

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Reportable

Case no: J 164 /2016

In the matter between:

CHARL WENUM

Applicant

and

MAQUASSI HILLS LOCAL MUNICIPALITY

First Respondent

ITUMELENG RONALD JONAS

Second Respondent

Heard: 5 February 2016

Delivered: 5 February 2016

Date of Reasons: 18 February 2016

Summary: Urgent application for payment of outstanding remuneration for January 2016 and for finding the Respondents in contempt of Court. Appropriate means to execute was writ of execution. The application was ill conceived and an abuse of process. Application was dismissed and the Applicant's attorneys were ordered to pay the costs *de bonis propriis*.

JUDGMENT-REASONS FOR ORDER

PRINSLOO J.

Introduction

- [1] On 5 February 2016 this matter served before this Court as an urgent application for the payment of the Applicant's remuneration for January 2016 and to find the Respondents in contempt of a Court order dated 4 December 2015. The application was opposed.
- [2] The application was dismissed and on 12 February 2016 the Applicant's attorneys of record requested reasons for the order. The reasons for the order are set out below.

The background facts

- [3] The Applicant was employed by the First Respondent ('Municipality') on 2 February 2014 as chief finance officer in terms of the provisions of section 56 of the Local Government: Municipal Systems Act¹.
- [4] On 18 August 2015 the Municipal Council took a resolution to nullify his employment and on 27 August 2015 under case number J1684/15 the Applicant approached this Court to reinstate him pending the hearing of Part B of his application. On 27 August 2015 and by agreement between the parties the matter was postponed until 23 September 2015 for the hearing of Part B of the application and the Municipality was ordered to remunerate the Applicant until 23 September 2015.
- [5] On 23 September 2015 the matter was postponed to 4 December 2015 and the Municipality was ordered to remunerate the Applicant until the hearing of the matter on 4 December 2015.
- [6] On 4 December 2015 the matter was argued and judgment was reserved. The Municipality was ordered to remunerate the Applicant until judgment was handed down. The Applicant was paid accordingly until the end of December 2015.
- [7] On 28 January 2016 the Applicant communicated with the Municipality's payroll section and he was informed that the Second Respondent (Municipal Manager) instructed that he must not be remunerated on the effective pay date in respect of his remuneration for January 2016.

¹ Act 32 of 2000.

- [8] The Applicant immediately instructed his attorneys, Scholtz Attorneys, to address a letter to the Municipality's attorneys and to remind them of the Court order dated 4 December 2015. A letter was subsequently addressed to the attorneys stating that a Court order was granted in terms of which the Municipality had to continue to remunerate the Applicant until judgment is handed down in case number J1684/15. Scholtz attorneys indicated that if payment was not made to the Applicant, they would proceed with a contempt application.
- [9] Payment was not made and on 1 February 2016 the urgent application was filed.
- [10] The urgent application was opposed and the Respondents filed an answering affidavit setting out the reasons why the Applicant has not established that the Respondents are in contempt of Court and much effort was spent on dealing with the alleged contempt of Court.
- [11] The Applicant filed a substantial reply and the papers before this Court consisted of 283 pages.
- [12] During argument I confirmed with Mr Scholtz that there is a Court order that orders the payment of the Applicant's salary until judgment is handed down, that judgment was not yet handed down and therefore his client's claim was one sounding in money. Mr Scholtz was unable to explain why he has approached this Court, and that on an urgent basis, for the payment of arrear remuneration and contempt when his client has a claim sounding in money.

Contempt of Court

- [13] Section 163 of the Labour Relations Act² ('LRA') provides that any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court.
- [14] The word 'executed' means to carry into effect. That is the ordinary and the clear meaning of the word.

² Act 66 of 1995.

- [15] In *Tromp v Tromp*³ the court referred to *Reid and another v Godart and another*⁴ and quoted from that matter:

'The word 'execution' means, as it seems to me, 'carrying out' of or 'giving effect' to the judgment in the manner provided by law; for example by specific performance, by sequestration, by the passing of transfer, by issue of letters of administration, by ejectment from premises, or by a levy under a writ of execution.'

- [16] If the judgment is one *ad pecuniam solvendam*, namely one in which the court orders the debtor to pay a sum of money, it is appropriate to seek its enforcement by means of a writ of execution. When the judgment is one *ad factum praestandum*, namely an order to perform some act for example to pass transfer or vacate premises, the judgment creditor cannot seek its enforcement by the levying of a writ and his or her remedy lies in contempt proceedings⁵. These are principles practitioners in this Court should know and consider before applications are filed.
- [17] The purpose of contempt proceedings is to enforce a Court order and to compel compliance where the performance of an act is ordered. Where the Court ordered the payment of an amount of money, the Court order can be given effect to by following the process associated with obtaining a writ of execution.
- [18] Section 143 of the LRA provides that a certified arbitration award may be enforced as if it were an order of the Labour Court. Section 143(4) provides that where a party fails to comply with such an award where performance of an act is ordered, it may be enforced by way of contempt proceedings in the Labour Court. Where payment of an amount of money is ordered, contempt proceedings are excluded.
- [19] The same principles that apply to arbitration awards that may be enforced as if it were an order of the Labour Court, apply to Court orders.

³ 1956 (3) SA 664 (N) at 666H.

⁴ 1938 AD 511 at 514.

⁵ Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, Fifth edition, volume 2 page 1022 – 1023.

[20] In *Butchard v Butchard*⁶ the Court held that:

‘....there is no reason in principle or practice why a judgment for payment of a category of expenses which can be quantified without difficulty should not be able to sustain a writ, if the accrual and the amount of the expenses, on the basis of which liability therefor is established in a judgment, are proved, for example, by an affidavit of the judgment creditor.’

[21] In *Ngaka Modiri Molema District Municipality v Ramphela and others*⁷ this Court held as follows:

‘It seems to me that the registrar should be directed that as a rule of practice no writ of execution should be issued where an order or a judgment does not quantify the judgment debt unless the request for the writ is accompanied by an affidavit setting out how the debt has been quantified.’

[22] The Registrar of the Labour Court can issue a writ of execution where the request to issue the writ is accompanied by a Court order that orders payment of money and specifies the amount or an affidavit setting out how the amount claimed has been quantified.

[23] *In casu* the Applicant has a Court order that orders the Municipality to continue to pay his remuneration until judgment is delivered. He claims his salary for January 2016, an amount that should be known to the Applicant and could have been set out in an affidavit, accompanied by the Court order. The Applicant should have approached the Registrar to issue a writ of execution as that was the appropriate way to seek enforcement of the Court order.

[24] It was for this reason that the contempt application was dismissed.

Costs

[25] During argument I canvassed with Mr Scholtz why the Applicant, Mr Wenum, should pay for this ill-conceived application. Mr Scholtz conceded that he would not have a problem if Mr Wenum does not pay for this application and I ordered that the Applicant’s attorneys, Scholtz Attorneys, are not entitled to charge a fee for this application and appearance in Court

⁶ 1996(2) SA 581 (W) at 587.

⁷ (2011) 32 ILJ 2181 (LC).

and any fees which they have already received from Mr Wenum for this application, should be paid back to him within 7 days.

[26] I also ordered Scholtz Attorneys to pay the Respondents' costs *de bonis propriis*. In arriving at this decision, I am guided by the principles set out by the courts in making such an order, mindful of the fact that it is awarded only in exceptional cases.

[27] In *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others*⁸ the Constitutional Court ordered costs *de bonis propriis* on a scale as between attorney and client and held that:

'An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.'

[28] In *Indwe Risk Services (Pty) Ltd v Van Zyl*⁹ the Court considered circumstances where a *de bonis propriis* cost order was warranted and held that:

'I am also mindful of the fact that an order for costs *de bonis propriis* is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted *bona fide* or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of *bona fides* or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus *Superior Court Practice* at E12-27.) '

[29] *In casu* the principles of enforcement of a judgment *ad pecuniam*

⁸ 2009 (1) SA 565 (CC) at paragraph 54.

⁹ (2010) 31 ILJ 956 (LC).

solvendam, and *ad factum praestandum* should be known to Scholtz Attorneys and should have been considered before an application was filed. Scholtz Attorneys showed a flagrant disregard for the appropriate means to enforce the Court order and to claim the payment of the Applicant's remuneration for January 2016.

[30] To approach the urgent Court to obtain relief that should have been obtained by approaching the Registrar of this Court to issue a writ of execution, is an abuse of process and not merely an error of judgment. Scholtz Attorneys acted in a manner that constitutes a departure from their office by abusing the urgent Court and the Court's displeasure should be known to the attorneys.

[31] This is an exceptional case where the Applicant's representatives acted in a manner that justifies an order for costs *de bonis propriis*.

[32] In *Wallis v Thorpe and another*¹⁰ the Court held:

'In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The ordinary rule, ie that costs follow the result, is a factor to be taken into account, but it is not a determinative factor.....'

[33] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*¹¹ it was emphasized that:

'...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

¹⁰ [2010] 31 ILJ 1254 (LC)

¹¹ 2012 33 ILJ 2117 (LC).

[34] I can see no reason to deviate from the ordinary rule that costs should follow the result. The Respondents are entitled to costs.

[35] Mr Scholtz argued that each party should pay its own costs. If I were to order each party to pay its own costs, the result would be that taxpayers will pay the costs to defend an ill-conceived urgent application. Public funds are certainly not intended to fund costs, especially in municipalities where service delivery should be a key priority.

[36] The taxpayers should not be burdened to pay the costs of this application.

[37] A cost order is also a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law, the provisions of the LRA and the Rules of this Court.

[38] It was for these reasons that the following order was made:

1. The application is dismissed;
2. The Applicant's Attorneys, Scholtz Attorneys, are not entitled to charge a fee for this application and appearance in court on 05 February 2016 and any fees charged and received from the Applicant, should be refunded to the Applicant within 7 days of the date of this order;
3. Scholtz Attorneys must file an affidavit within 14 days of the date of this order confirming that it has complied with the terms of this order;
4. The First Respondent's costs are to be paid by Scholtz Attorneys *de bonis propriis*.

C. Prinsloo J

Judge of the Labour Court

Appearances:

Applicants: Mr Scholtz of Scholtz Attorneys

Respondent: Advocate M C Makgato

Instructed by: Mokone Phambane Inc Attorneys