



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 58/2020

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION

UNION (AMCU)

Appellant

and

MINISTER OF MINERAL RESOURCES AND ENERGY

First Respondent

CHIEF INSPECTOR OF MINING

Second Respondent

MINISTER OF CO-OPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

Third Respondent

MINERALS COUNCIL SOUTH AFRICA

Fourth Respondent

Heard: 13 May 2021

Delivered: (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 23 July 2021.)

Coram: Waglay JP, Coppin JA and Molefe AJA

JUDGMENT

MOLEFE AJA

- [1] This is an appeal only in respect of the decision of the Labour Court (van Niekerk J) to make no order as to costs. The issue is whether the learned Judge was correct to apply the default rule that the parties should bear their own costs or whether he should have applied the rule that when a party successfully litigated against the State in constitutional litigation, it is entitled to its costs.
- [2] The appellant ('AMCU') submits that the court *a quo*'s decision on costs should be set aside as the court applied the wrong legal principles in deciding what costs order to make and also fundamentally misunderstood the factual position before it.

The background facts.

- [3] AMCU and representatives of the Department of Mineral Resources and Energy ("the DMRE"), along with other representative Unions and the fourth respondent ("the Mineral Council"), as the representatives of employers, sit together as partners on the Mine Health and Safety Council ("the MHSC")¹, a statutory body established in terms of the Mine Health and Safety Act² ("the MHSA") that is responsible generally for supervising health and safety at mines, including at least once every two years, arranging and co-ordinating a tripartite summit to review the state of health and safety at mines³. The second respondent ("the Chief Inspector") chairs the MHSC. The DMRE is responsible for the enforcement of the MHSA, and the protection conferred on workers under it against employers.

¹ Section 43(2) of the MHSA provides that the MHSC must consists of five representatives of each of employers and employees in the mining industry, and four representatives of departments of the State, as well as the Chief Inspector of Mines.

² Mine and Safety Act 29 of 1996.

³ Section 43(2) of the MHSA.

- [4] On 13 March 2020, faced with the Covid-19 pandemic, the members of the MHSC agreed on a joint approach to be taken to protect workers -in mines and minimise the risk of transmission of Covid-19 in mines, and resolved to prepare and issue Guiding Principles and Guiding Note to ensure that mines took steps to protect mineworkers.
- [5] The Chief Inspector issued Guiding Principles on 26 March 2020 after taking comments from all the members of the MHSC, including AMCU. The Mining Occupational Health Advisory Committee (“the MOHAC”) a specialist advisory committee of the MHSC, met on 17 March 2020 and began work on a comprehensive Guidance Note. The Minerals Council for its part, issued a “ten-point” plan for the protection of mineworkers that it adopted on 18 March 2020.
- [6] The Chief Inspector subsequently issued a further communique dated 23 April 2020 to mines in relation to start-up of operations . The first respondent (“the Minister”) conducted inspections at mines to see whether workers were being protected, and convened several meetings with representatives of labour and business to co-ordinate an industry response. These meetings took place on 7-8 April 2020, 17 April 2020 and 22 April 2020.
- [7] AMCU’s representative on the MHSC left the meeting of 13 March 2020 early, and its representative on MOHAC did not attend the meeting of 17 March 2020. AMCU did not attend a single one of the meetings convened by the Minister.
- [8] On 5 April 2020, AMCU indicated in correspondence that it had no intention to participate in any process of engagement with the DMRE and gave these reasons:
- ‘Moreover, as AMCU, we have no reason to believe that this will be a genuine consultative engagement. Rather, we believe it will be another rubber-stamp and tick-box exercise by the DMRE to flout the rights of workers for the sake of profits of the mining bosses.’⁴
- [9] On 12 April 2020, AMCU, through its attorneys sent a letter of demand to the DMRE. This letter was simply intended to form a basis to litigate against the

⁴ Founding affidavit, Vol 2, Annexure ‘JMZO’, page 133.

DMRE. On 16 April 2020, AMCU launched an urgent application in the Pretoria High Court, which application was set down for hearing on 21 April 2020. The application was subsequently abandoned.

- [10] Four days later, on 20 April 2020, AMCU launched the second urgent application in the Labour Court. AMCU sought as its main and first alternative relief an order compelling either the Minister, or the Chief Inspector, to act under the MHSA and declare “the Covid-19 viral pandemic” a health hazard or an occupational health issue, and compelling mining companies to put in place mandatory measures to deal with Covid-19 at their mines.
- [11] At the hearing of the matter, the Minister and the Chief Inspector agreed that if the MHSA applied to Covid-19, then, steps could also be taken under the MHSA in addition to those already taken, and they assisted in constructing an order that contained time periods for such steps, and the interim relief which AMCU had not sought in its application.
- [12] The Labour Court held in favour of AMCU on the issue of whether Covid-19 is an occupational disease as defined in the MHSA, and declined to make an order of costs in AMCU’s favour. In reaching its decision, the court *a quo* took into account the factors identified in section 162(2) of the Labour Relations Act 66 of 1995 (“the LRA”), and the ordinary principles relating to cost orders in the Labour Court.
- [13] AMCU submits that it should not have to bear the costs of successful litigation that was brought to protect constitutional rights.

Costs awards on appeal

- [14] In making its order of costs, the Labour Court enjoys a wide discretion. This court will only interfere with the Labour Court’s decision if it finds that the court, in exercising its discretion, “*acted capriciously or applied the law incorrectly*”⁵. In other words, “*if it is shown that the discretion has not been exercised judicially*”

⁵ *Mbana v Shepstone and Wylie* (2015) 36 ILJ 1805 (CC) at [52].

or has been exercised based on a wrong appreciation of facts or wrong principles of law.”

[15] Section 162 (1) and (2) of the LRA provides as follows:

“(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-

(a).....

(b) the conduct of the parties-

(i) in proceedings with or defending the matter before the Court; and

(ii) during the proceedings before the Court.”

[16] There is no dispute that in determining the issue of costs, the Labour Court had regard to the factors expressly identified in section 162(2)(b) of the LRA. AMCU nevertheless contends that the Labour Court in making its order of costs, applied the wrong principle of law⁶.

AMCU's submissions

[17] AMCU submits that although this matter was heard by the Labour Court, and although the costs order was made in terms of section 162 of the LRA, the *Zungu*⁷ principle did not apply because that principle should only be applied to “litigation between employers and employees”, which AMCU submits its application was not. AMCU’s argument is that its application was in fact a constitutional challenge against the State, to which the principles of costs in the *Biowatch* case⁸ should have applied. In these circumstances, according to its argument, the Labour Court should have concluded that the *Zungu* principle

⁶ *Giddey N.O v JC Barnard and Partners* 2007 (5) SA 525 (CC) at [19].

⁷ *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC).

⁸ *Biowatch trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC). The Constitutional Court in *Biowatch* was concerned with the potential chilling effect that an adverse costs order would have on litigation conducted in the public interest.

was not applicable, and once it has made that finding, then the *Biowatch* principle “should have kicked in”.

- [18] Counsel of AMCU submitted that the costs principle in *Zungu* is meant to preserve the ongoing relationship between employers and employees, and in this regard relied on *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation) and Others*⁹ (“Ngululu”), where the Constitutional Court explained that the rule that costs orders should not be granted in labour matters is based on the special relationship that exists between employers and employees. Where that special relationship does not exist, the usual rule that costs follow the result should apply.
- [19] It is argued that AMCU only sought costs against the State respondents who were acting as regulators and not the employers. The “special relationship” which is the foundation for the *Zungu* rule therefore never existed. The Labour Court therefore erred in holding that *Zungu* principle should be extended to apply to a tripartite relationship that exists between the State, employers and organised labour in the mining industry. Firstly, because previous judgments of the Labour Court concerning the State’s role as regulator under the MHSA did not apply the *Zungu*¹⁰ rule as the issues were constitutional issues where a successful party is entitled to its costs. Secondly, the DMRE acted as a regulator to govern the relationship between employers and employees in the mining sector under the MHSA.
- [20] AMCU does not dispute that AMCU and the DMRE have an ongoing relationship, a fact which the Labour Court stated was the most important in making its decision. AMCU nonetheless contends that the court *a quo* made other findings of fact that warrant its decision on costs being set aside.
- [21] Counsel for the first and second respondents argues that every dispute before the Labour Court involves constitutional rights, namely the right to fair labour practices under section 23 of the Constitution of the Republic of South Africa,

⁹ [2020] ZACC 8; 2020 (7) BCLR 77 (CC) at para 33.

¹⁰ *International Ferro Metals (SA) (Pty) Ltd v Minister of Mineral Resources the Honourable Shabangu N.O and Others* [2015] ZALC JHB 9; *Glencore Operations SA (Pty) Ltd Coal Division v Minister of Mineral resources and Others* [2016] ZALC JHB 31; (2016) 37 ILJ 966 (LC).

1996. If AMCU's submission was correct that once a matter involves the reliance on constitutional rights against the State, and that the *Biowatch* principle must be applied, then the *Biowatch* principle would apply to every matter before this court in which the State was involved, and the court would have no discretion under section 162 of the LRA whenever the State was a party to a litigation before it. And, further, the ordinary principle recognised in *Zungu* would be rendered completely inapplicable.

- [22] While it is true that the matter did not involve an "employer-employee" relationship, the relationship between employers, organised labour and the DMRE under the MHSA is clearly analogous to the relationship between unions and employers and the general principle under section 162 of the LRA applies. Representatives of labour, employers and the State sit together on the MHSA, which body, in turn, is responsible generally for supervising health and safety at the mines.
- [23] AMCU's reliance on the *Ngululu* case as support for its proposition is, in my view, misplaced. The Constitutional Court in that case merely confirmed that where there is no ongoing relationship, (because in that case the employer had been placed in liquidation) then the principle, that costs order should generally not be made, has no application. This finding affirms that, at the heart of the principle applied in this court, is the recognition of the ongoing relationship between the litigants¹¹.

The alleged misdirection of fact.

- [24] AMCU submits that the court *a quo* made three other "material errors of fact" in relation to the conduct of the parties before and during the hearing that amount to a misdirection so serious that its decision on costs ought to be set aside on appeal, and replaced with an order that the Minister and Chief Inspector pay AMCU's costs.
- [25] *Firstly*, AMCU submits that it had been obliged to bring this application because DMRE had abdicated its responsibility to protect workers, and also that it had

¹¹ The same is true in respect of the two other cases relied on by AMCU in para 20 of its heads of argument.

been excluded from participating in the DMRE's processes aimed at ensuring that workers were protected. The Labour Court found that neither of these allegations was sustainable.

[26] AMCU submits that these findings are so flawed that they amount to a material misdirection of facts. AMCU's main submission is that the Labour Court ought to have held that the DMRE "*bore virtually all the blame*" for the litigation, while AMCU itself cannot be blamed for the failure to resolve the issue without litigation.

[27] In my view, this submission is untenable on the facts. The full relevant chronology of facts is common cause;

27.1 The Minister and the Chief Inspector were both actively involved, since before the declaration of the national state of disaster on 15 March 2020, in putting in place measures to ensure that employers took steps to protect mineworkers from the spread of Covid-19 when the workers returned to work in April 2020.

27.2 The Minister and the Chief Inspector consulted regularly during the period with all stakeholders, and prepared directions and guidelines to protect workers at mines including:

27.2.1 The Chief Director mandated MOHAC to prepare a detailed Guidance Note in relation to the prevention of the spread of Covid-19;

27.2.2 The Chief Director issued a Guideline dealing with specific issues of concern raised by business and labour on 26 March 2020, and also issued a communique dated 23 April 2020 to mines in relation to start-up of operations.

27.2.3 The Minister promulgated directions under the Disaster Management Act Regulations on 29 March 2020.

27.3 The Minister conducted inspections at mines to see whether workers were being protected and that mines were complying with the Guiding Principles.

27.4 AMCU first raised the DMRE's duties under the MHSA in its letter to the Minister dated 8 April 2020. The Minister thereafter convened two meetings at which he hoped to resolve the issues raised by AMCU through a process of engagement, within two weeks of AMCU raising the point. AMCU did not attend either of the meetings. Instead, AMCU launched the first of its urgent applications against DMRE on 16 April 2020, a week after it sent its letter of demand, and four days after then launched the second urgent application on 20 April 2020.

- [28] In these circumstances, the Labour Court's conclusion that AMCU's conduct "*indicates an attitude that served to undermine the consensus-seeking process that the DMRE has implemented and the efforts to reach consensus within a tripartite structure*" cannot be faulted.
- [29] Secondly, AMCU submits that the Labour Court ought to have held that the Minister and the Chief Inspector has acted unreasonably in failing "to insist on binding legal standards," and that since the Chief Inspector's conduct, in not acting under section 9 of the MHSA, was found to be objectively unreasonable by the Labour Court, it must follow that the Chief Inspector's response to the pandemic was unreasonable.
- [30] This mischaracterised the Labour Court's findings that once it was accepted that the Chief Inspector had the power to act under section 9 of the MHSA, then it would be unreasonable for him not to make use of that power. The Chief Inspector never contested, and it was never in dispute, that if section 9 was applicable then, he should exercise his powers under it.
- [31] Thirdly, AMCU submits that the Labour Court misdirected itself in concluding that AMCU had achieved partial success because AMCU was granted the relief it sought in the notice of motion.

[32] It is common cause that AMCU made no provision in its notice of motion for any interim relief at all. The relief was granted as a result of the acknowledgment by the Minister and the Chief Inspector of the importance of interim relief, if they were wrong on the substantive point in the dispute, and because of their willingness to engage with both AMCU and the Minerals Council as to the substance of that relief. The Labour Court was therefore entirely correct to recognise that AMCU could not claim to have been successful in relation to the grant of the interim relief.

Medical experts' costs

[33] AMCU submits that it ought at least to have been awarded the costs of its medical experts, and that it was necessary for it to brief five medical experts (including international experts) to provide their opinion on the seriousness of the Covid-19 pandemic, in particular, to show that "*the fundamental right to life of mineworkers was at stake*".

[34] Counsel for the respondents argued that no one, and certainly not the Minister or the Chief Inspector has ever disputed this. The Minister and the Chief Inspector have consistently recognised the seriousness of the pandemic since the declaration of the national state of disaster and even before, as is manifest from the facts set out above. It is also argued that AMCU does not explain why it did not present this evidence to the DMRE before commencing litigation.

Evaluation

[35] The principle in *Biowatch* is explained in *Democratic Alliance v President of South Africa and others* as follows¹²:

'as a general rule in the constitutional litigation an unsuccessful litigant in proceedings against the state should not be ordered to pay costs. The general rule is concerned not with the characterisation of the parties, but the nature of the issues. Equal protection under the law requires that costs awards should not depend on whether the litigant is financially endowed or indigent, or reliant on external funding. The critical question is whether the litigation has been

¹² 2014 (14) SA 402 (WCC) at [107].

undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive, and whether there has been impropriety in the manner in which the litigation has been undertaken.’.

- [36] The Court *a quo* was correct in finding that the *Biowatch* principle finds no application here.
- [37] The Labour Court held that no order of costs should be made against the Minister or the Chief Inspector because the DMRE and AMCU are in an ongoing relationship as social partners under the MHSA, and a costs order might undermine that relationship.
- [38] In making its order of costs, the Labour Court enjoyed a wide discretion, and this court will only interfere with the Labour Court’s decision if it finds that in exercising its discretion, the court “acted capriciously or applied the law incorrectly”¹³.
- [39] Neither the Minister nor the Chief Inspector has ever disputed the seriousness of the Covid-19 pandemic or the need to take steps before AMCU launched the urgent application, which steps culminated in the Minister on 29 April 2020 issuing a binding direction under the Regulations issued in terms of section 27(2) of the Disaster Management Act 27 of 2020¹⁴. I agree with the court *a quo*’s finding that AMCU’s conduct indicates an attitude that serves to undermine the DMRE process’.
- [40] This court has developed and consistently applied a principle that while litigation may inevitably arise between social partners, the partners should bear their own costs of prosecuting or defending the litigation. The established principles take into account that the parties that appear as adversaries in the Labour Court are often also required to work together collaboratively after the litigation is concluded, litigants before this court, including the State, are generally only ordered to pay their opponents’ costs when their conduct is

¹³ *Mbana v Shepstone & Wylie* (2015) 36 ILJ 1805 (CC) at [52].

¹⁴ The direction was issued in terms of regulation 10(8) of the Regulations.

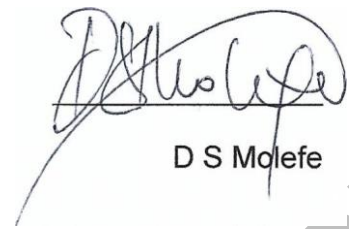
deserving of censure¹⁵, or when their conduct in the litigation has been unreasonable or frivolous¹⁶.

- [41] The conferral of jurisdiction in this court in respect of disputes arising out of the MHSa precisely recognises the similarity between the disputes that may arise under the MHSa, such as this one, and those under the LRA. The MHSa was itself a product of negotiation between unions, employers and the DMRE. One of the objects of the MHSa is to “promoteco-operation and consultation on health and safety between the state employers, employees and their representatives.”¹⁷
- [42] The Labour Court correctly held that the most important fact before it was that AMCU and the DMRE have an ongoing relationship and that an adverse costs order might negatively affect that relationship.
- [43] The Labour Court had proper regard to all of the facts and circumstances of the application, including the conduct of the parties, and the potential effect of a costs order on the parties’ ongoing relationship and for reasons aforesaid. In so doing, the court *a quo* exercised its broad discretion properly, and was consistent with all of the established principles relating to order of costs. Therefore, there is no basis for this court to interfere with its decision.
- [44] Although in their heads of argument the respondents asked for a costs order against the appellant, at the hearing of this matter the respondents’ counsel submitted that there should be no order as to costs.
- [45] For all these reasons, the appeal is dismissed with no order as to costs.

¹⁵ *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others* (2019) 40 ILJ 773 (CC) at [91].

¹⁶ *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin N.O & Another* (2008) 29 ILJ 1707 (LAC) at [19].

¹⁷ Section 1(6) (iii) of the MHSa.



D S Molefe

Acting Judge of the Labour Appeal Court

Waglay JP and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT:

A Dodson SC and M Bishop

Instructed by Richard Spoor Inc

FOR THE RESPONDENT:

M A Wesley

Instructed by State Attorney