

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case number J2468/10

In the matter between:

SUID AFRIKAANSE ONDERWYSERUNIE

1st Applicant

NATIONAL PROFESSIONAL TEACHERS'

ORGANISATION OF SOUTH AFRICA

2nd Applicant

And

THE HEAD OF DEPARTMENT, GAUTENG

DEPARTMENT EDUCATION

1ST Respondent

THE MEC FOR EDUCATION, GAUTENG

2ND Respondent

THE MEC FOR FINANCE, GAUTENG

3RD Respondent

THE PREMIER OF GAUTENG

5th Respondent

THE DIRECTOR GENERAL OF

TREASURY PERSAL

6th Respondent

SITA (PTY) LTD

7th Respondent

Judgement

Molahlehi J

Introduction

1]This is an urgent application in terms of which the applicants sought an order to have the second to the sixth respondents declared to be in contempt of court for failing to comply with the order which was made by Steenkamp J on the 21 December 2010. In that order the respondents were ordered to refund all monies deducted from the salaries of the applicants' members pertaining to the public service sector strike that took place towards the end of 2010. The refund was to be made pending the compilation of a factually correct database regarding attendance at schools by members of the applicants during the strike action. The respondents were also ordered to pay the applicants' costs.

2]On the 11th January 2011 this court made an order on the following terms:

- *“The first, second, fifth and sixth Respondent are ordered to comply with the order of this Honourable Court made by Steenkamp J (on 21 December 2010) on or before 14th January 2011;*
- *In the event of the Respondents failing to do so , they will be in contempt of the aforesaid order and to show cause on or before 25th January 2011 why an order in terms of the notice of motion dated 3rd January 2011 should not be granted;*

- *The judgment in relation to costs is reserved.”*

3]The only issue which this court needs to determine in this judgement concerns to the issue of costs. The applicants as will appear more in details later contend that the respondents should be ordered to pay costs on a punitive scale.

Background facts

4]The general background concerning the deductions which were effected by the respondents are set out in the judgement of Steenkamp J. It is not necessary in my view to repeat the same in this judgement. However, those facts are taken into account to the extent that the applicant argued that they form part of the case to support their contention that they are entitled to be paid costs on a punitive scale.

5]The case of the applicant as concerning the present matter is that after the judgement was made on the 21st December 2010, the applicant heard nothing from the respondents. On 28th December 2010, the applicants’ attorney telephonically enquired from the respondents’ attorney as to what progress had been made regarding compliance with the court order. During that conversation the respondents’ attorney indicated that he had sent an email to the applicants’ attorney regarding the issue of the compliance with the court order. The deponent to the founding affidavit

of the applicants, Mr Delport, says that on enquiry their attorney confirmed that the email was indeed sent. The email dated 28th December 2010 reads as follows:

“Please advice (sic) that, we instructed our client to implement the court judgment as ordered by the court. It was brought to our attention that it will not be possible to implement it as persal was closed on the 20th December 2010 and that the next sitting of persal committee will be on the 3rd of January 2011. The reversal will be tabled then for supplementary run, which could take two to three weeks.

We trust you will find this in order.”

6]The applicants responded to the above email on the same day, 28th December 2010 and stated amongst others that:

“The terms of the court order are patently clear. Payment to affected SAOU and NAPTOSA members should be made not later than 31 December 2010.

There is absolutely no reason why payment should not be made timeously. If necessary, Persal’s staff members’ leave should be cancelled and all forces mustered to implement the court order.

The email goes further to indicate that the delay in implementing the

court order would cause prejudice to the members of the applicants because they would not be able to meet their financial obligations. The author of the email goes further to say:

“It is my instructions to proceed with a further urgent application against the heads of the applicable departments of the GDE and Persal for their incarceration for contempt of court, should they persist in their failure to implement the court order by the 31st instant. We hereby give notice that if our clients are forced to bring such the application, we shall ask the court to order that the delinquent heads pay the Applicants legal cost on an attorney and client scale in their personal capacities.”

7]The respondents’ attorney replied to the above communiqué of the applicants on 3rd January 2011 and indicated that the persal committee would *“definitely be sitting to work on the repayment process.”*

8] The respondents, whilst conceding that they have not complied with the court order, contend that they have not committed a contempt of court. They provide three reasons for not implementing the court order, which are:

- due to security measures that have been put in place to avoid fraud;

- the fact that the relevant people who are responsible for effecting the changes were on leave; and
- The National Treasury had stopped accepting system change control requests.

9]The respondent's further state in their answering affidavit that a special supplementary reverse of the deductions will occur on the Persal system on the 10th January 2011 and refunds will be effected on the 14th January 2011.

Principles governing awarding of costs

10] In considering whether or not to grant costs the court is guided by the provision of s 162 of the LRA. In terms of that section the court has discretion to make an order as to costs, according to the requirements of law and fairness. Section 162 of the LRA reads as follows:

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

11]The first aspect of s 162 (1) is that costs may be awarded according to the requirements of the law. The courts have interpreted this to mean that costs would follow the results. In other words a successful party would be entitled to costs. See *City of Cape Town v SAMWU (2008) 7 BLLR*

618 (LC).

12]The second aspect of s 162 of the LRA, concerns the consideration of fairness. It is this aspect of the legislation that makes costs in labour matters not to automatically follow the results. In *Apollo Tyres (Pty) Ltd (formally Dunlop Tyres Internal (Ladysmith (Pty) Ltd) v NUMSA & Others* 2009 JOL 24326(LC), this court in dealing with the same issue and relying on the authorities of *Jacob James v Reguest Life Company Ltd* JS268/06 – unreported and *Collguard Security Services (Pty) Ltd v Transport & General Workers Union & Others* (1997) 18 ILJ380, held that:

“Costs in this Court do not automatically follow their results because of the provisions of section 162 of the Labour Relations Act 66 of 1995 which provides that the court may make an order for the payment of costs, according to the requirements of the law and fairness (see also SAMWU & another v SA Local Government Association, unreported judgment case number C229/07 and City of Cape Town v SAMWU [2008] 7 BLLR 618 (LC) also reported at [2008] JOL 21770 (LC).

13]The court went further quoting from *Collguard Security* to say:

”It seems to me that what the Act has decreed is that whether or

not this court should or should not make an order of costs in a particular matter depends on the requirements of the law and fairness.’ In my view it is therefore important to appreciate that consideration should be given not only to the requirements of the law in disregard of the requirements of fairness nor should consideration be given only to the requirements of fairness in disregard to the requirements of the law.”

14]It seems to me that the reason why the court in *Collguard Security* said that both the requirements of law and fairness should be treated equally in considering whether or not to grant costs is because the underlying consideration which is to be informed by the general purpose of awarding costs. The general purpose of awarding costs as set out by Van Winsen at all, in *The Civil Practice of the Supreme Court of South Africa* (4th Ed Juta) page 701, is to indemnify the successful litigant for the expense to which he or she has been put through by having been unjustly compelled to initiate or defend litigation.

15]The provisions of s 162 of the LRA is not different to those of s 17 C (2) of the 1986 Act. The decision in *National Union of Mineworkers v East Rand Gold Mine & Uranium Co Ltd* 1992 (1) SA 700 (A), was endorsed by Mlambo AJA, as he then was, in *Chevron Engineering (Pty) Ltd v Nkambule & Others* 2004 (3) SA 495 (SCA) para 42. In that case which

was decided under s 17 C (2) of the 1956 Labour Relations Act the court in dealing with the issue of costs had the following to say:

“Although the appellant succeeds on appeal, when deciding the question of costs discretion must be exercised after taking into account the requirements of law and fairness. Section 17C (2) specifically enjoins this Court to decide the question of costs “according to the requirements of law and fairness”. The guidelines as to fairness are set out in National Union of Mineworkers East Rand Gold & Uranium Ltd 1992 (1) SA 700 (A) at 738F–739G (see also Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union 1994 (2) SA 204 (A) at 221A–C). The proper approach is to take account of the conduct of the parties during the dispute and in the conduct of the litigation. The general approach developed by courts acting in terms of this Act is that costs do not automatically follow the result, unless there are special or exceptional circumstances justifying a costs order. Mala fides, unreasonableness and frivolousness have been found to be factors justifying the imposition of a costs order.”

Evaluation

16]The counsel for the applicants in support of the contention that the respondents should be ordered to pay costs relied on the *Minister of Health & Another v Bruckner* [2007] 5 BLLR 418 (LAC) and *Fakie NO v*

CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA). He also argued that account should be taken that Steenkamp J, did issue costs in this matter despite the ongoing relationship between the parties. In reasoning as to why the respondents had to pay the costs of the applicants the Learned Judge had the following to say in his judgment:

“[51] The applicants have made out a case for the relief sought.

Although they have an ongoing relationship with the respondents, they were forced to incur significant legal costs to approach this court only after attempts at an amicable resolution failed. In law and fairness, costs should follow the result in this case.

17]In my view the case of *Minister of Health & Another[supra]*, does not provide any assistance in considering whether or not costs should be awarded because in that case whilst the court was dealing with contempt proceedings and the court awarded costs against the respondent on appeal the court did not give reasons for awarding such costs. The same applies to the costs which had been granted by the court a quo. The Labour Appeal Court simply confirmed the decision of the Court a quo without providing reasons as to why it agreed with that decision concerning the awarding of costs. There is no citation provided for the judgement in the Court a quo and therefore this Court is unable to

determine why costs were awarded in that case.

18]In as far as the decision of Steenkamp J, in the application to interdict the deductions in this matter is concerned, it is apparent that the Court awarded costs having regard to the principles set out in *National Union of Mineworkers v East Rand Gold & Uranium* [supra] in which the LAC held that as a general principle costs should not be granted where a relationship exists between them.

19]In my view the facts in the present matter are different to those presented when this matter came before this Court in the urgent application to interdict the deductions from the salaries of the applicants' members. It is clear that in that case the Court arrived at the decision to award costs in favour of the applicants because their endeavour at seeking an amicable solution to the dispute was frustrated by the respondents. I will in this regard revert back to the facts and circumstances of this case later in this judgment.

20]In order to satisfy the aspect of the legal requirements of s 162 of the LRA, the applicants needed to show that they had been successful not only in that there has been no-compliance with the order issued on the 21st December 2010, but also that such non-compliance was wilful and malafide. See *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg Co Inc 1996 (3) SA 355 (A) at 367H-I*. In other words in as far

as the law requirements are concerned the applicants needed to show that the facts of the case satisfied the test for determining whether or not the non-compliance with the order constituted contempt of court. The test for determining the existence of contempt of court is set out in *Fakie No CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)*, the case which both parties in this case relied on from their different respective perspectives. The tests for determining whether non-compliance with an order of the court amounts to contempt was set out in *Fakie* by Cameron JA as he then was, in the following terms:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bone fide (though unreasonableness could evidence lack of good faith). These requirements- that the refusal to obey should be both wilful and mal fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt- accord with the broader definition of the crime, of

which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court, but by the deliberate and intentional violation of the court's dignity, repute or the authority that this evinces."

21]In my view, the law aspect of the provisions of s 162 of the LRA in the present instance has to be determined not only on the surrounding circumstances that led to the making of the order made by this court.

22]In my view the proper reading of the order made by this court on the 11th January 2011, does not in any manner suggest that any of the parties has been successful in the institution or defending the action. What is also clear from the order is that the respondents have failed to comply with the order made during December 2010. There is no indication that such failure was deliberate and malafide. The background facts indicate that the respondent conceded that they had complied with the order and that they would not be able to do so until the 10th January 2011, the day before this matter came before the court.

23]In their submissions the applicants were highly critical of the reasons given by the respondents for their failure to comply with the court order. Whilst there may be merits in the complaints of the applicants that the respondents could have called back from leave those of its employees who were on leave, the applicants have not shown that the reasons given

shows a deliberate plan on the part of the respondent to undermine or frustrate the implementation of the court order. In my view the reasons given why the court order was not timeously implemented are reasonable, acceptable and do not in any manner even suggest a strategy for undermining the court. At best the respondents should be encouraged to avoid such incidences in the future. In this respect it needs to be pointed out to the respondents the seriousness and the importance of compliance with court orders. Failure to comply with court orders does not only undermine the rules of the law but has also serious implications to industrial peace in the labour market. In addition to this, the applicants have not made a case why costs should be made against some of the respondents in their personal capacity.

24]In my view the above reasons equally answers the aspect of fairness in terms of s 162 of the LRA. In essence it would not be fair to impose a cost order if regard is had to the fact that the respondents indicated that they were committed to comply with the court order. The commitment may have not been as clear and concise as the applicants may have wished it to be. It would also not be fair to impose a cost order in the circumstances where the court order was essentially consensual. In this regard I need to point out that the court order was not made on the basis of the determination of the merits of the matter. It may well be said that

the applicants are partially successful in that the order directed the respondent to comply with the earlier court order. The dictates of fairness would however not support the awarding of costs if regard is had to the background facts and the circumstances of this case.

Conclusion

25]It is common cause that the respondent failed to comply with the court order made on the 20th December 2010. The applicants have not made out the case that shows that the non-compliance was deliberate and malafide. The order of the court made on the 11th January 2010, does say that the failure to comply with the order amounted to contempt but simply confirmed the non-compliance with the court order.

26]In the premises no order as to costs is made.

Molahlehi J

Date of Hearing : 11th January 2011

Date of Judgment : 25 January 2011

Appearances

For the Applicant: W.H.J Van Reenen, instructed by L M Erasmus
Inc.Instructed by: T.F Mathibedi, instructed by the State Attorney.

