THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

JUDGMENT

Not reportable

CASE NO: J 235/2020

In the matter between:

LORRAINE PULENG KUHLMANN Applicant

and

CITY OF JOBURG PROPERTY COMPNAY (SOC) LTD First Respondent

BONITAS MEDICAL AID SCHEME Second Respondent

Hearing: 1 July 2020 (via Zoom)

Judgment delivered: 2 July 2020, by email at 13h30pm

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks an order to hold the first respondent's accounting officer in contempt of court for his alleged failure to comply with an order of this court granted on 28 February 2020, and for an order that the respondents comply with the terms of the order forthwith.

[2] When the matter was called, the parties advised the court that they had reached agreement on the substantive issue in dispute, i.e. the applicant's continued membership of the second respondent (the medical aid scheme). The only outstanding issue that required decision was that of costs.

[3] The first respondent advised the court that on account of the applicant being represented *pro bono*, it did not seek an order for costs, but opposed any order being made against it. That being so, the only issue before the court is whether the applicant is entitled to her costs.

[4] In terms of s 162 of the LRA, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. In *Long v South African Breweries* 2019 (5) BCLR 609 (CC), the Constitutional Court affirmed the proper approach to the exercise of that discretion:

> [27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply…This principle is based on section 162 of the LRA, which reads:
>
> (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."

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

"In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct…"

[5] In short, the discretion to be exercised in relation to orders for costs extends beyond the rule that costs follow the result, and requires the court to have regard to all relevant facts and circumstances.

[6] The present application was filed on 24 June 2020. The purpose of the application is to declare the first and second respondents in contempt of a judgement delivered by this court on 28 February 2020 in which the respondents were ordered to reinstate the applicant's medical aid scheme, to reinstate a housing subsidy benefit, and to reinstate her salary with effect from 28 February 2020. It is only the first two parts of the order that are relevant to the current proceedings.

[7] The applicant states that on 16 June 2020 she received a message from the medical aid confirming that her membership will be terminated with effect from 30 June 2020. She confirmed with the medical aid that the reason for termination was her resignation from the first respondent's employ. The applicant then became 'suspicious' that her home loan subsidy may not have been paid to the bank and discovered that payments had indeed not been made. On this basis, she contends that the first respondent deliberately did not pay her bond and medical aid 'because the officials thereof are even prepared to defy the court order and openly lied about the fact that I have resigned…'.

[8] On 18 June 2020, the applicant addressed a letter to the acting CEO of the first respondent in which she, at great length, records the first respondent's failure to pay her medical aid contribution and homeland subsidy, and a host of other issues. On 22 June 2020, the applicant's attorney addressed a letter to the first respondent's attorneys of record alerting them to the fact that payment of the applicant's medical aid and housing subsidy had been terminated. On the same date, the first respondent's attorneys investigated the matter and wrote to the applicant's attorney advising him that they had been instructed that there was an unfortunate oversight with regard to the payment of the applicant's benefits, that the oversight had been rectified and that they had been instructed that the applicant's medical and membership will not be terminated and that all outstanding third-party payments would be made by the end of the month.

[9] Despite this undertaking, on 24 June 2020, the present application was served and filed. The first respondent's attorneys of record sent email correspondence to the applicant's attorney of record confirming that the first respondent had provided them with proof that the applicants payments would be made at the end of June 2020, that the applicant had been informed prior to bringing of the application that the applicant was not paid on account of an administrative oversight that had been rectified, and that there was no merit in the application which the applicant should seriously consider withdrawing.

[10] On 24 June 2020, the applicant's attorney of record forwarded correspondence from the second respondent recording that the applicant's membership had been terminated 'as per request from HR directly, stating that you are on unpaid leave and should be terminated effective 30/04/2020'…. The first respondent immediately investigated the circumstances surrounding the alleged instruction to terminate, and determined that on account of non-payment of the applicant's salary, benefits were stopped. This was an administrative oversight which was immediately rectified once it came to the attention of the first respondent that payments had not been made. On 25 June 2020, the first respondent's attorneys of record addressed correspondence to the applicant's attorney of record noting the nature of the administrative oversight and confirming once again that the error

had been rectified and that payment was being processed. It is not in dispute that the relevant payments were subsequently made and that the applicant's medical aid has been reinstated.

[11] Despite these developments, the applicant delivered a supplementary affidavit to the founding affidavit on 28 June 2020, dealing with the applicant's discontent in respect of her salary payment for June 2020 and other matters. The first respondent's attorneys recorded that the issue of the applicant salary was not relevant to the present proceedings but the applicant's attorney of record persisted with the inclusion of the affidavit in the present proceedings.

[12] Applications for contempt of court are ordinarily dealt with in terms of the practice manual. Clause 13 of the practice manual contemplates an application brought *ex parte* and the allocation of a return date on which the respondent is required to show cause why he or she should not be held in contempt of the order concerned. In the present instance, the applicant has failed to comply with this procedure and has sought to secure an order holding the respondents in contempt by way of urgent proceedings. The founding affidavit does not deal with the issue of urgency, nor does it seek to explain why the prescribed process was ignored. Counsel for the applicant submitted that the procedure adopted was employed on account of concerns harboured by the applicant in relation to the payment of her medical aid and housing subsidies. That does not explain why the applicant thought it necessary to seek the limited relief that she sought in that regard by way of an application to hold the respondents in contempt. In any event, by the time the application was filed, the first respondent had undertaken to resolve what ultimately transpired to be an administrative issue. Certainly by the time that the supplementary affidavit was filed, matters had been resolved. The filing of that affidavit was entirely unnecessary, and has served only to cause the first respondent to incur unnecessary costs. In regard to the substance of the application, there was no reason in the present circumstances to resort to an application to hold the respondents in contempt of court, or to persist with that application. It would appear that the proceedings were driven by the applicant's

distrust of the first respondent, and her refusal to accept that what transpired was the subject of administrative error rather than deliberate intent.

[13] As I have indicated, the first respondent's representative charitably did not seek an order for costs against the applicant. Had he done so, I would have given serious consideration to such an order. It seems to me that the nature and format of the present application was entirely inappropriate and that even if the necessity for the filing of the notice of motion and founding affidavit were to be accepted, it was abundantly clear by that date that the first respondent had acknowledged the error that had been perpetrated and was committed to resolving the matter.

[14] In the circumstances, in my view, the interests of the law and fairness dictate that there should be no order as to costs.

I make the following order:

1. There is no order as to costs.

André van Niekerk

Judge of the Labour Court of South Africa