contended that Botes had no authority to file a review. This however again does not make sense as Botes as the evidence had demonstrated throughout, had acted for the Employer in regards to its labour matters. In my view, the attempt to disassociate Botes and the Employer's Association from the Employer's actions in December 2015 insofar as the award was received is disingenuous and lame in the extreme. The invariable conclusion to be reached is that indeed the Employer received a copy of the award on 13 November 2015, which copy was sent to Botes' fax address. Botes was acting on behalf of the Employer at the time, and if he did not forward a copy of the award to it upon its receipt, any blame in that regard cannot be imputed to the CCMA.

[24] Having concluded that a copy of the award was sent to the Employer (*albeit* through Botes), it follows that the delay in filing the review application is indeed about six weeks. The delay might not be excessive in the extreme. Be that as it may, the explanation proffered in that regard is not a full explanation, nor is it reasonable. At worst, and as correctly pointed out on behalf of the Employee, the Employer in its application for condonation had failed to take the Court in its confidence. Furthermore, the explanation by Engelbrecht for the delay merely gives a timeline of events from 12 January 2016 from when consultations were held with Botes, attorneys of record and counsel, without giving much detail about what the Employer had done in view of it being aware of the time periods.

[25] Even if there is any cause to accept the Employer's explanation for the delay, it is apparent from the facts of this case, that its prospects of success are non-existent, and that on the whole the interests of justice would not be in favour of granting condonation based on the factors considered below.

- [26] The Employer seeks to have the award reviewed on a variety of grounds including that the Commissioner 'did not properly, rationally or justifiably apply her mind to the facts and the law'. It was correctly pointed out on behalf of the Employee that the review application is more akin to an appeal, and I agree. In *Goldfields*, it was stated that in a review conducted under section 145(2)(a) (ii) of the LRA, the review court is not required to take into account every factor individually, and to consider how the arbitrator treated and dealt with each of those factors, and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award⁷.
- [27] To the extent that the Employer's grounds of review and heads of argument does the exact opposite to what is postulated in *Goldfields*, I do not intent to deal with all these grounds, as the primary function of this Court is to determine whether on the facts, the arbitrator considered the principal issues before her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.
- [28] Certain allegations of gross irregularities were unfairly made against the Commissioner. The first is that she did not allow the Employer's representative at the arbitration proceedings to make an opening statement without interfering, and thus denied the Employer a fair hearing as he could not assess the Employer's true submissions, and thus committed a gross irregularity. This submission is clearly devoid of any truth and not supported by the transcribed record of proceedings at pages 208 – 210⁸, which clearly demonstrates that the Commissioner granted Botes the opportunity to make opening remarks, and at no stage did the Commissioner interfere with his submissions. The allegations made against the Commissioner in this regard are a classic case of throwing anything at the award, with the hope that something will stick.

⁷ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paragraphs 18 - 19

⁸ The Paginated bundle

- [29] There is further no merit in the Employer's contentions that the Commissioner assisted the Employee's representative and laid the ground work for him to prove an allegation of bias of the chairperson in the disciplinary hearing. The record reflects that the Commissioner was merely ascertaining the nature and basis of the allegations made on behalf of the Employee, that Botes was biased in the disciplinary hearing. Clearly the Commissioner was entitled to do that in order to understand the gist of each party's case. The same conclusions should be made in regards to the Employer's contention that the Commissioner took part in the cross-examination of Botes in the arbitration proceedings. Again, a Commissioner is entitled to ask questions to clarify certain issues that arise from evidence led, and cannot sit passively in proceedings if the evidence presented is not clear to him or her.
- [30] It is further trite that central to any determination of a substantive fairness of a dismissal, the Commissioner is obliged to have regard to the substance of the allegations made against an employee, and not be swayed by the labels attached to those allegations. Insofar as the allegation was made that the Commissioner ignored certain material evidence and took into account irrelevant considerations and facts, the Labour Appeal Court recently in *Edumbe Municipality v Thabo Putini & Others*⁹ reiterated the test on review in the following terms;

"It is a trite principle of law that for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. It is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator "must not misconceive the inquiry or undertake the inquiry in a misconceived manner", as this would not lead to a fair trial of the issues. Mere errors in the law and fact as well as other process related errors are not sufficient to show that the arbitrator misconceived the inquiry. It must be shown that "the arbitrator undertook the wrong enquiry, undertook the enquiry in a wrong manner" or "arrived at a

⁹ Case no: DA20 (Delivered on 11 December 2019) (Reportable)

decision which no reasonable decision-maker could reach on all the material that was before him or her". [Citations omitted]

[31] In this case, I fail to appreciate how it can possibly be concluded that the Commissioner misconceived the inquiry or undertook the inquiry in a misconceived manner. The Employee was charged with contempt of a court order. The charge is clearly unusual if not unheard of. The Employer for some strange reason viewed the Court order as part of its rules in concluding that the Employee was guilty of insubordination. The Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*¹⁰ has provided an elucidation of the principles applicable to contempt of court orders. In this regard, it was reiterated that the essence of contempt of court "lies in violating the dignity, repute, or authority of the Court"¹¹, and civil contempt, as in this case, involves the disobedience of court orders¹².

[32] The Commissioner in this case had regard to the essence of the charge of contempt of Court and correctly concluded that it is only the Court that could pronounce on whether there was contempt of its orders or not. An employer in possession of a Court order cannot make that pronouncement, nor can that order automatically morph into a workplace rule for the purposes of a charge of insubordination. To the extent that the Employer held the view that the employees were in contempt of the interim Court order issued by Whitcher J,

¹⁰ CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC)

¹¹ At para 52

¹² At para 53 – 54, where it was stated;

"Civil contempt, in contrast, involves the disobedience of court orders. The continued relevance of the distinction between civil and criminal contempt also seems to lie, on occasion, in the ability to settle the dispute and to waive contempt.

Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, *mandamus*, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with *mala fides*, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron JA (as he then was) for the majority in *Fakie*:

"[W]hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."" (Citations omitted)

it was at liberty to approach the very same Court to make a finding whether there was in fact contempt. Only a Court has supervisory and enforcement powers over its orders.

- [33] Notwithstanding the above conclusions, it is trite that nothing prevents an employer from subjecting employees to disciplinary proceedings in cases of misconduct committed in the course of a strike action. At the very least, the Commissioner, in trying to make sense of the charge against the Employee considered whether in fact ordinarily, he should have been dismissed for insubordination by analysing the evidence in regards to his conduct on 23 July 2015.
- [34] It was not in dispute that the Employee was seen in an area covered by the interim interdict talking to other employees who had just ended their shift at about 16h00. The Commissioner had concluded that the Court order referred to striking and picketing within the identified area. She correctly concluded that there was nothing wrong with the employees being in the area if they were not striking or picketing.
- [35] It is my view that based on the substance of the charge against the Employee, it would be nonsensical to charge a single employee with being on strike or involved in a picketing, as at the heart of a strike or a picket for that matter, is collective action by employees. Furthermore, it was not in dispute that the Employee ordinarily used the road in question for his daily commute to and from the premises. To have charged the Employee for simply cycling in or around the restricted area when no evidence was proffered to demonstrate that his conduct had posed a discernible harm to the Employer or other employees cannot be fair. To the extent that the Employer did not pursue any allegations of intimidation and harassment against the Employee, and further to the extent that the charge of contempt of Court was unsustainable, clearly the Employer had not discharged the onus placed on it to prove that the dismissal was substantively fair. In the light of the conclusions reached, it is not even necessary to consider other grounds of review related to the procedural unfairness findings made by the Commissioner.

[36] In summary, and in line with the approach set out in *Goldfields*¹³, I am satisfied that on the facts and the material placed before the Commissioner, in terms of her duty to deal with the matter with the minimum of legal formalities, she had afforded the parties a full opportunity to have their say in respect of the dispute, had properly identified the dispute she was required to arbitrate, understood the nature of the dispute she was required to arbitrate, dealt with the substantial merits of the dispute, and most importantly, her decision is one that another decision-maker could reasonably have arrived at based on the evidence placed before her.

[37] In the end, the Employer has not been able to establish good cause for the delay in filing the review application, and it follows that review application ought to fail. I have further had regard to issue of costs, and since the Employee was represented by NEHAWU in this case, no order as to costs ought to be made. Accordingly, the following order is made;

Order:

1. The review application that was deemed withdrawn in accordance with the provisions of Clause 11.2.3 of the Practice Manual of this Court on account of the late filing of the transcribed record of arbitration proceedings is reinstated.
2. The application for condonation for the late filing of the review application is dismissed.
3. The review application is dismissed.
4. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

¹³ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* at para 20

APPEARANCES:

For the Applicant: Adv M.E Coetzee, instructed by Manong
Badenhorst INC

For the Third Respondent: M.S Maraka, NEHAWU Official

LABOUR COURT