REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2454/13

JAN HENDRIK SWANEPOEL **Applicant**

PERSONS LISTED IN ANNEXURE "A"HERETO **Second to further Applicants**

and

LEICA GEOSYSTEMS AG **First Respondent**

ACIEL GEOMATIC (PTY) LTD **Second Respondent**

GEOSYSTEMS AFRICA (PTY) LTD **Third Respondent**

Decided in Chambers

Date: 20 August 2014

JUDGMENT – LEAVE TO APPEAL

TLHOTLHALEMAJE, AJ

Introduction:

[1] Following the hearing of an urgent application brought by the Applicants, an order was made on 21 November 2013 in the following terms:

i. The Applicants' application is struck from the roll on account of lack of urgency.

ii. The Applicants are ordered to pay the First Respondent's costs, including the costs of two counsel.

[2] The Applicants have since filed an application for leave to appeal against the order in respect of costs. The application is opposed. For the sake of reference, my reasons for granting costs are reflected in the judgment as follows:

'Costs:

[22] In the original notice of motion filed by the applicants, an order was sought in terms of prayer 3 to declare that the employment contracts of the applicants automatically transfer from the employ of GSA to the employ of Leica, and alternatively Aciel in terms of section 197 of the LRA with effect from 1 November 2013. In its answering papers, Leica had pointed out that its registered offices were in Switzerland and that it merely conducted its business in South Africa through distributors and agents. Leica does not have a branch office in South Africa nor does it have any employees in South Africa. In effect, Leica is a peregrines, and any order granted against it would have been difficult to give effect to.

[23] The applicants had just prior to the hearing of the matter realised the absurdity of the relief they sought against Leica, hence, an amendment was made to the notice of motion. This amendment however was of no comfort to Leica, hence Mr. Kennedy on its behalf vigorously argued for a cost order to be made in its favour. Mr. Kennedy's pivotal argument was that once a party abandons its relief, the party against whom such relief was initially sought should not be burdened with costs.

[24] This court may where appropriate, make an order of costs by virtue of the provisions of section 158 (1) (a) (vii) of the LRA. In terms of section 162 of the LRA, such an order of costs may made in accordance with the requirements of law and fairness. This court per Molahlehi J in Suid Afikaanse Onderwyserunie and Another v The Head of Department, Gauteng Department of Education and Others dealt extensively with the legal principles surrounding the issue of costs. Essentially, and on further authorities referred to by the learned Judge, the first aspect of section 162 (1) of the LRA is that costs may be awarded according to the requirements of the

law. The courts have interpreted this to mean that costs would follow the results. The second aspect of s 162 of the LRA, concerns the consideration of fairness. It is this aspect of the legislation that makes costs in labour matters not to automatically follow the results.

[25] Mr. Redding's contention was that Leica had refused to cooperate with the applicants in regards to enquiries regarding where it conducted its business. This contention can however not be sustainable moreso in view of the fact that it is inconceivable that GSA or the applicants for that matter would not have information about Leica after a relationship dating back to 2004. In my view, it is clear that given the long standing relationship between GSA and Leica, the applicants should have known the futility of seeking any remedy against Leica. As Mr. Kennedy had correctly pointed out, Leica was forced to oppose this application under strenuous circumstances and in the process, had incurred unnecessary costs. The relief sought against Leica was clearly misconceived and considerations of both law and fairness dictate that it should be entitled to its costs.'

The grounds for seeking leave to appeal:

[3] The Applicants' grounds for seeking leave to appeal are summarised as follows:

a) The Court *a quo* erred in law and fairness in cosidering costs against the Applicants. The Applicants have reasonable prospects of success in the Labour Appeal Court;

b) The Court failed to take into account uncontested evidence of the difficulty and confusion experienced by the Applicants (arising from the First Respondent's failure to furnish information) in attempting to effect service on the First Respondent;

c) That the First Respondent may be the alter ego of the Third Respondent did not make the relief sought against the First Respondent futile;

d) The application against the First Respondent was accordingly not *mala fide*, unreasonable or frivolous;

e) It was possible that there was a second generation section 197 transfer from the Third Respondent to the First Respondent, and the Court did not consider the fact that the Applicants sought to establish this by way of the letter requesting information;

f) It was arising from the refusal of the First Respondent to co-operate in responding to the Applicant's enquiries (and being warned of the potential litigation) that the First Respondent became party to the litigation;

g) Exceptional circumstances existed in that the cost order involved a pertinent question of law, and the Court misdirected itself in the exercise of its discretion.

[4] The First Respondent opposed the application and its subsmissions in this regard shall be dealt with within the context of the evaluation below.

The legal framework and evaluation:

[5] In considering whether to grant or refuse leave to appeal, the question always remains whether there are reasonable prospects that another Court (the Labour Appeal Court) may come to a different conclusion. In *Minister of Safety and Security and Another v Madyibi* [1], Petse, ADJP considered the approach in this regard as follows:

> "In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I

[1] (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto".

[6] In *National Union of Metal Workers of South Africa v Jumbo Products CC*[2], the then Appellate Division (per Corbett CJ) expressed the test in the following terms:

> *"In such a case the enquiry is whether there are reasonable prospects of success, ie whether there is a reasonable prospect that the court of appeal may take a different view and hold the trial Judge to have been wrong (see S v Ackerman en 'n ander 1973 (1) SA 765 (A); Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A), at 28 D)"*

[7] As correctly pointed out on behalf of the First Respondent, the awarding of costs is a matter within the discretion of the Court, and the Labour Appeal Court may interfere with the exercise of that discretion if it is shown that the Court exercised its discretion improperly or unfairly, acted capriciously, acted upon a wrong principle, acted in a biased manner, for unsubstantial reasons or committed a misdirection or an irregularity.

[8] In view of the reasons and factors taken into account in granting the cost order, the grounds of seeking leave to appeal as summarised above, and submissions made on behalf of the First Respondent in opposing the application, it is my view that there are no reasonable prospects that the Labour Appeal Court may take a different view. Central to the Applicants' application is that the Court misdirected itself in the exercise of its discretion, moreso in failing to take into account the failure of the First Respondent to furnish it with certain information.

[9] In opposing the application, the First Respondent pointed out that a day prior to the hearing of the urgent application, the Applicants had abandoned the relief initially sought against the First Respondent in terms of section 197 of the LRA, save for seeking a cost order against the First Respondent. In this regard, it was further pointed out that on their own version, the very reason for

[2] 1996 (4) SA 735 (A) at 742B.

them abandoning the relief against the First Respondent was already known to them prior to launching the urgent application, and that notwithstanding, the Applicants still elected to seek relief against the First Respondent in circumstances where they should never have proceeded against the First Respondent. The Applicants had therefore unnecessarily forced the First Respondent to oppose the urgent application under strenous circumstances and in the process, incurred costs. In this regard, it was contended that the Applicant's actions and omissions were unreasonable and frivolous.

[10] In my view, the alleged failure to secure information from a party cannot be a basis for seeking a cost order against it in the absence of a substantive application to seek that information. Having abandoned its main claim against the First Applicant, there was no basis for persisting with a cost order against it, and the First Applicant's contention that such conduct was *mala fide* and frivolous is not far fetched.

[11] It is still reiterated that it was indeed futile to persist with seeking a remedy against the First Respondent in circumstances where the Applicants were aware that it was a company incorporated in terms of laws of Switzerland; that it merely conducted its business and affairs in South Africa through distributors and agents, and further since it was acknowledged that the company did not have direct presence in South Africa.

[12] To the extent that the substantial claim pertaining to the application of the provisions of section 197 of the LRA in respect of the First Respondent was abandoned, any suggestion that there was a second generation s197 transfer from the Third Respondent to the First Respondent was clearly not sustainable. Furthermore, in view of the fact that the issue of a second generation transfer was no longer before the Court following the abandonment of the main claim against the First Respondent, it followed that this could not have been a basis for persisting with a cost order against the First Respondent.

[13] Having had regard to the above, I am satisfied that the Applicants have not established a basis for a conclusion to be made that the Labour Appeal Court

may interfere with this Court's discretion in awarding costs against the Applicants. Having reflected dispassionately upon the cost order granted and the grounds of seeking leave to appeal, I am not satisfied that a basis has been laid to show that the Court in exercising its discretion, acted improperly or unfairly. In the circumstances, the application ought to be dismissed. Again, having had regards to considerations of law and fairness, although the application failed, I am of the view that costs should not follow in this instance.

Order:

i. The application for leave to appeal is dismissed.
ii. There is no order as to costs.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa