**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Not Reportable

Case no: C720/2019

In the matter between:

**THEMBELANI MABANDLA AND 228 OTHERS** **Applicants**

**and**

**CAPE PENINSULA UNIVERSITY OF TECHNOLOGY** **First Respondent**

**VICE CHANCELLOR PROFESSOR NKONGWANE STOFFEL NHLAPO** **Second Respondent**

**Date heard: 6 December 2019**

**Delivered: 10 March 2020**

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**JUDGMENT**

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RABKIN-NAICKER, J

[1] The applicants seek a declaratory order: "that the Respondents are in contempt of a Settlement Agreement reached on 6 June 2019, made an arbitration Award on 17 October 2019". They further ask the Court to fine the respondents and make a costs order in favour of their *pro bono* advocate and attorney.

[2] The application was initially brought on an ex parte basis on the 19 November 2019. If regard is had to the Certification of the Award in terms of section 143(3)

of the LRA, annexed to the papers, it is dated 28 October 2019. It is thus from that date, when the Award became binding as if it were an order of the Labour Court, and that the issue of contempt arises.

[3] According to the applicants' notice of motion in the contempt application, the respondents were in contempt of paragraph 1.3 of the Settlement Agreement. It is necessary to record that Agreement in full as follows:

"The parties agree as follows:

1. With effect from 1 August 2019, the Respondent will increase the Applicants' monthly wages as follows:

   1.1 those Applicants who are Cleaners on grade 18 will receive R8,940-00;

   1.2 those Applicants who are Security Officers on grade 17 will receive R10, 278 -00;

   1.3 those Applicants who are Campus Leaders, Shift supervisors Team Leaders and Control Centre Operators including those names on Annexure A, will receive the wage listed as the 50th percentile for the grade attached to each job title.

2. The Respondent will assign grades ranging from grade 11 to grade 16 to the job titles of Campus Leader, Shift Supervisor, Team Leader and Control Operators before 31 July 2019 and will advise the Applicant's legal representatives in writing of their grading decision in this regard. It is expressly recorded that the Applicants reserve the right to challenge any of these forthcoming grading decisions.

3. The Respondent agrees to correct the job titles assigned to the Applicants named in Annexure A to the job titles listed in column 3 of Annexure A.

4. The parties agree that the dispute regarding medical benefits has not been settled, and that it may be pursued by the Applicants in the future.

5. Subject to paragraph 4 above, this agreement is in full and final settlement of the dispute referred to the CCMA under case number WECT 20390-18.

6. This agreement shall be made an arbitration award by the presiding CCMA Commissioner…".

[4] In the founding affidavit it is averred that as of the date of its signature (15 November 2019), "…arrear salaries due to campus leaders, Shift Supervisors, Team Leaders and Control Centre Operators have not been paid, and the requested undertaking to pay the corrected monthly basic salaries from November and thenceforth has not been given".

[5] In his answering papers, the second respondent avers that the failure to comply with the settlement agreement reached on 6 June 2019 was not malicious and/or intentionally calculated to frustrate the applicants. He adds that the failure to enforce the Award once certified was also not intended to undermine or disrespect the Court but the delay was caused by an operational oversight in the internal affairs of the first respondent.

[6] The second respondent deals in some detail with the history of the insourcing of the applicants in the wake of the 'Fees Must Fall' Movement. He avers that:

"Since insourcing was not a planned decision by the institution, we agreed with the respective unions which represented the insourced employees to engage on a harmonization process which would run over a process of 2 years ending 31 July 2019. The purpose of the harmonization period was so that the institution is provided with a fair amount of time to harmonize the terms and conditions of employment of the insourced staff (900+ insourced staff) to be in line with those employees of First Respondent who were not so insourced."

[7] The Second Respondent explains that the two relevant Directors involved in this process, Mr Solomons who heads up Risk and Protection Services, and the Head of Employee Relations Mrs Abrahams, directly report to him. However in terms of CPUT's organigram both of these individual should be reporting to the Deputy Vice Chancellor Operations whose position is currently vacant. He avers therefore that he is not always aware of each and every operational decision.

[8] I find that the Second Respondent is candid with the Court when he makes the following averments in his answering papers:

"16.I must confess that when the Applicants referred this dispute to the CCMA, I was made aware by Mr Solomons that the matter was before the CCMA. Likewise, in July 2019 when the matter was subsequently settled and

the Agreement was reached between the parties, this was also reported to me by Mr Solomons. I advised Mr Solomons that I welcome the Agreement and that it should be implemented. Mr Solomons assured me that the Agreement would be implemented accordingly.

17. Since July 2019, I was therefore always under the impression that the Agreement had been implemented as I was led to believe this by the respective director in charge of Risk & Protection Services. It is only on 20 November 2019 that I became aware that the agreement was never implemented fully and that it had subsequently been made an Arbitration Award which was later certified resulting in the interim court order of contempt of court. When the Institution failed to comply with the Agreement, the matter was never reported to me or in any ManCom meeting by either Mr Solomon or Ms Abrahams who were both closely involved in the matter.

18. When the Order was served on me on 20 November 2019, I immediately called the two respective directors and required an explanation as to what had transpired in this matter. I was furious to learn that this matter had advanced to a level of a contempt of court order without it ever having been brought to my attention or that of ManCom. If there were any challenges pertaining to the implementation of the Agreement, normal operations of the Institution dictate that I be advised of this and that the matter be tabled before ManCom for resolution. This was unfortunately never done.

19. I have been subsequently advised that the delay in the implementation of the Agreement was occasioned by some of the employees responsible for its implementation being under the belief that its implementation would negatively impact First Respondent's section 189 of the Labour relations Act 66 of 1995 ("LRA") retrenchment consultation process currently undergoing. Below I set down the circumstances which caused First respondent's non-compliance…"

[9] It is submitted by the Second Respondent that the failure to implement the certified Award was not occasioned by First Respondent's deliberate refusal to do so. It is averred therefore that the First Respondent did not deliberately fail to comply or act in bad faith in this matter.

[10] In a supplementary affidavit placed before Court on the 6 December 2019, the applicant's attorney provided information contained in a large number of annexures showing that since the handing down of the interim order, the First Respondent "had corrected some of the applicants' salaries, to some extent." The parties have subsequently agreed to exchange further papers in an effort to ensure complete compliance.

[11] The replying papers make a number of factual allegations. These are garnered to demonstrate that CPUT had a strategy to abuse section 189A of the LRA and that the planned retrenchments were interwoven with the planned 'compliance' with the Settlement Agreement i.e. the notion that "harmonization was centered on compliance with the Agreement in so far as necessary following the dismissal of Applicants for operational requirements".

[12] For the purposes of deciding this application the Court is only concerned with the period subsequent to the serving of the certification order on the 1 November 2019 and the ex parte application brought on 19 November 2019. According to the answering papers, it was only a day later, on the 20th November 2019, that Second Respondent became aware that the certified Award had not been implemented and ordered the relevant management officials to do so. That some progress was made on an urgent basis is reflected in the applicants' supplementary affidavit dated 6 December 2019.

[13] At the hearing of the matter before me, the applicants sought that an appropriate fine be ordered against the First Respondent. Where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a mandamus demanding the contemnor behave in a particular manner, a fine and any further order that would have the effect of coercing compliance. [1]

[14] The law on contempt was surveyed and summarized by the Constitutional Court in the case of **Matjhabeng Local Muni v Eskom Holdings Ltd 2018 (1) SA 1 (CC)**:

[1] Pheko v Ekurhuleni City 2015 (5) SA 600 (CC) (2015 (6) BCLR 711; [2015] ZACC 10) at para 37

> [67] Summing up, on a reading of *Fakie*, *Pheko*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, or differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof — beyond reasonable doubt — applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies — for example, declaratory relief, mandamus or a structural interdict — that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof — a balance of probabilities — applies."

[15] While it is apparent, on Second Respondent's own version, that certain employees of the First Respondent were knowingly avoiding compliance with the certified Award, the institution itself (at the level of the ManCom and the Vice Chancellor) were not aware of the contempt of court until receipt of the ex parte Notice of Motion. I do not therefore find that a remedy arising from proof of malice is applicable. The Court however expresses its displeasure by means of a declaratory order and an order for costs.

Order

1. It is declared that the First Respondent was in contempt of Court on a balance of probabilities.
2. The First Respondent shall pay the costs of this application.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: S. Harvey instructed by Guy and Associates

Respondents: A Oosthuizen SC instructed by Mcaciso Stanfield Inc