Not reportable

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: JR 2566/11

**In the matter between:**

**HARRY MABASO** **APPLICANT**

and

**CEMENT AND CONCRETE INSTITUTE** **RESPONDENT**

**Heard**: **3 December 2015**

**Judgment delivered**: **18 December 2015**

---

**JUDGMENT**

---

**VAN NIEKERK J**

[1] This is an application in terms of Rule 11 to set aside a writ of execution issued by the registrar on 2 September 2013.

[2] The material facts are not in dispute. The applicant was employed by the respondent until his dismissal in November 2010. At a later arbitration hearing, the parties concluded a settlement agreement. In terms of the agreement, the respondent agreed to pay the applicant an *ex gratia* payment of R15 000 in full and final settlement of the dispute. The amount was paid on 6 May 2011. On 17 October 2011, the applicant filed a review application in this court in which he took issue with the settlement agreement. On 5 December 2011, the respondent demanded repayment of the R15 000 paid in terms of the settlement agreement, on account of the applicant's challenge to the agreement. The amount was repaid on 7 December 2011, by way of a deposit made into the respondent's attorney's trust account. On 9 March 2012, the applicant withdrew the review application, which the respondent had opposed, and tendered the respondent's costs. On 27 March 2012, the applicant subsequently apologized for filing the review application and requested the applicant to furnish him with its taxed bill of costs, on a party and party scale. On 28 May 2012, a bill of costs was taxed and allowed in the respondent's favour in the sum of R14 608.68. On 5 June 2012, the respondent's attorneys advised the applicant that the sum of R15 000 paid on 7 December 2011 plus interest and less the taxed costs would be paid to him on the same day. On the same day, a deposit of R708, 87 was made into the applicant's bank account.

[3] On 12 March 2013, the applicant applied to have the settlement agreement made an order of court. The respondent opposed the application. For reasons that are not apparent, the application was treated as unopposed and on 17 July 2013, this court granted the order in terms of which the settlement agreement was made an order of court. On 26 August 2013, the respondent's attorney wrote to the applicant recording its surprise at the granting of the s 158 (1) (c) application, given that the applicant was aware that the application had been opposed, and

an answering affidavit filed. The letter records that on enquiries made in the office of the registrar, the court file had been removed by the applicant on 26 March 2013. The letter falls short of a direct allegation that the applicant himself removed the notice of intention to oppose and answering affidavit from the file, but records that the applicant had committed fraud by representing to the court that his s 158 (1) (c) application was unopposed. The letter further records that the respondent's attorneys had deducted from the R15 000 held in trust an amount of R14 608.68 (being the respondent's taxed costs) and paid the difference of R391.32, plus interest of R 317.35, (total R708.67) to the applicant on 6 June 2102. The letter concluded with a demand that the applicant conform that the respondent had complied with all of its obligations in terms of the settlement agreement and that he confirm that he had no further claims against the respondent. The respondent indictaed that a failure by the applicant to provide such an undertaking by no later than 30 August 2013 would result in the respondent taking the view that that the applicant intended pursuing a claim for the sum of R15 000, and proceeding with the 'necessary execution steps' in terms of the taxed bill of costs.

[4] On 3 September 2013, the registrar issued a warrant of execution authorizing the sheriff to attach the applicant's movable goods to satisfy the costs taxed by the respondent. That writ was served on the applicant on 13 September 2013 and a *nulla bona* return issued. On 18 September 2013, the registrar issued a writ of execution in favour of the applicant in the sum of R15 000, by virtue of the judgment issued on 17 July 2013. That writ was executed on 10 March 2014 when the respondent paid the sheriff the sum of R17 057.00 approximately R 1319.71 related to the sheriff's costs and commission. That amount, it would appear, is being held by the sheriff,

[5] The respondent contends that by proceeding to have a writ issued and executed, the applicant made it clear that he did not intend to honour his previous undertaking that the sum of R15 000 first be appropriated to the respondent's taxed costs, and that he thus became indebted to the respondent for the

payment of its taxed costs. On this basis, then respondent issued a writ and executed same as against the monies that it paid the sheriff in settlement of its indebtedness to te applicant in terms of the writ issued by him, since these monies would be the only asset that the respondent would be able to attach in order to obtain payment under the respondent's writ.

[6] The applicant seeks to have the writ issued on 2 September 2013 set aside. The only grounds on which he relies is that he was advised by the registrar to apply to have the writ set aside on the basis that it was never served on him, nor was it correctly issued in that the signature on the writ does not accord with that of the registrar. The applicant states only in his founding affidavit that some 6 months after signing the settlement agreement, he 'felt aggrieved' by its terms and filed the application for review. He states that in December 2011 the respondent 'demanded' that money be paid into its trust account, and that he repaid the money and withdrew the review application. He avers that the respondent thereafter demanded payment of taxed costs, and that he thereafter filed the s 158 (1) (c) application, which was granted on 17 July 2013. The applicant submits that the warrant should be set aside and the money in the sheriff's trust account paid to him.

[7] None of these are valid ground on which to set aside the writ of execution. The averment that the writ ought to be set aside because it was never served on him is of no consequence, since there is no requirement in law that for a warrant to be valid, it must be served. In any event, the writ was in fact served on the applicant, a fact established by the sheriff's return of service annexed to the answering affidavit. In so far as the veracity of the registrar's signature is concerned, the applicant's averment amounts to nothing more than his say-so. On the face of it, the writ is regular. There is no affidavit by the registrar to confirm that the writ was not validly issued. In short, the applicant has failed to establish any valid ground for the writ of execution to be set aside. For these reasons, the application stands to be dismissed.

[8] In so far as the costs of the present proceedings are concerned, the respondent sought a punitive costs order. It did so on the basis that the applicant has acted frivolously, maliciously and has engaged in what amounts to vexatious litigation. The history of the present dispute goes some way to justifying a punitive costs order. The applicant signed a settlement agreement, which he sought to have undone some 5 months later by way of a misguided application for review. He tendered the respondent's costs, and then sought to challenge the taxed bill, in effect, by asserting that the respondent had not performed in terms of the settlement agreement. This was blatantly false. In the present application, the applicant continues to raise issues relating to the taxation of the bill, despite clear evidence of his acquiescence in relation to the agreed terms of payment of the bill. Further, the answering affidavit raises serious questions as to how the s 158 (1) (c) application came to be dealt with on an unopposed basis when the respondent had filed both a notice of intention to oppose and an answering affidavit.

[9] This court has a broad discretion in relation to costs orders. While the applicant has been misguided in bringing the present application, and while his conduct borders on the vexatious, I do not believe that an order for costs is appropriate. In relation to the s 158 (1) (c) application, I would note that the hand-written index to that application includes a reference to the respondent's notice of intention to oppose. On that basis, the application should never have been granted on an unopposed basis, but the inclusion of the notice in his index does indicate that the applicant did not act dishonestly by representing the application as unopposed. Further, the applicant is unemployed. Little purpose would be served in ordering him to pay the respondent's costs, on a punitive scale or otherwise.

[10] On the other hand, the applicant has caused the respondent to incur costs in opposing an application that from the outset had no merit, and was wholly misguided. This is not the first time that the applicant has put the respondent to the expense and inconvenience of litigation. Also relevant is the applicant's failure to disclose fully in his founding affidavit the terms on which he agreed that

the issue of the taxed costs be resolved – the applicant appears to have made a habit of entering into agreements and later reneging on them. Indeed, this matter ought to have proceeded no further than the finalisation of the settlement agreement in May 2011. The applicant is largely responsible for the events that have transpired since.

[11] On balance, the interests of the law and fairness are best served by there being no order as to costs. Having said that, the applicant is cautioned that any further fruitless litigation may not be met with the same response.

I make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances

For the applicant: Self

For the Respondent: Adv J Campanella, instructed by Garratt Hugo and De Souza