

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C258/2018

In the matter between:

SICK AUTOMATION SOUTHERN AFRICA (APTY) LTD **Applicant**

And

HANRE SWANEPOEL **First Respondent****DATALOGIC (PTY) LTD** **Second Respondent****Date heard: 16 May 2019****Delivered: 2 August 2019**

JUDGMENT

RABKIN-NAICKER, J

[1] This judgment concerns only the issue of costs. The applicant filed an application to enforce a restraint of trade agreement on the 3 April 2018. The

answering affidavit filed of record by the first respondent stated in paragraph 30 that:

“Lastly the Applicant has joined the Second Respondent as a party to these proceedings, however no relief was sought against the Second Respondent. This had the effect of having my fixed term and interim consultation agreement with the Second Respondent being terminated and has left me without an income for the immediate to medium terms future.”

[2] I deal only with the application for which the issue of costs was reserved on the 20 April 2018, following the applicant’s decision not to proceed with the application¹. On the 16 April 2018, attorney for the applicant addressed the following correspondence to the first respondent’s attorney of record:

“Dear Sir

1. The answering affidavit served on behalf of your client this morning refers.
2. In paragraph 30 of it your client makes the submission that the Second Respondent terminated his contract of employment upon receipt of the application. I confirm our telephonic discussion that he indeed never commenced employment with the Second Respondent.
3. In these circumstances our client’s application is moot and it will serve no purpose to argue it as the Court is not inclined to make order which are academic or cannot be enforced.
4. Our instructions are to offer that our client withdraws its application and that each party is liable for its own legal costs.
5. We would appreciate if you could revert with your client’s instructions before the close of business today.”

[3] In reply the attorney for the first respondent pointed out, *inter alia*, that the decision to withdraw the application belongs to the Applicant and does not require the Respondent’s consent, and that such withdrawal should be accompanied with an appropriate tender for costs. Furthermore, it is recorded

¹ Other applications between the parties under case number J1462/18, including orders as to costs have been dealt with by Le Grange J.

that the agreement² between the first and second respondents was cancelled as a direct result of the application. In addition, first respondent's attorney stated that: "The reality is that the first respondent had to incur costs in opposing the interdict sought by the Applicant and that these costs could have been avoided."

- [4] The applicant submits that it was then forced to file a replying affidavit addressing the merits of the application, as well as costs. It was argued by Mr. Posthma that the first respondent should never have opposed the application as once the agreement had been terminated it became moot. No answering affidavit should have been filed. The applicant had to incur unnecessary costs in preparing the replying affidavit.
- [5] I am not convinced that the issue of costs could not have been dealt with in submission by the applicant given its case that the application was moot, without the drafting of a replying affidavit. I am also unimpressed by the submissions on behalf of the first respondent. These seek to convince the Court of the mala fides of the applicant, drawing on issues raised in an application brought by the first respondent in the application under J1462/18. As I have stated in paragraph 2 above, this Judgment concerns costs under the above case number, and cannot be influenced by judgments in other applications before another Court and between the same parties.
- [6] In the result, I am of the view that both parties could have prevented the occurrence of further costs. The first respondent could have notified the applicant that the agreement had been cancelled before incurring the costs of filing its answering affidavit, and the applicant did not need to file replying papers given that the application was moot on its own submission. In these circumstances I exercise my wide discretion to make the following order:

Order

Each party is to pay its own costs

² The nature of the relationship as employment or consultancy was disputed in the papers.

H. Rabkin-Naicker
Judge of the Labour Court

Appearances:

Applicant: Snyman Attorneys

First Respondent: Hogan Lovells South Africa Inc