THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 1104/2018

In the matter between:

LUMKO MTINDE	**Applicant**
and	
SHERIFF JOHANNESBURG EAST	**First Respondent**
UNIVERSAL SERVICES AND ACCESS AGENCY	**Second Respondent**
CHAIRPERSON AND BOARD OF USAASA	**Third Respondent**
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGY	**Fourth Respondent**

Heard: 22 October 2019

Judgment delivered: 29 October 2019

JUDGMENT

VAN NIEKERK J

[1] The applicant was suspended by the first respondent on 14 March 2018. He contested the lawfulness of his suspension and on 28 March 2018, he filed an

urgent application in this court seeking to have the suspension set aside. The application was opposed. On 24 April 2018, the court struck the application from the roll for lack of urgency, with costs, such costs to include the costs of two counsel.

[2] The applicant could not have imagined then that consequent on the order, in mid-September 2019, the sheriff would be attaching his assets to satisfy a bill of costs taxed in the sum of R512 091.49. In this application, also brought on an urgent basis, the applicant seeks to have the writ of execution issued on 1 August 2019 stayed, pending the outcome of an application to review and set aside the taxed bill of costs.

[3] The issuing of the writ has a history. The applicant was initially represented by Marweshe Attorneys, and later, when the costs order was made, by Matuba Maponya Attorneys. A bill of costs was prepared for the respondents and served on Marweshe Attorneys, and not Matuba Maponya, who were then on record. After the bill was taxed on 17 May 2019, the respondents demanded payment of the taxed costs. The applicant then appointed Ndobela Lamola to deal with the matter. On 23 May 2019, Ndobela Lamola wrote to the respondents' attorneys and advised that the taxed bill of costs had been addressed to the wrong attorneys, and that they were now attorneys of record. The same letter acknowledged receipt of a taxed bill in the sum of R 512 091.49, and recorded that the applicant intended to bring an application to rescind the costs order. On 24 May 2019, the respondent's attorneys wrote a letter to Ndobela Lamola in which they acknowledged the area of having served a bill of costs on Marweshe Attorneys, and in which they gave an undertaking that the taxed costs would not be enforced. At the same time, the respondent's attorneys attached a new draft bill of costs for taxation *de novo*. The applicant was requested to make an offer in regard to costs but he did not respond. On 3 July 2019, the applicant's attorneys were advised that the period within which to lodge objections to the item stated in the bill of costs had lapsed and that the bill would be set down for taxation. On 16

July 2019, the notice of set down for the taxation was sent to the applicant's attorneys. On 1 August 2019, the taxing master taxed the bill in the presence of the applicant's legal representative, and without any objection to any item by the representative. On the same date, an email was sent by the respondents' attorney to the applicant's attorneys, attaching the taxed bill and demanding full payment.

[4] The applicant contends that this application is urgent because after receiving the writ of execution on 17 September 2019, he contacted his current attorneys of record to assist him to resolve the matter. An offer was made to settle the bill of costs, which was refused. On 15 October 2019, the applicant was advised by the respondents that they persisted with their instruction to the sheriff to remove the assets under attachment. The present application was filed on 18 October 2019.

[5] The respondents dispute that the application is urgent. They contend that any urgency is self-created, since the applicant was aware as far back as 17 May 2019 of the bill of costs and that he took no steps to raise any objections to the bill. Further, the writ of execution was served on 17 September 2019, and the present application filed only a month later.

[6] There is merit in this submission. On his own version, the applicant has been aware since mid-May of the bill of costs, and the respondents'' intention to have it taxed and enforced. In early July 2019, the applicant was presented with the revised bill of costs and afforded the opportunity to object to any item and to consider making an offer of settlement. He did neither. On 1 August 2019 the applicant's representatives were aware of the amount that had been taxed. Any right to review the taxing master in terms of Rule 10 ought to have been filed within 10 days of the date of taxation. The applicant failed to file a review application within this period. Indeed, at the time of the hearing of the present application 22 October 2019, no review application had been filed. The applicant ought therefore not to have been surprised when on 17 September 2019, the

sheriff sought to execute the writ. Yet it took the applicant another month, to the day, to file the present application.

[7] In these circumstances, any urgency there might be is self-created, and the application stands to be struck from the roll on that basis.

[8] In so far as costs are concerned, s 162 affords the court a broad discretion to make orders for costs according to the requirements of the law and fairness. In *Long*, the Constitutional Court affirmed the proper approach to the exercise of a discretion in terms of s 162 and awards of costs in this court:

> [27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply…This principle is based on section 162 of the LRA, which reads:
>
> > (1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
> >
> > (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
> >
> > > (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
> > >
> > > (b) the conduct of the parties—
> > >
> > > (i) in proceeding with or defending the matter before the Court; and
> > >
> > > (ii) during the proceedings before the Court."
>
> [28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:
>
> > "In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct…"

[9] This court is in any event reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. Given particularly that the applicant is an individual employee who pursues a legitimately felt grievance against his employer, the interests of the law and fairness dictate that there should be no order as to costs.

I make the following order:

1. The application is struck from the roll for lack of urgency.
2. There is no order as to costs.

Andre van Niekerk
Judge

APPEARANCES

For the applicant: Adv. Serwarweng, instructed by Thembekile Graham
For the respondents: Adv. L Monnakgotla, instructed by Leepile Attorneys