THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1079/2022

In the matter between:

LESIBA EDWARD MOOKA	Applicant
and	
SCAW SOUTH AFRICA (PTY) LTD	First Respondent
DORON BARNES	Second Respondent
WILLEM FRANCOIS COERTZEN	Third Respondent
VUSI OOPPER TWALA	Forth Respondent
LEFU LUCAS TSEKI	Fifth Respondent
MOEGAMMAD GANIEF BARDIEN	Sixth Respondent
EDGAR CARL THIELE	Seventh Respondent
MAPASEKA PATIENCE NKODI	Eighth Respondent
NOMASONTO ANASTASIA MASEKO	Ninth Respondent
MZAMO APHIWE MUSAWENKOSI	Tenth Respondent

Heard: 20 April 2023

Delivered: 21 April 2023

(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 21 April 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to hold the respondents in contempt of court on account of their alleged failure to comply with an arbitration award issued on 20 October 2020. The application was filed on 29 August 2022, enrolling the matter for hearing on an *ex parte* basis on 4 November 2022. On that date, the court issued a rule *nisi* with a return date of 17 February 2023.

[2] On 15 September 2022, Mahosi J granted an urgent application brought by the first respondent in these proceedings and made the following order:

> 2. The enforcement of the arbitration award issued on 21 October 2020 under case number MEGA 55345 is stayed pending finalization of the applicant's application to revive the review application at the Labour Court.

It is not in dispute that at the time the urgent application was filed and the order granted, that the first respondent (the applicant in those proceedings) had filed an application to revive an application to review and set aside the arbitration award that is the subject of these proceedings.

[3] It follows from the above, and I did not understand the applicant's representative to dispute this, that on the date of the *ex parte* application seeking to hold the respondents in contempt was heard (4 November 2022), that the applicant (or at least his attorneys) were fully aware of the order to stay granted on 15 September 2022. The same attorney acted on the applicant's behalf to oppose the urgent application and indeed, filed and an answering affidavit on his behalf.

[4] In these circumstances, the rule *nisi* ought never to have been issued and for present purposes, it stands to be discharged. The only issue to be determined

is that of costs. The respondents seek costs on a punitive scale, to be paid *de bonis propriis*.

[5] The respondents rely on *Schlesinger v Schlesinger* 1974 (4) SA 342 (W) in support of the submission that a punitive order for costs is warranted. In that judgment, the court held that there was an obligation on an applicant in an *ex parte* application to disclose all material facts that could have an influence on the decision that the court can reach, and that the court would ordinarily frown upon in order obtained exporter on incomplete facts. On the facts of that case, the court found that the respondent and her legal advisers had brought the original application with a reckless disregard for the full and true facts in an effort to obtain some tactical advantage over the applicant and that on that basis, an award of costs on the attorney and client basis was warranted.

[6] In the present instance, it is clear to me that the applicant and his representative displayed a reckless disregard for the full and true facts when they failed to disclose to the court on 4 November 2022 the order staying further enforcement of the arbitration award. It is clear that had the court been made aware that enforcement of the award had been stayed, it would never have issued the rule *nisi*.

[7] The explanation proffered by the applicant's representative is that the person who attended court on the applicant's behalf on 4 November 2022, a Mr Tooka, 'had limited knowledge of the factual history of this matter'. That is no explanation for an omission that was either deliberate or which displayed startling incompetence on the part of the applicant's representatives. To make matters worse, once the rule *nisi* had been issued, the applicant made no attempt to abandon the order. On the contrary, the applicant sat on the order for months, without any attempt to serve the order, until the breakdown of settlement negotiations conducted in early 2023. It was only on 6 February 2023, after an un-successful attempt to resolve the dispute, that the applicant's attorney requested the physical addresses of the first respondent's directors in order to serve the rule *nisi* on them. (Why it was considered necessary to cite nine of the first respondent's directors as respondents in the present proceedings is another question that warrants an answer from applicant's

attorney.) This was the first stage at which the respondent's attorney became aware of the existence of the rule *nisi*, i.e. less than two weeks prior to the return date. The respondent's attorney requested the applicant's attorney to consent to the discharge of the rule, given the existence of the order granted by Mahosi J. There was no response from applicant's attorney and counsel was duly briefed to oppose the relief sought on the return date. On 17 February 2023, the matter was postponed to 20 April 2023 to afford the applicant an opportunity to file a replying affidavit.

[8] Despite the fact that the opportunity to file a replying affidavit was extended to the applicant on 17 February 2023, the affidavit was filed only on 19 April 2023, a day before the extended return date. It is clear from the terms of the replying affidavit that the applicant refuses to accept the consequences of the conduct of his attorney. Indeed, in circumstances where he must have appreciated the impossibility of proceeding with the application to hold the respondents in contempt, the applicant persists with the contention that the rule *nisi* ought to be confirmed and the respondents held in contempt.

[9] In summary: the applicant ought never to have sought a rule *nisi* on 4 November 2022, and ought properly at that stage to have disclosed to the court the existence of the order granted on 15 September 2022, an order of which the applicant's attorney was fully aware, he having opposed the granting of the order. Even if I accept that the failure to make disclosure of all of the relevant material facts was not deliberate and was the consequence instead of sheer incompetence on the part of the applicant's attorney, the applicant's attorney ought properly to have abandoned the order. Instead, the order was produced, not unlike a trump card in a game of cards, when it became obvious after unsuccessful settlement discussions that the dispute remained unresolved. Further, it was incumbent on the applicant's attorney to have made clear to the court on 17 February 2023 that the matter ought not properly to be postponed, for the purpose of filing a replying affidavit (or any other purpose), given the existence of the order dated 15 September 2022. Even then, after being afforded the opportunity to file a replying affidavit, it took more than two months for the applicant to file that affidavit, the content of which, as I have indicated, demonstrates no appreciation by the applicant or his attorney of the true facts.

[10] In terms of section 162 of the LRA, this court has a broad discretion to make orders for costs in terms of the requirements of the law and fairness. This court does not ordinarily make orders for costs against individual employees, who in good faith, seek redress against their erstwhile employers. In the present instance, I have no doubt that the applicant is acting on the advice of his attorney. The applicant has not been served well. The advice, for all of the reasons disclosed above, borders on the scurrilous and indeed, displays contempt for the terms of the order dated 15 September 2022. What aggravates matters is that the applicant's attorney persisted during argument with his attempt to lay blame at the feet of the respondents, seeking to invoke the merits of the review application the application to revive the review application and the respondents conduct in the present proceedings. It is clear to me that the applicant's attorney persisted with the contempt application to seek tactical advantage, conduct which in terms of *Schlesinger* warrants an order for costs on a punitive scale. In these circumstances, it would be unfair to order the applicant to pay the respondent's costs on that scale, or at all. Given all of the circumstances, the requirements of the law and fairness are best satisfied by an order granted *de bonis propriis*, on the scale is between attorney and client.

I make the following order:

1. The rule *nisi* issued on 4 November 2022 is discharged, with costs, such costs to be paid *de bonis propriis* on the scale as between attorney and client.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: B Mokoena, Bareng Mokoena Attorneys Inc

For the respondent: Adv J Prinsloo

Instructed by: De Villiers & Du Plessis Attorneys