



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C 605/2018

In the matter between:

RYAN STEWART

Applicant

and

DUTCH WINGS FOUNDATION

First Respondent

**GREAT CITY ATTRACTIONS PROPERTIES
SOUTH AFRICA (PTY) LIMITED**

Second Respondent

**AFRICAN TOURISM ATTRACTION
SERVICES (PTY) LIMITED**

Third Respondent

CAPE WHEEL (PTY) LIMITED

Fourth Respondent

MR RONALD BUSSINK

Fifth Respondent

Heard: 24 April 2025

Delivered: 07 May 2025

JUDGMENT

MABASO, AJ

Introduction:

[1] This Court is tasked with determining the costs in accordance with the Order dated 15 March 2024¹, which states, "2. Costs of 21 November 2023, and today are postponed to be heard in the normal cause." The date of 15 March 2024, served as a return date following an Order, by agreement between the parties herein issued on 21 November 2023.²

Arguments and Analysis:

[2] The parties have submitted their respective heads of argument regarding the issue of costs. The Applicant contends that he is entitled to a punitive costs order, specifically seeking costs as between attorney and own client. In contrast, the Respondents have submitted that costs be awarded to them specifically "in relation to the 15 March 2024 application by the Applicant and that the Applicant's prayer for costs be dismissed with costs", as they contend that the Applicant's pursuit of costs in the main matter was both frivolous and vexatious; further invite this Court to consider Section 162 of the Labour Relations Act³, which succinctly establishes that costs in this Court do not automatically follow the outcome of the case.

[3] During oral arguments, the Respondents remained primarily concerned with the implications of what they call the Applicant's conduct during the proceedings before this Court, particularly regarding the court appearance on 15 March 2024 and the events leading up to that date. The Respondents contend that they should not have incurred legal costs in this matter as they are unrelated Respondents.

¹ Per the learned Rabkin-Naicker J. This Order also discharged the *rule nisi* issued on 21 November 2023.

² Per the learned Mahalelo AJ.

³ 66 of 1995 ("the LRA").

[4] On the other hand, the Applicant has urged this Court to consider inter alia the fact that the application resulting in the Order of 15 March 2024 arose from an agreement between himself and the Third Respondent. This agreement subsequently became the subject of litigation in this Court as the Applicant successfully obtained an order concluding that it was valid and enforceable, which ordered the Third Respondent to pay him monies due to him and that this Respondent failed to comply with this Order, which prompted the Applicant to seek, among other remedies, an order to pierce the corporate veil against the Respondents. This latter application was granted by agreement on 21 November 2023, with a stipulated return date of 15 March 2024.

[5] The foundation of this matter originates from a judgment delivered by this Court, under the presiding authority of Van Niekerk J, on 27 February 2020, against the Third Respondent ("the first order"). In this ruling, the learned van Niekerk J established that following the Applicant's dismissal by the Third Respondent, an oral settlement agreement was promptly negotiated between the parties. The Court affirmed that this settlement agreement was both valid and enforceable, consequently ordering the First Respondent to remit a monetary amount to the Applicant. It is essential to clarify that this application was submitted in accordance with the Basic Conditions of Employment Act⁴ ("the BCEA") as opposed to the LRA.

[6] Due to delays from the First Respondent's failure to comply with the initial order, the Applicant initiated an *ex parte* application against all the Respondents mentioned herein. The purpose of this application was, among other matters, to pierce the corporate veil pertaining to the First and Second, as well as the Fourth and Fifth Respondents, and to seek additional consequential reliefs. The Applicant asserts that he he did so after observing that the Third Respondent was employing what he characterises as a "stratagem to avoid its obligations under the first order." This application was scheduled for consideration on an unopposed motion roll of 13 November 2023, as indicated *supra*. The Respondents accidentally became

⁴ 75 of 1997.

aware of this development and subsequently engaged a law firm⁵ that dispatched Mr van heerden to represent them. During the court proceedings, he concurred with the representatives of the Applicant that the application should be granted, which was ultimately endorsed by the Court ("second order") with a return date set for 15 March 2024.

[7] It is important to highlight four key features arising from the second order, namely: (a) Second to Fourth Respondents were interdicted and restrained from acting in a specified manner, (b) "Costs shall be reserved for later adjudication, (c) there is a return date of 15 March 2024, and Second Respondent was interdicted from alienating the business or assets of the Third Respondent and Fourth Respondent. It has to be highlighted that this application was not in terms of LRA, so this Court was now wearing its civil court hat, which applies the costs follow the result principle, mentioned in paragraph 10 below. Due to the return date, all the parties were bound to appear in this Court on the agreed date, 15 March 2024.

[8] The Respondents changed law firms by appointing the current ones. Soon thereafter, but prior to the return date, the following notable developments were observed: The Third Respondent elected to remit a monetary sum to the Applicant's legal representatives' account, and subsequently, the Fourth Respondent provided an answering affidavit addressing each allegation presented in the *ex parte* supporting affidavit of this application. It has to be emphasised that this affidavit was in line with the second order undertakings. In the answering affidavit, sworn by Mr Slamdien, a director of the Fourth Respondent, wherein a point in limine was raised thus:

"18. It is clear from the above that the Third Respondent, being the primary Judgment Debtor, has rendered payment of the capital sum owed by it and has tendered the interest thereon. In the circumstances, it is clear that the present Application launched against the Respondents is a nullity in that nothing can be claimed from them.

*19. Wherefore it is submitted that the Application **should be dismissed with costs**" (Own emphasis)*

⁵ Hayes Inc. ("the first law firm")

[9] The Applicant delivered a replying affidavit disputing that the matter has been settled and also disputing Mr Slamdien's averment that the money that was paid included texted costs.

[10] At this point, it is important to indicate that the BCEA permits parties to initiate legal proceedings within this Court concerning employment relationships. In the context of these proceedings, this Court assumes the role of a Civil Court, wherein costs follow the results. The general principles relating to costs in this Court, if the matter is not brought in terms of the LRA, have been set out by the LAC thus, in *Moropene v Competition Commission of South Africa and Others* (2024) 45 ILJ 1583 (LAC), at para 31:

“In such circumstances, the Labour Court operates on the same basis as the High Court. Therefore, costs do follow the results as is the norm in civil courts. It is axiomatic that section 162 of the LRA is of no application when the Labour Court exercises its jurisdiction in terms of section 77(3) of the BCEA.”

[11] The purpose of awarding costs is to compensate a successful litigant for the expenses they had to incur due to the other party's conduct, and it is at the discretion of the Court, which has to be exercised judicially. Relating to a particular order, the Court has to take into account all the circumstances of the matter at hand. This Court may depart from the “costs do follow the result” norm upon a good cause shown, it may also refuse to make a costs order in an undecided matter, and or where a party despite succeeding but failed to curtail proceedings, so such a party may be ordered to pay costs even if he succeeded in the substantive issue. It may also order an attorney and own client costs.⁶ The apex Court, *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), at para 223, regarding this type of costs said the following:

“More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been

⁶ *De Lacy v South African Post Office* - 2011 JDR 0504 (CC); *Mkhatshwa and Others v Mkhatshwa and Others* [2021] (10) BCLR 1191 (CC).

endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court...”⁷

[12] Relating to costs on an attorney and own client, the SCA in *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* - 2000 (1) SA 639 (SCA), at para 20, also sent the following warning:

*“ [20] To sum up, in considering a punitive costs order, a court should warn itself against using hindsight in assessing the conduct of a party. It has become notable that a practice has taken root in some jurisdictions of making awards of costs on an attorney and own client scale where someone other than the own client or his privy is involved. Whether such orders are justified or justifiable in the light of decisions of this Court (such as *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597) may be questioned. Further, sight appears to be lost of the fact that they may have unexpected or unforeseeable consequences...”*

[13] In light of the information presented in this Court, it is evident that these proceedings have been adjudicated in accordance with the BCEA and common law principles, particularly due to the establishment of a piercing of the corporate veil and the subsequent relief granted as per second order. Furthermore, both parties acknowledged that the norm of costs following the outcome is applicable, as stipulated within the settlement agreement decreed by the Court on 21 November 2023 and as referenced in this judgment. Additionally, there are no exceptions to the prevailing rule that costs should align with the outcome, thereby rendering section 162 of the LRA inapplicable in this matter.

[14] The subsequent inquiry pertains to the allocation of costs and whether there are any circumstances under which an involved party may be exempt from this obligation. During the proceedings, the Applicant indicated he no longer seek a cost

⁷ Footnotes omitted.

order against the First and Fifth Respondents, whom they have identified as “foreign entities.” Consequently, the Applicant requests a cost order against the Second to Fourth respondents, therefore, hereinafter reference to the Respondents will be about them.

[15] This Court is not adjudicating the substantive merits of the case; rather, it is addressing the issue of costs. The principal matter was considered by both courts on 15 March 2024 and 21 November 2023. On the latter date, the court order was issued affirming certain requests made by the Applicant, which the Respondents consented. Consequently, this Court concludes that the Respondents' assertion that the Applicant should be responsible for costs because the First, Second, Fourth, and Fifth Respondents were compelled to appear before this Court on 15 March 2024 is unfounded. The response to this claim is succinct: the Respondents who attended the court on 21 November 2023 did so voluntarily, as the matter was scheduled for on an unopposed roll as it was an *ex parte* application. They opted to engage legal counsel, who contested the order issued at that time. Furthermore, they agreed to postpone the case to 15 March 2024 and allowed to inter alia being interdicted and restrained, and offered to submit an answering affidavit, which one of them subsequently provided. They also acknowledged that the determination of costs would be addressed at a later stage, leading the presiding judge to issue the second order. Armed with that order, the Respondents made a commitment to appear in court on the specified date.

[16] Furthermore, one party submitted an affidavit asserting that the matter had been resolved. However, upon consideration of this affidavit, it is evident that uncertainties regarding the resolution persist. The documents exchanged between both parties prior to 15 March 2024, clearly indicate that the matter remains unsettled, as there was no meeting of the minds relating to the money paid by the Third Respondent to the Applicant's legal representatives. So the Respondents argument relating to costs fails.

[17] Regarding the Applicant, there is no evidence suggesting that the Applicant is not justified in being awarded the order for costs. Additionally, the documents presented to this Court at the relevant time reflect necessary efforts undertaken to

compel the Third Respondent to comply with the initial order. Moreover, 15 April 2024 has been established as the deadline for addressing the issue of costs in accordance with the agreement between the parties. Under these circumstances, no exceptions have been presented as to why the Applicant should not be entitled to recover costs, including those from this most recent hearing. In addition, considering the application which resulted in the second order, it seems clear that the Respondents were agreeing to be interdicted from doing something and they do not dispute this in the answering affidavit, therefore, it is reasonable that they all should be ordered to pay costs, as indicated in the order below.

[18] The final consideration is whether the Respondents will be obligated to pay costs at the rate requested by the Applicant. This Court acknowledges that it is not addressing the primary application, which was previously submitted before Justices Mohalelo and Rabkin-Nieker and was subsequently discharged. While this Court is impressed by the exemplary manner in which Mr Frans Rautenbach, counsel for the Applicant, managed this matter particularly in light of the Third Respondent's unwillingness to comply with the Court Order Mr Rautenbach effectively fulfilled his responsibilities by presenting necessary applications, on behalf of the Applicant, that yielded favorable results. However, in accordance with the findings articulated in both the *Alloys* and *Public Protector* judgments *supra*, this Court concludes that there is insufficient justification for the scale of costs requested by the Applicant. Consequently, the Court shall refrain from imposing a punitive costs order; but will issue a ruling as delineated hereinafter.

Order:

1. The Second to Fourth Respondents are liable to the Applicant for the party and party costs, of the *ex parte* application heard on 21 November 2023 and the appearances on 15 March 2024, along with any associated costs, until 24 April 2025, jointly and severally, the one paying the other to be absolved.
2. The Second to Fourth Respondents are also liable to the Applicant, for party and party costs, for the appearance held on 24 April 2025, jointly and severally, the one paying the other to be absolved.

Sandile Mabaso
Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicants: Mr Frans Rautenbach of CK Attorneys

For the Respondents: Mr Levin of Clifford Levin Inc.

LABOUR COURT