

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 3095/2018

Date Heard: 8 February 2019

Date Delivered: 19 February 2019

In the matter between:

SOUTH AFRICAN TEACHERS' UNION

Applicant

and

KLUB 24

First Respondent

FBSAOU

Second Respondent

GERHARD BURGER

Third Respondent

MAURITZ DE VRIES

Fourth Respondent

JUDGMENT

GAJJAR AJ:

Introduction

[1] The applicant, the South African Teachers' Union ("SATU"), a duly registered union, brought an urgent application wherein it sought the following relief:

- 1.1 an interdict interdicting the respondents, and/or their members/associates/sympathisers from disrupting, in any manner, the proceedings at the 23 National Principals' Symposium ("the symposium") which was to be held on 9-12 September 2018 at the Nelson Mandela Metropolitan University, Port Elizabeth, which

disruption was to include, but not limited to, the interruption of any of the speakers at the symposium.

1.2 Costs against the third and fourth respondents.

[2] Although final relief was sought, a rule *nisi* with immediate effect was issued against the respondents on 8 September 2018 which was returnable on 25 September 2018.

[3] On the return day, by agreement between the parties, the rule *nisi* was discharged and the issue of the costs was reserved.

[4] The only issue thus remaining for determination is costs.

[5] The first respondent is Klub 42, and the second respondent, Forum vir Bekommerde SAOU-Lede ("FBSAOU") which translated into English reads "Forum for Concerned SATU Members". They are voluntary associations. The third and fourth respondents, Gerhard Burger ("Burger") and Mauritz de Vries ("De Vries") are members of SATU as well as Klub 42 and FBSAOU.

[6] Burger and De Vries, both school principals, oppose the matter. They have sought that SATU pay the costs of the application on the scale as between attorney and client and SATU in turn has sought costs against them.

Background

[7] SATU is one of the biggest teachers' trade unions in South Africa with approximately 37 000 members with its main objective being to promote and protect the interests of all its members.

[8] During the course of November 2017 a dispute arose between a non-member of SATU, a Michael Pashut ("Pashut") in respect of his business not being accepted as a sponsor by SATU for its 2018 symposium.

[9] Pashut became disgruntled with SATU's decision and, on its version, started a smear campaign described by SATU as being "of epic proportions" against it, its affiliated organisations and SATU's president, Dr Louis Swanepoel ("Swanepoel") and its Chief Executive Officer, Mr Chris Klopper ("Klopper").

[10] Pashut publicly accused Swanepoel and Klopper of financial mismanagement, corruption, theft and the like. When Burger and De Vries raised concerns about the management of SATU, SATU associated them with Pashut on the basis of an email dated 24 May 2018 from Juan Rossouw, also a school principal, wherein he said the following:

"I have no doubt in my belief that a bomb is going to burst in PE. And it WILL happen in the presence of the media. Wonderful platform. Just wait ..."

[11] In light of the accusations made against it by Pashut, SATU on its own accord appointed retired Judge Hartzenberg together with two forensic auditors to investigate the allegations. The Hartzenberg report was released during November 2018.

The actions of Burger and De Vries that led to the application

[12] Burger and De Vries being disgruntled with SATU's senior management formed Klub 42 and FBSAOU as platforms to voice their concerns against SATU.

[13] It is common cause that the following correspondence was addressed by Burger and De Vries to SATU's offices:

13.1 On 23 August 2019 Burger, as chairperson on behalf of Klub 42 and on 24 August 2018 De Vries on behalf of FBSAOU addressed letters to SATU representatives requesting that they be afforded a time slot at the symposium to debate the alleged mismanagement maladministration and malfeasance. These requests went unanswered.

13.2 On 4 September 2018 Burger addressed an email to a Gordon Lancaster, the Mpumalanga provincial chairperson of SATU, with the subject matter being Open debate Symposium.

13.3 On 5 September 2018 De Vries addressed an email to Swanepoel wherein he implored SATU to agree that a time slot be allocated during the symposium for question and answers to spare him public embarrassment.

[14] During the course of argument, Ms **Morgan**, counsel for SATU, and Ms **Bands**, counsel for Burger and De Vries, correctly accepted that the emails of 4 and 5 September 2018 from Burger and De Vries respectively assume considerable importance in respect of SATU's claim that it had a reasonable apprehension of harm. The relevant portions of those emails bear repetition.

[15] The relevant portion of Burger's email of 4 September 2018 as translated into English reads as follows:

*"From: Gerhard Burger [mailto: legdaar@vodamail.co.za]
Sent: 04 September 2018 11:07am
To: gordon@laerskoolbergland.co.za
Subject: Open debate Symposium*

"As Club 42 we want to assure you that we absolutely do not want to disrupt the Symposium, but we want to further assure you that we will NOT allow the speakers free reign during the Symposium."

[16] The relevant portions of the letter of 5 September 2018 from De Vries to Dr Swanepoel reads as follows, as translated into English:

"Dear Dr Swanepoel

FBSAOU / REQUEST FOR A TIME SLOT DURING NATIONAL SYMPOSIUM 2018

1. *We addressed the request more than a week ago to you (Friday 2018/08/24 12:48).*
2. *..., FBSAOU be given an opportunity to address the symposium about aspects that was set out in the correspondence from FBSAOU to SATU as well as that to individual members*
3. *...*
4. *More and more SATU members share their concerns and the symposium is the ideal opportunity to have a question and answer session ...*
5. *...*
6. *It is now unavoidable that you as chairperson of SATU must allow an opportunity for questions and answers to spare you possible public humiliation.*
7. *It is strongly suggested that the full Standing Committee must be present. They are first answerable to their respective provinces in respect of transparency.*

Friendly greetings

*Mauritz De Vries
FBSAOU – Convenor
05/09/2018”*

The urgent application and the subsequent correspondence

[17] The quoted portions of the aforesaid emails together with Burger's and De Vries' failure to have provided SATU with a written undertaking sought by it that they would not disrupt the symposium caused SATU to approach this court on an urgent basis seeking the relief as aforesaid.

[18] SATU contends that the emails of 4 and 5 September 2018 must be read in the context of the following:

18.1 The symposium is not a union structure/meeting in accordance with its Constitution to deal with union related matters;

18.2 that it does not and cannot prescribe to school principals with whom they do business in procuring goods and services for their schools;

18.3 it came to be in possession of a screenshot of an email sent on 24 May 2018 sent from the principal of the Goodwood Park Primary School addressed to Burger, Pashut and copied to De Vries.

[19] In my view, the question that arises is whether or not the contents of the emails of 4 and 5 September 2018 from Burger and De Vries respectively was sufficient to cause reasonable apprehension of irreparable harm on the part of SATU to have approached this court for urgent final relief. The test for reasonable apprehension is objective.¹

[20] SATU's case is that premised on its reading of the two mentioned emails it reasonably apprehended that Burger and De Vries would come to the symposium and raise false allegations against it which would damage its good name and reputation coupled with their failure to provide the written undertaking sought.

[21] It bears mentioning that on 6 September 2018 SATU addressed a letter to Burger and De Vries recording that their request for a time slot was declined and it

¹ See *Pickles v Pickles* 1947 (3) SA 175 (W) at 179-180; *National Council of the SPCA v Openshaw* 2008 (5) SA 339 (SCA) at 347D-E and 397C;

was also stated that they await the outcome of the formal enquiry (the Hartzenberg Enquiry). SATU also noted that in the event that further discussion was necessary same could be entered into following the release of the report.

[22] Neither Burger nor De Vries responded to SATU's letter of 6 September 2018.

[23] On 7 September 2018 SATU's attorneys addressed a letter to Burger, De Vries and two others, a Mr J Smuts and Ms R du Toit seeking their written undertaking that the members of Club 42 and/or FBSAOU will in my way disrupt the proceedings during the symposium more particularly that none of the speakers at the symposium will be interrupted or hindered during their respective presentations. The undertaking was sought by 11:00 on 8 September 2018.

[24] Neither Burger nor De Vries provided the undertaking sought, which prompted the urgent application.

[25] I accept that both Burger and De Vries had notice of the application. SATU's email of 8 September 2018 transmitted to Burger and to De Vries' email addresses is significant. It stated that in the event that their written undertaking not to disrupt the symposium is given, it would not seek costs against them. This email was sent at 15:33 some two and a half hours before the urgent application was heard. By then SATU had already incurred the costs of preparing and finalising the application.

[26] On 11 September 2018, three days after the interdictory relief was granted and in the midst of the ongoing symposium (it having commenced on 9 September and was due to conclude on 12 September 2018), the respondents proposed that the matter be settled on the basis that the rule *nisi* be discharged with no order as to costs.

[27] SATU's attorney replied on 13 September 2018 recording that the contents of the respondents' attorneys letter was referred to its client for "further instructions". On 14 September 2018 SATU's attorney recorded its client's rejection of the respondents' proposal.

[28] In my view, the perceptions of the respective individuals clouded their ability to engage maturely. Of significant importance is that the representatives of SATU on the one hand, and Burger and De Vries on the other, claimed to be acting in the interests of their organisation, SATU. In this regard Burger's and De Vries' request for a time slot for a question and answer session to debate the affairs of SATU during the symposium, albeit ill-informed to the extent that the symposium was not the appropriate forum, cannot, in my view, be said to have been motivated by malice but rather a desperate desire to have genuine concerns addressed and debated. By contrast SATU, was driven by process in that it did not view the symposium to be the correct forum to air and address the respondents' concerns about its internal and operational matters.

[29] It is not clear why SATU did not suggest to Burger and De Vries that they submit their questions and/or further queries in writing. In my view, doing so could probably have placated Burger and De Vries. I am mindful of the fact that to a limited extent SATU attempted to do so in its letter of 7 September 2018 to Burger and De Vries.

The principles governing costs

[30] It is trite that as a general rule the successful party is entitled to its costs and this rule should be departed from where there are good grounds for doing so.²

[31] The determination of costs falls within my discretion which must be exercised judicially and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.³

[32] Moral and ethical considerations may enter into the exercise of the court's discretion.⁴

² Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)

³ Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 5th edition page 954-955 and the authorities cites there.

⁴ See: Mahomed v Nagdee 1952 (1) SA 410 (A) at 420H

[33] In Ferreira v Levin NO and Others⁵ the Constitutional Court said the following in respect of costs:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings.”

[34] Ms **Morgan** submitted that as SATU obtained the relief it sought it must be viewed as the successful party and is thus entitled to its costs. Measured against this submission I must weigh up that the rule *nisi* was discharged and that both Burger and De Vries remain members of SATU.

[35] Ms **Bands** submitted that not only should the general rule be departed from but that I should order attorney and client costs against SATU on the following grounds:

35.1 absence of urgency;

35.2 absence of well-grounded apprehension of irreparable harm;

35.3 the invitation on 11 September 2018 to settle the matter.

[36] Regarding urgency, I am of the view that as Burger and De Vries did not give their written undertaking as sought by SATU by 15:33 on 8 September 2018, SATU cannot be criticised for approaching court on an urgent basis.

⁵ 1996 (2) SA 621 (CC) at para [3]

[37] Whether or not SATU had made out a case to obtain final relief is, in my view, open to doubt. However, given the conclusion which I have reached, it is not necessary to consider this issue further.

Conclusion

[38] Considering all of the above I shall take the course which Swain J (as he then was) adopted in Natal Zoological Gardens (Pty) Ltd and Others v Ezemvelo KZN Wildlife⁶, and in the exercise of my discretion, I am of the view that this is a case where neither of the parties should be ordered to pay the others costs. As the court said in Natal Zoological Gardens.⁷

“Although the applicants did not possess a reasonable apprehension of irreparable injury, this is not a case where they should be ordered to pay the respondents’ costs, due regard being had to the fact that they were substantially successful, in the sense set out above. Likewise, this is not a case where the respondents should be ordered to pay the applicants’ costs, particularly as it is clear that the refusal to furnish an undertaking, was dictated by concern for the welfare of the animals housed in the Zoo and Lion Park.”

[39] Both parties, in my view, were motivated by a singular concern in this matter, that being the welfare and integrity of the organisation, SATU. Fairness demands that that be reflected in the costs order.⁸

[40] Accordingly, I make the following order:

40.1 Each of the parties are ordered to pay their own costs.

G J GAJJAR

⁶ Saffli case no. 5945/09 (KZN) 13 August 2009

⁷ Supra at para [23]

⁸ See Rhodes University v Students Representatives Council [2017] 1 All SA 617 (ECG) para 157

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv M Morgan instructed by Boyens Attorneys c/o
Erasmus Inc, Port Elizabeth

For Third and Adv I Bands instructed by Randell and Associates, Port
Fourth Respondent: Elizabeth