



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 895/16

In the matter between:

TILLY LABE

Applicant

and

LEGAL AID SOUTH AFRICA

First Respondent

BRAIN NAIR

Second Respondent

PARTICK HUNDERMARK

Third Respondent

FLAVIA ISOLA
Respondent

Fourth

AYSHA ISMAIL
Respondent

Fifth

THE CURRENT BOARD MEMBERS OF THE LEGAL

AID SOUTH AFRICA

Sixth Respondent

THE CHIEF TAXING MASTER, LABOUR COURT

Seventh Respondent

THE TAXING MASTER, NOKWANDA MOLEFE

Eighth Respondent

Decided: In Chambers

Delivered: 20 September 2018

JUDGMENT-APPLICATION FOR LEAVE TO APPEAL

PRINSLOO. J

Introduction

[1] This matter came before me on 15 June 2018 and I made an order in the following terms:

- '1. The Condonation is granted for the late filing of the Applicant's review application;
2. The taxed bill of cost under case number JS 895/16 is reviewed and set aside;
3. There is no order as to costs.'

[2] Subsequent thereto, the Applicant requested reasons for the order above which reasons were furnished on 1 August 2018. The Applicant seeks leave to appeal against the order of no costs.

Brief background facts

- [3] This matter has an unfortunate history: The applicant, an admitted attorney was employed by the First Respondent (Legal Aid South Africa who will be referred to as the 'respondent' in this judgment) as a civil professional assistant until her dismissal on 6 May 2016 following a finding of guilt resulting from various allegations of misconduct.
- [4] Aggrieved by the dismissal, the Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Both parties agreed to have the matter referred to the Labour Court. On 25 August 2016, the CCMA issued a ruling in terms of which it found that it had no jurisdiction to arbitrate on the applicant's dispute which relates to *inter alia*, victimization, intimidation, harassment and unfair discrimination.
- [5] The Applicant approached the Labour Court and the matter served before other Judges of this Court before the matter finally came before me. On 20 June 2018, Tlhotlhemaje, J handed down judgment in terms of which he *inter alia*, upheld the First Respondent's preliminary points in respect of the citation of the Second to Sixth Respondents and thereby declared that these Respondents were not party to the proceedings. He further held that costs associated with the preliminary points and special plea be costs in the cause. Finally, he directed the parties to approach the Registrar of this Court to set the matter down for trial.
- [6] It is evident that the matter was to proceed to trial. However, and instead the Applicant filed an application for leave to appeal against the judgment of Tlhotlhemaje, J on 10 July 2017. On 02 August 2017, Tlhotlhemaje, J dismissed the Applicant's application for leave to appeal with costs.
- [7] Subsequent thereto, the Applicant petitioned the Labour Appeal Court (LAC) which petition was granted and the Applicant filed an appeal which is still to be decided by the LAC. In the meanwhile, the First Respondent proceeded to set down the bill of costs for taxation. A series of correspondence surrounding the events leading up to and following the taxation of the bill of costs ensued between the Applicant and various personnel of this Court and I do not intent venturing into these, suffice to mention that the bill of costs was taxed on 05 March 2018.

- [8] The Applicant took serious issue with the taxing of the bill and having engaged the office of the Registrar, the manager of this Court and the taxing master, she filled the application to review and set aside the taxed bill of costs which application served before me.
- [9] As already pointed out, I reviewed and set aside the taxed bill of costs and made no order as to costs. This is the gravamen of the Applicant's complaint. In a nutshell, the Applicant takes issue with the fact that I did not award her costs against the Respondents as she views the conduct of taxing the bill as irregular, unlawful and deserving of a sanction of an order of costs on a punitive scale.
- [10] I turn to deal with the grounds for leave to appeal as submitted by the Applicant *infra*.

Grounds for leave to appeal

- [11] The grounds which the Applicant seeks leave to appeal are briefly summarised as follows:
- 11.1 The Court erred and or misdirected itself by refusing to award her costs incurred by referring the taxed bill on review.
- 11.2 The Court erred and or misdirected itself by failing to sanction the Respondents with a costs order and failed to consider the fact that the Respondents hold highly respectable positions that required them to be competent when discharging their duties and disregarded and neglected an important call from the Applicant to refrain from violating the provisions of Section 18 of the Superior Court Act prior to taxation.
- [12] Finally, the Applicant contends that the Court committed an improper exercise of judicial discretion and that the LAC must interfere with this improper conduct.

Test to be applied in exercising a discretion

- [13] In terms of Section 162 of the Labour Relations Act¹(LRA), this Court has a wide discretion to make an order of costs in accordance with the requirements

¹ Act 66 of 1995 as amended.

of law and fairness. As early as 1948, our courts have endorsed the principle that the awarding of costs fall within the discretion of the court ceased with the matter. In *Merber v Merber*² the Appellate Division quoted with approval, the earliest decision which pronounced on the traditional test that when a discretion in the awarding of costs has been exercised, the Court on appeal will not readily interfere with the exercise of that discretion. Greenberg, JA. held that:

'In *Fripp v Gibbon and Company* 1913 AD 354), Lord DE VILLIERS CJ, said (at p 357):

'In appeals upon questions of costs two general principles should be observed. The first is that the Court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs.'

[14] Furthermore, in *Trustees for the time being of The Biowatch Trust v Registrar Genetic Resources and Others*³ the Court held:

'It seems therefore that when a successful party has been deprived of his costs in the trial court, an appeal court will enquire whether there were any grounds for this departure from the general rule and if there are no such grounds then ordinarily it will interfere.'

[15] In the labour law landscape the issue of costs is provided for in the LRA and if the awarding of costs was an automatic right that a successful party was entitled to, the legislature would not have given this Court discretionary powers and would not have introduced the concept of 'fairness' as an element to be considered in awarding costs.

² (1948 (1) S.A.L.R. 446 at 452). At p. 453.

³ (A831/2005) [2007] ZAGPHC 270 (6 November 2007).

[16] The Applicant's argument that she was forced to bring the review application does not hold. The Applicant was successful with her review application however; the Court was also alive to the case of the Respondent namely that the taxed bill of costs would not be executed until the final determination of the appeal by the LAC. The Respondent could still set down the bill of costs for taxation and execute it if the appeal fails and on the other hand, should the Applicant succeed in the appeal, she has no reason to be concerned about the bill of costs as it had been set aside by this Court. In my view, the requirements of law and fairness were best served and the respective positions of the parties were fairly balanced by making no order as to costs.

[17] In *Kent v Bevern and Co*⁴ the Court had this to say:

'The appellant argued that a judge has no jurisdiction to condemn a successful litigant in costs; that it was not a matter on which he could exercise discretion. The general rule of our law is that the unsuccessful litigant must bear the costs of litigation; but it gives a judge a wide discretion in deciding on the question of costs. It is left to the arbitrament of the judge as seems to him equitable and just. He may condemn the unsuccessful party to pay the costs, or he may decide that each party shall bear his own costs, and he may even condemn the successful party in the costs, though the last very seldom happens. .'

[18] Most importantly, this Court is bound by the recent decision of the Constitutional Court in *Zungu v Premier of the Province of Kwazulu Natal and Others*⁵, where it was held that the rule of practice that costs follow the result does not apply in labour matters. The Court reiterated the statutory provision that costs should be awarded in accordance with the requirements of law and fairness and these were the principles I applied *in casu*.

The test for leave to appeal

[19] It is trite that an applicant in an application for leave to appeal must convince the court *a quo* that it has reasonable prospects of success on appeal. What the test requires is the reasonable likelihood that another court, presented with

⁴ (1907, T.S. 395).

⁵ (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC).

the same facts and evidence as this Court, could come to a different conclusion than the one arrived at by this Court.

[20] In *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others*⁶ this Court confirmed that the test applicable in applications for leave to appeal is stringent and held as follows:

‘The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. As the respondents observe, the use of the word “would” in s17(1)(a)(i) are indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015). Further, this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law...’

[21] *In casu*, the Applicant has not demonstrated that the Courts’ decision was arbitrary, capricious or irregular. The above authorities show that in the exercise of a discretion, a number of factors can be taken into consideration.

[22] *In casu*, applying the principles applicable to applications for leave to appeal, I am not persuaded that there are reasonable prospects that the LAC would arrive at a different conclusion than the one arrived at by this Court. The Applicant failed to make out a case for leave to appeal to be granted.

[23] In the result, I make the following order:

Order

1. The application for leave to appeal is dismissed;

⁶ (2016) 37 ILJ 1485 (LC).

2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

LABOUR COURT