



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case Nos: JR 2454/10 and JI 304/13

In the matter between:

LUSITANIA FOOD PRODUCTS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

MYHILL E, N.O.

Second Respondent

NICOLE AUTUMN MARTIN

Third Respondent

Heard: 2 March 2017

Judgment: 8 May 2017

Summary: Judgment on costs only in respect of two related applications. Applicant's conduct in the litigation unreasonable and vexatious warranting award of costs on the attorney and client scale. Not demonstrated that the manner in which litigation

conducted attributable entirely to the applicant's attorney or that the conduct of the applicant's attorney rose to the level of negligence in a serious degree. Costs *de bonis propriis* against the applicant's attorney therefore not warranted.

JUDGMENT

BARNES AJ

Introduction

- [1] This judgment concerns the question of costs only. It does so in respect of two related applications – a review application launched under case number JR 2454/10 and an interlocutory application launched under case number JI 304/13.
- [2] The two applications were set down to be heard together on 2 March 2017. On 1 March 2017, the applicant filed a notice of withdrawal of the review application. This effectively rendered the relief sought in the interlocutory application moot.
- [3] While the applicant did not tender costs in its notice of withdrawal, counsel for the applicant, Ms Sibeko, did so in court on 2 March 2017. Counsel for the third respondent, Mr Goslett submitted, however, that this is a case which warrants a costs order on the attorney and client scale to be paid *de bonis propriis* by the applicant's attorney. Mr Goslett stated that upon receiving the applicant's notice of withdrawal on 1 March 2017, the third respondent's attorney advised the applicant's attorney in writing that it intended to seek such a costs order. Ms Sibeko confirmed this.

- [4] In order to determine the appropriate costs order, it is necessary to have regard to the history of the litigation in this matter. I do so below.

The History of the Litigation

- [5] On 15 August 2008, the third respondent resigned from her employment with the applicant and referred a constructive dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”).
- [6] Following an arbitration, the CCMA issued an award in the third respondent’s favour, finding that she had been constructively dismissed and ordering the applicant to pay her R124 032.00 as compensation.
- [7] On 23 September 2010, the applicant launched an application to review and set aside the arbitration award under case number JR 2454/2010.
- [8] On 10 December 2010 the applicant filed the record.
- [9] The applicant failed, however, to file a notice in terms of Rule 7A(8).
- [10] In February 2011, and in the absence of any further steps having been taken by the applicant in the review application, the third respondent filed an answering affidavit. The third respondent states that it did so as a “precautionary measure.”
- [11] On 15 September 2011 the registrar directed the applicant to file heads of argument in the review application. It failed to do so.
- [12] On 19 June 2012 the arbitration award was certified in terms of section 143(3) of the Labour Relations Act¹ (“the LRA”).
- [13] A writ of execution was issued and on 4 March 2013, the sheriff attached

¹ Act 66 of 1995.

movable property belonging to the applicant in execution of the award. This was released in terms of an agreement between the parties on the basis that the applicant indicated that it intended to apply for a stay of execution. The applicant failed to bring an application for a stay.

- [14] In the circumstances, a further writ was issued on 11 April 2013 and funds belonging to the applicant were attached on 30 April 2013.
- [15] That attachment gave rise to the applicant launching an interlocutory application to set aside the attachment and stay the execution of the award pending the outcome of the review application. The interlocutory application was launched on 8 August 2013 under case number JI 1304/13.
- [16] On 1 July 2013, the third respondent filed its answering affidavit in the interlocutory application together with a counter application in which it sought the dismissal of the review application.
- [17] The applicant filed no answering affidavit to the counter application.
- [18] The third respondent set its counter-application down for hearing on 29 April 2015. The applicant filed heads of argument which dealt with the review application instead of the counter-application. As a consequence, the applicant was forced to apply for a postponement on 29 April 2015. The postponement was granted and the applicant was ordered to pay the wasted costs.
- [19] Thereafter, the applicant took no further steps in relation to either the review application or the interlocutory application.
- [20] The third respondent then took steps to have both applications set down for hearing simultaneously. On 25 November 2016, a notice of set down was sent to both parties advising the parties that the applications had been set down for hearing on 2 March 2017.

- [21] The applicant failed to file heads of argument.
- [22] On 1 March 2017, the applicant filed a notice of withdrawal of the review application. The effect of that was to render the relief sought in both the applicant's interlocutory application and the third respondent's counter application moot.
- [23] Upon receipt of the notice of withdrawal, the third respondent's attorney gave the applicant's attorney written notice that it intended to apply for a costs order on the attorney and client scale to be paid *de bonis propriis* by the applicant's attorney.

Attorney and Client Costs?

- [24] It is well established that a court will not order a litigant to pay the costs of another litigant on the attorney and client scale unless there are special grounds justifying this. Such grounds have been found to be present in cases where litigants have been guilty of dishonesty or fraud or where their motives have been vexatious, reckless, malicious or frivolous, or where they have acted unreasonably in the conduct of the litigation or where their conduct has been in some way reprehensible.²
- [25] In *Gois t/a Shakespeare's Pub v Van Zyl and Others* (2003) 24 ILJ 2302 (LC), this Court held as follows:

"....this court may make a punitive costs order such as costs on an attorney and client scale where it believes it appropriate to do so. Factors to consider whether or not to grant such punitive costs orders include where the conduct of the party –

- (a) is vexatious and amounts to an abuse of the legal process, even though there is no intention to be vexatious;
- (b) evinces a lack of bona fides;

² See Erasmus *Superior Court Practice* at E12-20 and the footnotes cited there.

(c) is reckless, malicious and unreasonable.”³

- [26] As is evident from the above, the applicant was guilty of inordinately long periods of inactivity in relation to both applications launched by it. The applicant took no steps to prosecute its review application after filing the record on 10 December 2010. Moreover, the applicant took no steps whatsoever to prosecute its interlocutory application after launching it on 8 August 2013.
- [27] Also notable is the fact the applicant failed to take any steps to defend the counter application brought by the third respondent for the dismissal of the review application.
- [28] The applicant failed to file heads of argument when required to do so. Ultimately, when the applications were finally set down to be heard at the third respondent’s instance, the applicant filed a notice of withdrawal of its review application. It did so at the eleventh hour.
- [29] All these facts taken together make it difficult, in my view, to resist the conclusion that the applicant was not serious about prosecuting its applications but sought mainly to delay and obstruct the third respondent in her efforts to execute the award. I am of the view that the applicant’s conduct in this regard was unreasonable and vexatious and that a costs order on the attorney and client scale is therefore warranted.

Costs de Bonis Propriis?

- [30] The circumstances in which a costs order *de bonis propriis* may justifiably be imposed are however significantly more exacting. Negligence in a serious degree must be established on the part of the party against whom such a costs order is sought. Thus in *Moloi and another v Euijen and another* (1999) 20 ILJ 2829 (LAC) the Labour Appeal Court held as follows:

³ At para 43.

"Costs *de bonis propriis* are awarded against legal practitioners in cases which involve serious delinquencies such as dishonesty, wilfulness or negligence in a serious degree."⁴

- [31] That this is the appropriate standard was confirmed by the Constitutional Court in *SA Liquor Traders Association v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) in the following terms:

"An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure."⁵

- [32] In that case the Constitutional Court referred to the case of *Waar v Louw* 1977 (3) SA 297 (O) in which the court said the following:

"The tendency of time past was to make attorneys pay for their mistakes by means of an order of costs *de bonis propriis*. And the reason for such an order against an attorney is quite clear. The office of an attorney is a high and responsible office. The attorneys' profession is a learned profession requiring great skill from its members. Mistakes which an attorney makes in litigation and which result in unnecessary costs should, therefore, not lightly be overlooked. And a litigant should not always be obliged himself to the costs which have been caused by the negligence of his attorney. But too strict action should not be taken against an erring attorney. The administration of justice is sometimes an irritating discipline, and even the most skilful practitioners can make mistakes which cause unnecessary costs. The attorney's profession should not be moved by too lenient an attitude to loosen its reins, but should also not be demoralised by too much cracking of the whip. As usual, in the affairs of man, the middle course is best. The circumstances under which a court can make an order of costs *de bonis propriis* against an attorney should be reasonably serious, as, eg, dishonesty, wilfulness or negligence of a serious degree."⁶

⁴ At para 27.

⁵ At para 54.

⁶ At para

[33] In this case, I do not believe that it has been demonstrated that the manner in which the litigation was conducted was attributable entirely to the applicant's attorney or that the conduct of the applicant's attorney rose to the level of negligence in a serious degree. I am therefore not persuaded that an order of costs *de bonis propriis* against the applicant's attorney is warranted.

[34] In the circumstances I make the following order.

Order

1. The applicant is to pay the third respondent's costs incurred under case numbers JR 2454/10 and JI 1304/13 on the attorney and client scale.

Heidi Barnes
Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv X Sibeko instructed by Kirchmanns Inc

For the Third Respondent: Adv R Goslett instructed by Craig Ballie Attorneys