Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2808/14

In the matter between:

FREDERIC ANDRE CROSNIER **APPLICANT**

and

EASIGAS (PTY) LTD **RESPONDENT**

Heard: 25 February 2016

Delivered: 23 March 2016

Summary: Costs – matter settled on first day of trial; only costs in dispute. The discretion established by s 162 applies regardless of the nature of the action, in this case, a contractual claim referred in terms of s 77 (3) of the BCEA. In latter instance, Labour Court does not sit as a civil court; it simply exercises a concurrent jurisdiction. Also considered - whether High Court tariff should apply when claim falls within ambit of jurisdiction of Magistrates' Court and on the facts, whether a punitive costs order is warranted.

JUDGMENT

VAN NIEKERK J

Introduction

[1] On 25 February 2016, the day on which this matter had been set down for trial, the parties settled their dispute, but for the issue of costs. The dispute had been referred to this court in terms of s 77 (3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA). It was agreed that the oral submissions made on the day could be supplemented by later written heads of argument. I am grateful to both parties' representatives for the thorough heads that they submitted.

[2] In essence, the court must decide three things. The first is whether in disputes about contracts of employment referred for adjudication in terms of s 77(3) the approach to ordering costs is that established by s 162 of the Labour Relations Act, 66 of 1995 (LRA), or whether the court ought more properly to apply the approach adopted in the civil courts, i.e. that in the absence of exceptional circumstances, costs should follow the result. The same question has previously been cast another way – when the Labour Court exercises its jurisdiction to determine contractual disputes, does it sit as a civil court? The second issue is whether, in a case (such as the present) where the Magistrates' Court has concurrent jurisdiction, costs should necessarily be limited to those recoverable on the Magistrates' Courts' tariff. Finally, the applicant seeks an order for costs on the scale as between attorney and client; the court must decide whether a punitive costs order is warranted.

Does s 162 apply?

[3] This court's power to order that an unsuccessful party pay the costs of the successful party is to be found in s 158 (1) (a) (vii). That subparagraph simply states that this court make any appropriate order, including an order for costs. Section 162 defines the ambit of that power. It reads as follows:

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

[4] Section 77 (3) of the BCEA provides that this court has concurrent jurisdiction with the civil courts to 'hear and determine any matter concerning a contract of employment'. Does it necessarily follow that when this court exercises its s 77 (3) jurisdiction it sits as a civil court and that s 162 of the LRA does not apply? In *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union obo members* [2015] 1 BLLR 34 (LAC), Waglay JP thought so, and said the following:

> [46] With regard to costs, the Labour Court exercised its jurisdiction concurrently with the civil courts and in effect, sat as a civil court. The court therefore did not have the discretion conferred by the LRA to decide whether it was equitable to grant costs. That discretion is confined to matters that arise under the LRA. Costs in a purely contractual dispute such as the present, unless there are exceptional circumstances, ought ordinarily to follow the result. In any event, even if there was a discretion to allow or disallow costs

> based on considerations of equity, I would award costs against the respondent…

The judgment by Waglay JA is a minority judgment and as such, it is not binding on this court.

[5] I am respectful in disagreement with the view that this court's powers in relation to costs falls to be determined by the nature of the action brought before it or more particularly, that when the court determines a contractual dispute in terms of s 77 (3), s 162 of the LRA does not apply. There is nothing in s 162 that draws any distinction in relation to this court's powers to make orders for costs when it exercises jurisdiction under the LRA on the one hand, and any other statute on the other. Put another way, the discretion established by s 162 to make orders for costs according to the requirements of law and fairness is not confined to matters that arise under the LRA. There is equally nothing in the BCEA which affords this court powers in relation to costs orders, whether on the terms provided in s 162 or otherwise. This court's powers (including the power to award costs) and the terms on which costs orders should be made) remain regulated by the LRA regardless of the statute under which the court exercises its jurisdiction in any particular dispute.

[6] The reference to 'concurrent jurisdiction' in s 77(3) of the BCEA means no more than that this court's jurisdiction overlaps with that of the civil courts in a dispute that concerns an employment contract – it does not mean that this court sits as a civil court or is imbued with powers that extend beyond those conferred by the LRA. In s 77(3) referrals, this court sits as the Labour Court, exercising its statutory jurisdiction (whether concurrent or otherwise) and imbued with all its statutory powers.

Applying s 162

[7] The nature and extent of the statutory injunction to exercise a judicial discretion in relation to costs having regard to the requirements of the law and fairness has never been better expressed than the unanimous judgment of what was then the

Appellate Division of the Supreme Court in *NUM v East Rand Gold and Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A) at 1241J in relation to the similarly worded powers afforded to the industrial court established under the 1956 LRA. Goldstone JA said:

> (1) The provision that 'the requirements of law and fairness' are to be taken into account is consistent with the role of the court in which both law and fairness ought to be applied.
> (2) The general rule of law that in the absence of special circumstances costs follow the event is a relevant consideration. However, it will yield twin considerations of fairness require it.
> (3) Proceedings in the industrial Court of frequently part of the conciliation process. Parties, and particularly individual employees, should not be discouraged from approaching the industrial Court in such circumstances. Consideration should be given to avoiding costs orders especially where there is a genuine dispute and the approach to the court was not unreasonable. The industrial Court should be easily accessible to litigants who suffer the effects of unfair labour practices.
> (4) Frequently the parties will have an ongoing relationship that will survive after the dispute has been resolved. A costs order, especially with a dispute has been a bona fide one, may damage that relationship and thereby detrimentally effect peace and the conciliation process.
> (5) The conduct of the parties is obviously relevant especially where considerations of fairness are concerned.
> (6) The aforegoing considerations are not a numerus clausus. Very wide discretion is given to the court by the act in respect of orders for costs. Such a discretion must be exercised with a proper regard to all the facts and circumstances in each case.

[8] On this basis, the convention applied in the civil courts to the effect that costs ought to follow the result is a significant but not determinative consideration.

[9] To the extent that the court ought to have regard to the degree of success achieved by the applicant, the parties have recorded that for the purposes of the resolution of the present dispute, the respondent agreed to pay the applicant the

sum of R54 771.44 and the applicant abandoned his claim for R9575.19. By any measure, the applicant has achieved substantial success. In the present instance, there is obviously no ongoing relationship between the parties, collective or otherwise, that might militate against a costs order. It not disputed that the respondent is a multinational corporation, while the applicant is an individual employee. While this court has never as a matter of policy always awarded costs to successful individual employees and always denied them to successful corporate entities, I must take into account that the applicant has been obliged personally to fund a lengthy process of litigation, to the point of trial, and that he substantially succeeded in his claim on the proverbial steps of the court. In the same way that this court should not be seen to close its doors to individual employees by having them always run the risk of an adverse order for costs, individual employees should not ordinarily be substantially deprived of the value of a judgment or settlement in their favour by being denied their costs.

[10] Ultimately, s 162 requires the court to exercise a discretion, and to exercise it judicially, having regard to all of the relevant facts and circumstances. For the reasons reflected above, I am persuaded that the requirements of the law and fairness are best satisfied by awarding the applicant his costs.

Which tariff should apply?

[11] Section 151 (2) of the LRA provides that this court is a superior court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of a division of the High Court in relation to matters under its jurisdiction. Consistent with this provisions, Rule 24 of the Rules of this court provide that costs between party and party allowed in terms of any judgment or order of the court must be taxed, in the absence of the court's own tariff, on the tariff applicable in the High Court.

[12] It is not disputed that the nature and quantum of the applicant's claim (R64 346.63) brings it within the ambit of the jurisdiction of the Magistrate's Court, as does the lesser amount of the settlement. In general terms, Parties may institute

proceedings in the court of their choice. However, generally speaking, where matter could have been heard in the Magistrate's Court but is instead brought in the High Court, costs are allowed only on the scale of the appropriate court. In *Carlin Medical Extrusions v Light-Be Lighting & others* (16312/2103) Van Oosten J made the point in the following way:

> It has in my experience always been the practice of this court, in acknowledgement of the concomitant jurisdiction of this court and the magistrates' courts, to entertain and adjudicate matters in which the amount claimed falls within the jurisdiction of a lower court, subject of course to an appropriate order as to costs. The discretion which the court has in regard to costs provides a powerful deterrent against preference to the high court where the lower court would have been more convenient or even perhaps more appropriate (see *Goldberg v Goldberg* 1938 WLD 83 at 85; *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W)). But, a party remains entitled to a free choice of the forum in which to bring proceedings (Cf *Sparks v David Polliack & Co (Pty) Ltd* 1963 (2) SA 491 (T) 494H-495C) on condition that such court has the necessary jurisdiction and subject to the possibility of an order limiting or, if appropriate, disallowing costs. On the other hand an order for costs on the high court scale may be justified (*Sealandair* supra 642F-I; *Soleprops 39 (Pty) Ltd v Miltiaes Korssketides t/a Prime Grill Boksburg* (09/50779, 09/30950) [2013] ZAGPJHC 31 (1 March 2013) para [13]). Each case must be decided on the circumstances of that particular case (*Koch v Realty Corporation of South Africa* 1918 TPD 356 at 359). The High Court will obviously, in its inherent discretion, prevent an abuse of the process of the court.

[13] I see no reason why a similar approach should not be adopted by this court. When a party refers a contractual dispute for determination by this court in terms of s 77 (3) of the BCEA in circumstances where a lower court has jurisdiction, one of the factors that the court must necessarily take into account when it exercises its discretion in relation to costs is the potential for abuse. A party seeking an order for costs of the higher scale must justify his or her recourse to the more expensive tribunal.

[14] The scale on which costs are to be awarded, as Van Oosten J noted, is a matter that remains within the discretion of the trial judge, to be exercised judicially on consideration of all of the relevant facts. Factors that have been held to be ordinarily relevant include any considerable difficulties in fact or law presented by the case, whether the matter is one of public interest, and whether recourse to the High Court amounts to an abuse of the process of court. They were summarised by Jones J in *Vermaak v Road Accident Fund* [2006] ZAECHC 10, at paragraph [5]:

> The high court frequently restricts costs to the magistrates' courts scale on the ground that the plaintiff could and should have proceeded in the magistrate's court where litigation is less expensive. In doing so, it applies the basic principle of costs that the court has a discretion which it must exercise judicially upon a consideration of all the facts of each case, and that the underlying consideration is fairness to both sides. The amount of the judgment or settlement is always a significant factor in balancing fairness. The courts discourage litigants from choosing a more expensive forum where relief can be obtained in a less expensive one. The defendant should not have to pay more in the way costs because he has been brought to a more expensive court unnecessarily. While the amount of a judgment is always important, it is, however, not the only consideration. Various other circumstances – for example, the complexity of the factual issues, the difficulty of the legal issues, the seriousness of an imputation against reputation, the honesty of officials, the general importance of the issue to the parties or the public – might induce a court to award costs on the high court scale although the amount involved is small. But as a general rule the proper exercise of the court's discretion on costs provides a powerful deterrent against bringing proceedings in the high court which might more conveniently be brought in the magistrate's court, and this implies that the party who could have chosen to proceed in the lower courts will have to satisfy the high court that there are good and sufficient reasons for the exercise of a discretion to award high court costs in his or her favour.

[15] This court has generally been disinclined to grant orders for costs other than on the Magistrate's Court scale in cases where statutory rights under the BCEA have been enforced as contractual terms, at least where the claims fall within the jurisdiction of the Magistrate's Court or even the Small Claims Court (see, for example, *Fourie v Stanford Driving School* (2011) 32 *ILJ* 914 (LC)).

[16] Although the monetary value of the applicant's claim is such that he could have instituted proceedings in the Magistrate's Court, it has a number of features that suggest that a referral to a specialist court was justified. The claim turned to some extent at least on the contention that any right to withhold payment was based on a variation to the applicant's terms and conditions of employment, a variation that the applicant contended was unilateral. The terms of the dispute, as they were initially raised, also concerned the application of s 34 of the BCEA and the subsection that ought properly to be invoked in the present instance. Further, the settlement agreement itself contemplated that either party could approach this court in the event of a dispute.

[17] The applicable tariff therefore for the costs order which I intend to make is that ordinarily applied in this court, which is the High Court scale.

A punitive costs order?

[18] Finally, I turn to the applicant's prayer for the costs order on a punitive scale. Since this court enjoys the inherent powers in relation to matters under its jurisdiction as a High Court has in relation to matters under its jurisdiction, it is clear that this court, in appropriate circumstances, may order costs to be paid on a punitive scale.

[19] Courts do not often make orders for costs on a punitive scale. Orders of this nature are conventionally reserved for those instances where a claim is brought or defended frivolously or where a party has conducted itself in a *mala fide* way, where a claim or defence is entirely devoid of merit, or where the conduct of a representative warrants a punitive order. The applicant has urged me to make a finding that the respondent has acted *mala fide* in defending the claim, and that a

punitive costs order is justified on this basis. I am not persuaded that on the papers alone a punitive costs order is warranted.

I make the following order:

1. The respondent is to pay the applicant's costs, on a party and party basis, on the ordinarily applicable scale.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv M Sibanda, instructed by Howes Inc.

For the respondent: Mr A Patel, DLA Cliffe Dekker Hofmeyr Inc.