

SOUTH AFRICA / JUDGMENT

Mfebe v Minister Of Higher Education, Science And Technology and Others (J 1040/20) [2023] ZALCJHB 43 (6 March 2023)

[2023] ZALCJHB 43

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

J 1040/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: J

1040/20

In

the matter between:

WEBSTER

MFEBE Applicant

and

THE MINISTER OF HIGHER

EDUCATION,

SCIENCE

AND TECHNOLOGY AND OTHERS Respondents

Heard:

21 February 2023

Delivered:

06 March 2023

Summary:

Determination of the costs issue. Where a matter is stood down for the determination of the costs issue, a Court is not entitled to

entertain any other application not launched in terms of the provisions of the Rules. Where such a defective application is raised, the appropriate order is to strike it off with an appropriate order as to costs.

When

it comes to an award of costs, the Labour Court is saddled with a very wide discretion emanating from section 162 of the Labour Relations Act, 1995. Although, the ex parte application was justified, the applicant is not entitled to an order as to costs.

Ordinarily, an ex parte order calls upon a respondent to show cause either by way of an affidavit or by appearing physically why a particular order should

not be made. Unlike a rule nisi –

interim order, on the return date, a respondent must show cause and not oppose the making of an interim order final. Under those

circumstances, there is no need to discharge anything. It is either cause is shown or is not shown. In an instance where no cause is

shown, an order of civil contempt may be issued.

In

casu, the Minister showed cause and the Court was not empowered to make any order, including a cost order for or against any party.

Held

(1): There is no order as to costs in relation to the ex parte application. Held (2): The Minister is liable to pay the costs of the defective application.

JUDGMENT

MOSHOANA, J

Introduction

- [1] On 14 May 2021, this Court per my sister Prinsloo J was unable to make a determination on the issue of costs relating to the ex parte contempt application. Prinsloo J then directed the Registrar of this Court to enrol the issue of costs for hearing on an opposed basis. On this day, the Registrar as directed by Prinsloo J enrolled the issue of costs before me. Despite the lucid and clear direction from Prinsloo J, the first respondent, the Minister of Higher Education, Science and Technology (Minister) decided to launch an application seeking permission to file an additional affidavit. This move was met with protestation. However, this Court was saddled with an opposed motion totalling about 306 pages. Resultantly, it took this Court almost four hours to entertain such an application. This Court warned the parties

that this additional time would be taken into account in the consideration of a costs order.

Background

facts

- [2] The facts appertaining the present motion are less complicated and actually limited. On or about 25 February 2020, this Court issued a judgment against the Minister and others. Dissatisfied with the judgment, the Minister sought leave to appeal against the judgment. Leave to appeal was refused by this Court. Unhappy with the refusal, the Minister petitioned the Labour Appeal Court for leave to appeal. At a particular point, the petition was struck off due to lack of condonation. Instead of launching the condonation, the Minister sought reasons why the petition was struck off.
- [3] It was during that period of a wild goose chase that Mr. Webster Mfebe (Mfebe) took a decision to bring contempt proceedings. It is common cause that a wrong procedure was followed, which culminated in a draft application (improper application) served unto the Minister. However, upon noting that a wrong procedure was invoked, Mfebe advised the Minister to ignore the draft application. In the meanwhile, an application compliant with the practice manual of this Court was launched on 1 October 2020. Whilst such an application was pending a determination, the Minister proceeded full steam to oppose the draft application, to an extent that an application to stay contempt proceedings was launched in the midst.
- [4] For reasons that are not altogether clear from the record, the application launched on 1 October 2020, only emerged before this Court (Moshoana J) on 12 February 2021. On this day, consistent with the procedure contemplated in the practice manual, I called upon the Minister to show cause on 14 May 2021, why certain orders should not be made. I interpose to record that in the contemplated orders, there was no order as to costs that was contemplated against the Minister. It is common cause that at the time the order was made, already on 8 December 2020, the Minister was granted leave to appeal the judgment. Also by 28 December 2020, the Minister had caused a notice of appeal to be issued.
- [5] Nevertheless, on or about 5 May 2021, a judge's associate informed the parties that a matter was set down for hearing and parties would be required to appear physically. At this time, it is common cause that the Minister was not served with the order of 21 February 2021, neither was the order made available to Mfebe.
- [6] Indeed, the parties duly appeared before Prinsloo J as directed. This Court was provided with the transcript of the proceedings of 14 May 2021. It is apparent therefrom that the Prinsloo J debated the mootness of the orders made on 21 February
2021. It was the submission of Mfebe that the contempt application be postponed sine die pending the appeal process, which was underway at the time.

[7] After the debate, Mfebe submitted that the order be discharged and the Minister be ordered to pay the costs of the ex parte application. I pause to state that, in my view, there was nothing to be discharged. No rule nisi or interim order was made. If there was anything to discharge, it was an obligation to show cause. On the other hand, the Minister

supported the discharge of the order of 21 February 2021 and submitted that the issue of costs be reserved and stand over for future determination. Prinsloo J agreed with the submission. At the ultimate end, Prinsloo J made the following order:

1. The rule nisi issued on 21 February 2021 is discharged.
2. The registrar is directed to enroll the issue of cost for hearing on an opposed basis.
3. The parties are to file heads of argument on the issue of costs only five days prior to the hearing date as set down by the registrar.

[8] Contrary to the order of Prinsloo J, on 08 September 2021, the Minister filed what he termed an affidavit in support of costs. The aforesaid affidavit was deposed to by attorney Verushka Reddy (Reddy). In the affidavit she begged leave of the Court to file the additional affidavit. The said affidavit together with annexures thereto ran into some 267 pages. After mounting an objection to the move, Mfebe's legal representative, Mr. Peter Mosebo (Mosebo), deposed to an answering affidavit. Of significance, Mosebo testified as follows:

"7.1 The court order is clear and this is crisply stated in the transcript that the parties are required to file heads of argument on the issue of costs only five days prior to the date of hearing as set down by the Registrar. There is no requirement for filing of affidavits and this matter has not been set-down by the Registrar in terms of the court order. This affidavit has further and unnecessarily escalated the costs in this matter to the prejudice of the applicant."

[9] The Minister did not file a replying affidavit, in particular to dispute the pertinent allegation that filing of further affidavits was not required and that such a step escalated the costs unnecessarily.

Evaluation

[10] Before this Court deals with the relevant issue in this matter, this Court must state that this application turned into a finger pointing exercise by two senior practitioners. Both accuses each other of some form of negligence and recklessness. Both seek a punitive cost order against one another. When the offending affidavit is considered as a whole, it was filed for the reasons of seeking a punitive costs against Mosebo. Mosebo is correct in his allegations that the affidavit was not authorized by the Court, unnecessary and escalated the costs in this simple matter of the costs of the ex parte contempt application. In due course, this Court shall revert to the issue of the filing of the affidavit and the costs associated with it.

The costs of the ex parte application.

- [11] The ex parte application constituted less than fifty pages. On 21 February 2021, it was considered in chambers. It seem apparent that after the order was typed it was never made available to Mfebe. On 14 May 2021, parties made an appearance through legal representatives. No further papers were filed by the Minister in respect of the ex parte application. The draft contempt application allegedly answered to and to which a stay application was launched never served before this Court on 21 February 2021 nor 14 May 2021.
- [12] Of importance, the order of 21 February 2021 did not call upon the Minister to show cause why an order of costs should not be made against him. In the notice of the ex parte application, Mfebe did not pray for an order for the Minister to show cause why an order of costs should not be made. In my view, Mosebo was on shaky grounds when he submitted that the Minister must be ordered to pay the costs. He did not pray for that and the Minister was not ordered to show cause why a costs order should not be made against him. To my mind that concludes the issue of the costs of the ex parte application.
- [13] Having said that, at the time both parties appeared before Prinsloo J, there was no longer a live issue between the parties. In my considered view, there was effectively nothing to discharge on 14 May 2021. An order issued pursuant the bespoke procedure outlined in clause 13 of the practice manual is not per se a rule nisi. A rule nisi is an order of Court calling upon the opposite party to show cause why the Court should not grant a final order. It is an order of an interim nature that may be issued even if open to doubt. In most instances it is used in interdict applications.
- [14] That said, clause 13.2 of the practice manual prescribes that an application seeking to hold a party in contempt must be made ex parte. The bespoke procedure arose because it was discovered that applications for contempt of Court were varied and often fail to meet the minimum requirement to obtain the relief sought. As a general rule, contempt applications must be brought on notice. Clause 13.2 specifically prescribes what the notice of motion should seek as an order. Perspicuously absent is an order seeking the issuing of a rule nisi and an order as to costs.
- [15] Clause 13.4 specifically prescribes what should happen where a defence is raised by the respondent. The Court may either hear the matter on the date on which the respondent was ordered to appear in Court or postpone the matter for the convenience of the parties. It therefore seems to me that on 14 May 2021, what ought to have happened was to have the matter heard and effectively consider one factual issue – why there is non-compliance with a Court order. Should the Court not be in a position to hear the matter, all it can do is to postpone the matter.
- [16] Owing to the facts of this case, on 14 May 2021, there was no matter to be heard by the Court. Thus, the parties were faced with a situation contemplated in rule 13 (1) (b) of the Rules for the Conduct of Proceedings in the Labour Court. In other words, given what was happening at the time, Mfebe needed to have withdrawn the matter and if no costs are

tendered, then the Minister would be entitled to apply for costs on notice. Such would effectively be wasted costs, which are not necessarily predicated on any success of a party. The general rule is that where a party is responsible for a case not proceeding with on the day set down for hearing, he or she must pay costs which are wasted[1]. In *Hi Line Investment (Pty) Ltd v Lamprecht*[2], it was held that the usual rule where a postponement has become necessary because of the fault of one of the parties, the party at fault must pay the wasted costs occasioned by the postponement.

[17] Both parties appeared before Prinsloo J not because they wished to bring any form of a motion but they made an appearance following a request from a judge's secretary. It is common cause that both parties did not until 14 May 2021 know of the Court order of 21 February 2021. It is safe to assume that had any of the parties not received an email notification from the judge's

secretary, none of them would have made an appearance. To my mind, the quibble from both parties is the wasted appearance costs of 14 May 2021.

[18] When it comes to costs, the Labour Court is solely guided by section 162 of the Labour Relations Act[3] (LRA). Only the requirements of the law and fairness would guide the Labour Court when it comes to an award of costs. The Constitutional

Court has already provided guidance to the Labour Court on the award of costs. The legal principle of costs following the results does not find application in the Labour Court. Nevertheless, in this instance no party achieved success. At best both parties wasted their time by appearing in Court on 14 May 2021. The question then becomes one of fairness.

[19] In fairness to both parties, are the costs of the moribund ex parte contempt applications warranted? In my view not. The conduct of the parties properly judged is not one that will warrant a costs order. In wasted costs, which in my view, this is what the present motion is all about, considerations are, which party is to blame. As already indicated the appearance of the parties was prompted. It may be so that Mfebe knowing what the state of play was ought to have withdrawn the application before the appearance date. However, there is clear evidence that a postponement was suggested which would have obviated the wasted costs of 14 May 2021. The correspondence exchanged between the parties prior to the appearance seem to point to an agreed postponement. This arrangement seems to have been shared with the office of the Registrar.

[20] Lo and behold both parties made an appearance on 14 May 2021. The Minister does not explain why such was the case. All the deponent on behalf of the Minister states is that letters provided to the Registrar are not a correct recordal. Mfebe too does not explain why he made an appearance in the circumstances where an agreement to postpone was ostensibly reached.

- [21] Under those circumstances, this Court is unable to apportion any blame to anyone regarding the wasted appearance costs. Therefore, an appropriate order to make is that of each party bearing its own costs.

Costs of the application for leave to file further affidavit

- [22] In the type of an application that served before Court – ex parte contempt application, two forms of affidavit are contemplated. The founding affidavit and an explanatory affidavit. As indicated above, the procedure outlined in clause 13 of the practice manual is a bespoke one. It is an application sui generis. It is common cause in this matter that owing to the fact that the order of 21 February 2021 was not served onto the Minister or his legal representatives, the Minister did not file an explanatory affidavit. At the time Prinsloo J discharged the order of 21 February 2021, an explanatory affidavit was not provided. Owing to the discharge, the need to file any form of affidavit dissipated. It was for that reason, this Court believes, why Prinsloo J did not order any of the parties to file any form of an affidavit. It was unnecessary to have done so. The only live issue that remained for determination was the issue of wasted costs. To that end, Prinsloo J afforded parties to provide heads as opposed to affidavits. This because, ordinarily a cost issue is a matter of law than fact.
- [23] Therefore, the urge by the Minister to file an affidavit was unnecessary. An additional affidavit in a matter of this nature is not contemplated. Thus properly considered, the affidavit was filed in support of an application of the nature contemplated in rule 13 (1) (b) of the Labour Court Rules. To my mind an application contemplated in that rule must be brought on notice within the contemplation of rule 7 of the Labour Court Rules. It is clear that the legal team of the Minister knew that if they contend
- for costs an application within the contemplation of rule 7 was required. In the letter dated 9 May 2021, Reddy stated amongst others the following: “If there is no tender for costs, our client will set the matter down in due course to argue for the costs associated with same.”
- [24] Clearly, Reddy as a senior practitioner must have been thinking about a rule 13 (1) (b) application. Rule 7
- (2) specifically provides that a notice of application must substantially comply with Form 4 and must be signed by the attorney bringing the application. The application must contain certain information. The affidavit deposed to by Reddy on 30 August 2021, effectively seeks a punitive cost against Mosebo, alternatively Mfebe. However, the affidavit was accompanied by what was termed a “Filing notice”. This notice is far from complying with the peremptory provisions of rule 7. Accordingly, it is a defective notice. This Court is perplexed as to why a senior practitioner would file such a defective notice and seek a cost order.
- [25] Despite the fact that Prinsloo J did not order parties to file affidavits, even if this could have been considered to be a rule 13 (1) (b) application, it is defective and non-compliant. This Court appreciates the protestation by Mosebo. Therefore, all the unnecessary and defective application did was to escalate costs. Although, Reddy begged leave to file the affidavit, such

leave was not granted yet a voluminous affidavit was filed, which prompted Mfebe to provide a response. Leave to file further affidavits is normally a substantive application made on notice. It required a notice of motion within the contemplation of rule 7. Thus, the application for leave is equally defective. What compounds issues, on 30 November 2021, the Minister is told in no uncertain

terms that the voluminous affidavit has not been ordered and it is unnecessary, a fact that is not disputed in a reply, the Minister

forges ahead with such an affidavit. This is conduct smacking of vexatiousness and frivolity. Section 162 (2) (b) (i) of the LRA

specifically provides that the Labour Court may take into account the conduct of the parties in proceeding with the matter before Court, when deciding whether or not to order the payment of costs.

[26] Undoubtedly, the affidavit and its defective notice escalated the costs in the matter. The majority of the submissions made in Court were directed to issues raised in these affidavits. Accordingly, it is unfair to mulct Mfebe with the costs associated with this patently defective motion. To my mind, a cost order is warranted in respect of the filing of further affidavits. Mosebo passionately argued that a punitive cost order must be made against Reddy. In my view, the legal requirements of such an order were not shown to exist. Accordingly, a normal cost order is warranted. The defective application enrolled by the Minister by way of notice on 18 February 2023 ought to be struck off the roll. In terms of rule 7 (6) (a) and (b) of the Rules, the duty to enroll matters is that of the Registrar. The Registrar as directed by Prinsloo J enrolled the costs issue only. I conclude that the enrolment is defective.

Conclusions

[27] In summary, a cost order in respect of the ex parte contempt application is not warranted. However, a cost order in respect of the defective application for leave to file further

affidavits or one contemplated in rule 13 is patently warranted. The defective application, which has been enrolled defectively ought to be struck off the roll.

[28] For all the above reasons, there is no order as to costs with regard to the ex parte application and the defectively brought and enrolled application is struck off the roll.

[29] In the results I make the following order:

Order

1. Each party must bear its own costs in relation to the ex parte contempt application.
2. The defective application for leave to file affidavits and for a costs order on a punitive scale is struck off the roll.
3. The Minister must pay the costs of the defective application.

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr P M Mosebo of Werksmans

Attorneys, Sandton.

For the Respondents: Mr. R Tshetlo

Instructed by:

Norton Rose Fulbright South Africa

Inc, Sandton.

[1] Jowell v Behr 1940 WLD 144.

[2]

[2014] JOL 3283 (ECP)

[3] No. 66 of 1995.

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