

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1924/19

In the matter between:

XOLANI NTULI

Applicant

and

MATTHEW FLORIAN WELZ

First Respondent

WARREN FRANSMAN

Second Respondent

CATHERINE RENEE HIND

Third Respondent

PENELOPE MPHO OSIRIS

Fourth Respondent

CLICKS RETAILERS

Fifth Respondent

In Re:

CLICKS RETAILERS

Applicant

and

TSHEPANG VINCENT MADIKWE

First Respondent

XOLANI NTULI

Second Respondent

**THE COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

NOMSA MBILENI N.O

Fourth Respondent

Heard: 12 March 2024

Delivered: These reasons were handed down electronically by emailing a copy to the parties on 22 pril 2024 which is deemed to be the date of delivery thereof.

Summary: Reasons for an order in which the court made an order *inter alia* that “there is no order for costs” in relation to which, reasons are specifically sought by the Applicant. Awarding of costs at discretion of Court.

REASONS FOR ORDER

SHABA, AJ

Introduction

- [1] This is an *ex parte* contempt application, (contempt application) the rule *nisi* of which, was to be discharged on the return date of 12 March 2024, and has since been extended to 28 May 2024. The Court rendered its order on 12 March 2024.
- [2] The Applicant subsequently requested reasons for part of the order, which states: “There is no order of costs” which reasons follow after outlining the material facts hereunder.

Material facts

- [3] The Applicant filed an *ex parte* contempt application on 21 November 2023 which was set down for 1 February 2024.
- [4] Makhura J ordered the return date of 12 March 2024 for the discharge of the rule *nisi* ordered on 1 February 2024 for the Fifth Respondent (and its directors), to show cause why they should not be found guilty of contempt of court for failing to comply with the order of this court dated 22 July 2019.

- [5] The matter served before me on the return date of 12 March 2024 in which both parties were legally represented.
- [6] The Applicant, without any prior notice, to the Court, applied for postponement from the bar. The Fifth Respondent opposed the postponement. Both parties asked for costs in their favour.
- [7] The nub of the Applicant's submissions in support of its application for postponement from the bar was that it was not ready to proceed as the Fifth Respondent served it with voluminous documents, through e-mail only, on Saturday of 9 March 2024 at 10:47, before the return date of 12 March 2024. Further that it did not have time to read and consider such documents and that the Fifth Respondent's documents did not constitute an affidavit as directed in paragraph 2 of Makhura J's order of 1 February 2024.
- [8] The voluminous documents referred to by the Applicant above, turned out to be the Fifth Respondent's notice of opposition to the Applicant's *ex parte* contempt application, service affidavits, confirmatory affidavit related thereto, notice of set down of the Fifth Respondent's application for reconsideration and discharge of the *ex parte* order as well as the supporting affidavit related thereto, which somewhat contained parts of the Fifth Respondent's explanation and/or response to the Applicant's contempt application. All these Fifth Respondent's documents, were simultaneously filed by the Fifth Respondent's on Monday (11 March 2024), the day before the return date of 12 March 2024.
- [9] The Fifth Respondent further submitted additional unfiled heads of arguments that only came to my attention on the rule *nisi* return date of 12 March 2024.
- [10] The Fifth Respondent made submissions in opposition to the Applicant's application for postponement from the bar and persisted with its reconsideration application which also contained, its opposition to the Applicant's contempt application.

[11] After a lengthy debate between the parties' legal representatives, which continued for the better part of the afternoon of 12 March 2024, the Fifth Respondent, subsequently indicated that it was withdrawing its application for the reconsideration of the order made by Makhura J on 1 February 2024. Further that it will only proceed with its opposition to the Applicant's contempt application based on and only limited to those parts of its reconsideration documents that, dealt with its specific opposition, to the Applicant's contempt proceedings.

[12] Despite the Fifth Respondent having indicated its readiness to proceed limited to only the above parts of its documents, relating to its opposition to the Applicant's application, the Applicant, declined to proceed with its application of contempt on the day, citing *inter alia* that, the Fifth Respondent must serve it with a stand-alone explanatory affidavit that is envisaged in paragraph 2 of the order by Makhura J of 1 February 2024.

[13] The Applicant further submitted that it wanted to exercise its right to reply to the Applicant's explanatory affidavit as envisaged in paragraph 2 of the order by Makhura J above and that the Fifth Respondent must subsequently serve it with such a stand-alone explanatory affidavit that is not combined with or contained in its reconsideration application.

[14] It was against the above background that the Court made the following order on 12 March 2024:

- '1. The rule *nisi* issued on 1 February 2024 is extended to 28 May 2024.
2. The Respondents are to file a non-combined explanatory affidavit given the withdrawal of their application for reconsideration, in compliance with paragraph 2 of the rule *nisi* issued on 1 February 2024.
3. There is no order of costs.'

Reasons for the order are limited to “No order for costs”

- [15] I now turn to the reasons for the aforementioned order as further hereunder, suffice to state upfront that: “No order for costs” in the context of the order made, means the Court, exercised its discretion not to award costs to either of the two parties.
- [16] Section 162(1) of the Labour Relations Act¹ (LRA) confers discretion to this Court, to make orders of costs based on the requirements of the law and fairness.
- [17] The Court has exercised its discretion judicially, based on the above key requirements for the awarding of costs by not awarding costs to either of the two parties for the sitting on the return date of 12 March 2024 as, the manner in which both parties dealt with the matter on 12 March 2024, contributed to the contempt application not being proceeded with on that day.
- [18] The Applicant sought postponement from the bar without prior notice to Court on 12 March 2024 for reasons referred to in *inter alia* paragraph 7 herein above, which postponement, was inherently granted as, the contempt application, could not be proceeded with on that day.
- [19] The operational word “may” in paragraph 2 of the *ex parte* order by Makhura J on 1 February 2024 aforementioned and Clause 13.2(b) of the Practice Manual Directive², simply suggests that the Respondents had to be present in Court on 12 March 2024 or file affidavits to explain their conduct and that if they do file affidavits, such fact, will not excuse them from being present in Court.
- [20] Paragraph 2 of the *ex parte* order by Makhura J, further required the Respondents to explain their conduct by affidavits if any, on the date of hearing or before. This can only suggest that the Respondents are not

¹ Act 66 of 1995, as amended.

² Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

obligated to file their explanatory affidavit only before the return date but may do so on the return date of the hearing.

- [21] The above being said, the Fifth Respondent, in any event, withdrew its reconsideration application during the sitting on 12 March 2024 and was ready to give the Court the benefit of its explanation for non-contempt, with or without an affidavit for its conduct. The Applicant declined to proceed with its contempt application, under the circumstances and, insisted that it be furnished with an explanatory affidavit that is not combined with the Fifth Respondent's reconsideration application.
- [22] Given the above, nothing much should turn on the fact that the Fifth Respondent served its reconsideration application that contained its opposition to the Applicant's contempt application, on 9 March 2024 and filed it on 11 March 2024, as it, in any event, withdrew such reconsideration application and was ready to proceed with the explanation for its conduct on the return date of 12 March 2024. The Applicant declined to have such an explanation proceeded with, without a stand-alone explanatory affidavit that, was not part of the Fifth Respondent's reconsideration application.
- [23] The Applicant on its own version, did not consider or attend to, whatever the Fifth Respondent served and filed between the 9th and 11th of March 2024 even though it had a working day of Monday (11 March 2024) before the sitting on the return day of 12 March 2024.
- [24] Even if the Fifth Respondent did not withdraw its reconsideration application, there was no way in which, the Court, at least on 12 March 2024, could have considered any such application and heads related thereto, given their non-timeous service, filing and furnishing to Court. Needless to mention that such a reconsideration application, was not properly before the Court on such date given its non-timeous delivery (service and filing) as, the 12th of March 2024, was the return date of the rule *nisi* issued by Makhura J on 1 February 2024 and not for the sitting of the Fifth Respondent's reconsideration application.

[25] Despite the Fifth Respondent having withdrawn its reconsideration application on 12 March 2024 and accordingly, having indicated its readiness to proceed with the explanation of its conduct against contempt or proceed with its opposition to the Applicant's contempt application based on some parts of the content of its reconsideration application, the Applicant declined to proceed on the return date, indicating *inter alia* that it was not obligated to go through the contents of the Fifth Respondent's reconsideration application and identify parts therein that, are relevant to its contempt application and deal with such parts, without a stand-alone explanatory affidavit that was not part of such reconsideration application.

[26] Even if, it were to be accepted that the Applicant, inherently, succeeded with its postponement application from the bar and that such postponement was not as a result of time constraints in the late afternoon of 12 March 2024 as the contempt application, could not be proceeded with to discharge the rule *nisi* on that day, it is axiomatic that the rule of practice that cost follow the result does not automatically apply to this Court³ as, it is necessary to always strike a balance between not unduly discouraging workers, employers (including employer organisations) and unions from bringing their disputes to court and allowing parties to defend themselves.

[27] The Constitutional Court has once more set the standard that the rule that costs against unsuccessful litigants automatically follow the result, is not applicable in Labour Court matters in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and others*⁴ that:

[24] The established rule in litigation that costs follow the result does not apply in labour matters. This Court has made that abundantly clear on a number of occasions, not least in its often-

³ *Member of the Executive Council for Finance, KwaZulu -Natal & another v Dorkin NO & another* (2008) 29 ILJ 1707 (LAC); [2008] 6 BLLR 540 (LAC) at para 19C. See also *Ethekwini Municipality v Hadebe and others* [2016] 8 BLLR 745 (LAC); [2016] ZALAC 14 at 755.

⁴ [2021] 12 BLLR 1173 (CC); (2021) 42 ILJ 2371 (CC) at para 24.

quoted decision in *Zungu*⁵. Despite this, however, there is now a concerning pattern of this Court being requested to overturn decisions of the Labour Court and the Labour Appeal Court applying the general rule that costs follow the result, without more, to matters before those courts. I deem it vital, then, to clarify in some detail in this judgment that it is not merely out of overzealous generosity on this Court's part that we say that costs do not follow the result in labour matters. We are constitutionally and statutorily obliged to do so.'

[28] It is for all reasons herein above that this Court exercised its discretion judicially and fairly by, not awarding costs to either of the parties for the sitting on the return date of 12 March 2024.

[29] Both parties are not unsuited by the contempt application having not been heard on 12 March 2024 as the rule *nisi* of 1 February 2024 has since been extended to 28 May 2024 by this Court's order of 12 March 2024.

Conclusion

[30] In the premises, after considering papers and arguments made by the parties, I made an order *inter alia* that "There is no order for costs" on 12 March 2024, in relation to which reasons, have been sought by the Applicant and furnished herein above.

S.M. Shaba

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ndyebo Jongwana of NJ Attorneys

⁵ *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (39) ILJ 523 (CC). See also *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44; 2019 (3) SA 362 (CC).

Instructed by:

For the Respondent:

Adv Andrew Redding SC

Instructed by:

Bradley Conradie Halton Cheadle