CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 192/20

In the matter between:

UNION FOR POLICE SECURITY AND CORRECTIONS ORGANISATION	Applicant
and	
SOUTH AFRICAN CUSTODIAL MANAGEMENT (PTY) LIMITED	First Respondent
KENSANI CORRECTIONS MANAGEMENT	Second Respondent
ROYAL MNANDI (PTY) LIMITED	Third Respondent
TEC-TRON MAINTENANCE (PTY) LIMITED	Fourth Respondent
JFE SECURITY	Fifth Respondent
NATIONAL COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICES	Sixth Respondent

Neutral citation:	*Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] ZACC 26
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ, and Tshiqi J
Judgment:	Khampepe J (unanimous)
Decided on:	7 September 2021

Summary: Appeal from the Labour Court — costs — no reasons from the Labour Court for departure from the general rule that costs do not follow the result in labour matters — appeal on costs upheld and costs order set aside

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal on the merits is refused.
2. Leave to appeal against the costs order of the Labour Court is granted.
3. The appeal against the costs order of the Labour Court is upheld.
4. The costs order of the Labour Court is set aside.
5. There is no order as to costs in the application for leave to appeal in this Court.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ, and Tshiqi J concurring):

Introduction

[1] Few things are as sacrosanct to a constitutional democracy founded on the rule of law as the peaceful resolution of disputes in an accessible legal forum. Thus, where that democracy entrenches labour rights, thereby appreciating the unique and significant nature of matters involving a person's livelihood, and creates fora in which labour disputes are to be ventilated and peacefully resolved, it is of utmost importance that the right of access to those fora is safeguarded. It is precisely this recognition that is

embedded in the rule that costs in labour disputes do not follow the result. Regrettably, the Labour Court in this matter departed from this cardinal rule without providing any reasons for doing so, and this Court is now called upon to correct that departure.

Factual background

[2] This is an application for leave to appeal against a judgment and order of the Labour Court. The applicant is the Union for Police Security and Corrections Organisation, a trade union registered in terms of the Labour Relations Act (LRA),[1] which acts on behalf of its members in the employ of the first to fifth respondents.

[3] The first respondent is South African Custodial Management (Pty) Limited (SACM), a company that provides prison services to the Department of Correctional Services (the Department) in terms of a public-private partnership with the Department. The second to fifth respondents are Kensani Corrections Management (Pty) Limited, Royal Mnandi (Pty) Limited, Tec-Tron Maintenance (Pty) Limited and JFE Security. They are SACM's subcontractors in its provision of services to the Department under the partnership. The sixth respondent is the National Commissioner of Correctional Services.

[4] Only the first and second respondents participated in the proceedings in the Labour Court and have filed papers in the application for leave to appeal to this Court. Therefore, where I refer to the respondents in this judgment, the reference is to those respondents.

[5] At the heart of the dispute is an audit report containing the findings and recommendations of a Task Team comprising the applicant, the first to fifth respondents, and the Department. The Task Team was established to address various employment-related issues at the Kutama Sinthumule Correctional Facility, which is one of the Department's correctional facilities serviced by the first to fifth respondents.

[1] 66 of 1995.

The report was rendered by the Task Team pursuant to the signature by the parties of two documents styled "Project Plan with Source Documents Required" and "Task Team Rules of Engagement" (the relevant documents). The applicant submits that the relevant documents establish that the findings and recommendations contained in the report were meant to be binding on, and implemented by, the first to fifth respondents.

[6] In substance, the report deals with the first to fifth respondents' remuneration structures, and various other matters concerning the employment terms and conditions of the applicant's members in the employ of the first to fifth respondents.

Litigation history

[7] The applicant, acting on behalf of its members, launched proceedings in the Labour Court seeking to enforce the obligations imposed by the relevant documents and the findings and recommendations contained in the report.

[8] The Labour Court upheld an exception by the respondents that it had no jurisdiction to adjudicate the matter, because the relevant documents on which the applicant based its claims constituted a collective agreement. The Court reasoned that this was so because the relevant documents were agreements between the applicant, a trade union, and employers, and dealt with the terms and conditions of the employment of the applicant's members, including procedures for ensuring their implementation. The Court held that, since the relief sought by the applicant was the enforcement of a collective agreement, section 24 of the LRA[2] unequivocally placed the dispute outside of its jurisdiction and within the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA). It therefore dismissed the application with no order as to costs.

[2] Section 24(1) of the LRA provides that—

> "[e]very collective agreement . . . must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration."

[9] The applicant sought leave to appeal, but its application was dismissed by the Labour Court in a separate judgment. In that judgment, the Court rejected the applicant's arguments to the effect that it had erred in characterising the relevant documents as a collective agreement, and held that it could find nothing to disturb its findings in that regard. The Court further dismissed an attempt by the applicant to rely on its right of access to courts enshrined in section 34 of the Constitution.[3] It held that section 34 could not extend the jurisdiction of the Labour Court beyond its boundaries, and that the CCMA is an independent and impartial forum as envisaged in section 34, where the applicant can exercise its right to have its dispute resolved. The Court therefore dismissed the application for leave to appeal. It is worth noting, at this stage, that in dismissing the application for leave to appeal, the Labour Court ordered costs against the applicant. It provided no reasons for doing so other than a terse statement that it "could find no reason for costs not to follow the result".

[10] A late attempt by the applicant to petition the Labour Appeal Court was dismissed by that Court for want of reasonable prospects of success or any compelling reason for it to be heard. Significantly, the Labour Appeal Court made no order as to costs.

[11] The applicant now approaches this Court for leave to appeal.

Parties' submissions in this Court

Applicant's submissions

[12] The applicant seeks leave to appeal against both the Labour Court's order on the merits and that Court's costs order.

[13] On the merits, the applicant repeats many of the arguments that failed in the preceding courts. It argues that the Labour Court was incorrect to find that the relevant

[3] Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

documents constituted a collective agreement and that it had no jurisdiction to adjudicate the dispute. The applicant also asserts, apparently on the authority of this Court's decision in *Fredericks,*[4] that even if the dispute concerned the enforcement of a collective agreement, section 24 of the LRA does not oust the jurisdiction of the Labour Court. It says that this is so because the Legislature could only have ousted that Court's jurisdiction to adjudicate disputes over the interpretation and application of collective agreements if it had assigned the determination of such disputes to another court of equivalent status, which the CCMA is not.

[14] On costs, the applicant takes issue with the Labour Court's costs order in the application for leave to appeal. It says that that order failed to follow the correct approach in labour and constitutional matters, which is that the losing party should not be mulcted in costs.

Respondents' submissions

[15] The respondents submit that the application lacks prospects of success, because it is clear from the documents attached to the applicant's statement of claim in the Labour Court that what the applicant sought to enforce in its statement of claim is a collective agreement. They say that the Labour Court's findings in this regard, and its conclusion that it lacked jurisdiction to adjudicate the dispute, are unassailable. The respondents argue that the applicant's reliance on *Fredericks* is inapposite because, unlike in that case, the applicant did not seek to rely on a constitutional right in its statement of claim, but merely sought to enforce a collective agreement.

[16] On costs, the respondents submit that the Labour Court was entitled to award costs in the application for leave to appeal under the circumstances because its decision in the main application was unassailable and leave was refused for lack of prospects of success.

[4] *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) at para 33.

[17] This Court has decided to determine the matter without oral argument, and its decision on each of the issues raised follows.

Jurisdiction and leave to appeal

[18] It is perspicuous that not all those who knock on our doors are let in. For this Court to entertain an application, its jurisdiction must be engaged and it must be in the interests of justice for leave to appeal to be granted.

[19] This Court has on numerous occasions affirmed that matters that concern the interpretation and application of the LRA raise a constitutional issue, and therefore engage this Court's jurisdiction.[5] Axiomatically, then, this application engages this Court's jurisdiction on that ground. But should leave to appeal be granted?

[20] Whether or not it is in the interests of justice to grant leave to appeal depends on a variety of factors which I need not get into, save to say that reasonable prospects of success carries significant weight.[6] In assessing what the interests of justice dictate in this case, I am compelled to distinguish between the applicant's appeals on the merits and on costs, for they are destined for different outcomes.

[21] There are simply no prospects of success in the applicant's appeal on the merits, and leave to appeal must therefore be refused. I can find no reason to interfere with the Labour Court's assessment of the relevant documents and the report in its two judgments, or its characterisation of the dispute. That Court's conclusion, that the applicant's claim is concerned with the interpretation and enforcement of an alleged collective agreement, is indeed unassailable.

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[5] See, for example, *Member of the Executive Council for Health, Western Cape v Coetzee* [2020] ZACC 3; 2020 (41) ILJ 1303 (CC); 2020 (6) BCLR 674 (CC) at para 36 and *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 16 and 20.

[6] See, for example, *S v Ramabele* [2020] ZACC 22; 2020 (2) SACR 604 (CC); 2020 (11) BCLR 1312 (CC) at para 35, where the Court relies on *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC).

[22] It follows, then, that the Labour Court was correct to conclude it had no jurisdiction to determine the matter. This Court's decision in *Fredericks*,[7] and numerous decisions of the Labour Appeal Court and the Labour Court,[8] make plain that section 24 of the LRA places disputes concerning the interpretation and application of collective agreements within the jurisdiction of the CCMA. The Labour Court's power over such disputes is limited to one of review, which may be exercised if a party challenges the award emanating from the relevant arbitration proceedings before the CCMA.[9] That the Labour Court has no jurisdiction to entertain disputes of this nature is therefore uncontroversial, and there are no reasonable prospects of this Court finding otherwise. Leave to appeal on the merits is therefore refused.

[23] But what of the appeal against the Labour Court's costs order? On my assessment, that appeal stands on a different footing. As the ensuing discussion reveals, the applicant's argument that the Labour Court failed to follow the correct approach to costs in labour matters has prospects of success. Leave to appeal against the Labour Court's costs order is therefore granted.

The proper approach to costs in labour matters

[24] The established rule in litigation that costs follow the result does not apply in labour matters. This Court has made that abundantly clear on a number of occasions, not least in its often-quoted decision in *Zungu*.[10] Despite this, however, there is now a concerning pattern of this Court being requested to overturn decisions of the Labour Court and the Labour Appeal Court applying the general rule that costs follow the result,

[7] *Fredericks* above n 4 at para 31.

[8] See in this regard the cases referred to in the discussion at para 39 of *Aucamp v SA Revenue Service* 2014 (35) ILJ 1217 (LC), at the end of which the learned Judge concludes that "there surely can be no doubt that where it comes to the interpretation and application of a collective agreement, the dispute can only be determined by arbitration, and not by the Labour Court".

[9] *Fredericks* above n 4 at para 31.

[10] *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (39) ILJ 523 (CC); 2018 (6) BCLR 686 (CC). See also *South African Commercial, Catering and Allied Workers Union v Woolworths (Pty) Limited* [2018] ZACC 44; 2019 (3) SA 362 (CC); 2019 (3) BCLR 412 (CC).

without more, to matters before those courts.[11] I deem it vital, then, to clarify in some detail in this judgment that it is not merely out of overzealous generosity on this Court's part that we say that costs do not follow the result in labour matters. We are constitutionally and statutorily obliged to do so.

[25] Indeed, the rule that costs do not follow the result in labour matters honours key imperatives that flow directly from the Constitution and the LRA. Two constitutional provisions are particularly relevant here.

[26] The first is section 23 of the Constitution, which entrenches various labour rights, including the right to fair labour practices. Rights alone, however, often ring hollow, and are seldom capable of meaningful realisation without institutions where they may be ventilated and enforced, and in which disputes about their scope and content may be resolved. This is why one of the primary purposes of the LRA, which is intended to give effect to the labour rights in section 23 of the Constitution,[12] is "to promote the effective resolution of labour disputes".[13] The LRA achieves this by "[providing] simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration" and "[establishing] the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act".[14]

[27] It is clear from a holistic reading of the LRA that the dispute resolution mechanisms that it creates were meant to be a "one stop shop" for the resolution of

[11] Since *Zungu*, we have been requested to do so on at least three occasions, including the present one. See *National Union of Mineworkers v Samancor Limited (Eastern Chromes Mines)* [2021] ZACC 16; 2021 JDR 1249 (CC) (*NUM*) and *Long v South African Breweries (Pty) Ltd* [2019] ZACC 7; 2019 (40) ILJ 965 (CC); 2019 (5) BCLR 609 (CC).

[12] *AMCU v Royal Bafokeng Platinum Ltd* [2020] ZACC 1; 2020 (3) SA 1 (CC); 2020 (4) BCLR 373 (CC) at para 103; *Transport and Allied Workers Union of South Africa v PUTCO Ltd* [2016] ZACC 7; 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) at para 28; and *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) at para 22.

[13] Section 1(d)(iv) of the LRA.

[14] Preamble to the LRA.

labour disputes.[15] These mechanisms were intended to be simple and accessible, so that those to whom the labour rights enshrined in our Constitution are conferred can vindicate those rights speedily and cost-effectively. This laudable statutory goal is eroded when the bearers of labour rights are faced with the threat of adverse costs orders if their claims are, for whatever reason, unsuccessful. That brings us to the second, and closely related, constitutional right that the rule against costs in labour matters is meant to fulfil.

[28] Section 34 of the Constitution enshrines the right to have one's disputes resolved by the application of law "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". In the labour context, section 34 affords those who enjoy labour rights in terms of the Constitution and the LRA the right of access to the statutory dispute resolution mechanisms crafted by the LRA. And it is trite, of course, that the right of access to legal dispute resolution mechanisms in the context of our democracy is closely linked to the rule of law, a core foundational value on which that democracy is grounded.[16] This Court put it thus in *Barkhuizen*:

> "Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value."[17]

[29] In essence, then, the section 34 guarantee of peaceful and orderly dispute resolution before legal fora is a critical bulwark against resort to unlawful methods of settling disagreements and, crucially, prevents self-help. Thus, in *Chief Lesapo*, this Court said that section 34—

> "ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. [It] is a bulwark against vigilantism, and the chaos and

[15] *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 54.

[16] Section 1(c) of the Constitution.

[17] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 31.

> anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to [courts or other independent and impartial tribunals] is indeed of cardinal importance."[18]

[30] In the labour context, the right of access to the statutory dispute resolution mechanisms created by the LRA guarantees that labour disputes, which are not infrequently fraught and contested, are resolved in peaceful, regulated and institutionalised fora. It ensures that parties do not resort to unlawful means of resolving disputes that should be ventilated in the specialised institutions envisaged by the LRA. Indeed, the priority given by the LRA to the dispute resolution mechanisms that it creates is no more evident than in its proscription of industrial action if the issue in dispute "is one that a party has the right to refer to arbitration or to the Labour Court".[19] When the very same institutions created by the LRA shut their doors to litigants by too keenly mulcting them in costs, they encourage recourse to industrial action and other proscribed means to air disputes that the LRA demarcates for resolution in those institutions. Zondo JP, as he was then, on behalf of a unanimous Labour Appeal Court in *Dorkin*, explained the position thus:

> "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' organisations 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. That is a balance that is not always easy to strike but, if the court is to err, *it should err on the side of not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication*."[20] (Emphasis added.)

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[18] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22.

[19] Section 65(1)(c) of the LRA.

[20] *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 41; 2008 (29) ILJ 1707 (LAC) (*Dorkin*) at para 19.

[31] Lest I be misunderstood, I must make this clear: the right to pursue industrial action, which is protected by both the LRA and section 23 of the Constitution, is indispensable to our democracy. It is "of both historical and contemporaneous significance"; it enables workers "to assert bargaining power in industrial relations"; and is a key "component of a successful bargaining system" of the nature contemplated in the Constitution and the LRA.[21] Nothing said in this judgment must be taken as suggesting otherwise. The crisp point I am making, rather, is this: when costs orders are too readily made against those who seek to vindicate their constitutionally-entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action. That would cultivate unlawfulness and be inimical to the foundational value of the rule of law underpinning our democratic order.

[32] It is therefore imperative for our democracy that the doors of labour dispute resolution institutions be kept wide open for litigants to air their grievances, so that unlawful industrial action, and all its potential consequences, is generally avoided. That accords with the scheme of the LRA, which contemplates industrial action only where no other avenues are readily available.[22] The rule against automatic costs orders is an integral part of that scheme in that it ensures access to labour dispute resolution institutions and no doubt enlarges the width by which the doors of those institutions are kept open.

[33] The principles set out above form the bedrock of how the question of costs should be understood in labour matters in the context of our democracy. These principles find expression in section 162 of the LRA,[23] which rejects the ordinary rule

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[21] *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 13.

[22] See [30] and above n 19.

[23] Section 162 of the LRA provides:

> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

of litigation that costs should follow the result in favour of an approach based on "law and fairness". When we pay heed to this fairness standard, we do so because we are obliged by the LRA and the above constitutional imperatives. Hence, I repeat: when making costs orders in labour matters, courts are enjoined to apply the fairness standard in the LRA as a matter of constitutional and statutory obligation.

[34] What, then, are the implications of what I have said in this judgment? Do the principles I have enunciated dictate that costs can never be ordered against a party in labour matters? I think it is clear from this Court's jurisprudence that the answer to this question is a resounding "no". This Court has previously affirmed the principle that costs are discretionary to the court adjudicating a matter.[24] That applies no differently to labour matters. But, like all exercises of discretion, a court exercising its discretion to award costs must do so judicially.[25]

[35] In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered.[26] Second, it must apply its mind to the dictates of the fairness standard in section 162, and the constitutional and statutory imperatives that underpin it. Where

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court."

[24] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 144.

[25] *NUM* above n 11 at para 32; *Long* above n 11 at para 29; and *Zungu* above n 10 at para 26.

[26] *NUM* id at paras 30-1 and *Zungu* id at para 25.

a court fails to do so, it commits an error of law and thus misdirects itself. This Court explained this in *Long*:

> "[W]hen 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. This, the Labour Court failed to do. There is no reasoning on the question of costs beyond an indication that costs are to follow the result. This is a misdirection of law and it follows that the Labour Court's discretion in respect of costs was not judicially exercised and must be set aside."[27]

[36] An instructive approach to a court's exercise of its discretion on the question of costs can be found in the Labour Appeal Court's decision in *Bester*.[28] In determining the question of costs in that case, the Court held:

> "The appellant seeks a costs order. The question falls to be decided with reference to law and equity. As an individual, bearing her own costs without the help of a trade union, it is appropriate to give consideration thereto, even though the usual approach is that costs do not simply follow the result. It seems to us that fairness dictates that she be granted costs in the review and in the appeal because of the burden such costs would be on an individual. Moreover, the appellant is a single parent with three children.
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> In defending the award in the review proceedings and in prosecuting the appeal, the appellant has represented herself. To the extent that she has incurred legal costs, she can recover them, including, in principle, the value of her own legal expertise, as a legal practitioner, devoted to the case. It is unnecessary to specify what these costs might include. Thus, the appropriate costs order is one that is subject to taxation in the absence of an agreement between the parties about a sum." (Footnotes omitted.)[29]

[37] Here, the Labour Appeal Court demonstrated its cognisance of the correct point of departure when dealing with costs in labour matters, being *Zungu*, and provided detailed reasons for its costs award. This approach to costs is an example of a court that

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[27] *Long* above n 11 at para 29.

[28] *Bester v Small Enterprise Finance Agency SOC Ltd* [2019] ZALAC 73; (2020) 41 ILJ 877 (LAC).

[29] Id at paras 16-7.

has applied its mind to the constitutional and statutory principles enunciated in this Court's jurisprudence, which are affirmed in this judgment. This naturally brings me to the critical question in this case: did the Labour Court exercise its discretion judicially when mulcting the applicant in costs?

Did the Labour Court exercise its discretion judicially?

[38] The answer to this question must, I regret, also be a resounding "no". It is evident from the Labour Court's curt statement that it "could find no reason for costs not to follow the result" that the Court's point of departure was informed by an incorrect understanding of the applicable legal principles. Put plainly, the Labour Court ignored this Court's jurisprudence and simply assumed the application of the default rule that costs were to follow the result unless there was a reason for them not to. That flies in the face of everything this Court has said about costs in labour matters,[30] which has been, yet again, set out extensively in this judgment.

[39] The Labour Court's decision on costs therefore must fail at the first hurdle. The correct premise from which the Court ought to have departed was that the applicant would not be ordered to pay costs unless there was a reason to deviate from the *Zungu* general rule that a losing party in labour matters should not be mulcted in costs. The inevitable consequence of this application of the wrong default rule meant that the Labour Court was not minded either to provide reasons for deviating from *Zungu*, or to

[30] In particular, see this Court's recent decision in *NUM* above n 11 at paras 30-1 which I quote, in relevant part, for the principles espoused bear emphasis:

> "It appears that the Labour Appeal Court simply adopted the rule that costs follow the result. There is nothing to indicate why the applicant was ordered to pay the costs in both Courts. This is compounded by the fact that the Labour Court had made no order as to costs in its judgment. . . . [The Labour Appeal Court gave] no explanation for order number three, which had the effect of overturning the Labour Court's finding that there should be no order as to costs.
>
> The applicant's role is to defend the rights of its members. It cannot be argued that challenging a dismissal alone justifies a costs order. Mulcting the applicant in costs in a labour matter where there is no finding of any untoward conduct on the part of the applicant is intolerable. The costs orders will have a chilling effect on the applicant and may deter it from fulfilling its duty to represent its members without fear of reprisal. This may affect its members' right to access justice and thus, may infringe sections 23 and 34 of the Constitution. However, there may be instances where a costs order is warranted and in that case, reasons must be provided."

apply its mind to the fairness standard prescribed by the LRA and the various constitutional imperatives set out above.

[40] It follows, then, that in arriving at its costs order, the Labour Court applied incorrect principles of law and thus failed to exercise its discretion judicially. Moreover, there is nothing forthcoming from the record of this matter that justifies a departure from the important precedent of *Zungu* and *Dorkin*. The applicant is mandated to safeguard its members' labour rights and was presumably litigating in pursuit of this important constitutional imperative. That its appeal before the Labour Court bore poor prospects of success and failed is not, on its own, a sufficient reason to ignore the clear message of *Zungu*: courts adjudicating labour matters must prefer an approach to costs that will not have a chilling effect on bona fide litigation intended to vindicate labour rights. I see no reason to dispense with this practice in this matter. The Labour Court's approach clearly constitutes a misdirection, and its costs order falls to be set aside on that basis.

Conclusion

[41] Judicial precedent has no opt-out clause. Decisions of this Court bind all other courts. They bind the Labour Appeal Court and the Labour Court. We expend unnecessary judicial energy and resources when this Court is asked to correct departures by other courts from routine legal principles that we have explicated time and time again.

[42] I have penned this judgment in the hope that no more judicial resources will be wasted on this trite issue in the future. Costs do not follow the result in labour matters.

Costs

[43] It would be a surprise if our fidelity to the principles affirmed in this judgment did not compel me to conclude that there is no order as to costs in this Court. That is, without hesitation, the order I make.

Order

[44] The following order is made:

1. Leave to appeal on the merits is refused.
2. Leave to appeal against the costs order of the Labour Court is granted.
3. The appeal against the costs order of the Labour Court is upheld.
4. The costs order of the Labour Court is set aside.
5. There is no order as to costs in the application for leave to appeal in this Court.