Cost to not follow suit in labour matters

What does that mean for litigants?

Johanette Rheeder - JR Attorneys Incorporated

We are all aware of the fact that costs are often a major deterrent to any party to litigate. The same applies to every employer or employee who approaches the CCMA or Labour Court for adjudication of labour disputes. Cost order in the CCMA have been limited substantially by the rules of the CCMA, and the same topic was yet again before the Constitutional Court (CC) in late 2021.

The CC confirmed the principle that cost does not follow suit in labour matters. In ***Union for Police Security and Corrections Organisation v South African Custodial***

Management (Pty) Limited[1] the CC found that section 162 of the LRA, which sets out how costs should be dealt with, is an important provision that rejects the ordinary rule that "*costs follow suit*". In this matter, the LAC gave a cost order without reasons for doing so, on the basis that "*costs follow suit*". The matter was taken to the CC. This was confirmed in the matter of ***Zungu v Premier of the Province of KwaZulu-Natal***[2] .

According to the CC, rights alone, however, often ring hollow, and are seldom capable of meaningful realisation without institutions where they may be ventilated and enforced, within the principle of "promotion of effective resolution of labour disputes".

The LRA achieves this by [providing] simple procedures for the resolution of labour disputes and it is clear from a holistic reading of the LRA, according to the CC, that the dispute resolution mechanisms that it creates were meant to be a "one stop shop". These mechanisms were intended to be simple and accessible, so that those to whom the labour rights enshrined in our Constitution are conferred can vindicate those rights speedily and cost-effectively.

According to the CC, this laudable statutory goal is eroded when the bearers of labour rights are faced with the threat of adverse costs orders if their claims are, for whatever reason, unsuccessful. Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals, and construed in this context of the rule of law and the principle against self-help in particular, access to [courts or other independent and impartial tribunals] is indeed of cardinal importance. When the very same institutions created by the LRA shut their doors to litigants by too keenly mulcting them in costs, they encourage recourse to industrial action and other proscribed means to air disputes that the LRA demarcates for resolution in those institutions.

The CC confirmed that "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 the CC frivolous cases that should not be brought to court.

This is a balance that is not always easy to strike but, it is clear that the CC favours the principle as set out in the LAC, that, if the court is to err, it should err on the side of not discouraging parties to approach labour courts with their disputes[3]. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.

In the words of the CC!

"Lest I be misunderstood, I must make this clear: the right to pursue industrial action, which is protected by both the LRA and section 23 of the Constitution, is indispensable to our democracy. It is "of both historical and contemporaneous significance"; it enables workers "to assert bargaining power in industrial relations"; and is a key "component of a successful bargaining system" of the nature contemplated in the Constitution and the LRA. Nothing said in this judgment must be taken as suggesting otherwise. The crisp point I am making, rather, is this: when costs orders are too readily made against those who seek to vindicate their constitutionally-entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action."

The CC confirmed the principle that it is therefore imperative for our democracy that the doors of labour dispute resolution institutions be kept wide open for litigants to air their grievances and that the rule against automatic costs orders is an integral part of that scheme, in that it ensures access to labour dispute resolution institutions and no doubt enlarges the width by which the doors of those institutions are kept open.

It is important to note that the CC did not ban cost orders in the LC and the LAC outright, therefore, the principle of fairness will apply to any party who wish to argue costs before the court. The court will have to consider these principles as set out in the CC and give reasons for its finding on costs, should it wish to make such an order. However, costs should not follow suit in labour matters, for the reasons as set out by the Constitutional Court.

1 [2021] ZACC 26 (also in 2021 (11) BCLR 1249 (CC); (2021) 42 ILJ 2371 (CC); [2021] 12 BLLR 1173 (CC))

2 [2018] ZACC 1; 2018 (39) ILJ 523 (CC); 2018 (6) BCLR 686 (CC)

3 Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O. [2007] ZALAC 41; 2008 (29) ILJ 1707 (LAC) (Dorkin) at para 19.

Director JR Attorneys Inc.

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