IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg **JA 54/98**

In the matter between

MOLOI KM FIRST APPELLANT

NATIONAL ENTITLED WORKERS' UNION SECOND APPELLANT

and

T M G EUIJEN FIRST RESPONDENT

ASAHI INVESTMENT CC SECOND RESPONDENT

JUDGEMENT

NICHOLSON JA

[1] The second respondent, who was represented by a member Ms Yen, runs a Japanese restaurant in Rosebank, Johannesburg. Ms Yen, acting in her capacity as member of the second respondent, terminated the services of first appellant, who was employed as a cashier, on 15 November 1996. On 6 December the first appellant referred the dispute about the fairness of her dismissal to the Bargaining Council having jurisdiction. On 17 January 1997 the said Council issued the certificate to the effect

that the dispute remained unresolved.

[2] The first respondent, at the time an advocate at the Johannesburg bar and part-time commissioner with the CCMA, arbitrated the dispute on 18 April 1997 and gave an award in favour of the second respondent, upholding the fairness of the dismissal.

[3] The first appellant reviewed the decision of the first respondent in the Labour Court on a number of grounds. The first appellant was represented by Mr Maluleke, in the Labour Court, an official of the second respondent, which is a trade union which is registered in terms of section 96(7)(a) of the Labour Relations Act, No 66 of 1995 ('the Act'). The review was dismissed and the Labour Court ordered the first and second appellants to pay the costs of the review, jointly and severally, the one paying the other to be absolved.

[4] The dismissal by the second respondent arose from the absence from work of first appellant on 3 November and thereafter from 6 November 1996, without valid reason. Although, initially, during the arbitration there was some dispute about a short-fall in the petty cash box and some evidence concerning retrenchment, the absence from duty was found to be the sole reason for dismissal. The review application sought an order setting aside the first respondent's award, an order that the Labour Court determine the dispute and costs.

[5] The first appellant challenged the findings of the first respondent in the award and alleged that he acted 'as [second respondent's] defence counsel' by advising second

respondent, not to rely on the short-fall in the petty cash. First appellant also alleged that first respondent was biassed, did not have an open mind, conducted the proceedings in a 'domineering and high-handed' way, and prejudged the matter by suggesting to second respondent that it rely on ground of absenteeism alone.

[6] Perhaps the most serious allegation against the first respondent was that he had a 'secret meeting', in the absence of first appellant and Mr Maluleke, with Ms Yen for 'substantial minutes' after the arbitration concluded, in the room in which the arbitration was heard. First appellant alleged that the secret meeting 'created the impression of [a] lack of impartiality and improper obtaining of an award.' The first appellant went on to say '[a]lthough on 16th April, 1997 the arbitration award was reserved, I knew in my heart that I had already lost the case due to, *inter alia*, this aforesaid meeting.'

[7] In his answering affidavit in the review the first respondent denied that he acted 'as [second respondent's] defence counsel' by advising second respondent, not to rely on the short-fall in the petty cash. First respondent denied that he was biassed, and did not have an open mind, and that he conducted the proceedings in a 'domineering and high-handed' way, and prejudged the matter by suggesting to second respondent that it rely on the ground of absenteeism alone. Little turned on these matters. He explained that he was clarifying the issues and it seems to me that there was every advantage, from the first appellant's point of view, in having fewer grounds for her dismissal.

[8] First respondent explained the circumstances of the 'secret meeting' in his replying affidavit to the review application, as follows

> "45 The applicant and her representative were the first to leave the room in which the arbitration proceedings were conducted, at the conclusion thereof. At that stage I was packing my brief case.
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> 46 I was in the process of leaving shortly thereafter, when Ms Yen spoke to me. I can no longer remember exactly what she said. I remember saying to her that I did not wish to speak to her in the absence of the other party. She then said she wished to ask me a question unrelated to the dispute, and that as she was a foreigner she did not know who else to approach. Ms Yen then asked me whether I could recommend to her an attorney specialising in labour law to deal with any future dispute with which she may be faced. I wrote down on a piece of paper the names of three reputable attorneys' firms with labour law departments and I gave this to Ms Yen. Ms Yen then asked me which one I would recommend. I replied that she should be guided by fee structure and convenience. I then left.
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> 47 If the [first appellant] had raised any concerns at the time these erroneous impressions were manifesting themselves in her mind, they could and would have been easily and swiftly dispelled."

[9] In reply to this first appellant states the following:

> "50(1) It is a misconduct and gross irregularity for commissioners to hold secret meetings in the absence of other opposite parties.
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> a)I now strongly believe that I have lost my case mainly due to this secret meeting between the deponent and Ms Yen."

[10] It is clearly wrong to stigmatise the meeting as 'secret' in that it was known to the appellants. The content of any conversation was not known. It is clear from the first appellant's reply that she does not dispute the explanation by first respondent that the

meeting could not have prejudiced the first appellant in the arbitration award and that the conversation, which took place between first respondent and Ms Yen, was entirely innocent. In the absence of any evidence to challenge the explanation given by first respondent, one would have expected the first appellant to abandon the review at that stage.

[11] The court a quo granted the costs order for three reasons: firstly, as there was no relationship between the Appellant and the Second Respondent, secondly, because the first appellant attacked the first respondent's integrity and thirdly that her case was presented and argued on the basis that he was dishonest The union, second appellant herein, was liable to pay the costs as the representative of the first appellant. The Labour Court granted leave to appeal to this court on the costs award alone.

[12] Mr Maluleke, who appeared for both appellants, applied for condonation for the late filing of the record, which was granted, as good cause was shown. He also applied to lead further evidence, but it became apparent that, what he sought to introduce as evidence, was already on record. He then abandoned the application to lead further evidence. With regard to the sole issue on appeal namely the propriety of the costs order, Mr Maluleke argued that section 162, empowering the Labour Court to make orders of costs, did not permit a joint and several judgement, such as was made by the court a quo. Section 162 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.

(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."

[13] Section 161 of the Act provides that 'in any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by a legal practitioner, a co-employee or by a member, an office-bearer or official of that party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee.'

[14] Mr Maluleke emphasised that the provisions of section 162(3) provided that a costs order could only be made against a party **or** any person representing that party but not both. In other words he submitted that the provisions were disjunctive and not conjunctive. It is clear that in a certain circumstances the word 'or' can mean 'and/or' and the context in which it appears in legislation is the determining factor. See **Bouwer v Stadsraad van Johannesburg 1978 (1) SA 624 (W) at 632A**. Mr Maluleke drew attention to the provisions of section 17(12) (a) of the present Act's predecessor, the Labour Relations Act, No 28 of 1956, which read as follows

" The industrial court may in the performance of any of its functions under paragraph (a) or (f) of subsection (11), make an order as to costs according to the requirements of the law and fairness.

(b) Any order as to costs in terms of paragraph (a) may also be made against a trade union, employers' organization, office-bearer or official acting on behalf of or in any manner assisting any person."

[15] Sub-section (12) in the form it stood at the time of its final repeal was introduced by section 5 (h) of Act 83 of 1988. The use of the word 'also' appears to me to mean 'in addition' or 'as well as' and in that sub-section means that an order could be made against a party as well as a trade union or employers' organisation. It seems clear that a joint order for costs against a representative and a party was competent under the old Act. The point which is not entirely clear is whether the legislature intended changing the situation under the new Act.

[16] A union has locus standi to bring an application not only where it is directly involved in the cause of action, for example, where the cause of action relates to a breach of a recognition agreement or other agreement between the union and the particular employer, but also where it acts as the representative of its members. See **Amalgamated Engineering Union v Minister of Labour 1949 (4) SA 908 (A). National Union of Metalworkers of SA & Others v Standard Brass, Iron & Steel Foundry Ltd t/a Malleable Castings (1989) 10 ILJ 951 (IC) at 957 G**.

[17] Where a trade union is not a party to the action or application, it is clear under normal

circumstances, that the only basis for an order of costs against it is where such are awarded *de bonis propriis.* See **National Union of Metalworkers of SA & Others v Standard Brass, Iron & Steel Foundry Ltd t/a Malleable Castings** op cit 958 G. In **Shishava v West Rand Consolidated Mines Ltd (1991) 12 ILJ 1382 (IC)** at page1386E - G Jacobs AM said the following

> "The learned authors Cameron Cheadle & Thompson The New Labour Relations Act at 193 suggest that my discretion [to order costs against a union official] should be sparingly employed. They point out that trade unions and employers' organizations may very often, through the deployment of their greater resources and experience, ensure that individual litigants are not prejudiced by their lack of resources and that justice is done. Officials and office-bearers through their experience and expertise may assist the court in the proper presentation of evidence and argument and the curtailment of proceedings. The requirements of fairness would not be served by penalizing the institutions or their officers for their mere assistance and representation in unfair labour cases. With all this I agree. However, they go on to say that 'this discretion should be exercised only in circumstances where the trade union or employers' organizations are the real litigants and the individual litigants merely front as stratagems to avoid a costs order'. While I agree that those circumstances justify the exercise of discretion to award costs I do not agree that they are the only circumstances. In my view circumstances where the trade union or employers' organization conducts the litigation in an improper manner also justify the award of costs against it."

[18] I leave aside the situation where a union abuses the court's process by litigating through employees, in cases which are in reality being fought for and on behalf of the union. Although there are two appellants in this appeal, the original arbitration related to the first appellant (the employee) and the second respondent (the restaurant) and the subsequent application for review cited the arbitrator as a first respondent. In the Numsa case cited above Maritz AM held at page 958B-D

"I believe that it is necessary in each matter to consider whether an applicant union so appeared as a true party or whether it appeared in its representative capacity. The reason for the need to make this distinction is, as will appear later, that there is in our law a different test to be applied before costs are granted against a representative to when an award is made against the parties.

In the present matter the cause of action was the dismissal of the second to fifth applicants, the joinder of the union caused no additional costs to those which would have been occasioned the respondent by the bringing of the action by the dismissed workers and the union sought no relief for itself but only for the dismissed workers.

Under these circumstances I have no doubt that the first applicant interceded on behalf of the dismissed workers and must be held to have acted not for itself but on behalf of the second to fifth applicants."

[19] Although Mr Van der Riet, who appeared for the first respondent, argued in the review that the second appellant (union) had acted so closely with the first appellant that it had, so to say, made the case its own, that was not the basis for the finding of the Labour Court. Indeed there was no evidential basis for holding that the union had any particular interest in the matter, apart from assisting a member, who had been dismissed. The case did not seek to establish any new principle, nor did it hold out any particular advantage for the union. The Labour Court held that the second appellant was liable essentially on the basis that Mr Maluleke had attacked the integrity and honesty of the first respondent to such an extent that costs *de bonis propriis* were justified.

[20] Given the manner in which section 162 is framed I am of the view that the general principle is that when making orders of costs the requirements of law and fairness are paramount. There may well be cases where the losing party deserves a cost order against it, given the nature of the claim or the defence and the other relevant factors. In addition there may be instances in the same case where the representative, be it a

legal practitioner or the other persons permitted by statute to represent a party, behave or conduct the case in a manner which justifies an order *de bonis propriis*. In that instance it would be manifestly fair to grant a joint order against the party and the representative. The Labour Court has the status of the High Court in its particular field. It would therefore be anomalous that a body such as the Industrial Court could make such an order and yet the Labour Court could not.

[21] Sub-section (2)(b) provides that when deciding whether or not to order the payment of costs, the Labour Court may take into account the conduct of the parties in proceeding with or defending the matter before the Court; and during the proceedings before the Court. This sub-section falls under the general rubric of fairness in making cost awards and relates to parties alone. This sub-section, in my view, indicates some of the circumstances when costs orders will be justified. In stating that 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, the sub-section is not expressly excluding a costs order against both.

[22] The question which needs to be answered is whether it is a necessary implication that an order against both is excluded. It seems to me that, given the enhanced status of the Labour Court and the desirability of joint costs orders in certain instances, that it would do an injustice to the paramountcy of the principle of fairness of costs orders, to limit the section in the manner suggested by Mr Maluleke. Such a narrow construction would limit powers which the court would have if sub-section (3) was

not present. In my view the wording of sub-section (3) does not exclude a joint order against a party and a representative.

[23] The sole remaining question is whether the order was justified. Mr Maluleke was constrained to concede that the order against the first appellant was unassailable. The order against the second appellant could only have been made on the basis that it was justified as an order *de bonis propriis*.

[24] As I have mentioned section 161 of the Act provides that representation may be by a legal practitioner or by 'a co-employee or by a member, an office-bearer or official of that party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee.'

[25] Legal practitioners have had the advantage of studying the law and the principles of ethics. Hopefully the process continues. They are aware of the manner in which litigants and their representatives should present their cases in court. They are subject to discipline by their professional bodies and in the final instance are subject to removal from their profession if they cease to be fit and proper persons. Trade union officials, directors of companies or co-employees have no such training, nor is their appearance in court or professional life subject to the same discipline.

[26] Non-lawyers must realise, however, that if they want to appear in the Labour Court and indeed, this Court, they must represent their clients and behave in a manner which

is appropriate and fitting. In this regard it is appropriate to recall the remarks of Landman P in **United People's Union of SA on behalf of Mkala & others v Fraser & Alexander Trailings (1994) 15 ILJ 1123 (IC)** at page 1128H- 1129E

> "The duties and the conduct expected from other persons such as trade union officials, officials of employers' organizations, labour consultants and the like, have not been spelt out in any authoritative manner. It seems to me desirable to make certain observations in regard to at least two of the duties which govern the conduct of the latter category of representatives in this court. The purpose of engaging a representative, whether that representative appears as a benefit of the membership of an organization, or because the representative is remunerated for doing so, is for the representative to assist a party to prepare his or her case, to place the relevant facts before the court, and, although this is not entirely essential, to refer the court to relevant authorities and to advance reasons and make representations in regard to the matter before the court. Essentially the purpose of a representative is to assist a party who by reason of a lack of skill, lack of confidence, lack of knowledge or linguistic ability, is unable to present his or her case, or who simply desires such representation. It must follow as a basic premise that a representative of the kind under discussion will not at law enjoy any greater rights in regard to the court than that which the party represented would have enjoyed had that party appeared unaided. Two of the duties flowing from this basic premise (there are of course others, but they need not concern us in this matter) are the following:
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> 1 The duty to assist the court in arriving at the truth of the matter, which requires a party to act honestly in regard to their dealings with the court.
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> 2 To interact with the court in a courteous, civilized manner and to refrain from contemptuous conduct.
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> The duty to act honestly in regard to the court will of course include some of the following. The party or his or her representative must refrain from perpetrating a fraud on the court, and must refrain from misleading the court or placing false evidence before the court."

[27] Costs *de bonis propriis* are awarded against legal practitioners in cases which involve delinquencies such as dishonesty, wilfulness or negligence in a serious degree. See **Cilliers Law of Costs** (2 ed) para 10.25. **Shishava v West Rand Consolidated**

Mines Ltd (1991) 12 ILJ 1382 (IC) at page1386B **NUMSA v Standard Brass** op cit at 958. Mr Van der Riet quite fairly and properly in my view conceded that the second appellant through its official Mr Maluleke did nothing to justify a costs order *de bonis propriis*. It cannot be shown that Mr Maluleke acted dishonestly in his dealings with the court nor did he indulge in contemptuous conduct. He perpetrated no fraud on the court, nor did he mislead or place false evidence before the court. His conduct did not smack of wilfulness or negligence in a serious degree.

[28] It will be recalled that the first appellant alleged that the first respondent acted 'as [second respondent's] defence counsel' and was biassed, did not have an open mind, conducted the proceedings in a 'domineering and high-handed' way, and prejudged the matter. There was also mention by first appellant of the 'secret meeting'. Once the first respondent explained the circumstances, Mr Maluleke did not introduce false evidence to contradict the allegations and in effect accepted them.

[29] Mr Maluleke argued on the facts as put up by first respondent that it was misconduct and a gross irregularity for commissioners to hold secret meetings in the absence of other parties. This legal conclusion was not justified on the evidence disclosed in the affidavits.

[30] The above allegations were made in affidavits by the first appellant. Whatever suspicions one might have as to whether she independently conceived them or was aided and abetted by Mr Maluleke, the fact remains that she signed the affidavit and

took responsibility for them. Mr Maluleke can be criticised for carrying on with the review when the first respondent explained the conversation which took place at the 'secret meeting' and the other matters complained of. In the absence of any countervailing evidence he should have counselled the first appellant against proceeding with the review. But a review application is a complex matter especially when it involves allegations of bias and irregularity. He showed an error of judgement which should be censured but does not deserve an order of costs *de bonis propriis*.

[31] I am of the view that the costs order was not properly made where it included the second appellant. As the second appellant is not entitled to a costs order with regard to the appeal no such order can be made.

[32] In the result the appeal succeeds in part. The order of the court a quo is altered to read

"The costs of the application for review are to be paid by the applicant."

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NICHOLSON JA

Date of hearing: **20 May 1999**

Date of judgement: **12 August 1999**

Representative for Appellants: **Mr Maluleke of Newu**

Attorneys for Respondents: **Cheadle Thompson and Haysom**

Counsel for Respondents: **Mr van der Riet.**