CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 136/17

In the matter between:

SIBONGILE ZUNGU Applicant

and

PREMIER OF THE PROVINCE OF KWAZULU-NATAL First Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, KWAZULU-NATAL Second Respondent

SIFISO TOKELLO MTSHALI Third Respondent

Neutral citation: *Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1

Coram: Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgments: Mhlantla J

Decided on: 22 January 2018

Summary: Appeal from the Labour Appeal Court — costs — rule of practice that costs follow result does not apply in labour matters — law and fairness governs the awarding of costs — nothing in the present case meriting the award of costs — Labour Appeal Court and Labour Court did not exercise their discretion judicially —

justice requires that cost orders be set aside and each party pay its own costs — appeal on costs upheld and set aside

---

ORDER

On appeal from the Labour Appeal Court:

1. Leave to appeal on the merits is refused.
2. Leave to appeal against the costs orders of the Labour Court and Labour Appeal Court is granted.
3. The appeal on costs is upheld.
4. The costs orders granted by the Labour Court and the Labour Appeal Court are set aside.
5. No order as to costs is made in relation to the proceedings in this Court.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Theron J and Zondi AJ concurring):

[1] This is an application for leave to appeal against an order of the Labour Appeal Court in terms of which the applicant's appeal was dismissed with costs.[1] The applicant is Dr Sibongile Zungu. She was employed by the first respondent, the Premier of KwaZulu-Natal Province (Premier) as the Head of Department: Health in KwaZulu-Natal (Head of Department) on a five year contract from 1 December 2009 to 31 July 2014. The second respondent is the Member of the

[1] *Zungu v Premier, Province of KwaZulu-Natal and Another* [2017] ZALAC 26.

Executive Council for the Department of Health (MEC), and the third respondent is Dr Sifiso Tokello Mtshali, the incumbent Head of Department. The third respondent did not participate in the proceedings.

[2] On 26 June 2014, the Premier gave notice to the applicant that he had no intention of renewing her contract upon the expiry of her term but would advertise the post. He indicated to the applicant that she could apply if she so wished. Thereafter, the post was advertised and the applicant and other candidates applied. In the interim, short-term extensions were made to the applicant's contract of employment until December 2014. The applicant was one of the candidates interviewed for the position. The selection committee recommended that the applicant be appointed as Head of Department for a further period of five years.

[3] In the meantime, certain allegations were levelled against the applicant by the National Education, Health and Allied Workers' Union (NEHAWU). The Premier decided to conduct an investigation before making a final decision on the appointment process. This necessitated another extension of the applicant's contract from 1 December 2014 until 31 March 2015.

[4] During March 2015, the investigating team submitted a provisional report to the Premier and the applicant. It sought more time to conclude the work. There were findings in the report that related to the applicant's managerial shortcomings as an accounting officer.

[5] The applicant was concerned that the Premier would rely on the provisional report and not appoint her. As a result, on 30 March 2015, a day before her contract was due to come to an end, she launched an urgent application in the Labour Court. She sought the issuance of a rule nisi calling upon the respondents to show cause why an order in the following terms should not be made:

(a) an interdict prohibiting the Premier from replacing her with anyone else in the position of Head of Department;

(b) a *mandamus* (a mandatory direction) that she be appointed as Head of Department in accordance with the recommendation of the selection committee;[2] and

(c) a declarator that the Premier was not entitled to take into account the findings contained in the provisional report.

[6] The matter was set down for 31 March 2015. On that day, the hearing was postponed by agreement between the parties to 17 April 2015. The Premier undertook not to appoint anyone to the position of Head of Department. After the postponement, the applicant became aware that the Premier had appointed Dr Simelane as acting Head of Department with effect from 1 April 2015 until the appointment of a new Head of Department.

[7] On 2 April 2015, the applicant received a letter from the Premier advising her that her contract had expired and that he had no intention of renewing it. The applicant formed the view that the Premier had reneged on the agreement between the parties when he appointed an acting Head of Department. As a result, she launched another urgent application and sought an order declaring that the Premier had breached the undertaking not to appoint a Head of Department. In addition, she sought a personal costs order against the Premier on an attorney and client scale (*de bonis propriis*).

[8] The Premier submitted that, had the position of Head of Department been left vacant, he would have been in breach of the provisions of the Public Finance

[2] For ease of reference, the term "selection committee" will be used throughout this judgment. In their submissions, the parties use "selection committee" and "selection panel" interchangeably, however the term "selection committee" is the term adopted in section D.7 of the Public Service Regulations, 2001. GN No. R. 1, 5 January 2001 (Public Service Regulations).

Management Act[3] (PFMA) which preclude him from leaving the position of an accounting officer vacant.[4]

[9] The Labour Court, per Lallie J, held that the agreement by the parties related to the subject matter of the original application. This was the appointment in the Head of Department position for a period of five years. In terms of the agreement, the Premier had undertaken not to make that appointment pending the finalisation of the dispute between the parties. That appointment had not been made. The Labour Court held that the Premier had not undermined the agreement because he had placed someone only as an acting Head of Department, not as permanent Head of Department. The Labour Court further stated that the defence by the Premier that he was bound by the PFMA was not challenged by the applicant. It therefore dismissed the urgent application and postponed the remainder of the application to 17 April 2015 in terms of the agreement between the parties. The Labour Court declined to make a costs order against the applicant.[5]

[10] On 21 April 2015, the main application was eventually heard by the Labour Court before Whitcher J.[6] The Labour Court dismissed the main application on the grounds that it had no jurisdiction and that, in any event, no case had been made for urgency or for final interdictory relief. With regard to jurisdiction, it held that the nature of the dispute between the applicant and the Premier was connected to a dismissal issue, that is, whether there was a legitimate expectation of the contract to be renewed. Therefore, the dispute fell within the exclusive jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant

[3] 1 of 1999.

[4] Section 36(1) of the PFMA states that "[e]very department and every constitutional institution must have an accounting officer".

Section 37 provides that—

> "[w]hen an accounting officer is absent or otherwise unable to perform the functions of accounting officer, or during a vacancy, the functions of the accounting officer must be performed by the official acting in the place of that accounting officer".

[5] *Zungu v Premier of the Province of KwaZulu-Natal and Another* [2015] ZALCJHB 122.

[6] *Zungu v Premier of the Province of KwaZulu-Natal and Another*, unreported judgment of the Labour Court, KwaZulu-Natal, Case No. D244/15 (21 April 2015).

bargaining council. The Labour Court thus dismissed the application for an interdict with costs.

Labour Appeal Court

[11] Aggrieved by the decision, the applicant appealed to the Labour Appeal Court. Whilst the appeal was pending, the Premier advertised the post and appointed the third respondent as the Head of Department.

[12] In the Labour Appeal Court, the applicant challenged the conclusion of the Labour Court that it had no jurisdiction because the issue related to a dispute that had to be referred to the CCMA. She contended that her cause of action was that the Premier's decision not to adopt the recommendations of the selection committee was irrational and susceptible to review under the Promotion of Administrative Justice Act[7] (PAJA).

[13] The Labour Appeal Court pointed out that the applicant, whose fixed term contract of employment was about to expire, sought to compel a renewal thereof. The alleged right of renewal was premised on a legitimate expectation, founded on a recommendation by the selection committee, that the applicant's contract of employment be renewed. The Labour Appeal Court held that the dispute was within the realm of section 186(1)(b) of the Labour Relations Act[8] (LRA). This section defines a dismissal as including a failure or refusal by the employer to renew a fixed term contract of employment on the same or similar terms. The Labour Appeal Court held that a claim that a fixed term contract be renewed on the grounds of a legitimate

[7] 3 of 2000.

[8] 66 of 1995. The definition of "dismissal" provided in section 186(1)(b) is as follows:

> "[A]n employee employed in terms of a fixed term contract of employment reasonably expected the employer—
>
> (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
>
> (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee."

expectation is a species of dismissal as defined in section 186 and regulated by section 191, which requires such a dismissal to be arbitrated and not adjudicated.[9] The Labour Appeal Court also held that there was no basis to rely on PAJA as the dispute was a pure labour relations dispute.

[14] The Labour Appeal Court also considered the provisions of the Public Service Regulations.[10] Section D.7 makes provision for when an executive authority does not approve a recommendation of a selection committee and states that the authority must record the reasons for his or her decision in writing. In terms of section D.8, the executive authority shall, before making a decision on an appointment, satisfy himself or herself about the suitability of the candidate.[11]

---

[9] Section 191(1) provides:

> "(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
>
> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
>
> (ii) the Commission, if no council has jurisdiction.
>
> (b) A referral in terms of paragraph (a) must be made within—
>
> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
>
> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."

Section 191(5) of the LRA lists the circumstances under which an employee may refer a dispute to the Labour Court for adjudication:

> "
>
> . . .
>
> (b) [T]he employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—
>
> (i) automatically unfair;
>
> (ii) based on the employer's operational requirements;
>
> (iii) the employees participation in a strike that does not comply with the provisions of Chapter IV or
>
> (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[10] Public Service Regulations above n 2.

[11] Sections D.7 and D.8 of the Public Service Regulations read as follows:

> "D.7 When an executing authority does not approve a recommendation of a selection committee, she or he shall record the reasons for her or his decision in writing.

[15] Lastly, the Labour Appeal Court upheld the decision of the Labour Court that it did not have jurisdiction and that the proof of a clear right necessary for a final interdict was absent. The Court therefore dismissed the appeal with costs.

In this Court

[16] The applicant lodged an application in this Court for leave to appeal against the order of the Labour Appeal Court. She also seeks leave to appeal directly to this Court against the judgment of the Labour Court. On 20 September 2017, the Chief Justice issued directions,[12] calling on the parties to file written submissions on costs.

[17] The parties filed written submissions and the matter was determined without oral argument.

[18] This Court cannot entertain an application for direct access to appeal the decision of the Labour Court in the applicant's urgent application because this was an interlocutory order, which is ordinarily not appealable, except to the extent that the interests of justice dictate otherwise. The applicant has not provided any basis for so concluding.

[19] With regard to the merits, we are satisfied that leave to appeal must be refused as the application has no prospects of success. The applicant seeks to challenge the adverse decision of not being appointed on the basis that the Premier did not have the discretion to ignore the selection committee's recommendation. The applicant's

---

> D.8 Before making a decision on an appointment or the filling of a post, an executive authority shall—
>
> (a) satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims or his application for the post have been verified; and
>
> (b) record in writing that verification."

[12] The Chief Justice issued the following directions:

> "The Court is minded to intervene on the costs orders and invites the applicant and respondents, if so minded, to make submissions by 6 October 2017."

complaint in effect relates to a dismissal as defined in section 186(1)(b) of the LRA, which defines a dismissal as follows:

> "[A]n employee employed in terms of a fixed term contract of employment reasonably expected the employer—
>
> (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
>
> (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee."

[20] The Labour Appeal Court was correct in upholding the Labour Court's decision that it did not have jurisdiction in the matter. This is because the claim by the applicant relating to the Premier's decision not to appoint her, and the contention that this was unlawful, falls squarely within the definition of dismissal in section 186(1)(b) of the LRA. The dispute should have been referred to conciliation and ultimately to arbitration under section 191 of the LRA. Therefore, the applicant cannot bypass the dispute resolution process envisioned in the LRA. The applicant was obliged to follow the dispute resolution process in Chapter VIII of the LRA but did not do so.

[21] In any event, the applicant's argument that the Premier had no discretion to ignore the recommendation of the selection committee has no merit when regard is had to sections D.7 and D.8 of the Public Service Regulations.[13] The regulations expressly contemplate instances where the Premier may not accept the recommendation of the selection committee. They do not fetter the Premier's discretion to make the appointment. Section D.7 in fact makes provision for when an executive authority does not approve a recommendation of a selection committee. It states that the authority must record the reasons for his or her decision in writing. In

[13] Public Service Regulations above n 2.

terms of section D.8 the executive authority shall, before making a decision on an appointment, satisfy himself or herself about the suitability of the candidate. That shows that the Premier has a discretion and may reject the recommendation of the selection committee. On 8 April 2015, the Premier gave written reasons to the applicant for not accepting the recommendation of the selection committee. Therefore, the applicant's appeal on the merits must fail.

[22] What remains is the question of costs. The applicant submits that the costs orders against her constituted a misdirection by the Labour Court and Labour Appeal Court. She contends that the Premier should have been ordered to pay her costs. On the other hand, the Premier submits the courts sufficiently and judicially considered the issue of costs and that the costs orders should not be set aside.

[23] I disagree with the Premier's submissions. The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. Section 162 provides:

> "(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."

[24] The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

> "The rule of practice that costs follow the result does not govern the making of orders of costs 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 costs orders are not made unless the requirements are met. In making decisions on costs 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."[14]

[25] In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct.

[26] In the result, the Labour Court and the Labour Appeal Court erred in not following and applying the principle in labour matters as set out in *Dorkin*. The courts did not exercise their discretion judicially when mulcting the applicant with costs. This Court is therefore entitled to interfere with the costs award. Taking into account the considerations of the law and fairness, it will be in accordance with justice if the orders of costs by the Labour Court and Labour Appeal Court are set aside and each party pays his or her own costs. With regard to costs in this Court, there will be no order as to costs.

[27] In the result the following order is made:

1. Leave to appeal on the merits is refused.

[14] *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O.* [2007] ZALAC 41 (*Dorkin*) at para 19. See also *Martin Vermaak v MEC for Local Government & Traditional Affairs, North West Province* [2017] ZALAC 2.

2. Leave to appeal against the costs orders of the Labour Court and Labour Appeal Court is granted.
3. The appeal on costs is upheld.
4. The costs orders granted by the Labour Court and the Labour Appeal Court are set aside.
5. No order as to costs is made in relation to the proceedings in this Court.

For the Applicant:	T G Madonsela SC instructed by Strauss Daly Inc
For the First and Second Respondents:	A A Gabriel SC and I J Patel instructed by the State Attorney