



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 2399/12

In the matter between:

PASSENGER RAIL AUTHORITY OF SOUTH AFRICA

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

First Respondent

AND ARBITRATION OF SOUTH AFRICA

TIMOTHY BOYCE N.O.

Second Respondent

NSIZWA CROMET MOLEPO

Third Respondent

Date of Hearing: 25 April 2014

Date of Judgment: 09 May 2014

Summary: Application for leave to appeal-costs order against a non-party; whether a non-party must be given a hearing before a cost order is made against such a party; no invariable requirement that a non-party must be given a hearing

JUDGMENT

MOOKI AJ

- [1] This judgement concerns the application for leave to appeal an order by the court that was handed down on 17 January 2014. The notice of the application for leave to appeal was served on 4 February 2014. The submissions in support of the application were served on 19 March 2014. The submissions opposing the application were served on 3 April 2014. The application was heard on 25 April 2014.
- [2] The applicant relies on three grounds. First, that the court ought to not have made an order that Mr Lucky Montana, the applicant's chief executive officer, pay the costs in his personal capacity. Second, that the court ought to have found that Mr Molepo, the third respondent, occupied the post of adviser to Mr Montana when Mr Molepo's employment contract was terminated. Third, that the court ought to have found that the Commissioner erred in not concluding that Mr Molepo had repudiated his contract of employment and that the applicant accepted the repudiation.
- [3] The applicant sought leave to introduce a further affidavit. Mr Molepo, represented by Mr Mthombeni, objected on the basis that the affidavit was sought to be placed before the court in an irregular manner. I allowed the affidavit.
- [4] Mr Naidoo SC (together with Mr Mmusi) appeared for the applicant. Mr Naidoo submitted to the court that the affidavit dealt with aspects that bear on the enforcement application in which Mr Molepo sought to enforce the arbitration award made in his favour pending the determination of the applicant's review application. The enforcement

application is not before this court. The affidavit is irrelevant to the extent that it deals with issues that bear on that application. Mr Naidoo did not refer to any allegation in the affidavit and how such allegations bear on the application for leave to appeal.

[5] Mr Naidoo focused the substance of his submissions on the first ground. There are two aspects to the submissions. First, that the court erred in granting the cost order because Mr Montana was not a party to the litigation. Second, that the court should first have given Mr Montana a hearing before making a cost order against him.

[6] I am not persuaded by Mr Naidoo's submissions. The fact that Mr Montana was not a party to the litigation is not a bar to the court granting a cost order against him. The correct legal position is, for example, as set out in *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Another, and Four Related Applications*.¹ The following passages are relevant:

[69] The rule in our law is that all costs, unless expressly otherwise enacted, are in the discretion of the judge, which discretion must be judicially exercised (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69, per Innes CJ). [...]

[70] [...] A costs order is not often made against a person who is personally not a party to the litigation before a court considering a costs order, but in certain circumstances our courts, in the exercise of the discretion regarding costs, do order a non-party to pay costs de boniis propriis. These include the attorneys of a party, the director of a company, liquidators, administrators, municipal councillors

¹ 2014 (1) SA 141 (WCC)

and officials, and employees of government departments and public officials.

- [7] The law as stated in *EP Property Projects (Pty) Ltd* is consonant with the stance in other common law jurisdictions that vest the determination of costs in the discretion of a court. Such discretion takes into account, among others, that:

Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.²

- [8] It seems to me, with reference to the expression "exceptional case" in the *Dymocks Franchise Systems (NSW) Pty Ltd* decision, that such reference is not intended to constitute a non-party as meriting special consideration when a court determines the issue of costs.

- [9] The Privy Council, in *Dymocks Franchise Systems (NSW) Pty Ltd*, advised that the non-party was liable for costs in part because the non-party took the decision to fund and thereby promote the particular appeals.³ The fact that the decision entailed a non-party who funded the litigation does not detract from the principle that the determination of costs is in the discretion of a court; including whether such costs are to be

² *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others* [2005] 4 All ER 195 (PC), para 25

³ *Dymocks Franchise Systems (NSW) Pty Ltd*, para 30

made against a non-party. There is nothing in principle that suggests that a court can exercise its discretion and award costs against a non-party who funds litigation, but cannot exercise such discretion in respect of a non-party involved in some other aspects to the litigation.

[10] Mr Naidoo referred me to the decision in *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government*,⁴ pointing out that the Supreme Court of Appeal did not make an order against the MEC in that decision because such an order was not asked for.

[11] The immediate response is that the court in *Gauteng Gambling Board* exercised its discretion having regard to the circumstances in that case. I do not, in addition, understand the court in *Gauteng Gambling Board* to be pronouncing a new legal principle pertaining to the law on costs.

[12] The lower courts are and should be mindful of statements by superior courts such as the Supreme Court of Appeal. I do not, however, consider this court to be bound by the line in paragraph 54 of the *Gauteng Gambling Board* decision; at least on two bases. First, a determination on the issue of costs is in the discretion of the court seized with a particular matter. The particular court has regard to the various circumstances that are peculiar to the matter before that court and whether such circumstances should bear on the issue of costs. Second, I am not aware of any authority (and the court in *Gauteng Gambling Board* did not refer to any) to the effect that a cost order against a public official is competent only where such an order has been expressly asked for.

[13] Mr Naidoo also submitted that the court erred by not giving Mr Montana a hearing. I enquired from Mr Naidoo whether it is invariable that a court will not make an adverse cost order without first giving a person a hearing. He submitted that such a person must first be given a hearing, illustrating

⁴ [2013] 3 All SA 370 (SCA)

his submission with reference instances where a court makes an order that the attorney bear the costs.

[14] I disagree with the submission by Mr Naidoo that it is invariable that a court will not make a cost order against an attorney without first calling on such an attorney to explain why such a cost order should not be made. The law reports are replete with instances where a court made a cost order against attorneys without first calling on such an attorney to be heard.⁵

[15] The second ground of appeal is essentially that the court should have found that the Commissioner erred in rejecting the contention that Mr Molepo did not agree to become the special advisor to Mr Montana. There is no merit to this ground. The applicant has not laid any proper basis to impeach the Commissioner's finding that Mr Molepo did not agree to become Mr Montana's special advisor.

[16] The third ground of appeal is essentially that the court should have found that the Commissioner erred in his finding that Mr Molepo did not repudiate his contract of employment. There is equally no merit to this ground.

[17] The second and third grounds of appeal essentially concern the same subject matter. The two grounds are, in any event, inherently self-destructive. On the one hand, the applicant says that Mr Molepo should have been found to have agreed to become Mr Montana's special advisor; whilst, on the other hand, the applicant says that Mr Molepo repudiated his contract of employment and that the applicant accepted such repudiation.

⁵ See, for example, *Tasima (Pty) Ltd v Department of Transport and Others* 2013 (4) SA 134 (GNP); at paras 36, 40, 43, and 74

[18] The test to be applied in this application is whether there are reasonable prospects of success on appeal.

What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law. The question is whether a reasonable person, adopting a different line of reasoning – usually by attaching more weight to factors ignored or downplayed in the judgment, or by attaching less weight to factors accentuated in the judgment, could come to a different conclusion. That there is a possibility of success, the fact that the case is arguable, or that it is not a hopeless case, do not constitute grounds for granting leave to appeal. (See also *S v Smith* 2012 (1) SACR 567 (SCA) para 7).⁶

[19] I am not satisfied, in the premises, that the applicant has reasonable prospects of success in its intended appeal.

[20] I make the following order

20.1. The application for leave to appeal is dismissed.

20.2. There is no order as to costs.

MOOKI O

Acting Judge of the Labour Court of South Africa

⁶ *Ngobeni v S* (741/13) [2014] ZASCA 59 (2 May 2014), para 15,

Appearances:

For the applicant: Mr M Naidoo SC (with Mr L Mmusi)

Instructed by: Makhubela Attorneys

For the third respondent: Mr Mthombeni

Instructed by: Shongwe Attorneys

Labour Court