

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA29/2019

In the matter between:

KOPANONG LOCAL MUNICIPALITY

First Appellant

THE MUNICIPAL MANAGER OF

KOPANONG LOCAL MUNICIPALITY

Second

Appellant

and

T S MANTSHIYANE

Respondent

Heard: 21 May 2020

Delivered: 28 May 2020

Summary: Costs---Punitive costs in the labour dispute guided by fairness and equity---fairness dictates that a party be given an opportunity to make representations---in the absence of such representations costs order contravening the principle of natural justice---Appeal upheld.

Coram: Waglay JP, Davis JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The first appellant, the Kopanong Local Municipality, and the second appellant, its municipal manager, appeal against a costs order made by the Labour Court (Rhodie AJ) ordering the second appellant and the appellants' attorneys to pay costs *de bonis propriis* in an application brought by the

respondent to enforce a prior judgment of the Labour Court (Prinsloo J). The appeal is with the leave of the Labour Court and is unopposed.

- [2] The respondent was employed by the first appellant until his dismissal on 30 July 2009. The respondent referred an unfair dismissal dispute to the relevant bargaining council for conciliation and arbitration. On 24 January 2012, the arbitrator issued an award ordering the first appellant to reinstate the respondent and to pay him back pay.
- [3] The first appellant made application to the Labour Court for a review of the arbitration award. On 9 February 2016, Prinsloo J dismissed the application for review for lack of prosecution, made the arbitration award an order of court in terms of section 158(1)(c) of the Labour Relations Act¹ ("the LRA") and ordered the costs of the application in terms of section 158(1)(c) of the LRA to be paid *de bonis propriis* by the first appellant's attorneys. The learned judge made the costs order on the basis that the attorneys had been grossly negligent in the prosecution of the review and had squandered taxpayers' money. Leave to appeal against this order was refused by the Labour Court and by this court on petition.
- [4] After the respondent was reinstated, a dispute arose regarding the amount payable to him as back pay. The respondent obtained actuarial advice indicating that he was owed R1 909 064 as salary for the period 30 July 2009 to 30 June 2013, and *mora* interest in the amount of R1 341 807.
- [5] On 25 November 2016, the first appellant paid an amount of R1 173 860 (being R1 981 833 less R807 972 deducted in accordance with a tax directive from SARS) into the respondent's bank account. The respondent was not satisfied with this payment and instructed his bank to return the money to the first appellant.
- [6] In June 2017, the respondent made an application to the Labour Court for the enforcement of the judgment of Prinsloo J.

¹ Act 66 of 1995.

- [7] On 20 July 2018, in an *ex tempore* judgment of four paragraphs, Rhoodie AJ ordered the appellant to pay the capital amount it had previously tendered, interest on the outstanding capital amount from the date 1 March 2012 until 26 November 2016, and interest on the outstanding interest amount until the date of payment. There is no appeal or cross-appeal against these orders.
- [8] As mentioned at the outset, Rhoodie AJ awarded costs *de bonis propriis* and the appeal is restricted to this order. The relevant part of the order reads:

‘Costs on a punitive scale of attorney own client is to be paid by both the attorneys of record for the First Respondent and the Municipal Manager as the Second Respondent, jointly and severally, the one paying the other to be absolved.’

- [9] The learned acting judge set out the rationale for the punitive costs award as follows:

‘It is trite that an outstanding award will accrue interest and the applicant employer should at least have endeavoured to pay or to calculate the due amount, but it has to date failed to do even the most basic of exercises in determining what that interest should be.

As for the legal advice, I note that the same attorneys that were slapped with a punitive cost order *de bonis propriis* is still driving this matter. They were on record as late back as February 2014. As stated by Judge Prinsloo in her earlier judgments in this matter. I am equally of the opinion that costs should not be shouldered by the taxpayer. The municipal manager, as the Second Respondent in this matter, should be fully aware of what happened in the past, and what had been the consequence of the legal advice that had been obtained to date in this matter.’

- [10] One cannot fault the learned judge’s sentiments. Too often organs of state and municipalities engage in futile, unworthy or pointless litigation which is wasteful of taxpayers’ money. Personal costs orders and awards of costs *de bonis propriis* are useful means of disciplining officials and attorneys who act in this fashion. However, section 162(1) of the LRA provides that the Labour Court may only make an order for the payment of costs, according to the

requirements of the law and fairness. An order for personal costs against a person acting in a representative capacity (be it as an attorney or as an official) is inherently punitive. It is extraordinary in nature and should not be awarded without following the precepts of fairness. While the municipal manager was a party to the proceedings, the attorneys were not. Therefore, in the absence of any prayer for a personal costs order or one *de bonis propriis*, as in this case, it was incumbent on the court when considering such orders to have acted fairly by first inviting the second appellant and the attorneys to make representations as to why such an order should not be made. There is no evidence that the Labour Court did that in this case. The second appellant and the attorneys have been denied natural justice in accordance with the principle of *audi alteram partem*, with the result that the costs order cannot stand.

- [11] Despite sharing the misgivings of Rhodie AJ, we consider that justice and fairness will be adequately served in this instance by substituting the impugned order with one requiring the first appellant to pay the costs of the respondent's application to the Labour Court on a punitive scale.
- [12] In the result, the appeal is upheld, paragraph 5 of the order of the Labour Court dated 20 August 2018 is set aside and substituted with an order directing the first respondent in the application (the first appellant on appeal) to pay the costs of the application on the attorney and client scale.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

I agree

DM Davis

Judge of Appeal

APPEARANCES:

FOR the appellant:

Adv T Molokomme

Instructed by Maduba Attorneys

FOR THE RESPONDENT:

No appearance