THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 124/2023

In the matter between:

NTHABISENG CHOEU	**Appellant**
THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, LIMPOPO PROVINCE	**First Respondent**
THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
MAHASHA THOMAS N.O.	**Third Respondent**
NEHAWU obo E A MAVHNGA	**Fourth Respondent**
THE SHERIFF, POLOKWANE	**Fifth Respondent**

In re:

THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, LIMPOPO PROVINCE	**Applicant**
THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
MAHASHA THOMAS N.O.	**Second Respondent**

NEHAWU obo E A MAVHNGA **Third Respondent**

THE SHERIFF, POLOKWANE **Fourth Respondent**

Heard: **14 November 2024**
Delivered: **24 December 2024**
Coram: **Molahlehi AJP, Musi AJA, and Mooki AJA**

JUDGMENT

MOOKI, AJA

Introduction

[1] The appellant is a legal practitioner, practising as an advocate. She is a member of the Pan African Bar Association of South Africa. The Labour Court (per Sethene AJ) made an adverse order against the appellant. She appeals against the following two orders of the Labour Court:

> '…
> 6. The Justice Department's legal practitioner (Advocate) in this application is ordered not to charge any fee for legal services rendered. If she has already been paid, the legal practitioner is ordered to reimburse Justice Department (sic) within (60) days of granting of this order;
> 7. The State Attorney is ordered to investigate the conduct of the instructing attorney who acted on behalf of the Justice Department, to establish if section 45 (c) of the PFMA was contravened or not …'

[2] The appeal is unopposed. The Labour Court made the order in the circumstances as detailed below.

Background

[3] The appellant appeared as counsel for the Department of Justice and Constitutional Development, Limpopo (Department) in proceedings by the Department to stay the execution of an arbitration award issued in favour of the fourth respondent. The matter came before Sethene AJ by way of urgent proceedings.

[4] The Labour Court determined that the application was "*absolutely hopeless*", to the knowledge of the appellant. The Labour Court held that the appellant, as an officer of the court, had fiduciary responsibility to the court, with the result that:

> 'Once appointment [as a legal practitioner] is confirmed and accepted, the forensic skills of legal practitioners must be ignited to ensure that they protect the court from the burden of entertaining and adjudicating absolutely hopeless cases. It remains the duty of a legal practitioner to act in the best interest of his or her client. Acting in the best interest of the clients also denotes that a legal practitioner has an obligation to disclose to the client that the case sought to be pursued is either absolutely hopeless or has prospects of success….'[1]

[5] The Labour Court also stated that:

> 'In respect of the legal representatives of the applicants, they assisted in bringing absolutely hopeless cases to court when they reasonably ought to have known that the applications were not urgent and there were no reviews pending before court. Had they simply embarked upon drafting the chronology and juxtapose same with Section 145 of the LRA, Practice Manual and the Rules, the court's resources could have been directed to worthy cases.'[2]

[6] The Labour Court continued as follows in its remark:

> 'Understand: it must be deprecated by those who attach premium and prestige to their trade as legal practitioners to align themselves with cases that are absolutely hopeless for pecuniary reasons and thereby, rendering courts as instruments to frustrate employees or employers with worthy cases

[1] At para 31 of the court *a quo's* judgment.
[2] Ibid at para 35.

for the court to adjudicate. This court must firmly and without fear, favour or prejudice apply the provisions of section 162 of the LRA in hopeless cases.'[3]

In these proceedings

[7] The appellant contends that there was no support for the trenchant criticism against her by the Labour Court, including the finding that the appellant prosecuted proceedings for pecuniary reasons as opposed to the best interest of her client. She further contends that the application was not hopeless as the Sheriff had removed vehicles belonging to the Department and that the Sheriff undertook to remove additional vehicles. The appellant says that she, upon engaging with the Court and on realising that the Department's review had lapsed, did not persist with the order to stay enforcement of the award but conceded costs.

[8] The appellant contends that she was entitled to a hearing before the Labour Court condemned her. She pointed out that the Department was entitled to approach the Court for relief and that she, in turn, performed her duties as counsel when she moved the application on behalf of her client. She further contended that the Labour Court erred in its view that she, as a legal practitioner, was to be the ultimate arbiter of the dispute between the Department and its former employee.

[9] The applicant says the findings and order by the Labour Court have been detrimental towards her. She contends that several of her rights have been infringed, including the right to dignity in that her reputation as an advocate was impugned without a hearing; that she was deprived of her professional income without a hearing, and that she was denied access to a court by having adverse findings made against her without having been afforded a hearing.

Evaluation

[3] Ibid at para 44.

[10] The judgement by the Labour Court received wide publicity. The commentary was unfavourable towards the legal practitioners. This is illustrated by the following commentary by an organisation called "*GroundUp*":

> '…
>
> In the justice department application, he made a similar order regarding fees against the advocate and directed the state attorney's office (which briefed the advocate) to investigate the conduct of its own attorney.
>
> He awarded costs against both UNISA and the department on a punitive scale.
>
> According to the judgment, the lawyers for UNISA were Advocate Sello Raselalome instructed by Poswa Inc; and for the department Advocate N.R. Choeu, instructed by the State Attorney, Polokwane.'[4]

[11] The Labour Court is correct in saying that legal practitioners owe fidelity to the courts. This is a function of legal practitioners being officers of the court. The Labour Court erred in this instance as regards the appellant and her duties as an officer of the court.

[12] Fundamental to the criticism by the Labour Court is that the appellant knowingly prosecuted an application that was "hopeless". The record does not support such a finding. The Labour Court stated that the application in which the appellant was counsel was triggered by "*the alleged attendance of the Sheriffs to the respective premises of the applicants*". This remark is a surprise; given that it is not disputed in the papers that the sheriff had removed vehicles belonging to the Department. The application to stay the enforcement of the award was precisely to prevent further removals by the sheriff.

[13] There may well be criticism to be raised against the appellant for not having done the exercise suggested by the Labour Court as to the status of the review application before approaching the court. The fact of the matter, however, is that the application was triggered by the Sheriff being at the Department's doors and having removed vehicles. That is why the application was brought on an urgent basis. There

[4] Extracts of article appearing on GroundUp website dated 8 June 2023.

was no warrant for the Labour Court to criticise the appellant by saying that: "*acting in the best interest of the clients also denotes that a legal practitioner has an obligation to disclose to the client that the case sought to be pursued is either absolutely hopeless or has prospects of success*".[5]

[14] There is no support for the suggestion that the appellant was aware, when she accepted the brief and drew the papers, that the application to stay the award was "hopeless". This is demonstrated by the appellant, following the exchange with the court, conceding that the review had lapsed and conceding costs.

[15] Statements by a court as regards conduct by a legal practitioner carry enormous weight. Such statements can make or break the reputation of a legal practitioner. This power requires restraint by a court when passing judgment on the conduct of a practitioner.

[16] The courts have, at various points, mentioned that a practitioner cannot be saddled with an adverse finding without a hearing. The Labour Court did not meet this injunction. The Labour Court referenced the decision in *Mashishi v Mdladla and Others*[6] as part of its justification for its adverse findings and order against the appellant, that "…*those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences*."[7]

[17] The Labour Court did not, however, refer to the full caution in Mashishi, namely that:

> 'The present application is unopposed, and the question of costs accordingly does not arise. In fairness to the applicant's attorney, I did not afford him the opportunity to make submissions on why he should forfeit his fees, and for that reason. I do not intend to make any such order. But those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences.'[8]

[5] At para 31 of the court *a quo*'s judgment.
[6] [2018] ZALCJHB 116; (2018) 39 ILJ 1607 (LC) (*Mashishi*) at para 18.
[7] Ibid at 18.
[8] Ibid.

[18] The court in *Mashishi*, as in other decisions,[9] recognised that fairness demands that a person be given a hearing before a court makes adverse findings against such a person. That did not happen in relation to the appellant. The Labour Court erred in this regard.

[19] The Labour Court indicated that it was invoking section 162 of the Labour Relations Act[10] as justification for its order.[11] I do not express a view as to the scope of the power of the Labour Court as contemplated in the section. The question of whether section 162 entitles the Labour Court to order a practitioner to forfeit their fee, as opposed to the Labour Court making a cost order against a practitioner, was not argued. In addition, the appellant did not raise this issue as an aspect to her appeal.

[20] In the premises, the following order is made:

Order

1. The appeal succeeds with no order as to costs.
2. Paragraph 6 of the order of the Labour Court is set aside.

O. Mooki AJA

Molahlehi AJP and Musi AJA concur.

APPEARANCE:

FOR THE APPELLANT: M. M. Mojapelo SC (together with D. Hodge),
Instructed by Ndobela and Associates Inc.
No appearance for the respondents

[9] See: *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC) at para 11.
[10] Act 66 of 1995, as amended.
[11] At para 44 of the court *a quo*'s judgment.