



REPORTABLE

CASE NO: SA 1/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SHOPRITE NAMIBIA (PTY) LTD

Appellant

and

NAMIBIA FOOD AND ALLIED WORKERS UNION

First Respondent

EMMA N. NICANOR N.O.

Second Respondent

CASE NO: SCR 2/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

First Applicant

SHOPRITE NAMIBIA (PTY) LTD

PAUL JOSHUA MALAN

Second Applicant

WILLEM SCHALK PIENAAR

Third Applicant

CHRISTOFFEL JOHANNES LABUSCHAGNE

Fourth Applicant

and

NAMIBIA FOOD AND ALLIED WORKERS UNION

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA
Heard: 6 April 2022
Delivered: 26 April 2022

Summary: This is an appeal and a review of the decisions of the court *a quo* – originating from the same protracted labour dispute which culminated in a strike. During the first half of 2020, Shoprite and Namibia Food and Allied Workers Union (the Union) were engaged in annual wage negotiations in respect of employees within the bargaining unit – these negotiations reached a deadlock and the Union referred a dispute of interest to the Labour Commissioner in terms of s 82 of the Labour Act 11 of 2007 (the Act). The dispute was referred to conciliation in terms of s 82(a) of the Act. Conciliation did not succeed which meant that the protected industrial action under the provisions of the Act could proceed. On 7 December 2020, the parties agreed to strike rules. A strike ballot was held by the Union of employees within the bargaining unit from 11 to 18 December 2020. A majority voted in favour of a strike, set to start on 23 December 2020. A dispute developed between the parties concerning the recruitment of additional employees (temporary fixed term employees over the festive period) by Shoprite which the Union objected to contending that their recruitment was for the purpose of performing the work of striking employees in conflict with s 76(3)(a) of the Act and clauses 8 and 9 of the strike rules.

Appeal

The issues on appeal raises important questions concerning the rights of employers during a strike and the Labour Court's jurisdiction in terms of s 117(1)(e) to grant urgent interim relief, whilst the review concerns whether there was an irregularity in proceedings which led to a finding of contempt of court. The review proceedings also raise the manner in which petitions directed to the Chief Justice to invoke this court's review jurisdiction are to be brought.

Held that, Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC 2015 (3) NR 733 (SC) on the approach to interpreting text – both statutory and contractual refers.

Held that, sec 117(1)(e) of the Act does not qualify a dispute with reference to any parts of chapter 8. This means that any dispute referred under this chapter would have to meet this statutory requisite for jurisdiction. The purpose of the provision is to restrict access to the Labour Court for urgent relief to those matters where a dispute had first been referred and was unresolved.

Held that, the aim of sec 117(1)(e) is to prevent parties from approaching the court for urgent relief without first referring a dispute under chapter 8 and requiring parties to make use of the dispute resolution mechanisms created by the Act in accordance with the legislative intention behind the provision.

Held that, the court a quo was correct to reject the challenge to the to the court's jurisdiction to hear the matter.

Held that, s 76(3) restricts an employer's freedom of contract and its right to carry on a trade or business protected by Art 21(j) of the Constitution. Accordingly, s 76(3) is to be strictly interpreted, given the restriction it necessarily entails upon the constitutional right to trade and common law contractual rights of an employer.

Held that, there is no positive duty on an employer to ensure that the employees' rights to strike and associate are fulfilled. The Act provides more than ample protection of those rights and in some respects facilitates and furthers them. An employer's duty is to ensure compliance with the Act so as not to hinder or interfere with those rights – whether done directly or by indirect means.

Held that, The Union approached the application on the basis that the right to strike would appear to include a right to stop an employer from trading at all by asserting that a strike 'entails the cessation or interruption of normal business operations'. It may be the result of a strike, but is not necessarily an incident of the right to strike. Even though s 76(3) places a drastic infringement of an employer's right to trade, the legislature did not seek to prohibit an employer from trading at all with a skeleton staff

(of non-striking employees) as was correctly stressed by the Labour Court in *Namibia Food and Allied Workers Union v Lüderitz Spar* HC-MD-LAB-MOT-GEN-2021/00071 [2021] NALCMD 20 (30 April 2021). The court in that matter also correctly posited that the legislature also did not intend that s 76(3) prevented non-striking employees from volunteering to work during a strike.

Held that, the Union did not establish that the seasonal and managerial employees were required in the sense of being compelled or instructed to perform the work of striking employees. That was also not its case. It considered that permitting or allowing those employees to perform the work of striking employees fell foul of s 76 and amounted to requiring them to do so. This approach is untenable and in conflict with s 76(3) as properly approached.

It follows that the court below erred in granting the orders based upon s 76(3).

With regards to rules 8 and 9 of the strike rules, the court finds that, the Union failed to establish an entitlement to relief based on rule 8 as Shoprite had already engaged seasonal employees prior to the strike and upon the facts, seasonal employees were annually so engaged for more than ten years and were also engaged to render the same services as striking employees during seasonal peak periods.

Held that, rule 9 uses the term 'require' in the sense used in s 76 and prohibits Shoprite from requiring employees to do the work of striking employees in the same department. This rule would thus not apply to non-striking employees voluntarily performing work pursuant to a contract of employment. It follows that a breach of rule 9 was also not established and could also not found a basis for the interdicts sought and granted by the court *a quo*.

Review

On the day Shoprite noted an appeal against the judgment and orders of the court *a quo*, it also launched an urgent application for an interdict against the Union to enforce the strike rules, alleging multiple breaches on the part of the Union and its members at several branches (this application was withdrawn when the parties managed to resolve the wage dispute which gave rise to the strike on 23 January 2021). The Union

brought a counter application against Shoprite and four of its directors (three directors by the time the application was heard by Parker AJ on 26 January 2021) applying to commit those respondents for contempt of the court order of 8 January 2021 and seeking a declaratory relief to that effect.

In reaching its decision on 15 February 2021, the court *a quo* per Parker AJ referred to the test for contempt in civil proceedings in *Teachers Union of Namibia v Namibia National Teachers' Union & others* 2020 (2) NR 516 (SC) and found that the Union had established service of the order and notice of its terms on the part of Shoprite and its directors – the court found that they had not complied with the order. The court further found that Shoprite and its directors had not discharged the evidential burden cast on them in relation to wilfulness and *bona fides* as they had not placed any evidence before him to establish that their non-compliance of the court order was 'casual or accidental or unintentional'. The court found that contempt was thus established beyond a reasonable doubt and granted the declaratory relief to the effect that Shoprite and the directors were in contempt of the judgment and order given by Ueitele J and convicted them of contempt. The court postponed sentencing to enable evidence or statements to be prepared and considered in mitigation of sentence.

Shoprite and the directors thereafter (ie on 26 March 2021) petitioned the Chief Justice for the Supreme Court to exercise its review jurisdiction under s 16 of the Supreme Court Act 15 of 1990. They contended that irregularities occurred in the proceedings before Parker AJ (ie that their rights to a fair trial under Art 12 of the Constitution were violated because the court had 'directed that the matter be heard without reasonable opportunity having been given to the applicants to respond to what, in effect, had turned into criminal charges in a criminal prosecution'. They also contended that the court had failed to exercise any discretion in hearing the matter on an urgent basis or had taken irrelevant considerations into account in deciding that issue). A pertinent feature of the petition was the failure by the applicant to provide the transcript of what transpired on 18 January 2021 and the failure to explain why the transcript was not sought timeously considering their allegation of irregular proceedings.

Towards the end of the applicants' erstwhile counsel's oral argument on 26 January 2021, he requested leave for the applicants to put up answering papers in the event of

his argument on procedural points being rejected. The court declined that request. It was submitted that this refusal amounted to an irregularity.

Held that, the failure to provide the transcript of what transpired in court on 18 January 2021 or at the very least the gist of what transpired amounts to a material non-disclosure and misrepresentation of what actually transpired in the matter in respect of the issue raised in those proceedings.

Held that, the proceedings viewed as a whole showed that Parker AJ was most scrupulous on 18 January 2021 in ensuring that each of the parties, was afforded an adequate opportunity to place its respective case before him. He not only provided the opportunity to them to do so but went out of his way to explain the importance of doing so in the context of a factual enquiry as to whether contempt had been committed or not.

It is further held that, from the transcript of the proceedings on 18 January 2021, applicants' counsel elected on their behalf not to file answering affidavits and confine their opposition to the counter application to the points of law in their notice. This, he said as much expressly. That election is binding upon the applicants, as was correctly found by Parker AJ and amounts to an abandonment of the right to do so.

Held that, a review under s 16 is directed at an irregularity in the conduct of the proceedings and not to challenge a result reached by the court. The recourse against a result is to take a matter on appeal. Where a party is not happy with the result of procedural point taking which is not appealable, as is the case with an urgency ruling, it is not open to that party to dress up its challenge to the merits of a ruling as an irregularity for the purpose of invoking s 16.

Held that, where a court determines dates for the exchange of papers, particularly as occurred here in consultation with the parties and with their agreement, the point of prejudice caused by the initial inadequate timelines imposed in notices of motion falls away.

Held that, the point of urgency on the basis of the very short period provided in the notice of motion in the counter application accordingly fell by the wayside after the applicants agreed to time lines for filing further papers, given the fact that the prejudice faced by the severely short initial period imposed on them fell away.

Held that, there is no suggestion of prejudice to filing papers in the fullness of time as would be reasonably required to do so. The only 'prejudice' is that the point of urgency could no longer be tenably raised on this basis and that does not amount to any cognisable prejudice. The procedural defect in the proceedings (of the unreasonably short timeline) was thus rectified by the court with the active agreement of the applicants. It then fell away.

This court found that the applicants failed to establish an irregularity in the proceedings sought to be reviewed. The refusal of the request at the end of oral argument to file answering papers by the court in the context of the proceedings viewed as a whole did not amount to an irregularity. The applicants subsequently misled this court in their petition. Petitions directed to this court under s 16, parties and their practitioners owe this court a duty to properly place all relevant material before this court and not, as occurred in this instance, suppress or omit factual matters which could be adverse to a petition. The misleading manner in which the petition and review were brought, warrants the severe censure of this court, and justify an appropriate cost order, as is reflected in the order.

The appeal is upheld with costs and the application to review the decision of the Labour Court of 15 February 2021 is dismissed with costs.

APPEAL AND REVIEW JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] We have before us an appeal and a review which have their origin in the same protracted labour dispute which culminated in a strike. The background facts overlap

and the parties are in essence the same. The appeal and review have accordingly been heard together and this judgment addresses both matters in that sequence.

[2] The appeal raises the important questions concerning the rights of employers during a strike and the Labour Court's jurisdiction to grant urgent interim relief, whilst the review concerns whether there was an irregularity in proceedings which led to a finding of contempt of court. The review proceedings also raise the manner in which petitions directed to the Chief Justice to invoke this court's review jurisdiction are to be brought.

The background facts

[3] The appellant (and first applicant in the review proceedings) is Shoprite Namibia (Pty) Ltd (Shoprite). It is a retailer with 72 branches across the length and breadth of Namibia. The respondent in both the appeal and review application is the Namibia Food and Allied Worker's Union (the Union). It is the recognised exclusive bargaining agent for Shoprite employees within the bargaining unit in Shoprite's employ.

The appeal

[4] During the first half of 2020, Shoprite and the Union were engaged in annual wage negotiations in respect of wages and conditions for employees within the bargaining unit. These negotiations reached a deadlock and the Union on 26 June 2020 referred a dispute of interest to the Labour Commissioner in terms of s 82 of the Labour Act 11 of 2007 (the Act).

[5] The Labour Commissioner in turn referred the dispute for conciliation under s 82(7)(a) of the Act. The conciliation also did not succeed in settling the dispute and the conciliator issued a certificate of unresolved dispute on 8 September 2020. This meant that the protected industrial action under the provisions of the Act could proceed. On 7 December 2020 the parties agreed to strike rules. A strike ballot was then held by the Union in respect of employees within the bargaining unit from 11 to 18 December 2020. A majority voted in favour of a strike, set to start on 23 December 2020.

[6] In the meantime a dispute developed between the parties concerning the recruitment of additional employees by Shoprite. The Union on 14 December 2020 objected to Shoprite taking on temporary fixed term employees over the festive period, contending that their recruitment was for the purpose of performing the work of striking employees in conflict with s 76(3)(a) of the Act and clauses 8 and 9 of the strike rules.

[7] The Union argued that clause 8 precluded Shoprite from hiring 'scab' labour to perform the work of striking employees and that clause 9 meant that Shoprite could not require non-striking employees to perform the work of striking employees. The Union also contended that both forms of conduct fell foul of s 76(3)(a). The Union argued that s 76(3)(a) prohibited an employer from engaging employees to do the work of striking employees as well as prohibiting managerial employees from doing such work.

[8] Shoprite's response was to point out that seasonal employees were employed annually as an established practice during the peak festive season up to the re-opening of schools in January. The Union demanded an undertaking from Shoprite

that additional seasonal employees would not be employed in contravention of clause 9 of the strike rules. This was not forthcoming from Shoprite. This resulted in the Union approaching the Labour Court on an urgent basis to interdict Shoprite from contravening clause 9 and s 76(3)(a) on 23 December 2020. The application was struck from the roll for a lack of authority.

[9] The strike proceeded on 23 December 2020 and the Union again raised the issue and a conciliator was again involved. An inspection of four of Shoprite's stores was conducted. The Union contended in a report that seasonal employees and managerial employees (outside the bargaining unit) were performing the work of striking employees and demanded on 31 December 2020 that Shoprite desist from doing so forthwith and by noon on 31 December 2020.

[10] In response, Shoprite stated that the majority of employees identified by the Union (95%) in the report were 'fixed term' (seasonal) employees. It was denied that they were doing the work of the striking employees. Shoprite pointed out that fixed term employees were employed for at least the past ten years during the peak festive period. It was also not denied that managerial employees were doing the work of striking employees, asserting that this was permissible.

[11] The Union thereafter brought another urgent application on 3 January 2021, seeking to interdict Shoprite from hiring and permitting seasonal or fixed term employees or any other employee from performing the work of striking employees for the duration of the strike. The interdicts sought in this regard were embodied in paragraphs 2 and 3 of the notice of motion. A further order was sought to direct

Shoprite to receive and accept that the Union's representatives upon their premises in accordance with clause 21 of the strike rules.

[12] In opposition to the application, Shoprite raised preliminary objections and also provided an answering affidavit addressing factual matter and contended that the Union had not met the requisites for the granting of the interdict sought against it.

[13] The principal preliminary point relevant for present purposes is a denial of the Labour Court's jurisdiction to hear the matter under s 117(1)(e) of the Act – although formulated that the court was not 'suitably clothed to be seized' with the application, because there was no dispute pending.

[14] On the merits, Shoprite's answering affidavit confirmed its practice for several years of annually hiring employees for a fixed period over the festive season until the return to school in January. A graph depicting statistics reflecting this practice since 2010 was confirmed under oath. Additional employees were engaged during this annual recruitment exercise which started in early December 2020, and which was also to take into account the impact of Covid-19 on Shoprite's staff. The recruitment started on 3 December 2020, and said to be prior to the stage when Shoprite would have known of the strike and its inception date. It was denied that this recruitment drive was motivated by the strike and was done pursuant to its standard practice and the impact of Covid-19 infections amongst staff at that time.

[15] Shoprite also pointed out that 2042 of its 4600 workforce went on strike, with some 421 employees returning to work during the strike.

[16] Shoprite explained that the temporary recruits were engaged to perform a wide range of functions and not for the purpose of performing the work of striking employees. It was also pointed out that employees not on strike would continue with their duties and contended that management employees are not prohibited from performing the work of striking employees by virtue of their employment conditions which provided that they are to work where needed.

[17] Shoprite further stated that it had reported a dispute to the Labour Commissioner on 24 December 2020, complaining of a breach of the strike rules against the Union in respect of conduct at certain of its outlets.

[18] Finally Shoprite placed in issue that the Union had established - and stated that the Union had not even attempted to ascertain – whether employees undertook their work voluntarily or compelled to do the impugned work and asserted that the failure to do so meant that the requisites for interim relief had not been met.

The approach of the High Court

[19] Of the several preliminary points raised against the application by Shoprite, only the point of a lack of jurisdiction remains relevant. The Labour Court, per Ueitele J referred to s 117(1)(e) and to the decided cases raised by Shoprite in support of the defence of a lack of jurisdiction. Ueitele J distinguished those cases and found that there was a dispute pending (as had been reported earlier) and that the conciliator remained seized with it until it was resolved in terms of s 82(9) of the Act.

[20] Given that there was a dispute pending between the parties, the court concluded that it had jurisdiction under s 117 of the Act.

[21] As to the merits of the interdict sought, the court posited the following two questions – firstly whether the strike was protected under the Act and if so, whether Shoprite ‘has an obligation to give effect to or refrain from interfering with that right (to strike)’.

[22] It answered the first question in the affirmative as it was not disputed that the Union had followed the requisites for a lawful strike under the Act.

[23] The court also answered the second question in the affirmative. It did so by referring to Art 5 of the Constitution which obliges all to respect the rights enshrined in the Constitution which includes freedom of association. The court further held that Shoprite has a duty not to prevent or undermine the strike of Union members and a positive obligation to ensure that freedom of association ‘is protected and fulfilled’.

[24] The court proceeded to refer to s 76(3)(a) and clauses 8 and 9 of the strike rules.

[25] The court found that the purpose of s 76(3) is to ‘ensure full enjoyment of the right to strike by employees, and that it meant that employers must not require an employee not participating in the strike to do the work of striking employees in a protected strike’. The court further found that ‘requiring’ seasonal/fixed term employees and management staff to perform the work of striking employees to be in conflict with the rules of the contest – with reference to s 76(3)(a). The court on 8 January 2021 granted the interdicts sought by the Union in paragraphs 2 and 3 of the notice of motion – interdicting the hiring of seasonal workers and interdicting Shoprite

from permitting managerial employees from performing the work of striking employees. The court also granted an order directing Shoprite to accept and receive union representatives on their premises even though there was no evidence to support it. This aspect would appear to have been an issue prior to the application but was no longer in dispute when the application was heard. No argument was delivered on the issue and the focus was on paragraphs 2 and 3 of the order.

Submissions on appeal

[26] Shoprite appealed against the judgment and orders of Ueitele, J of 8 January 2021.

[27] It was contended on behalf of Shoprite that s 117(1)(e) meant that the Labour Court had no jurisdiction to hear the matter as there was no dispute pending under chapter 8 when the application was launched. Counsel submitted that the Labour Court only has jurisdiction to grant relief in urgent applications once a dispute under chapter 8 is pending. Counsel referred to s 82 of the Act with regard to disputes being referred for conciliation, and submitted that the conciliator was no longer seized with the dispute, after issuing a certificate of the dispute referred on 26 June 2020.

[28] In the course of oral argument, counsel very properly pointed out that a dispute under chapter 8 is referred to in the founding papers which was still unresolved when the application was launched. In their written argument, counsel further contended that the order granted was not competent in that final relief was granted which is not permitted by s 117(1)(e).

[29] Shoprite also challenged the Labour Court's decision on the merits. It was argued that s 76(3)(a) and the strike rules were not contravened. Counsel referred to Shoprite's statement that management staff were required to render services in any department as the need might arise and that 'non-striking employees did not cease to exist due to the strike . . .'. No contrary evidence was put up in reply. On the basis of the test for disputed facts in motion proceedings in *Plascon-Evans*,¹ counsel argued it is to be accepted that managerial staff were required to assist with rendering of services at any of the departments within stores in terms of their employment contracts. Counsel contended that clauses 12 and 16.4 of the strike rules permitted and contemplated that non-striking employees may continue to render services. Clause 12 provided that the Union would not 'intimidate . . . non-striking employees who may wish to continue rendering their services . . .'. Clause 16.4 precluded striking employees from intimidating or in any way interfering with any employee 'endeavouring to carry out his or her duties in terms of a contract of employment'.

[30] Counsel contended that the word 'replace' is the key term in clause 8. It was pointed out that the fixed term employees were already engaged and were not to replace striking employees but render the same services because of heavier demand over the festive period. As far as the term 'require' used in clause 9 and s 76(3)(a) was concerned, counsel argued that this meant compel and that where employees had been engaged to perform services within any or all departments, they would be allowed to render those services. This accorded with the approach adopted by Schimming-Chase, J in the Labour Court in *Namibia Food and Allied Workers Union v Lüderitz Spar*.²

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

² *Namibia Food and Allied Workers Union v Lüderitz Spar* (HC-MD-LAB-MOT-GEN-2021/00071) [2021] NALCMD 20 (30 April 2021) (*Lüderitz Spar*).

[31] Both side's written argument concerned paragraphs 2 and 3 of the order. Upon enquiry, counsel for Shoprite also submitted that the court was not justified to grant the order directing Shoprite to accept and receive union officials upon its premises after the delivery of the answering affidavit but this would no longer appear to be in issue.

[32] It was also argued that it was incumbent upon the Union to establish the Union and employees were 'lawfully striking' and to do so meant that the employees and Union complied with the strike rules. This Shoprite disputed and raised breaches. It was submitted that it would be unjust for the Union to seek compliance with the rules in circumstances where it would be taking advantage of its own wrongful conduct.

[33] It was argued on behalf of the Union that the Labour Court had correctly found that an employer had a positive duty to ensure that the right to strike is fulfilled within the context of the history of exploitation which preceded the adoption of the Constitution. Counsel contended that exploitative wages continued even after the Constitution's adoption and remained the case with Shoprite's employees within the bargaining unit. Counsel further contended that the Labour Court was also correct in holding that Shoprite had required seasonal and managerial employees to perform the work of striking employees in conflict with s 76(3) and the strike rules.

[34] By deploying seasonal employees without job descriptions in work wherever the need arose and assign managerial employees to perform the work of striking employees entitled the Union to its interdict. It was argued that the scheme of employing seasonal employees to perform the work of striking employees was unlawful and had a negative effect upon the strike and that the Labour Court was correct in interdicting that practice.

[35] Counsel for the Union also contended that the Labour Court had the jurisdiction to grant the interdict in terms of s 117(1)(e) as a dispute had been reported (and gave rise to the strike) and remained unresolved.

Interpretation of statutory provisions

[36] Before turning to the specific statutory provisions raised in this appeal and the terms of strike rules 8 and 9, the approach to interpreting text – both statutory and contractual - is first referred to.

[37] This court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*³ recently adopted the lucid articulation of the approach to be followed in the construction of text by Wallis JA in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁴

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible,

³ *Total Namibia v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC) paras 17-20 (*Total Namibia*). Since followed in the context of statutory construction in *Namibian Association of Medical Aid Funds & others v Namibia Competition Commission & another* 2017 (3) NR 853 (SC) paras 39-40 (*Namibian Association of Medical Aid Funds*) and *Torbitt v International University of Management* 2017 (2) NR 323 (SC) para 26.

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[38] In *Total Namibia*, this court also referred to the approach in England and concluded:

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

[39] As this court said in *Namibian Association of Medical Aid Funds*:

'To paraphrase what was stated by this court in *Total*,⁵ the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.'⁶

[40] This process has aptly been described as 'essentially one unitary exercise' in which text and context are relevant to construing provisions.⁷

[41] This court has also stressed the importance of the Constitution in interpreting statutory provisions:⁸

⁵ Para 24.

⁶ Para 41.

⁷ *Total Namibia* para 23.

⁸ *Metropolitan Bank of Zimbabwe Ltd & another v Bank of Namibia* 2018 (4) NR 1115 (SC) para 31.

'The Constitution and the values enshrined in it form the starting point in interpreting statutory provisions. An interpretation consistent with advancing and giving effect to the values enshrined in the Constitution is to be preferred where a statute is reasonably capable of such interpretation.'

[42] It is against this backdrop that I turn to s 117(1)(e) on the one hand and s 76(3) and strike rules on the other.

Section 117(1)(e)

[43] This subsection provides:

'The Labour Court has exclusive jurisdiction to –

...

(e) Grant urgent relief including an urgent interdict pending resolution of a dispute in terms of Chapter 8;

...'

[44] The context of s 117 of the Act is the statutory intention and purpose of the dispute resolution regime created by the Act, described by this court in *Namibia Financial Institutions Union v Nedbank Ltd & another*:⁹

'The statutory intention behind the new regime of arbitration of disputes is clearly that labour disputes would be determined with all due speed and not subject to delays which had previously characterised court proceedings. This underlying statutory intention was explained in earlier Labour Court proceedings:

"But the Act did away with district labour courts. It placed greater emphasis on conciliation and, of importance in this context, it brought about a new regime of arbitration of disputes by specialised arbitration tribunals operating under the

⁹ *Namibia Financial Institutions Union v Nedbank Ltd & another* 2015 (4) NR 1161 (SC) para 23 (*Nafinu*).

auspices of the Labour Commissioner. The provisions dealing with these tribunals in Part C of the Act place emphasis upon expediting the finalisation of disputes and upon the informality of those proceedings. The restriction of participation of legal practitioners and the range of time limits for bringing and completing proceedings demonstrate this. Arbitrators are enjoined to determine matters fairly and quickly and deal with the substantial merits of disputes with a minimum of legal formalities.

The overriding intention of the legislature concerning the resolution of disputes is that this should be achieved with a minimum of legal formality and with due speed. This is not only laudable but particularly appropriate to labour issues. I stress that it is within this context that the Act places greater emphasis on alternative dispute resolution and confines the issues to be adjudicated upon by this court [in terms of] s 117”.

[45] This court in *Nafinu* concluded its remarks in this context:¹⁰

‘Within this statutory scheme, the Labour Court’s jurisdiction in granting urgent relief under s 117(1)(e) is to be of a temporary nature and limited to relief pending the final determination of a dispute by an arbitrator (in terms of chapter 8).’

[46] It is also to be stressed that the Act accords the Labour Court exclusive jurisdiction to grant the remedies crafted and determined by the legislature in the Act in respect of labour disputes. Those remedies and procedures are subject to the limits placed upon them in the Act.¹¹

[47] Its jurisdiction to grant urgent relief including an urgent interdict can only be invoked pending resolution of a dispute in terms of chapter 8 of the Act.

¹⁰ Para 24 citing *Meatco v Namibia Food and Allied Workers Union & others* 2013 (3) NR 777 (LC) paras 24-25 where *Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia & others* (case no. LC 103/2011, unreported judgment delivered on 13 April 2012) paras 24-25. See also *Haimbili & another v TransNamib Holdings Ltd & others* 2013 (1) NR 201 (HC) para 13.

¹¹ *Masule v Prime Minister of the Republic of Namibia & others* (SA 89/2020) [2022] NASC (4 February 2022) paras 47-49, per Damaseb DCJ.

[48] The Labour Court held s 82(17) of the Act found application in this matter. That sub-section provides:

'(17) A conciliator referred to in terms of subsection (9)(a) –

(a) remains seized of the dispute until it is settled; and

(b) must continue to endeavour to settle the dispute through conciliation in accordance with the guidelines and codes of good practice issued in terms of section 137.'

[49] The court below held that the wage dispute originally referred to the Labour Commissioner on 26 June 2020 remained pending and was not resolved and thus constituted a dispute for the purpose of s 117(1)(e).

[50] Counsel for Shoprite contended that a conciliator is not seized with the dispute forever. The conciliator had after all issued a certificate of unresolved dispute on 8 September 2020.

[51] In oral argument, counsel however correctly conceded that there was a dispute pending for the purpose of s 117(1)(e) at the time the urgent application was launched. Counsel submitted that the Labour Court can only grant urgent relief of a temporary nature.

[52] Significantly, the legislature used the term resolution of a dispute in terms of chapter 8. The significance of the term becomes apparent upon an examination of the types of disputes addressed in chapter 8 in the context of the remedies afforded by the Act.

[53] Chapter 8, entitled 'Prevention and resolution of disputes', comprises four parts, each dealing with different categories of disputes and, in some instances, with different definitions of disputes given for certain of those disputes. Part A concerns disputes affecting the national interest and grants the Minister certain powers to address those.

[54] Part B concerns the conciliation of disputes defined as disputes of interest and disputes referred for conciliation by the Minister or the Labour Court or under the Affirmative Action (Employment) Act.¹²

[55] Part C deals with the arbitration of disputes. It relates to complaints concerning breaches of employment agreements including collective agreements, disputes referred under the Affirmative Action Act or s 82(16) of the Act or those which are required to be referred to arbitration under the Act. These disputes relate to matters where disputes of right are to be adjudicated by an arbitrator.

[56] Finally, part D concerns disputes where private arbitration has essentially been agreed upon.

[57] The Union referred the wage dispute under part B to the Commissioner who in turn referred it for conciliation under s 82(9). The conciliator issued the certificate of unresolved dispute when the parties failed to resolve it in conciliation. The dispute was at that stage unresolved and would follow the course for its further conduct as contemplated in the Act.

¹² Act 29 of 1998.

[58] Section 82(17) referred to by the Labour Court is to the effect that a conciliator (to whom a dispute is referred under s 82(9)(a)) remains seized of the dispute until it is settled and is to continue to endeavour to settle the dispute through conciliation. This obligation thus continues after a certificate of unresolved dispute is issued. That certificate is issued as a prerequisite for the parties who seek to act before making use of their respective right to take strike or lockout action against each other in compliance with the Act. That is the purpose of that certificate and the timelines provided for in s 82(10) are set to avoid delaying tactics from either side. The certificate merely certifies that the dispute is unresolved for the purpose of the Act – and as a precursor invoking the right to strike or lock-out and is not an end in itself. Despite issuing the certificate, the conciliator remains seized of the dispute until settled and has a duty to endeavour to settle it through conciliation. That duty does not continue forever but for as long as the dispute is unresolved.

[59] In this dispute, the conciliator was in fact engaged by the Union to inspect Shoprite's premises for the purpose of seeking compliance with s 76(3) and the strike rules. Shoprite rightly did not contest the involvement of the conciliator in this regard as this was in accordance with the conciliator's duty. Shoprite too referred a dispute concerning alleged breaches of strike rules to the Commissioner. This was under Part C for the Commissioner to refer to arbitration, and concerning which the Commissioner must first attempt to resolve through conciliation before beginning the arbitration under s 86(5).

[60] Section 117(1)(e) does not qualify a dispute with reference to any of the parts of chapter 8. This means that any dispute referred under chapter 8 would meet this statutory requisite for jurisdiction. The purpose of the provision is to restrict access to

the Labour Court for urgent relief to those matters where a dispute had first been referred and was unresolved.

[61] In this instance the Union had reported a dispute (under part B) of chapter 8. It remained unresolved after conciliation. That entitled the Union to engage in a protected strike. The dispute thus reported remained unresolved as the strike commenced and at the time the Union launched its application against Shoprite. The interdicts were sought and granted for the duration of the strike and thus pending the resolution of the dispute although it would have been preferable for the Labour Court to have followed the wording of the Act in formulating its order. The effect is however the same.

[62] Whilst s 117(1)(e) does not employ the term 'temporary', the use of that term in *Nafinu* is to be understood within the context of that matter and refers to the power to grant urgent relief pending the resolution of a dispute, thus providing temporary as opposed to permanent interdicts. The nature of the order given by the court below was by no means permanent in nature but was for the duration of the strike. It was pending the resolution of the dispute underpinning the strike and would only apply until the end of the strike. A strike is, by its very nature, temporary.

[63] Section 117(1)(e) is after all to prevent parties from approaching the court for urgent relief without first referring a dispute under chapter 8 and thus requiring parties to make use of the dispute resolution mechanisms created by the Act in accordance with the legislative intention behind the provision.

[64] It follows that the Labour Court was correct in rejecting the challenge to the court's jurisdiction to hear the matter.

Section 76(3) and the strike rules

[65] The heading to s 76 is 'Strikes and lockouts in compliance with this chapter'. It proceeds to set out consequences which ensue if strike or lockout action is in compliance with the Act. It follows s 75 which prohibits strike and lockouts not in compliance with the Act. If there is compliance, s 76(1) provides that a party does not commit a delict or breach of contract by engaging a strike or lock-out but that an employer is not obliged to remunerate an employee while on compliant strike. Section 76(2) regulates peaceful picketing during a compliant strike.

[66] Section 76(3) reads:

'(3) Despite the provisions of any contract of employment or collective agreement, an employer must not –

- (a) require an employee who is not participating in a strike that is in compliance with this Chapter or whom the employer has not locked-out to do the work of a striking or locked-out employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual; or.
- (b) hire any individual, for the purpose, in whole or in part, of performing the work of a striking or locked-out employee.'

[67] Section 76(4) entitles an employee to resume employment at the end of a compliant strike or lockout. Finally s 76(5) prevents civil actions for damages against persons participating in a compliant strike unless the conduct in question amounts to defamation or a criminal offence.

[68] The provisions of s 76(3) are to be construed in a manner consonant with the Constitution. The Labour Court correctly refers to the right to withhold labour and freedom of association protected in Art 21(1) of the Constitution. These fundamental freedoms are entrenched in these terms:

'All persons have the right to:

...

(e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

(f) withhold their labour without being exposed to criminal penalties;

...'

[69] The Act certainly firmly entrenches and furthers these freedoms in its elaborate provisions directed at protecting employees from unfair labour practices and facilitating the registration of trade unions and their operations. The Act not only entrenches the right to withhold labour without being exposed to criminal sanction as protected constitutionally, but s 76 goes considerably further in providing wide ranging protection and rights to employees engaged in a strike which is in compliance with the Act. Employment security is protected, as is the right to peaceful picketing. Not only is criminal sanction completely absent and excluded, but employees are essentially immune from civil liability for the act of taking part in a protected strike.

[70] The legislature went even further in s 76(3) to restrict the right of employers to hire other employees to do the work of striking employees. This far reaching provision goes considerably further than the right to strike and freedom of association as

entrenched in the Constitution and is not part and parcel of those rights as set out in the Constitution.

[71] On the contrary, s 76(3) restricts an employer's freedom of contract and its right to carry on a trade or business protected by Art 21(1)(j) of the Constitution. Section 76(3) is accordingly to be strictly interpreted, given the restriction it necessarily entails upon the constitutional right to trade and common law contractual rights of an employer.

[72] I fully agree with the Labour Court that an employer has an obligation not to infringe an employee's right to freedom of association including the right to join unions, or the right to take strike action in compliance with the Act. The Labour Court further found that an employer has an obligation to ensure that the right is fulfilled and to ensure the full enjoyment of the right to strike. This meant, so the court held, that an employer must not require, in the sense of permitting or allowing, non-striking employees including managerial employees from performing the work of striking employees.

[73] This approach is contrary to the passage relied upon in the court's judgment:¹³

'A strike or lock-out is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The Court is the referee. It does not intervene simply because one of the opponents is being hurt – that is the idea of the contest. The referee may intervene if one of them is struck a blow below the belt, but he would be astounded while the bout is in progress to receive a complaint that something had gone wrong at the weigh-in. Parties to an industrial contest take time and trouble to shape up for the fight . . . '.

¹³ *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C) at 530E-F.

[74] There is in my view no positive duty on an employer to ensure that its employees' rights to strike and associate are 'fulfilled' in the sense stated by the Labour Court. The Act provides ample protection of those rights and in several respects facilitates their exercise and furthers them by protecting those who do so. An employer's duty is to ensure compliance with the Act so as not to hinder or interfere with those rights – whether done directly or by indirect means. An employer's duty cannot extend to ensuring that a strike is effective. That negates the nature and context of collective bargaining and the use of industrial action used to support it and is contrary to the authority cited by the Labour Court in the preceding paragraph. A strike's effectiveness is rather dependent upon participation in it by employees within the bargaining unit and by their and the Union's collective bargaining.

[75] The Union approached the application on the basis that the right to strike would appear to include a right to stop an employer from trading at all by asserting that a strike 'entails the cessation or interruption of normal business operations'. It may be the intended result of a strike to cause a cessation or interruption, but a cessation is not necessarily an incident of the right to strike. Even though s 76(3) places a far-reaching infringement of an employer's right to trade, the legislature did not seek to prohibit an employer from trading at all with a skeleton staff component (of non-striking employees) as was correctly stressed by the Labour Court in *Lüderitz Spar*.¹⁴ The court in that matter also correctly posited that the legislature also did not intend that s 76(3) prevented non-striking employees from volunteering to work during a strike.¹⁵

¹⁴ Para 45.

¹⁵ *Ibid* 45.

[76] Because of the manner in which s 76(3) makes inroads into an employer's right to trade, the term 'require' is to be interpreted restrictively in the sense of compel or insist upon or instruct and would certainly not include permit or allow, as sought by the Union in its application and as found by the court below in its order. That also accords with the ordinary meaning of the term. To interpret require to include 'permit' would also be contrary to the ordinary meaning of the term 'require'. It would also follow that s 76(3) would entitle a non-striking employee to decline to perform the work of a striking employee.

[77] Approaching the facts along the lines of *Plascon-Evans*, it is stated in Shoprite's answering affidavit that Shoprite's managerial employees contractually agreed to render services in any department as the need might arise and that they thus agreed to perform work where needed. It is in any event not alleged in the founding papers that managerial employees were compelled or instructed to do the work of striking employees. If they did not do so voluntarily, s 76(3) would in my view preclude an employer requiring them to do so. The complaint is that they were merely doing that work in the sense of being permitted by the employer to do so. That does not fall foul of s 76(3).

[78] It is further stated in Shoprite's answering affidavit that non-striking employees' duties did not cease due to the strike. It is furthermore stated that the seasonal fixed term employees were already engaged when the strike commenced and were engaged not to replace striking employees but to render the same services because of the higher demand over that period.

[79] The Union did not reply to these statements. Nor did it apply for a referral to oral evidence. Those issues are thus to be determined on Shoprite's version.

[80] It follows that the Union did not establish that the seasonal and managerial employees were required in the sense of being compelled or instructed to perform the work of striking employees. That was also not its case. It considered that permitting or allowing those employees to perform the work of striking employees fell foul of s 76 and amounted to requiring them to do so. This approach is, as already pointed out, untenable and in conflict with s 76(3) properly approached.

[81] It follows that the court below erred in granting the orders based upon s 76(3).

Strike rules

[82] Rule 8 prohibits Shoprite from engaging scab labour to replace striking employees. It reads:

'(8) No scab labour (hiring any individual) may be engaged to replace the lawfully striking employees during the duration of the industrial action.'

[83] The facts properly approached show that Shoprite had already engaged the seasonal employees prior to the strike. More importantly, upon the facts, seasonal employees were annually so engaged for more than ten years and were also engaged to render the same services as striking employees during seasonal peak periods. A far smaller number of seasonal employees were engaged (270) than those on strike - in excess of 2000 employees. The Union thus failed to establish an entitlement to relief

based on rule 8 which could found a basis for the interdicts granted by the Labour Court.

[84] Rule 9 of the strike rules reads:

'(9) The employer will not require non-strikers or any employee to perform any duties, functions or work of the legally striking employees during the industrial action within the same department example groceries, non-foods, perishable etc.'

[85] Rule 9 uses the term 'require' in the sense used in s 76 and prohibits Shoprite from requiring employees to do the work of striking employees in the same department. The interpretation given to the term 'require' as outlined above is reinforced by rules 12 and 16 of the strike rules. Rule 12 prohibits the Union members from intimidating non-striking employees 'who may wish to continue rendering their services.' Rule 16.4 enjoins striking employees from intimidating or 'in any way interfer(ing) with any employee endeavouring to carry out his or her duties in terms of a contract of employment'.

[86] These provisions make it clear that rule 9 would not apply to non-striking employees voluntarily performing work pursuant to a contract of employment. Their contracts were to the effect that they would perform services where needed. It follows that a breach of rule 9 was also not established and could also not found a basis for the interdicts sought and granted.

[87] In so far as Shoprite seeks to contend that it would be unjust and contrary to good faith for the relief to have been granted because of the alleged breaches of strike

rules on the part of the Union, the doctrine of fictional fulfilment was not in my view properly raised on the papers by the reference of 'unclean hands'. The reliance upon that expression was correctly dealt with by the court below and shown to be without substance.

[88] Quite apart from failing to properly raise the doctrine of fictional fulfilment on the papers, it is in any event not apparent to me that it would find application in the statutory setting of this case despite its contractual elements as well. But given the conclusion reached concerning the interdicts, it is not necessary to further consider this question which is left open.

[89] There was no evidence to support the order in paragraph 4 of the order and no argument was directed on behalf of the Union that it was justified. It follows that it is to be set aside.

The review - events subsequent to the judgment of 8 January 2021

[90] On 13 January 2021, Shoprite noted an appeal against the judgment and orders. On the same day, it launched an urgent application for an interdict against the Union to enforce the strike rules, alleging multiple breaches on the part of the Union and its members at several branches. That application was set down in the Labour Court on 18 January 2021.

[91] On 17 January 2021, the Union brought a counter application against Shoprite and four of its directors, applying to commit those respondents for contempt of the court order of 8 January 2021 and seeking declaratory relief to that effect. The events relied upon in the counter application emanated from a number of Shoprite's branches.

The counter application was set down together with the main application on 18 January 2021.

[92] In response to the counter application, Shoprite's legal practitioners delivered a notice on 18 January 2021 – taking points of law against the counter application, including contesting that it was properly brought as one of urgency.

[93] When the main application and counter application were called on 18 January 2021, they were not capable of being heard and the duty judge (Parker AJ) postponed them to 26 January 2021 for hearing. In the meantime the wage dispute which gave rise to the strike was resolved on 23 January 2021. Shoprite's application to enforce strike rules became academic and was withdrawn when the matter was called on 26 January 2021 and argument on the counter application proceeded. The Union's application against one of the directors was withdrawn as he was no longer a director.

[94] Shoprite and its directors' defence to the counter application was confined to the legal points raised in their 18 January 2021 notice. They had not put up any evidence to counter the detailed accounts of alleged violations of the court order contained in the founding affidavit to the counter application. The main point centred on urgency. The point was taken that the counter application did not have a prayer for it to be heard as one of urgency and it was also argued that the counter application was also not urgent. Other points such as non-joinder were also raised and are no longer relevant. After hearing argument, Parker AJ reserved judgment which was given on 15 February 2021.

Judgment of Parker AJ of 15 February 2021

[95] The court rejected the points raised by Shoprite and the directors. Parker AJ pointed out that the counter application was brought in response to Shoprite's urgent application to enforce strike rules which Shoprite sought as a matter of urgency against the Union. The counter application was found to be inextricably tied to the main application and would also be heard as one of urgency. The court furthermore found that the enforcement of a court's judgment, where it has been breached, concerned a vindication of the rule of law and was an inherently urgent matter.

[96] The court referred to the test for contempt in civil proceedings as recently articulated by the Chief Justice in *Teachers Union of Namibia v Namibia National Teachers Union & others*:¹⁶

' . . . the test for contempt of court is that an applicant must prove the elements of contempt of court beyond reasonable doubt; once the applicant has proved the order, its service or notice to the respondent as well as non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides. Should the respondent fail to advance evidence establishing a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.'

[97] Parker AJ found that the Union (applicant in the counter application) had established service of the order and notice of its terms on the part of Shoprite and its directors and found that they had not complied with the order. He further held that they had not discharged the evidential burden cast on them in relation to wilfulness and *bona fides* as they had not placed any evidence before him to establish that their non-compliance of the court order was 'casual or accidental or unintentional'. He concluded that contempt was thus established beyond a reasonable doubt. The court proceeded

¹⁶ *Teachers Union of Namibia v Namibia National Teachers' Union & others* 2020 (2) NR 516 (SC) para 11, adopting *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

to grant declaratory relief to the effect that Shoprite and the directors were in contempt of the judgment and order given by Ueitele J and convicted them of contempt. The court postponed sentencing to enable evidence or statements to be prepared and considered in mitigation of sentence.

Petition for review

[98] Shoprite and the directors (the review applicants) thereafter on 26 March 2021 filed a petition with the Chief Justice to exercise this court's jurisdiction under s 16 of the Supreme Court Act¹⁷ to review the decision of Parker AJ convicting them of contempt of court.

[99] The review applicants contended that irregularities occurred in the proceedings before Parker AJ. Their principal contention is that their rights to a fair trial protected under Art 12 of the Constitution were violated because the court had 'directed that the matter be heard without reasonable opportunity having been given to the applicants to respond to what, in effect, had turned into criminal charges in a criminal prosecution'. They also contended that the court had failed to exercise any discretion in hearing the matter on an urgent basis or had taken irrelevant considerations into account in deciding that issue.

[100] With reference to the chronology, the applicants for review stated in their petition that Shoprite had launched its urgent application against the Union (to enforce strike rules) (on 13 January 2021). In the next breath, it is stated that the Union had launched the counter application (for contempt) on 17 January 2021 and set it down for 18 January 2021. What was not stated in the affidavit - and is one of several highly

¹⁷ Act 15 of 1990.

unsatisfactory features of the petition - was that Shoprite's urgent application was set down for 18 January 2021.¹⁸

[101] The transcript of oral argument on 26 January 2021 was provided but significantly not the transcript of proceedings or even the gist as to what transpired on 18 January 2021.¹⁹ When subsequently challenged by the Union's legal practitioners who asserted that the failure to attach a transcript of the proceedings on 18 January 2021 amounted to a material omission and non-disclosure, it is merely stated that the transcript of those proceedings on (18 January 2021) was not as yet to hand (as at 26 March 2021). No statement is made as to why the transcript was not timeously sought or when it subsequently came to hand and why a supplementary affidavit dealing with it had not been filed, especially given the basis for the review being that the applicants were irregularly denied the opportunity to answer to the allegations of contempt by Parker AJ.

[102] On the strength of the allegations contained in the affidavit filed in support of their petition, this court granted the applicants leave to bring their review under s 16 and directions were provided for doing so.

[103] The applicants were given leave to file a further founding affidavit. It confirmed what was stated by the applicants in their petition for review. A further affidavit was filed by the applicants' instructing practitioner, Mr Philander to deal with a letter addressed to him by the Union's practitioners complaining that the earlier affidavit

¹⁸ This fact does however appear from the notice of motion in Shoprite's urgent application which is in one of several annexures to the petition but it is not stated in the body of the petition where it should have been pointed out in the context of the set down of the counter application and the complaint of such short notice.

¹⁹ Nor was the judgment of Parker AJ attached. And nor was the notice containing the points of law raised in opposition to the counter application and referred to in the petition. The heads of argument were attached in their stead.

created a false and misleading impression (of being irregularly denied the opportunity to answer to the contempt allegations), and pointing out that Parker AJ had in fact in the course of proceedings on 18 January 2021 provided an opportunity for the applicants to file answering papers to the counter application and had enquired about how much time would be needed. It was also pointed out in the letter that the applicants' instructed counsel had declined the opportunity to file further papers and preferred to persist only with the procedural points taken.

[104] Mr Philander attaches the transcript of proceedings of 18 January 2021 to his affidavit although he does not state when it was received. Even in this further affidavit it is not stated that Shoprite's urgent application was set down for 18 January 2021. This is a material and relevant fact as the counter application was in response to it, claiming that the applicants were acting in contempt of the order granted by Ueitele J on 8 January 2021. As it was a counter application, the Union obviously sought to have the matters be heard together which is precisely what a court would seek to do and is what Parker AJ very properly sought to achieve when being confronted with the main and counter applications in relation to the same fundamental dispute and factual setting. There was furthermore not the slightest opposition on the part of the applicants in this review to the two applications being heard together.

[105] It is evident that Parker AJ was confronted with a deluge of dense papers in the main and counter applications on a Monday morning (18 January 2021), with the papers in the counter application only available to the court that morning. The applicants had that morning filed their points of law in response to the counter application, taking the point that the counter application was not urgent and a few other procedural points. The applicants' counsel stated on 18 January 2021 that he

was ready to argue both the main and the counter applications which he said were ripe for hearing.

[106] The Union's representatives sought more time to file further papers and prepare as they had not yet seen the points of law raised by the applicants. It was also pointed out by them that the counter application had not yet been served on the individual directors of Shoprite.

[107] Parker AJ then pointed out that it was not possible to hear both applications that day as duty judge and stated:

' . . . (A)lso as a labour matter, I prefer that each party put his or her case across. It is very important in labour matters . . . for labour matters, it is important that, even as a court, you must whatever you are doing, your main aim is to bring harmony in labour relations.

Its not like selling a Jaguar car, selling a beautiful house somewhere in Olympia. So let us 1), let us be able to find accommodation and allowing each party to file papers appropriately so that when the matter is being heard, the Court has . . . (and) everybody is happy that he has put his or her case before the Court, instead of hearing the matter then one party because has not been able to file papers and as Mr Nixon (Marcus) has said they are not living in the same place I am trying to come to the point that the matter is not going to be heard today. That is out of the question because it is not an urgent application that can be heard within one hour and then I go on my motion court. So, let us start from the basis that 1) in the Court's view (that) parties should be allowed to file papers of course within time . . . so that when the matter is being heard, each party has placed its case appropriately before the Court as he wishes or she wishes. So nobody is short changed in the exchange . . . of papers. That is one. 2) The matter is not going to be heard today because it cannot be heard within one hour. I have Motion Court at 10.' (As per the unedited transcript).

[108] The court proceeded to make it very clear that it would accommodate the parties to place their respective cases fully before it and afford time for this to be done, given the imperative to afford each side an adequate opportunity to be heard.

[109] Shoprite's counsel's response to this approach was: 'Your Lordship is clear on the position.'

[110] After briefly hearing Shoprite's counsel's request for interim relief (which was opposed by the Union), the court stated:

'Ok, with all that, I am doing this on the two bases. One, the matter is not going to be heard today. That is out of the question and two, I prefer in a labour matter that parties are allowed sufficient time, of course in terms of rules, to file papers so that if a decision is taken, then (they) do not turn around and say well we were not heard This is a labour matter we are dealing with. The Court should be seen not to be part of the problem but as part of the solution. That is my stance. So, for me if I am not going to hear the matter today . . . because of the Motion Court at 10, all parties papers must be served properly. Parties must answer or reply properly. Then we put a date for hearing. So, then the Court . . . has sight of each party's position . . . '.

[111] The court was further disinclined to grant interim relief at that stage and proceeded to reiterate what was previously said and also stressed the factual nature of an enquiry into contempt in these terms:

'One, I am not going to hear the matter today. That is one, two, I prefer that all papers are properly delivered in the sense that . . . filed and served on the other parties, so the papers are before the Court of course in terms of the rules of Court and three, we get a decision. We get a time to hear the matter. When it comes to a *rule nisi*, is there, has the employer, whether the employer has or has not abided, implemented the decision of the court, as a matter, is factual. It is not law. Has the employer done that on the instructions from the instructing counsel? It is not a matter of law that you can argue.

Whether the employer has implemented the order of the court (or not) is factual. It is not law. It is factual’

[112] The court later repeated to counsel that it was a question of fact whether a court order was being adhered to. Counsel for the applicants responded that their opposition to the counter application was ‘by way of points of law’.

[113] The court then pointed out that it would postpone the matter and repeated again that, as it was a labour matter, the court preferred that papers are exchanged in accordance with the rules. The court again reiterated its conclusion:

‘So, let us for, one, my view is that I am prepared, as labour matter, I am prepared to give time of course within the constraints of the rules to file papers properly, served properly and heads must be filed even for a short time and then we put a time for argument’

[114] The court proceeded to propose a time table for the filing of further papers. Parker, AJ firstly enquired whether there were any papers outstanding in the main application. The applicants’ counsel pointed out that the main application had also been met by points of law and that no further papers needed to be filed.

[115] As far as the counter application was concerned, the Union’s counsel reiterated that the individual respondents (directors) still needed to be served and undertook to do so on the same date (18 January 2021), although the court permitted an extra day for doing so.

[116] The applicants’ (Shoprite and the directors) position was set out in these terms by their then counsel:

'Mr Muhongo: The respondents, whilst the second to the fifth respondents, may not have been served with the papers in the classical sense, that application did come to their attention. They have opposed that application. They will content themselves with points of law that I handed up to Your Lordship moments ago.

Court: Okay. So on the side of the respondents.

Mr Muhongo: Yes.

Court: (In) the counter application.

Mr Muhongo: Yes.

Court: Everything has been done?

Mr Muhongo: Yes.'

(Emphasis supplied)

[117] After enquiring if the Union would want to reply to those points of law in order to provide a time limit for doing so, dates for the hearing and exchanging heads of argument were canvassed by the court with the parties. Before setting a hearing date, the court once again sought confirmation from the applicants' counsel that the pleadings would all be filed by 20 January 2021 in these terms:

'Court: So on the 20th all papers are in?

Mr Muhongo: Yes.

Court: Mr Muhongo, am I correct?

Mr Muhongo: Yes, Your Lordship.'

[118] The Union's representative requested that the matter be heard early the following week, proposing the following Tuesday or Wednesday 2021. Applicants' counsel preferred that the matter not be heard on 27 January (as it is his birthday) and asked that the hearing rather be conducted on 26 January 2021. The date of hearing was thus by express agreement. Dates for the filing of heads were canvassed, agreed upon and set, with the court meticulously enquiring from both sides as to whether they could meet the deadlines. Each side again agreed.

[119] This is how the matter came to be postponed on 18 January 2021 for 26 January 2021, so striking in its contrast to the picture painted in the petition.

[120] I have set out the proceedings of 18 January 2021 in painstaking detail in view of the allegations of serious irregularity levelled against Parker AJ and the impression created in the petition for review that the court irregularly deprived the applicants entirely of an opportunity to answer to the contempt allegations, which are confirmed and persisted with by the applicants' instructing legal practitioner, Mr Philander, after the transcript of the proceedings on 18 January 2021 came to hand.

[121] Despite what was repeatedly said in court on 18 January 2021, Mr Philander asserts in his affidavit with reference to these proceedings:

'When the court mentioned that the matter was not going to be heard and that the parties would be given opportunity (*sic*) to file papers, the court was concerned with the manner in which the joinder point raised by the first applicant (Shoprite) was going to be dealt with by the Union. It was against this backdrop that instructed counsel mentioned that everything on the side of the respondents (the applicants herein) had been done.'

[122] This is unfortunately a distortion of what transpired, as is apparent from the quoted portions of those proceedings. The extensive quotations from the transcript unequivocally demonstrate the full context of the court providing the parties the opportunity to file further papers to answer the factual allegations in the counter application. Indeed the court also explained that an enquiry into contempt is invariably of a factual nature. It is moreover apparent from what was stated by Parker AJ that he had not been able to read the papers relating to the counter application in the time

available to him. Furthermore, the reference by counsel to everything having been done, did not relate to joinder at all but rather to the fact that the applicants had contented themselves to raise legal points and that everything had been done with regard to opposition and not in respect of joinder. The reference to joinder by Mr Philander is thus not only incorrect but would appear to be an attempt to explain away the blundering conduct on the part of the applicants' legal representatives on 18 January 2021 and thereafter.

[123] Mr Philander finally states that he 'simply did not believe that the events of 18 January 2021 were pertinent to refer to at the time the request (for a review) was made . . .'. This statement beggars belief in view of what actually occurred on 18 January 2021 in his presence and the impact of those proceedings upon the basis for the petition – where an irregularity in the proceedings is contended for because the applicants were irregularly not afforded an opportunity to answer to the contempt application.

[124] In the Union's answering affidavit to this review, it is made clear that when the applicants' instructed counsel was asked by the court if they wished to file further papers and if so how much time is needed, their counsel declined. That much is borne out by the transcript. The point is also made in the Union's answering affidavit that the applicants did not ask for time to file answering papers when the exchange of further papers was being regulated by the court. That too is reflected in the transcript.

[125] In the Union's answering affidavit, there is reference to the applicants' heads of argument before the court *a quo* containing a request for the opportunity to file further papers. The Union's counsel states that after seeing this, she spoke to applicants'

counsel before court on the day of argument (26 January 2021) and pointed out to him that they had been given such an opportunity but that he had declined it. The Union's practitioner further states that applicants' counsel's response at the time was that since the applicants had filed points of law, they could not file further papers to which she responded that, with the leave of court, one can do anything. The bare denial in reply by the applicants' erstwhile counsel of this exchange lacks any credibility in the context of all the facts.

[126] In his replying affidavit, Mr Philander denies that the applicants waived their rights to put up answering papers on the merits 'or declined an opportunity to do so' and says that 'no such opportunity was availed'. That statement is unfortunately not borne out by the record.

Submissions before this court

[127] Applicants' counsel contended that there was a procedural irregularity in the proceedings before Parker AJ which was of such a nature as to deprive the applicants of their right to a fair trial. It was argued that the refusal on the part of the court to grant counsel's request during argument on 26 January 2021 to file answering affidavits and hearing the matter as one of urgency amounted to vitiating irregularities.

[128] A large part of the applicants' argument turned on the question of urgency. It was contended that the counter application did not address urgency as required by rule 73(4) of the High Court Rules. That sub-rule enjoins applicants to set out explicitly the circumstances which render an application urgent and provide reasons why redress cannot be obtained in due course. They also point out that the counter application did not include a prayer seeking that the counter application be heard as

one of urgency. They complain it was brought on a day's notice. It was further argued that there was no basis for the Union to argue that it would not have obtained substantial redress in the normal course and that when the counter application was heard, any alleged contempt had ceased. Counsel submitted that it was irregular to pursue the contempt application urgently and that Parker AJ was 'patently wrong' to have heard it as one for urgency.

[129] Applicants' counsel referred to the contempt proceedings being criminal proceedings in which a criminal sanction can be invoked with reference to the approach of this court in *Teachers Union*, adopting the approach in *Fakie NO v CCII Systems (Pty) Ltd*.²⁰

[130] It was argued that the set down of the contempt application afforded the applicants no time to properly oppose it. Whilst counsel correctly conceded that a respondent should file an answering affidavit on top of procedural points taken, it was submitted that the applicants should not have been penalised for the poor advice they received for not doing so, particularly in view of the serious nature of contempt which proceedings are in essence of a criminal nature. Even if junior counsel had made a mistake for not accepting the invitation of Parker AJ to file further papers, it was contended that, by failing to afford the applicants a reasonable opportunity after deciding the urgency point against the applicants when a request to do so was made by counsel in his oral argument, the hearing of the counter application was procedurally 'completely irregular' and 'self-evidently deprived the applicants of a fair trial'.

²⁰ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (*Fakie NO*).

[131] Applicants' counsel concluded by contending that the applicants did not enjoy a fair criminal trial primarily because Parker AJ ignored the precedents relating to the dictates and requirements of urgency. The thrust of counsel's approach is that by denying the applicants an opportunity to answer the contempt allegations when this was requested in argument on 26 January 2021 amounted to an irregularity.

[132] The Union's counsel firstly argued that there was a failure to disclose highly relevant factual material in the applicants' petition for a review – by contending for an irregularity on the basis that they were not afforded the opportunity to file answering affidavits to deal with the substantive allegations of contempt. Counsel submitted that contrary to repeated assertions by the applicants, they were in fact given such an opportunity to engage the substance of the counter application on 18 January 2021 but declined to do so. Counsel also pointed out that the request in argument on 26 January 2021 by applicants' erstwhile counsel for time to put up papers was at the end of his oral argument as an afterthought after the applicants had elected not to do so.

Section 16 review proceedings

[133] Section 16 empowers this court to invoke its review jurisdiction in respect of High Court proceedings tainted by an irregularity. This court has held that this jurisdiction will only be invoked when required in the interests of justice.²¹ An irregularity in the proceedings concerns the conduct of those proceedings and not their

²¹ *Schroeder & another v Solomon & others* 2009 (1) NR 1 (SC) paras 17-20. *Ardea Investments (Proprietary) Limited v Namibian Ports Authority & others* (SCR 4/2013) [2017] NASC (28 March 2017) paras 12-14 (*Ardea*).

outcome.²² This remedy has been characterised as an ‘extraordinary’ procedure²³ and only to be exercised in exceptional circumstances.²⁴

[134] This court has approved an apt description of an irregularity in this context as being:

‘But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party, from having his case fully and fairly determined.’²⁵

[135] The onus is thus upon the applicants to establish an irregularity in the proceedings and to satisfy this court that good grounds exist to review the conduct complained of.²⁶

[136] In approaching this court to exercise its review jurisdiction under s 16, this court has held that a petitioner is to identify the irregularity contended for, the grounds upon which the review is sought, a concise statement of facts material to the review and the inclusion of pertinent transcriptions, the relief sought and the verification of factual matter under oath.²⁷

[137] The irregularity contended for in the proceedings before Parker AJ is an alleged failure to accord the applicants their rights to a fair trial by not properly affording them the right to answer to allegations of contempt of court made against them in the

²² *Bank Windhoek Ltd v Mofuka & another* 2018 (2) NR 503 (SC) para 8.

²³ *Schroeder* para 20.

²⁴ *Ardea* para 16.

²⁵ *Ardea* para 17 approving *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576.

²⁶ *Ardea* para 19.

²⁷ *Schroeder* para 17.

courter application. In order to determine whether there was an irregularity in the proceedings, those proceedings in their entirety are to be considered, thus what transpired on 18 and 26 January 2021. Put otherwise, the refusal of counsel's request at the conclusion of his argument for time for the applicants to put up answering affidavits is to be considered in the context of what preceded it.

[138] In their petition, the applicants stated under oath that there was a serious irregularity in that the court 'directed that the matter be heard without reasonable opportunity having been given to the applicants to respond to what, in fact, had turned into criminal charges in a criminal prosecution'. The transcript of the proceedings on 26 January 2021 was attached. But inexplicably not those of 18 January 2021. When challenged on this score, the applicants' practitioner said a transcript of the 18 January 2021 proceedings was not as yet available (when the petition was made on 26 March 2021 more than two months afterwards). He subsequently stated that he did not consider that those proceedings were pertinent.

[139] Those proceedings have been quoted extensively because they are plainly most pertinent to the question as to whether there was an irregularity in the sense contended for – namely whether an opportunity to answer to the allegations of contempt was denied to the applicants by the court. Mr Philander was present in court on 18 January 2021 and knew what transpired on that day and most certainly should have been aware of how pertinent they are to the question as to whether there was an irregularity in the proceedings as contended for. The failure to provide that transcript or at the very least the gist of what transpired amounts to a material non-disclosure and misrepresentation of what actually transpired in the matter in respect of the issue raised in these proceedings.

[140] This non-disclosure of such highly relevant material warrants the censure of this court.

[141] This conduct is compounded by the manner in which the proceedings on 18 January 2021 were sought to be rationalised in the subsequent affidavits. I have already referred to the baseless reference to joinder in a bid to explain away what was intended by the court in providing further time to the parties.

[142] On the contrary, it is obvious from the transcript that Parker AJ was concerned that each of the parties should have an adequate opportunity to answer factual allegations levelled against them. He was at pains to do so. He repeated several times that he wanted to afford the parties the opportunity to put up answering and further papers. He expressly pointed out to counsel for the applicants that it was invariably a factual issue if an order had not been complied with or not. He also stressed the importance of hearing both sides in labour disputes. He moreover expressly asked how much time was needed to put up further papers and to prepare argument. He also canvassed the date of hearing with both sides. They both, including the applicants' erstwhile counsel, agreed to the dates for filing further papers and for the hearing.

[143] In response to Parker AJ's repeated invitation to file answering papers, applicants' then counsel expressly said that they 'content themselves with points of law' handed up to the court that morning. The court clarified that was in respect of the counter application. In response, counsel confirmed. The court finally enquired if everything had been done (in connection with opposition to the counter application) and counsel again confirmed that to be the case.

[144] It is clear from the record that Parker AJ was most scrupulous in ensuring that the parties each be afforded an adequate opportunity to place its respective case before him. He not only provided the opportunity to them to do so but went out of his way to explain the importance of doing so in the context of a factual enquiry as to whether contempt had been committed or not. That was also the stage of the proceedings when they are regulated by the managing judge to set time limits for the submission of written argument and the oral hearing.

[145] Where a party seeks to oppose an application on a question of law only, then a notice setting out points of law can be filed in terms of rule 66(1)(c) of the High Court Rules can be given (read with rule 22 of the rules of the Labour Court).

[146] Rule 66(1)(c) provides:

- (1) a person opposing the grant of an order sought in an application must –
- (a) . . .
 - (b) . . .
 - (c) if he or she intends to raise a question of law only, he or she must deliver notice of his or her intention to do so within the time stated in paragraph (b), setting out such question.'

[147] The use of the term only in this sub-rule makes it clear that this form of opposition to an application means that a party elects not to file an answering affidavit. This much is clear from the rule. Respondents who seek to raise preliminary points but also have a defence on the merits cannot postpone the filing of an affidavit setting their

defence on the merits. It is of course open to parties to take procedural points and set out defences in an answering affidavit, as frequently occurs.

[148] It was also plainly open to the applicants to put up answering affidavits as invited by the court and reiterate their preliminary points in them at the outset. In fact they were invited in no uncertain terms to do so at the appropriate stage of the proceedings by the managing judge.

[149] It is abundantly clear from the transcript of the proceedings on 18 January 2021 that the applicants' counsel elected on their behalf not to file answering affidavits and confine their opposition to the counter application to the points of law in their notice. He said as much expressly in the portion quoted above. That election is binding upon the applicants, as was correctly found by Parker AJ and amounts to an abandonment of the right to do so.

[150] The advice given by the applicants' representatives at the relevant time was indeed bad when considered against the facts raised in their affidavits in this review application. It was however also open for them to bring an application for postponement properly motivated under oath in advance of the hearing of 26 January 2021 but they did not do so.

[151] Counsel for the applicants places heavy reliance upon the rejection by Parker AJ of the request made by their erstwhile counsel in oral argument as amounting to a vitiating irregularity. That request is to be seen in context of the proceedings viewed as a whole. As pointed out by counsel for the Union, it is made at the conclusion of his oral argument after making extensive submissions that the counter application should

be struck as not being properly brought as one of urgency. But erstwhile counsel for the applicants also argued that the Union had failed to make out a case for the declaratory relief sought - of being in contempt of court – until the appeal is heard on the basis of rule 121(2) of the High Court Rules. (That point was understandably not raised in these proceedings). After concluding his argument in respect of those issues, counsel concluded:

‘Mr Muhongo: So Your Lordship the application is not urgent.’

Court: Yes, I have noted.

Mr Muhongo: Attracts the striking off, no case made out for the primary relief, it should attract the dismissal. And in the alternative Your Lordship is that in the event that Your Lordship does not want either of those two orders, Your Lordship then we humbly submit would be appropriate then to stay this application pending the outcome of the Supreme Court. And in the event that Your Lordship is not minded to granted any of these orders, we Your Lordship would seek an opportunity to then put up a reasonable opportunity on behalf of the employer to then put up papers in response to the allegations that are levelled against them so that Your Lordship can engage their minds.’

[152] The court then pointed out to counsel that the applicants had been afforded an opportunity to answer to the counter application and that they elected not to do so. The court declined that request made at the end of oral argument.

[153] Counsel for the applicants contends that this amounts to an irregularity. In addressing this question, regard is to be had to the full context of the proceedings – both on 18 and 26 January 2021.

[154] Much of the applicants’ written argument in this court was directed at the court hearing the counter application on a semi-urgent basis. Presumably alive to the fact

that a ruling on urgency is not appealable,²⁸ counsel contended that it was irregular for the application to have been pursued on an urgent basis. The attack upon the judgment of the court below was however that Parker AJ was wrong to have heard the matter as one of urgency. Indeed their contention is that he was ‘patently wrong’, using the language of an appeal, directed at the result of the ruling on urgency.

[155] As is made clear, a review under s 16 is directed at an irregularity in the conduct of the proceedings and not to challenge a result reached by the court. The recourse against a result is to take a matter on appeal. Where a party is not happy with the result of procedural point taking which is not appealable, as is the case with an urgency ruling, it is not open to that party to dress up its challenge to the merits of a ruling as an irregularity for the purpose of invoking s 16. Counsel for the applicants correctly conceded this and agreed that it would amount to an abuse. This court will have regard to the substance of a challenge and not how it is formulated or dressed up. I understood criticism concerning the way the court dealt with urgency was raised to provide the context for the irregularity contended for in the sense of refusing an opportunity to file answering papers when it was raised at the end of counsel’s oral argument on 26 January 2021.

[156] Whilst it is thus not open to the applicants to challenge the judgment on the basis that it should not have been heard on a semi-urgent basis, it is in any event clear that the applicants’ point taking on that issue is entirely without substance. Firstly, the applicants overlook the fact that the counter application was launched in response to Shoprite’s urgent application brought on 13 January 2021 and set down on 18 January 2021. The counter application launched on 17 January 2021, was set down on 18

²⁸ *Shetu Trading CC v Chair, Tender Board of Namibia & others* 2012 (1) NR 162 para 42. See also *Beukes & others v Kubitzausboerdery (Pty) Ltd* 2020 (3) NR 662 (SC) para 30 (*Kubitzausboerdery*).

January 2021 for that very reason. The applicants were then entitled to complain about their lack of opportunity to answer to the serious and wide ranging allegations of contempt. But they did not need to do so, because the court was alive to the completely inadequate opportunity afforded to them to answer those allegations and enquired from them as to how much time was needed to prepare answering papers with the court manifesting a clear intention to grant time to the applicants to do so as was reasonably required by them.

[157] Where a court determines dates for the exchange of papers, particularly as occurred here in consultation with the parties and with their agreement, the point of prejudice caused by the initial timelines imposed in notices of motion falls away.²⁹ Once a court enquires into time needed and provides time periods for the exchange of papers, particularly with the agreement of the respondents, as occurred in this matter, it is not open to the respondents in motion proceedings to take the point of urgency on the basis of having insufficient time to answer.

[158] As is spelt out in *Kubitzausboerdery*, it would remain open to such a party to challenge the factual basis of the urgency contended for. In that event, a respondent may put up papers to demonstrate that the urgency was contrived, self-created or amounts to an abuse of process.³⁰

[159] The point of urgency on the basis of the very short period provided in the notice of motion in the counter application accordingly fell by the wayside after the applicants agreed to time lines for filing further papers, given the fact that the prejudice faced by the severely short initial period imposed on them fell away.

²⁹ *Kubitzausboerdery* paras 22 and 24.

³⁰ *Ibid* para 26.

[160] There is no suggestion of prejudice to filing papers in the fullness of time as would be reasonably required to do so. The only 'prejudice' is that the point of urgency could no longer be tenably raised on this basis any more. But that obviously does not amount to any cognisable prejudice. The procedural defect in the proceedings (of the unreasonably short timeline) was thus rectified by the court with the active agreement of the applicants. It then fell away.

[161] A complaint is also made that the counter application did not include a specific prayer for it to be heard as one of urgency. This point taking again overlooks – which the applicants have consistently done in these proceedings from the outset – that it was brought in response to Shoprite's urgent application to enforce strike rules. Parker AJ was entirely correct in brushing aside this point taking, finding that the two applications were 'joined by the hip'. Clearly they were inextricably bound together at the time when the counter application was launched as a response to what was certainly an urgent matter – the enforcement of strike rules during the strike. It was also contended that the counter application was no longer urgent when it was heard. But this point taking misses the point. It was plainly urgent when it was brought and when the time lines were agreed upon. No prejudice is understandably contended for on this score.

[162] Parker AJ in his judgment correctly referred to the administration of justice in addressing the question of urgency. The vindication of the rule of law is at the heart of enforcing court orders in contempt proceedings and renders them inherently urgent.

[163] Contempt of court is lucidly described by Cameron, JA in *Fakie NO*:³¹

³¹ *Fakie NO* para 6 and approved by this court in *Teacher's Union* paras 9-13.

'It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.

And, after a thorough comparative survey of contempt of court in a constitutional setting where the right to a fair trial is enshrined, Cameron JA concluded:

- (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.¹³²

[164] The applicants were at short notice confronted with the counter application which comprised a civil contempt procedure. Although they were not cited as accused persons, the proceedings are analogous to criminal proceedings in the sense that they

³² *Fakie NO* para 42.

are at risk of being found in contempt of court and at risk of being committed to imprisonment or fined or cautioned. But they also enjoy analogous protections which are appropriate to motion proceedings. Those include being afforded the basic tenets of the constitutional right to a fair trial protected under Art 12 of the Constitution. Relevant for present purposes is the right to be afforded an adequate opportunity to put up a defence and answer to the allegations of contempt. The failure to do so, as is demonstrated in this matter, can have far reaching consequences.

[165] The applicants were represented at all times material to the counter application. They were represented by no less than one instructing and one instructed practitioner on 18 and 26 January 2021 and at times by two instructing legal practitioners.

[166] It is abundantly clear from the record and the facts placed before us that an ample opportunity was offered to the applicants to put up their defence and answer to the allegations.

[167] They elected not to do so and elected to confine their defence to procedural points which were demonstrably without substance. Possibly realising the shortcomings to this strategy on the day of the postponed hearing on 26 January 2021, applicants' erstwhile counsel directed his request for time for them to put up answering papers of the procedural point taking did not find favour. There was no application for a postponement, duly motivated, made that day which, should rather have been made at the outset of proceedings and not as a throwaway line at the conclusion on oral argument.

[168] For the court to reject an unmotivated request to provide answering affidavits as a throwaway line at the end of oral argument on the date of the hearing on their behalf would not amount in my view to an irregularity let alone a serious irregularity on the part of the court in rejecting this, in full context of the proceedings, as asserted on their behalf in the review application.

[169] It follows that the applicants failed to establish an irregularity in the proceedings sought to be reviewed, despite their allegations of serious irregularity levelled against Parker AJ. On the contrary, Parker AJ very properly went out of his way to ensure the fairness of the proceedings. Despite repeatedly offering the applicants an adequate opportunity to answer to the serious allegations of contempt and scrupulously explaining the importance of doing so, these entreaties were not only not heeded by the applicants' legal representatives. But they subsequently misled this court in their petition by failing to refer to them. This review is thus entirely without merit, compounded by the misleading way in which the petition to seek it was brought.

[170] In petitions directed to this court under s 16, parties and their practitioners owe this court a duty to properly place all relevant material before this court and not, as occurred in this instance, suppress or omit factual matter which could be adverse to a petition. The misleading manner in which the petition and review were brought, warrants the severe censure of this court, and justifies an appropriate cost order, as is reflected in the order.

Orders

[171] In the result, the following orders are made:

In the appeal (Case No. SA 1/2021):

- (a) The appeal is upheld with costs.
- (b) The order of the Labour Court is set aside and replaced with the following order:

‘The application is dismissed with no order as to costs.’

- (c) The costs on appeal include the costs of one instructing legal practitioner and two instructed legal practitioners.

In the review: (Case No. SCR 2/2021):

- (a) The application to review the decision of the Labour Court of 15 February 2021 is dismissed with costs.
- (b) The costs of the review include the costs relating to the petition seeking the review and are to include the costs of one instructing legal practitioner and are on the scale as between legal practitioner and client.

MAINGA JA

HOFF JA

APPEARANCES

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