

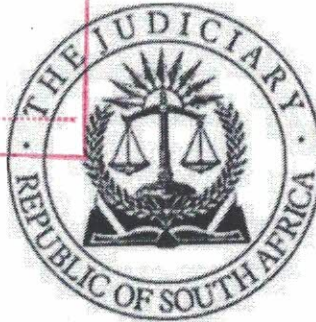
DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

23/11/2023

DATE

SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J431/23

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION WORKERS UNION (AMCU)**

First Applicant

**INDIVIDUAL APPLICANTS LISTED IN
ANNEXURE "X"**
and

Second to Further Applicants

**YEYE ENTERPRISES
MOKOENA, YEYE JOHANNES
MOKOENA, BHEKIMUZI SAMUEL**

**First Respondent
Second Respondent
Third Respondent**

Heard: 9 November 2023

Delivered: 23 November 2023 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 23 November 2023.)

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicants seek an order holding the respondents guilty of contempt of Court for failing to comply with the arbitration award issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) and certified on 18 November 2022 in terms of section 143 of the Labour Relations Act¹ (LRA) (the order).
- [2] The application is opposed by the respondents on the basis that they have complied with the order.

Background

- [3] The applicants were employed by the first respondent and they rendered services to Eskom at the Eskom Duvha Power Station (the Duvha site), a client of the first respondent. The first respondent employs approximately 300 employees who are placed at the Duvha site, rendering maintenance services on conveyor belts.
- [4] The applicants were dismissed from the employ of the respondent on 29 November 2021 for having participated in an unprotected strike action.² They subsequently referred an unfair dismissal dispute at the CCMA. The outcome of the dispute was an arbitration award dated 14 August 2022, in which ordered thus:

- '1. The Respondent YEYE Enterprises is ordered to reinstate the 37 Applicants back to the positions they held at the time of their dismissal

¹ No. 66 of 1995, as amended.

² Five of the 37 employees that were dismissed were reinstated to their previous positions prior to the commencement of the arbitration proceedings. The remaining 32 employees comprise of the second to further applicants before this Court. See: para 17 of the founding affidavit, on pp 9 to 10.

without any compensation. The respondent must restore the employee's years of service.

2. The applicants must report for duty and tender their services to the respondent on 5 September 2022, at their normal starting time, or any time to be decided by the respondent in consultation with the Applicants.'

Contempt of Court proceedings

- [5] The arbitration award was certified as stated above. The applicants subsequently launched these contempt of court proceedings, in which they aver that the second respondent advised them on 22 August 2022, that the first respondent was unable to comply with the order, as Eskom refused to allow the individual applicants access to the Duvha site due to their misconduct and that the first respondent did not have any other sites at which the individual applicants could be placed. The applicants refer to correspondence by the first respondent dated 1 September 2022³ in which the first respondent confirms its discussion with the applicants held on 22 August 2022, and proposes the termination of the applicants' contracts with 1 weeks' salary payment. The offer was rejected by the applicants. In the circumstances, the applicants allege that the respondents failed to comply with the order.
- [6] A rule *nisi* was granted per Prinsloo J on 10 May 2023, calling upon the respondents to appear in court on 27 July 2023 to make representations as to why the Court should not find them guilty of contempt of Court for failing to comply with the order.
- [7] On the return date (27 July 2023), the third respondent made an appearance in Court. The second respondent failed to appear in Court, but had delivered an answering affidavit, ostensibly on behalf of all the respondents,⁴ in which he stated that the respondents complied with the order and set out the steps

³ Annexure "AL5" to the founding affidavit on pp 40 to 41.

⁴ See: paragraph (vii) of the third respondent's answering affidavit, on p 73.

undertaken by the respondents in this regard, which are largely common cause when regard is had to the correspondence between the parties.

- [8] In short, the first respondent engaged with Eskom in August and September 2022 to permit the individual applicants entry to work on the Duvha site, however, Eskom refused, as it did not want the individual applicants on its site as they had misconducted themselves as aforesaid. Therefore, the first respondent made a proposal to the individual applicants to terminate their employment and offered them one week's salary.
- [9] Taking a different stance to their letter dated 1 September 2022 that the termination of the individual applicants' contracts of employment does not constitute retrenchment, in papers before this Court, the respondents now allege that a consultation process had commenced to retrench the applicants but had not been concluded during September 2022 as was envisaged, as the applicants proceeded to certify the arbitration award.
- [10] In conclusion, the respondents contend that they complied with the order and there was no *mala fides* on their part.
- [11] In response, the applicants deny that the respondents have complied with the order. They do not deny that a consultation process to retrench them had been initiated – they state that the “*the contemplated retrenchment process*” has not been finalized and they have not been paid their salaries from 5 September 2022 when they tendered their services. They further allege that the first respondent operates at another power station called the Kriel Power station, where they could be placed.
- [12] The *rule nisi* was extended to 7 September 2023. It is unclear as to what transpired on the return date on 7 September 2023. The matter served before me on 9 November 2023 pursuant to further pleadings having been filed.
- [13] In a further affidavit filed on behalf of the respondents, also deposed to by the second respondent, the respondents aver that the applicants were found guilty

for misconduct at the arbitration proceedings, but dismissal was found not to be the appropriate sanction. They deny that they operate at Kriel power station and confirm that during September 2022, the first respondent transported the individual applicants to the site, but they were barred entry by Eskom. The respondents are at pains to state that they were at risk of losing their contract with Eskom and engaged the applicants to terminate their services on the grounds of operational requirements but the applicants were non-co-operative. In reply, the applicants confirm that they reject the respondents' offer to terminate their employment on one week's salary and insist that the order be complied with.⁵

[14] In an email dated 29 September 2022, the second respondent reiterated that it is impractical for the first respondent to reinstate the applicants, with reference to the letter by Eskom of 22 October 2021.⁶

[15] The email correspondence of 29 September 2022 reads:

'Dear Madam,

You were furnished with a self-explanatory letter dated 22 October 2020 one Eskom (Attached)

1. The reinstatement is not practicable as we do not have any site except the one of Eskom (Duvha Power Station Coal Management Plant / CMD).
2. We try to offer the affected employees were weak remuneration and made it clear that we cannot compromise the employment of +- 300 employees on the Eskom site (Duvha Power Station Coal Management Plant / CMD).
3. If we could manage to get other sites in future the affected employees would be given a first preference for employment provided they meet the requirements and have the necessary qualifications/skills.

Kind Regards

Yeye Johannes Mokoena

⁵ Further replying affidavit at para 26.2 on p 115.

⁶ See: annexure AL4 to the founding affidavit on p 39.

Yeye's Enterprise CC

...

- [16] The applicants admit receiving this correspondence. They however, deny that their employment contracts have been terminated.

Analysis

- [17] It is not disputed by the applicants that Eskom denied them entry to the site to render their services. It is also not disputed that consultations to retrench the individual applicants commenced when Eskom refused to grant the individual applicants access to the Duvha site. Further, it is not disputed that the applicants rejected the offer by the respondents to receive one week's salary on termination of their contracts. Finally, it is not disputed that the applicants received correspondence on 29 September 2022 from the respondents that reinstatement is impractical given the stance by Eskom and that the first respondent has no other site where it operates and that should other sites exist in future, the affected employees would be considered, provided they possess the required qualifications or skills.
- [18] The respondents aver that on 29 September 2022 following their email correspondence as aforesaid, the applicant union was informed that the individual applicants must no longer report for duty and would receive their monies. At this stage, with reference to the applicant union's letter of 27 September 2022, the respondents' offer of one week's salary on termination of employment had been rejected. The applicant union denies being informed that the individual applicants' contracts had been terminated.
- [19] On the *Plascon-Evans*⁷ principle, I find in favour of the respondents that the employment contracts of the individual applicants were terminated on 29 September 2022 when they were informed that reinstatement is impracticable given Eskom's stance and that they would be given first preference for

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

employment should another site become available in future provided they had the requisite qualifications and experience.

- [20] Mr. Cook submits on behalf of the applicants, as I understand the submission, that there is non-compliance with the order by the respondents in that the respondents have failed to reinstate the individual applicants to date. He submits that where reinstatement is impractical, the respondents were enjoined to place the individual applicants in any other site, failing which, the respondents were enjoined to retrench the individual applicants and this did not happen.
- [21] Mr. Mabaso of the respondents, submits that the respondent has complied with the order, as all they were required to do was to place the individual applicants in the positions that they held at the date of their dismissal. This was impractical since Eskom refused them entry to the site where they worked at the date of their dismissal. In circumstances, the respondents could not be faulted, and cannot be said to be in contempt of Court, as they complied with the order. The respondents were under no obligation to place the individual applicants in any other site, as this is not required, as all the respondents were required to do, was to place them at the Duvha site where they worked at the time of their dismissal. This is precisely what they did.
- [22] Following the decision in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*⁸ where the Constitutional Court held that reinstatement is aimed at placing an employee in the position she or he would have occupied but for the dismissal and on the same terms and conditions that existed as at the date of dismissal, I agree, having regard to the order, that all that was required of the respondents was to place the individual applicants at the site. The order does not award retrospective reinstatement, contrary to what the applicants demand in their letter of 27 September 2022 when they rejected the first respondent's offer to terminate their contracts with one week's salary payment.

⁸ 2009 (1) SA 390 (CC).

Are the respondents in contempt of Court?

[23] With the afore-going in mind, in deciding whether the respondents are in contempt of Court, the principles in *Fakie NO v CCII Systems (Pty) Ltd*,⁹ are to be considered. Briefly, this Court is to consider whether the respondents failed to comply with the order, and if so, whether their non-compliance is wilful and *mala fide*.

[24] In consideration of the afore-going, I am of the view that the respondents' non-compliance with the order is not wilful or *mala fide*. They made attempts to have the individual applicants render services at the site, but access was denied by Eskom. Thereafter, and in consideration of the applicants' legal rights arising from their contracts or applicable legislation upon reinstatement,¹⁰ the respondents had engagements with the applicants to propose terminating their services and to pay them one week's remuneration, which proposal was rejected. Consequently, their services were terminated. I find that the essence of the email of 29 September 2022, although not eloquently drafted, is that the individual applicants' contracts of employment have been terminated as reinstatement at the Duvha site is impracticable given Eskom's stance contained in its letter of 22 October 2021 denying the applicants access to the site, which stance is reiterated unequivocally in Eskom's letter dated 19 September 2022¹¹ and the first respondent is warned that failure to adhere to Eskom's terms would result in the immediate termination of its contract with Eskom.

[25] In the premises the following order is made:

Order

⁹ 2006 (4) SA 326 (SCA).

¹⁰ See: *National Commissioner of the South African Police Service and Another v Meyer* [2019] JOL 42244 (LAC), where the Labour Appeal Court considered what the rights are of an employee post reinstatement, that arise from his employment contract or legislation

¹¹ p 98.

1. The rule *nisi* issued on 10 May 2023 is discharged.

2. There is no order as to costs.



M. T. M. Phehane

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant:

Adv. AL Cook

Instructed by:

LDA Incorporated Attorneys

For the Respondent:

Mr. S Mabaso of S. Mabaso Inc. Attorneys

LABOUR COURT