

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable
Case No: M24/2018

In the matter between:

BOSELE NATIONAL PROVIDENT FUND
APPLICANT

and

DANIEL POONYANE TLHOLE
FIRST RESPONDENT

THE SHERIFF OF THE HIGH COURT
SECOND RESPONDENT

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**
THIRD RESPONDENT

STANDARD BANK OF SOUTH AFRICA
FOURTH RESPONDENT

Coram: Masike AJ

Date Heard: 10 October 2025



Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail, and released to SAFLII. The date that the judgment is deemed to be handed down is **11 MAY 2026 at 10h00**.

Summary: Civil Procedure – Contempt of court proceedings – whether requirements of contempt of court have been met - Interim Interdicts – whether requirements for interim interdict have been met – costs legal principles repeated.

JUDGMENT

MASIKE AJ

Introduction

[1] Before me is an application to set aside an enforcement award issued by the third respondent in favor of the first respondent, for an order declaring the first respondent is in contempt of the orders of the Honourable Court dated 12 April 2018 and 7 October 2021, for interdictory and further ancillary relief against the first, second and fourth respondents.

[2] Bosele National Provident Fund (under curatorship), a duly registered pension fund with registration number 12/8/37022, and its principal place of business situated at 2[...] M[...] Street, Golfview, Mahikeng, ('the applicant') instituted motion proceedings in this Court against the first, second, third and fourth respondents in which the following relief is sought:

- '1. Setting the Enforcement of Award order, dated 16 November 2023, and issued by the Third Respondent, aside;

2. declaring that the First Respondent is in contempt of the orders of the above Honourable Court, dated **14 April 2018** and **7 October 2021**, respectively under case number M24/2018;
3. Imposing a period of imprisonment, such as is deemed appropriate by this Honourable Court, on the First Respondent, on conditions deemed appropriate by this Honourable Court.
4. Interdicting and restraining the Fourth Respondent, from paying the amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rands and Thirty-Eight Cents)** over to the First Respondent and/or Second Respondent and/or his agents and assigns; alternatively
5. where the amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rands and Thirty-Eight Cents)** has been transferred into a suspensive account, directing the Fourth Respondent to transfer said amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rands and Thirty-Eight Cents)** bank into the Applicant's bank account held by the Fourth Respondent; *alternatively*
6. where the aforesaid amount has been paid to the First Respondent and/or Second Respondent directing the First and/or Second Respondent to repay the amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rands and Thirty-Eight Cents)** into the Applicant's bank account, held by the Fourth Respondent;
7. directing the First Respondent to pay the costs of this application on an attorney and own client scale;
8. directing the Second, Third Respondent and Fourth Respondent to pay the costs of this application, on an attorney and client scale, should they oppose this application; and
9. Further and/or alternative relief.'

[4] The service of the application was effected on the first respondent, who has opposed the application. Service was effected on the second and third respondents on 8 February 2024 and 20 February 2024, respectively. This is evinced by the date stamp of the offices of the second and third respondents. The second and third respondents have not filed any opposing papers to this

application. On consideration of the papers that served before this Court, I could not find a return of service or proof of service of the application on the fourth respondent. However, on consideration of an email from Tshepo Masipa, an employee of the fourth respondent to the attorneys of the applicant, dated 17 January 2024, the following was stated in paragraphs 3 and 4 of the email:

- ‘3. We understand that your client intends to approach court to have the notice of attachment set aside.
- 4. SBSA does not wish to become embroiled in the dispute and will not oppose such application made by your client provided no costs order are sought against SBSA and no negative averments are made against SBSA.’

[5] No cost order has been sought against the fourth respondent, and on consideration of the founding affidavit deposed to on behalf of the applicant, I found no negative averments against the fourth respondent. In my view, the fourth respondent appears to be aware of this application and has elected not to oppose it.

Factual Background

[6] The first respondent in this application is Mr Daniel Poonyane Tlholoe, a major male person, former employee of the applicant, with his last known address 2[...] O[...] A[...] Crescent, Unit [...], Mmabatho, North–West.

[7] The second respondent is the Sheriff of the High Court, Johannesburg Central, Mr MT Mangaba, appointed in terms of s 2 of the Sheriff’s Act, 90 of 1996, as amended, (‘the Sheriff’s Act’), and cited in this application in his official capacity as the sheriff performing functions assigned to him in terms of s 3 of the Sheriff’s Act, these functions include execution of court orders with his registered office at 2[...] H[...] Street, Johannesburg.

[8] The third respondent is the Commission for Conciliation, Mediation and Arbitration ('the CCMA'), a statutory body and juristic entity established in terms of s 112 of the Labour Relations Act, 1995 ('LRA'). For purposes of this application, the third respondent's principal place of business is situated at CCMA House, 4[...] S[...] Street, Klerksdorp.

[9] The fourth respondent is Standard Bank of South Africa Limited, a public company duly incorporated in terms of the company laws of the Republic of South Africa and a duly registered credit provider in terms of the National Credit Act 34 of 2005 ('NCA'), with its head office situated at [...] S[...] Street, Johannesburg.

[10] The first respondent was appointed as the applicant's principal officer until he was dismissed in April 2016 for alleged misconduct. On 7 June 2017, the third respondent issued an arbitration award ordering that the first respondent be reinstated as the applicant's principal officer and be compensated in the amount of R915 704.38, payable no later than 15 July 2017. On 26 July 2017, the applicant launched review proceedings in the Labour Court of South Africa, Johannesburg. In that application, the applicant sought to review the arbitration award granted by the third respondent in favor of the first respondent. It is contended in the founding affidavit deposed to by Ntshengedzeni Anthony Michael Tshivase ('Mr Tshivase') on behalf of the applicant that the review application was issued under case number JR1392/17.

[11] The first respondent has dissociated himself from the application under case number JR1392/17 but refers to a matter in the Labour Court under case number JR1592/17. Mr Tshivase, in the replying affidavit on behalf of the applicant, has clarified this issue by asserting that the reference to case number JR1392/17 was a 'typo'; I understand this to mean a typing error, and the

correct case number is JR1592/17. The first respondent vehemently denies being served with the review application. It is the contention of the first respondent that the review application was served at the wrong email address rather than his.

[12] On 12 September 2017, the first respondent obtained a certification of the arbitration award from the third respondent under s 143 of the LRA. The first respondent made numerous attempts to enforce the arbitration award. On 8 February 2018, the applicant was placed under provisional curatorship. Mr Malcom Campbell ('Mr Campbell') and Mr Tshivhase were appointed as provisional curators. On 12 April 2018, Hendricks J (as he was then), placed the applicant under final curatorship. The provisional appointment of Mr Campbell and Mr Tshivhase was confirmed ('the Hendricks order'). In the papers before this Court, reference is made to the Hendricks order being granted on 14 April 2018. This is a typographical error, as the order annexed to the papers states that it was granted on 12 April 2017.

[13] So far as it relates to the Hendricks order, paragraph 5 of that order is relevant to the application before this Court, it reads as follows:

‘5. THAT: Whilst the curatorship exists, all claims, actions, proceedings, the execution of all writs, summonses and other processes against the Fund are stayed and may not be instituted or proceeded with, without leave of the Court.’

The first respondent became aware of the Hendricks order and, on 1 February 2019, launched an application to enforce and/or execute the arbitration award granted by the third respondent in his favor dated 7 June 2017 ('the first application for leave to enforce the arbitration award'). The first application for leave to enforce the arbitration award was withdrawn on or about 15 March 2019.

[14] The first respondent relaunched the application to enforce and/or execute the arbitration award granted by the third respondent in his favor dated 7 June 2017 ('the second application for leave to enforce the arbitration award'). That application was opposed and heard by Petersen J (as he then was) on 1 July 2021, and judgment was handed down on 7 October 2021 ('the Petersen judgment'). The application was dismissed. Petersen J (as he then was) said the following in paragraphs 20 to 22 of his judgment:

‘[20] The applicant further calls on this Court to consider that the review application in the Labour Court has lapsed. This Court is not vested with jurisdiction to make any pronouncement in that regard. The applicant’s submissions in this regard lie to the Labour Court where Rule 11 of the Labour Court Rules appears to have become commonplace in complaints of this nature by aggrieved employees alleging that a review has lapsed. That appears to be the correct and applicable manner to approach the Labour Court rather than approach this Court at this stage

[21] Further, on a careful reading of the order of this Court on 12 April 2018, which provides that “*Whilst the curator exists, all claims, actions, proceedings, the execution of all writs, summonses and other processes against the Fund are stayed and may not be instituted with, without leave of the court*”, the applicant is clearly not precluded from defending the Review Application in the Labour Court in accordance with the prescripts of the LRA and Rules of the Labour Court. The present application in this Court is accordingly premature.

[22] However, it must be said that, the review application having been issued in 2017, no cogent reasons are put forward for the inordinate delay in prosecuting the review to finality. It does not avail the respondents simply to contend, even before this Court, that the CCMA has to file its record, more than three years later. In *Chilibish Communications (Pty) v Gericke and Others*, Molahlehi J stated that:

“It seems to me that the unintended consequences of the introduction of the provisions of section 143 Labour Relations Act in 2000, outweighs the objective which the legislature sought to achieve. The provisions of section 143 are undermined by the delaying tactics of certain employers. The problem does not in my view arise only at the stage of the writ of execution but at the every beginning of the section 143 process itself. As I understand it the

purpose of section 143 was not only intended to expedite the enforcement of arbitration awards but mainly to ensure that only genuine and legitimate awards are enforced.’’ [Footnotes omitted]

[15] Mr Tshivhase contends that on 8 January 2024, he received an email from Mr Campbell regarding the attachment and an attempt to withdraw R915 704.38 from the applicant's bank account. Several enquiries and attempts to obtain a copy of the warrant authorising the attachment of the aforesaid amount were made. Mr Tshivhase contends that he eventually received a copy of the enforcement award order (‘the warrant’) on 17 January 2024. It is contended on behalf of the applicant that from the examination of the warrant on 16 November 2023, the first respondent wilfully acted in a manner which contravenes the Hendricks order and the Petersen judgment respectively. The first respondent, in his answering affidavit, confirms that on the basis of the enforcement award order, the Sheriff executed against the applicant’s right, title and interest the equivalent of his arbitration award in its Standard Bank of South Africa account.

[16] The first respondent contends that he was validly entitled to proceed to execute the enforcement award order against the applicant in terms of s 143 of the LRA, that the Hendricks order and the Petersen judgment do not contemplate an absolute bar on the execution of writs, summonses and other processes against the applicant, but provide that such are stayed and may not be instituted or proceeded with, without leave of the court. The first respondent goes on to contend that the filing of a s 145 review application in terms of the LRA does not stay the LRA’s s 143 process unless an order in terms of s 145(3) of the LRA has been granted by the Labour Court. It is contended further that the sheriff and the fourth respondent were legally enjoined by s 42(1)(c) of the Magistrate’s Act.

[17] Mr Tshivhase attempted to have the attachment released by the second and fourth respondents by correspondence, detailing the shortcomings with the warrant. Mr Tshivhase's correspondence to the second and fourth respondents did not achieve the desired outcome. It is contended that whether the fourth respondent has paid any monies to the second respondent is unknown to the applicant; however, the fourth respondent has resolved to pay the monies over to the second respondent should the second respondent so demand. It is contended by the first respondent that the amount of R915 704.38 has been transferred to the fourth respondent's suspense account following the execution.

[18] It is contended on behalf of the applicant that the imminent harm arising from the attachment of the applicant's bank account is obvious. It is further contended that the applicant, being a provident fund, was placed under curatorship to protect the interests of vulnerable groups, and stands to lose a substantial amount of money to the first respondent, who ultimately may not be entitled to such monies because the arbitration award of the third respondent in favor of the first respondent is under review. The applicant has further indicated that the first respondent is unemployed and of pensionable age; there is a threat that, should the monies be paid over to the first respondent, the applicant will not be able to recover them should the Labour Court in the review application set aside the arbitration award of the third respondent.

[19] The first respondent contends that he continues to suffer prejudice: the arbitration award in his favour by the third respondent has been ignored by the applicant, and he has been left out of employment and without income since his dismissal by the applicant in 2016. It is further contended that the first respondent did not receive his pension fund benefits. The first respondent further contends that the applicant can institute an action against him for

damages using the usual remedies for recovering a debt, particularly given that he has pension benefits that have not been encashed.

[20] It is not in dispute that the applicant has brought an interlocutory application in the Labour Court in the matter under case number JR1592/17, which the first respondent has opposed. The first respondent contends further that because he was not served with the review application, there is no review application before the Labour Court, and that he has ascertained from the registrar of the Labour Court that there is no record of a review application under case number JR1592/2017 before the Labour Court, and as a result, he proceeded with steps to enforce the award.

Legal Principles

[21] In S[...] v S[...] -H[...]¹ Nicholls JA, writing for the court, said the following:

‘The requirements for contempt of court are now trite. They are the existence of a court order; the contemnor must have knowledge of the court order; there must be non-compliance with the court order; and, the non compliance must have been wilful or male fides. Once the first three elements have been shown, wilfulness and male fides will be presumed and the evidentiary burden switches to the contemnor.’ [Footnotes omitted]

[22] Where committal is sought, the standard of proof in civil contempt matters has to be the criminal standard². In those circumstances, wilfulness and *mala fides* have to be shown beyond a reasonable doubt³.

Analysis

¹ (Case no 771/21) [2023] ZASCA 49 (13 April 2023) para 19

² *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited (Matjhabeng)* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 61.

³ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) (Pheko II)* [2015] ZACC 10 para 35-36; *Fakie v CCII Systems (Pty) Ltd* [2006] SCA 54 (RSA) (*Fakie*) para 19, 29 and 40

[23] It is a crime to disobey a court order unlawfully and intentionally.⁴ This type of contempt of court is part of a broader offence that can take many forms, but the essence of which lies in violating the dignity, repute, or authority of the court.⁵

[24] This Court is satisfied that the Hendricks order and the Petersen judgment remain extant. The first respondent has not denied that he is aware of the Hendricks order and the Petersen judgment. Paragraph 5 of the Hendricks order, which I have quoted above, is written in unambiguous terms.

[25] The applicant was placed under final curatorship on 12 April 2018, and when the first respondent caused the warrant to be issued and the second respondent to execute it in November 2023, the first respondent was fully aware of the existence of the Hendricks order. This Court is satisfied that the first three elements of contempt of court have been established by the applicant. Wilfulness and *mala fides* are presumed, and the evidentiary burden now shifts to the first respondent to provide evidence raising a reasonable doubt as to whether his non-compliance was wilful and *mala fide*.⁶

[26] The first respondent contends that when he established with the registrar of the Labour Court that there was no review application before it, he executed the warrant. I have difficulty with the contention. Curiously, the first respondent has not attached to his answering affidavit any documentary proof that the registrar of the Labour Court informed him that there is no review application before the Labour Court. The first respondent did not take this Court into his confidence and did not disclose the identity of the registrar of the Labour Court, who informed him that there is no review application before it by the applicant,

⁴ *S v Beyers* - 1968 (3) SA 70 (A)

⁵ *Fakie* para 6 and the authorities referred to therein

⁶ *Pheko II* para 36

he did not disclose when was the registrar approached and when he states his search of the Labour Court revealed no record/contents/evidence of the application under case number JR1592/2017, he does not disclose when was this search was conducted.

[27] It becomes curiouser that the first respondent contends he received service of a condonation application under the same case number in December 2023. The first respondent is referring to case number JR1592/17. My belief that the first respondent is referring to the matter under case number JR1592/17 is fortified by the examination of the answering affidavit in the matter before the Labour Court, which bears the case number JR1592/17, which the applicant attached to its founding affidavit as an annexure, and the first respondent has attached the same answering affidavit as an annexure to his answering affidavit in the application before this Court. If there is no main review application, how can there be an interlocutory application under the same case number (JR1592/17)? The first respondent has confirmed that he has strenuously opposed the interlocutory application, and it appears that the application is pending before the Labour Court.

[28] The applicant contends that the application is for directives considering the poor quality of the record under the review application, whereas the first respondent contends that the application is for condonation with the non-compliance by the applicant with Rule 7A(2)(b) of the Rules of the Labour Court. What is not disputed is that the pending application in the Labour Court concerns the applicant, the first respondent, and the third respondent. The difficulty the first respondent faces is that the Hendricks order remains in effect. The existence of the order is not dependent on the determination of the application to review the arbitration award granted by the third respondent in favor of the first respondent in the Labour Court. The Hendricks order remains

in force for so long as the applicant is under curatorship. It was incumbent on the first respondent to bring an application for leave to execute the arbitration award.

[29] Counsel for the first respondent submitted in his written heads of argument that the first respondent has not deliberately defied the court order, that the actions of the first respondent were brought about as a result of extreme frustration arising from the applicants' delay in finalising the review application of the arbitration award. I am not persuaded by this line of argument. In the Petersen judgement, Petersen J (as he then was) advised that the first respondent to approach the Labour Court and bring an application under Rule 11. In my view, there was no impediment for the first respondent to bring an application declaring that the applicant's review application had lapsed. Even if the first respondent had successfully brought an application declaring that the review application had lapsed, or even if it is true that there is no review application before the Labour Court, that would not have changed the position; the moratorium against all claims, actions, proceedings, the execution of all writs, summonses and other processes against the applicant remains in place until the curatorship ceases to exist as per the Hendricks order. It would be incumbent on the first respondent to bring an application for leave to execute the arbitration award.

[30] It has been submitted in the alternative on behalf of the first respondent that the stay in paragraph 5 of the Hendricks order may not apply retroactively to awards already granted before the curatorship was imposed. There is no merit to this submission. Paragraph 5 of the Hendricks order speaks to proceedings which were instituted before the applicant was placed under final curatorship, and proceedings which are pending or are to be instituted after the applicant was placed under final curatorship. Any other interpretation of paragraph 5 of the

order would lead to absurd results. On this issue, I can do no better than to refer to the *Born Free Investments 247 (Pty) Ltd v Pierre Du Plessis Kriel NO (Born Free Investments)*⁷ judgment that counsel for the first respondent has referred to in his heads of argument.

[31] In *Born Free Investments*, a matter involving an order similar to paragraph 5 of the Hendricks order, Mokgohloa AJA (as she was then) at paragraph 16 said the following:

‘To accept that failure to obtain leave of the court prior to instituting legal proceedings leads to nullity would, in my view, lead to injustice. It would also lead to inconsistency, because existing actions would be stayed, but an action instituted without prior leave would be dismissed, which seems an extreme and unnecessary result. It would be contrary to s 34 of the Constitution which provides that ‘everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court’. Suppose a creditor, oblivious to the moratorium, issued summons without obtaining the leave of the court, it would mean that it would be precluded from proceeding with its claim because its summons was a nullity for want of prior leave of the court. Such a construction, in my view, would be unjust. It seems to me that a sensible interpretation of paragraph 6.2 is that an action may not be instituted without the leave of the court, and where it has been instituted, such action should be stayed until leave is obtained.’ (own emphasis)

[32] In my opinion, for as long as the applicant remains under curatorship, the enforcement of the award of the third respondent in favor of the first respondent is stayed until leave is obtained in the court to execute the award. Having considered the facts of this application, I am of the view that the first respondent failed to provide evidence raising a reasonable doubt as to whether his non-compliance with the Hendricks order was not wilful and *mala fide*. I am satisfied that the first respondent is in contempt of the Hendricks order.

⁷ (1183/17) [2019] 21 ZASCA (26 March 2019)

[33] Relating to the Petersen judgment, in my view, the first respondent is not in contempt of the Petersen judgment. The Petersen judgment did not require the first respondent to perform any act or desist from performing any act. As I have stated above, the Honourable Petersen J (as he then was) advised the first respondent on what steps to take against the applicant in the Labour Court and proceeded to dismiss the application brought by the first respondent on the basis that the application was prematurely re-instated without exhausting his remedies in the Labour Court in relation to the pending review application.⁸

[34] I now turn to the relief sought in the interdict. It is contended on behalf of the first respondent that it is not clear if the interdict the applicant seeks is a final interdict or an interim interdict. In my view, the first respondent understands that the interdict sought is an interim interdict. The first respondent, in his answering affidavit, when addressing the question of the interdictory relief, refers to the Financial Institutions (Protection of Funds) Act, 2001 Act 28 of 2001 ('Protection of Funds Act') in particular the first respondent states that the relevant section of the Protection of Fund Act makes reference to staying the writ, other processes, summonses against the Fund which may not be proceeded with, without leave of the court, during the exitance of the curatorship. The first respondent did this without being prompted; the applicant did not refer to s 5(5)(a) of the Protection of Funds Act in his founding affidavit.

[35] Section 5(5)(a) of the Protection of Funds Act reads as follows:

‘The court may, for the purposes of a provisional appointment in terms of subsection (2)(a) or a final appointment in terms of subsection (4), make an order with regard to —

- (a) the suspension of legal or foreclosure proceedings against the institution for the duration of the curatorship;’

⁸ Petersen judgment para 25

[36] Even if I am wrong, from the reading of paragraph 5 of the Hendricks order and the applicant's founding affidavit, it is clear that the applicant cannot move for a final interdict. The applicant must at least make out a case for an interim interdict, as the applicant is under curatorship, and any interdictory order sought is tied to the curatorship order. In addition, a review application is pending in the Labour Court between the applicant, the first respondent, and the third respondent. An interim interdict is one which is granted *pendente lite*. There must be legal proceedings pending between the parties.⁹ It is a provisional order designed to protect the rights of the complainant party pending an action or application to be brought by him/her to establish the respective rights of the parties.¹⁰ It does not involve a final determination of the parties' rights and does not affect such a determination¹¹. Its effect is to 'freeze' the position until the court decides where the right lies at which point it ceases to operate¹². It is aimed at ensuring, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief¹³.

[37] The general rule is that the applicant must be a person having *locus standi* to apply in that he/she has an interest in the subject matter of the interdict¹⁴. A party which cannot demonstrate an extant right in property could nonetheless apply for an interdict to preserve the property concerned if it could make out a *prima facie* case that it would receive relief in the future from which a right in the property would flow.¹⁵ The person against whom an interdict is sought must be the person responsible, either as principal or as agent, for the wrong

⁹ *Pikoli v President of Republic of South Africa (Pikoli)* 2010 (1) SA 400 (GNP) at 403H).

¹⁰ *Pikoli at 403I; Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* 1986 (2) SA 663 (A) at 681D–F.

¹¹ *Apleni v Minister of Law and Order* 1989 (1) SA 195 (A) at 201B; *Pikoli at 403I – 404A*.

¹² *Jordan v Penmill Investments CC* 1991 (2) SA 430 (E) at 436F.

¹³ *Pikoli at 404A*.

¹⁴ *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388A–I.

¹⁵ *Antares International Ltd v Louw Coetzee & Malan Inc* 2014 (1) SA 172 (WCC) at 188C–E, 188I and 190G–H.

committed or threatened; and in appropriate circumstances, third parties may have to be cited.

[38] In order for the applicant to succeed with the interdictory relief that it seeks, it must satisfy this Court that it has: ‘(a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) a balance of convenience in favour of the granting of the interim relief; and (d) the absence of any other satisfactory remedy.’¹⁶ Sight should not be lost to the fact that the Hendricks order is not final in nature; it remains extant and ceases to exist when the applicant is no longer under curatorship.

A prima facie right

[39] As a result of the first respondent’s warrant, the monies attached from the applicant’s bank account held with the fourth respondent are now held in the fourth respondent’s suspense account. The applicant has been placed under curatorship to protect the interests of vulnerable groups. The applicant has lost access to money, which could be used to fulfil the objectives of the curatorship order. The applicant stands to lose a substantial amount of money to the first respondent, who may ultimately not be entitled to such monies if the Labour Court sets aside the award granted by the third respondent in his favor. I am accordingly satisfied that the applicant has made out a proper case showing it has a *prima facie* right.

A well-grounded apprehension of irreparable harm if the interim relief is not granted, and the ultimate relief is eventually granted

¹⁶ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) 2014 (4) SA 371 (CC) para 24.

[40] It is not disputed that the fourth respondent informed the applicant that it had not transferred the monies to the second respondent. Should the attachment be complete and the second respondent demand payment, the fourth respondent would release the monies to the second respondent. The first respondent is of pensionable age and unemployed. The applicant has a concern that, should the monies be paid over to the first respondent and the Labour Court set the award of the third respondent in favor of the first respondent aside, it would not be able to recover the monies from the first respondent. The first respondent has contended in his answering affidavit that his pensions have not been encashed. I have difficulty with the first respondent's contention.

[41] In the Petersen judgment at paragraph 11, the Honourable Judge refers to what the first respondent stated in the application before that court. The first respondent stated that he is 61 years old, a married father of adult children, and his wife is unemployed and has been a housewife most of her life. The Honourable Judge went on to record that the first respondent stated that, since his dismissal, he has lost all his assets, including his house, which was sold, and has depleted his investments and pension funds. He has consequently had to rely on charity from his church and family. It appears that the first respondent made two conflicting statements under oath regarding his pension benefits. I am satisfied that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted, and the monies are paid over to the first respondent, the Labour Court sets aside the award of the third respondent in favor of the first respondent, that the applicant will not be able to recover the monies from the first respondent.

A balance of convenience in favour of the granting of the interim relief.

[42] If the interim order is not granted, paragraph 5 of the Hendricks order will be rendered hollow, as the first respondent would have executed the arbitration

award without first obtaining leave of the court. There is no impediment to the first respondent approaching the court for an order granting him leave to execute the arbitration award against the applicant. I am accordingly satisfied that the balance of convenience is in favor of granting the interim relief.

The absence of any other satisfactory remedy.

[43] Having considered the history of this matter, the first respondent has attempted to execute the arbitration award granted in his favor by the third respondent on numerous occasions before the Hendricks order. The applicant has not taken this Court into its confidence to explain why it did not approach the Labour Court for an order staying execution of the award. The applicant has not taken this Court into its confidence to explain why it did not approach the Labour Court for an order interdicting the fourth respondent from paying the attached monies over to the second respondent or an order interdicting the second respondent if the money had been paid over to the second respondent by the fourth respondent from paying the money over to the first respondent and to direct the second respondent to repay the money received from the fourth respondent to the applicant.¹⁷

[44] The applicant has approached this Court for an order declaring that the first respondent is in contempt of the Hendricks order and the Petersen judgment. The effect of a finding that the first respondent is in contempt of the orders of the court does not result in the applicant gaining access to the monies held in the suspense account of the fourth respondent. I am satisfied that the applicant has shown that it has no other satisfactory remedy than to approach the

¹⁷ *Windybrow Theatre v Maphela and Others (Windybrow Theatre)* (J89/15) [2015] ZALCJHB 450; (2015) 36 ILJ 1951 (LC) (13 February 2015)

court for interdictory relief. The applicant could have approached the Labour Court for the interdictory relief sought in paragraphs 4, 5 and 6 of its notice of motion, but as *dominus litis* chose to bring the application in this Court. I believe the other factor that may have contributed to the applicant in bringing the application for interdictory relief in this Court is the *Windybrow Theatre* judgment, in that judgment, the Labour Court found at paragraph 13, that it did not have jurisdiction to order the first respondent in that matter to repay the money he received from the Sheriff to the applicant and the applicant in that matter may rely on other legal avenues to recover the money. I have dealt with why instituting action against the first respondent does not appear to be an appropriate alternative relief above.

[45] In prayer 1 of the notice of motion, the applicant has sought an order setting aside the enforcement of the award order/the warrant, dated 16 November 2023, and issued by the third respondent. The applicant faces two difficulties in this regard. The first, an application to set aside a writ, can only be made in the court that issued the writ.¹⁸ The enforcement of the award order/warrant was not issued in this court. Second, the enforcement of the award order/warrant was issued by the third respondent. The third respondent is a creature of statute and is not clothed with the jurisdiction to set aside or stay the enforcement of its own award orders/warrants.¹⁹ An application to stay the enforcement of award order/warrant may be brought in the Labour Court in terms of s 145(3) of the LRA. The applicant ought to have approached the Labour Court and brought an application under s 145(3) of the LRA for an order staying the enforcement of the award pending the Labour Court's decision. This Court does not have the necessary jurisdiction to entertain this request. Prayer 1 of the notice of motion must accordingly fail.

¹⁸ *Shandling v Southern Union Manufacturing Co Ltd* 1933 CPD 607 at 609.

¹⁹ *MBS Transport CC v South African Municipal Workers Union (SATAWU) and Others* (J1807/2015) [2015] ZALCJHB 461 (6 November 2015) para 15

[46] Having found that the first respondent is in contempt of the Hendricks order. I now turn to determine an appropriate punishment for the contempt-of-court finding. The applicant, in its notice of motion, sought a term of imprisonment as punishment for the first respondent's contempt of the court's order. The applicant, however, did not indicate the period of imprisonment the court should impose on the first respondent. In the heads of argument, the applicant sought a term of direct imprisonment to be determined by the court. Is a term of direct imprisonment an appropriate sanction? In *Fakie*, Heher JA writing for the minority with Farlam JA concurring said the following at paragraphs 73 to 77:

‘[73] Upon proper analysis the distinction between coercive and punitive orders has something to do with the intent of an applicant or the court but much to do with the consequences of the order. It is the latter aspect to which any judicial officer who is required to consider whether an order of committal for contempt of court should be granted should pay careful attention.

[74] The following are, I would suggest, the identifying characteristics of a coercive order:

1. The sentence may be avoided by the respondent after its imposition by appropriate compliance with the terms of the original (breached) order *ad factum praestandum* together with any other terms of the committal order which call for compliance. Such avoidance may require purging a default, an apology or an undertaking to desist from future offensive conduct.
2. Such an order is made for the benefit of the applicant in order to bring about compliance with the breached order previously made in his favour.
3. Such an order bears no relationship to the respondent's degree of fault in breaching the original order or to the contumacy of the respondent thereafter or to the amount involved in the dispute between the parties.
4. Such an order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court.

[75] By contrast a punitive order has the following distinguishing features:

1. The sentence may not be avoided by any action of the respondent after its imposition.

2. The sentence is related both to the seriousness of the default and the contumacy of the respondent.
3. The order is influenced by the need to assert the authority and dignity of the court and as an example for others.
4. The applicant gains nothing from the carrying out of the sentence.

[76] The differences are marked and important. They emphasise that a coercive order of imprisonment is one to which a respondent willingly (if reluctantly) and defiantly submits in order to frustrate the rights of another party. If he is 'deprived' of his liberty it is because he has, with knowledge of the order and the consequences of disobedience, elected to flout the order. Such an attitude has nothing to do with an onus of proof: the respondent would or would not submit or comply irrespective of the onus. Nor can one properly describe as 'punishment' that confinement to which a defendant of his own choice submits to serve his own ends. So understood, the circumstances of a coercive detention (and the procedure which is fair and appropriate to its imposition) stand at a vast remove from the case of enforced deprivation of liberty against which s 12 is primarily concerned to guard.

[77] Of course there is a public dimension to both categories of order. But its emphasis is not the same, as I have pointed out. In any event, the public interest in having court orders which do not contain empty promises is a strong factor in favour of retaining the lighter onus.'

[Footnotes omitted]

[47] Coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance. This Court cannot ignore the fact that the first respondent has, on numerous occasions, attempted to execute the arbitration award. Some of these attempts were made before the Hendricks order, and they were well within the law's prescriptions. The difficulty the first respondent faces is that attempting to execute the arbitration award after the Hendricks order, without first seeking leave from the court, is contemptuous of that order. There was no prior threat to the first respondent's freedom. A coercive order that employs the threat of imprisonment in the event of further non-compliance would be capable of vindicating the extent to which the court's authority has been violated. If this Court orders a suspended sentence, it will

deter the first respondent from executing the arbitration award without first applying to the court for leave to do so. The first respondent will be given an opportunity to purge his contempt. In *Fakie*, the court stated that a coercive order only incidentally vindicates a court's honour.

[48] It is trite that the court enjoys wide remedial discretion to determine appropriate relief; it is also trite that, in determining appropriate relief in contempt proceedings, the court should be guided by the approach adopted by other courts.²⁰ It has been held that the 'principal purpose of contempt of court proceedings when an order has been disobeyed has been held to be 'the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of its order ... and to compel the performance thereof.'²¹ It is indeed the accepted practice in contempt matters to seek compliance by using punishment as a means of coercion. In other words, committal is ordered for coercive purposes and made conditional upon non-compliance with a mandamus or interdict.²² It is vital to the administration of justice that those affected by court orders obey them. Our courts cannot tolerate the disregard of their orders. A court would be failing in its duty if it did not impose a punishment which takes into account the serious nature of this type of offence.²³ It should be further borne in mind that a court is loath to restrict the personal liberty of the individual in matters of this kind.²⁴

[49] I have considered the *Zuma* judgment in deciding if a punitive order/an order of direct imprisonment would be appropriate in the application before this Court. I further considered the judgment of Morgan AJ in *E[....] N[....] M[....] I*

²⁰ *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others (Zuma)* 2021 (5) SA 327 (CC) para 54

²¹ *Victoria Park Ratepayers' Association v Greyvenouw CC and Others* - 2004 JDR 0498 (SE) para 19 and the authorities cited therein, referred to in *Zuma* para 54

²² *Ibid*

²³ *Protea Holdings Ltd v Wriwt and Another* 1978 (3) SA 865 (W) at 871H

²⁴ *Ibid* 872B

(*n[...]* *D[...]*)*v* *L[...]* *T[...]* *M[...]*2 and another (*E[...]* *N[...]* *M[...]*1 (*n[...]* *D[...]*) (DIV88/11& UM107/18) [2023] ZANWHC (30 March 2023). The similarities I found between the *Zuma* judgment and *E[...]* *N[...]* *M[...]*1 (*n[...]* *D[...]*) are that the contemnors in those matters made it clear, in unambiguous terms, that they would not abide by the court's orders. In *Zuma*, Mr Zuma had made it clear that he would not purge his contempt. Mr Zuma had failed to comply with previous court orders. Khampepe ADCJ (as she was then) identified that Mr Zuma offered neither contrition nor apology.²⁵ In *E[...]* *N[...]* *M[...]*1 (*n[...]* *D[...]*) the first respondent indicated that he would not comply with the court order. He had failed to comply with previous orders. Morgan AJ identified that the first respondent in the matter that served before him had offered no contrition or apology.

[50] In arriving at what I consider to be an appropriate punishment, I have considered the alleged prejudice the applicant has suffered because of the attachment of the monies in the suspense account of the fourth respondent. It has been contended on behalf of the applicant that, because of the attachment, the applicant has lost access to money which could be used to fulfil the objectives of the curatorship order. I have further considered that the application in this matter was issued on 30 January 2024, the first respondent filed his answering affidavit on or about 4 March 2024, the application was heard by this Court on 10 October 2025, from the date on which the application was issued to the date of hearing of the application the applicant has not filed a supplementary affidavit detailing further attempts by the first respondent to execute the arbitration award. I have considered the authorities on contempt of court proceedings that I have cited in this judgment and weighed the distinction between coercive and punitive orders. In my view, a fine would not be an appropriate punishment given that the first respondent is unemployed and a

²⁵ *Zuma* para 51

pensioner. In all the circumstances, I have decided to impose a term of imprisonment suspended on certain conditions. One hopes that this will have a salutary effect on the first respondent and ensure that he desists from and refrains from repeating his contemptuous conduct.

Costs

[51] It is a trite principle in our jurisprudence that costs follow the cause, and I have not found any reason to deviate from this principle. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.²⁶ The first respondent was advised in the Petersen judgment what steps to take against the applicant. The first respondent decided not to follow the sound and solemn advice of the court and elected to execute the arbitration award without first exhausting his remedies in the Labour Court and obtaining leave to execute the award in the court.

[52] The contemptuous conduct of the first respondent prompted this application. It has been said that the court orders attorney and client costs to mark its disapproval of a litigant's conduct. In *Public Protector v South African Reserve Bank*²⁷ (*Public Protector*), the majority of the Constitutional Court, with reference to *Orr v Schoeman*²⁸, stated:

‘More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.’ [Footnotes omitted]

²⁶*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488

²⁷ 2019 (6) SA 253 (CC) para 223

²⁸

[53] The authors of Erasmus: Superior Court Practice, Vol 2 at RS 27, 2025, D5–25, as it relates to the *Public Protector* judgment, state the following:

‘This terminology suggests that an award of attorney and client costs is a form of punishment. The treatment of such an award simply as punishment does not, however, supply a complete explanation of the grounds on which the practice rests; something more underlies it than the mere punishment of the losing party. On the other hand, the order cannot be justified merely as a form of compensation for damages suffered. The true explanation of awards of attorney and client costs not expressly authorized by statute is that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. However, in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. Therefore in a particular case the court will try to ensure, as far as it can, that the successful party is recouped.’ (own emphasis)

[55] I agree with what the authors of Erasmus: Superior Court Practice have stated above. This Court disapproves of the manner in which the first respondent caused to be executed the arbitration award; it was reckless and contemptuous of the Hendricks order. I cannot find any reason why the applicant should be out of pocket in instituting these proceedings; the conduct of the first respondent warrants a costs order on the attorney-and-client scale.

Order

[56] Resultantly, the following order is made.

1. It is declared that the first respondent is in contempt of the order of Hendricks J (as he then was) of 12 April 2018 under case number M24/2018 (the Hendricks order).

2. The first respondent is committed to serve a term of imprisonment for a period of 30 (thirty) calendar days.
3. The operation and execution of the order in (2) above is suspended on condition that the first respondent complies with the Hendricks order whilst the curatorship of the applicant exists.
4. A copy of this order must be served personally on the first respondent by the Sheriff.
5. Should the first respondent fail to act in accordance with paragraph (3) above, leave is granted to the applicant to again approach this Court on the same papers, duly supplemented, to have the suspension of the order in paragraph (3) lifted and for an order of imprisonment to become immediately operative.
6. The fourth respondent is hereby interdicted from paying the amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rand and Thirty – Eight Cents)** over to the first respondent and/or the second respondent and/or his agents and assigns; *alternatively*,
7. Where the amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rand and Thirty – Eight Cents)** has been transferred into a suspensive account, the fourth respondent is to transfer said amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rand and Thirty – Eight Cents)** back into the bank account of the applicant held by the fourth respondent.
8. Where the aforesaid amount has been paid to the first and/or second respondent, the first and/or second respondent is ordered to repay the amount of **R915 704.38 (Nine Hundred and Fifteen Thousand Seven Hundred and Four Rand and Thirty – Eight**

Cents) into the applicant's bank account held with the fourth respondent.

9. The first respondent is ordered to pay the costs of this application on the attorney-and-client scale.

T MASIKE

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

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