



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2844/16

In the matter between:

**THE JOHANNESBURG METROPOLITAN
BUS SERVICES SOC LTD**

Applicant

and

**SOUTH AFRICAN MUNICIPAL
WORKERS' UNION**

1st Respondent

**INDEPENDENT MUNICIPAL AND
ALLIED TRADE UNION**

2nd Respondent

**DEMOCRATIC MUNICIPAL AND ALLIED
WORKERS UNION OF SOUTH AFRICA**

3rd Respondent

KEDIBONE DEON MAKHURA

4th Respondent

THIVALI DAVID SIKWENI

5th Respondent

MANDLA ABRAM NHLAPO

6th Respondent

SAMUEL MOSOMI

7th Respondent

SAMUEL SIHLANGU

8th Respondent

**THE PERSONS LISTED IN ANNEXURE “A1”
TO THE NOTICE OF MOTION**

**9th to Further
Respondents**

Heard: 09 February 2017

Delivered: 23 February 2017

Summary: On the return day, the applicant sought to have the rule discharged. The third respondent (Democratic Municipal and Allied Workers Union of South Africa) brought a counter-application, which it also sought to have withdrawn. The live issue was the issue of costs following the discharge and the withdrawal of the counter-application. Held: (1) The appropriate order is one of each party to pay its own costs.

JUDGMENT

MOSHOANA AJ

Introduction

[1] In opposing a rule nisi which was issued on 30 December 2016, the third respondent – Democratic Municipal and Allied Workers Union of South Africa sought relief to the effect that the suspension of its members be set aside.¹ In the opposing affidavit, the deponent, Ms Kedibone

¹ In the notice to oppose, the third respondent stated the following:

“Kindly take further notice that the third respondent will seek an order in the following terms:

2.1. ...

2.2. that the suspension on (sic) the fourth to the sixth respondent be set aside.”

Makhura prayed that the suspension of the fourth to the sixth respondent be set aside. The relief was opposed. In opposing the relief, the applicant indicated its intention not to seek confirmation of the rule.²

Background facts

- [2] The main facts to this application are no longer relevant for the purposes of this judgment. Suffice to mention that the applicant alleged that the members of the third respondent embarked on an unprotected strike on 29 November 2016. The third respondent's version is that the members did not engage in a strike action. They attended a meeting summoned by the applicant. On 30 November 2016, the applicant approached this Court on an urgent basis. Van Niekerk J issued a rule nisi which was returnable on 09 February 2017. On the return day, the matter came before me mainly for the issue of costs. The initial stance taken by Mr Ndou for the respondents was that there is no counter-application. Later, he relented and effectively advised that the application was not persisted with.

Evaluation

- [3] When it comes to costs, this Court is guided by section 162³ of the Labour Relations Act.⁴ What then guides me as the Labour Court are the requirements of the law and fairness. In law a successful party ought to be compensated for its litigation costs. Put differently costs follow the results. In relation to the fairness requirement, aspects like an on-going

² Paragraph 6 of the answering affidavit, the deponent stated that the applicant does not seek confirmation of the rule nisi. As such, the applicant will primarily pray for an order discharging the rule nisi.

³ Section 162(1) provides:

“The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.”

⁴ 66 of 1995 as amended.

relationship between the parties come into the picture.⁵ Mr Sibanda for the applicant submitted that the third respondent was not supposed to be before Court as there was no relief sought against it. I cannot agree. The applicant was cited as a party together with its members who were allegedly on strike. It was well within the third respondent's rights to oppose the relief sought by the applicant, in the circumstances where it knew that there was no strike as advised by its members. Also, although badly advised in my view, it was entitled to initiate what turned out to be an ill-conceived counter-application in the interest of its members. It cannot be said that the opposition is unreasonable. It must be borne in mind that a right to strike is constitutionally guaranteed.⁶ Any party seeking to protect such a right in a court of law is well within his or her right.⁷ To my mind the third respondent was entitled to oppose the application.⁸ I am aware that the third respondent is not involved in this matter on a representative capacity. It was cited as a party who may choose to abide and/or oppose.

[4] Turning to the counter-application. As pointed out above, there is a counter-application. The third respondent in a notice and an affidavit

⁵ See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); (1991) 12 ILJ 1221 (A) at 1242-3; *Xaba v Portnet Ltd* (2000) 21 ILJ 1739 (LAC) at 1751-2; *Callguard Security Services (Pty) Ltd v Transport & General Workers Union & Others* (1997) 18 ILJ 380 (LC) at 389-391. *Communication Workers Union & Others v SA Post Office Ltd* (2005) 26 ILJ 1679 (LC) at paras 59-60.

⁶ See section 17 of the Constitution of the Republic of South Africa which provides:

“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”

⁷ Section 34 of the Constitution of the Republic of South Africa is entitled “Access to courts” and states that—

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁸ Section 200(1) provides that—

“A registered *trade union* . . . may act in any one or more of the following capacities in any dispute to which any of its members is a party—

- (a) in its own interest;
- (b) on behalf of any of its members;
- (c) in the interest of any of its members.”

sought a relief in this Court. Such a request was opposed. In terms of the rules,⁹ a party seeking to withdraw an application should tender costs of the application. Therefore, the other party is entitled to its costs. If not tendered the court has discretion to order it. I now turn to the discharge. A discharge of a rule is tantamount to a dismissal of the application. If on the return day, the rule is not confirmed, it is as good as being dismissed. Therefore, a successful party is entitled to its costs. The third respondent was successful in relation to the discharge of the rule. The fact that the applicant chose to advise of its intention not to seek confirmation on the return day, only in the replying affidavit as it were is of no consequence. The applicant finds itself in the same position as a losing party. Like any other losing party, it ought to be mulcted with costs.

- [5] Since both parties were successful fairness dictates that each party must bear its own costs. Much as I was tempted by Mr Sibanda's submission, to order punitive costs, I do not believe that in fairness the opposition by the third respondent is unreasonable. To the extent that it was submitted that the deponent made certain allegations that are distasteful, there was no application to strike out before me. I must state though that I frown upon some submissions made by Mr Ndou, which suggested that his learned colleague was dishonorable. Mr Ndou needs to relook at his advocacy approach in that regard.

Order

- [6] In the results, I make the following order:

1. Each party must pay its own costs.

GN Moshwana

Acting Judge of the Labour Court of South Africa

⁹ See rule 13 of the Rules of this Court.

Appearances

For the Applicant: Mr Sibanda

Instructed by: Cliffe Dekker Hofmeyer Inc, Sandton

For the Respondents: Mr Ndou

Instructed by: Morwasehla Attorneys, Braamfontein.

LABOUR COURT