

SOUTH AFRICA / JUDGMENT

Maxambele v South African Local Government Bargaining Council and Others (C1221/18) [2020] ZALCCT 1 (31 January 2020)

[2020] ZALCCT 1

COURT
Labour Court Cape Town

BEFORE
Rabkin-Naicker

CASE / FILE NUMBER
C1221/18

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IN
THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
Not
Reportable
Case
no: C1221/18

In the matter between: BONGILE
 MAXAMBELE Applicant
 And
 THE SOUTH AFRICAN LOCAL GOVERNMENT
 BARGAINING
 COUNCIL First
 Respondent
 COMMISSIONER
 RETIEF OLIVIER Second
 Respondent
 CITY
 OF CAPE
 TOWN Third
 Respondent
 Date
 heard: 26 November 2019

Delivered: 31 January 2020

JUDGMENT

RABKIN-NAICKER, J

[1] This application concerns costs only. It was brought against the first respondent (the SALGBC) on the following basis:

1.1 The applicant requested the first respondent to provide the record of the proceedings on 26 November 2018;

1.2 The review was not yet launched and the record was requested in order that his attorney could 'evaluate the case'.

1.3 On the next day the first respondent responded explaining that the record could only be provided when a formal review application is brought.

1.4 On the 14 December 2018 the review application was served on the first respondent.

1.5 The first respondent's regional secretary was away on sick leave. She sent out an 'out of office' reply informing all senders she would return to work on 9 January 2019 and providing an alternative email address of the case administrator.

1.6 On the 16 January 2019, the first respondent dispatched the record of the arbitration proceedings. This consisted of the Award; the CD of the proceedings; referral forms and the respective document bundles of the City of Cape Town and SAMWU.

1.7 Within a week applicant's attorney of record addressed correspondence to the first respondent requesting addition documents such as a statement of claim, plea and pre-trial minute.

1.8. The first respondent, although informing the applicant's attorney that the SALBGC forum was not a court of law nevertheless asked the second respondent if there were any further documents in his possession.

1.9 On the 8 February 22019 the applicant launched an application to compel and it is this that stands before me on the issue of costs.

1.10 Closing arguments from the parties at arbitration were procured by the first respondent from the Arbitrator and these were filed by the 11 February 2019.

[2] It is submitted on behalf of the applicant that in the process of seeking the first respondent to provide the complete record, the applicant incurred 'financial losses' and further that:

"The Respondent had knowledge as from September 2018, by this time the first Respondent should have the complete record proceedings ready for transmission to the Registrar."

It appears that the First Respondent did not take the review application seriously as he should have done and as such should be held liable for the resultant legal costs as the First Respondent's conduct is wanting of professionalism expected of such a body central to the administration of justice."

- [3] The first respondent submits that it dispatched the complete record of the proceedings as set out above, and there is no basis upon which a costs order should be sought against it. Moreover, the first respondent's attorneys of record have repeatedly addressed correspondence to the applicant's attorney of record reiterating that the SALGBC has complied with its obligations and requesting that this application be withdrawn. In addition, confirmation was sought that the Applicant will not persist with seeking a cost order. No response was forthcoming.
- [4] It was submitted that the conduct of the applicant or at the very least his attorney (i.e. in seeking a cost order nine months after the first respondent fully complied with the Rules of the Labour Court), is a flagrant abuse of process and has exposed the SALGBC to unnecessary costs. The conduct, it was argued should be viewed in conjunction with the applicant's deliberate failure to respond to email correspondence requesting that the present matter be withdrawn.
- [5] Applicant's attorney, on the other hand, submits that the reasonable financial losses were brought to the attention of the first respondent in order that an amiable solution could be reached. However, the first respondent threatened the applicant with punitive costs if the applicant did not abandon the request to resolve "the financial loss incurred as the result of First Respondents conduct."
- [6] At the hearing of the matter the cost order sought by the first respondent were costs de bonis propriis. Applicant sought costs on an attorney client scale.

Evaluation

- [7] In *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* (2019) 40 ILJ 87 (CC) the Constitutional Court had this to say:

"[60] The rule of practice that costs follow the result does not apply in Labour Court matters. In Dorkin, Zondo JP explained the reason for the departure as follows:

"The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory

provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless those requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court

and this court frivolous cases that should not be brought to court.”

[8] In this matter, the applicant should have removed the application to compel from the role as requested by the first respondent. However, this application was recklessly pursued. In addition, although the submission was made by applicant’s attorney that he was motivated by his client’s ‘financial losses’, such concern did not prevent him from filing two bundles of authorities for this matter, each containing 100 pages of photocopies.

[9] In *Telkom SA SOC Ltd v Mashaba* (2019) 40 ILJ 629 (LC), Prinsloo J set out the following authorities:

“[50] In SA Liquor Traders’ Association & others v Chairperson, Gauteng Liquor Board & others the Constitutional Court ordered costs de bonis propriis on a scale as between attorney and client and held that:

‘An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court’s displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.’

[51] In *Indwe Risk Services (Pty) Ltd v Van Zyl*: In re *Van Zyl v Indwe Risk Services (Pty) Ltd* the court considered circumstances where a de bonis propriis costs order was warranted and held that:

‘I am also mindful of the fact that an order for costs de bonis propriis is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted bona fide or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus Superior Court Practice at E12-27.)’

[10] In my view, the applicant’s attorney has been cavalier in his insistence on pursuing this application. He was warned a number of times of the consequences of pursuing it. By doing so, the fees and disbursements owed by the applicant to his attorney can have only increased. It will not be just and equitable for the applicant to be burdened with the costs of this application. This is a matter where the Court must reflect its displeasure by awarding costs de bonis propriis.

[11] I do not consider that my order should be on an attorney own client scale however. I am taking into consideration that ENS Africa is the attorney for both the first and third respondent in this matter, and that a senior attorney was briefed to deal with this interlocutory application. This is a case where the applicant’s attorney must be ordered to

pay the costs of the application de bonis propriis, on a party to party scale. Further, the applicant should not be left out of pocket by these ill-advised legal proceedings, and it is also justified that no disbursements may be charged by applicant's attorney of record to his client.

Order

1. The application is dismissed.
2. Costs are to be paid by the applicant's attorney of record de bonis propriis on a party to party scale;
3. No disbursements are to be charged by applicant's attorney of record to his client in respect of this application.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: BK Ngonzo Attorneys

First Respondent: ENS Africa

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