



- (1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J128/2023

In the matter between:

PETRUS TSHEPO MALOKOANE

Applicant

and

COMBINED PRIVATE INVESTIGATIONS CC

First Respondent

RAYMOND ROY ROBERTSON

Second Respondent

**DEPARTMENT OF EMPLOYMENT AND
LABOUR**

Third Respondent

Delivered: 05 January 2026

JUDGEMENT

GXOGXA, AJ

Introduction

[1] This is an application for security for costs in terms of Rule 47 (1) of the Uniform Court Rules, in which the first and second respondents seek the following order:

- (i) That the applicant be ordered to pay security for costs in the amount of R250 000;
- (ii) That proceedings be stayed until such order is complied with;
- (iii) That in the event that the security for costs is not furnished within the time stipulated, that the first and second respondents be given leave to apply on the same papers, amplified as may be necessary, for the dismissal of the proceedings.
- (iv) That the applicant be ordered to pay the costs of this application.

[2] The first and second respondents' application for security for costs is based on the allegation that the declaratory order sought in the main application constitutes an abuse of this court's processes in that the applicant ought to have issued a statement of claim, as there are dispute of facts between the parties.

[3] The second basis of the respondents' demand for security for costs is that the applicant's prospects of success in the main application are said to be lacking in that the first and second respondents intend to raise a special plea of *lis pendens*.

[4] In *African Farms and Townships v Cape Town Municipality*¹, Holmes JA observed:

'An action is vexatious and an abuse of the process of Court inter alia if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability.'

¹ 1963 (2) SA 555 (A) at 565D-E.

- [5] It is also evident from the papers, both for the declaratory order and the current application, that the parties have been litigating against each other before, in the high court under case number 16611/2021 and this court under case number J1003/2020.
- [6] Therefore, the first and second respondents' view that the proceedings by the applicant are an abuse of court process will become clear below.

Background

- [7] The applicant in his main application seeks a declaratory order in the following terms:
- 7.1 Confirming that the applicant's appointment with the first respondent terminated simultaneously with the applicant's membership in terms of the Close Corporations Act² and the court order, by the Honourable Acting Judge Strydom on 20 April 2021.
 - 7.2 Authorising the third respondent to calculate the benefits accrued and due to the applicant in terms of the Unemployment Insurance Fund as from 20 April 2021.
 - 7.3 Ordering the first and second respondents to amend the exit date on the applicant's UI-19 form, salary schedule and certificate of service to record 20 April 2021.
 - 7.4 Directing the first and second respondents to pay the applicant's salary from 1 September 2020 to April 2021.
 - 7.5 Ordering the first and second respondents to calculate and pay the applicant's contributions towards the UIF and the Provident Fund, which was held with Liberty, from 1 September 2020 to April 2021.

² Act 69 of 1984.

7.6 Costs of this application be paid by the respondents in the event of opposition.

- [8] The applicant's application to compel is opposed by the CPI and the second respondents, and it is clear from the grounds of opposition that the issue of the termination of the employment of the applicant by the CPI is in dispute.
- [9] The issue of the termination of employment of the applicant is the main basis that the respondents are of the view that the main application is an abuse of court processes and lacks prospects of success.

Analysis

Security for costs

- [10] Rule 47(1) relied upon states the following:

'A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.'

- [11] In an application for security for costs, a court is not required to do a detailed investigation of the case, nor attempt to resolve the dispute between the parties, as this would be tantamount to pre-empting a trial court seized with the main case³.

- [12] In *Keary Developments Ltd v Tarmac Construction Ltd and Another*,⁴ the court held that:

'The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant

³ *Legal Practice Council v Sampson and Others* (2556/2021) ZAGPPHC 742 (6 October 2022) at para 11.

⁴ [1995] 3 All ER 534 (CA) at 540a-b.

finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.’

- [13] In *casu*, this court is required to balance the injustice that is likely to result if the applicant is prevented from enforcing his rights as a former member and employee of the CPI against the injustice to be caused if the first and second respondents are granted the security for costs.
- [14] It has been held that in the case of an insolvent natural person who is an *incola*, security will only be granted if his or her action can be found to be reckless and vexatious⁵. Frivolous or vexatious litigation has been held to be an abuse of process in *Western Assurance Co V Caldwell's Trustee*⁶ (*Western Assurance*). There is no basis for such a finding in the present facts.
- [15] It was explained in *Ecker v Dean*⁷ (*Ecker*) that the court's power to order security against an *incola* is derived from the court's inherent jurisdiction to prevent abuse of its own process in certain circumstances. There is no basis for a finding that the applicant is abusing court processes in this matter.
- [16] This court turns to deal with the issue of dispute of facts, which the first and second respondents believe it to be an abuse of this court's processes.
- [17] In deciding whether there exists a dispute of facts which is incapable of resolution through motion proceedings, this court has considered the allegations of the first and second respondents in the main application and those in the current application.
- [18] In having regard to the allegations in the main application, the first and second respondents, in their answering affidavit, in particular in paragraphs 71-72, read with paragraph 32 on page 269, indicated that they believed that the applicant

⁵ *Ecker v Dean* 1938 AD 102 at 110.

⁶ 1918 AD 512 at 517.

⁷ *Ecker v Dean* 1938 AD 102 at 111.

had resigned as an employee of the CPI on 19 February 2020 and continued to be a member of the CPI.

- [19] It is also clear from the paragraphs mentioned above that the second respondent says he continued to pay monies to the applicant after the alleged date of resignation. The reason advanced by the second respondent for such payment is that he paid based on the decision he took to continue paying an amount equivalent to the applicant's salary, pending finalisation of the evaluation of the applicant's interest in CPI and his loan account.
- [20] In a later turn of events, a year later, the first and second respondents seem to have agreed that only the applicant's membership in the CPI was terminated on 21 February 2020. This is contained in a court order, which remains unchallenged to date.
- [21] When the court considers the above-mentioned paragraphs of the answering affidavit, this court is of the view that the crisp issue of the termination of the employment of the applicant can be resolved on paper alternatively by a court in exercising its wide discretion in terms of Rule 6(5)(g) of the Uniform Rules of the Court.
- [22] Despite the allegations in the affidavit of the first and second respondents as stated above and the new version advanced in the application for security for costs in paragraph 14 thereof which states that the respondents' case is that the applicant resigned as an employee of CPI on 19 February 2019, this court is convinced that the court order of Strydom AJ is capable of assisting the parties and the court that will be seized with the main application.
- [23] Again, in terms of the order 1 of the Strydom AJ court order, the applicant was ordered to perform a task within 48 hours of that order, which is what this court believes to be the issue that has caused the applicant to believe that his employment was terminated on 21 April 2021.

[24] For ease of reference, this court considers it desirable for it to quote order 1 of the court order below:

'HAVING HEARD counsel on behalf of the Applicant and the First Respondent and after perusal of the documents filed, an order in the following terms is made by agreement between the parties:

1. The First Respondent is ordered to sign the declaration to confirm black shareholding, as provided for and envisaged in the Broad-Based Black Economic Empowerment Act, 53 of 2003 read together with the provisions of the Broad-Based Black Economic Empowerment, published in Government Gazette No. 42496 on 31 May 2019, within a period of 48 hours.'

[25] It is this court's view that the first and second respondents possess the full knowledge which demands that they provide an answer on whether or not the applicant was an employee of the CPI after 19 February 2020, and if he was not an employee, on what basis then did they, as parties, agree that the applicant sign a declaration to confirm black shareholding.

[26] The applicant could not have been ordered to sign a declaration to confirm black shareholding if there was no relationship that existed between the applicant and the CPI or second respondent on 20 April 2021.

[27] Unfortunately, the first and second respondents do not address this issue in their application, save to state in paragraph 14 of their application that the applicant resigned as an employee of CPI on 19 February 2019.

[28] This then requires this court to decide whether or not the alleged dispute of fact is one that is said to be incapable of being resolved on paper. This court is of the view that the issue of termination of the employment of the applicant is an issue that can be resolved on paper.

- [29] Even if this court is wrong in its belief, this court believes that the provisions of Rule 6 (5)(g) grant the court which will be seized with the main application wide discretion in ensuring a just and expeditious decision.
- [30] Another ground for demanding the security for costs is that the first and second respondents intend to raise an issue of *lis pendens*, in that the relief sought in the main application is the same relief that was sought in the application that was struck off the roll for lack of urgency.
- [31] To this end, the applicant has undertaken to withdraw the case that was struck off the roll. As to when the applicant decided to withdraw the application, it is the applicant who will suffer the consequence of not doing so timeously.
- [32] As already stated in the case of *Western Assurance Co*, the power to order security for costs is ordered in exceptional circumstances. In this case, the first and second respondents have failed to demonstrate the exceptional circumstances for this court to exercise its discretion in favour of their application for security for costs.
- [33] In terms of the common law, mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security; something more is required.⁸
- [34] In *casu*, the allegation that the applicant is unemployed and therefore cannot afford to pay the costs is not enough for the reason that the CPI and the second respondent, who still have an obligation to determine the value of the applicant's membership interest in the CPI, are entitled to an order for security.
- [35] The court has taken note of the respondents' dispute in paragraph 59, where it is stated that the applicant definitely does not have R71 091 857.50 as security for this application.

⁸ *Ramsamy NO v Maarmann NO and Another* 2002 (6) SA 159 (C) 172I-J.

- [36] This allegation is the subject of another pending litigation, and until the judgement is delivered in that matter, only then will the respondents be certain that the applicant does not have that amount.
- [37] Even if the applicant does not have an amount of R71 091 857.50, what is certain is that the applicant has his unpaid share of his membership in the first respondent in terms of the agreement between the parties, which was made an order of court by Strydom AJ under case number 16611/2021.
- [38] It is also clear from the papers that the applicant has not been paid the benefits from his provident fund and unemployment benefits due to the pending disputes between the parties.
- [39] It is therefore clear to the court that upon the resolution of the disputes between the parties, it is more likely than not that pay-out due to the applicant by the CPI is payable when the parties have determined the fair share of the applicant.
- [40] The first and second respondents, in the court's view, have failed to show that the applicant's application is an abuse of court processes and that the applicant will not be able to pay litigation costs, should the need arise.
- [41] This is clear from the fact that the first and second respondents have not disputed that the applicant has paid the first and second respondents' legal costs in the urgent application and the pending high court litigation, as is stated in paragraphs 9.4-9.7 of the applicant's answering affidavit filed in this application.
- [42] Consequently, this court is of the view that if there is any party that is abusing the court processes, it is the first and second respondents whose conduct indirectly seeks to prevent the applicant from pursuing his claim against the parties who ought to have long paid the applicant his fair share in the CPI.
- [43] This court refuses to close the door to the applicant in having his legal dispute decided before a court.

[44] It is this court's considered view that the first and second respondents' application must fail and the first and second respondents must pay the costs occasioned by the unnecessary institution of the application for security for costs.

[45] The court accordingly makes the following order:

Order

The application for security for costs is dismissed with costs.

A Gxogxa

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Mr Lusenga

Instructed by:

Lusenga Attorneys Incorporated

For the First and Second Respondent: Adv C Prinsloo

Instructed by:

Arthur Channon Attorneys

For the Third Respondent

No appearance

LABOUR COURT