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(1) REPORTABLE: YES/NO
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12/05/2020
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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C331/17

In the matter between:

SAMWU OBO ZANDILE MAKASANA **Applicant**

and

CITY OF CAPE TOWN **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

A. SINGH-BHOOPCHAND **Third Respondent**

Heard: 11 March 2020

Delivered: 12 May 2020 **"By Email"**

JUDGMENT

NIEUWOUDT, AJ

Introduction

[1] There were two applications by the applicant before Court, namely an application for postponement and an application for the reinstatement of the review application that the applicant had instituted on 6 December 2017. For ease of reference the Court will refer to SAMWU as the applicant and to Ms Makasana as the employee.

[2] The Court dismissed the application for postponement in an *ex tempore* judgment and only the aspect of costs needs to be dealt with in this judgment. Mr Whyte, who had appeared for the first respondent had submitted that the applicant's attorneys of record should be ordered to pay the costs *de bonis propriis*. The Court afforded the applicant's attorneys until 18 March 2020 to present facts and submissions on the issue and the first respondent to respond thereto by 23 March 2020. This aspect will be dealt with at the end of this judgment.

Application for reinstatement

[3] The applicant had failed to comply with the provisions of paragraph 11.2.2 of the Practice Manual by failing to file the record of the proceedings within 60 days and it was thus, in terms of paragraph 11.2.3, deemed to have withdrawn the application.

[4] The consequences of the deeming provision have been dealt with a number of times and is settled law. In *Ralo v Transnet Port Terminals and Others*[1] the Court found that a review application would be deemed to have been withdrawn as a consequence of the fact that the applicant had not filed the record within the prescribed 60-day period and stated the following:

> '...the word 'deemed' means 'considered' or 'regarded' and is used to denote that 'something is a fact regardless of the objective truth of the matter[2]...'

[1] (2015) 36 ILJ 2653 (LC).
[2] Id fn 1 at para 10.

The Court further held that an applicant may apply for condonation of the late filing of the record. Thus, the default may be cured by a condonation application.[3]

[5] In *Collett v Commission for Conciliation, Mediation and Arbitration and Others*[4] the Labour Appeal Court (LAC) dealt with the remedies that an applicant had when a matter had been archived. It held that the principles that were normally applicable to condonation applications would apply when considering an application for reinstatement. It added the following:[5]

> 'There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court, condonation may be refused without considering the prospects of success. In *NUM v Council for. Mineral Technology* (1999) 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-D should be followed but:
>
> > 'There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."

And further[6]:

> 'The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.'

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[3] Id fn 1at para 11.
[4] (2014) 18 ILJ 367 (LAC).
[5] Id fn 4 at para 38.
[6] At para 39.

[6] This matter is unusual in the sense that the explanation for the delay is so poor that the other factors do not require any mention. However, it does deserve mentioning that, as pointed out by Mr Whyte in his heads of argument, the applicant required condonation for a number of deficiencies. The Court lists the important ones:

6.1. The review application itself is late.
6.2. The full record is still not before Court.
6.3. The applicant did not file heads of argument.

[7] The delay in filing the partial record that had been filed to date is in excess of a year. The explanation for the delay is offered by the employee but there is no indication as to how she had first-hand knowledge of the facts contained in her affidavit. The explanation centres on the conduct of the applicant's attorneys. Messrs Parker Attorneys, the first set of attorneys, allegedly did not do anything regarding the record and then withdrew by filing a notice of withdrawal on 8 August 2019. This explanation is curious, in view of the fact that the attorneys who acted for the applicant at the time that the application for reinstatement was made, Messrs Qhali Attorneys (who was the second firm of attorneys) had obtained a quotation for the transcript of record of the arbitration proceedings on 3 December 2018 and that the applicant had paid for the transcript on 7 March 2019. The delay in the matter after 3 December 2018 can thus not be laid at the door of the applicant's first firm of attorneys.

[8] The employee states that the payment was made late because the applicant had a financial crisis. There is no confirmatory affidavit attesting to this fact. Further, the second firm of attorneys wrote to the first firm of attorneys on 29 August 2019 requesting it to explain the delay in filing the record as "*you were the attorneys of record*". This request is not compatible with the explanation tendered that the delay was occasioned by financial difficulties of the applicant. The explanation of financial difficulties is also bereft of detail, which makes it impossible for the Court to assess it.

[9] Even if the fact that the applicant had financial issues is accepted, there is no explanation why the Cape Town correspondent of the second firm of attorneys waited for six weeks after the transcribed record had been couriered to it, before it filed the record. This period on its own is approximately one half of the period permitted for the filing of a record.

[10] The replying affidavit in the application for reinstatement does not deal with any of these worrying issues.

[11] Thus, if the principle laid down in *Colett* is followed, there is no acceptable or satisfactory explanation for the delay in the filing of the record and, more so, for the fact that the complete record had not yet been filed. This means that the application for reinstatement of the review application must be dismissed.

Costs

[12] The general point of departure in considering the issue of costs should be the *dictum* in *Member of the Executive Council for Finance KwaZulu-Natal v Dorkin N.O. and Another*[7] where the LAC held that:

> 'The rule of practice that costs follow the result does not govern the making of orders of cost in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements 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 employer's organisations from approaching the Labour 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.'

[7] (2008) 29 ILJ 1707 (LAC). This decision was recently endorsed by the Constitutional Court in *Zungu v Premier of the Province of Kwa Zulu Natal and others* (2018) 39 IILJ 523 (CC).

[13] The Court is satisfied that law and fairness dictate that the first respondent should receive its costs in both the application for postponement and the application for reinstatement of the review application.

[14] The following authorities are relevant to the issue of costs:

14.1. In *Moloi and another v Euijen and another*[8] the LAC held that, where a trade union is not a party to proceedings, the only basis for an order of costs against it would be under circumstances where costs would be awarded *de bonis propriis*, for example conduct which involve delinquencies such as dishonesty, wilfulness or negligence to a serious degree. The Court is prepared to apply this principle even though the applicant is in fact a party to these proceedings. It is, after all, litigating in the interests of the employee in the matter even though its name appears on the pleadings.

14.2. In *Indwe Risk Services (Pty) Ltd v Van Zyl: In re Van Zyl v Indwe Risk Services (Pty) Ltd*[9] the Labour Court held that:

> '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 from 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 indemnify the party against an account for costs from his own representative. (See in general Erasmus Superior Court Practice at E1227.)'

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[8] (1999) 20 ILJ 2829 (LAC) at para 17
[9] (2010) 31 ILJ 956 (LC) at para 39

14.3. In *Mashishi v Mdladla NO and others* [10] this Court dealt with a condonation application that was hopeless and stated the following[11]:

> 'Judge Owen Rogers recently suggested that it is improper for counsel to act for a client in respect of claim or defence which is hopeless in law or on the facts. (Rogers O 'The Ethics of the Hopeless Case' December 2017 30(3) Advocate 46.) Although these assertions are directed primarily at counsel (the article having been published in the South African Bar Journal), the same principles apply to attorneys, and indeed all those who have the right of audience before a court.) By this he means that counsel must be able to formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail. But counsel acts improperly when she is 'quite satisfied' that one or more of them will fail. In particular, there is an ethical obligation on counsel to ensure that only 'genuine and arguable' cases are ventilated, and that this be achieved without delay (at 51).

14.4. Thus, it appears as if the test for awarding costs *de bonis propriis* against a legal representative is also applicable to a decision to award costs against a trade union.

14.5. It is also necessary to refer to the issue of "*attorney and client*" and "*attorney and own client*" costs. In *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* [12] the Court held that:

> 'The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure

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[10] (2018) 39 ILJ 1607 (LC)
[11] At paras 14 and 15
[12] 1946 AD 597 at p. 607.

> more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. .... Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say "as far as it can" because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party. ..... Where the attorney and client costs are to be paid by the opposite party, the taxation should be stricter than in a taxation between attorney and client where the costs are to be paid by the client to his attorney. .... Thus the award of attorney and client costs against the losing party really demands what may be termed an intermediate basis of taxation.'

[15] Costs as between attorney and own client are only awarded in most serious instances. *Erasmus: Superior Court Practice*[13] gives very useful examples of the degree of unacceptable conduct by a litigant that would justify an order of costs as between attorney and own client:

> 'The courts have awarded costs against the losing party on an attorney and own client basis in the following circumstances: where the losing party, a large company, had attempted to intimidate the plaintiff into not proceeding with legal proceedings by threatening to institute a counterclaim for a large amount of money and to ruin the plaintiff, and had conducted itself during the trial in a vexatious manner; where the losing party had obtained evidence, which was subsequently held to be inadmissible on the grounds of public policy, in an improper and reprehensible manner; where the losing party had resorted to procedural stratagems, trifling defences and delaying tactics, conduct which was held by the court to be vexatious and reprehensible; where the losing party

[13] Jutastat e-publications RS 11, 2019, D5-30

had been guilty of an abuse of procedure; where the losing party's conduct of the case had been found to be unconscionable, appalling and disgraceful; where the losing parties had requested a postponement which had been necessitated by their attorneys' procrastination and negligent failure to oppose an application; where the losing party (a) delivered an answering affidavit, the substantial portion of which contained facts which were irrelevant; (b) resorted to defences which were extravagant; (c) adopted a deliberate hostile position in an attempt to frustrate the winning party in enforcing her rights; and (d) acted unreasonably; where the respondents acted tactically to avoid and frustrate scrutiny under disciplinary proceedings before a Law Society.

[16] The Court now turns to consider the issues of who should be ordered to pay the first respondent's costs and the scale on which such costs should be paid.

Application for postponement

[17] Mr Whyte submitted that the applicant's third set of attorneys, Messrs Macgregor Erasmus (ME) should be ordered to pay the costs of the application for postponement *de bonis propriis* on the scale as between attorney and own client.

[18] The Court has taken the following issues into account in deciding the issue:

18.1. On 17 December 2019, soon after ME came on record, the first respondent's attorneys alerted them of various problems which the reinstatement application faced.

18.2. On 7 February 2020, after the notice of set down in the matter had been issued, the first respondent's attorneys informed ME by letter that the applicant's heads of argument were due to be filed by 19 February 2020. These heads were not filed. In the same correspondence the problems which the applicant faced in the matter, were repeated.

18.3. On 21 February 2020, the first respondent's attorneys reminded ME that the applicant's heads of argument had not been filed. ME was requested to index and paginate the court file. This was also not done and the first respondent had to do it.

18.4. On 4 March 2020, Mr Geldenhuys of ME informed Mr Whyte telephonically that he was of the opinion that ME was precluded from representing the applicant due to the fact that its second firm of attorneys had not withdrawn as attorneys of record. This is not a correct reflection of the law. In *Maluti Plant Hire CC v Orecrushers SA (Pty) Ltd*[14] the applicant in a rescission of judgment application submitted that its new attorneys could not go on record until such time as its erstwhile attorneys had withdrawn. The Court rejected this submission[15] and stated that:

> 'A former attorney can never hold a client ransom during litigation as Mr Sander wanted the court to accept. Obviously, the former attorney may decline to hand over the relevant file pending payment of the account. If Mr Noordman and his client acted in terms of this rule immediately after he had left Matsepes' employ, all further pleadings and notices would have been served on Mr Noordman's new firm.'

18.5. Rule 21(2) of the rules for the conduct of proceedings in this Court provides that:

> 'Any party who terminates a representative's authority to act and then acts in person or appoints another representative, must give notice to the registrar and all other parties concerned of that termination, and of the appointment of any other representative, and include the representative's particulars, as referred to in subrule (1).'

18.6. It is not clear to the Court how ME could accept instructions to deliver a notice of appointment as attorneys of record, as ME had done, without advising its client of the provisions of rule 21. The rule requires both the termination of the mandate of the erstwhile representative and the appointment of the new representative. In this matter the latter had occurred but the former apparently not.

18.7. ME tried to gauge the first respondent's position to a possible postponement. The issue of postponement was formally addressed for

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[14] (3147/2017) [2019] ZAFSHC 53
[15] At para 28

the first time on 10 March 2020. The averment in Mr Whyte's affidavit that this had occurred on 9 March 2020, is incorrect. Mr Whyte also had the date of hearing wrong, but nothing turns on this. The important fact is that the approach occurred on the day before the hearing. The third respondent, as it was quite entitled to do, required that a formal application be brought and stated that it would oppose such application.

18.8. At 7:43 pm on 10 March 2020, which was the evening before the matter was scheduled to be heard, ME emailed an unsigned affidavit by the employee in support of an application for postponement to the first respondent's attorneys. It was not accompanied by a notice of motion. A copy of this email and an unattested affidavit (albeit signed by the employee) were filed on the day of the hearing of the matter.

18.9. The statement by the employee shows that she must have been advised that the prospects of success of the applicant in the reinstatement application were poor. It recorded the employee's view (which must have been based on the advice that she had received) that the applicant would be prejudiced if the application for reinstatement were to be determined on the current pleadings.

18.10. The statement is problematic in another respect. It records that ME had advised the applicant that it could not commence working on the file until such time as Messrs Qhali Attorneys had withdrawn as attorneys of record. This contradicts the statement by Mr Geldenhuys that the applicant had instructed ME to only draft heads of argument once its erstwhile attorneys had withdrawn. It is, however, compatible with the recordal contained in the letter dated 4 March 2020 (from the first respondent's attorneys to ME) that ME was of the view that it was precluded from taking steps in the matter until such time as Messrs Qhali Attorneys had withdrawn. As already stated, this view does not correctly reflect the legal position.

18.11. The applicant had throughout tendered the wasted costs of the postponement.

18.12. The application for postponement was argued (and dismissed) on 11 March 2020 which is the same day on which the application for reinstatement was argued.

18.13. The application for postponement was utterly devoid of merit and, as stated, not even accompanied by a notice of motion.

[19] The conduct (or more correctly put, the inaction) by ME attorneys which appears to have frustrated the first respondent's attorneys of record had more to do with the retrieval application than the last-minute postponement application, although that no doubt added to the irritation. The Court is concerned about the contradiction in ME's explanation for not taking any steps in the matter until Messrs Qhali Attorneys had withdrawn but is not prepared to make a definitive finding on this aspect on the papers before it.

[20] Irrespective of the true explanation for the inaction, the Court has to consider whether the events, set out above, constitute a serious departure from the requirements of the office of an attorney or the progressing of a case which is hopeless in law or on the facts. Formulated differently, ought ME to have withdrawn from the matter when it became clear that the first respondent was not prepared to consent to the application for postponement or should ME simply have tried to argue the application for reinstatement on its merits.

[21] The Court thinks not. ME was obliged to advance its client's case. Further, the applicant had tendered wasted costs in the matter and it was ready to argue the reinstatement application when the application for postponement had failed. Pursuing an application for postponement under the circumstances, on short notice, does not constitute a material departure from the responsibilities of an attorney's office and the fact that the application might have been hopeless is not conclusive. The Court is however of the view that ME ought to have advised the applicant about the provisions of rule 21 and ensured that a properly attested affidavit, under cover of a valid notice of motion, was delivered in the application for postponement.

[22] The failure of ME to advise its client about the provisions of rule 21 is culpable. The absence of an application that is formally in order (irrespective of the merits of the application) is extremely culpable. The latter is the reason why the Court concludes that ME should be ordered to pay the costs of the postponement application *de bonis propriis* on the scale as between attorney and own client. This only applies to the costs that were incurred in addition to the costs of the reinstatement application. The costs occasioned by the post hearing affidavits should also be paid *de bonis propriis,* but only on the scale as between party and party.

Reinstatement application

[23] The first respondent did alert the applicant that it would seek costs on an attorney and own client scale against it. It stated in its answering affidavit that the applicant had:

23.1. Failed to adequately advise and assist the employee in the matter.
23.2. Pursued an application with absolutely no merit.
23.3. Failed to remedy the defects in the application after it had been pointed out.

[24] The applicant did not respond to these allegations, only the employee did. The response is startling; it simply states that no case had been made out for a costs order of this nature. It must be pointed out that the applicant was still represented by Messrs Qhali Attorneys when this response was made.

[25] The decision on costs should be made on the basis of the test set out in *Moloi*[16] and the issue is thus whether the applicant was negligent to a serious degree in not filing the record in time and in the manner in which the reinstatement application was conducted. The applicant did not furnish any information to this Court. On the strength of the facts set out in this judgment, a case has been made out to order the applicant to pay the costs of the retrieval application. It

[16] Discussed in para 14.1 above.

would be very unfair towards the employee to saddle her with the costs in this matter.

[26] However, the conduct of the applicant is not so culpable that costs should be paid on the scale as between attorney and own client; it only justifies costs on the scale as between attorney and client.

[27] In the premises, the Court makes the following order:

Order:

1. The application for postponement is dismissed.
2. The application to reinstate the review application is dismissed.
3. Messrs Macgregor Erasmus is ordered to pay the costs of the postponement application *de bonis propriis* on the scale as between attorney and own client, save for the costs of the post hearing affidavits, which must be paid on the scale as between party and party.
4. The South African Municipal Workers Union is ordered to pay the costs of the retrieval application on the scale as between attorney and client.

H. Nieuwoudt
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Geldenhuys of Macgregor Erasmus Attorneys

For the First Respondent: Mr Whyte of Norton Rose Fulbright South Africa Inc