IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Reportable

Case No: J 1592/16

In the matter between:

BEMAWU **First Applicant**

AND OTHERS **Second to Fourth Applicants**

and

SOUTH AFRICAN BROADCASTING

CORPORATION SOC LTD **First Respondent**

HLAUDI MOTSOENENG **Second Respondent**

MALAKO SIMON TEBELE **Third Respondent**

and Case no: J 1343/16

In the matter between:

SOLIDARITY **First Applicant**

AND OTHERS **Second Respondent to Fifth Applicants**

and

SOUTH AFRICAN BROADCASTING

CORPORATION SOC LTD **First Respondent**

HLAUDI MOTSOENENG **Second Respondent**

MALAKO SIMON TEBELE **Third Respondent**

Date of Order: **8 September 2107**

Date Reasons delivered: **15 September 2017**

REASONS FOR ORDER

GUSH, J:

[1] In this matter I handed down an order regarding the apportionment of the costs on Friday 8 September 2017 and indicated that I would give reasons for the order later. These are those reasons.

[2] The order is attached to the reasons.

[3] In both the judgment by the Honourable Lagrange J (J1342/16 Solidarity) and my order, on 26 and 28 July 2016 respectively, the determination of the final apportionment of the costs "between the respondent [South African Broadcasting Corporation: SABC] and any of its officials or employees" was postponed *sine die*.

[4] Specifically:

4.1 In Lagrange, J's judgment he ordered:

"79.5 Within five days of this order, Seboleto Dithlakanane, the respondent's General manager: radio news and current affairs and Molopo S Tebele, acting executive: news and current affairs, must file an affidavit showing course why they should not personally be held liable for part of the costs of this application, such costs to be paid on an attorney and client scale including the cost of two counsel.

79.6 The determination of the final apportionment of liability for payment of the applicant's costs of the application including the costs of two counsel, **as between the respondent and any of its officials or employees** is postponed *sine die*, and may be enrolled by any party for determination once 20 days have elapsed from the date of this order".[1] (My emphasis)

4.2 In the second application I ordered the respondent (SABC) to file an affidavit indicating which of its officials were involved in the decision to terminate the contracts of employment and for the officials so identified to in turn file affidavits to show cause why they should not be held personally liable for the costs and:

"The final determination of the apportionment of the liability for payment of the costs of the application (such costs to be paid on the attorney and client scale and including the costs of two counsel) **as between the respondent and any of its officials or employees may be enrolled** … together with the matter of *Solidarity and Others vs. SABC (SOC)* J1343/16." (My emphasis)

[1] Judgment J1343 /16 paras 79.5 and 79.6.

[5] In the *Solidarity* matter Lagrange J, in dealing with the liability for costs, referred to both "the reckless regard for the pending applications when the decision to dismiss was made" and to the first respondent's decision to persist in opposing the application after agreeing to the order in the Helen Suzman Foundation application[2].

[6] As a consequence of my order that the matters be dealt with together the applications were consolidated in order to determine "the final apportionment of liability for payment of the applicant's costs" in both matters.

[7] It is appropriate to set out the chronology of events that culminated in the Court having to consider the question of costs. In so doing I simply summarise the facts and circumstances that are more fully dealt with in the pleadings and the judgment as they may relate to the question of costs.

7.1 On 26 May 2016 the first respondent issued what became known as the Protest Policy. The essence of this policy is dealt with in detail in Lagrange, J's judgment.

7.2 It is clear from the press statement issued at the time and in numerous statements thereafter that the second respondent was the author of or at the very least, emphatically associated himself with the policy. His role and responsibility in the execution and application of the policy became clear in the outcome of the Helen Suzman Foundation's application in the North Gauteng High Court.

7.3 Shortly after the Policy was issued certain of the applicants were summoned by the second respondent and made it clear that criticism or disregard of the Policy would not be accepted.

[2] Judgment J1343 /16 at para 76

7.4 At subsequent meetings a number of the individual applicants voiced their disagreement with the Policy. This led to the suspension of a number of the individual applicants by the respondent. Thereafter notices to attend disciplinary enquiries were issued.

7.5 The Protest Policy attracted widespread criticism that led to a complaint being laid with the Complaints and Compliance Committee (CCC) of the Independent Communications Authority of South Africa (ICASA).

7.6 On 11 July 2016 the CCC held that the Protest Policy was in conflict with the duties of the first respondent as a public broadcaster, was invalid in terms of the Broadcasting Act read with sections 16, 192 and 39(2) of the Constitution of South Africa.

7.7 Ironically at the same time the ICASA (CCC)'s finding was delivered. The first respondent was in the process of adding more charges of misconduct levelled at the individual applicants.

7.8 In response to the ICASA finding the applicants requested an undertaking that their suspensions be reversed and disciplinary action stopped.

7.9 The first respondent initially indicated that it would not comply or the ICASA (CCC) finding as it intended applying for the judgment to be reviewed and set aside and therefor would not accede to the applicants' request.

7.10 Immediately prior to their dismissal the applicants in the *Solidarity* matter had filed the urgent application to set aside their suspensions; and after their dismissals, for their dismissals to be set aside.

7.11 Notwithstanding the ICASA finding; a request by the applicants' attorneys that the disciplinary action against the applicants be withdrawn; or the pending application to the Constitutional Court and to this Court, the first respondent proceeded to dismiss the individual applicants on 18 and 19 July 2016.

7.12 Shortly thereafter the applicants in the *BEMAWU* matter filed a similar urgent application.

7.13 Before the applicants' urgent application could be heard, on 20 July 2016 the application by the Helen Suzman Foundation in the North Gauteng High Court for an interdict preventing *inter alia* the first and second respondents from implementing or enforcing the protest policy came before that court.

7.14 On 20 July 2016 the first and second respondents agreed to an order in the North Gauteng High Court which order interdicted them from giving effect to, implementing or enforcing the Protest Policy.

7.15 Despite this, on 22 July 2016, when the *Solidarity* matter was heard it was vigorously opposed by the first respondent.

7.16 Judgment reinstating the applicants in that matter was handed down on 26 July 2016.

7.17 Two days later on 28 July 2016 the *BEMAWU* application was heard. The first respondent did not appear nor indicate to the Court what its attitude to the application was.

[8] In considering the question of costs it is clear from section 162 of the Labour Relations Act[3] (LRA) that the Court has the discretion to make an order for the payment of costs according to the requirements of law and fairness.

[9] In exercising this discretion the Court may take into account:

> "(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."** (my emphasis)

[10] This specific provision requires the court, in exercising its discretion when awarding costs, to specifically consider the conduct of the parties in pursuing a matter before the court.

[11] In this matter the two pertinent issues to be considered in determining a just and equitable apportionment of the costs relate to, firstly, the conduct of the first and second respondents regarding the decision to pursue their continued opposition to the applications and secondly to the decision to dismiss the individual applicants.

[12] It is common cause that the suspension and dismissal of the individual applicants was as a direct consequence of the Protest Policy.

[13] The Protest Policy was found, in no uncertain terms to have been unlawful, unconstitutional and offensive. Firstly, by ICASA and then confirmed BY CONSENT in the interdict granted in the North Gauteng High Court. It bears repeating that in the Helen Suzman foundation application the order interdicted

[3] Act 66 of 1995 as amended.

the first and second respondents from giving effect to, implementing or enforcing the Protest Policy.

[14] From the affidavits filed in this matter there can be no doubt that the second respondent was if not the author, an enthusiastic proponent of the Protest Policy and its application in respect of the employees of the first respondent; So much so that the interdict applied to him personally.

[15] In the same vein it is abundantly clear that the second respondent was aware of the disciplinary proceedings involving the individual applicants and the urgent applications that they had launched.

[16] The order granted in the North Gauteng High Court by its very nature and wording required the respondents to act. The second respondent, specifically, by consenting to the order, was obliged to act in accordance therewith.

[17] The second respondent offers no explanation whatsoever for his inaction and failure to comply with the interdict by reversing the dismissals and not opposing the urgent applications.

[18] During argument the second respondent's counsel expressly refused to deal with this issue confining his argument only to submissions regarding who made the decision to dismiss the individual applicants.

[19] I am satisfied that the conduct of the second respondent as an employee or official of the first respondent in taking no action to abide by, or comply with the interdict (thus necessitating that the applicants' were obliged to pursue their urgent applications) justifies an order that he be ordered to pay the applicants' costs jointly and severally.

[20] The second concern regarding the apportionment of costs involved the decision to dismiss. Whilst on the probabilities it is clear that the second respondent was

aware of the dismissals and by implication associated himself with them, the third respondent, and falling heavily on his sword, admits to having made the decision.

[21] The second respondent's answer to the issue regarding the decision to dismiss is, simplistically, that he did not make the decision. That, in the light of the surrounding circumstances and the second respondents position, there is no answer as to why he should not also be personally liable for the applicants' costs, jointly and severally, in this regard.

[22] The affidavits filed by the third respondent are most unsatisfactory. The third respondent is largely evasive to the extent that his counsel suggested that the Court ignore the contents of the affidavits and find that the third respondent was merely a cat's paw.

[23] The essence of the third respondent's explanation however is that he took the decision to dismiss the individual applicants. That decision was as Lagrange, J described, made with "reckless regard" for the circumstances. In the absence of a denial, the third respondent must have been aware of both the Helen Suzman Foundation interdict and the pending hearing of the urgent applications before this Court. Having ostensibly enjoyed the authority to dismiss the individual applicants he tenders no explanation for not having either withdrawn the dismissal or the opposition to the urgent applications.

[24] That being so, there is no reason why the third respondent should not also be ordered to pay the applicants' costs jointly and severally with the second respondent.

[25] In both matters the issue of apportionment was to be determined between the first respondent and the second and third respondents. I can find no reason why the first respondent should not be held liable for the costs together with the second and third respondents. Counsel for the first respondent conceded that the

first respondent should be held liable for the costs (albeit only for a small proportion thereof).

[26] It is for the reasons set out above that I made the order handed down on 8 September 2017.

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D. Gush

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	In *Solidarity*: J1343/16 Advocate Goosen
Instructed by	Serfontein Viljoen and Swart
For the Applicants:	In *BEMAWU*: J1592/16 Advocate H van der Riet SC with him E Tolmay
Instructed by	Webber Wentzel
For the First Respondent:	Advocate P Mokoena SC with him N Mayat-Beukes
Instructed by	Werksmans.
For the Second Respondent:	Advocate. B Masuku
Instructed by	Majavu Attorneys.
For the Third Respondent:	Advocate. P C Pio
Instructed by	Welman Bloem

IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Case No: J 1592/16

Honourable Justice **GUSH ORDERED on 08 September 2017**

In the matter between:

BEMAWU **First Applicant**

AND OTHERS **Second to Fourth Applicants**

and

SOUTH AFRICAN BROADCASTING

CORPORATION SOC LTD **First Respondent**

HLAUDI MOTSOENENG **Second Respondent**

MALAKO SIMON TEBELE **Third Respondent**

and

Case no: J 1343/16

In the matter between:

SOLIDARITY	**First Applicant**
AND OTHERS	**Second Respondent to Fifth Applicants**
AND	
SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	**First Respondent**
HLAUDI MOTSOENENG	**Second Respondent**
MALAKO SIMON TEBELE	**Third Respondent**

ORDER

Having read the documents and having considered the application:

The determination of the apportionment of liability for the payment of the costs involves the following hearings where costs were reserved:

A. The Application by Solidarity and Others (J1343/16) heard on 22 July 2016 and 26 July 2016;
B. The application by BEMAWU and Others (J1592/16) heard on 28 July 2016;
C. The Consolidation Application heard on 24 February2017;
D. The joinder Application heard on 28 March 2017;
E. The Adjournment on 16 August 2017; and
F. The hearing regarding costs on 6 September 2017 and 7 September 2017.

I have found it necessary in the interests of fairness to differentiate between the various hearings and accordingly make different costs orders in respect of each of the hearings set out above.

IT IS ORDERED THAT:

1. Re A above: The 1st, 2nd, and 3rd respondents, in case number J1343/16, are ordered to pay the Applicants' costs (Solidarity, Foeta Krige, Suna Venter, Krivani Pillay and Jaques Steenkamp) on an attorney and own client scale including the costs of two counsel, jointly and severally the one to pay the others to be absolved;
2. Re B above: The 1st, 2nd, and 3rd respondents, in case number J1592/16, are ordered to pay the Applicants' costs (BEMAWU, Busisiwe Ntuli, Lukhanyo Calata and Thandeka Gqubele-Mbeki), on an attorney and client scale including the costs of two counsel, jointly and severally the one to pay the others to be absolved;
3. Re C, D and E above: the First respondent is ordered to pay the Applicants' costs on the usual scale.
4. Re F above: The 1st, 2nd, and 3rd respondents in the consolidated matter in case number J1343/16 (Solidarity, Foeta Krige, Suna Venter, Krivani Pillay and Jaques Steenkamp) and case number J1592/16 (BEMAWU, Busisiwe Ntuli, Lukhanyo Calata and Thandeka Gqubele-Mbeki) are ordered to pay the Applicants' costs on an attorney and client scale including the costs of two counsel, jointly and severally the one to pay the others to be absolved

BY THE COURT

REGISTRAR