IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 15/2014

MARTIN PHILLIP VERMAAK **Appellant**

and

MEC FOR LOCAL GOVERNMENT & TRADITIONAL

AFFAIRS, NORTHWEST PROVINCE **First Respondent**

GREATER TAUNG LOCAL MUNICIPALITY **Second Respondent**

MPHO SIMON MOFOKENG **Third Respondent**

KAONE LEBELO & OTHERS **Fourth to Fifty-Third Respondents**

Heard: **1 September 2015**

Delivered: **10 January 2017**

Summary: Costs – attorney and own client – when to be granted- factors to be considered – General approach to costs in the Labour Court restated – requirements of law and fairness.

Coram: Tlaletsi DJP, Musi JA *et* Makgoka AJA

JUDGMENT

MAKGOKA AJA

[1] This is an appeal against a punitive costs order made against the appellant by the Labour Court (Moshoana AJ) on 12 March 2013. This followed the dismissal of the appellant's urgent application in which he had sought to interdict the second respondent from instituting a disciplinary enquiry against him. The appeal is opposed by the second respondent (the municipality), which supports the order of the Labour Court.

[2] The facts are simple. The appellant was employed as a chief financial officer (CFO) by the municipality with effect from 16 January 2012. On 1 August 2012, the third respondent, purportedly as a municipal manager, tabled a report regarding the appellant's alleged misconduct before the municipality's council. The third respondent appointed a firm of attorneys to investigate the allegations. On 19 October 2012, the appellant was called to attend a disciplinary enquiry to answer certain charges. The enquiry commenced on 8 November 2012. On 18 December 2012, he was found guilty of various charges. The presiding officer recommended that the appellant be dismissed with immediate effect.

[3] On 29 January 2013, the third respondent served the appellant with a letter informing him that the council of the municipality had accepted and confirmed the recommendation of the presiding officer that the appellant should be dismissed with effect from 25 January 2013. On 3 February 2013, the municipality advertised the appellant's erstwhile position of chief executive officer. On 14 February 2013, the appellant launched an urgent application in the Labour Court seeking to set aside the process leading to, and including, his dismissal. On 25 February 2013, he filed a referral for unfair dismissal at the Commission for Conciliation Mediation and Arbitration (CCMA).[1] By the time the urgent application served before the Labour Court, the referral to the CCMA was pending.

[1] The appellant was eventually reinstated with full retrospective effect following a successful challenge of his dismissal at the CCMA. The CCMA award was not taken on review and the appellant is still in the employ of the municipality as the chief financial officer.

[4] The thrust of the appellant's urgent application was the validity of the third respondent's appointment by the municipality. In particular, the appellant challenged the validity of a resolution taken by the council of the municipality on 13 June 2012 extending the contract of the third respondent as municipal manager. He contended that the appointment was invalid and therefore any steps taken by the third respondent after the extension of his contract as per that resolution was of no force and stood to be set aside.

[5] The urgent application was opposed by, among others, the second respondent. The opposing respondents argued that the application was not urgent as the resolution sought to be set aside had been taken already in June 2012, and the application was only brought in February 2013. The appellant contended that although he was dismissed in January 2013, his position was advertised on 3 February 2013, and therefore the position could be filled before the application could be finalised if he had approached the court on a normal basis.

[6] The opposing respondents adopted a different view on urgency. Their views in this regard are set out in a letter dated 21 February 2013 sent to the appellant's attorneys. In that letter, it was suggested that the application was defective, and should be withdrawn and that a punitive costs order would be sought in the event the application was not withdrawn. Needless to say, that suggestion was not heeded, and the matter was argued on 12 March 2013. Urgency was argued *in limine*, during which counsel for the opposing respondents argued for the matter to be struck from the roll with a punitive costs order on an attorney and client scale. The opposing respondents' contentions found favour with the Labour Court, and in an *ex tempore* judgment, the application was struck from the roll and costs were granted on attorney and own client scale against the appellant.[2]

[7] In awarding costs on attorney and own client scale, the Labour Court reasoned as follows:

[2] See the judgment of the Labour Court on the SAFLII website reported as *Vermaak v Taung Local Municipality (*JR 315/13) [2013] ZALCJHB 43 (12 March 2013).

> 'On 3 February 2013 he (the appellant) became aware of another angle that will (sic) his relief in the long run, that is the filing of the post. He does nothing until 7 February 2013 when he went to consult the legal team. More so he does not seek to interdict the filing of the post, that part of the relief, in my mind if it was specifically sought, might have been perhaps urgent. I do not agree that that kind of relief ought to be implied …The applicant finds himself in the same position as millions of employees who are dismissed, whether fairly, unfairly or lawfully or unlawfully, on a daily basis. The question is what makes the applicant special to have his case determined quickly. That is the reason why rule 8 requires a party to set out the reasons why the relief is necessary. His relief is still there on another day, like millions of dismissed employees. The fact that the applicant chose to peg his claim as one of unlawfulness as opposed to unfairness is of no moment. In the premises I am not persuaded that the application is urgent. That brings me to the question of costs. Mr Olua had pressed on me to make a costs order at a punitive scale. The reason behind that being that the applicant was warned in advance. To my mind this application was ill-conceived. The applicant has already sought a remedy in another forum, the CCMA. As to why he came to this court albeit under the banner of unlawful dismissal, it baffles me. I know I do not have to deal with the merits of the other points raised and I have read the heads filed by the applicant's counsel with care. I do not believe that the applicant is to be considered at any different level than any employee who had been dismissed.'

[8] In this Court, it was contended that the Labour Court misdirected itself in the exercise of its discretion by awarding costs in the first place, alternatively, awarding costs on a punitive scale against the appellant. It was argued that the court acted upon a wrong principle or failed to exercise its discretion properly or fairly in the circumstances of the matter. It was further contended that there were no special or extraordinary circumstances warranting the type of order made against the appellant, and that a fair order would have been one where each party paid its own costs, and at worst for the appellant, he should have been ordered to pay the costs on a party and party scale.

[9] Unsurprisingly, the municipality supports the costs order made by the Labour Court. On its behalf, it was contended that the Labour Court properly took into

account the fact that the appellant sought to challenge only in February 2013, a resolution which had been taken as early as June 2012. According to the municipality, this was grossly vexatious and abuse of the court process, which had to be met with a punitive costs order. It was further contended that the appellant's urgent application was premised on "a perverse" view of the law and a costs order as ordered by the Labour Court was therefore justified under the circumstances.

[10] The awarding of costs in the Labour Court is governed by s 162 of the Labour Relations Act 66 of 1995 (LRA) which provides that in making orders for payment of costs, the Court has to have regard to the requirements of law and fairness. In deciding whether to order payment of costs, the court may take into account, among others, the conduct of the parties in proceeding with the matter before the court and during the proceedings. In *Moloi v Euijen,*[3] it was observed that the framework of s 162 supports the proposition that when making orders of costs the requirements of law and fairness are paramount.[4] The requirements of law and fairness are on equal footing, and none is secondary to the other. See in this regard *Callguard Security Services v T&GWU*[5] and *Xaba v Portnet Ltd*.[6]

[11] The rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court and such orders are made in accordance with the requirements of law and fairness. See in this regard *MEC for Finance (KZN) and Another v Dorkin NO and Another*[7] where Zondo JP explained the rationale for that approach:

> '[T]he norm ought to be that costs orders are not made unless those requirements (of law and fairness) are met. In making decisions on costs orders this court should strive to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employer organisations from approaching the Labour Court and this court to have their

[3] *Moloi and Another v Euijen and Another* (1999) 20 IJL (LAC).
[4] Para 20.
[5] *Callguard Security Services (Pty) Ltd v Transport and General Workers Union and Others* (1997) 18 ILJ 380 (LC).
[6] *Xaba v Portnet Ltd* (2000) 21 IJL 1739 (LAC).
[7] *Member of the Executive Council for Finance, Kwazulu-Natal and Another* (2008) 29 ILJ 1707 (LAC) at para 17.

> disputes dealt with, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. This is a balance that is not always easy to strike, but if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes…'[8]

[12] The award of costs and the scale thereof are a matter within the discretion of the court making the order.[9] The appeal court will not easily interfere with the exercise of that discretion. It can only interfere where the discretion was exercised on a wrong principle or was capriciously made. Put differently, a court of appeal's power to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court below, acting reasonably, could have made the order in question.[10] In applying this principle to the present case, it should always be borne in mind that the court not only granted costs against the losing party, but also that such costs were ordered on a punitive scale of attorney and own client.

[13] I cannot fault the Labour Court in its reasoning and conclusion that the application was not urgent and that it was misconceived. But I part ways with the Labour Court in its conclusion that that constituted a basis for a costs order, let alone a punitive one. The scale of attorney and client is the highest scale possible that a litigant can be ordered to pay. It is an extraordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. The nature and reach of such an order has been described as "exceptional, very punitive and as indicative of extreme *opprobrium*."[11] The learned authors of *Erasmus Superior Court Practice* list various circumstances in which the courts have, over the years, awarded costs on an attorney and own client scale. One of the instances is where a party's conduct has been found to be "unconscionable,

[8] At para 19.
[9] *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 976H; *Minister of Prisons and another v Jongilanga* 1985 (3) SA 117 (A) at 124B.
[10] See *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670D – E.
[11] *Erasmus Superior Court Practice* at E12-26.

appalling and disgraceful". See also *Sentrachem v Prinsloo*[12] where it was reiterated that an award of attorney and own client costs had to be seen as an attempt by the Court to go one step further than an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation, and that it was an extraordinary order which could not be made without good reason.[13]

[14] In the present case, the only basis on which the order was premised was that the matter was not urgent and that the appellant has been warned in advance that a punitive costs order would be sought against him, should he not withdraw the application. That, in my view, can hardly be described as "unconscionable, appalling or disgraceful". The very fact of a finding that the application was "misconceived" of itself excludes all of the above descriptions. It should be borne in mind that in making the impugned order, the Labour Court moved from the default position (of no costs orders in the Labour Court, as explained in para 11 above) to the extreme end of the spectrum (order of costs on attorney and own client scale).

[15] It is discernable from a consideration of the authorities that where the Labour Court has made a costs order, it has invariably considered that it was deviating from the general premise, and therefore carefully reasoned the basis of such an order.[14] Unfortunately this is not the case in the present matter. What is more, the Labour Court made an order not sought by any of the opposing respondents. As stated earlier, the opposing respondents requested an order on attorney and client scale. Instead, the court made an order on attorney and own client scale. There is no indication in the record of proceedings or in its judgment, why the court adopted that route. It would have been preferable, if the court was of the view that the circumstances of the case warranted costs on a much higher scale than sought by the opposing respondents, to have given the parties notice of its intention, and invited them to address it on that aspect.

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[12] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (SCA).
[13] At 22B-D.
[14] See for example *Rudman v Maquassi Hills Local Municipality and Others* (J1472) [2013] ZALCJHB 166; (2014) 35 ILJ 765 (LC) 30 July 2013; *New Justfun Group (Pty) Ltd v Turner and Others* (J786/14) [2014] ZALCJHB 177 (14 May 2014).

[16] The other consideration which the Labour Court seems not to have taken into account is the fact that the appellant is an individual employee not supported by a trade union. In *Lewis v Media 24 Ltd,*[15] it was observed that the Labour Court has generally been reluctant to order costs against an individual employee. Indeed, there is an unambiguous trend in the judgments of the Labour Court, this Court and the erstwhile Appellate Division, in which those Courts have declined to make costs orders against unsuccessful individual litigants not supported by trade unions, first, because of their vulnerable financial position, and second, because a costs order may deter similarly placed individuals from approaching the courts.[16]

[17] For the above reasons, I conclude that the Labour Court did not exercise its discretion properly. This Court is therefore at large to interfere with the award of costs and make an order that we consider appropriate in the circumstances. Taking into account considerations of law and fairness, I am of the view that the order of the Labour Court should be substituted with one of no order as to costs.

[18] With regard to the costs of this appeal, I take a view too, that no order should be made as to costs. I take into account that there is an on-going relationship between the parties as the appellant has been reinstated as the municipality's chief financial officer. One of the considerations in making costs orders in the Labour Court is the on-going relationship between the parties, which will survive after the dispute has been resolved by the court. Therefore, a costs order, especially where the dispute has been a *bona fide* one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.[17]

[19] In the result, the following order is made:

1. The appeal is upheld;

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[15] *Lewis v Media 24 Ltd* (2010) 31 2418 (LC) para 129.
[16] *NUM v East Rand Gold & Uranium Co. Ltd* (1991) 12 ILJ 1221 (A); *Malandosh v SABC* (1997) 18 ILJ 544 (LC); *Value Logistics v Basson and Others* (2011) 32 ILJ 2552 (LC*); University of Pretoria v CCMA and Others* (2012) 33 ILJ 183 (LAC); *Nombakuse v Department of Transport & Public Works: Western Cape Provincial Government* (2013) 34 ILJ 671 (LC).
[17] *NUM v East Rand Gold and Uranium Co. Ltd* (1991) 12 ILJ 1221 (A).

2. The costs order granted by the Labour Court is set aside and in its stead the following is substituted:

'There is no order as to costs'

3. Each party shall bear their own costs of the appeal.

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TM Makgoka

Acting Judge of Appeal

Tlaletsi DJP, Musi JA concur in the judgment of Makgoka AJA.

APPEARANCES:

FOR THE APPELLANT:	Adv. R. Grundlingh Instructed by Nilsen Steenkamp & Koen Inc Johannesburg
FOR THE SECOND RESPONDENT:	Adv. Sibuyi Instructed by Kgomo Mokhetle & Tlou, Mahikeng
FOR THE FIRST, THIRD AND FOURTH TO FIFTY-THIRD RESPONDENTS.	No appearance