THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Of interest to other Judges

Case no: D 81/2021

In the matter between:

ABDOOL SAMAD CASSIM APPLICANT

and

RICHARDS BAY MINERALS RESPONDENT

Enrolled for hearing: 18 February 2022

Heads of argument submitted: 25 February 2022

Judgment delivered: 28 February 2022

JUDGMENT

VAN NIEKERK J

[1] This matter was enrolled for an interlocutory hearing, and concerns a special plea in respect of jurisdiction raised in response to a statement of claim filed by the applicant. After the matter was stood down to enable the parties' respective legal representatives to engage in discussion, the substantive dispute between the parties was remitted to the CCMA for determination. The parties could not agree on the issue of costs. By agreement, the parties' representatives submitted written arguments in regard to costs, on the basis that the issue would be decided in Chambers.

[2] On the face of it, the statement of claim makes out a case for an unfair dismissal on the grounds of medical incapacity, a dispute that must be determined through arbitration (see section 191 (5) of the Labour Relations Act (LRA)). The respondent's objection to jurisdiction was based primarily on section 157 (5), which expressly excludes this court's jurisdiction in those circumstances. The applicant was thus constrained to submit, as his counsel did, that on the pleaded facts, a case of unfair discrimination on the grounds of disability, religion and conscience could be inferred, a dispute over which this court does have jurisdiction. Given what amounts to an abandonment of that case by the applicant and his consent to an order remitting the matter to the CCMA in the form of a dispute limited to an alleged unfair dismissal on the grounds of medical incapacity, the respondent contends that it is entitled to its costs.

[3] Section 162 of the LRA provides that this court may make an order for the payment of costs, according to the requirements of the law and fairness. In exercising its discretion, the court may take into account whether the matter referred to the court ought to have been referred to arbitration in terms of the Act, and the conduct of the parties in proceeding with or defending the matter before the court, or in proceedings before the court. The Constitutional Court has made clear that in labour matters, section 162 should not be interpreted to mean that costs necessarily follow the result. This court must necessarily take into account the principle of fairness. In particular, the court must take into account the vulnerable

position of those who seek to vindicate their constitutionally entrenched rights and have regard to the statutory purpose of dispute resolution, one which attempts to secure labour peace by the efficient resolution of disputes by specialist institutions (see *Union for Police Security & Corrections Orgainsation v SA Custodial Management (Pty) Ltd & others* (2021) 42 *ILJ* 2371 (CC), referring to among other authorities *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 *ILJ* 523 (CC)).

[4] I must thus necessarily take into account the fact that the applicant is an individual employee who has been aggrieved by his employer's decision to dismiss him on account of his incapacity. I accept that his grievance is *bona fide,* as was his referral of his dispute to this court. These are typically circumstances in which this court ordinarily is cautious when the issue of costs is considered, and reluctant effectively to close its doors to litigants who wish to exercise their statutory rights, given the spectre that an adverse order for costs may present. As the Constitutional Court put it in *Union for Police Security & Corrections Organisation*, it is '*imperative for our democracy that the doors of labour dispute resolution institutions be kept wide open for litigants to air their grievances*…' (at paragraph 31)

[5] Insofar as the respondent submits that the court's lack of jurisdiction was obvious, it should be recalled that despite the terms of the applicant's referral to the CCMA, the presiding commissioner at the conciliation hearing indicated, by ticking the relevant box on the certificate of non-resolution, that the matter ought properly to be referred to this court for adjudication. While it may be necessary for commissioners from time to time to determine the real nature of a dispute referred for conciliation (or indeed for arbitration), commissioners ought to be cautious not to substitute their own views of the nature of the dispute for that of the applicant. In a matter such as the present, the jurisdictional dividing line between incapacity and discrimination on the grounds of disability (or some other specified ground) is often blurred, and the same set of facts can conceivably give rise to a claim on either basis, depending on how the referring party elects to formulate the claim.

But that is not a licence for commissioners themselves to determine that the dispute is in fact one that concerns a reason for dismissal that is potentially automatically unfair, and to direct the dispute to this court for adjudication. The consequence more often than not is that an applicant comes before this court, having waited years for a trial date, only to be expected to advance a case which he or she had never intended to advance. Applicants should be permitted the necessary autonomy to formulate their claims in the terms that they consider will best serve their interests. Regrettably, the standard form certificate of non-resolution is crafted in terms that would appear to confer more weight on the commissioner's indication of the next step in the dispute resolution process than it carries in law. My sense is that in the present instance, the commissioner 'read in' to the applicant's referral a case that he preferred ultimately to limit to an arbitrable dispute concerning his dismissal for incapacity. The commissioner's conduct elevated the dispute to the level of adjudication in this court, a vastly for time-consuming and expensive option. Frankly, I suspect that but for the commissioner's classification of the dispute, the matter would have been resolved months ago through arbitration. If anyone ought appropriately to be held liable for the costs of these proceedings, it is the commissioner.

[6] Secondly, I must necessarily take into account that the applicant has adopted a conciliatory attitude by being amenable to the issuing of a directive that the CCMA afford him the opportunity of raising his complaint before it. While I take the respondent's point that the applicant's election to pursue a dispute of unfair dismissal for medical incapacity came late in the day, the fact remains that the remittal of the dispute to the CCMA will ensure the expeditious and informal resolution of the dispute, a primary purpose of the LRA. I also take the respondent's point that the applicant has had access to legal advice and that a perfunctory consideration of the applicable authorities would have disclosed that the certificate of outcome has no value in the determination of the appropriate forum for the determination of the dispute, an adverse costs order may serve to punish the applicant for the shortcomings of his attorney. There is no suggestion that an order for costs *de bonis propriis* is appropriate, and I therefore need not

consider that prospect. But given the role played by the commissioner's conduct and the fact that the order granted by the court represents the outcome of conciliatory engagement between the parties, in my view, the requirements of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. There is no order as to costs.

André van Niekerk
Judge of the Labour Court

REPRESENTATION

For the applicant: Adv MS Khan SC, instructed by Moolla Attorneys Inc.

For the respondent: Adv F le Roux, instructed by Joubert Galpin Searle