IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, MTHATHA) Case no. 996/2010

In the matter between:

THEMBELA TAMARA GOLIMPI Applicant

And

UNITRADE 117 CC T/A STOP DISCOUNT Respondent

JUDGMENT

HINXA AJ :

[1] In this matter the applicant instituted application proceedings against the respondent seeking relief in the following terms :

1. That the respondent be and is hereby directed to complete and sign unemployment insurance fund application forms of the applicant which were handed to the respondent on the 24th of February 2010.

2. That the respondent be and is hereby directed to furnish applicant's attorneys with the said duly completed unemployment insurance fund application forms within ten days from the date of service of this order.

3. That the respondent shall pay costs of this application.

4. That the above Honourable Court grant such further and/or alternative relief.

[2] When the matter came for hearing on an opposed basis, the respondents having filed the answering affidavits, it turned out that the applicant had already been furnished with the forms in question, duly completed by the respondent in compliance with prayer a, and b, supra.

[3] On this basis, the application became academic and only the issue of costs remained outstanding and fell to be considered and discussed.

[4] The facts which appear to be common cause in this application can be summarised as follows :

4.1 The applicant, a major female, was on or about 1 July 2003 employed by the respondent as a credit clerk working at its shop at Old Transkei Building, Elliot Road in the district of Umtata.

4.2 The respondent is a close corporation with limited liability duly incorporated in terms of the Close Corporation Act of 1984.

4.3 On or about 24 June 2009 the applicant was confronted by one Mr. Chris Howie (on behalf of respondent) about theft and fraud in the shop, an accusation which the applicant vehemently denied.

4.4 On 28 June 2009 the applicant was verbally suspended by the said Mr. Howie.

4.5 An enquiry was held in the absence of the applicant wherein she was dismissed.

4.6 On 24 February 2010 the applicant per its attorneys, wrote insists to the respondent requesting it to complete the unemployment insurance certificate for onward transmission to the Department of Labour.

4.7 On the same day the respondent (per Mr. Howie) responded by e-mail acknowledging receipt of the aforementioned correspondence and requesting the applicant's attorneys to furnish them with copies of the relevant forms and applicant's identity document so as to comply with the request.

4.8 The applicant's attorneys duly complied on 25 February 2010.

4.9 On 13 April 2010 the applicant instituted the present proceedings against the respondent and service was effected on 16 April 2010 at 8h15 upon the respondent (per Mr. Brian Eamiah who was apparently in charge).

4.10 The respondent filed its notice to oppose the application on 11 June 2010, followed by its answering affidavit (deposed to by Mr. John Howie) on 2 July 2010. Hereto attached was a letter dated 16 April 2010 addressed to the applicant's attorneys wherein the respondent was advising that the documents requested on 5 March 2010 have been waiting for collection since 8 March 2010.

4.11 In the answering affidavit, the respondent did not tender any payment of the applicant's costs.

4.12 The applicant, filed a replying affidavit on 7 July 2010 and caused the matter to be set down for hearing.

[5] The applicant derives her right to be furnished with the signed unemployment insurance fund application forms by the respondent from the provisions of Section 56 (1 and 3) of the Unemployment Insurance Act 63 of 2001 read with Regulation 18 (1 and 2). In terms hereof, an employer must, by the seventh day of each month, inform the Commissioner of any changes arising

during the previous month regarding the employees' remuneration details including new appointments and termination of service (my emphasis).

[6] According to annexures UNI 3 and TTG 6 filed of record, the applicant was dismissed by the respondent on 11 September 2009. In terms of the abovementioned legislation, the respondent should have *mero motu* informed the Department of Labour (Commissioner in particular) by the seventh day of October 2009 of this termination of service. This would undoubtedly obviate any request from the applicant for the completion of the forms in question, let alone the present proceedings. Having failed to meet its obligation on the 7 October 2009, the respondent was prompted by the applicant on 24 and 25 February 2010 to comply within five (5) days. The respondent only signed the forms on 8 March 2010.

[7] It is not discernible from the papers, nor did Mr Majali for the respondent refer me to anything in the papers, as to why did the respondent fail to comply timeously with its obligations.

[8] Having signed the documents on 8 March 2010, the respondent further, and critically, failed and ignored to notify the applicant promptly and only did so after the applicant, as was her rights, had instituted the present application on 16 April 2010. The explanation by Mr Majali for this inordinate delay was that the respondent owed no duty to notify the applicant as it was the latter's duty to come and retrieve the forms.

[9] This argument is devoid of any substance and credence. It is unimaginable, and Mr Majali did not explain, how in law and in logic could the applicant be reasonably expected to go and retrieve the forms without being notified that they were ready. It cannot be argued with any measure of justification,

hence Mr Majali failed to convince the court, that a mere telephone call by the respondent would not serve the notification purpose in the circumstances of this matter.

[10] In the circumstances, I am persuaded to find merit in Mr Pangwa's submission that compliance with legal obligation only took place on 16 April 2010 when the respondent deemed it fit to notify the applicant about the readiness of the documents. Further argument by Mr Pangwa that even this compliance was actuated by receipt of summons has much to commend it.

[11] It is equally incomprehensible, and Mr Majali did not attempt to explain, why the respondent did not tender payment of the applicant's costs upon belated furnishing her with the required documents.

[12] The situation in this case is in all forms with the case of in **Mapela Fikiswa v Experian SA (Pty) Ltd 1687/2007** and **Fikiswa Mapetu v Transunion (Pty) Ltd** (both unreported cases from this division). In both cases the court held that where the respondent was obliged to comply with statutory obligation to furnish the applicant with the documents, and it does so only after the legal proceedings have been instituted, it would at the very least at that stage tender to pay the applicant's costs.

[13] In the Transunion case, Schoeman J went further (at paragraphs 25-27) to hold that the respondent should have made that offer prior to approving the application. Contrary to such expectation, it increased costs many-fold by opposing the application on the same day it furnished the information.

[14] At this junction it is apposite to refer to the remarks of Combrick AJA in **Claase v Information Officer South African Airways (Pty) Ltd 2007(5)**

SA 469 (SCA) at **470A-471A** where he said, "The present appeal illustrates how a disregard of the aims of the Act and the absence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation".

[15] Echoing similar sentiments in the Experian matter, Alkema J remarked, (at paragraph 5), "I have at the outset of this application, and even before the application was called, expressed my disquiet about the fact that the time of the High Court is consumed by applications for costs which should not detain this court. My disquiet in relation to the nature of this application is shared also by other courts and our Law Reports abound with judgments on this issue".

[16] In all the aforementioned three cases, the courts concluded by expressing the view that where the state body or private person or institution obdurately and unreasonably refuses to furnish records in circumstances where it obviously should have, the court may make a punitive order of costs to mark its displeasure.

[17] *In casu* Mr. Pangwa placed on record, without elaborating, that he was not arguing for punitive costs, but for costs on a party and party scale notwithstanding the respondents' conduct that deserved to be visited with punitive costs.

[18] It is trite exposition of our law that the courts have discretion in the award of costs. In the exercise of such discretion, I find myself unpersuaded by Mr Pangwa's inexplicable mercy.

[19] In these circumstances, I am of the opinion that the stern approach adopted by the courts in the abovementioned cases on punitive costs should obtain

with more vigour in this case.

[20] In the premises, I make the following order :

The respondent is ordered to pay all the applicant's costs on the scale as between attorney-and-client up to/ and including today.

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M. D. HINXA

ACTING JUDGE OF THE HIGH COURT

HEARD ON : 06 MAY 2011

DELIVERED ON : 23 JUNE 2011

ATTORNEY FOR THE APPLICANT : MR PANGWA

INSTRUCTED BY : CAPS PANGWA & ASSOCIATES

MTHATHA

ATTORNEY FOR THE RESPONDENT : MR MAJALI

INSTRUCTED BY : MESSRS W.T. MNQANDI & ASSOCIATES
MTHATHA