

SOUTH AFRICA / JUDGMENT

**Association of Mineworkers and Construction
Union (AMCU) and Others v Tshipi 'E Manganese
Mining (PTY) LTD (JS 754/2020) [2022] ZALCJHB
338; (2023) 44 ILJ 516 (LC) (1 December 2022)
[2022] ZALCJHB 338**

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 754/2020

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case****No: JS 754/2020****In**

the matter between:

ASSOCIATION
OF MINEWORKERS AND
First Applicant
CONSTRUCTION UNION
(AMCU)
AMCU MEMBERS AS PER
ANNEXURE AMC1
Second
to Further Applicants
And
TSHIPHI
'E MANGANESE MINING (PTY) LTD
Respondent
Delivered: 01 December
2022
(This
judgment was handed down electronically by circulation to the
parties' legal representatives, by email, publication
on the
Labour Court's website and released to SAFLI. The date on which
the judgment is delivered is deemed to be 01 December

2022.)

JUDGMENT

VAN NIEKERK, J

- [1] On 31 October 2022, the present matter was removed from the trial roll, with an invitation to the parties to submit written argument on the issue of costs, to be decided in Chambers.
- [2] The factual background is not in dispute. The second to further applicants were issued with written notices of termination of employment in February 2016. A statement of claim was filed on 5 July
2016. The applicants were subsequently re-employed, on 1 April 2017. The matter was subsequently settled on the basis that individual applicants who had been re-employed were to be paid an amount equivalent to six months' remuneration, with a reservation of rights regarding the disparity between their previous and current salaries. A statement of claim was filed on 19 October 2020, seeking compensation for what was alleged to be an act of discrimination, and damages for the difference in the respective rates of pay.
- [3] The applicants' claim was withdrawn on 28 October 2022, two days before the commencement of the trial. The notice of withdrawal was served in circumstances where the respondent's bundles of documents had been served on 13 and 24 October 2022. The applicants took the view that the documentation was dispositive of their claim, hence the notice of withdrawal. The applicants' attorney recorded that the information furnished in the bundles had been requested 18 months previously, and in these circumstances, proposed that the matter be withdrawn on the basis that each party pay its own costs. The respondent's attorneys replied to the effect that they had been instructed to appear on the trial date to argue the issue of costs.
- [4] Rule 13 provides that a party who has initiated proceedings may deliver a notice of withdrawal, and if costs are not tendered, may apply on notice for costs. Section 162 requires the court to exercise a discretion in relation to costs, on the basis of the requirements of the law and fairness. The Constitutional Court has made clear that in labour matters, section 162 should not be interpreted to mean that costs necessarily follow the result. This court must necessarily take into account the principle of fairness. In particular, the court must take into account the vulnerable position of those who seek to vindicate their constitutionally entrenched rights and have regard to the statutory purpose of dispute resolution, one which attempts to secure labour peace by the efficient resolution of disputes by specialist institutions (see *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others* (2021) 42 ILJ 2371 (CC), referring to among other authorities *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC)). As the Constitutional Court put it in *Union for Police Security & Corrections Organisation*, it is 'imperative for our democracy that the doors of labour dispute resolution

institutions be kept wide open for litigants to air their grievances...' (at paragraph 31).

- [5] What the authorities require is that in principle, costs do not necessarily follow the result, and that the court exercises a discretion judicially, having regard to all of the relevant facts, to determine how the requirements of the law and fairness would be best advanced. The court retains a discretion to award costs in an appropriate case.
- [6] In the present matter, essence of the applicants' claim is one of an unfair differential in pay based on an arbitrary ground, being membership of AMCU. The applicants submit that had the respondent provided the information when it was requested, the matter would have been withdrawn earlier. The union contends that the information concerned was not in its possession, and it was only at the last minute that the union was able to consider the information provided by the respondent, after which it took immediate steps to withdraw the claim. What the applicants' submissions overlook is the fact that on 2 November 2020, the respondent's attorneys of record addressed a letter to the union's attorney of record,

denying any differentiation in terms and conditions of employment and recording that in any event, the comparators relied on by the union to claim that the differentiation was based on union membership, were all members of the union. The union's response was to note that it would file a statement of claim and reserve its rights. The statement of claim had attached the pay slips of the applicants who had allegedly been discriminated against and the pay slips of the chosen comparators, from which it was apparent that all but one of the chosen comparators were members of AMCU. How it could be asserted that the applicants concerned had been discriminated against on account of their union membership is difficult to appreciate, to say the least. The pre-trial minute indicates that the respondent again asserted that to the extent that any differentials in pay existed between the individual applicants and their comparators, these were based on the nature of the jobs concerned, length of service and skill, and further that there had been no discrimination on account of union membership. The trial bundle served on 2 October 2022 contained pay slips that sustained this version.

- [7] The applicants ought to have been aware from the outset of the futility of a complaint of unfair discrimination on account of union membership, and in particular, that the chosen comparators were members of the union. Even if the union was for some reason unable to ascertain this much from its own records, the respondent's letter dated 2 November 2020 must have alerted the union to this prospect. Instead of determining the correctness of the respondent's assertions by reference to its own records, the union elected to proceed to file the statement of claim. There is no explanation in these circumstances to rely on the filing of the bundles of documents for the purposes of trial to explain the decision to withdraw, and to rely on the filing of the bundle to avoid an adverse order for costs. The withdrawal of the applicants' claim was clearly not on account of any new information that came to light shortly before trial – the union had been warned some two years prior to the trial date of the respondent's position and had all of the documents necessary in its position (being its own membership records) to verify the respondent's assertions.

- [8] The inescapable conclusion is that the union was intent on pursuing its claim against the respondent, come what may, and in the course of that pursuit failed to have regard to the information provided by the respondent's attorneys, a failure that had the consequence of the matter unnecessarily proceeding to trial.
- [9] The right of access to justice requires that the court does not discourage, through orders for costs, the referral of bona fide disputes for adjudication. But that right is frustrated when other litigants are crowded out or subjected to lengthy delays on account of the backlog in the allocation of trials. The inescapable conclusion in the present instance is that the union gave serious

attention to the matter only shortly before the trial, when it realised from the documentation filed for the purposes of trial that it had no case. That much ought to have been appreciated by the union from the outset. In the interim, the respondent was obliged to incur the costs of preparing for trial. The requirements of the law and fairness dictate that the respondent should be entitled to recover those costs, to the extent that an order for costs on the ordinary scale permits.

Order

1. The first applicant is liable for the costs of the proceedings.

André van Niekerk

Judge of the Labour Court of South Africa

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