THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J 675/23
J 680/23

In the matter between:

UNIVERSITY OF SOUTH AFRICA **Applicant**

and

MARCIA SOCIKWA **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

SHERIFF SENZO DLAMINI **Third Respondent**

AND

Case No: J 680/23

In the matter between:

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, LIMPOPO PROVINCE **Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC) **First Respondent**

COMMISSIONER MAHASHA THOMAS **Second Respondent**

NEHAWU obo MAVHUNGA E.A. **Third Respondent**

SHERRIF OF POLOKWANE BALJU: AT RALEHLAKA **Fourth Respondent**

Heard: **18 May 2023**
Delivered: 07 June 2023
Summary: Absolutely hopeless urgent applications to stay writs of execution when review applications are deemed withdrawn

must be deprecated. Whether legal practitioners are entitled to charge for legal services rendered when the case is hopeless and the facts relied upon for urgency are also hopeless. Section 162 of the Labour Relations Act 66 of 1995 considered. Held: (1) Applications are struck off the roll for want of urgency. (2) Applicants' legal practitioners are barred from charging any legal costs flowing from these applications. If the said legal representatives have been paid, they are ordered to reimburse the Applicants within 60 days of this order and submit proof thereof to the Registrar of this court. (3) Applicants are ordered to pay the costs of the Respondents on attorney and client scale.

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 07 June 2023.)

JUDGMENT

SETHENE, AJ

Introduction

> *"Where a hopeless case is brought with the assistance of the advocate, the advocate must either be bringing it in the knowledge that it is hopeless (and therefore assisting in an abuse), or believing that it is not hopeless (and therefore incompetent) or not caring whether it is hopeless (and therefore guilty of recklessness or gross negligence). In any of these cases the conduct of the advocate warrants action being taken by the court."1*

[1] Courts are constitutional constructs designed to serve justice and enhance the rule of law. Courts are not theatres of amusement to elevate hedonism. Courts must be respected by their officers and those privileged to have the right of audience. Legal practitioners bringing hopeless cases to court must be prepared for consequences that flow from the proper reading and application of section 162 of the Labour Relations Act 66 of 1995 ("the LRA"), as amended.

[2] Following the hearing of these two urgent applications, I considered it apt to write a consolidated judgment for a simple reason: both urgent applications were hopeless in law and facts.

Salient background facts of each applicant

Unisa's urgent application

---

1 Webb D. Hopeless Cases: In Defence of Compensating Litigants at the Advocate's Expense. (1999) 30 (1) Victoria University of Wellington Law Review 295. Par 299

[3] In the first case under case number J 675/23, the University of South Africa (Unisa) employed Dr Marcia Socikwa (Dr Socikwa), the first respondent, for a five year fixed-term contract (1 January 2016 to 31 December 2020) as the Vice-Principal: Operations and Facilities. Dr Socikwa's contract of employment was not renewed and she believed that legitimate expectation was created that it would be renewed.

[4] Unisa embarked on a review process to ascertain if ever certain employment contracts of its executives and other senior managers should be renewed or not. On 27 January 2021, the review process was concluded and the Council for Unisa resolved not to renew Dr Socikwa's employment contract amongst others.

[5] On 1 February 2021, Dr Socikwa was issued with a letter informing her that her employment contract would not be renewed and she was therefore discharged from her duties effective from 28 February 2021.

[6] Aggrieved by Unisa's decision not to renew her contract, Dr Socikwa approached the CCMA and following a due process, the arbitration award was issued on 28 July 2022, in her favour. The said award found that Dr Socikwa's dismissal was substantively and procedurally unfair and awarded her compensation (R1 271 964.72) equivalent to six (6) months' salary.

[7] After twelve (12) weeks of Unisa having obtained the arbitration award, Unisa only saw it fit to file a review application on 26 October 2022. On 4 November 2022, Unisa was advised that the record of arbitration proceedings was available for collection from this court. The record of arbitration proceedings was obtained, transcribed and completed on 10 March 2023, which is approximately eighty-five (85) days since it was obtained from this court (2 November 2022). During the time period set out above, Unisa never sought the indulgence of Dr Socikwa to consent to the late filing of the record. Unisa never even bothered to calculate that its review application has been deemed withdrawn effective from 1 February 2023, as contemplated in Clause 11.2.3 of the Practice Manual of this court. Alternatively, the review application was archived effective from 26 April 2023. Unisa never applied to this court for its review application to be resuscitated.

[8] Armed with the transcribed and completed record of arbitration proceedings since 10 March 2023, Unisa only filed the said record to this court on 5 May 2023, which is approximately thirty-four (34) days later for reasons not tendered to court.

[9] On 9 May 2023, the Sheriff, the third Respondent attended to the Unisa premises to attach movable assets for the purposes of sale in execution. On 12 May 2023, Unisa filed this application and pleaded that it be heard on 18 May 2023.

[10] Dr Socikwa vehemently opposed Unisa's urgent application on three grounds: (1) urgency was self-created; (2) the review application was deemed withdrawn on 1 February 2023, alternatively, (3) the review

application was archived on 26 April 2023. In this regard, Dr Socikwa pleaded for the dismissal of Unisa's application with punitive costs.

[11] Following the completion of the submission by Dr Socikwa's attorney, counsel for Unisa asked for the court's indulgence to take instructions. This is after I asked counsel for Unisa if there is any pending review application before court. Counsel for Unisa retorted to court and stated that he only realised the previous night around 23:00 that there was no pending review application as it is either deemed withdrawn or archived. He duly called his attorney around the time stated above to inform her of the same. I graciously granted the indulgence sought by Unisa's counsel.

[12] At the resumption of the proceedings, Unisa's counsel informed the court that he has taken instructions from his attorney who was in court—and his instructions are that Unisa was making an application that its own urgent application which is before court be struck off the roll with costs. That was but a startling new application by Unisa without papers!

[13] I must state that the deponent to Unisa's founding affidavit is Professor Vuyo Ntsangane Peach (Prof Peach), Acting Executive Director: Legal Services Department. According to Prof Peach, at paragraph 3, the facts contained in Unisa's founding affidavit are to the best of his knowledge and belief both true and correct.

[14] However, at paragraph 8, sub-paragraph 8.1, Prof Peach states that the review application was launched by Unisa on 5 May 2023. At paragraph 16, Prof Peach proceeds as follows:

> *"16. The applicant consequently launched an application on 05 May 2023 under case number JR 2350/2022 to review and set aside the arbitration award. The application is still pending before the Labour Court."*

[15] Nowhere in Prof Peach's founding affidavit on behalf of Unisa is it categorically stated that Unisa instituted its review application on 26 October 2022. Dr Socikwa in her answering affidavit laid bare the date of Unisa's review application as 26 October 2022, and provided a copy of Unisa's Notice of Motion and the email addressed to her to serve the said application. In the review application dated 26 October 2022, Prof Peach is the deponent to Unisa's founding affidavit and yet he states in this urgent application that the review application was only instituted on 5 May 2023. In clear terms, Prof Peach in Unisa's founding affidavit in this application elected to be a stranger to the truth. Or perhaps, Prof Peach deliberately meandered into amnesia as a tactic to deceive the court. The case number which Prof Peach says is a review application launched on 5 May 2023, bears the case number allocated in 2022 (JR 2350/2022).

Department of Justice and Constitutional Development—Limpopo Province's urgent application

[16] In this second urgent application under case number J 680/23, the Department of Justice and Constitutional Development—Limpopo Province ("the Justice Department") is the applicant. The Justice

Department employed Ms Elelwane Asnath Mavhunga (Ms Mavhunga) as Chief Administrative Clerk at the Polokwane Magistrate court. In this capacity, Ms Mavhunga was a supervisor at the cash hall. The Justice Department has a rotation policy in terms of which Ms Mavhunga was periodically required to move to another section as per the rotation policy. Ms Mavhunga refused to rotate. Her reason was she was advancing her studies in finance and it was best suited for her not to rotate. Further, Ms Mavhunga was of the opinion that the rotation was to disadvantage her in her studies. Rotation was enforced and Ms Mavhunga lodged a grievance.

[17] A FaceBook posting by Ms Mavhunga surfaced in which she was accused of allegedly making derogatory statements against the court manager. Ms Mavhunga was disciplined and duly dismissed by the Justice Department.

[18] Ms Mavhunga marched to the bargaining council (GPSSBC/ First Respondent) and the Commissioner, Second Respondent, found that the dismissal of Ms Mavhunga was substantively and procedurally unfair and ordered her reinstatement effective from 1 October 2021. The arbitration award was issued on 6 September 2021.

[19] On 11 July 2022, which is approximately thirty (37) weeks later, the Justice Department filed and served a review application under case number JR 708/22. In the same month of July 2022, on the date not stated by the applicant in its founding papers, the Justice Department filed an urgent application to this court to stay the execution of the arbitration award but did not pursue the said application due to "challenges in obtaining a date". The Justice Department claims without tendering any evidence that it has filed and served the record of arbitration proceedings on the date it cannot mention in its founding papers2.

[20] On 28 March 2022, Ms Mavhunga attached the Justice Department's movable property, being four vehicles3. On 10 May 2023, the Sheriff attended to the premises of the Justice Department and allegedly stated that he would be removing the vehicles by no later than 15 May 2023. There is no proof attached by the Justice Department to substantiate the Sheriff's attendance. What is attached is a notice of attachment dated 28 March 2022. Even on this application, there was no application to reinstate the review application.

[21] Counsel for Nehawu4 mounted an opposition to this urgent application.

---

2 It is trite law that *an applicant must stand or fall by his/her founding affidavit. See* Director of Hospital Services v Mistry *1979 (1) SA 626 (AD) at 635H-636D.*

3 GNC 511L Toyota Corolla; GNC 443 L Toyota Corolla; GNC 512 L VW Polo and GNC 498L Toyota Avanza. Each of the listed vehicles is valued at R100 000.00.

4 National Education, Health and Allied Workers' Union-a trade union registered in terms of section 96 of the LRA.

He submitted that there is no pending review application before this court as it has been deemed withdrawn, alternatively, archived due to the Justice Department's dismal failure in taking any steps to prosecute5 its application. Nehawu's counsel further submitted that the Justice Department's urgent application is doomed to fail as urgency is self-created as evinced in the applicant's founding papers. On that score, Nehawu's counsel invited the court to dismiss the Justice Department's urgent application with costs.

Law and Analysis

[22] In its various judgments on urgency in terms of Rule 8 of the Rules, this Court has overemphasised the principles set out in *Jiba v Minister: Department of Justice and Constitutional Development*6.

[23] In respect of the Practice Manual of this court, two clauses are vital for the purposes of the applications before this court: Clause 11.2.2 and 11.2.3 which state respectively:

> *"11.2.2. For the purposes of Rule 7A (6), records* ***must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received****.*
>
> *11.2.3. If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application,* ***unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given****. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."* [emphasis added]

[24] For both applicants, Unisa and the Justice Department, urgency was self-created for reasons that are inexplicable, devoid of rationality and candour.

[25] Unisa obtained the arbitration award on 28 July 2022. Unisa ought to have lodged its urgent application upon receipt of the arbitration award. However, Unisa only filed its review application on 26 October 2022. Section 145 (1)(a) of the LRA provides that a party aggrieved by an

---

5 Cassimjee v Minister of Finance 2014 (3) SA 198 (SCA)—it was held that failure by the applicant to expeditiously prosecute his claim constitute an abuse of court and on that score alone, the court can dismiss the claim.

6 (2010) 31 ILJ 112 (LC) at para 18. *"Rule 8 of the Rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules."*

alleged defect in any arbitration proceedings may apply to this court within six weeks of the date of that award for an order to review and set aside the arbitration award. Unisa elected to file its review application after twelve (12) weeks of having been issued with the award. Prof Peach does not explain in his affidavit the reason for non-compliance with the time frames prescribed in section 145(1)(a) of the LRA.

[26] In respect of the record, Unisa was issued with the record by this court on 4 November 2022. In terms of Clause 11.2.2 of the Practice Manual of this court, Unisa had to file the record within sixty (60) days of its receipt from court. Unisa only filed and served the record on 5 May 2023, which is in flagrant disregard of the Practice Manual of this court.

[27] The Justice Department did not cover itself in glory. It too, totally disregarded the time frames prescribed by both section 145(1)(a) of the LRA and Clauses 11.2.2 and 11.2.3 of the Practice Manual of this Court.

[28] The conduct of both Unisa and the Justice Department highlights that the pervasiveness of ineptitude within the organs of state is a brazen assault on the rule of law and a travesty of justice to the citizens. The pervasiveness of ineptitude within the organs of state to comply with the rules of court assail sections 165(4) and 237 of the Constitution of the Republic, 1996 ("the Constitution"). For ease of reference, the said sections provide:

> *"165(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and the effectiveness of the courts.*
>
> *237 Diligent performance of obligations*
>
> *All constitutional obligations must be performed diligently and without delay."*

[29] Unisa and the Justice Department perform public functions in terms of the Constitution and the law. They ought to have been extra vigilant in ensuring that they comply with the provisions of the LRA, the Rules of Court and the Practice Manual of the Court consistent with the obligations set out in sections 165(4) and 237 of the Constitution.

[30] However, both applicants, powered by prevalence of ineptitude impaired them to believe that there was hope in their hopeless urgent applications. What triggered these hopeless urgent applications was the alleged attendance of the Sheriffs to the respective premises of the applicants. Both Unisa and the Justice Department knew or ought to have known that there were no pending review applications before this court due to their inexplicable sloppiness in prosecuting their applications. Worse, none of the applicants had instituted an application to resuscitate its review application. To borrow from William Shakespeare's play Hamlet, undoubtedly, both applicants were "hoisted with their own petard".

Conduct of applicants' legal practitioners

[31] I squarely attribute the launching of these absolutely hopeless urgent applications to legal practitioners who represented Unisa and the Justice Department. Legal practitioners, as officers of the court, have the fiduciary responsibility to the court. Once legal practitioners accept either the instructions and/or briefs, their appointment by their clients connotes that they become fiduciary in relation to the litigant. In the words of Innes CJ, fiduciary duty7 also involves *"…a solicitor to his client…"* . Once appointment 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 interests 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.

[32] It would be remiss of this court not to pronounce on the conduct of Prof Peach, the deponent to Unisa's founding affidavit. Prof Peach deliberately concealed to this court that Unisa's review application was filed and served on 26 October 2022. Under oath in the founding affidavit, Prof Peach stated that the review application was filed only on 5 May 2023 and is pending before this court. As set out above, Prof Peach is a deponent to the review application filed on 26 October 2022 as evinced in the answering affidavit and annexures of Dr Socikwa. For someone in charge of the Legal Services of Unisa, *albeit* in an acting stead, to commit such elementary error warrants the investigation of the Legal Practice Council to establish if Prof Peach deliberately concealed material facts to this court in respect of when the review application was actually filed and served.

Costs

[33] Section 162 of the LRA confers discretionary powers on this court to make an order for costs according to the requirements of the law and fairness. When deciding whether or not costs should be awarded, this court must first ascertain whether this matter ought to have been to court in the first place. The court also has to take into account the conduct of the parties in the matter. Section 162 of the LRA states:

"162 Costs

(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-

---

7 Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court."

[34] Section 162 (3) of the LRA, confers this court with the discretion to award costs against a party to the dispute or against any person who represented that party in the proceedings before the court. In deciding whether a cost order is appropriate, the court has to take into account the conduct of the parties and their representatives in the proceedings.

[35] 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.

[36] Mindful of the fact that the Justice Department is represented by the State Attorney and not a private attorney, what should be the fate of an Attorney from the State Attorney in the circumstances of the costs. Attorneys employed by the State Attorney are employed in terms of the Public Service Act 103 of 1994 ("the PSA"), as amended. As civil servants, they are bound by the provisions of the Public Finance Management Act 1 of 1999, ("the PFMA"), as amended. Section 45(c) of the PFMA provides:

"45. Responsibilities of other officials

An official in a department, trading entity or constitutional institution—

(a) ….

(b) ….

(c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) ….

(e) …."

[37] An attorney duly employed by the State Attorney who agrees to take a hopeless case to court without properly advising the litigating department or organ of state, contravenes section 45 (c) of the PFMA. In the premise, consequence management measures must ensue.

Conclusion

[38] In the December 2017 edition of the Advocate8, Justice Owen Rogers posed a crucial question in his article entitled "The Ethics of the Hopeless Case": *If counsel argues a hopeless case, is she not guilty of wasting court time and of abusing the court's process?*

[39] In *Mashishi v Mdladla & Others*9, this court through the prolific pen of Van Niekerk J, in a way responded to Justice Rogers's pertinent question. Perhaps, Van Niekerk J cautioned by stating:

> *"…those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences."*

[40] It is without doubt that the applicants in this consolidated judgment have paraded the traits for the court to ascertain when is a case hopeless.

[41] Two learned academics from Unisa, Prof Angelo Nicolaides and Prof Stella Vetorri, collectively penned an article that was published by Athens Journal of Law in April 2019 entitled: *The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case*. In their article, they too and primarily for ethical reasons, discourage any pursuit of a hopeless case by officers of the court. They further emphasise that the conduct of legal practitioners must exhibit professionalism in all respects. They caution as follows10:

> *"Lawyers cannot fail to exercise competence and care as this may give rise to an action against them for damages by their client. If a court is misled by a lawyer, the latter has then acted unvirtuously and failed in his or her duty to assist the court in legal proceedings. Equally without virtue and also lacking in professionalism, are lawyers who are obstructionist and delay proceedings of a court."*

[42] A plethora of legal literature on the duties of lawyers is well documented in various tomes. In pursuit of its absolutely hopeless urgent application, Unisa's legal research did not even consult the journal article penned by its own consummate legal commentators/educators.

---

8 Vol 30 Number 3

9 (2018) 39 ILJ 1607 (LC) at par 18. See Sepheka v Du Point Pioneer (2019) 40 ILJ 613 (LC); Ngwenya v Trustee For the Time Bing of Sishen Iron Ore Company Community Development Trust and Another (J 3581/18)[2022] ZALCJHB 246 (17 August 2022)

10 Athens Journal of Law-Volume 5, Issue 2-Pages 156. https://doi.org/10.30958/ajl.5-2-4

[43] Perhaps, it is apt to conclude with the pearls of wisdom from Justice RPB Davis (as he then was) on the Foreword to the First Edition of *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa11*. He said:

> *"Ours is a fine profession: it is the pursuit of justice and the truth, and these are surely well worth pursuing for their own sake, regardless of reward. And they should be pursued, too regardless of consequences…"*

[44] 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 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.

[45] In the result the following order is made:

Order

Case No: J 675/23

1. The application by Unisa is struck off the roll for want of urgency;

2. Unisa's legal practitioners (Advocate and Attorneys) in this application are ordered not to charge any fee for legal services rendered. If they have already been paid, the legal practitioners are ordered to reimburse Unisa within sixty (60) days of granting of this order;

3. Unisa is ordered to pay Dr Socikwa's costs on an attorney and client scale; and

4. The Legal Practice Council is ordered to investigate the conduct of Prof Vuyo Ntsangane Peach as to whether he sought to mislead the court in respect of the date of the filing to the review application by Unisa.

Case No: J 680/23

5. The application by the Justice Department is struck off the roll for want of urgency;

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 within sixty (60) days of granting of this order;

---

11 Fifth Edition by C Cilliers, C Loots and H Nel. Vol 1. Juta (2009)

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; and

8. The Justice Department is ordered to pay Nehawu's costs on an attorney and client scale; and

SMANGA SETHENE
Acting Judge of the Labour Court of South Africa

Appearances:

J 675/23

For the Applicant:	Adv. Sello Raselalome
Instructed by:	Poswa Inc
For the Respondent:	Makhura M of Cheadle Thompson & Haysom Inc

J 680/23

For the Applicant:	Adv. N.R Choeu
Instructed by:	The State Attorney - Polokwane
For the Respondent:	Adv. Matodzi Mudimeli
Instructed by:	Katlego Ralikhuvhana Attorneys