

SOUTH AFRICA / JUDGMENT

Ngwenya v Sishen Iron Company (J 3581/18) [2022] ZALCJHB 173 (27 June 2022) [2022] ZALCJHB 173

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

J 3581/18

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: J 3581/18

In the matter between:

ZANELE NGWENYA

Applicant

and

SISHEN IRON COMPANY

Respondent

Heard: 02 March 2022

Delivered: 02 March 2022

Edited: 27 June 2022

EX TEMPORE JUDGMENT

MOSHOANA, J

- [1] Earlier I heard legal submissions in this matter and indicated to the parties that I would give judgment after the tea break. It is befitting to commence this judgment by stating that this is a strange application. It will become clearer as I deliver the judgment why I consider the application to be a strange one.

- [2] In this application the applicant, Mr Zanele Ngwenya, is seeking a relief in the following terms. (1) That he be permitted to amend his founding affidavit. (2) That the honourable Court hear this application in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997. (3) That the applicant made a protective disclosure against the respondents in terms of the Protective Disclosure Act and the first respondent's protection of whistle blower's policy.
- [3]
- (4) That the respondent failed to protect the applicant as a whistle blower in terms of the Protected Disclosure Act and the first respondent's protection of whistle blower policy. (5) That by instituting a disciplinary hearing against the applicant the respondent subjected the applicant to an occupational detriment. (6) That the respondents be ordered to pay the applicant compensation equivalent to 24 months' salary. (7) That the respondents be ordered to pay the costs of suit.
- [4] The genesis of this matter is an urgent application brought wherein the applicant, Mr Ngwenya, will be seeking to interdict certain disciplinary processes that were undertaken by the employer on the basis that he had made a protective disclosure and as such those disciplinary steps amounted to what he considered to be an occupational detriment.
- [5] The Labour Court did not entertain that urgent application, however, the applicant was given an opportunity, he states, to amend his papers. In the meanwhile a section 188A of the LRA Inquiry was agreed upon and that Inquiry ran and its outcome was that the applicant was dismissed. The applicant then amended the notice of motion and also filed an amended founding affidavit and presented a case that I have already outlined above.
- [6] On the day of the hearing I enquired from Mr Sadike who appears on behalf of the applicant what this application was all about and he indicated to the court that it is a section 77(3) application where the applicant is alleging a breach of a policy since he has not been protected after he had made a protected disclosure which disclosure, according to the submission, is common cause. Now, having made the protected disclosure and not being protected, he suffered damages and he is seeking compensation equivalent to 24 months.
- [7] Mr Makhura, appearing for the respondent, submitted that the application should be dismissed and he submitted that the prayers 3 and 4 are effectively an unfair labour practice and fall outside the jurisdiction of this Court. In relation to prayers 2 and 6, which relates to the civil claim, the papers filed by the applicant do not make the necessary averments of any contract of employment in place and its breach and Makhura insisted that because of the correspondence that was exchanged over a period this Court must award punitive costs against the applicant. I must mention at this stage that Mr Sadike conceded that prayer 5 of the notice of

motion has since become moot and probably it is not being persisted with.

- [8] Now I return to the issue of the strange application. In terms of section 77(3) of the Basic Conditions of Employment Act[1] this Court has concurrent jurisdiction with the civil courts to determine any matter that arises out of an employment contract. It is trite that such would be matter relating to a breach of contract.
- [9] Now matters involving a breach of contract are ordinarily presented to this court by way of an action or statement of case. However, the applicant chose to approach this Court by way of motion and it is understood on the basis that initially this application was meant to be an interdict and for some strange reason it turned out into an action proceeding that is proceeded with on affidavit. The elementary rule in motion proceedings is that a party stands and fall by the papers. Affidavits that are filed in motion proceedings serve two purposes. One, as the pleadings. Two, as evidence.
- [10] Now Mr Sadike, when asked to comment on the submission by Mr Makhura that the necessary averments that will sustain a section 77(3) claim were not made in the papers, he retorted by saying that although there is no direct averment the applicant zoomed into the issues relating to policy and by extension that connects to the breach of contract. Of course, this sounds very convoluted.
- [11] In a claim of breach of a contract, the first thing to establish is the existence of a contract and the second thing to establish is the breach of the clauses in the contract of employment. In this particular matter, such averments do not exist in the papers before Court. Clearly this application is a non-starter. In relation to prayers 3 and 4, section 186 (2) (d) of the Labour Relations Act provides that it is an unfair labour practice to subject an employee to an occupation detriment within the meaning of the Protected Disclosure Act.
- [12] Section 191 (13) (a) of the Labour Relations Act gives jurisdiction to the CCMA to deal with disputes relating to unfair labour practice. Therefore, even if this court would have been minded to entertain prayers 3 and 4, they fall outside the jurisdiction of this Court and cannot be entertained. However, it is important to state that it appears that the applicant is suggesting that by not protecting him the employer, in this regard the respondent, would have failed in its duty of care as it were and that would bring to the fore a delictual claim instead of a contractual claim. Of course such a claim is not before Court. This Court would not even have jurisdiction to entertain such a delictual claim.
- [13] Now having said all of that it is very clear that this application, having started as an interdict and progressed to a point of an action proceedings under section 77(3) which is not properly pleaded was or remains a non-starter. It ought not to have been persisted with and that brings me to the issue of costs.

- [14] Mr Makhura submitted that there were various correspondences wherein the applicant or the respondent pleaded with the applicant to withdraw this application, failing which a costs order de bonis propriis would be sought. It is clear that those pleas fell onto deaf ears. The applicant, being legally represented, forged ahead with an application of this nature. Clearly it is unreasonable to have dragged the respondent to this Court to answer to such an application which I have already remarked is a strange application.
- [15] A further consideration is that as Mr Sadike pointed out, it is a section 77(3) application. It is a civil matter. It being a civil matter, costs follow the results. With regard to the scale and the type of costs Mr Sadike submitted that punitive costs would be inappropriate, because the applicant and his legal team took a view that they have an arguable case before this court.
- [16] One wonders why that is the case when there is correspondence where another legal person expresses a view about the weakness of the case, but that legal person, representing the respondent, was ignored. So clearly, the applicant approached this court with frivolity and in the manner that is vexatious, having been informed in a number of correspondences that this case must be withdrawn.
- [17] It is about time that this court must send a message, a very clear one, to litigants that in as much as section 151 establishes this Court as a Court of equity, it is also a Court of law and in the instances where its civil jurisdiction is invoked, then the costs issue would be considered. The Constitutional Court has made it very clear that in pure labour matters this Court should not apply the costs following the result principle. But that does not find the application, when it comes to civil matters.
- [18] So the message is that costs will be considered in civil matters and in this instance this court takes a view that Mr Ngwenya is a victim of poor legal advice. It has already been pointed out that he continues to be unemployed. He probably has no means of dealing with the issue of the costs that this Court may order, but that is not the end of the enquiry. Mr Makhura has indicated that in those correspondences reference was made to the costs de bonis propriis.
- [19] Now clearly the legal team of the applicant, who is obviously not legally qualified, should have known better that this application is a non-starter. Yet again the application is before court. The application was argued in an opposed motion. Mr Sadike appeared and argued, as he is entitled to, that this is an application or a matter that has merit.
- [20] Now I am minded to make an order that attorney, Motlatsi Lekhesa must, within 14 days of this order, show cause by way of an affidavit why costs should not be ordered against him and the law firm and that would be costs on a punitive scale.
- [21] In the result, the order I make is the following.

Order

1. The application is dismissed.

2. Attorney Motlatsi Lekhesa should, within 14 of this order, show cause why costs de bonis propriis, should not be made against him and or his firm. Should he fail to do so within the time period an order is made that the costs should be paid on an attorney and own client scale by the firm Lekhesa Attorneys and or Motlatsi Lekhesa as the attorney.

G. N. Moshwana

Judge of the Labour Court of South Africa

[1] Act 75 of 1997.

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