

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J8/17

In the matter between

A R MOSHOESHOE

Applicant

and

**DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT: NATIONAL**

Respondent

Heard: 16 July 2019

Delivered: 14 August 2019

Summary: The Labour Court has the power to award costs in terms of section 162 read with section 158(1) (a) (vii) of the Labour Relations Act 66 of 1995 having regard to the considerations of law and fairness.

JUDGMENT

SWARTZ, AJ

Introduction

[1] The only issue for determination before the Court pertains to costs. This sole determination is as a result of the merits of the matter becoming moot. This was only brought to the Court's attention on 16 July 2019, being the day this matter was argued.

- [2] The application was initially launched to compel the Respondent to finalise the job evaluation in respect of the position of Principal Messenger at the Master of the High Court, Bloemfontein, as required in terms of the Public Service Regulations, Chapter 4, Part 1, Regulation 39(1) and 39(2).
- [3] The Respondent submitted in argument that the upgrading of “Messengers” to “Driver Messengers” within the Department of Justice and Constitutional Development was implemented and finalized approximately around 14 November 2018.
- [4] The Respondent handed up additional heads of argument on the day of the hearing. Attached to the Respondent’s heads of argument is the Applicant’s Service Record marked as annexure “A” and dated 15 July 2019. This Service Record indicates that the Applicant was upgraded from level 3 (three) to level 4 (four) on 1 October 2018.
- [5] Accordingly, the purpose of this application has become moot and the only issue to be determined is that of costs given that the merits became moot at least 9 (nine) months prior to the hearing of this application.

Factual background

- [6] In May 2010, the Applicant initially lodged a grievance with the Respondent in respect of the salary level on which he was employed. After a series of events and as a result of the Applicant’s persistence with this matter, the Applicant eventually launched this application on 10 January 2017.
- [7] The matter was initially unopposed and was set down for hearing on the unopposed roll on 23 May 2017. On this day, the Respondent attended Court and the matter was ordered to be enrolled on the opposed roll and timelines were ordered for the filing of the Answering and Replying Affidavits. Of importance in this Order of 23 May 2017 was that costs were ordered to be in the cause.¹
- [8] Approximately 5 (five) months after the Respondent filed its heads of argument, it upgraded the Applicant’s salary level, rendering the merits of this application moot.

¹ See Court Order pg: 39 of paginated bundle.

Parties' Submissions

- [9] It is common cause that the merits have become moot and the only issue outstanding are the costs. The costs in question are the costs in the cause from the Order of 23 May 2017 and the costs of 16 July 2019.
- [10] The Applicant contends that the merits became moot in that the Respondent upgraded the Applicant's salary level from level 3 (three) to level 4 (four) in October 2018,² only after the Applicant had:
- [10.1] launched this application;
- [10.2] first set this matter down on 23 May 2017; and
- [10.3] filed heads of argument.
- [11] On 6 June 2019, the Applicant's attorneys wrote a letter to the Respondent requesting³ that the Respondent tender the taxed costs and on confirmation thereof, the Applicant would remove the matter from the roll of 16 July 2019
- [12] In this letter, the Applicant's attorneys further stated that if the Respondent did not tender the taxed costs, the issue of costs would have to be argued. The Respondent did not respond to the Applicant's attorney's letter dated 6 June 2019.
- [13] The Applicant contends that he had no choice but to instruct counsel to appear on 16 July 2019 to argue costs.
- [14] The Respondent argued that the Applicant's attorneys were notified that the Applicant's salary had been upgraded on 14 November 2018 and had requested the Applicant to withdraw his application.
- [15] The Respondent referred the Court to the Applicant's supplementary practice note dated 11 June 2019 which does not refer to the merits being moot and states that the matter will proceed on 16 July 2019.
- [16] The Respondent is of the view that as the Applicant was aware that the merits had become moot by the very latest November 2018, the matter should have been withdrawn and there should be no order as to costs.

² Respondent's letter dated 14 November 2018 informing Applicant's attorney of upgrade.

³ Annexure B of Respondent's supplementary heads of argument.

Reasoning/Merits

[17] Rule 13 (1) of the Rules of this Court provides that:

“(a) A party who has initiated proceedings and wants to withdraw the matter must deliver a notice of withdrawal as soon as possible.

(b) If costs are not tendered any other party may apply on notice for costs.”

[18] It is common cause that the matter was not withdrawn by the Applicant despite the Applicant himself being fully aware that his position had been upgraded from at least November 2018.

[19] It is trite that the Labour Court has the power to award costs in terms of section 162 read with section 158(1)(a)(vii) of the Labour Relations Act⁴ (LRA). Costs will generally be awarded in favour of a successful party unless the considerations of law and fairness dictate otherwise. In considering an order of costs in terms of section 162(2)(b) of the LRA, the Court will take into account the conduct of the parties in the following respects:

“(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.”

[20] However, the Labour Appeal Court (LAC) in *MEC for Finance (KZN) v Dorkin*⁵ has held that “*the norm ought to be that costs orders are not made unless those requirements (of law and fairness) are met*”. This approach has been confirmed by the Constitutional Court.⁶

[21] As to what constitutes considerations of law and fairness in the exercise of a discretion was explained within the context of the now repealed Labour Relations Act 1956 in *Chevron Engineering (Pty) Ltd v Nkambule and Others*⁷

“Although the appellant succeeds on appeal, when deciding the question of costs, a discretion must be exercised after taking into account the requirements of law and fairness. Section 17C(2) specifically enjoins this Court to decide the question of costs ‘according to the requirements of law

⁴ Act 66 of 1995 as amended

⁵ [2008] 6 BLLR 540 (LAC), cited in *Ethekwini Municipality v Hadebe* [2016] 8 BLLR 745 (LAC) at para 35.

⁶ See: *Zungu v Premier of the Province of KwaZulu-Natal* (2018) 39 ILJ 523 (CC) at paras 24–26.

⁷ 2004 (3) SA 495 (SCA) at para 42.

and fairness'. The guidelines as to fairness are set out in *NUM v East Rand Gold and Uranium Ltd* [1991] ZASCA 168; 1992 (1) SA 700 (A) at 738F-739G. (See also *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union* [1993] ZASCA 201; 1994 (2) SA 204 (A) at 221A-C). The proper approach is to take account of the conduct of the parties during the dispute and in the conduct of the litigation. The general approach developed by courts acting in terms of this Act is that costs do not automatically follow the result, unless there are special or exceptional circumstances justifying a costs order. Mala fides, unreasonableness and frivolousness have been found to be factors justifying the imposition of a costs order."

- [22] Despite the merits of this matter becoming moot, there was no settlement and the reliance by the Respondent on the unreported case *Radebe v South African Postal Workers Union and Others*⁸ in which there was a settlement, is misplaced for this very reason.
- [23] Prior to the Applicant's upgrade, he had incurred legal costs which he would not have incurred had the upgrade been implemented by the Respondent when the dispute was brought to its attention and/or on the issuing of the application.
- [24] It is common cause that the Respondent has never tendered costs. The costs of 23 May 2017 were in the cause. As the matter had to be placed on the unopposed roll due to the Respondent's conduct of opposing the matter on the day of the hearing, being 23 May 2017, the Respondent should pay these costs.
- [25] In respect of the costs of 16 July 2019, it was argued by the Applicant that as the Respondent did not tender costs, the Applicant had no choice but to come to Court to argue costs.
- [26] Although the Respondent did finally upgrade the Respondent, it did so only after the heads of argument had been filed. In my view, the Applicant incurred unnecessary legal costs in circumstances which such costs could have been avoided had the Respondent acted reasonably and tendered the costs in

⁸ J731/2013.

June 2019 when the Applicant's attorney's requested the Respondent to do so.

Conclusion

[27] Despite the Court only being asked to determine the issue of costs, the Court must still deal with the application as such was not withdrawn nor was the matter settled. As the matter has become moot, the matter must be struck from the roll.

[28] In respect of costs, the Applicant's persistence with the application in respect of the costs was not unreasonable nor *mala fide*. Costs should have been tendered by the Respondent before the hearing of this matter on 16 July 2019.

[29] In the absence of such a tender, and the Court having had regard to the history of this matter, finds that the requirements of law and fairness are met and the following order is deemed appropriate:

Order

1. The application is struck from the roll.
2. The Respondent is to pay the costs of 23 May 2017 and the costs of 16 July 2019.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

C Malan

Instructed by:

J Nortjie, Kramer Weihman & Joubert

For the Respondent:

B.G Mashabane

Instructed by:

The State Attorney