

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA150/17

In the matter between:

MUSAWENKOSI THEMBANI NCANANA

First Appellant

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

Second Appellant

And

DUAL PRODUCTS INTERNATIONAL (SA) CC

First Respondent

GERRY VAN RENSBURG

Second Respondent

STEPHEN VAN RENSBURG

Third Respondent

JACO KOEN

Fourth Respondent

Heard: 23 May 2019

Delivered: 13 June 2019

Summary: Appeal against adverse costs order upheld.

CORAM: COPPIN JA, MURPHY *et* SAVAGE AJJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the judgment of the Labour Court (Prinsloo J) in a contempt application, ordering the appellants, in effect, to jointly and severally pay the costs of the fourth respondent (“Mr Koen”), the one paying the other to be absolved. Leave to appeal was granted on petition.
- [2] The appellants contend that the Labour Court, in making such an order, had not exercised its discretion judicially. Mr Koen, who has opposed this appeal, submits, in effect, that the costs order was correctly made, in that the appellants had cited him together with the other respondents in contempt proceedings, but had failed to make out a case against him and the costs order was, therefore, justified.

The background facts

- [3] Until his dismissal on 29 July 2013, the first appellant (“Mr Ncanana”), a member of the second appellant (“NUMSA”), was employed by the first respondent (“Dual Products”) as an assistant boilermaker at its plant in Boksburg. Mr Koen was the workshop manager. Dual Products, a closed corporation, at all times had two members namely the second respondent (Mr

Gerry Van Rensburg) and his son, the third respondent, Mr Stephen Van Rensburg (“Mr Van Rensburg”).

- [4] Following his dismissal, Mr Ncanana referred an unfair dismissal dispute to the Metal Industries Bargaining Council. The matter eventually proceeded to arbitration, following an unsuccessful conciliation. The arbitrator found that Mr Ncanana’s dismissal was substantively and procedurally unfair and required Dual Products to retrospectively reinstate him to the same position he held at the time of his dismissal and on the same conditions that pertained then. In addition, Dual Products to pay him back pay in the amount of R 39,114 – 9 and Mr Ncanana was to resume work on 17 March 2014. The employer was to comply with the terms of the award within seven days of the award having been served on it. The award was served on the employer on 18 March 2014, but there was no compliance with it.
- [5] On 27 May 2014, the award was certified by the Commission of Conciliation Mediation and Arbitration (the CCMA) in terms of section 143(3) of the Labour Relations Act¹ (“the LRA”) declaring the award binding. This enabled its enforcement as contemplated in that section. Section 143(4) of the LRA provides – “if a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court”.
- [6] Mr Ncanana’s attempts to be reinstated were fruitless and he was given “the run-a-round”. On 24 January 2017, he again attended at the premises of Dual Products in an attempt to achieve compliance with the award. In his affidavit in support of the application for contempt, he states that he was told by Mr Koen to come back on 30 January 2017, as he (Mr Koen) wanted to consult with the employer’s Legal Department. According to Mr Ncanana, when he returned on 30 January he was met by Mr Van Rensburg and Mr Koen. He was told by Mr Koen to only return on 1 February 2017 as Mr Koen wanted to check with the employer’s Human Resources Department as to how they

¹ Act 66 of 1995.

were going to comply with the terms of the award. According to Mr Ncanana when he returned on that date he was told by Mr Koen that they were not going to comply with the arbitration award and Mr Koen gave Mr Ncanana a letter dated 31 January 2017, on the letterhead of Dual Products and signed on its behalf.

- [7] The letter advised Mr Ncanana as follows: “the Company received notification from your attorneys on 17 January 2017 that you would report for duty at the premises of Dual Products International (SA) CC on 24 January 2017. You then arrived at the premises of the company on 30 January 2017 and were told to arrive at the company on 1 February 2017. The company places on record that your representatives, as well as the sheriff of the court, was informed that the wrong entity was cited on the documentation presented and that the documentation was therefore not binding. Despite the above, the company attempted to resolve the matter and an offer was made by means of a financial settlement, failing which to accept the offer, you had to report for duty. No response was received and you failed to report for duty and it was deemed that you abandoned your claim. The company is unsure why you are attempting to revive your claim to be reinstated after such a lengthy period as it can be claimed that you have absconded. It is proposed that a meeting be scheduled between yourself, your representatives and the company to resolve the matter in an amicable manner”.
- [8] However, according to the appellants, it was the respondents, including Mr Koen, who had failed to take steps to comply with the award. The appellants consequently brought an application in the Labour Court, seeking an order, *inter alia*, that all the respondents be found guilty of contempt of court. On 20 April 2017, the Labour Court issued a rule *nisi*, *inter alia*, calling upon the respondents to explain their conduct by way of affidavit. They were also to show cause why they were not to pay the costs of the application.
- [9] Mr Koen filed an affidavit in which he proclaimed his innocence, but he did not directly traverse the appellants’ averments concerning his conduct when Mr Ncanana had come to the premises of the employer, especially on 24 January 2017, 30 January 2017 and 1 February 2017. Instead, Mr Koen spoke about

events of 21 February 2017, March 2017, July 2017 and in August 2017 and, seemingly, expressed surprise at his implication in the contempt proceedings. He, *inter alia*, states in his affidavit that he was not aware of the Labour Court orders that had been served and says that if he had been aware of them he would have appeared in court in response.

- [10] Mr Koen denies being involved in Mr Ncanana's disciplinary hearing and states that, apart from knowing that Mr Ncanana's employment had been terminated after a disciplinary hearing, he had no further knowledge of the matter. He states: "to my knowledge I cannot assist the honourable court in any manner or form pertaining to the aforementioned matter". He goes on to request that he should not be held liable for contempt, because his failure to attend court on 24 March 2017 and 20 April 2017 was not due to his fault.
- [11] What is obviously missing from Mr Koen's affidavit is a response to the pointed averments made by the first appellant (Mr Ncanana) concerning Mr Koen's complicity in the failure or refusal of Dual Products to comply with the award. Save for his general denial of knowledge of the court orders, he failed to engage the detailed averments made by the appellants concerning his conduct, particularly on the dates referred to above, which could be construed as aiding and abetting non-compliance with the certified award.
- [12] It appears that before the hearing, Dual Products and Mr Ncanana entered into a written agreement of settlement, in terms of which Dual Products was to pay Mr Ncanana an amount of money. Even though it is recorded in the preamble of the settlement agreement that the parties to the agreement were Dual Products and Mr Ncanana, clause 4.1 purports to extend the settlement to all the parties. It is recorded in clause 4.1 that the agreement was in full and final settlement of the disputes between the "applicants" (referring to the appellants) and the "respondents" (seemingly referring to all the respondents identified on the face of the settlement agreement, including Mr Koen). Alongside that clause appear multiple endorsements (i.e. not just of two parties). The settlement agreement is dated 11 August 2017.

[13] However, on that same date, the Labour Court made an order in the following terms, which, at best, is ambiguous about whether Mr Koen was part of the settlement:

“1. The court order issued on 20 April 2017 is discharged.

2. The settlement agreement entered into by and between the applicant and the first respondent on 11 August 2017 and marked “X” is made an order of court.

3. The first and second applicants are ordered to pay the fourth respondent’s costs, the one paying the other to be absolved.”

[14] Reasons for the costs order were requested on behalf of the appellants on the same day as the order. These were furnished on 24 August 2017. The Labour Court found, *inter alia*, that Mr Koen had filed an affidavit in compliance with its rule *nisi*, calling upon him to show why he should not be found guilty of contempt of court. The Labour Court further made reference to submissions that were made on behalf of Mr Koen to the effect that the appellants were to pay his costs because no case of contempt had been made out against him. The court then found that there had been no proof that an award had been made against Mr Koen, or that he was in a position, or had the capacity to execute the order, as he was merely a workshop manager.

[15] Even though the Labour Court went on to refer to the broad discretion that it had in terms of the LRA to make costs orders according to the law and fairness – it ultimately made its order on the basis that the appellants had “dismally failed to make out a case for contempt against” Mr Koen, and found that “fairness dictates that he cannot be expected to endure costs for defending litigation that ought not to have been brought against him in the first place”.

[16] This Court may only interfere with the Labour Court’s decision on costs if it satisfied that there has not been a judicial exercise of its discretion in that

regard.² This includes a situation where the Labour Court based its decision on the wrong view of the facts or the law, or where it failed to take into account relevant facts. As has been held by this Court, the award of costs does not necessarily follow on the result, but is to be based on an assessment of all the relevant facts, the law and fairness,³ success being only one of the factors, albeit an important one, that is to be considered in conjunction with other factors.

[17] While the joinder of a party in contempt proceedings could have been dispensed with where the party merely acted as an agent of the principal, the joinder may, nevertheless, be reasonable and thus justified in the light of the facts. Even though the award had not been made against Mr Koen personally, he was implicated by the appellants as an agent of the employer who participated in the employer's efforts to frustrate the appellants and to not comply with the award. Even though he may not have been guilty of contempt of court himself, the Labour Court failed to take into account that he could nevertheless be held liable for his conduct in the contempt saga. In particular, the Labour Court did not take into account that even though he filed an affidavit, Mr Koen failed to deal with the averments made by the appellants concerning his conduct on specific dates.

[18] As regards the settlement, it is not altogether clear what the intention with clause 4.1 was, and whether the Labour Court had been informed that Mr Koen was not part of the settlement. The fact that the application against Mr Koen was not dismissed supports the perception that Mr Koen was part of it, but the fact that his costs were still an issue detracts from that perception, because the settlement in clause 4.1 contemplates a full and final settlement of all the disputes between the parties identified in that clause. It does not appear from the record before us how Mr Koen's costs still remained an issue in those circumstances, but the Labour Court should have clarified that aspect. In argument before us, counsel for Mr Koen informed us that Mr Koen

² See: *Merber v Merber* 1948 (1) SA 446 (A) 453; *NUMSA and Others v Fibre Flair CC t/a Kango Canopies* [2000] 6 BLLR 631 (LAC) at 633-634; *Ball v Bambalela Bolts (Pty) Ltd* [2013] 9 BLLR 843 (LAC) para 28.

³ See, *inter alia*: section 162 of the Labour Relations Act, 66 of 1995; *MEC Finance: KwaZulu-Natal and Another v Dorkin NO and Another* [2008] 6 BLLR 540 (LAC) paras 19-20.

was not part of the settlement. This was not contested. There is, therefore, no need to deal any further with the settlement.

[19] Notwithstanding, the joinder of Mr Koen it cannot be said to have been unreasonable in the circumstances, in particular since the conduct attributed to him is reasonably susceptible of being constructed, at least *prima facie*, as aiding and abetting a wilful non-compliance with the certified award. As has been held by the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality*:⁴ “When a court order is disobeyed, not only the person named for the party to the suit but all those who, with the knowledge of the order, aided and abetted the disobedience or wilfully, are party to the disobedience [and] are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute.”

[20] The facts, in that case, illustrate that even though the agent may not be guilty of contempt his, or her, conduct in relation to non-compliance with a court order could merit censure in the form of an adverse costs order against him, or her. The appellants’ case against Mr Koen was essentially that he interfered in a manner that was tantamount to aiding and abetting the disobedience and wilfulness of the employer in complying with the certified award. The appellants’ pointed averments about the nature and extent of his interference went unanswered. On the appellants’ version, which was not addressed by Mr Koen, he had knowledge of the certified award at the relevant, material times.

[21] In any event, Mr Koen’s conduct called for an explanation and the appellants did not act gratuitously and thus unreasonably, in joining him in the contempt application. The fact that it may not have been proven beyond a reasonable doubt that Mr Koen’s conduct amounted to contempt, was not (solely) determinative of the question of costs. His joinder to those proceedings was

⁴ 2015 (5) SA 600 (CC) para 47.

not without reason and was justifiable. Since the issue of Mr Koen's actual liability is not before us, I make no finding in that regard.

[22] Although it is our view that the appeal should succeed it does not follow that Mr Koen should pay the costs of the appeal. Taking all the facts, the law and fairness into account, there should, similarly, be no order of costs at this juncture.

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

1. The appeal is upheld.
2. The order of the Labour Court that "the First and Second Applicants... pay the Fourth Respondent's costs, the one paying the other to be absolved" is set aside, and is replaced with the following order: "There is no order as to costs."
3. No order is made in respect of the costs of the appeal.

P Coppin

Judge of the Labour Appeal Court

Murphy and Savage AJJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

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FOR THE RESPONDENT:

JP Duvenhage

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LABOUR APPEAL COURT