IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1665/16

In the matter between:

LUNGISA GQWETA	**Applicant**
and	
MS JOYCE MOGALE *N.O*	**First Respondent**
MR ABIE PHOOKO N.O	**Second Respondent**
In re:	
NATIONAL HEALTH LABORATORY SERVICES	**Applicant**
and	
LUNGISA GQWETA	**Respondent**

Heard: **7 September 2017**

Delivered: **28 August 2018**

JUDGMENT

MAHOSI.J

Introduction

[1] This is an opposed application in terms of which the second respondent seeks an order of costs occasioned by the applicant's withdrawal of a contempt application.

[2] Prior to outlining the second respondent's claim in detail and considering the issues that gave rise thereto, it is necessary to summarise the facts that form relevant background to the dispute between the parties.

Parties

[3] The applicant is employed by the National Health Laboratory Services (employer) as a Regional Finance Manager.

[4] The first respondent is the Chief Executive Officer (CEO) of the National Health Laboratory Services.

[5] The second respondent is a practising attorney and was appointed by the employer to preside over the disciplinary proceedings that were instituted against the applicant.

Material background facts

[6] On 14 March 2016, the applicant was suspended by the employer pending an investigation into various allegations of misconduct. The applicant was given a notice to attend a formal disciplinary hearing on 25 May 2016. On 24 May 2016, the afternoon prior to the commencement of the disciplinary hearing, the applicant requested a postponement of the disciplinary hearing in order for his legal representative to prepare. The employer granted the postponement and the disciplinary hearing was re-scheduled by agreement to 6 June 2016.

[7] On 27 May 2016, the applicant referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), on the basis that he was being subjected to an occupational detriment. The con/arb process was

set down for 20 June 2016. On 31 May 2016, the applicant requested that the disciplinary hearing scheduled for 6 June 2016 be stayed, pending the outcome of the CCMA dispute. The request was rejected as the employer was of the view that there was no *nexus* between the applicant's CCMA dispute and the disciplinary hearing.

[8] On 2 June 2016, the applicant brought an urgent application before this Court under case number J 1096/16 to interdict the disciplinary hearing pending the outcome of the dispute before the CCMA.

[9] On 6 June 2016, this Court granted an order interdicting the employer and the second respondent from proceeding with the disciplinary proceedings against the applicant.

[10] On 1 August 2016, the applicant launched an *ex parte* application to hold the first and second respondents in contempt of the abovementioned court order.

[11] On 12 August 2016, this Court granted an interim order in terms of which the first and second respondents were required to appear before it on 4 November 2016, to show cause why they should not be found guilty of contempt of court for failing to comply with the court order dated 6 June 2016.

[12] The first and second respondents filed affidavits in opposition to the application giving rise to the interim order. Consequently, the employer gave an undertaking that it would not proceed with the disciplinary proceedings. As a result, it became unnecessary for the applicant to proceed with the contempt application. On 3 November 2016, the applicant's attorneys and the first respondent's attorneys in the absence of and having not discussed the matter with the second respondent reached an agreement to withdraw the application.

[13] A draft order in terms of which the parties agreed to have the contempt application withdrawn was emailed to the second respondent. Upon receipt thereof, the second respondent declined to be a party thereto on the basis that he was not approached and consulted. As a result, the second respondent

decided that he would proceed to oppose the contempt application and pray for costs.

[14] On 4 November 2016, the application for contempt of court was withdrawn, but the second respondent insisted that the applicant should tender costs. However, the applicant refused to tender costs. Consequently, the application for contempt of court against the first respondent was removed from the roll. The second respondent proceeded to argue for costs against the applicant.

[15] The basis upon which the second respondent is seeking an order for the payment of costs against the applicant is outlined in his heads of arguments as follows:

> '7. Prior to the interim order of 12 August 2016, the second respondent was involved in an arbitration which was scheduled to reconvene on 4 November 2016. The arbitration had commenced on 11 January 2016. Resulting from the interim order, second respondent sought from the CCMA Durban from the applicant attorneys in the arbitration, a postponement of the arbitration in order to attend the Honourable court on 4 November 2016.
>
> 8. The applicant attorneys in the arbitration indicated that they will be seeking costs against the second respondent for the delay in the finalisation of the arbitration. The arbitration has already prior to 4 November 2016 been postponed on three occasions. The CCMA has also indicated its unhappiness in the delay in finalising the arbitration and has reserves an argument on the costs.
>
> 9. The postponement of the arbitration, and the potential costs order against the second respondent, could easily have been avoided had the applicant communicated its intention to withdraw his contempt application timeously. The second respondent could have requested the CCMA Durban to re-enrol the arbitration on 4 November 2014.'

[16] In his application for contempt of court, the applicant only sought a costs order against the second respondent in the event that he opposes the application. In his answering affidavit to the application for contempt of court, the second respondent submitted that the applicant's application was incompetent, frivolous and deserved a dismissal with costs. The applicant submitted that to an extent that the second respondent insisted on proceeding with the contempt application, he is also asking this Court to grant costs against him.

Applicable law and analysis

[17] Section 162 of the Labour Relations Act[1] (LRA) provides for the manner in which this Court may award orders for costs and it states as follows:

> '(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 -
>
> (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.'

[1] 66 of 1995, as amended.

[18] The Constitutional Court (CC) has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others (Zungu)*[2] that the rule of practice that costs follow the result does not apply in Labour Court matters and further that costs orders should be made in accordance with the requirements of law and fairness. In *Zungu*, the CC referred to *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O.*[3] where it was stated as follows:

> 'The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court.'

[19] In the current matter, the legal proceedings were settled, disposing of the merits except in so far as the costs are concerned. The question is whether the applicant's contempt application was incompetent, frivolous and deserved a dismissal with costs.

[20] It is common cause that despite the court order granted on 6 June 2016, the employer proceeded to reschedule the applicant's disciplinary hearing to be heard on 15 July 2016 on the basis that the court order had lapsed. The applicant submitted that it would not have been possible for the employer to schedule a disciplinary hearing without the second respondent's knowledge and consent. As a result, the applicant argued that the scheduling of the disciplinary

[2] (2018) 39 ILJ 523 (CC).
[3] [2007] ZALAC 41 at para 19.

hearing was done in concert with the second respondent. This is a reasonable proposition.

[21] The disciplinary hearing was only postponed on 14 July 2016 to afford the applicant an opportunity to consider the employer's response to his statement of claim. In her answering affidavit to the contempt application, the first respondent made it clear that the disciplinary hearing should be rescheduled after the CCMA's jurisdictional ruling on the protected disclosure dispute as the agreement was to postpone it pending the outcome of the CCMA. This is what prompted the applicant to launch a contempt of court application. At no stage did the first and second respondents make it clear that they will abide by the court order of 6 June 2016. It can, therefore, not be said that the applicant's application was frivolous and vexatious. The applicant was indeed justified in launching the application for contempt of court.

[22] As aforesaid, the agreement to withdraw the application for contempt was entered into by the applicant and the first respondent on 4 November 2016. Despite the said agreement, the second respondent persisted in arguing a costs order against the applicant. It is apparent that the second respondent's reason to seek a costs order against the applicant has to do with an arbitration hearing at CCMA Durban which had to be postponed and further that there was a potential costs order occasioned by the said postponement against him.

[23] In this regard, the second respondent contended that the postponement of his Durban arbitration and the potential costs order against him could have been avoided had the applicant communicated his intention to withdraw his contempt application timeously. I find this submission disingenuous. The employer only gave an undertaking not to proceed with the disciplinary hearing on 4 November 2016 and on the same day, the applicant agreed to withdraw the contempt application. The applicant could, therefore, not have been in a position to communicate his intention to withdraw the contempt application prior to 4 November 2016. The second respondent's persistence with this application was

unreasonable and in fact it amounted to a vexatious and frivolous action. Moreover, his contended basis upon which this Court should grant a cost order against the applicant is clearly irrelevant to the issues to be determined in the current matter. As such, the second respondent ought not to have persisted with this application.

[24] In the premise, the requirements of law and equity prompt me to exercise my discretion in favour of the applicant and to order the second respondent to pay the applicant's costs.

[25] In the circumstances, I make the following order:

Order

1. The second respondent is to pay the applicant's costs on the party and party scale.

_____

D Mahosi

Judge of the Labour Court

Appearances:

For the applicant:	MM Bill of Motsoeneng Bill attorneys
For the respondent	Advocate MJ Van As
Instructed by	Webber Wentzel Attorneys