IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no: JA 61/2019

In the matter between:

UASA -THE UNION	**First Appellant**
SOLIDARITY	**Second Appellant**
NATIONAL UNION OF MINEWORKERS	**Third Appellant**

and

WESTERN PLATINUM (PTY) LTD	**First Respondent**
EASTERN PLATINUM (PTY) LTD	**Second Respondent**
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Third Respondent**

Heard: **20 August 2020**

Delivered: **13 November 2020**

Summary: *Practice and procedure---Mootness---Whether exceptional circumstances exist to conisider issue of costs despite mootness---Failure to provide reasons supports inference that Labour Court failed to take into consideration all relevant facts and circumstances, as well as the requirements of law and fairness, when it ordered appellants to pay costs---Labour Court's misdrecition constituting exceptional circumstaces justifying interference on appeal.*

Coram: Davis JA, Murphy AJA and Kathre-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] The appellants, UASA-The Union ("UASA"), Solidarity and National Union of Mineworkers ("NUM") (collectively referred to as "the appellants") appeal against the judgment and order (including the costs order) of the Labour Court (Mooki AJ) dismissing their application, in which they sought an order obliging Western Platinum Ltd and Eastern Platinum Ltd ("Lonmin") and the Association of Mineworkers and Construction Union ("AMCU") (collectively referred to as "the respondents") to comply with a certified award[1] of the Commission for Conciliation, Mediation and Arbitration ("CCMA") granting the appellants organisational rights referred to in sections 12, 13 and 15 of the Labour Relations Act 66 of 1995 ("LRA").

Background

[2] A Coalition was formed between NUM, UASA and Solidarity for purposes of seeking organisational rights at Lonmin. The Coalition made a request to Lonmin, in terms of section 21 of the LRA, to be granted organisational rights referred to in sections 12 , 13 and 15 of the LRA.

[3] Lonmin did not grant the Coalition the requested organisational rights. Consequently, on 1 March 2018, the Coalition referred an organisational rights dispute to the CCMA for conciliation. The conciliation was unsuccessful, and the Coalition referred the dispute to arbitration.

[1] The CCMA issued the award on 12 November 2018.

[4] The arbitrator issued her award on 12 November 2018. She found that the appellants represent a substantial number of employees in the workplace (at Lonmin) and granted them organisational rights referred to in sections 12, 13 and 15 of the LRA. As concerning deductions of trade union subscriptions and levies, the award stipulated as follows:

> ' 2.2.1 The General-Secretaries of the three Unions which constitute the Coalition, or his delegate will ensure that duly completed stop orders are delivered in bulk to Lonmin or by email on or before 25 November 2018 for such stop orders to be deducted by the HR of Lonmin from the December 2018-payroll.
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> 2.2.2 Lonmin is entitled to verify the authenticity of such stop order forms by contacting employees directly by e-mail to confirm such... .'

[5] On 23 November 2018, AMCU brought a review application against the arbitration award.[2] The arbitration award was not stayed pending the outcome of the review application as contemplated in section 145(3)[3] of the LRA.

[6] It is common cause that Lonmin made no stop order deductions from the appellants' members in the January 2019 payroll run. Consequently, on 30 January 2019, the appellants applied for the certification of the arbitration award. It was certified in terms of section 143(3)[4] of the LRA on 4 February 2019.

[7] Consequent upon a dispute arising in relation to, *inter alia*, whether the appellants had submitted new membership forms to Lonmin in 2018 and, the accuracy and quality of the membership forms already submitted by them, Lonmin did not comply with the arbitration award. As a result, on 12 February

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[2] The review application was dismissed by the Labour Court ("Gush J") on 3 April 2019 with no order as to costs. The Labour Court granted AMCU leave to appeal its decision on 31 May 2019. The Labour Appeal Court upheld AMCU's appeal in a judgment delivered on 13 November 2020.

[3] Section 145(3) provides:
'The Labour Court may stay the enforcement of the award pending its decision.'

[4] Sections 143(3) and (4) of the LRA provide:
'(3) An arbitration award may be only enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
(4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings in the Labour Court.'

2019, the Coalition made urgent application to the Labour Court for enforcement of the arbitration award.

[8] The Labour Court handed down judgment on 26 February 2019 in the application to compel compliance with the arbitration award. It held as follows:

> 'The [appellants] evidently have alternative remedies; including contempt proceedings because the award that is the subject of this application may be enforced as if it were an order of this Court. This is more so given the [appellants'] contention that Lonmin has created a 'fictitious dispute' in insisting that the [appellants] provide Lonmin with newly signed forms for purposes of making subscription deductions.
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> An order that the respondents comply with a certified award has the same force as the certified award itself; given the legal effect of certified awards. The [appellants] will have to institute contempt proceedings in the event of non-compliance with such an order. Contempt proceedings are open to the [appellants] in relation to the award that is the subject of this application. Contempt proceedings is the appropriate recourse where a party fails to comply with a certified award.
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> Mr Grundlingh, appearing for the [appellants] submitted that a litigant has a choice not to proceed by way of contempt proceedings because section 143(4) states that a party 'may' enforce a certified award by way of contempt proceedings. The word 'may' cannot be construed to connote an election on the process to be followed when there is non-compliance with a certified award. The expression quite clearly states that an aggrieved litigant has recourse, if such a litigant is so inclined, to pursue contempt proceedings.
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> The [appellants] ultimately conceded that they seek the particular relief because they are unable to meet the high hurdle required in contempt proceedings. The application for the relief as formulated was thus a gamble on their part.'

[9] The Labour Court accordingly concluded that the appellants have not met the requirement for the grant of an interdict and dismissed the application with costs. It did not provide reasons for making a costs order against the appellants.

[10] The appeal lies against these orders with leave of this Court.

The Appeal

[11] During the hearing of the appeal, the appellants rightly conceded that the appeal is moot and will have no practical legal effect because Lonmin has been implementing stop order facilities since April 2019. They, however, persist in their appeal against the costs order, which they contend remains a live issue.

[12] The question that arises is whether this Court should entertain an appeal on costs only. Section 16(2)(a) of the Superior Courts Act[5] is instructive on this question. It provides:

> '(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
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> (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs. '

[13] In the decision of *Khumalo and Another v Twin City Developers (Pty) Ltd and Others*,[6] the Supreme Court of Appeal considered the meaning of the term "exceptional circumstances" in section 16(2)*(a)*(ii) of the Superior Courts Act. It endorsed the meaning given to the term by the court in *MV Ais Mamas Seatrans Maritime v Owner, MV Ais Mamas and Another* [7] which is that 'exceptional circumstances' is a reference to "something out of the ordinary and of an unusual nature, something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different". In applying this test, a court is required to carefully examine the facts and circumstances of the case.[8]

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[5] No. 10 of 2013.
[6] *Khumalo and Another v Twin City Developers (Pty) Ltd and Others* [2017] ZASCA 143.
[7] *MV Ais Mamas Seatrans Maritime v Owner, MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 156H-J ("*Seatrans Maritime*") .
[8] *Seatrans Maritime* at 157E-F.

[14] Are there exceptional circumstances in this appeal that merit deviation from the rule as set out in section 16(2)*(a)(*ii) of the Superior Courts Act? The appellants contend that the Labour Court's deviation from the established principle in labour matters that costs do not follow the result, constitutes an exceptional circumstance which justifies the consideration of the issue of costs only in the appeal. I agree. This principle as established by this Court[9] was endorsed by the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[10] where it observed as follows:

> 'In this matter, there was 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 followed the result. This is not correct.
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> 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. The court is therefore entitled to interfere with the costs award. Taking into account the considerations of law and fairness, it will be in accordance with justice if the orders of costs by the Labour Court and the Labour Appeal Court are set aside and each party pays his or her own costs. '[11]
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> '[29] It is clear that when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties. This, the Labour Court failed to do. There is no reasoning on the question of the costs order beyond an indication that costs are to follow the result. This is a misdirection of law and it follows that the Labour Court's discretion in respect of costs was not judicially exercised and must be set aside.'

[9] *Member of the Executive Council for Finance Kwa-Zulu Natal v Wentworth Dorkin N.O.* [2007] ZALAC 41 at para 19 ("*Dorkin*") ; *Martin Vermaak v MEC for Local Government & Traditional Affairs, North West Province* [2017] ZALAC 2.
[10] *Zungu v Premier of the Province of KwaZulu-Natal & others* 39 ILJ 523 (CC) ("*Zungu*"); *Long v SA Breweries (Pty) Ltd & others* 2019 (40) ILJ 965 (CC) at paras 27 and 28.
[11] *Zungu* at paras 25-26.

[15] Equally, in this matter, the Labour Court made a costs order against the appellants that deviated from the established principle in labour law that costs do not follow the result. It also made the costs order without providing reasons. The Labour Court's explanation, as set out in its reasons for refusing leave to appeal its judgment, that it is a common attribute for a court to grant costs without providing reasons is unacceptable specifically in the Labour Court, where costs orders are not only governed by the law – but also by the requirements of fairness.[12] In my view, the failure of the Labour Court to provide reasons supports the inference that the Labour Court failed take into consideration all the relevant facts and circumstances, as well as the requirements of law and fairness, when it ordered the appellants to pay the costs.

[16] Important considerations which the Labour Court failed to have regard to are that: (a) the evidence did not suggest that appellants approached the Labour Court on a mala fides or frivolous basis; (b) their matter concerned the interpretation of section 143(4) of the LRA on the question of whether a litigant has a choice not to proceed by way of contempt proceedings in order to enforce a certified arbitration award; and (c) the appellants and the respondents have an ongoing collective bargaining relationship that will likely survive the resolution of the dispute. The Labour Court was merely guided by the outcome of the application and omitted to take these factors into account. In doing so, it failed to properly exercise its judicial discretion.

[17] These misdirections, in my view, constitute exceptional circumstances within the meaning of section 16(2)*(b)*(ii) of the Superior Courts Act, which justify this Court's interference on appeal.

[18] The appeal must accordingly succeed.

Costs in the Appeal

[12] Section 162 of the LRC provides:

[19] In view of the ongoing relationship between the appellants and the respondents which is likely to survive after this dispute is resolved, I consider it to be just and fair not to award costs against the respondents in this appeal.

Order

[20] In the result, I make the following order:

1. The appeal against costs is upheld with no order as to costs.

2. Paragraph 4 of the order of the Labour Court is set aside and substituted with the following order:

"*4. There is no order as to costs.*"

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F Kathree-Setiloane AJA

DM Davis JA and J Murphy AJA concur:

APPEARANCES

FOR THE APPELLANTS:	Mr R Grundlingh
	Instructed by: Bester & Rhoodie Attorneys
FOR THE FIRST AND SECOND RESPONDENTS:	Mr L Hollander
	Instructed by Larry Dave Incorporated Attorneys