REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J2075**/11**

In the matter between:

NOMPUMLELO FAITH GABELA **Applicant**

and

SIZWE MEDICAL AID FUND **Respondent**

Heard: **06 October 2011**

Delivered: **17 January 2012**

Summary: Urgent application withdrawn. Costs of the suit the applicant having withdrawn the case

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JUDGMENT

MOLAHLEHI J

Introduction

[1] The respondent in this matter is seeking costs against the applicant after the urgent application which was launched against the respondent was withdrawn. The order which the applicant had sought with her urgent application reads as follows:

‘1. The Applicant's non-compliance with the rules of this Honourable Court relaying to service, filing, time limits and set down is condoned and the matter is dealt with as one of urgency in terms of Rule 8.

2. The Respondent is directed to commence its proposed disciplinary inquiry against the Applicant as soon as possible in any case by no later than 24 October 2011 and by 19 October 2011at the latest to furnish the Applicant with a copy of the charge sheet setting out the full details of the alleged acts of misconduct.

3. It is declared that the proposed disciplinary inquiry proceedings is to be held in terms of the Respondent's disciplinary policies and procedures and in terms of clause 17 of the Applicant's contract of employment.’

[2] The purpose of the application is stated in the founding affidavit of the applicant at paragraph 5 thereof as follows:

‘ The necessity for this application arises from the following. Although as the Respondent's most senior employee, I have been on suspension for more than four weeks now. My continued suspension is proving to be highly prejudicial more especially because of the following: Statements that are highly damaging to my reputation and which have been attributed to the Respondent's Board of Trustees have appeared in the press. Although I am being paid for now, the bonus I will be entitled to will be drastically refused as its quantum dependent on my being at work. As detailed later in this affidavit, I have urged the Respondent on several occasions to expedite the disciplinary process and to confirm that the disciplinary hearing would be a proper disciplinary hearing and a "dispute" between it and me to be resolved by mediation and or arbitration. Its response has been totally unsatisfactory and leaves me with no option but to seek the intervention of this Honourable Court.’

[3] The validity of the suspension of the applicant was not challenged. However, the applicant dealt in details with the background facts that led to the suspension and how that affected dignity. Those details are not relevant for the purpose of this judgment.

[4] The urgent application was set down for 6 October 2011. Two days before the hearing, on 4 October 2011, the applicant withdrew its application. The respondent is now claiming the cost on a punitive scale. The essential basis upon which the respondent is seeking cost is that it had advised and warned the applicant before filing its answering affidavit in a letter dated 3 October 2010. The relevant part of that letter reads as follows:

‘2.1. the applications was premature and not urgent.;

2.2. the undertaking was made to the Applicant's attorneys that they will be advised of the date of the disciplinary inquiry after 30 September 2011 when the Respondent's instructing attorney back in office;

2.3. the application should, in the result be withdrawn."

[5] Because the applicant refused to heed the advice and withdraw her application, the respondent says it had to file its answering affidavit on 4 October 2011. The respondent contends that the applicant withdrew its application few days before the hearing because it was clear from the reading of the answering affidavit that she did not have a case. The respondent further contends that the withdrawal was not made in accordance with the provisions of paragraph 10 of the Court's directive in that the applicant removed the matter from the roll without the consent of either the presiding judge or the Deputy Judge President.

[6] It is trite that the Labour Court has the power to award costs in terms of section 162 read with section 158(1) (a) (vii) of the Labour Relation Act (LRA).[1] It has been held that costs will be awarded in favour of a successful party unless the dictates of fairness directs otherwise.[2] In terms of section 162 of the LRA, the Court in considering the issue of costs has to take into account the conduct of the parties in the following respect:

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

(ii) during the proceedings before the Court'.

[7] In the present instance, not only was the applicant warned that there were no merits in her application, an undertaking was made to look into the issue as soon as the respondent's attorney was back in office. It was not as though the respondent has taken a clear stand that it will not meet the demand of the applicant.

[8] It is further my view that although the applicant did finally withdraw her application, she did that only once the respondent had already filed its answering affidavit which could have been avoided had the applicant acted reasonably. The applicant's application was also devoid of merits and was unnecessary.

[9] In light of the above, I am of the view that fairness dictates that the applicant is to pay the costs of the respond on the attorney and scale.

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[1] 66 of 1995.
[2] See *NUM v Coin Security Group (Pty) Ltd t/a Protea Coin Group* (2011) 3 2 ILJ 137 (LC).

Order

[10] The applicant is ordered to pay the costs of the respondent on own attorney and client scale.

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Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv P G Seleka instructed by Maserumule INC

FOR THE RESPONDENT: Mabuza Attorneys