THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

CASE NO: J1695/19

In the matter between:

DANIEL KITIMI LEKGANYANE

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

ROAD ACCIDENT FUND **Second Respondent**

Heard: 12 August 2019

Judgment delivered: 13 August 2019

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JUDGMENT

VAN NIEKERK J

[1] This is an application to hold the CCMA in contempt of court and for certain other ancillary relief.

[2] This court has issued a number of warnings regarding the filing of urgent applications in circumstances where aggrieved parties (especially employees) seek to have their grievances resolved by the court as a resort of first instance. In this matter, the applicant in effect seeks to have this court hold the CCMA in contempt of court in circumstances where he is aggrieved at the postponement of an arbitration hearing.

[3] The material facts are not in dispute. The applicant was employed by the second respondent (the RAF) on 1 July 2008. He was dismissed for misconduct in November 2015. The applicant's dismissal was upheld by the CCMA after an arbitration hearing. The applicant sought to review and set aside the award. On 12 February 2019, in the unopposed motion court, this court (Gush J) reviewed and set aside the award and ordered that the matter 'be referred back to the First Respondent [the CCMA] to be arbitrated *de novo* before an arbitrator other than the Second Respondent [the arbitrator]'.

[4] The matter was duly remitted to the CCMA and enrolled for an arbitration hearing on 23 April 2019. On that date, the proceedings were postponed, by agreement between the parties, to 23 May 2019 on the basis, it would appear, that the RAF had filed an application to rescind the order granted by this court on 12 February 2019. On 23 May 2019, the second respondent in these proceedings sought a

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further postponement. The presiding commissioner ordered that the matter be stayed *sine die* pending the outcome of what he refers to as a review application filed in this court and ordered the second respondent to pay the wasted costs of the day. (The reference ought to have been to an application for rescission.) The application for rescission was filed in mid-June 2019 and remains pending. For present purposes, it is not insignificant that the applicant in the present proceedings filed an answering affidavit in the rescission application on 27 June 2019, and that he avers in that affidavit that the CCMA has 'allowed itself to be misled' and that it was in contempt of court for failing to execute the order granted on 12 February 2019. In other words, as far back as 27 June 2019, the applicant had taken the view that the CCMA was in contempt of court. The matter was again enrolled for hearing on 18 July 2019, when the presiding commissioner recorded that given that the outcome of the rescission application remained outstanding, it was not open to him to make a ruling that varied or set aside the ruling made on 23 May 2019 and that the arbitration hearing 'cannot proceed at this time'.

[5] In his notice of motion, the applicant seeks an order in terms of which the CCMA be declared to be in contempt of this court for its failure to abide by the order granted on 12 February 2019, and that it be declared that the application for rescission does not stay in execution of the court order and that the order remains binding on the CCMA.

[6] The application is opposed by the RAF.

[7] When the matter was called, I put certain difficulties to the applicant's counsel. These included the urgency of the application, the absence of any properly formulated allegation of contempt on the part of the CCMA in the founding affidavit, the failure by the applicant to use the form required by clause 13 of the practice manual, including the failure by the applicant to join any responsible person whom he alleges was aware of the court order and failed to comply with it.

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[8] It is sufficient to say that counsel was unable to offer any submissions that dealt with these shortcomings. A perusal of the papers indicates that the applicant's true complaint is against the RAF, and not the CCMA. He accuses the RAF of deliberately seeking to delay the arbitration hearing by way of postponements of the hearing. The RAF denies this and has proffered an explanation for the circumstances that gave rise to each postponement. Be that as it may, if the applicant was aggrieved by the further postponement of the arbitration hearing or by the ruling issued on 18 July 2019, he was at liberty to seek a review of the ruling in terms of s 158(1)(g) of the LRA. I fail to appreciate how it can be said that an arbitrator acts in breach of an order by this court to the effect that a matter be remitted and heard *de novo* when he or she postpones the *de novo* hearing on the basis that a respondent party intends to or has filed an application to rescind that order. In the present instance, the fact remains that the matter was remitted to the CCMA for a rehearing, that an arbitrator was appointed and that the arbitration proceedings remain pending. What the applicant avers, in effect, is that a ruling by an arbitrator to postpone a hearing on an account of an application pending in this court to rescind an order remitting a dispute for rehearing, is an act of contempt. That proposition only has to be stated to demonstrate its manifest absurdity. In any event, the applicant's papers make no case for any breach of the order on the part of the CCMA or any commissioner, let alone any allegation of wilful and *mala fide* non-compliance. Insofar as the form of the application is concerned, counsel could offer no explanation for the applicant's failure to utilise the format prescribed by the practice manual for contempt applications.

[9] Notwithstanding these difficulties, the applicant has failed to establish that the application is urgent. In the founding affidavit, he avers that the application is brought on an urgent basis since there is no alternative remedy, that he continues to suffer irreparable harm, and that the balance of convenience is in his favour. These, of course, are requirements that relate to interdictory relief, and the applicant appears to have confused them with the discrete requirement that urgency be established. Be that as it may, the applicant suffers no

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irreparable harm, since his matter remains pending before the CCMA. Insofar as the applicant submits that he has no alternative remedy, as I have indicated above, if his real complaint relates to the merits of the arbitrator's ruling, it remained open to him to seek to review that ruling. In short, the application is not urgent and it stands to be struck from the roll for that reason.

[10] I reserved judgment for a day to prepare this judgment and to record, once again, that abuse of the urgent court remains rife, and that practitioners who continue to clog the courts roll with misguided applications such as the present must expect that orders for costs will be made. In terms of s 162 of the LRA, this court has a broad discretion to make orders for costs according to the requirements of the law and fairness. While the court is often reluctant to make orders for costs against individuals who feel genuinely aggrieved by the conduct of their employers, I fail to appreciate how the applicant, who is legally trained and who has completed his articles of clerkship, could view the present application as anything but misguided. The RAF, against whom no direct relief was sought but who was cast in the papers as the villain of the piece (to the extent that the applicant sought an alternative to have the RAF declared a vexatious litigant on account of its 'dishonesty in litigating this matter'), was obliged to instruct its attorney to oppose these proceedings. The RAF's attorney was obliged to spend a long weekend taking instructions and preparing an answering affidavit in circumstances where the RAF's attorney had been led to believe that the matter had been settled. It was only on 9 August 2019, a public holiday before the scheduled hearing date, that the applicant introduced a new demand into negotiations being conducted by the parties' respective attorneys. In these circumstances, I fail to appreciate why the RAF, a statutory body funded effectively by the taxpayer, should have to bear the costs of opposing these proceedings. Mr. Ramdaw, who appeared for the RAF, urged me to grant costs on a punitive scale. I agree that there is no merit whatsoever in the application, and that it falls into the category of the frivolous and vexatious. In those circumstances, it appears to me that the interests of the law and fairness are best satisfied by an order for costs on a punitive scale.

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I make the following order:

1. The application is struck from the roll for lack of urgency, with costs, such costs to be paid on the scale as between attorney and client.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. M.J Matlhanya instructed by Thuketana Attorneys

For the respondent: Mr. A R Ramdaw, Ramdaw and Associates Inc.

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