IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NUMBER: J2647/2007

In the matter between: -

INDWE RISK SERVICES (PTY) LIMITED Applicant

and

HESTER PETRONELLA VAN ZYL Respondent

In re: -

HESTER PETRONELLA VAN ZYL Applicant

and

INDWE RISK SERVICES (PTY) LTD Respondent

JUDGMENT

AC BASSON, J

Nature of this application

[1] This was an application for rescission of an order granted by my

learned brother Cele J on 27 February 2008 in terms of which it was ordered that the applicant (the respondent in the application in terms of section 77 of the Basic Conditions of Employment Act 77 of 1997 ("the BCEA") pay Ms Van Zyl ("the respondent") an amount of R 17 764.17 with interest. The court also ordered the applicant to pay costs on an attorney own client scale. The matter was unopposed. (I will refer to the order dated 27 February 2008 of Cele J as "the order"). The applicant did not oppose the section 77 application as it had already made payment in the amount of R 11 235.52 to the respondent on 22 November 2008. This was the amount that the applicant was of the view was owed to the respondent. At that point the applicant then regarded the respondent's claim for her salary and leave pay as finalized. Notwithstanding this payment, the respondent's attorneys, Jansen Inc persisted with the section 77 application for the amount of R 17 764.17.

[2] To the extent necessary, the applicant in this application (Indwe Risk Services (Pty) Ltd – hereinafter referred to as "the applicant") also sought condonation for the late service and filing of the application to rescind the order by Cele J. The applicant also sought a costs order against Jansens Inc, *de bonis propriis.*

[3] The applicant conducts business as an insurance brokerage. The respondent was appointed as from 1 July 2004 as a service consultant

until her resignation on 9 November 2007.

[4] To the extent that condonation was necessary condonation was granted. Although the delay is long, the applicant tendered a good explanation for the delay. The applicant only found out on 27 February 2008 that Jansens Inc had proceeded with the section 77 application despite the fact that the applicant had paid the respondent the sum of R 11 235.52 on 22 November 2008.

[5] On 29 February 2008 the applicant's attorneys received a letter from Jansens Inc which informed the applicant that the court had granted the application in terms of section 77. It is also important to point out that the author of the letter, one Scholtz (from Jansens Inc), also confirmed in this letter that an amount of R 11 235.52 was paid to the respondent on 22 November 2008 and demanded payment of the sum of R 6 824.13. Upon receiving legal advice to the effect that an application for rescission of the order would cost in excess of R 7 000.00, the applicant decided to pay the sum of R 6824.13 (although it did not agree that it was owed to the respondent), without prejudice to the respondent, instead of incurring further legal expenses as well as wasting time in drafting affidavits. However, when the applicant received the respondent's Bill of Costs in the amount of R 57 505,03 (before it was taxed by the Master)[1] for the unopposed section 77 of the BCEA application, it realised that the

[1] The final Bill of Costs was: R 55 315.63.

rescission application would be necessary. Before receiving the Bill of Costs, the applicant was not aware that a punitive cost order had been made against it. It was only when Jansens demanded payment of their Bill of Costs on 25 March 2008 that the applicant realise that it was necessary to file a rescission application.

[6] The applicant also had to launch an urgent application to stay a writ of execution (in respect of the amount due in terms of the Bill of Costs) as Jansens Inc had already instructed the Sheriff to execute the writ on 8 May 2008 and calling on him to execute urgently. This despite the fact that the Bill of Costs was taxed only on 7 May 2008 and despite the fact that the applicant's attorneys only received the letter of demand calling for payment of the legal costs on 7 May 2008. (I will return to the Bill of Costs hereinbelow. I will also deal with the application in terms of section 77 of the BCEA in more detail hereunder.)

Rescission application

[7] Once the applicants brought an order to stay the writ of execution (which was granted by Nel, AJ) the applicant filed the application for rescission of the order granted by Cele J.

[8] On behalf of the applicant it was submitted that the order of Cele J be rescinded on the basis that it was erroneously sought and granted, *alternatively*, that the Applicant has a *bona fide* defence and a

reasonable explanation for its failure to file a notice of opposition. The applicant's *bona fide* defences are that: (i) the application was launched prematurely; (ii) all monies due was paid on or before the due date; (iii) there was an express agreement between the applicant and the respondent that the Respondent's November 2007 salary would be paid on or before *25 November 2007* and that leave pay and the *pro rata* portion of her December 2007 salary would be paid on *7 December 2007*. In essence the defence is that payment was, in any event, not due when Jansens Inc launched the section 77 application before Cele J.

[9] It was submitted on behalf of the applicant that the order was granted erroneously because, at the time when it was granted, Cele J was not advised that an amount of R11 235.52 has already been paid to the respondent on *23 November 2007*.

[10] The court was also not advised that the amount that was claimed (namely R17764,17) did not provide for required deductions, being tax; UIF; and in respect of insurance (Prestasi policy). The court, as already pointed out, was also not advised that there was an agreement between the applicant and the respondent that the respondent's November 2007 salary would be paid on 25 November 2007 and that outstanding leave and *pro rata* salary (from 1 December 2007 to 7 December 2007) would be paid on 7 December 2007. This arrangement is evident from a letter in the

respondent's own handwriting (and which is attached to the applicant's founding papers in the rescission application). In this letter dated 13 November 2007, the respondent expressly requested the applicant that the "*polispremie*" be deducted from her November 2007 salary "*wat op 25/11/07 betaalbaar is sodat dekking vir Desember in orde is*". This letter also specifically confirmed the arrangement that her outstanding leave will be paid out only on 7 December 2007.

[11] In her answering affidavit, the respondent now states that she has never reached an agreement with the respondent. In the same breath, however, she concedes that her salary was normally paid out on the 25th of each month. Then she states that the letter written by her was "*merely confirmation of a statement made by Ms. Mostert*." Two points must be made: Firstly, if the respondent had a problem with the arrangement in respect of the dates of payment of her salary and her leave pay, she should have said so in her letter. The respondent chose not to do so. Secondly, in terms of clause 5.2.3 of the respondent written conditions of employment with the applicant, the respondent expressly agreed that all monies due to her when her employment is terminated will be calculated and paid out to her on the last working day of her notice period. She resigned on 9 November. The applicant had waived the need for the respondent to work her notice. In terms of clause 5.2.3 the applicant was not obliged to pay

her the monies due immediately upon her resignation but only on the last working day of her notice period which was 7 December. On the papers I have little doubt that the respondent did agree to the payment arrangement which was, in any event, in accordance with her conditions of service.

Sequence of events

[12] In order to place the rescission application in its proper context, it is necessary to briefly refer to the sequence of events preceding the present application. On 16 November 2007 Jansens Inc (the respondent's attorneys) sent a letter to the applicant calling for payment of the sum of R 17 764.17. Although the applicant agreed that it did owe money to the respondent it did not agree that the amount claimed was the amount that was owed to the respondent. The applicant was of the view that an amount of R 15 211.75 was owed to the respondent. The applicant was on the verge of responding to the respondent by letter in which it would have been pointed out firstly, that the respondent had to wait until 25 November 2007 for her salary (as she should have in terms of the agreement (*supra)* and her conditions of service), and secondly, that the respondent was owed an amount of R 15 211.75.

[13] However, before the applicant could do so, Jansens Inc served the

section 77-application on the applicant. As already pointed out, the applicant acknowledged that it owed the respondent money and that it had every intention to pay such monies to the respondent on 25 November 2007 (as per the agreement). In order to avoid unnecessary legal costs, the applicant then paid an amount of R 11 235.52 which it agreed was owing to the respondent at that particular time. The payment of this amount was made directly to the respondent on 22 November 2007. It is not in dispute that this amount was paid to the respondent on that day. In other words, as at 22 November 2007, the applicant had complied (at least to the extent that it was of the view it was obliged to do) with its undertakings in terms of the agreement between the parties and as confirmed by the letter from the respondent.

[14] I should interpose to point out that, simultaneously to the section 77 application, the respondent also referred a claim of constructive dismissal to the CCMA. The CCMA dismissed her claim with costs. At paragraph 78 of the award the commissioner makes the following comments:

> *"This dispute is frivolous, an abuse of the CCMA and should be dismissed with costs."*

The commissioner also made an adverse credibility finding against the

respondent. In fact, the commissioner went as far as to find that the respondent had a *"strong motive to lie at arbitration, in order to obtain compensation"*.

[15] On 29 February 2008 the applicant received a letter from Jansens Inc. In this letter the Scholtz of Jansens Inc confirmed that the sum of R 11 235.52 was received on *22 November 2007 (*three months before the application in terms of section 77 was heard by Cele J). Scholtz then called for the applicant to pay the sum of R 6824.14. This letter also confirmed that the respondent has obtained an order from Cele J on an unopposed basis in the amount of R 17 764.17.

Proceedings before Cele J

[16] The applicant submitted that Jansens Inc withheld information from Cele J and in particular the fact that the respondent had already paid an amount of R 11 235.52. It was thus submitted that even if the amount of R 17 764.17 was owed to the respondent, Cele J should have been alerted to the fact that a portion of the amount had already been paid to the respondent as far back as November 2007. This was clearly not done and is evidenced by the fact that Cele J gave judgment in an amount of R 17 764.17. (I will return to the other facts that were not disclosed to Cele J during the hearing hereinbelow.)

[17] The allegation that Cele J was not informed of the fact that the applicant has already paid out the sum of R 11235.52 is not specifically denied in the answering affidavit. According to the respondent (the deponent) she was informed by Scholtz that he had instructed a certain Adv. Rheeder who appeared on her behalf, to advise the court that an amount has already been paid to the respondent in November 2008. In the answering affidavit, it is also stated that Scholtz was *not* in court when the matter was heard by Cele J. This statement, however, conflicts with what is contained in a letter dated 16 April 2008 from Scholtz and signed by him. In this letter Scholtz clearly states that he *was* in court when the matter was heard by Cele J. The salient part of the letter reads as follows :

> "*We deny that our client failed to disclose to the court the fact that payment was received by your client.* ***Our client was represented at the court by counsel and our Mr. Wim Scholtz,*** *and the necessary confirmatory affidavits will be filed with our client's opposing papers. The court records are obviously also available*." (My emphasis.)

[18] Moreover, in the replying affidavit, in answer to the above allegations, the applicant states that the applicant's counsel had perused the court file on 16 May 2008 in preparation of the urgent application before

Nel, AJ. He saw and read a draft order which must have been prepared by Jansens Inc in the proceedings before Cele J. Adv Rheeder must therefore have seen the draft order when he handed it up to Cele J. If it was the intention of Jansens Inc to disclose the true state of affairs to Cele J (as alleged), Rheeder would have brought it to the intention of Cele J that partial payment has been made as far back as 22 November 2007. If that was done the order of Cele J would have reflected a lesser amount. This was not done. Adding insult to injury, the court was requested to grant a costs order against the respondent on an attorney and own client scale.

[19] Ms. Helen Mclean ("Mclean") and Ms Erica De Lange ("De Lange") of the applicant's attorneys made enquiries about the whereabouts of Adv. Rheeder who, according to the respondent's papers represented her in the proceedings before Cele J. This investigation was undertaken when the applicant received invoices allegedly rendered by Adv. Rheeder to Jansens for his appearance before Cele,J. Three invoices were submitted by Rheeder: The one in the amount of R 1 350.00 for perusing the file and for the consultation with Scholtz and the client. The second invoice was for an amount of R 675.00 for perusal of the file and for settling documents and annexure. The third invoice in the amount of R 11 215.00 was for his appearance in court in the unopposed matter and for his travel expenses.

[20] From the invoices it appears that Adv. Rheeder operated from the following address: *Peter Mokaba Chambers*, 4 Peter Mokaba Avenue, Potchefstroom. Jansens Inc operates from *Braam Fischer House*, 4 Peter Mokaba Avenue, Potchefstroom. Further investigations revealed that there was no number listed for Peter Mokaba Chambers (listed as the address of Rheeder). De Lange was also informed that Rheeder was previously employed by Jansens Inc but that he no longer worked there. Mclean also enquired from the General Council of the Bar whether Rheeder was listed as a practising advocate. It was established that Rheeder was not so listed with them. Subsequent enquiries also revealed that Rheeder was also not listed as an advocate with the Independent Bar nor was he listed with the Department of Justice. The applicant submitted that if it was so that Rheeder acted as an "in-house counsel working" from Jansens' premises, the Bill of Costs, which reflected not only the services rendered by him but also that rendered by Jansens, was not only misleading but constituted overreaching to a shocking degree. I am in agreement with the applicant's submission that a bill of costs amount to R 57 505.03 for an unopposed motion which was all but complicate, is exorbitant. This is clearly a matter that needs to be investigated by the Law Society of the Northern Provinces. I will return to the circumstances surrounding the taxation of the Bill of Costs

hereinbelow. As already pointed out, Jansens Inc persisted with the taxation of the Bill of Costs and issued a writ of execution, which necessitated the applicant to approach this court on an urgent basis to stay the writ of execution and to apply for rescission of the order of Cele J.

Rescission of the order dated 27 February 2008

[21] Section 38(2) of the Basic Conditions of Employment Act states:

> *"If an employer gives notice* of *termination* of *employment, and the employer waives any part* of *the notice, the employer must pay the remuneration referred to in subsection* (1), *unless the employer and the employee agree otherwise."*

[22] In terms of the applicant's basic conditions of employment (attached to the respondent's application in terms of section 77(1) and (3) of the Basic Conditions of Employment Act) it is stated *inter alia* that*:*

> *"All monies due to an employee, whose employment is terminated, will be calculated and paid out at the last working day of the notice period"* (ad paragraph 5.2.30.)
>
> *"Employees whose services are terminated, other than employees who are dismissed for misconduct, must have made the necessary*

arrangements with their relevant superiors or the employer's Human Capital Development in order to receive their payment in accordance with the above provisions" ad (paragraph 12.1)

"An employee's salary, benefits and/or other due monies will be paid monthly on a *date determined by the employer after all necessary deductions have been made. Salaries will be paid on the 25th of every month"* (ad paragraph 12.1)

[23] If regard is then had to section 38 of the Basic Conditions of Employment Act (*supra*) read with the applicant's basic conditions of employment as well as the letter from the respondent, it is clear that that the section 77 application was launched prematurely; and that the respondent was, in any event, only entitled to payment on 25 November 2007 and 7 December 2007 respectively. By approaching the Labour Court under these circumstances, Jansens Inc clearly abused the processes of this Court. (I will in paragraph [32] and further set out why I am also of the view that the section 77 application was misconceived in the first place.)

[24] The Supreme Court of Appeal stated in respect of the abuse of civil process, the following in *Philips v Botha* 1999(2) SA 555 (SCA) at 565:

“A terse but useful definition of abuse of civil process is to be found in the judgment of Isaacs J in the Australian High Court case of Varawa v Howard Smith Co Ltd (1911) 13 CLR 35 at 91:

> *'. . . (T)he term "abuse of process" connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose. . . .'*

In Solomon v Magistrate, Pretoria, and Another 1950 (3) SA 603 (T) Roper J (at 607F--H) remarked:

> *'The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (Western Assurance Co v Caldwell's Trustee 1918 AD 262; Corderoy v Union Government 1918 AD 512 at 517; Hudson v Hudson and Another 1927 AD 259 at 267), and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution.'*

Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the

Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case. (See Hudson v Hudson and Another (supra at 268).) "

[25] The Appellate Division in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 on 275 also stated: -

"We must act on principle, and the principle is that a *person ought not to be harassed by vexatious litigation."*

[26] To determine whether conduct constitutes an abuse of process, the court has to have regard to the circumstances of each case (see *Ramsay N.O. and Others v Maarman N.O. and Another* 2002 (6) SA 159 (C) at 174B – C/D and F).

[27] I am in agreement with the submission on behalf of the applicant that Jansens Inc as represented by Mr. Scholtz abused this court's procedures: In coming to this conclusion regard must be had to the following facts:

(i) Jansens Inc proceeded with an application in terms of section 77 of the BCEA, well knowing that the salary was only due and payable on or about 25 November 2007. What is particularly disconcerting about the section 77 application is the fact that Jansens Inc had failed to attach the letter from the respondent to the applicant

requesting certain deductions and confirming the date of payment of the outstanding amounts to the founding affidavit in the section 77- application. A negative inference must be drawn from the failure to do so. It should also be pointed out that despite the fact that the applicant was only obliged to pay out the outstanding monies on 25 November 2007 (as this was the last working day), Jansens Inc demanded that the money be paid by close of business on 19 November 2007. The letter of demand is also dated 19 November 2007.

(ii) I am further persuaded on the papers that Jansens Inc failed to disclose to the Cele J at the hearing of the section 77- application that the amount claimed did not provide for deductions which the applicant was obliged to make and moreover which was agreed and requested by the respondent in her own writing. Again, a negative inference must be drawn from the failure to do so. Even more damning is the fact that Jansens Inc failed to disclose to the court that an amount of R11235.52 had already been paid over to the respondent on or about 22 November 2007 and that (at best although this is disputed by the applicant) only R6 824,13 was outstanding in respect of the respondent's claim. Again, a negative inference must be drawn from the failure to do so.

(iii) I have already referred in paragraph [17] *supra* to the fact that the answering affidavit in these proceedings state that Mr. Jansen could not recall what counsel had disclosed to Cele J. This despite the fact that Scholtz of Jansens Inc is on record that he was in court. A draft order was presented to Cele J yet no mention was made about the fact that certain amounts had already been paid.

[28] There is a further aspect that needs to be pointed out in respect of the Bill of Costs attached to the founding affidavit. I have already referred to this Bill. What should further be pointed out that it appears from the papers that Jansens Inc intentionally neglected to advise the applicant's representatives of the taxation date. In a letter dated 16 April 2008 Scholtz sent a letter to the applicant's attorneys in which it advised the applicant that it may raise its concerns in respect of the Bill of Costs during the taxation. This letter makes no mention of the fact that the date for the taxation has already been allocated on 20 March 2008. The Bill was taxed on 7 May 2008 on an unopposed basis despite the fact that the applicant's attorneys requested Jansens Inc to furnish the applicant's attorneys directly with timeous notice of any taxation of the Bill. The Bill was however, taxed without having informed the attorneys of the applicant thereof. On 7 May 2008 Jansens addressed a letter of demand to the applicant's attorneys calling for payment of the bill of tax before close of

business on Friday 9 May 2008. It was as a result thereof that the applicant had to approach this court for a stay of execution of the writ that Jansens has already instructed the Sheriff to execute on 8 May 2008.

[29] Lastly, although not directly relevant to this proceedings but relevant in respect of Scholtz' general conduct before this court and the CCMA, it should be pointed out that Scholtz was also admonished by the CCMA Commissioner for his behaviour during the arbitration hearing. At paragraph [92] of the award the Commissioner states as follows:

> *"The dispute is indeed derived of merit and thus frivolous. The applicant's representative, Mr. Wim Scholtz had acted vexatiously on both arbitration dates by, amongst others, arguing with the commissioner on numerous instances after she had issued various rulings, likely in an attempt to have her change the ruling. He also, despite being experience in arbitrations, having appeared often before the commissioner, used the re-examination stage, after the applicant had been cross-examined, to raise new issues not testified to by the applicant during examination-in-chief, most likely because he had neglected to raise the issues at the appropriate time The commissioner admonished him, only to find that he then did so again. This derailed and lengthened the process unduly, which, together with his clear disregard for the commissioner's*

authority, amounted to vexatious conduct."

[30] In respect of the proceedings before Cele J, I am in agreement with the submission that the proceedings instituted by Jansens Inc did not serve the purpose of section 77 (apart from the fact that it was entirely misconceived – see paragraph [32] hereunder). As a result of this abuse of court proceedings the applicant had to incur unnecessary costs in order to defend a matter (by bringing an urgent application to stay the warrant of execution and to rescind the order granted by Cele J). At the very least the respondent had to wait until 25 November 2008 before demanding payment and should have waited at least until 7 December 2008 before launching an application. Moreover, withholding crucial information from a court constitutes in my view, an appalling abuse of this courts proceedings and an appalling disregard of the duties of an officer of this court. I cannot but find on the papers that Jansens Inc deliberately withheld crucial information from Cele J. The attempts of Jansens Inc to now try and convince the court that they cannot remember if counsel mentioned anything to the Court is, in my view, a desperate attempt to explain the failure to place crucial facts before the court. I am also not impressed by the attempts to hide behind Advocate Rheeder who has suddenly disappeared without a trace.

[31] I am in light of the aforegoing persuaded that the applicant has shown

good cause for the rescission of the order particularly in light of the respondent's legal representatives withholding important facts from Cele J. As a result important facts were not placed before the court which resulted in that court granting the order erroneously.

Misconceived application

[32] One last point must be made (although I am mindful that it is not strictly relevant in respect of the present rescission application). In preparing this judgment, I had regard to the decision *Mayo Mtokafona Ephraim v Bull Brand Foods (Pty) Ltd* (case no. J 104/09) by my learned brother Van Niekerk J. The application in terms of section 77 of the BCEA that served before Cele J are similar to the one that served before Van Niekerk J to the extent that the claim was also founded on the BCEA. In the present case the application was also brought in terms of section 32(3) and 40 of the BCEA. This is apparent from the founding affidavit where the following is stated:

> *"8.1 In terms of Section 32(3) and section 40 of the Basic Conditions of Employment Act, 75 of 1997 (as amended) ("BCEA"), I am entitled to payment of my outstanding salary and leave entitlement. The Respondent's failure to make these payments to me is in breach of the provisions of the Basic Conditions of Employment Act and unlawful."*

[33] As in the case before Van Niekerk J the case before Cele J was also not framed in contractual terms but fell squarely within the ambit of the BCEA which affords certain statutory rights to employees. It is noteworthy to point out that Mr. Scholtz (of Jansens Inc) was also the legal representative in the matter before Van Niekerk J. Van Niekerk J correctly, in my view, pointed out that applications in terms of section 77 (as opposed to claims based on contract) should be dealt with by the duly appointed functionaries of the Department of Labour and that the Labour Court should not be the point of first entry in the enforcement process:

> *"[5] In the absence of any provision in the BCEA that confers jurisdiction to this Court to enforce the provisions of the Act directly and as an agent of first instance, the applicant's claim is misconceived. To hold otherwise would entirely undermine the system of enforcement established by Chapter 10 of the Act. Chapter 10 establishes the mechanisms to monitor and enforce the protections guaranteed by the Act. In summary, the entry point into the system is the office of the labour inspector, to whom complaints may be made. The labour inspector is required to endeavor to seek an undertaking from the employer against whom the complaint is made (s 68), failing which the inspector may, if the inspector has reasonable grounds to believe that an employer has not complied with the Act, issue a compliance order (s 69). An employer may*

object to a compliance order by making representations to the director-general (s 71) and appeal to this Court in terms of s 72 against any order made by the director-general. In terms of s 73, the director-general may apply to this Court to have a compliance order made an order of Court in terms of s 158 (1) (a) of the Labour Relations Act. What relevance and purpose would this carefully crafted system continue to have if an employee were entitled to bypass it and approach this Court for orders directly enforcing the provisions of the Act?"

[34] I concur fully with this statement. The processes of this Court should not be used to enforce statutory rights often at great expense to the other party. The Bill of Costs in the present matter bears testimony to this. The claim was for the payment of an amount less than R 20 000.00 yet the legal costs run up by Jansens Inc were almost three times this amount. This is simply not acceptable. Van Niekerk J expressed a similar concern in respect of the conduct of Scholtz in bringing applications in terms of section 77 of the BCEA in the matter that was before him. Of particular concern to the Court in that matter (*Mayo Mtokafona Ephraim)* was Scholtz's strategy of approaching the Labour Court with claims which are relatively small and which is accompanied with a prayer for costs on a punitive scale. The court further expressed the view that the strategy adopted by Scholtz in instigating litigation in circumstances where the first

point of entry should have been the Department of Labour with the intention of running up legal costs that might later be recovered from the employer clearly amounts to unprofessional conduct:

> *"[8] Finally, in relation to costs, I have already noted that the applicant's claim is entirely misconceived. The strategy undertaken by the applicant (or, more likely, his attorney) appears to be one where a number of claims for relatively small amounts are instituted in terms of the BCEA following a termination of employment, each of them accompanied by a prayer for costs on a punitive scale. This claim is no exception. In correspondence addressed to the respondent, the applicant demanded payment of the applicant's outstanding leave pay, remuneration and notice pay under threat of proceedings in this Court where costs would be claimed on the scale as between attorney and own client. As matters transpired, it was only the claim for notice pay that was pursued, a claim which was defended by the respondent. The irresistible conclusion is that litigation initiated in these circumstances (in preference to lodging a complaint with a labour inspector) is intended solely to run up legal costs that might later be recovered from the employer party. A strategy of this nature clearly amounts to unprofessional conduct.*[2] *This is especially so where the amount of the claims does not warrant the scale of litigation initiated in what is the equivalent of a division of the High Court. In the present matter for example, a claim for some R3000, the papers extend to some 50 pages, a pre-trial conference has been held and the matter has been the subject*

[2] See the judgment by Todd AJ in *Bartmann AAC & Baartman MME t/a Khaya Ibhubesi v De Lange CLG & another* (J441/09, dated 17 April 2009).

of at least one interlocutory intervention by this Court. The parties attended Court ready to lead the evidence of their witnesses in trial scheduled to last a day. The legal costs incurred will inevitably far exceed the amount that the applicant claims. All of this has served to frustrate the statutory purpose of establishing an inexpensive and expeditious system for the enforcement of basic conditions of employment, and has served only to advance the interests of the applicant's attorney. I am reluctant in the present circumstances to make a punitive costs order against the applicant, who no doubt is an unwitting spectator to events. I am also reluctant to make an order for costs against the applicant's attorney without expressing the caution that similar matters will in future be dealt with on the basis of referrals to the appropriate Law Society or Bar Council, and the risk of costs orders de boniis propiis. This judgment serves as that caution. "

Costs

[35] I have ordered Jansens Inc to pay the costs in respect of this application as well as that incurred by the applicant in respect of the urgent application to stay the writ of execution on a punitive scale.

[36] As already pointed out, the applicant in this matter was forced to launch an urgent application to stay the warrant of execution issued in respect of the costs order granted by Cele J. Nel AJ reserved the costs of the urgent application to be determined by the Court dealing with the application for rescission. This court was therefore requested to consider the applicant's application for rescission as well as the costs incurred by the applicant in

the launching of the urgent application in order to stay the writ of execution. As already pointed out, the applicant argued that costs of both the applications be paid by the respondent's representatives, Jansens Inc, on an attorney and own client scale *de bonis propriis.* In light of the facts as set out in the aforegoing paragraphs, I have no hesitation to award costs against Jansens Inc on an attorney and own client scale *de bonis propriis* not only in respect of the present rescission application, but also in respect of the application to stay the writ of execution that the applicant had to bring on an urgent basis.

Costs attorney own client

[37] Erasmus *Superior Court Practice* at E12-26 points out that an award of costs as between attorney and own client has been described as "*exceptional, very punitive and as indicative of extreme approbrium"*. Erasmus lists various circumstances in which the Courts have, over the years, awarded costs on this exceptional scale. One of the instances is where a party's conduct has been found to be *"unconscionable, appalling and disgraceful*". See also in this regard *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 where the Court held, and I quote from the English headnote:

> **"***On appeal, the Court reiterated that an award of attorney and own client costs had to be seen as an attempt by the Court to go one*

step further than an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation. Taxation would in such cases be more liberal but would not sanction excessive or unreasonable costs. It was an extraordinary order which could not be made without good reason. (At 22B-D.) The Court was of the opinion that there was, in view of the appellant's conduct, no reason to interfere with the trial Court's award of attorney and own client costs against the appellant. (At 24D-D/E.) The appeal was accordingly dismissed.".

[38] I have little hesitation to award costs on this extraordinary scale in light of the conduct of Jansens Inc in prosecuting the respondent's claim in the manner in which it did.

[39] 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 of 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 indemnity the party against an account for costs from his own representative. (See in general: Erasmus *Suprerior Court Practice"* (at E12-27).)

[40] As already pointed out, it cannot in the present case it cannot be concluded that Jansens Inc was merely negligent or made an error in law. I am also not of the view that the conduct was merely unacceptable. I am of the view that the conduct was improper. Jansens Inc, and Scholtz in particular (and this appears to have been a trend in this matter having regard to his conduct before the CCMA), acted in a manner which constitutes a material departure of his duties as an officer of this Court. I have no hesitation in making a special cost order and ordering that Jansens Inc pay the costs. It will be manifestly unfair to saddle the respondent with the costs in the present circumstances. See also *South African Liquor Traders' Association and Others V Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC):

> *"[54] 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. (18) An attorney is an officer of the*

court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs de bonis propriis on the scale as between attorney and client…… This court's displeasure is primarily directed against the office of the State attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate."

[41] See also in general*: Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA):

"[37] There remains to be considered the appeal against the costs order. The general principle of the common law is that a trustee, who acts in a representative capacity, cannot be ordered to pay costs de bonis propriis unless he has been guilty of improper conduct. The Judge a quo found the appellant's conduct to be 'unacceptable'. Improper conduct is always unacceptable; but unacceptable conduct is not necessarily improper. While the appellant's conduct may have been ill-considered, and his application lacking in certain essential detail to the extent that it may be said that he did not make a full disclosure of all relevant facts, one cannot, in my view, go so far as to hold that his conduct

was improper. It has not been shown that there was a conscious attempt on his part to mislead the magistrate or to use s 69(3) unfairly to his advantage. In the circumstances the special costs order against the appellant was not justified and falls to be set aside."

Referral to the Law Society of the Northern Province

[42] In light of the conduct of Jansens Inc and Scholtz in particular, I have instructed the Registrar of the Labour Court to refer the matter to the Disciplinary Committee of the Law Society of the Northern Provinces. The Registrar has done so. I will in furtherance of this referral also request the Registrar to further a copy of this judgment to the Law Society.

[43] In the event the following order is made:

1. The applicant's application for condonation for the late filing of the rescission application is granted.

2. The application for rescission is granted with costs against the representatives of the respondent on an attorney and own client scale *de bonis propriis*.

3. The costs in respect of the urgent application must be paid by the respondent's attorneys on an attorney and own client scale *de bonis propriis*.

4. The matter is referred to the Law Society of the Northern Provinces for investigation into the conduct of Mr. Wim Scholtz of Jansens Inc.

AC BASSON, J

Date of judgemnt: 18 February 2010

For the applicant:

Adv AJR Booysen: Instructed by Matjila Hertzberg & Dewey

For the respondent

Mr Scholtz of Jansens Incorporated