



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no D474/10

PRENITHA KANTHA PADAYACHEE

Applicant

And

THE REGISTRAR OF THE LABOUR COURT, DURBAN

First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL

RESPONSIBLE FOR HEALTH (KWAZULU NATAL)

Second Respondent

SIBONGILE MARILYN ZUNGU NO

Third Respondent

Heard: In chambers

Delivered: 24 January 2012.

Judgment

CELE J

Introduction

[1] The applicant seeks to review, correct and/or set aside a ruling of the first respondent, the registrar, dated 25 August 2011 in this matter. In taxation proceedings the registrar awarded the second and third respondents' costs for counsel's fees amounting to R49 476.00. The applicant seeks an order allowing counsel's fees at R19 845.00. None of the respondents have opposed this application which was considered in chambers and on the papers filed.

Factual background

[2] The applicant was in the employ of the Department of Health, KwaZulu-Natal, the Department, as a General Manager, Legal Services. During July 2009, September 2009 and up until the date of her suspension, she made certain disclosures to the second and third respondents, relating to irregularities in the appointment of certain service providers. On 4 February 2010, the applicant was then suspended from her duties on the grounds of misconduct.

[3] On 7 April 2010, the applicant was charged with misconduct and was given a notice to attend a disciplinary hearing scheduled for 12 April 2010. Together with the Health and Other Services Personnel Trade Union of South Africa (Hospersa), she lodged an application in this court under case D421/2010, interdicting the Department and other respondents therein from proceeding with the disciplinary enquiry against her, pending an action which she was yet to bring. Hospersa had launched the application as a party and it appointed Llewellyn Cain Attorneys to represent the applicants. A rule nisi was granted by this court on 21 May 2010, staying the disciplinary hearing pending the results of an application which the applicants were to lodge and the finalisation of a referral brought by the applicants to the Public Health and Social Development Sectoral Bargaining Council.

[4] In June 2010, the applicant and Hospersa launched an application under case number D474/2010, alleging that the decision to suspend and charge the applicant was premised on the disclosures she had made under the Protected Disclosure Act. Hospersa withdrew as a party in both matters, on 22 July 2010 in case D474/10 and on 28 July 2010 in D421/10. On 22 July 2010, the applicant appointed new attorneys, Norton Rose South Africa, incorporated as Deneys Reitz.

[5] On 3 September, the applicant filed her statement of claim in respect of the unfair labour practice dispute relating to the protected disclosure claim and on 14 September, she withdrew her application under case number D474/10, with no tender of costs. Hospersa paid all legal costs up to the date of its withdrawal from the matter. The second and third respondents then set the matter down for argument for costs and on 1 February 2011, a costs order was issued against the applicant. They then submitted a bill of costs in the amount of R194 979.93 excluding VAT, to be taxed by the registrar. R121 201.30 of the amount claimed was a fee for two counsel of which R60 876.00 was for the senior counsel, claimed for:

- 5.1 Drafting a letter and reaching an agreement on time limits- R3 600.00;
- 5.2 Drafting an answering affidavit and confirmatory affidavits- R45 000.00 calculated at the rate of R1 184.00 per page and
- 5.3 Consultation for 2 hours- on 21 June 2010-R4 800.00 of which R2400 plus VAT is for the senior counsel.

[6] Upon presentation of the bill to the applicant, she lodged a formal objection to a number of items, including the item at issue, numbered 87. An amount of R49 476.00 was allowed by the registrar for senior counsel's fees on the basis that the applicant had also initially opted to engage the services of a senior counsel.

The ground for review

[7] The only ground for review proffered by the applicant is that the amount allowed by the registrar is too excessive when taking into account that the senior counsel was performing the functions of an attorney in respect of the items claimed for and that the registrar committed a gross irregularity.

Evaluation

[8] In *Gundelfinger v Norwich Union Fire Insurance Society Ltd*,¹ court held:

'Of course if a litigant wishes to employ eminent counsel who requires a very large fee before coming into court, he is entitled to do so, but the court should not allow him to saddle

¹ 1916 TPD 341 at 348.

the losing side with the costs of specially large fee which he has thought fit to allow his counsel.'

[9] Therefore the eminence of counsel is not in itself a good reason for allowing a larger fee than would ordinarily be applicable.² Further, in labour matters a consideration of fairness underpins the determination of costs in addition to the applicable law. There is no specific statutory provision limiting the powers of this court only to granting or refusing costs. It must follow as well that this court has to be guided by the considerations of the law and fairness as to what reasonable costs to grant or refuse a litigant. In this matter, the costs are on a party and party basis. A reasonable amount of costs should therefore be striven for. In the initial court proceedings, it was Hospersa that instructed senior counsel and the union paid for those costs. The probe should turn on whether the matter being considered was of such a complex or voluminous nature as to justify burdening the losing party with a larger fee than is ordinarily permitted.

[10] The drafting of a letter and reaching an agreement on time limits was essentially the function of an attorney and the client. As there is no dispute that the letter was drafted, it would not be proper to disallow this charge *in toto* as suggested by the applicant but a reasonable charge is determined to be R1 900.00. Ordinarily affidavits are drafted by attorneys and counsel will then settle the papers. An attorney's fee of R6 745.00 for the draft and counsel's fee for settling at R9 500.00, totalling R16 245.00, as suggested by the applicant, should have been upheld by the registrar as reasonable costs. In respect of the consultation fees, the attorney should have consulted with the client in preparation for the drafting of the affidavit. If the matter was considered complex, the affidavit would then be sent to counsel to consider the draft in chambers so as to settle it. The consultation fee ought to have been allowed by the registrar on the basis of the attorney doing it and thereafter consulting counsel. In this regard the reasonable amount is determined to be R2 000.00 per hour, totalling R4 000.00.

² See *Ocean Commodities Inc. and Others v Standard Bank of South Africa Ltd and Others* 1984 (3) SA 15 AD at 22H.

[11] The difference between the charge allowed by the registrar and the charge found by court to be a reasonable amount is so great that court is entitled to intervene in this matter for fairness to prevail between parties.

[12] Accordingly the following order will issue:

1. The second and third respondents are allowed counsel's fees of R22 145.00.
2. No costs order is made.

Cele J.

APPEARANCES :

FOR THE APPLICANT : Ms.M.Naidoo instructed by :Norton Rose South Africa(Inc.as Deneys Reitz)

FOR THE RESPONDENTS: ADV.G.O.van Niekerk SC instructed by :Nxumalo &Partners Attorneys