



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J1014/24

In the matter between:

PSA obo MODISE MMADIKGOMO SOPHIE

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL:

PUBLIC WORKS & ROADS, NORTH WEST PROVINCE

First Respondent

THE HEAD OF DEPARTMENT:

PUBLIC WORKS & ROADS, NORTH WEST PROVINCE

Second Respondent

MOSES IKGOPOLENG KGANTSI

Third Respondent

Heard: 6 May 2025

Delivered: 18 February 2026

JUDGMENT

ENGELBRECHT, AJ

Introduction and background

- [1] The Applicant seeks an order that the First to Third Respondents, i.e. the Member of the Executive Council: Public Works & Roads, North West Province (MEC), the Head of Department: Public Works & Roads, North West Province (HOD), and Mr Moses Ikgopoleng Kgantsi (Mr Kgantsi), be “*found guilty of contempt*” and that, in consequence, they be incarcerated and/or fined in an appropriate amount.
- [2] As is the practice, the application was initially brought *ex parte*. On 6 February 2025, Ramjii AJ issued an order calling upon the Respondents to show cause why they should not be held in contempt for failing to comply with a certified Arbitration Award of 6 March 2017, allowing them, for that purpose, to file an affidavit prior to the hearing. Thereafter, on 14 March 2025, my sister Phehane J extended the rule *nisi* to enable the Applicant to serve the rule *nisi* and the application on the Respondents. The matter accordingly came before this Court on 6 May 2025.
- [3] The Applicant is the Public Servants’ Association (PSA), a duly registered trade union acting on behalf of its member (Ms Modise), who is now retired, but who was formerly an employee of the Department of Public Works & Roads, North West Province (the Department).
- [4] The factual background on which the PSA relies is as follows:
- 4.1. On 6 March 2017, the Public Service Coordinating Bargaining Council (PSCBC) issued an Arbitration Award, ordering the Department to grade progress Ms Modise from salary level 6 to salary level 7.
 - 4.2. On 24 March 2017, the PSCBC transmitted the Arbitration Award to one “*M Rakgoale*”, a Labour Relations Official of the Department who represented the Department at the arbitration.
 - 4.3. On 5 June 2017, the Department launched a review, but that review lapsed for failure to prosecute it within the prescribed time period.

4.4. On 31 March 2023, Ms Modise retired. She remained at salary level 6 at that point.

4.5. On 10 June 2024, the Commission for Conciliation, Mediation and Arbitration (CCMA) certified the Arbitration Award in terms of section 143(3) of the Labour Relations Act¹ (LRA).

4.6. At no stage did the Department give effect to the Arbitration Award.

[5] The Respondents filed an answering affidavit deposed to by the State Attorney acting for the Department.

5.1. He effectively states that the State Attorney did not prosecute the Department's review for a variety of reasons and discovered, toward the end of January 2021, that the review had been archived.

5.2. He further explains that an application for reinstatement of the review has been filed.

5.3. The deponent raises a point *in limine* that there was no personal service.

5.4. In addition, he asks that the Court exercise a discretion to stay enforcement of the Arbitration Award pending resolution of the reinstatement and review applications.

5.5. Moreover, he asserts that the department was not aware that the Arbitration Award had been certified. This came to light only when the contempt application was filed.

Requirements for contempt

[6] The leading judgment on contempt of court is *Fakie NO v CCII Systems (Pty) Ltd*² (*Fakie*). The Supreme Court of Appeal (SCA) recounted the requirements for contempt as follows:

¹ 66 of 1995.

² *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

“[42] ...

- (c) 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.
- (d) 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.”³

[7] There are four points to be highlighted:

- 7.1. First, proof of the requirements for contempt – the order, service or notice, non-compliance, and wilfulness and *mala fides* – must be established beyond a reasonable doubt.
- 7.2. Second, actual service of the order is not required; notification of the order may suffice.
- 7.3. Third, the requirement of wilfulness and *mala fides* suggests that contempt is committed not only by disregarding the court order but also by deliberately and intentionally violating the court’s dignity, reputation, or authority, which this demonstrates; and
- 7.4. Finally, the shift of the evidentiary burden onto the respondent to prove that his non-compliance was not wilful and *mala fide*, once the first three requirements for contempt —order, service or notice, and non-compliance, have been satisfied, implies an inference of wilful and *mala fide* non-compliance in such circumstances, which the respondent must then rebut by providing evidence.

³ *Ibid* at subparas 42 (c) and (d).

- [1] However, as regards the standard of proof, the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*⁴ explained that:

“Summing up, on a reading of *Fakie*, *Phoko 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 *Burchell*. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

Discussion

- [8] In the circumstances of the present case, this Court considers that the applicable standard of proof is the criminal standard, as the relief sought is incarceration and a fine.
- [9] Before this Court is called upon to enter upon the question of wilfulness or *mala fides*, it must be satisfied that the Applicant has shown, beyond a reasonable doubt, that the Respondents bore knowledge of the order that they are said to have been in contempt of.
- [10] If that hurdle cannot be overcome, then the remaining questions that may arise in the circumstances of the case (for example, personal service, identity of the party or parties responsible for taking the actions required to

⁴ 2018 (1) SA 1 (CC) at para 67.

give effect to the Arbitration Award, the effect of the lapsed review, and any reinstatement application that may be pending) become irrelevant.

[11] Accordingly, I first deal with the question of knowledge of the order relied on.

11.1. It is common cause that the Arbitration Award was sent to the Department, and that officials in the Department bore knowledge of the Arbitration Award. Indeed, since the Department knew of the Arbitration Award, it was placed in a position to initiate the now-lapsed review.

11.2. However, the Applicant's founding papers also make it evident that the Arbitration Award was certified more than seven years after it was rendered.

11.3. Absent from the founding papers is any allegation that either the application for certification of the Arbitration Award or the certification itself was sent to the Department, or to the MEC or the HOD.

[12] The question that arises directly is this: does knowledge of the Arbitration Award issued in March 2017 suffice for purposes of these contempt proceedings, or is the Applicant required to show knowledge of the certification?

[13] The starting point is section 143 of the LRA. In the relevant parts, it reads as follows:

“143 Effect of arbitration awards

(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.

...

- (3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
- (4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.”

[14] The Constitutional Court in *Myathaza v Johannesburg Metropolitan Bus Services (Soc) Ltd t/a Metrobus and Others*⁵ confirmed the finality and enforceability of arbitration awards under section 143 of the LRA. However, as my brother Meyerowitz AJ pointed out in *Nxumalo & Others v Gauteng Department of Sports, Arts, Culture & Recreation & Another*⁶ (*Nxumalo*):

“When it comes to the issue of contempt of the Labour Court (which is what the present proceedings are all about), an arbitration award cannot be considered the equivalent of a Labour Court order until that award has been certified. Two of the essential requirements for a finding of contempt is that (a) a court order must exist, and (b) the order must have come to the attention of the respondent. This means that, until the arbitration award has been certified, no equivalent of a Labour Court order exists. Furthermore, **until the respondent has knowledge of the certification of an award, the respondent cannot have knowledge of the equivalent of a court order.**”⁷

and

“In my view the phrase ‘final and binding’ in s 143(1) simply means that the arbitration award is final and binding (which creates certain legal consequences such as the accrual of interest), but **the award cannot be considered the equivalent of a Labour Court order until it is certified.**”

[15] In coming to these conclusions, the learned Meyerowitz AJ placed reliance on the observation of the Labour Appeal Court (LAC) in *Commission for*

⁵ 2018 (1) SA 38 (CC).

⁶ (2024) 45 ILJ 2778 (LC).

⁷ At para [24]. Footnotes omitted. Emphasis supplied.

*Conciliation, Mediation & Arbitration v MBS Transport CC & others; Commission for Conciliation, Mediation & Arbitration v Bheka Management Services (Pty) Ltd & others*⁸ (MBS Transport), which expressed the view that “If the certified award to be enforced is for the performance of an act which was not done, then contempt proceedings may be instituted in the Labour Court ... This may be done because in terms of subsection (1), the certified award is assumed to be an order of the Labour Court”.⁹

[16] This Court also takes note of the comment of the LAC in *Techniflex and Another v Maanaso and Another*¹⁰ that the Labour Court *a quo* in that litigation had “erred in finding beyond a reasonable doubt that the appellants were wilfully in contempt of court”, including because “it was common cause that the certified award had not come to the knowledge of the appellants until the contempt proceedings were initiated by the respondents”.¹¹

[17] The jurisprudence, therefore, dictates that the Applicant had to show knowledge, not only of the Arbitration Award, but also of the fact of certification.

[18] The facts of the present case underscore why this is so.

18.1. The Arbitration Award was certified seven years after it was first granted, at a time when the employee in whose favour the relief had been granted had been retired for more than a year.

18.2. The relief granted was for the adjustment of the salary band, and no adjustment could be made once the employee was no longer in employment.

18.3. Moreover, the Respondents explain that the individuals who now occupy the positions of MEC and HOD were not in office when the Arbitration Award was first brought to the Department's attention, many years before the certification.

⁸ (2016) 37 ILJ 2793 (LAC).

⁹ *MBS Transport* at para 35, quoted in

¹⁰ (2021) 42 ILJ 366 (LAC).

¹¹ At para [16].

18.4. To then reach the conclusion that the HOD and the MEC must be held in contempt even though the certified Arbitration Award had not been served on them or brought to their attention prior to the moment when the *ex parte* application and order were served on them would fly in the face of the requirement that they had knowledge of the order they are said to be acting in contempt of.

[19] In circumstances where the Applicant has failed to show beyond a reasonable doubt that those sought to be held in contempt had any notice of the certified award, no further analysis is required. The requirements for contempt cannot be met.

[20] The success that the Respondents have achieved in thwarting an order holding them in contempt should be no cause for celebration. As the Constitutional Court explained in *Kirland*:¹² *“there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do so properly.”*¹³ It is shocking that an employee who obtained a favourable award is left without its benefit years after the fact. The labour dispute regime under the LRA is intended to facilitate the expeditious resolution of disputes. State departments that fail to comply with awards and hide behind pending review applications that are not properly pursued, for whatever reason, act inconsistently with the higher duty placed on them. The “victory” here is hollow, and this Court expresses its dissatisfaction with the conduct of the Department and its responsible officials. For this reason, no order of costs is made. The Applicant should not bear the costs of an attempt – albeit an unsuccessful one – at holding the Department and its officials responsible.

[21] I make the following order:

¹² *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

¹³ *Kirland* at para 82. Emphasis supplied.

Order

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

M. Engelbrecht

Acting Judge of the Labour Court of South Africa

Applicant's counsel: L Corns

Respondent's counsel: S Dlali