



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J2568/2010

In the matter between:

RAMADIBA: MOTLATSO ANGELINA **APPLICANT**

and

LIMPOPO LEGISLATURE **1ST RESPONDENT**

MAAKE: JOSIAS SELLO N.O. **2ND RESPONDENT**

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION** **3RD RESPONDENT**

NGOBENI: EVA N.O. **4TH RESPONDENT**

Heard: 20 December 2011

Delivered: 20 December 2011

Summary: Application in terms of section 165 of LRA to vary/rescind an order of the Court. The test for an order of costs *de bonis propriis* vs attorney and client costs examined in the light of the CC judgment of President of the Republic of South Africa v Quagliani and others. Application to vary the order granted, with the costs order varied from costs *de bonis propriis* to attorney and client costs

JUDGMENT

HARDIE AJ

[1] This is an application to rescind an order of Molahlehi J handed down in Applicant's absence on 18 January 2011, brought in terms of section 165 of the Labour Relations Act 66 of 1995 (hereinafter "the Act"), which application is being opposed by the First Respondent. In terms of section 165 of the Act, the Labour Court, acting of its own accord or on the application of any affected party, is entitled to vary or rescind a decision, judgment or order.

[2] The order sought to be rescinded or varied by the Applicant reads as follows: : "Having read the documents and having considered the matter: IT IS ORDERED THAT: 1. The Applicant's application is dismissed with costs *de bonis propriis*"

[3] The pertinent chronological sequence of events which led to the order being granted, is as follows. On 20 December 2010, the Applicant delivered an application for certain declaratory orders and certain ancillary relief under this case number (hereinafter "the main application"). In the Notice of Motion, the Applicant indicated that the main application would be made on 18 January 2011 or as soon thereafter as the application may be heard. On 3 January 2011, the First Respondent served a notice of intention to oppose the main application per facsimile and indicated *inter alia* that the First Respondent would file an answering affidavit once the Applicant had complied with the relevant rules, without specifying which rules were being referred to. Despite two facsimiles from the Applicant's attorneys to the First Respondent's attorneys seeking to clarify what was meant by this and enquiring when the answering affidavit could be expected, the *dies* for the delivery of the answering affidavit in the main application came and went.

[4] On 17 January 2011, the Applicant's attorney attended upon the Registrar of the Court and for various reasons, the date for the hearing of the main application was changed to 20 January 2011. The Applicant's attorney never notified the First Respondent's attorneys of this, who duly attended the

Labour Court to argue in opposition to the main application. The file was duly uplifted from the Registrar by the First Respondent's attorneys, and an order dismissing the main application with costs *de bonis propriis* was obtained in the Applicant's absence. This is the order of Molahlehi J which the Applicant in this application is seeking to rescind or vary.

[5] Applicant is the *dominus litis* in the main application. She gave the First Respondent notice that she would be proceeding with that application on 18 January 2011, and never disabused it of that fact. The First Respondent was therefore entitled to make preparations to oppose and to appear to oppose the main application on 18 January 2011, despite not having delivered an opposing affidavit which it was not obliged to do. The Applicant's attorney's conduct in attending the Court on 17 January 2011 at the eleventh hour, and obtaining a new set down date from the Registrar on 20 January 2011 without following formal process of setting the matter down or notifying the First Respondent's attorneys in any way that he was doing so, entitled the First Respondent to seek and obtain the order handed down on 18 January 2011 by Molahlehi J.

[6] In fact, this was also an appropriate circumstance where the Applicant's attorney should have come to the Court on 18 January 2011 to ensure that there was no slip betwixt cup and lip, particularly in the light of the fact that in the notice of opposition faxed to the Applicant's attorneys on 3 January 2011, the First Respondent's attorneys also gave notice that First Respondent would be seeking costs *de bonis propriis* because the main application was frivolous and vexatious, which they duly did on 18 January 2011.

[7] I now turn to consider the explanation for the Applicant's non-appearance on 18 January 2011 in the light of Molahlehi J's order of costs *de bonis propriis*. In doing so, I am guided by the judgement of the Constitutional Court in **President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director- General, Department of Justice and Constitutional Development and Others 2009 (8) BCLR 785 (CC) as per Sachs J at paragraph 10 thereof**. In that matter, that Court had to consider the nature of the costs to be awarded, arising from inappropriate conduct on the part of an attorney in seeking a postponement of delivery of a judgement at the

last minute. The Court held that whilst the attorney's conduct evinced a lapse of professional judgement, it was not so vexatious, grossly negligent or in any other way professionally wayward requiring an order for costs *de bonis propriis*. It instead ordered that costs be paid on an attorney and client scale.

[8] In this matter, having heard the Applicant's attorneys explanation for non-appearance on 18 January 2011, and more particularly that the First Respondent's attorneys had not responded to two of his facsimiles enquiring as to the future conduct of the matter, and the Registrar of the Court advised him on 17 January 2011 that the matter could not proceed on 18 January 2011 because it was not properly enrolled, that these factors could have lulled him into a false sense of security, thus causing him to commit the lapse in professional judgment in neglecting to notify the First Respondent's attorneys that he had attended the Labour Court on 17 January 2011 and that the matter was no longer proceeding on 18 January 2011, but on 20 January 2011. This lapse was not so vexatious, grossly negligent or any other way professionally wayward that the Applicant's attorney should be ordered to pay the wasted costs out of his own pocket. It did however, cause the First Respondent unnecessary costs, which costs should instead be paid on an attorney and client scale.

[9] Turning to the second element, I am not convinced that the Applicant's main application is without merit. On the face of it, the Fourth Respondent's decision that "the CCMA lacks jurisdiction to determine the dispute further and you (the Applicant) are therefore advised to re- refer the matter" as communicated to the Applicant in a telefax message dated 04 December 2000 *sic* (should read 2007) is open to challenge. I therefore find that the Applicant has a *bona fide* claim that she should be entitled to pursue.

[10] The Applicant has satisfied me that her claim carries reasonable or good prospects of success and she has also shown good cause for why the order of Molahlehi J should be varied.

[11] Whilst the Applicant has been substantially successful in this application, she is seeking an indulgence, and I thus do not believe that this is an instance where it is appropriate to make an order as to costs.

I therefore make the following order:

1. The order of Molahlehi J handed down on 18 January 2011 is varied as follows:
 - 1.1. The order dismissing the Applicant's main application is rescinded.
 - 1.2. The Applicant is to pay the costs on an attorney and client scale of the First Respondent, occasioned by it having to prepare to argue in opposition to the main application on 18 January 2011 as well as its actual appearance on 18 January 2011, to do so.
2. The Applicant and First Respondent are to bear their own costs in this rescission application.

S B Hardie
Acting Judge

APPEARANCES

APPLICANT: Adv G Shakoane and with him, Adv PM
Ramoshaba
Instructed by MS Malatsi Attorneys, Pretoria

FIRST RESPONDENT: Adv JS Mphahlani
Instructed by Lokwe Leburu Attorneys,
Roodepoort