



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P469/11

In the matter between:

BERRY MORTIMER & OTHERS

Applicants

and

NELSON MANDELA BAY

Respondent

Heard: 30 July 2013

Delivered: 30 July 2014

Summary: Costs are not automatically due by the initiating party when that party withdraws a matter. When the withdrawing party does not tender costs a determination must be made whether a costs order is warranted.

Payment of costs by a party which withdraws a matter in terms of Rule 13 (1) (b).

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application in terms of Rule 13 (1) (b) in which the respondent seeks a costs order against the applicants pursuant to their withdrawal of their matter.

Factual Background

- [2] The applicants are employees of the respondent. In 2005 they were moved from the erstwhile Port Elizabeth Municipality to the Nelson Mandela Metropolitan Municipality. Before February 2006 Assistant Directors, both placed and appointed, participated in the same travel allowance scheme. In February 2006, a Mayoral Resolution which granted Assistant Managers a transitional allowance as part of their remuneration pending the job evaluation process was approved. The transitional allowance was more beneficial than the travel allowance scheme. A number of placed Assistant Managers lodged a grievance regarding the unequal payment of the transport allowance leading to the adjustment of the transport allowance of some Assistant Managers. The applicants submitted that all the placed Assistant Managers who had participated in the grievance were awarded an adjustment on their transport allowance which was backdated from the date of implementation of the new scheme. The respondent denied that the transport allowance was backdated and submitted that it was the transitional allowance that was backdated. The applicants sought to be placed in the same position as the Assistant Managers who had lodged a grievance but were unsuccessful. They referred an unfair labour practice dispute concerning payment of benefits to the South African Local Government Bargaining Council ("the bargaining council") on 27 September 2010. The bargaining council issued a certificate of the non-resolution of the dispute on 24 February 2011. On 18 July 2011, the bargaining council issued an arbitration award that it lacked jurisdiction to arbitrate the dispute as payment of the transport allowance did not amount to a benefit. On 15 May 2012, the applicants filed their statement of case.
- [3] In the statement of response the respondent raised a point *in limine* that this Court lacks jurisdiction over this matter as there is no provision in the Labour

Relations Act 66 of 1995 (“the LRA”) which confers jurisdiction on this Court after a finding of lack of jurisdiction by a bargaining council. In addition, the applicant had characterized their dispute as an unfair labour practice placing it outside the realm of this Court’s jurisdiction. Lastly, the respondent submitted that the applicants failed to apply for condonation having filed their statement of claim over a year after the arbitration award was issued.

[4] The applicant’s attorneys forwarded the draft pre-trial minute to the respondent’s attorneys, the first paragraph of which reads thus:

- ‘1.1 It is the applicant’s view that in light of discussions had between the Applicant’s representative and the HR representative of the Respondent during the course of the dispute before the South African Local Government Bargaining Council it became clear that the Respondent is currently investigating the dispute by the Applicant.
- 1.2 The Respondent’s representative has made it clear that in the event of discrepancies being found the implementation of the travel allowance between the Applicants fellow employees, such discrepancies must be placed before council.
- 1.3 Flowing there from, Council may either uphold such payments which will entail the Applicant’s continuing with this matter.
- 1.4 Alternatively, Council may decide to adjust said travel allowance which would potentially lead to fellow employees having to repay the excess amounts.
- 1.5 If this scenario occurs, the application as it currently stands becomes academic’.

In response thereto the respondent addressed the following letter on 15 October 2012.

'Dear Sir

NELSON MANDELA BAY MUNICIPALITY / BJL MORTIMER & OTHERS

1. We have been instructed to, and accordingly shall, request the registrar of the labour Court to enrol the above matter for hearing on the special plea/points *in limine* raised by respondent in paragraphs 1 to 9 of its statement of response, dated 1 June 2012.
2. Furthermore, respondent hereby invites the applicants, in the light of the claim in paragraph 1 of their draft pre-trial minute that "the Respondent is currently investigating the dispute by the applicant" and that the matter is accordingly "not ripe for hearing", to withdraw their claim in the above matter, failing which our instructions are to seek a punitive costs order when the matter is heard.
3. We look forward to your kind and urgent response'.

On 1 February 2013, the applicants' attorney forwarded a notice of withdrawal of the matter to the respondent's attorneys who pointed out the applicants' omission to tender costs. The applicants' attorneys responded that the respondent's letter of 15 October 2012 made no reference to the issue of costs. As the parties failed to reach agreement on the issue of costs, the respondent filed a notice in terms of Rule 13 (1) (b) for a costs order against the applicants, alternatively, the dismissal of the applicants' claim with costs.

- [5] The applicants objected to the notice filed by the respondent in terms of Rule 13 (1) (b) on the basis that it did not comply with the Rule. Rule 13 (1) provides that if a party who has initiated proceedings delivers a notice of withdrawal without tendering costs any other party may apply on notice for costs. The respondent submitted that Rule 13 (1) (b) does not anticipate that a fresh notice of application be served and filed at court. The respondent sought to rely on a letter in which it informed the applicants that in the event of their failure to deliver a notice of withdrawal which included a tender to pay the respondents costs, on or before 18 March 2013, the respondent would request the registrar to enrol the matter for the hearing of the points *in limine* it raised and the dismissal of the applicants' claim with costs. Lastly, the respondent

submitted that the notice issued by the Registrar setting this matter down for argument on the aspect of costs constituted compliance with Rule 13 (1) (b).

- [6] In *NASECGWU and Others V Donco Investments (Pty) Ltd*,¹ the giving of notice was held to be aimed at giving the recipient an opportunity to consider its position and decide on an appropriate response. I find the following dictum in *Automobile Manufacturers Employers' Organization v Numsa*² apposite:

‘...The wording of the Act refers to a notice of application. A notice of application is generally a notice of motion together with supporting affidavits. In my opinion this is the construction which must be given to section 68 (3). A respondent, such as the union and other respondents in this case require to know what the case is that is being brought against them. They need to know whether they can oppose the case and they require more than simply the gist of the case. The applicant’s attorney’s letter of 26 August 1998 sets out the relief which is going to be claimed and the grounds but not the facts which are to be relied upon’.

- [7] The documents the respondent sought to rely on do not constitute notice as envisaged in Rule 13(1) (b) because the decision whether costs should be granted is more complex at the Labour Court. Costs do not necessarily follow the result. Section 162 of the LRA provides for factors which need to be taken into account in deciding whether a costs order should be made. In the notice referred to in Rule 13 (1) (b). The respondent was required to state the grounds on which it would rely on in its application for costs and afford the applicants an opportunity to consider those grounds and decide whether to oppose the application and the basis for the opposition. Having considered the papers filed by the parties in respect of the application for costs, I am satisfied that there is substantial compliance with Rule 13(1)(b). I have been placed in a position to determine the application without requiring strict compliance with Rule 13(1)(b).
- [8] The respondent’s approach to the question of costs is that costs usually follow the withdrawal of a matter. He submitted that absent substantial and cogent

¹ [2010] 3 BLLR 271 (LC)

² [1998] 11 BLLR 1116 (LC) at para 8

grounds as to why the applicants should not pay the respondent's costs as costs usually follow the event, as the applicants are the party which withdrew the action, they are regarded as being the unsuccessful party. A settlement of the dispute does not, according to the respondent, in all instances, translate to the conclusion that a costs order can never be awarded against an unsuccessful party. The respondent further argued that generally, when an applicant withdraws an application or an action that applicant is in an analogous position as an unsuccessful litigant and a respondent, by virtue of the withdrawal, is entitled to costs. In this regard see *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (forward Enterprices (Pty) Ltd and others Intervening)*³, *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested Party)*⁴

- [9] It is worth nothing that most of the authority the respondent sought to rely on consists of judgments of the High Court to which section 162 of the LRA does not apply. The proper approach in dealing with the issue of costs is captured in the following dictum of *Van Den Berg v SAPS*⁵

'I am not persuaded that this principle applies with equal vigour in the Labour Court. Rule 13 of the Rules of the Labour Court permits a party to withdraw a matter and if costs are not tendered then any other party may apply for costs. There is no requirement that the party withdrawing proceedings tender costs. The provisions of section 162 of the LRA govern the question of costs and there is no general principle in terms of which the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. In general the Labour Court may make an order for the payment of costs, according to the requirements of law and fairness and can amongst other things take into account the conduct of the parties in proceedings with or defending the matter (section 162 (2)(b)(i)). Moreover, in *National Union of Mineworkers v East Rand Gold and Uranium Company Ltd* 1992 (1) SA 700 (A), the then Appellate Division held that although the general rule that costs should in the absence of special circumstances follow the result is a relevant consideration, it may yield where considerations of fairness require it. Proper regard should be had to all the facts and circumstances of a particular matter. Furthermore,

³ 2003 (3) SA 547 (CPD) at 550 C-D.

⁴ 2003 (2) SA 590 (W) at 597 A-B.

⁵ [2005] 11 BLLR 1150 (LC) at para 17.

the special nature of dispute resolution in the employment context should always be kept in mind. In particular, the making of costs orders may well discourage parties, and particularly individual employees, from approaching the court and accordingly, the court should hesitate before making such an order where a genuine dispute exists and the approach to the court was not unreasonable’.

- [10] It is common cause that at the bargaining council the applicants’ attorney and Mr Viviers (“Viviers”), an official of the respondent, discussed the inequality in payment of the transport allowance between the applicants and their peers and the applicants’ attorney was informed that the respondent was busy investigating the issue. The possible outcome of the investigation would be that the applicants’ colleagues would have to repay money paid to them in excess of their transport allowance, alternatively the applicant would be paid an equivalent amount.
- [11] The applicants referred a dispute at the bargaining council on 27 September 2010. The bargaining council issued its ruling that it lacked jurisdiction to arbitrate their dispute in July 2011. By July 2011 the discussion between the applicants’ attorney and Viviers that the issue of the inequality of payment of the transport allowance would be investigated had started. On 15 May 2012, almost a year later when the applicants approached this Court, the investigation had not been completed. When this matter was argued there was no indication to the contrary. Based on the facts that are common cause, there is a possibility that there is transport allowance due by the respondent to the applicants which they are not receiving. They may receive, depending on the outcome of the investigation. Some of their colleagues are however, receiving it. The applicants approached this Court in an attempt to enforce their right to equality. It would appear that the respondent is not taking the necessary steps to establish whether the transport allowance they are seeking is due to them. In the mean time they are treated less than their colleagues. Employees who reasonably feel that they are treated differently from their colleagues in circumstances where their employer take too long to establish the reason for the differentiation should not be deterred from approaching this Court by a fear of an adverse costs order. It is not proper for litigants to approach this Court

prematurely and for purposes of protecting their claims from prescription only to withdraw their cases before they are heard on the basis of not being ripe for hearing.

[12] There was no duty on the applicants to tender costs when they were withdrawing their action. The purpose of Rule 13(1) (b) is to afford this Court an opportunity to determine in terms of section 162 of the LRA whether the withdrawal warrants an adverse costs order against the applicants. As the applicants did not act unreasonably in approaching this Court and the respondent is not before Court with clean hands, granting a costs order will not be fair.

[13] For these reasons, the respondent's application for costs is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: Advocate Grobler

Instructed by: Van Der Walt Attorneys

For the Respondent: Advocate Smith

Instructed by: Gray Moodliar Attorneys

LABOUR COURT