IN THE LABOUR COURT OF SOUTH AFRICA HELD IN CAPE TOWN

Case no: C429\2007

In the matter between:

CITY OF CAPE TOWN **Applicant**

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION **Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] In this matter, Gush AJ made an order in the following terms:

1. A rule nisi is issued calling upon the respondent to show cause on 25 October 2007 at 10H00 why an order should not be made in the following terms:

1.1 that the provisions of the rules of the above Honourable Court as to the time and the manner of service applicable to the matter be dispensed with, and that the matter is disposed of as one of urgency in accordance with the provisions of Rule 8 of the Rules of the above Honourable Court.

1.2 that the strike in respect of which written notice was given by way of a notice dated 07 August 2007, a copy of which appears as Annexure “RLF 2” to the supporting affidavit (“the respondent’s strike notice) is hereby

declared unprotected and unlawful.

1.3 that the respondent be interdicted from calling for or instigating any of the applicants employees to participate in the strike referred to in the respondent's strike notice.

1.4 that all of the applicants employees performing essential services as determined by the Essential Services Committee in Government notice No: 1216 in GG NO: 18276 on 12 September 1997, be interdicted from participating in any strike action referred to in the respondent's strike notice or otherwise.

2. Directing the respondent to pay the costs of this application.

3. Paragraphs 1.1 to 1.4 shall operate as an interim interdict and order pending the return day of this application.

4. Directing that service of this order be effected by fax on the Cape Metropolitan Branch of the respondent.

5. Authorising the applicant to seek further relief, if so required, under the same case number on the same papers, duly supplemented, provided that at least 24 hours notice of such application is given to the person against whom such relief is sought.

6. Grant the applicant such further and or alternative relief as the above Honourable Court may deem fit.

[2] On 25 October 2007 (the return day), Potgieter AJ made the following order:

1. The rule nisi granted on 27 August 2007 by Mr Acting Justice Gush is confirmed and made final;
2. The question of costs is reserved for determination on the

05th February 2008;

3. The respondent shall file its supplementary affidavits by no later than 08 November 2007;
4. The applicant shall file its replying affidavit (if any) by no later than 22 November 2007.

[3] On 05 February 2008, Cheadle AJ then postponed the issue of costs as per paragraph 2 of the order by Potgieter AJ to 07 March 2008.

[4] Therefore, the matter came before me for determination of costs. The applicant argued that it should be awarded costs including those of 07 March 2008. The respondent argued that an appropriate order is that of no order as to costs. In this judgment, I shall attempt to answer the following questions:

1. Does a cost order depend on the depth of the pocket or the size of the purse as it were?
2. When is it appropriate to award costs?

Background facts

[5] The applicant was formally constituted in 22 September 2000 by the Local Government: Municipal Structures Act 117 of 1998. This was after amalgamation of seven local municipalities. The employees of the disestablished municipalities were transferred to the applicant in terms of section 197 of the LRA.

[6] A process of restructuring was then undertaken. This process commenced with the publication of a so- called micro design structure in February 2002 and December 2004. A placement

agreement between the applicant and IMATU came into being.

[7] As a result certain employees were placed into the new structure. During 2006, the applicant, experienced a shift in political power to a Democratic Alliance led council. As a consequence, the applicant sought to realign (restructure again).

[8] On 05 October 2006, the respondent referred a dispute (the first dispute) to the SALGBC for conciliation. That dispute, concerned the alleged refusal to bargain by the applicant specifically about the restructuring process. This dispute was settled on 21 December 2006. On 30 May 2007, the respondent referred a second dispute to the Bargaining Council concerning the alleged failure by the applicant to apply the provisions of the so-called Task agreement. This dispute was conciliated upon and a certificate of non-resolution was issued. The respondent then referred it to arbitration.

[9] On 19 June 2007, the respondent referred yet another dispute to the Bargaining Council concerning the interpretation and application of the settlement agreement (the one reached after the first referral). This dispute was abandoned.

[10] On 02 July 2007, a fourth referral was made by the respondent. On 15 August 2007, the Bargaining Council issued a certificate and characterised the dispute as one of mutual interest as contemplated in section 135 (5) (a) of the LRA.

[11] As a result, on 17 August 2007, the respondent issued a strike notice calling upon the applicant's employees to commence strike on 28 August 2007. That led to an urgent application on 27 August 2007 which culminated in an order by Gush AJ referred to earlier. It is apparent that the respondent opposed

the application full steam. Heads of argument were filed. The respondent raised a point in limine. Effectively, it argued that since the certificate of 15 August 2007, had not been set aside, then such entitled it to call the strike. Much reliance was placed on the decision of the LAC[1].

[12] In response to that argument, the applicant relied on the decisions of the Labour Court which suggested that the fact that a certificate is issued does not mean that a strike that follows would be protected[2].

[13] It is apparent that Gush AJ was persuaded by that argument, hence the issuance of the rule nisi and the rejection of the point in limine. I shall now turn to the issue of whether a cost order should be made?

Should the Labour Court issue an order of costs against the respondent?

[14] It is important to mention that the Labour Court is established as a court of law and equity[3]. Also, it is important to note that the Labour Court is a Superior Court that has authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction[4].

[15] Therefore, the Labour Court is a Superior Court and has to

1 Fidelity Guards Holdings (Pty) LTD v Epstein & Other (2000) 21 ILJ 2382 (LAC).
2 Mittal Steel SA LTD v Solidarity and Others unreported J1655\05 dated 07 September 2005, followed in Cape Gate (Pty) LTD v NUMSA & Others (2007) 28 ILJ 871 (LC).
3 Section 151 (1) of the LRA.
4 Section 151 (2) of the LRA.

approach the issue of costs like the High Court. Unlike the High Court, the Labour Court would be guided by the provisions of the Act[5]

[16] In terms of section 162, the Labour Court has a discretion to make an order for the payment of costs, according to the requirements of the law and fairness. In deciding the issue, the Labour Court has a discretion to take into account whether the matter has been correctly referred to it and the conduct of the parties in defending the matter or during the proceedings.

[17] It is important to mention that proceedings in the Labour Court take two forms. The first is by way of referral[6]. The second is by way of motion[7].

[18] In my view factors to be taken into account as set out in section 162 (2) are only relevant to a referral as opposed to motion proceedings. Accordingly for the purpose of this judgment I shall consider only the law and fairness as required by section 161 (1), as this was motion proceedings.

[19] Since I have an unfettered discretion I have to exercise it judicially[8]. The purpose of awarding costs, particularly to a successful party, in terms of the general rule, is to indemnify him or her for the expense to which he has been put through having been unfairly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity, but that does not affect the principle[9]. That being

5 Section 162 of the LRA.
6 Section 191 (5) (b) and Rule 6.
7 Section 145 and 158 and Rule 7.
8 See Fripp v Gibbon 1913 AD 354 and AC Celliers Law of costs at 15:24.
9 Pajen components South Africa Ltd v Boric Gaskets CC 1999 (2) SA 409 (W)

the purpose, as a matter of law, when exercising my discretion judicially, I need to take that into consideration.

[20] The general rule is that costs should follow the results, this in my view is the law part that is being referred to in section 161 (1). If that was the only consideration, I would not hesitate to award the applicant costs as the successful party[10].

[21] However, being the Labour Court; I am enjoined to consider fairness. Fairness in this instance is fairness to both parties to the proceedings. Fairness being a wide concept, it is comprised of various ingredients; which in appropriate circumstances may include the size of the pocket or purse as it were.

[22] It does seem that **NUM v Ergo**[11] will forever remain the guiding authority on the issue of fairness. In that judgment, the Appellate Division as it then was set amongst others the following factors:

a) requirements of law and fairness to be applied (this was per the statutory requirement ever even then[12].
b) the general rule that in the absence of special circumstances costs follow the event would yield where consideration of fairness require it.
c) avoiding costs order where there is a genuine dispute and the approach to court was not unreasonable.
d) where there is an ongoing relationship, costs should be avoided particularly where there is a bona fide dispute.
e) the conduct of the parties.

10 K v Minister of Safety and Security 2005 (6) SA 419 (CC) and Van der Berg V GCB SA (2007) 2 ALL SA 499 (SCA).
11 1992 (1) SA 700 (AD).
12 Section 17 (12) (a) and 17 (21A) (c) of the 1956 Act.

[23] The court acknowledged that the above considerations were not intended to be *numerus clausus*. There is a wide discretion. In making no costs award, the court then took into consideration that:

a) **NUM** is the successful party.
b) **NUM's** conduct in the negotiations process led to justifiable unhappiness and frustration on the part of the **Ergo**.
c) there was and presumably still an ongoing relationship between the parties.
d) the issue raised are of fundamental importance, not only to the parties, but to all the players in the important arena of industrial conciliation.

[24] Recently the Supreme Court of Appeal endorsed the following as factors justifying the imposition of costs order:

a) mala fides;
b) unreasonableness and
c) frivolousness[13].

[25] Compare in this regard **Manhattan Motors Trust v Adbulla (2002) 110 BLLR 930 (LAC)** where Comrie AJA writing for the majority held that Maleka AJ was in error when refusing costs if his reasoning was as set out in this comment:

"I can only order costs when there is some element of vexatious or (bad faith?) on the part of the litigant".

13 Chevron Engennering (Pty) LTD v Nkambule and Others 2004 (3) SA 495 (SCA) at 512 G—J.

[26] In this court, Landman AJ as he then was in **Mutual Construction Company (Pty) LTD v Federated Mining Unions 1997 (11) BLLR 1470 (LC)** made an order of costs and he said:

"An order of costs is imperative; not only to compensate the applicant but to stress the point that uprocedural strikes are contrary to the ethos of the new labour dispensation and ought not to be tolerated".

[27] The facts of that case were such that the first respondent readily admitted in the answering papers that the strike was unprocedural. Such is not the case in the matter before me. In court, applicant's counsel argued that the fact that there was clear authority as in **Cape Gate** decision, the respondent should not have opposed and should have conceded to the order upon receipt of the papers.

[28] In my view, such cannot be the basis not to oppose a relief which the respondent believed was perfectly entitled to oppose, regard being had to their reliance on the LAC judgment of **Fidelity**.

[29] Recently the LAC per Zondo JP writing for the majority said the following:

"With regard to costs I am of the opinion that the requirements of the law and fairness dictate that there should be no order as to costs. There is a continuing employment relationship between the parties in this matter and the matter which is the subject matter of the present proceedings is of great importance to all parties concerned. Even in the Labour

Court no order as to costs ought to have been made[14].

It is clear from that judgment that where there is an ongoing relationship and the matter being of great importance to the parties, the Labour Court ought not to make an order as to costs. The message by the LAC is loud and clear.

Conclusion

[30] In view of the authorities referred to above, I took the following factors into account:

1. the undisputed ongoing relationship between the applicant and the respondent.
2. the respondent was not at all unreasonable in opposing the relief.
3. their belief that since they had the certificate, the strike action would be protected hence the opposition was not at all unjustified.
4. the matter about the legality or otherwise of the strike was of great importance to it and its members.
5. that they did not oppose the granting of the final order.
6. that they called off the strike immediately after the rule nisi issued.

Order

[31] In the result, I make the following order:

1. There is no order as to costs.

14 Solidarity v Eskom Holdings & Others yet unreported CA 9\05 dated 20 February 2008.

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G N MOSHOANA AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Adv Wakefield and Adv Kahanovitz
Instructed by	: Mallicks Attorneys
For the Respondent	: J Whyte
Date of hearing	: 07 March 2008
Date of Judgment	: 19 March 2008