THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1087/22

In the matter between:

NOMAGUGU KUNENE **First Applicant**

NOMPILO MNCUBE **Second Applicant**

and

LEXUS SECURITY **First Respondent**

JACO VAN WYK **Second Respondent**

Heard: **20 February 2025**
Delivered: **26 February 2025**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be on 26 February 2025.

JUDGMENT

PRINSLOO, J

Background

[1] In September 2022, the Applicants approached this Court for an order to find the First Respondent (Respondent or Lexus) and the Second Respondent guilty of contempt of Court for failing to comply with a settlement agreement which was made an arbitration award and certified in terms of the provisions of section 143 of the Labour Relations Act[1] (LRA). The Respondent opposed the application and filed an explanatory affidavit, deposed to by Mr Mthethwa, its operations manager. The Applicants filed a replying affidavit.

[2] The parties filed a full set of affidavits but the matter was referred for oral evidence. As a result, the matter was enrolled for hearing of oral evidence on 20 February 2025.

[3] It is trite that where, at the hearing of application proceedings, a dispute of fact arises on the affidavits filed and cannot be decided without the hearing of oral evidence, the court has a discretion as to the future course of proceedings. The court may dismiss the application or order that oral evidence be heard in terms of the Rules of Court. Before a dispute in motion proceedings can be referred to a hearing of oral evidence, it must be clear that there is a real or genuine dispute, which is to be determined on the basis of the affidavits. The fact that the court orders oral evidence does not enlarge the scope of the enquiry but is intended to provide a method of deciding conflicts of facts that are raised in the affidavits.[2]

[4] Oral evidence will be ordered when one fact or only a few disputed facts cannot be decided on the affidavits and when the evidence in question has a narrow scope.

[1] Act 66 of 1995, as amended.
[2] A C Cilliers, C Loots, H C Nel, 'Herbstein & van Winsen, The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed., Juta at p 459 – 469.

[5] It is trite that if the dispute of fact is such that the court cannot with any accuracy conclude that the probabilities in favour of the applicant's case should be accorded any more weight than an assertion under oath to the contrary, then it is incumbent upon the applicant to make an application for the hearing of oral evidence and the resultant probabilities should be acted upon.

[6] As a general rule, oral evidence is to be heard on specified issues as it is not intended to be used for deciding disputes of fact that give rise to a variety of wide-ranging factual enquiries involving real and substantial questions of fact. The court's discretion to order that oral evidence should be heard is not unlimited for that evidence must be confined to specified issues. The disputed issues must fall within a narrow compass.

[7] *In casu,* the Court ordered that the matter be enrolled for the hearing of oral evidence. It is not indicated on what specified issues oral evidence was to be adduced and there was no indication of what application was made for the hearing of oral evidence within a narrow compass of specific issues and disputed facts. Mr Feni for the Applicants was not even aware that the matter was referred for oral evidence.

[8] The matter was not referred to trial, but it was to be enrolled for the hearing of oral evidence – the difference between the hearing of oral evidence and trial is one which cannot be ignored.

[9] Be that as it may, the parties signed a pre-trial minute which I regard to be the best (and only) record of what the issues are to be decided by this Court. It is common cause that the Applicants had referred an unfair dismissal dispute to the CCMA. On 13 June 2022, when the dispute was set down for hearing, the parties entered into a settlement agreement. The terms of the settlement agreement were as follows:

1. The Respondent agrees to reinstate the Applicants on the same terms and conditions of employment which governed the employment relationship prior to the dismissal dated 11 February 2022;
2. The said reinstatement is to operate retrospectively with effect from 11 February 2022; and

3. The Applicants must report for duty on 14 June 2022 at 08:00 at 268 Ontdekkers Road, Roodepoort.

[10] It is further recorded to be common cause that the Applicants reported for duty on 14 June 2022, that they refused to sign any updating information sheet or new employment contracts that were presented to them and that they did not return to work. The settlement agreement was certified and the Applicants filed an application for contempt of court.

[11] In their founding affidavit, the Applicants stated that the Respondent failed to comply with the certified settlement agreement because the Respondent did not take them back to work on 14 June 2022 and they had not been contacted by the Respondent to arrange for them to return to work or to propose an alternative way of resolving the matter. On the Applicant's own version, they were given a new contract to sign on 14 June 2022, but they refused as they were supposed to be reinstated on the same terms and conditions which governed the employment relationship prior to their dismissal. When they refused to sign a new contract, they were told to go home by the HR manager, Ms Bongi Tiko.

[12] In its answering affidavit, the Respondent explained that the Applicants refused to sign the 'information update document' that is used to update the personal information and site update, as the Applicants were to resume duty at 268 Ontdekkers Road, since the client expelled them from the Ikwezi Mine, the site where they were previously working. The Applicants requested to be given time until 20 June 2022 to return to work, but they never returned and on 28 June 2022, the Respondent addressed a letter to the Applicants, which was sent to their known addresses, as per the information they provided to the Respondent. In the letter, reference was made to the agreement that they would return to work on 20 June 2022, it was recorded that they did not return to work and they were put on terms to report for duty immediately or to contact the operations manager, failing which they run the risk of their services being terminated.

[13] The Applicants did not return to work and on 2 August 2022, the Respondent sent them letters to notify them to attend a disciplinary inquiry scheduled for 17 August 2022 relating to their abscondment or absence without leave.

[14] On 15 August 2022, the Respondent received correspondence from the CCMA, which included a document indicating that the settlement agreement was made an arbitration award.

[15] The Respondent's case is that it was willing and prepared to reinstate the Applicants on 14 June 2022 at 268 Ontdekkers Road but the Applicants refused to sign the necessary documents, they left and never returned to tender their services, wherefore they are refusing to be reinstated and they are the ones who failed to honour the settlement agreement. The Respondent made all reasonable efforts to get them back at work and all avenues were exhausted. The Applicants made no further contact with the Respondent until 6 February 2023 to serve the order that the Respondents should appear in Court for contempt. The Respondent disputed that it was acting in contempt of Court.

[16] In response, the Applicants filed a replying affidavit, wherein they denied that they received the letter of 28 June 2022 or the notice to attend a disciplinary enquiry and they aver that all this is a fabrication and an afterthought.

[17] The Applicants deny that the Respondent was willing to reinstate them and their case is that if the Respondent was indeed willing, it should have allowed them to resume their duties on the day they reported for duty. They deny that they have absconded.

[18] The question that leaps out is what is the dispute of fact which this Court cannot decide without hearing oral evidence? As the dispute of fact was not specified, the best guidance is to be found in the signed pre-trial minute. The parties agreed that the issues to be decided by this Court are whether:

1. The Respondent has failed to reinstate the Applicants as per the settlement agreement;
2. The failure to reinstate the Applicants amounts to contempt of Court;

3. The Applicants returned to work on 20 June 2022; and
4. The Applicants have been fairly dismissed by the Respondent.

[19] The question as to whether the Applicants were unfairly dismissed by the Respondent is not an issue for this Court to decide. First, this is a contempt of Court application and the issue to be decided is limited to the question as to whether the Respondent acted in contempt of Court. A contempt of Court application does not include a determination as to the fairness of an employee's dismissal. In any event, no such case had been made out in the Applicants' papers. But even more important, this is not an issue that this Court has jurisdiction to decide.

[20] Section 157(1) of the LRA provides that subject to the Constitution and section 173, and except where the LRA provides otherwise, the Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by this Court. What this requires is that a party referring a dispute to this Court for adjudication must necessarily point to a provision of the LRA or some other law that confers jurisdiction on this Court to adjudicate the dispute. It is thus incumbent on an applicant referring a matter to this Court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this Court to entertain the claim. Jurisdiction, of course, is to be determined strictly on the basis of the applicant's pleadings; the merits of the claim are not material at this point. What is required is a determination of the legal basis for the claim, and then an assessment of whether the Court has jurisdiction over it.[3]

[21] Section 191(5)(b) of the LRA sets out which dismissal disputes may be referred to the Labour Court and those certainly do not include an alleged unfair dismissal dispute for reasons related to abscondment or absence without permission. Such a dispute, at best, had to be pursued at the CCMA through an arbitration process. In short: this Court does not have jurisdiction to entertain a claim where an applicant seeks relief on the basis of what is alleged to be unfair conduct on the part of the employer, without locating the claim in a cause of action justiciable

[3] See: *Shezi v SA Police Service and Others* [2021] ZALCJHB 155; (2021) 42 ILJ 184 (LC) at para 10, *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC) at para 155, *Gcaba v Minister of Safety and Security* [2009] ZACC 26; (2010) 1 SA 238 (CC) at para 75.

by this Court.[4] The fairness or not of the Applicants' dismissal is not a dispute that this Court has jurisdiction to adjudicate.

[22] It is common cause that the Applicants reported for duty on 14 June 2022 and that they did not subsequently return to work or report for duty at the Respondent. It is therefore undisputed that they did not return to work on 20 June 2022 and there is nothing further to be decided by this Court on this aspect.

[23] The two issues to be decided are whether the Respondent has failed to reinstate the Applicants as per the settlement agreement and if so, whether the failure to reinstate them amounts to contempt of Court.

Contempt of Court: general principles

[24] In *Bruckner v Department of Health and Others*[5], the Court dealt with the requirements for contempt and it was held that:

> 'It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:
>
> (a) that the order was granted against the respondent;
>
> (b) that the respondent was either served with the order or informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and
>
> (c) that the respondent is in wilful default and mala fide disobedience of the order.'

[25] In *Anglo American Platinum Ltd and Another v Association of Mineworkers and Construction Union and Others*[6] the Court has held that:

> 'The principles applicable in an application such as the present are well-established. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt

[4] See *Phahlane v SAPS & Others,* unreported case number J 736/2020, handed down on 11 August 2020.
[5] (2003) 24 ILJ 2289 (LC) at para 26.
[6] (2014) 35 ILJ 2832 (LC) at para 4.

committal is a 'peculiar amalgam' since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see para 8 of the judgment). The court summarized the position as follows at para 42:

"To sum up:

(a) 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.

(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

(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.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."'

[26] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*[7] *(Matjhabeng),* the Constitutional Court confirmed the requisites for contempt of court as follows:

"I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*. It needs to be stressed at the outset that, because the

[7] [2017] ZACC 35; 2018 (1) SA 1 (CC) at para 73.

relief sought was committal, the criminal standard of proof − beyond reasonable doubt − was applicable.'

[27] The Applicant has to prove the aforesaid requisites beyond reasonable doubt and I will deal with them in turn.

[28] Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden to adduce evidence to rebut the inference that the non-compliance was not wilful and *mala fide*. If the respondent fails 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.[8]

[29] To establish non-compliance requires more than a failure to comply with the order. In *Matjhabeng,*[9] the Constitutional Court affirmed that contempt of court does not consist of mere disobedience of a court order, but of "*contumacious disrespect for judicial authority*". The requirement of wilfulness and *mala fides* means that contempt is committed not by a mere disregard of the court order, but by the demonstration of a deliberate and intentional violation of the court's dignity, repute or authority.[10]

[30] There is no dispute in this matter that a certified settlement agreement exists of which the Respondents had knowledge. In issue is whether the Respondent failed to comply with the said agreement and whether such failure constitutes contempt of court.

Reinstatement

[31] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11] *(Equity Aviation),* the Constitutional Court specifically

[8] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 42.
[9] *Matjhabeng supra* at para 65.
[10] *Dibakoane NO v Van den Bos and Others; Van den Bos and Others v Gugulethu and Others* [2021] ZAGPJHC 652 (17 August 2021) at para 29.5.
[11] [2008] ZACC 16; (2008) 29 ILJ 2507 (CC).

dealt with the meaning of 'reinstatement' awarded in terms of section 193 of the LRA.

[32] The *ratio* in *Equity Aviation* is clear. Reinstatement means the restoration of the *status quo ante*. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on (or as from) the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as it existed at the time of the dismissal of the employee. Also, and as a necessary consequence, the original starting date of employment of the employee will remain the same and applicable, if such reinstatement is awarded.

[33] The obvious question *in casu* is whether the Applicants were indeed reinstated, as reinstatement is a fact that must be established.

[34] In *Kubeka and Others v Ni-Da Transport (Pty) Ltd*[12] *(Kubeka),* the Labour Appeal Court (LAC) considered a claim for arrear wages or backpay, consequent upon an order for reinstatement. The LAC held that the key issue to be decided was whether the employees' claim for backpay depended on the restoration of the contracts of employment and when the contracts of employment were restored, if at all.

[35] The LAC restated the reasoning of the Constitutional Court in *National Union of Metalworkers of SA on behalf of Fohlisa and others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*[13] *(Hendor)* about the governing principle that the contracts of employment of unfairly dismissed employees are terminated by dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer. The reinstatement order does not in and of itself reinstate the contract of employment, it is rather directing the employees to tender their services and for the employer to accept those services. In *Hendor,* it was confirmed that if an employee presents her or himself for

[12] [2020] ZALAC 55; (2021) 42 ILJ 499 (LAC).
[13] [2017] ZACC 9; (2017) 38 ILJ 1560 (CC).

work, but the employer refuses to accept him or her back, the remedy is not contractual, but it is to bring the employer before the court for contempt of court.

[36] As was confirmed in *Kubeka,* there is a crucial difference between an order for reinstatement and actual reinstatement pursuant to the right to reinstatement which the reinstatement order grants to an employee. An employee who is the beneficiary of a reinstatement order can elect not to enforce it. If the employee does not enforce the order, the employment contract is not restored and the relationship does not resume. There can be no legal basis for any contractual claim for arrear wages until such time as the contract is restored by the agreement of the employer to accept the tender of the employees in respect of future services. Rights to backpay flowing from the reinstatement order can only arise once the contract is restored. Prior to the employer agreeing to restore the contract pursuant to an order to do so, there is no contract in existence and thus no juridical basis for a claim for arrear wages.

[37] In *Kubeka* the LAC held that:

> 'The decision of the Constitutional Court in *Hendor* therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the employer fails to accept the tender of services in accordance with the terms of the order, the employee's remedy is to bring contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.'[14]

[38] The LAC further held that[15]:

> 'A requirement that backpay is only due and payable on reinstatement is in keeping with the remedial scheme and purpose of s 193 of the LRA. As Mr Watt-Pringle SC, counsel for the respondents, correctly submitted, if an

[14] *Kubeka supra* at para 35.
[15] Id at para 38.

employee in receipt of a reinstatement order could on the strength of the order alone claim contractual payment for the retrospective part of the order without actually seeking reinstatement (tendering prospective services), it would convert a reinstatement remedy (which requires a tender of services) into a compensation award (which does not), in excess of the statutory limitation on compensation awards. Such an outcome would be inconsistent with the purpose of ss 193 and 194 of the LRA. An unfairly dismissed employee must elect his or her preferred remedy and, if granted reinstatement, must tender his or her services within a reasonable time of the order becoming enforceable. If reinstatement has become impracticable through the effluxion of time, for instance where the employee has found alternative employment, he or she should seek to amend his or her prayer for relief to one seeking compensation.'

[39] Prior to the actual reinstatement of an employee, no contract of employment exists and thus also no contractual obligation, as the only obligation at that point is to reinstate. An employee is not entitled to the payment of remuneration in terms of a contract of employment that is yet to be resuscitated. An order to reinstate does not restore the contract of employment and reinstate an employee, it merely orders an employer to do so.

[40] *In casu,* it is common cause that the Applicants tendered their services on 14 June 2022.

[41] The Applicants' case is that on 14 June 2022, they attended the Respondent's offices, they were given a new contract to sign but they refused, whereafter they were told by Ms Tiko to go home.

[42] The Respondent's version is that it indeed reinstated the Applicants on 14 June 2022 by accepting their tender for service, but that they subsequently absconded and stayed away from work without a valid reason.

[43] In evidence, Ms Kunene testified that when they reported for duty on 14 June 2022, they were given a new contract to sign, which was not for the same job they

performed previously and the salary was not the same. She later explained that they refused to sign the contract because they expected to be taken back to the same site where they were working previously, but there was no change to the salary. They were told that there was only one position available in guarding and after they perused the contract, they gave it back as they were not in agreement with it. After 14 June 2022, they never went back to work. Ms Kunene testified that the contract was not the same as the contract they had with the Respondent previously and as such the Respondent did not honour the settlement agreement. Ms Kunene testified that they did not receive any correspondence from the Respondent about them absconding, nor did they receive a notice to attend a disciplinary hearing or a notice of dismissal.

[44] In cross-examination, Ms Kunene testified that on 14 June 2022, the Respondent informed them that they would be stationed in Johannesburg at a site they were to be deployed to, but they were expecting to go back to the Ikwezi Mine in Newcastle. It was explained to them that the client at Ikwezi Mine no longer wanted the Applicants on site and Ms Kunene understood that the Respondent was their employer and that the Ikwezi Mine was just a site or a workplace.

[45] Ms Tiko testified that on 14 June 2022, the Applicants were requested to sign documents to update their details on the system as they were no longer deployed to work at the Ikwezi Mine, but they refused and they asked for time until 20 June 2022. They did not return to work and they were sent a letter on 28 June 2022 to place them on terms to return to work. A second letter was sent in August 2022 and after the Applicants failed to return to work, a disciplinary hearing was held and they were dismissed *in absentia* on 17 August 2022.

[46] Ms Tiko testified that on 14 June 2022, there was no discussion about the rate or the money to be paid to the Applicants and she disputed that the Respondent wanted to change the rate to be paid to the Applicants. The Applicants had to sign forms to update their information as that was required for the ‘Easy Roster’ system used by the Respondent to change the site as the Applicants could no longer work at the Ikwezi Mine. Ms Tiko insisted that the Applicants were dismissed in August 2022 for absconding from work.

[47] Ms Tiko referred to the section 142A application that she had received from the CCMA on 15 June 2022. In paragraph 2 of the said application, the Applicants stated that they were not happy about the contracts they had to sign and *"now we don't want to go back to Lexus Security anymore. What we want is our money".*

Contempt

[48] The next consideration is whether the Respondents are in wilful and *mala fide* disobedience of the certified settlement agreement, which the Applicants must prove beyond a reasonable doubt.

[49] In my view, there is no evidence before this Court to show that the Respondent was not prepared to reinstate the Applicants or that it refused to do so. It rather seems that the Applicants had an expectation to be reinstated at the Ikwezi Mine, where they were placed previously. It was not disputed that the Respondent was not in a position to place the Applicants at the Ikwezi Mine, as the client no longer wanted them on site. There was no evidence to show that the Applicants' placement at the Ikwezi Mine was part of their terms and conditions of employment and that any attempt to place them at a different site, would be in contravention of the terms and conditions of employment.

[50] There is no evidence to show that the Respondent was not willing or prepared to take the Applicants back at all. The conduct of the Respondent in requesting the Applicants to sign forms or a different contract to cater for a placement at a different site is not indicative of a refusal to reinstate them or to take them back as employees.

[51] In fact, the Respondent's subsequent conduct of sending letters to put the Applicants on terms to return to work and when they failed to do so, to proceed with a disciplinary enquiry and a process to dismiss the Applicants for abscondment, is indicative of the conduct of an employer that had every intention to take them back in service and to restore the employment relationship. The Applicants' denial that they received any letters or correspondence from the Respondent is no more than a bare

denial when the Respondent has provided proof that the correspondence was sent per registered post to the addresses the Applicants provided to their employer.

[52] The Applicants refused to sign any document and on their own version, they did not go back to work nor tendered their services after 14 June 2022.

[53] For the Applicants *in casu* to succeed with their contempt of Court application, they must show, beyond a reasonable doubt, that the Respondent is in wilful and *mala fide* disobedience of the certified settlement agreement. The mere fact that there is non-compliance with the said agreement is not sufficient – more is required. The courts have confirmed that contempt of court does not consist of mere disobedience of a court order, but of "*contumacious disrespect for judicial authority".*

[54] Based on the facts placed before this Court, the Applicants failed to prove beyond reasonable doubt that the Respondent is in wilful default and *mala fide* disobedience of a certified settlement agreement.

[55] The threshold to find the Respondents in contempt of Court is high and the onus to prove that is on the Applicants, which onus they were unable to discharge.

[56] As a result, this application has to fail.

Costs

[57] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[58] In my view, this is a case where the interests of justice will be best served by making no order as to cost.

[59] In the premises, I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Advocate Z Feni
Instructed by:	Qhali Attorneys
For the Respondent:	Mr Mthethwa