

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J2594/15

DATE: 2016-01-12

In the matter between

LESIBA MSALESA

Applicant

and

KHUPHULANANI TRAINING INSTITUTE

First Respondent

DELL SA

Second Respondent

EX TEMPORE JUDGMENT

STEENKAMP, J:

This application was set down by the applicant, Mr Lesiba David Masalesa, on an urgent basis, to be heard during the recess at 10:00 today, 12 January 2016. Before hearing Mr *Desai*, for the first respondent, I placed on record that the applicant, Mr Masalesa was in attendance at 10:00 this morning; that I indicated to him and to Mr Desai that the matter would not be heard before the tea adjournment; and that if they wished to, they need not stay in court but they had to be back at

By 11:30, the the court was still in session. The court eventually took a lunch adjournment at 13:30 and reconvened at 15:00. At 13:30 I indicated again that this matter would be heard at 15:00. During the lunch adjournment, both Mr Desai's client and the court associate attempted to get hold of Mr Masalesa. When the matter was called again at 15:00, Mr Masalesa was not in attendance. In these circumstances, Mr *Desai* asked me to deal with the merits of the matter and I will do so.

The order that Mr Masalesa seeks is simply one for the payment
10 of the amount of R3 500, which he alleges is the salary due to him by the first respondent, Khuphulalanani Training Institute. He alleges that he is employed by the first respondent and he asks the court "to confirm the employment status of the applicant with befitting salary similar to that of financial manager." The first respondent, on very short notice, has set out in detail the substance for its counter-argument that the applicant is and was not employed by it but that the applicant acts as a labour consultant to it. In fact, the applicant purports to be the acting General Secretary of a trade union named WOCOFO, or the Workers Consultative Forum.

20 On the evidence before me and applying the well-known rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (1984) 3 SA 63 (A) at 634, I must find that the applicant is and was not employed by the first respondent and that he only provided consultation services to it as an independent contractor. The application must fail for that reason alone.

With regard to costs, there are a number of alarming features to this application. The first is that the application was brought on an extremely urgent basis during the recess in circumstances where the only relief sought is, firstly, for the payment of a salary; and secondly, for a far-reaching declarator that the Court would have been unlikely to determine in motion proceedings.

As Mr *Desai* correctly pointed out, one is constrained to find that the applicant brought this application for relief on an urgent basis in order to steal a march on the first respondent in the hope that it would
10 not file the comprehensive answering papers that it did. In this regard, he referred to the dictum of His Lordship Wepener, J, with whom I associate myself, in *In Re Several matters on the urgent court roll* (2013) 1 SA 549 (GSJ) at paragraph [17]:

“An abuse of the process has developed – in all likelihood in the hope that the respondent will not be able to file opposing affidavits in time – in order to steal a march upon such respondent...”

The other alarming feature is that the applicant has cited the second respondent, Dell South Africa, an entity that, on his own
20 admission, has no interest in this matter; and what is more, he asks for costs against that entity. That, as well, is a clear abuse of process. Taking into account the requirements of law and fairness, as I am enjoined to do in terms of section 162 of Labour Relations Act, I agree with Mr *Desai* that this is a matter where costs should follow the result. I do however baulk at the suggestion that I should order punitive costs.

ORDER

The application is dismissed with costs.

STEENKAMP J

10 For First respondent: M Desai
Instucted by Mwandlele attorneys.

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, ***in as far as it is audible***, the foregoing is a **VERBATIM** transcription from the soundtrack of proceedings, as was ordered to be transcribed by iAfrica Transcriptions and which had been recorded by Digital Court Recording Services by means of digital recording equipment.

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<u>Case No</u>	<u>J33 No / Client Ref</u>	<u>Tariff</u>	<u># Pages as per invoice</u>
J2594/15	R10,50	5.

RECORDED AT: JOHANNESBURG

Court: LABOUR COURT

Court Nr:

Stenographer:

TRIAL DATES:

12 JANUARY 2016

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Transcribe JUDGMENT

TRANSCRIBER:

AG VAN STADEN

SOUNDTRACK: Date and Time received:

29 JANUARY 2016

DATE COMPLETED:

1 FEBRUARY 2016

J406-ENVELOPE INFORMATION:

Not supplied

PLEASE NOTE:

1. *Where no clear annotations are furnished, names are transcribed phonetically.*

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