IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 204/17

In the matter between:

MPHO STOFFEL MAILA **Applicant**

and

GUARDS ON CALL SECURITY CC **Respondent**

Heard: **4 & 5 March 2019**

Delivered: **02 April 2019**

Summary: **Dismissal based on employer's operational requirements – claim for payment of balance of severance package - unlawful deduction of monies by employer from employee's salary**

JUDGMENT

PHEHANE, AJ

Introduction

[1] The Applicant was employed by the Respondent since 3 April 2013 until 15 January 2017, when the Applicant was dismissed due to the Respondent's operational requirements.

[2] It is common cause that the Applicant's dismissal was procedurally and substantively fair. The point of departure for the Applicant, however, is his claim that he did not receive from the Respondent, the full amount of the severance package which, on his version, was due to him.

[3] The Applicant approaches this court seeking relief that the balance of the severance package in the amount of R34 336.08 be paid to him by the Respondent. According to the Applicant, the Respondent unlawfully deducted an amount of R750.00 from his salary over a period of 45 months, as the Respondent was financially unsound[1].

Issues to be determined by the court:

[4] The issues to be determined by the court are:

4.1 Whether the retrenchment notice reflecting the total severance package amount of R40 645.15 is authentic;

4.2 What the agreed retrenchment package was between the parties;

4.3 Whether the Applicant was short paid of his severance package in the amount of R34 336.08 as a result of the Respondent failing to take into account, the repayment of the unlawful deductions from the Applicant's salary.

Jurisdiction

Legislative framework

[5] Section 189 of the Labour Relations Act[2] (LRA) regulates retrenchments and provides that in engaging in a consensus-seeking

[1] Pleadings, Statement of Case, p5, para 2.
[2] Act 66 of 1995, as amended.

exercise, parties must *inter alia,* attempt to reach consensus on *the severance pay for the dismissed employees*[3].

[6] Severance pay is given effect in section 41(2) of the Basic Conditions of Employment Act[4] (BCEA) which makes it peremptory for an employer to make severance payment to an employee who is dismissed on reason of that employer's operational requirements.

[7] In order to determine whether Mr Maila's claim for the payment of the balance of his severance package is properly before Court, the following provisions of section 41 of the BCEA are instructive:

> '**41 Severance pay**
>
> (1) For the purposes of this section, 'operational requirements' means requirements based on the economic, technological, structural or similar needs of an employer.
>
> (2) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act, 1936 (Act 24 of 1936), severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.
>
> …
>
> (5) The payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law.
>
> (6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to-
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> (a) a council, if the parties to the dispute fall within the registered scope of that council; or

[3] Sec 189 (c) of the Labour Relations Act *supra*.
[4] Act 75 of 1997.

(b) the CCMA, if no council has jurisdiction.

(7) The employee who refers the dispute to the council or the CCMA must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The council or the CCMA must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, the employee may refer it to arbitration.

(10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount.' (Emphasis added).

[8] On 3 February 2017, Mr Maila representing himself, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging unfair dismissal relating to operational requirements. The CCMA issued a certificate of outcome recording that the dispute remained unresolved.

[9] Pursuant thereto, Mr Maila launched an application in this Court, once more, representing himself. In his statement of case, he articulates that his dispute concerns the short payment of his severance package. He alleges that his total severance package amounted to R40 645.15 and that this amount includes the payment of unlawful deductions of R750.00 per month from his salary by the Respondent over a period of 45 months, totalling R33 750.00.

[10] Mr Maila's dispute accordingly falls into the purview of section 191(5) of the LRA read with section 41(10) of the BCEA. Therefore, the Court has jurisdiction to adjudicate his claim.

Onus

[11] Section 192 of the LRA provides as follows:

> 'Onus in dismissal disputes
> (1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
> (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

[12] In this case, dismissal is not in issue. The challenge is directed at the amount of severance money that Mr Maila is entitled to. Therefore, what becomes relevant is the 'evidentiary burden'; to whom this burden shifts to persuade the Court that that litigant is entitled to the relief he seeks.

[13] In *Louw v Golden Arrow Bus Service (Pty) Ltd* [5] direction is provided on whom the burden of proof lies, where Landman J stated as follows:

> '41. I believe it is correct that the onus or burden of proof lies on the applicant claiming relief. I use the term onus or its equivalent, burden of proof, in the sense used in *Pillay v Krishna* 1946 AD 946 at 952 to mean the duty upon the litigant, in order to be successful, of finally satisfying the court that he or she is entitled to succeed on the claim, or defence as the case may be. See too Hoffman and Zeffert: The South 22 African Law of Evidence 4th ed 495.'

[14] In the same judgment, in dealing with the shifting of the evidentiary burden, the Court held at para 44 that:

> 'The common law, though Hoffman and Zeffert are doubtful whether it is of any great assistance, is instructive. I take the liberty of paraphrasing Davis AJA's summary of the Roman law principle in Pillay v Krishna (*supra*) at 951-952. If one person claims something

[5] [1999] ZALC 166 (23 November 1999).

> from another in a court of law, then he or she has to satisfy the court that he or she is entitled to it. But there is a second principle which must always be read with it. Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he or she is regarded *quo ad* that defence as being the claimant and for the defence to be upheld he or she must satisfy the court that he or she is entitled to succeed on it'.(Emphasis added).

[15] Where the Respondent goes to great lengths in denying the Applicant's claim, in particular, the authenticity of the retrenchment notice on which Mr Maila relies. The evidentiary burden therefore shifted from Mr Maila to the Respondent.

[16] Where Mr Maila alleges unlawful salary deductions, the evidentiary burden shifts to him to prove that such deductions took place and that he is entitled to the relief he seeks.

Evidence

[12] Mr Morries' evidence on behalf of the Respondent was that Mr Maila was employed as a security officer. Mr Maila's salary at the commencement of his employment contract was R130.00 per shift. A shift duration was 12 hours.

[13] Mr Morries is the author of the time sheet which reflects the number of days that the Applicant worked in the month of December 2016. He is also the author of the salary summary documents of all security guards of the Respondent for the months of October to December 2016. The salary summary documents reflect the hours worked, the hourly rate, the deductions from the salary, including any loans owed and the net salary.

[14] Mr Morries is responsible for collating the salary summary documents and paying the salaries of the security guards according to the

information contained on the salary summary documents. His evidence was that he paid Mr Maila's salary for the months of October to December 2016 according to these documents and that no monthly deductions of R750.00 were deducted from Mr Maila's salary during these months or at any stage.

[15] It is common cause that the amounts that Mr Maila received as his salary for the months of October to December 2016 corresponded with the amounts on the salary summary documents of these respective months. No deductions in the amount of R750.00 are reflected on the payslips.

[16] Mr Morries' evidence was that the site where Mr Maila worked was cancelled by the client by way of a notification in which the client expressed that he was unhappy with the service of the Respondent. The security guards accordingly had been removed from the site. Two employees were retrenched in January 2017 following this notification by the client, being Messrs Maila and Ramabuda.

[17] Mr Morries did not discuss the retrenchment package with Maila. Mr Masindi, the labour consultant, discussed the retrenchment package with Mr Maila. Mr Morries identified the retrenchment notice on which the Respondent relies, as the notice that was authored by Mr Masindi and approved by him. Mr Morries confirmed that the signature on the retrenchment notice is his. The total of the retrenchment package reflected is R6 895.15. Mr Morries testified that Mr Maila's last working day was 15 January 2017.

[18] Mr Morries further testified that Mr Masindi was also the author of the retrenchment notice pertaining to Mr Ramabuda and he confirmed that he approved and signed the notice. Mr Morries discussed both the retrenchment packages of Messrs Maila and Ramabuda with Mr Masindi.

[19] Mr Morries testified that he was not present when both retrenchment notices were handed over to the Messrs Maila and Ramabuda. Further, that no queries regarding both retrenchment notices were raised with Mr Morries by either Mr Maila or Mr Ramabuda.

[20] The total retrenchment package that was paid out to Mr Maila following deductions such as the provident fund and UIF was an amount of R6 309.06. It is common cause that this amount was paid to Mr Maila.

[21] With respect to the retrenchment notice upon which Mr Maila relies reflecting the total amount of R40 645 15, Mr Morries' evidence was that he did not sign this notice and that he saw this notice for the first time in his attorney's office. He said that the signature on this notice was forged. In addition, that the main difference between the two retrenchment notices is that the notice relied upon by Mr Maila reflects an addition of R750.00 X 45 months, amounting to R33 750.00.

[22] Mr Morries was present at the CCMA when Mr Maila's dispute was conciliated. He denied that the retrenchment notice on which Mr Maila relies was presented at the CCMA. The only issue that was raised at the CCMA by Mr Maila was compensation and not the calculation of his retrenchment package. He confirmed that Mr Ramabuda withdrew his case at the CCMA. Mr Ramabuda had referred a joint dispute with Mr Maila and on the same merits.

[23] Mr Morries denied that any agreement existed between him and Mr Maila in terms of which he would deduct R750.00 from his salary every month. He further denied that the company was having financial difficulties as a reason to make such deductions. He confirmed that Mr Maila did not complain or lodge a grievance about salary deductions; neither did he report a matter of salary deductions to the Department of Labour.

[24] He further testified that he paid one lumpsum to Mr Maila on 9 September 2016 in the amount of R3 500.00 for leave days not taken.

[25] In cross examination, Mr Morries denied any knowledge of what a second payment of R3 500.00 made to Mr Maila on 4 October 2016, was for. He confirmed that the first payment of R3 500.00 on 9 September 2016 was for a period of leave for one year that was not taken. When he was questioned as to what became of the remainder of the leave that was due to Mr Maila as no leave had been taken by him since he commenced employment in April 2013, Mr Morries' evidence was that the remainder of the leave not taken by Mr Maila during the duration of his employment contract had been forfeited. I find it strange that Mr Morries, who on his own version was responsible for salary payments, could not explain and distanced himself from the second payment of R3 500.00 in October 2016, which payment bore the same reference number as the preceding payment in September 2016 and to which he admitted.

[26] Mr Morries explained that Mr Maila's rate was initially R130 per shift when the contract was concluded and the rate was increased as and when salary increments were effected. He further explained that he keeps his own timesheets that he marks daily on the work done by employees, as Mr Maila at times did not submit time sheets. From these timesheets, salaries are paid and that Mr Maila at no stage complained about his salary.

[27] Mr Masindi's evidence on behalf of the Respondent was that the respondent contacted him to render advisory services. He advised the Respondent to notify Mr Maila and Ramabuda about the possible retrenchment. This was done by way of letter dated 24 November 2017.[6] Mr Masindi thereafter, consulted with both Messrs Maila and Ramabuda on the retrenchment. He indicated to them that the

[6] The year ought to be 2016 according to the chronological sequence of events.

Respondent had no alternative vacancies and retrenchment was the only option. He discussed their respective retrenchment packages with them and enjoined them to approach the Department of Labour to verify the correctness of the calculation of their retrenchment packages.

[28] His evidence was that Mr Maila did not furnish him with any information pertaining to the calculation of his retrenchment package and he did not mention the R750.00 deductions from his salary.

[29] Mr Masindi confirmed that he is the author of both the retrenchment notices of Mr Maila and Mr Ramabuda on which the Respondent relies. He confirmed that he drafted these notices on his personal computer at his home and that no one has access to the content stored thereon. He printed only four copies of the notices, meaning two of each. He presented them to Mr Morries. Mr Morries signed two notices – one for Mr Maila and the other for Mr Ramabuda. He then made copies of both original notices in order to hand the originals to Messrs Maila and Ramabuda and retain a copy. When Mr Masindi attempted to hand the notice to Mr Maila, Mr Maila tore it in his presence and told him that he is not his boss and that he would talk to Mr Morries. Mr Maila refused to sign the copy of the original notice.

[30] Mr Masindi testified that he is not the author of the document upon which Mr Maila relies and that this notice is fraudulent. He further corroborated the evidence of Mr Morries by stating that the first time he saw this document was in his lawyer's offices.

[31] Mr Masindi testified as to the discrepancies between this notice and that on which the Respondent relies as well as the arithmetical inaccuracies in the notice upon which Mr Maila relies. He explained that the words "*Shortage Salary as we agreed*" was factored into the notice on which Mr Maila relies. He was at pains to emphasize that the signature on the notice on which Mr Maila relies was forged.

[32] Mr Masindi was present at the CMMA when Messrs Maila and Ramabuda's dispute was conciliated. He corroborated Mr Morries' evidence in stating that nothing was mentioned at the CCMA about salary shortage by Mr Maila.

[33] In cross-examination, it was put to Mr Masindi that he did not hand the retrenchment notice to Mr Maila, rather, that Mr Maila was given the notice on which he relies, directly by Mr Morries. Mr Masindi's response was that he authored the retrenchment notice and the one that Mr Maila relies upon was not authored by him.

[34] During re-examination, Mr Masindi could not explain how Mr Maila could have reconstructed the notice, as Mr Masindi's evidence was that he tore it up before him. Mr Masindi stated that perhaps he used the notice that was served on Mr Ramabuda but conceded that this was speculative.

[35] Mr Maila's evidence was that at the commencement of his employment, him and Mr Morries entered into an oral agreement in terms of which Mr Morries would deduct R750.00 from his salary on a monthly basis. He testified that the reason for such arrangement was because Mr Morries indicated that he could not afford to pay him for the days he worked in excess of 30 days, for work rendered on Sundays and public holidays and for leave. Mr Maila agreed to this arrangement.

[36] Mr Maila approached Mr Morries in 2016, seeking a repayment of the money that was being deducted, as he was not taking leave. Mr Morries then paid him R3 500.00 in September 2016 and a further R3 500.00 in October 2016. When the rest was not forthcoming in November 2016, Mr Maila enquired form Mr Morries. Mr Morries informed Mr Maila that he would retrench him and that he would give him a retrenchment package in *lieu* of the money that he owed to him. Mr Morries informed him to wait until January 2017 for the retrenchment.

[37] Mr Morries called him in January 2017 to collect his retrenchment letter. The letter he received is the retrenchment notice on which he relies. He was surprised, at the end of January 2017, to receive the salary of R6 309.06 when he was expecting to receive R40 645.15.

[38] He approached the CCMA on 2 February 2017 to complain about the money that Mr Morries had undertaken to pay over to him in terms of their arrangement. He took the notice upon which he relies to the CCMA and informed the CCMA about it; Mr Morries denied any knowledge of the retrenchment letter.

[39] In cross examination, Mr Maila was questioned about the additional shifts he said he worked, which he confirmed were six in number, and whether he was not paid for those shifts or whether R750.00 was deducted from his salary. His response was that the six days or shifts worked were deducted from his salary. He could not explain by putting a monetary value to the shifts in order to justify his claim that the deduction of the six shifts amounted to R750.00 per month. He insisted that the Respondent should make the occurrence book available, which would show the additional shifts that he worked and was not paid for.

[40] It was put to Mr Maila that he did not put to Mr Morries, during his cross examination, his version of the six shifts being deducted from his salary. His response was that there was an agreement between them when he commenced employment.

[41] Mr Maila could not explain further, why he did not deduct R7 000.00 comprising of the two R3 500.00 payments he received in September and October 2017 from his claim before this court.

[42] Mr Maila could not explain why deductions of R750.00 per month were not reflected on his pay slips. When an example was made of the deduction of a loan of R250.00 from his October 2016 salary slip, which

is what Mr Morries had testified on in his evidence, Mr Maila said he could not recall having a loan from the company.

[43] Mr Maila denied discussing any retrenchment package with Mr Masindi. He also denied that him and Ramabuda has the same dispute at the CCMA. He said that Mr Ramabuda's challenge at the CCMA was that he worked for Mr Morries for three years without a contract. I find his evidence unlikely, as a joint dispute was referred by both Mr Maila and Mr Ramabuda; further, that Mr Ramabuda's retrenchment notice, which is similar to that which Respondent relies upon in respect of Mr Maila, mentions that Mr Ramabuda was employed for a period of one year and seven months.

[44] Mr Maila denied forging the signature of Mr Morries on the retrenchment notice on which he relies.

[45] In the questions posed for clarity by the Court, Mr Maila, confirmed that monies were deducted from his salary monthly. He confirmed that he had discussions with Mr Morries before he handed him the retrenchment notice upon which he relies. He did not discuss the arithmetical error on his retrenchment notice with Mr Morries after he received it, as his focus was on the total amount of R40 000.00 he would receive. Mr Maila confirmed that his case before this Court is about the monies that the Respondent deducted from him.

Authenticity of the retrenchment notice

[46] Neither of the parties presented expert evidence to assist the Court to reach a finding on the authenticity or otherwise of the retrenchment notices in dispute.

[47] It is recognized in our law that there are certain areas of expertise that another person, other than the Court, will be more competent to reach

an opinion, based on the facts that would assist the Court in making a decision. Expert evidence is opinion evidence, *albeit*, by a witness that relies on his expert knowledge in order to form an opinion or to draw an inference.

[48] Our courts recognize two types of expert witness testimony. The first is an opinion that is based on text book information and the other is an opinion based on practical knowledge.[7]

[49] This concept was refined further. A lay person with relevant knowledge and background could give an opinion on an issue despite not being an 'expert' in the literal sense. In the matter of *Khangale v S*[8] the High Court found the following:

> 'As it was correctly submitted by counsel for the appellant, the evidence of a lay person on an issue in dispute will be admissible and cogent if such evidence is relevant in the legal sense, i.e if the witness, by reason of his or her work situation or close association with situations like the one in issue, can be said to be better positioned to talk authoritatively about that issue.'[9]

[50] Mr Masindi, by virtue of the advisory services he rendered to the Respondent and him being the author of the notice upon which the Respondent relies, is better positioned to speak authoritatively on the authenticity of the notices. Further, the evidence of Messrs Morries and Masindi on the one hand and Mr Maila on the other, are mutually destructive.

[51] When a Court is faced with two irreconcilable versions, the best technique to deploy in dealing with a factual dispute was set out in

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[7] See: *S v Van As* 1991 2 SACR 74 (W).
[8] (A20/2015, 172/2014) [2016] ZALMPHC 4 (31 May 2016).
[9] Ibid at para 52. See also: *S v Klevnhans* 2005(2) SACR 582(W): *S v Ramaobin & Another* 1986(4) SA 117.

Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others[10] where the Court described the technique as follows:

> '[5] … To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities'. [11]

Credibility/ Reliability and Probability Findings

[52] When a Court is asked to make a finding on the credibility of the witnesses that testified, the Court in *Stellenbosch supra* stated the following:

> '… the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.' [12]

[53] Thereafter, a Court will make an enquiry into the reliability of the witnesses that testified. The Court in *Stellenbosch supra* stated the following:

> '… a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.' [13]

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[10] 2003 (1) SA 11 (SCA).
[11] Id fn 11 at para 5.
[12] Id fn 11 at para 5.
[13] Id fn 11 at para 5.

[54] Once a witness is found to be both credible and reliable, the Court in *Stellenbosch supra* found that probability usually follows. It ended the test with the following:

> '… this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it ...'[14]

[55] Messsrs Morries and Masindi corroborated each other's' evidence with respect to the creation of the retrenchment notice, which was preceded by a consultative process. There were no material contradictions in their evidence in respect of the retrenchment notice upon which the respondent relies. Their evidence was further corroborated insofar as what transpired at the CCMA was concerned. Mr Maila sought compensation at conciliation. The referral form indicates this. I find that the calculation of the severance package *per se* was not an issue that was raised at the CCMA. Mr Maila's evidence that he raised the issue at the CCMA is improbable.

[56] To the extent that Mr Maila relied on the oral agreement that was entered into between himself and Mr Morries at the start of his employment, as outlined above, Mr Maila did not prove the existence of such agreement nor did he present any evidence of the monthly deductions of R750 per month. I find it improbable that he would sit back over a period of 45 months and not complain about the deductions and the repayment thereof, until 3 years had lapsed. I equally find it improbable that he would work additional shifts for no pay and take no leave over a three-year period without any complaint.

[57] Section 34(1) of the BCEA provides as follows:

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[14] Id fn 11 at para 5.

> 'An employer may not make any deduction from an employee's remuneration unless –
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> (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
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> (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award'.

[58] I therefore, in the light of the provisions of section 34(1) of the BCEA, find the evidence of Mr Morries more probable, i.e. that there were no deductions from Mr Maila's salary.

[59] Mr Maila failed to put the version to Mr Morries, while he was testifying, that it was Mr Morries and not Mr Masindi who handed the notice on which he relies to him and this was in furtherance of their arrangement to 'retrench' him. Mr Maila's version changed during his evidence, from unlawful deductions to not being paid for additional shifts worked. The latter was not pleaded in his statement of case. This version was also not put to Mr Morries. Mr Maila's evidence in this regard is a fabrication and is accordingly rejected.

[60] In the circumstances, I find that Messrs Morries and Masindi's evidence is credible and reliable. On a balance of probabilities, the evidence of the Respondent is more probable.

[61] In the circumstances, I find that the Respondent has discharged its onus of proving that the retrenchment notice relied upon by it is the authentic notice; that the retrenchment package of R6 895.15 is the correct amount; and there was no short payment to Mr Maila.

Costs

[62] Section 162 of the Labour Relations Act provides as follows:

> '**162. Costs**

(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.'

[63] What section 162 does is to confer on this Court, an unfretted discretion in granting costs orders subject to the requirements of the law and fairness. The Court is required to take into account *inter alia*, the conduct of the parties in proceeding with or defending the matter before it.

[64] The protection of the discretion on judicial officers when making costs orders was expressed by Innes CJ in *Kruger Bros and Wasserman v Ruskin*[15] when he said:

> 'the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.'

[65] The requirements of law and fairness in awarding costs in this Court was endorsed as early as 2008 in *Member of the Executive Council for*

[15] [1918] AD 63 at 69.

Finance, KwaZulu-Natal and Another v Dorkin NO and Another[16] where the Court held:

> '[T]he norm ought to be that cost orders are not made unless those requirements [of law and fairness] are met. In making decisions on cost orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.'

[66] In putting into context the striking of a balance as expressed in *Dorkin*[17] the Labour Appeal Court in *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others*[18], remarked that *'the requirements of law and fairness are on equal footing, and none is secondary to the other'*.

[67] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[19] referred with approval the decision in *Dorkin*[20] and reiterated that the correct approach in labour matters is that the rule of practice that costs follow the result does not apply; further the importance of applying the requirements of law and fairness in awarding costs was re-emphasized.

[68] In this case, the Respondent seeks a punitive cost order against the Respondent. I do not find that the conduct of Mr Maila during court proceedings was "*unconscionable, appalling and disgraceful*"[21] to warrant a punitive costs order against him. Mr Maila represented himself. I exercise my discretion in disallowing costs so as not to

[16] [2008] 29 *ILJ* 1707 (LAC) at para 19.
[17] Id n 8 at para 10.
[18] Unreported case no JA15/2014, 10-1-2017) at para 10.
[19] [2018] 4 *BLLR* 323 (CC) at para 24.
[20] Supra n 8.
[21] fn 18 at para 13

discourage lay litigants from accessing the courts to have their matters ventilated.

[69] In the premises, I make the following order:

Order

1. The Applicant's claim is dismissed.

2. There is no order as to costs.

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MTM Phehane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mpho Maila (Self Representing)

For the Respondent: Advocate JO Withaar

Instructed by: JW Wessels & Partners Inc.