



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: J661/23

In the matter between:

SOLIDARITY

Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR

First Respondent

DEPUTY MINISTER OF EMPLOYMENT AND LABOUR

Second Respondent

DEPARTMENT OF EMPLOYMENT AND LABOUR

Third Respondent

THE DIRECTOR GENERAL OF THE

DEPARTMENT OF EMPLOYMENT AND LABOUR

Fourth Respondent

Heard: 24 July 2025

Delivered: 3 September 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 3rd of September 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

ITZKIN, AJIntroduction

[1] These proceedings have arisen in the context of a settlement agreement concluded between the Republic of South Africa (represented by the erstwhile Minister of Employment and Labour, TW Nxesi) and Solidarity, following the initiation of two sets of proceedings by Solidarity.

[2] The first set of proceedings was launched in this Court under case number J661/23, to declare sections of the Employment Equity Amendment Act¹ unconstitutional. The second set of proceedings involves a complaint referred to the International Labour Organization (ILO) by Solidarity against the Republic of South Africa.

[3] The ILO complaint was referred to a mediation process, which was facilitated by the Commission for Conciliation, Mediation and Arbitration. The settlement agreement, which was concluded on 28 June 2023, was the product of that mediation. It contained a clause in which it was agreed that it would be made an order of court. On 31 October 2023, it was made an order of court in the first set of proceedings (under case number J661/23).

[4] Regulations under the Employment Equity Act² (EEA) were gazetted on 15 April 2025. According to Solidarity, the Minister acted in contempt of the court order (incorporating the settlement agreement) on the basis that the contents of the settlement agreement were not gazetted with the regulations on 15 April 2025.

[5] It is on this basis that Solidarity seeks an order requiring the Minister (who is currently Minister N Meth) to appear and show cause why a finding of contempt of court should not be made against her.

¹ Act 4 of 2022.

² Act 55 of 1998.

Analysis

[6] The leading judgment on the principles applicable to contempt of court proceedings is *Fakie*.³ In it, the Supreme Court of Appeal (SCA) (per Cameron JA, as he then was) undertook a detailed consideration of the nature of contempt proceedings and the principles applicable thereto, which were summed up as follows:

‘[42] To sum up:

1. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
2. The respondent in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings.
3. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
4. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.
5. A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.’ (Emphasis added)

[7] The principles enunciated by the SCA in *Fakie* have been espoused in several subsequent judgments, including by the Constitutional Court.⁴

[8] Rule 58 of the Labour Court Rules envisages a bifurcated process.

³ *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

⁴ See, for instance, *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC) at para 25.

[9] The first part of the process (referred to herein as 'stage 1') involves an application launched on an *ex parte* basis in motion court, wherein the applicant seeks an order requiring the respondent to appear and show cause why a finding of contempt of court should not be made.⁵ The second part of the process (referred to herein as 'stage 2') ensues if such an order is made.

[10] In these stage 1 proceedings, the requirements pertaining to the existence of the order and notice thereof on the part of the Minister are established.

[11] With these requirements having been addressed, what (if anything) must be established at stage 1 concerning a breach of the order? In particular, must the Court be satisfied that a breach has been established before it grants an order calling on the Minister to show why she should not be held in contempt (which may be shown through the absence of wilfulness and *mala fides*)?

[12] A requirement that a breach must be established presents several difficulties. It would mean that the Court makes such a determination in *ex parte* proceedings in relation to a party who is not heard regarding his/her alleged breach. A definitive determination in stage 1 may also preclude the question of breach from being revisited in stage 2 when both parties are before the court, based on the principles on *res judicata* or issue estoppel.

[13] In the present matter, there are potentially complex questions about the interpretation of the settlement agreement (incorporated into the court order), which may have to be considered in assessing whether there was a breach.

[14] The settlement agreement reads as follows:

'Following the Applicant's article 24 representation to the ILO, and the conciliation process as facilitated by the CCMA, the parties are desirous to settle the above-mentioned dispute as follows:

- a) Affirmative action is a coherent packet of measures, of a temporary nature in line with the Constitution, aimed specifically at correcting the position

⁵ Rule 58(1).

of members of a target group as defined in the Employment Equity Act in the workplace, in order to obtain effective equality;

b) Affirmative action shall be applied in a nuanced way, as embodied in this agreement, and the economically active population statistics will only be one of many factors that will be taken into account in the compliance analysis of affirmative action in any workplace;

c) No absolute barrier may be placed upon any employment practices affecting any persons from any group;

d) For the purpose of preparing and implementing an employment equity plan and reporting and compliance analysis of affirmative action in any workplace, the following criteria must be taken into account -

- Inherent requirements of the job;
- The pool of suitably qualified persons;
- The qualification, skills, experience and the capacity to acquire, within a reasonable timeframe, the ability to do the job;
- The rate of turn-over and natural attrition within a workplace;
- Recruitment and promotional trends within a workplace.

e) In the compliance analysis of affirmative action in any workplace justifiable/reasonable grounds for not complying with the targets as set by the employer and/or any other targets set by any other party, may include:

- Insufficient recruitment opportunities;
- Insufficient promotion opportunities;
- Insufficient target individuals from the designated groups with the relevant qualification, skills and experience;
- CCMA awards/Court Order;
- Transfer of business;
- Mergers/ Acquisitions; and
- Impact on Business Economic circumstances.

f) No penalties or any form of disadvantage will be incurred by the employer if in the compliance analysis of affirmative action in any workplace, there are justifiable/reasonable grounds for not complying with the targets.

g) No employment termination of any kind may be effected as a consequence of affirmative action.

The parties agree that the aforementioned agreement will be gazetted as part of the 2023 Employment Equity regulations, and will be deemed a settlement under case number J661/23 where it will be made an order of a Court.’

[15] Solidarity complains that the final regulations published on 15 April 2025 do not comply with the settlement agreement in that they do not incorporate its provisions as required by the obligation to gazette the agreement.

[16] During the hearing, counsel for Solidarity disclosed that following the settlement agreement being concluded, and before the publication of final regulations on 15 April 2025, a further iteration of draft regulations was gazetted for public comment in 2024. These were gazetted in Government Gazette Number 500058. Paragraph 4 thereof is headed “*Implementation of Affirmative Action Measures*”, and sub-paragraphs 4.1 to 4.7 contain provisions corresponding with the substantive provisions contained in paragraphs a) to g) of the settlement agreement.

[17] In these circumstances, in assessing the existence of a breach, the meaning of the portion of the settlement agreement requiring its gazetting will stand to be determined. This includes whether the agreement required gazetting as part of draft regulations published for public comment (which occurred on 1 February 2024), or as part of final regulations.

[18] The tenets on the interpretation of contracts which require a consideration (in addition to the language) of the context, the purpose, and the material known to those responsible for its production,⁶ can also not properly be undertaken in *ex parte* stage 1 proceedings where no input is received thereon from the other party.

[19] A further (and associated) layer of potential complexity arises from the fact that the issuing of regulations is a function designated to the Minister by the EEA,⁷

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA) at para 12.

⁷ See section 55(1).

which is of an administrative nature⁸ and which must thus be undertaken in a procedurally fair manner.⁹ The draft regulations gazetted on 1 February 2024, which included the substantive contents of the agreement, were published for public comment.

[20] The requirement of public participation (and the potential implications thereof) may be a contextual factor relevant to the interpretation of the agreement, and in particular, the assessment of whether, correctly interpreted, it required publication with draft regulations or as part of the final regulations.

[21] If publication as part of the final regulations is required, this will necessitate a further inquiry into the content of the final regulations and whether, properly interpreted, they incorporate the principles in the settlement agreement (or fall short thereof in any respects). Both parties would also require the opportunity to be heard thereon.

[22] None of this has been properly ventilated in these stage 1 proceedings, which, as *ex parte* proceedings, are not geared to a full ventilation thereof.

[23] What, then, must be established in stage 1 proceedings concerning the question of breach?

[24] Whilst our domestic jurisprudence does not appear to contain an authoritative articulation of the stage 1 breach threshold, the Labour Court of Namibia (in the context of the application of a bifurcated process in relation to contempt) has articulated the threshold as being whether *“there is some prima facie evidence supporting the applicant’s allegation that the respondent has breached and continues to breach a valid order of the Court”*.¹⁰

[25] This threshold appears to be in line with the notion that an order requiring a respondent to appear and show cause why he/she is not in contempt of court would

⁸ *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA) at paras 76 to 88.

⁹ See section 4 of the Promotion of Administrative Justice Act 3 of 2000.

¹⁰ *Alexander Forbes Group Namibia (Pty) Ltd v Ahrens* [2011] NALC 11 at para 3.

at least require some *prima facie* evidence of contempt to be put up, with a definitive determination of the issue being reserved for stage 2.

[26] Applied to the present matter, I am satisfied that an order ought to be made to facilitate the definitive determination of the issue of breach (and the remaining issues of wilfulness and *mala fides*) in stage 2.

[27] I am, however, disinclined to grant the additional order prayed for by Solidarity to the following effect:

‘That...

3.1 the respondents be directed to purge their contempt by-

3.1.1 taking such steps as may be necessary to withdraw the Employment Equity Regulations published under Government Gazette No 52515 and the Sectoral Numerical Targets published under Government Gazette No. 52514;

3.1.2 declining to implement, enforce or give effect to the EE Regulations and Sector Targets, pending full compliance with the order of this Court dated 31 October 2023;

3.1.3 within 90 (ninety) days from the date of the granting of this order, demonstrating to this Court the steps taken to comply with the order of 31 October 2023.

[28] Such an order is not in accordance with Rule 58(2), which provides as follows:

‘The notice of motion must seek an order in the following terms:

(a) that the respondent, [chief executive officer / head of department / owner / proprietor / municipal manager of the respondent] (full names) appear in the Labour Court on (date) of (month) (year) at 10h00 to show cause why he/she should not be found guilty of contempt of court for failing to comply with the order of this court dated (date) that the respondent may explain its conduct by way of affidavit filed prior to the date of hearing, although this will not excuse him/her from being present in court;

(b) that in the absence of providing an explanation to the satisfaction of the court, or failing to appear in court despite being properly served, the respondent(s) be found guilty of contempt; and

(c) that the respondent(s) be incarcerated for such period as the court deems appropriate; or for the respondent(s) to be fined in an amount the court deems appropriate; or other alternative relief;

(d) that service of the application and order be effected personally upon the respondent [chief executive officer / head of department / owner/ proprietor / municipal manager of the respondent] and on the state attorney, if the matter concerns an organ of state.'

[29] More fundamentally, given what has been said in this judgment regarding the breach issue in stage 1 proceedings, it would be inappropriate to make an order that identifies any steps that may be warranted to purge any breach.

[30] In the circumstances, the following order is made:

Order

1. The first respondent is to appear in the Johannesburg Labour Court on 19 November 2025 at 10h00 to show cause why she should not be found guilty of contempt of court for failing to comply with the order of this court dated 31 October 2023, and may explain her conduct by way of affidavit filed prior to the date of hearing, although this will not excuse her from being present in court.
2. In the absence of providing an explanation to the satisfaction of the court, or failing to appear in court despite being properly served, the first respondent is to be found guilty of contempt and incarcerated for such period as the court deems appropriate; or fined in an amount the court deems appropriate; or other alternative relief.
3. Service of the application and order is to be effected personally upon the first respondent and on the State Attorney, Pretoria.
4. Costs are reserved.

R Itzkin

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: M Engelbrecht SC

Instructed by: Serfontein Viljoen & Swart Attorneys

LABOUR COURT