



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 3010/12

In the matter between:

NSIZWA CROMET MOLEPO

Applicant

and

PASSENGER RAIL AUTHORITY OF SOUTH AFRICA

Respondent

Decided in Chambers: 17 January 2014

Summary: Application for leave to appeal— raising grounds of appeal that misstate exchanges in court;

Duty of the court to guard its prestige and dignity on the face of false statements on what transpired in court

Costs – conduct of attorneys—costs *de bonis propriis*

JUDGMENT: LEAVE TO APPEAL

MOOKI, AJ

- [1] This judgement concerns the application for leave to appeal an order by the court that was handed down on 11 July 2013. The reasons for the order were delivered on 15 August 2013. I refer to the parties as in the main application. The main application was an application by Mr Molepo to make an arbitration award made in his favour an order of court (“the enforcement application”).

- [2] PRASA filed its notice of application for leave to appeal and setting out the grounds upon which leave to appeal is sought on 25 July 2013. This was before the reasons for the order were delivered. PRASA requested the reasons for the order it appears, either on 25 July 2013 or on 31 July 2013.
- [3] I first set out the grounds upon which the application is made and as such grounds are formulated in the notice. I do so because of the view that I take of the application.

'GROUNDS FOR LEAVE TO APPEAL

- "1 The parties had by agreement consolidated the two applications, namely, the application for review and an application to the effect the CCMA award. Thus, his Lordship erred in fact and in law when he separated the two applications without an invitation from either of the parties to do so.
- 2 Due to a consolidation agreement reached between the two parties prior, the applicant elected not to file an answering application seeking enforcement of the CCMA award. The two matters were to be heard and/or decided on the same day by the same Presiding Officer. Thus, his Lordship erred in separating the two matters, such a decision left the applicant "exposed" in that there was no answering affidavit filed to the application to effect the CCMA award.
- 3 His Lordship erred in law when he ruled that an application to effect the CCMA award be entertained as a stand-alone application without any reference to the contents of the review application. In law, an application to effect the CCMA award is dependent on the merits and/or demerits of the review application. Therefore, complete ignorance of the review application is bad in law.
- 4 His Lordship's decision to separate the two matters caused a great prejudice to the applicant's case. Such prejudice can be summarised as follows:

- 4.1 The application to effect the CCMA award became unopposed by virtue of his Lordship's separation Order when in actual fact both parties knew that the application was opposed in a context of both the review application and the consolidation agreement.
- 2.2 The applicant's representative was denied opportunity to make submissions as each submission made on behalf of the applicant was shot-down by his Lordship absence of the answering affidavit being a virtue.
- 5 His Lordship erred in law when he ordered the applicant's attorneys to pay the cost of suit *de bonis propriis* without first affording such attorneys an opportunity to show cause why they could not be ordered to pay the costs."
- [4] Mr Molepo has filed submissions, setting out the bases for opposing the application for leave to appeal. PRASA has not filed submissions in support of its application.
- [5] There is a duty on the courts to resolve disputes as expeditiously as possible. It would be iniquitous on the applicant that the court not deal with the application only because the respondent has not filed submissions on its application. I determined this application with these considerations in mind.
- [6] I refer to the following points in Mr Molepo's submissions in opposing the application for leave to appeal:
- 1 There was no agreement to consolidate the applications.
 - 2 The applicant (i.e. Mr Molepo) requested that the two matters be heard on the same day by the same Judge. This was to save costs.
 - 3 Mr Lucky Makhubela of the respondent's attorneys of record did not attend the court proceedings on both 7 July 2013 (when the enforcement application was heard) and on 27 July 2013 (when the review application was heard).

- [7] It is a serious matter when an attorney puts his hand to a document intended to be part of the court process when such a document contains falsehoods, and when the court in turn is called to determine a particular matter based on the content of such a document.
- [8] Mr. Lucky Makhubela signed the notice upon which PRASA makes its application. Mr Makhubela has no personal knowledge of what transpired in court on 7 July 2013.
- [9] Mr. Mmusi, counsel for PRASA in both the enforcement application and the review application, requested that the review application be postponed. PRASA had not filed heads of argument despite a directive to do so. Mr Mmusi told the court that he had not had the opportunity to fully acquaint himself with the papers in the review application and that he wished to make written submissions regarding that application.
- [10] I agreed to the request by Mr Mmusi and determined that the review application be heard within a two-week period of the date on which it was originally scheduled to be heard. The two-week period fell on a Saturday. The court sat on that day to hear the review application.
- [11] Mr. Mmusi did not demur on behalf of his client that both applications should be heard at the same time. As indicated above, he sought an indulgence that the review application be heard on a different date.
- [12] There were no submissions made to the court, throughout the exchange between the court and Mr Mmusi, that:
- 1 The applicant and the respondent “had by agreement consolidated the two applications”.
 - 2 The respondent, ‘due to a consolidation agreement reached between the two parties’, had “elected not to file an answering affidavit seeking enforcement of the CCMA award [and that] the two matters were to be heard and/or decided on the same day by the same Presiding Officer’.
- [13] It is therefore a serious matter when the attorneys acting for PRASA put their hand to a notice in which they rely on grounds stated in such a notice, when regard is had of the proceedings in court at the time when the enforcement application was determined.

- [14] The bases upon which the PRASA application is made are a stain on the court. The bases are false. The court must guard its dignity and prestige in such circumstances.
- [15] I find, in the circumstances, that there is no merit in the application for leave to appeal. There is equally no merit in the other grounds advanced on behalf of the respondent.
- [16] It is not a requirement that this court could only determine the enforcement application with reference to the merits in the review application. The applicant in the enforcement application filed a substantive affidavit setting out the bases upon which he contended that the award should be made an order of court. That was sufficient for the court to consider the application.
- [17] There is equally no merit to the ground that the court could not have made an order of cost *de bonis propriis* without first inviting the attorneys to show cause why such a cost order could not be made.
- [18] I am of the view, having considered the bases upon which the application is made, that there are no reasonable prospects that another court may come to a different conclusion. I therefore refuse the application for leave to appeal.
- [19] I have referred to the conduct of the attorneys in respect of the stated grounds of appeal. I find that the application for leave to appeal is both an abuse of the court process and a stain on the dignity of the court. The court should express its displeasure as a result. Mr Makhubela, in signing the notice upon which the application is made, acted contrary to his duties to this court.
- [20] The Supreme Court of Appeal stated, in *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G, that being 'an attorney, as any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members...'. This sentiment was echoed in *S v Nyoka* [2009] JOL 24504, (ECG) the court reminded practitioners in para 33 that:

'Attorneys should have a high regard for truthfulness, be incorruptible and have a high sense of honour and integrity.

They are an integral part of the administration of justice and people should be able to trust them, especially where trust moneys are involved.'

- [21] Pleadings should not be a fabrication and legal practitioners have a duty to the court, not only to his client, and must not misrepresent facts to the court. *Jwili v Road Accident Fund* 2010 (5) SA 32 (GNP) ([2010] ZAGPPHC 37); *Tshabangu v Road Accident Fund* [2011] ZAGPJHC 145 (19 October 2011); *Kunene v Road Accident Fund* [2011] ZAGPJHC 194 (8 December 2011); and *Sibeko v Road Accident Fund* [2012] ZAGPJHC 43 (28 March 2012), give a clear indication to attorneys of the expectations of them from the courts.
- [22] The above authorities apply equally to notices placed before a court under the hand of an attorney.
- [23] Mr Makhubela failed to comply with what is expected of him as an officer of the court. He conducted himself in an irresponsible manner in putting his hand to an application on the stated grounds. He owes the court a duty to uphold the dignity of the court. He failed to discharge that duty in putting his hand to a document that contains demonstrably false statements about what transpired in court. I find that an order of costs *de bonis propriis* is appropriate.
- [24] I make the following order:

24.1 The application for leave to appeal is dismissed.

24.2. The respondent's instructing attorney, Mr Lucky Makhubela, is ordered to pay the applicant's costs incidental to this application *de bonis propriis* on the scale as between attorney and client.

24.3 The Registrar is directed to provide a copy of this judgement to the Secretary of the Law Society of South Africa.

MOOKI O

Acting Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

Applicant: Shongwe Attorneys

Respondent: Makhubela Attorneys

LABOUR COURT