

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**(HELD AT CAPE TOWN)**

CASE NUMBER: C673/2016

5    DATE: 3 AUGUST 2017

In the matter between:

**KIM MAART** Applicant

and

**CCMA** 1<sup>st</sup> Respondent

10    **COMMISSIONER REZA SLAMANG** 2<sup>nd</sup> Respondent

**POLAR ICE CREAM (PTY) LTD** 3<sup>rd</sup> Respondent

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**J U D G M E N T**

15    **STEENKAMP, J**

This application for review comes before the Court in rather unusual circumstances. The applicant, Ms Kim Maart, was dismissed by the third respondent, Polar Ice Cream (Pty) Ltd. Feeling aggrieved with the dismissal, she referred a dispute to  
20    the CCMA, the first respondent. Commissioner Reza Slamang, the second respondent, presided over the arbitration once conciliation had failed. The Commissioner found that the dismissal was fair and ordered the employer to pay Ms Maart only an amount in lieu of notice and an amount in respect of  
25    outstanding wages and no compensation.

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Ms Maart approached this Court to have the arbitration order reviewed and set aside in terms of Section 145 of the Labour Relations Act. She filed an amended notice of motion on 25  
5 January 2017 in which she asks that the award be reviewed, set aside and remitted to the CCMA for an arbitration *de novo* before a Commissioner other than the second respondent.

The company's attorneys wrote to Ms Maart on 20 February  
10 2107, shortly after having received the amended notice of motion, and made an offer on the record, or with prejudice, saying:

“Our instructions are that our client will not oppose your  
15 review application under the abovementioned case number on the basis that you agree that:

1. The matter is arbitrated afresh at the CCMA and that  
the Labour Court may not substitute its decision for  
20 [that of] the CCMA;

2. You will not pursue costs against our client.”

And the attorneys, Maserumule Attorneys, then told Ms Maart  
25 in that letter that, should she refuse to agree to the proposal:  
/LC /...

“...and as our client will incur legal costs in addressing the matter in that manner, we shall request that a costs order be granted against you.”

5 Ms Maart did not respond to that offer. There is some dispute as to whether she received the letter, but be that as it may, on 22 March 2017 the company filed its answering affidavit, assisted by its current attorneys of record. In that affidavit the General Manager of the company, Riyaaz Mohamed, repeated  
10 the tender and said the following:

“Third respondent would not oppose applicant’s review application should applicant agree that the matter be arbitrated afresh before first respondent and should  
15 applicant not pursue costs against third respondent. In the event that applicant refuse to agree to third respondent’s proposal, third respondent would file an affidavit confirming its agreement to applicant’s dispute being submitted to first respondent to be re-arbitrated  
20 and in such circumstances third respondent would request that a cost order be granted against applicant.”

Ms Maart confirmed, in her argument before Court today, but also in the replying affidavit that she subsequently filed on 10  
25 April, that she did receive that answering affidavit and that she /LC /...

was well aware of the tender made by the company. Before filing her answering affidavit and on 3 April, Ms Maart wrote to Maserumule Attorneys and said:

5           “Since third respondent initiated the proposal/request process, which applicant has however not received, the applicant therefore are [sic] now putting forth her proposal.”

10   She then asked to be paid a “non-deductible salary” of 12 months, paid in a lump sum “non-negotiable” and she said that, should the company refuse to agree to her counterproposal, she would continue with the case, she would file a notice to withdraw the relief against the CCMA and the Commissioner  
15   from being responsible for any costs, but would hold the company responsible for costs in the review application.

When the matter was heard this morning, Ms Maart was at a loss to explain why she would not accede to the reasonable  
20   offer made by the company in circumstances where the company offered her everything that she asked for in her notice of motion, i.e. that the award be reviewed and set aside and remitted to the CCMA for a hearing afresh before a Commissioner other than Slamang. After some time, when the  
25   Court asked her for her reasons, she simply answered “no  
/LC /...

reason”.

In those circumstances Ms *Pead*, for the company, argued that, as foreshadowed in its answering affidavit, costs should  
5 be awarded against the applicant as she carried on with litigation and forced the company to incur legal costs in circumstances where she was forewarned that costs would be sought against her and that her subsequent conduct amounted to malicious and vexatious litigation.

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In terms of Section 162 of the Labour Relations Act, this Court has to take into account the requirements of both law and fairness in deciding whether or not to award costs. One of the factors that should be considered is the conduct of the parties  
15 in pursuing or continuing with litigation. I agree with Ms *Pead* that the attitude of Ms Maart in this case in electing to continue with litigation in circumstances where her employer had offered her everything that she had asked for, was entirely unreasonable. No further legal costs should have been  
20 incurred once the employer had made the offer of 20 February, reiterated in its answering affidavit of 22 March. This is a case where she should be held liable for those costs.

I therefore make the following order:

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1. THE ARBITRATION ORDER OF 26 SEPTEMBER 2016  
UNDER CASE NUMBER WECT6945/16 IS REVIEWED  
AND SET ASIDE.
2. THE APPLICANT'S UNFAIR DISMISSAL DISPUTE IS  
5 REMITTED TO THE CCMA FOR A FRESH ARBITRATION  
BEFORE A COMMISSIONER OTHER THAN THE  
SECOND RESPONDENT.
3. THE APPLICANT IS ORDERED TO PAY THE THIRD  
RESPONDENT'S COSTS.

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STEENKAMP, J

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