



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: P53/19

In the matter between:

**EASTCAPE MIDLANDS TVET COLLEGE
DEPARTMENT OF HIGHER EDUCATION
AND TRAINING**

1st Applicant

2nd Applicant

and

**NATIONAL EDUCATION, HEALTH AND
ALLIED WORKERS UNION (NEHAWU)**

First Respondent

**THE INDIVIDUALS WHOSE NAMES ARE
ANNEXED HERETO ON ANNEXURE "A"**

Second & Further Respondents

Heard: 05 March 2019

Delivered: 06 March 2019

Summary: Strike interdict – interdicting conduct of the strikers – strike ended following a settlement agreement. Applicant returning to court for costs order only – rule discharged. Section 162 of the LRA in a strike context. Held (1): The interim order is discharged. (2): There is no order as to costs.

JUDGMENT

MOSHOANA, J

- [1] Following the recent Constitutional Court decision, it is apparent that the default position with regard to costs is that costs do not follow the results in the Labour Court.¹ What a judge should do is to consider the issue of fairness and the conduct of the parties. Of course fairness is a broad and elastic concept. Section 162(1)(b)(i)(ii) of the LRA refers to a conduct before the commencement of the proceedings and one during the proceedings. The conduct is that of the parties and not that of their representatives. Section 162(1) refers to two requirements. The one being law and the other being fairness. I can safely assume that in the light of the Constitutional Court judgment, the law part of it has been completely handicapped. I am not certain whether such is appropriate without the legislature amending section 162 of the LRA. Nonetheless, I am bound by the Constitutional Court decision. In the matter of *South African Airways Technical (SOC) v SATAWU and another*², my sister Prinsloo AJ (as she then was) concluded that the requirements of law has been interpreted to mean that the cost would follow the results³.
- [2] In *Dorkin*⁴, the LAC referred to the costs following the results as being a rule of practice. It therefore means that what had been abandoned by the Constitutional Court is the rule of practice. The Constitutional Court did not pronounce itself on the question of what the requirement of the law

¹ [27] It is well accepted that in labour matters, the general principle that costs follow the results does not apply... [29] It is clear that when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties. *Long v SAB (Pty) Ltd and others (CCT61/18) [2019] ZACC 7 (19 February 2019)*.

² [2014] 5 BLLR 491 (LC)

³ *City of Cape Town v SAMWU (C429/2007) [2008] ZALCCT 12 (19 March 2008)* at para 20

⁴ [2008] 6 BLLR 540 (LAC)

mean. Whatever it means, it seems that the remaining requirement is that of fairness. Although proper reading of *Dorkin*, which seem to have influenced *Zungu*, suggests that the two requirements remain. *Zungu* influenced *Long*, however it seems to be categorical that the law requirement has since departed. In all these matters reference is made to “labour matters”. It remains unclear in all the matters as to what effectively is a labour matter. Generally, all matters justiciable in the Labour Court are considered to be labour matters. A labour matter, in my view, is one that involves an employer and an employee, inclusive of their representatives (employer’s organisation and a trade union). Can it be said that if a matter may be justiciable in another court, like the High Court, it loses the touch of being a “labour matter”, even if, it involves an employer and employees, as parties to the litigation? In my view, it appears to be so.

[3] An example that comes to mind is the section 77(3) of the BCEA claim. Such a claim may be instituted in this court as well as in the civil courts. Another is an interdict of conduct during a protest action in accordance with the Gatherings Act. Such an interdict may be instituted in this court or in the high court. In terms of section 68(1)(a)(i)(ii) of the LRA, the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain participation in a strike or conduct in contemplation or in furtherance of a strike. In both examples, if a party approaches the High Court as opposed to the Labour Court, a cost order may be made on different basis than what would obtain in the Labour Court. Does it then mean that a section 77(3) claim is a labour matter when instituted in the Labour Court and a civil matter when instituted in the High Court? It does seem so. I do not intend to resolve this question in this judgment. I shall leave the question open.

[4] The Labour Court is a creature of a statute. The statute that created it provides guidance when it comes to costs. To my mind, once a party enters the Labour Court, there exist a labour matter and section 162 applies on the question of costs.

Applying the Long decision to this matter

- [5] On 19 February 2019, the applicant launched an interdict owing to the unlawful conducts of the second to further respondents of blocking access to the premises of the applicant; interfering with the passage of vehicles; harassing, intimidating and assaulting non-strikers, employees and pupils and damaging property. I pause to mention that this interdict may have been sought in the High Court. Its jurisdiction is not ousted in my view. On 20 February 2019, this court, per my brother Van Niekerk J issued an interim order. In the interim order, the respondents were to show cause why they should not be ordered to pay the costs of the proceedings. The interim order was returnable on 5 March 2019. Meanwhile, on 8 October 2018, the respondents had referred a dispute of mutual interest to the bargaining council.
- [6] On 27 February 2019, whilst the interim order was in place, the first respondent and the second applicant entered into a settlement agreement in order to resolve the dispute of mutual interest. I pause to mention that the first applicant was not party to the dispute referred and the settlement agreement. In the settlement agreement, the relevant parties agreed that the agreement was in full and final settlement of the dispute referred to the bargaining council (matter of mutual interest) as well as matters that were not part of the main dispute. The main dispute is the matter of mutual interest. It is not clear as to what is meant by “matters that were not part”. However, at that time, the second applicant was a party, together with the first respondent, to a litigation in this court.
- [7] It must then follow axiomatically that the second applicant and the first respondent must have been referring to this litigation. Relevant to this judgment, the first respondent was required on the return day to show cause why it should not pay the costs of the proceedings. In my view, Advocate Burton, appearing for the respondents, was correct when he submitted that the dispute of costs was also settled on 27 February 2019. I am unable to agree with Advocate Voultsos, when he submitted that the dispute emanating from the litigation, inclusive of the costs issue was not

resolved. Strange enough, Advocate Voultos submitted that the interim order must be discharged. If the interim order is discharged, the issue of costs, which was only to show cause why the respondents should not pay the costs, should also be discharged.

[8] I shall move from the premise that the applicant's counsel meant a discharge of paragraphs 2.1 – 2.6 of the order made on that day. Of course, there was no interim order on the issue of costs. All the respondents were to show on the return day was why should they not be ordered to pay the costs of the proceedings. The cause the first respondent shows is that the costs issue has become settled. Therefore, by ordering the first respondent to pay the costs, this court would be going behind the settlement agreement of the parties. Accordingly, in my view, the first respondent may not be ordered to pay the costs of the second applicant.

[9] What then remains is the costs as between the first applicant and the first respondent as well as the second to further respondents. The first applicant is not party to the settlement agreement. In respect of it, the respondents are still required to show cause why they should not pay its costs. Advocate Burton did not advance any cause in respect of these remaining parties. I pause to mention that the respondents did not lead any evidence in these proceedings. Accordingly, before me, there is no cause shown why the respondents should not pay the costs of the first applicant.

[10] Therefore, in considering whether I should make an order as to costs, I must first establish whether fairness dictates that I must make an order. Should fairness so dictate, then I must consider the conduct of the parties. With regard to fairness, on 15 February 2019, the first applicant addressed correspondence to the first respondent advising it of the objectionable conduct. The first respondent was informed that should the objectionable conduct not cease; the first applicant would have no option but to approach this court. The letter does not state that a costs order shall be sought. Nothing really turns on this. On the same day, the first

respondent replied to the letter and effectively said nothing that would have obviated the application to this court. Under those circumstances, the only available option was to approach this court. The LAC in *Dorkin* acknowledged that what is required is the striking of a balance, a task which is not easy to do. In this matter, fairness dictates that an order of costs must be considered in respect of the first applicant and the first respondent. However, the enquiry does not end there. I am obliged to consider the conduct of the parties in specific terms - in defending the matter before court and during the proceedings. On 20 February 2019, the respondents filed a notice indicating their intention to oppose the matter. A notice of intention to oppose is what it is, it is not an opposition of the matter. Since there was no opposing affidavit filed, in my view, the respondents did not oppose the matter. Since there is no opposition, I am unable to assess any conduct in opposing the proceedings. This matter remains unopposed despite a clear intention to do so.

[11] On the return day, which would constitute the part of during the proceedings, counsel for the respondents did not seek to waste the court's time. His submissions were crisp and to the point. Such a conduct is commendable and cannot be an objectionable conduct that could drive the court to making an order as to costs. On 4 March 2019, the first respondent filed a notice disclosing the settlement agreement between the parties. Similarly, on the same date, the first applicant, through Vukile Hewana, led further evidence indicating that oral submissions would be made at the hearing of the matter. This, in my view, prompted the respondents to engage counsel in order to make counter oral submissions. Therefore, the appearance of counsel was necessitated by the evidence of Hewana. Such on its own is not an objectionable conduct.

[12] No other objectionable conduct was demonstrated to me during these proceedings, which would have prompted me to make an order as to costs. In the absence of objectionable conduct there is no reason why I should mulct the respondents with costs. I do not find any reason to follow my sister Prinsloo J in the matter referred to above. In any event,

the facts are distinguishable. The Constitutional Court in *Long* decreed that the Labour Court must stipulate the reasons why an order of costs is made. In *casu*, I find none to stipulate.

[13] For all the above reasons, I accordingly make the following order:

Order

1. The interim order is discharged.
2. There is no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate L Voultzos

Instructed by: Joubert Galpin Searle, Port Elizabeth.

For the Respondents: Advocate C Burton

Instructed by: Wikus Van Rensburg Attorneys, Port Elizabeth.