9 May 2021 Version 1.1

ARTICLE

THE RIGHT TO CLAIM COSTS AT THE LABOUR COURT

I was recently asked to assist in a matter to oppose costs in the Labour Court. Although the merits of that matter are of less importance here, I thought it may be interesting to quickly touch on the aspect of what it means to claim costs at the Labour Court?

In the first place, the Labour Court is a Court of Equity and Law and not of Law alone as the High Court, although it has similar status. Judges make law in the Labour Court and create precedents that must be followed. The Labour Court's jurisdiction is nationwide.

However, distinct from High Court matters, at the Labour Court costs does not automatically follow the cause which means the losing party is not unless ordered to fit the bill of the opposing party, but costs are never-the-less, granted in cases where e.g. frivolous actions were brought and there were no clear right in the first place and we view it hereunder:

Here are some basic principles that have be considered by parties, as developed through case law:

1. **Section 162 of the Labour Relations Act**[1] reads as follows:

"(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."

1.1. Section 162 of the LRA sets out the considerations, which a court is required to consider before deciding whether or not to make an order as to costs. This can be summarised as follows as discussed in two De Rebus articles of 2018 and 2019:

1.1.1. Whether making the order would be in accordance with the requirements of the law and fairness (**in Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others (LAC)**[2], it was held at para 10 that no hierarchy exists between the requirements of law and fairness, and thus, both requirements are on an equal footing);

[1] 66 of 1995 (LRA)

[2] (unreported case no JA15/2014, 10-1-2017) (Makgoka AJA)

1.1.2. whether the applicant ought to have referred the matter to arbitration, as opposed to the court and, if so, the cost implications resulting from the incorrect referral;
1.1.3. the conduct of the applicant in prosecuting its case and the conduct of the respondent in defending the matter; and
1.1.4. the conduct of the litigants during the ventilation of their dispute before the court.

2. In **Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin and Another**[3] , the LAC was tasked with deciding whether or not an adverse costs order should be made. The LAC found that it was not bound by the principle that costs follow the result. Instead, the LAC held that cost orders ought not to be made unless such an order would be in accordance with the requirements of the law and fairness. The LAC held that – in labour matters – a balancing act should be performed by the court, whereby a fair balance should be struck between, on the one hand, not unduly discouraging prospective litigants from approaching the court seeking relief in employment disputes and, on the other hand, permitting prospective litigants from crowding the court roll with frivolous cases, which ought not be brought before the court. The LAC held that, in event that a court errs in performing the balancing act, the court should err on the side of not unduly discouraging prospective litigants from approaching the court in pursuit of appropriate relief. In so doing, the LAC held that it plays a role in dissuading employees from participating in industrial action, instead of approaching arbitral bodies or the courts for appropriate relief (para 19).

3. In the recent Constitutional Court (CC) decision of **Zungu v Premier of the Province of KwaZulu-Natal and Others**[4] the court pointed out again that 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. The court held that the LC and LAC 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 CC said (see paras 23 to 26).

4. It is proposed that the following considerations should be observed before seeking a costs order in labour matters governed by the **LRA**[5]**:**
4.1. The general rule of our law that in the absence of special circumstances, costs follow the event is a relevant consideration. This general rule will yield where considerations of fairness require it;
4.2. Individual employees, in particular, should not be discouraged from approaching dispute resolution institutions created by the LRA;
4.3. A bona fide litigant should not be penalised even if the litigant is misguided in bringing an application for relief;

[3] (2008) 29 ILJ 1707 (LAC)
[4] [2018] 4 BLLR 323 (CC)
[5] (CCMA Case Law Monitor 2ed (2010) at 11005-11006)

4.4. Where the parties will have an ongoing relationship after the dispute has been resolved, especially with a bona fide dispute, may damage the employment relationship and thereby affecting labour peace and conciliation;

4.5. The conduct of the parties is relevant especially when considerations of fairness are concerned;

4.6. Whether the issues raised are of fundamental importance, not only to the parties but to the labour community at large.

It is therefore clear that a wide discretion is allowed by the LRA and discretion must be exercised judicially with regard to all the facts and circumstances of each case. Where a court is to err, it should err on the side of not discouraging parties from approaching these labour dispute resolution bodies with their disputes.

5. In **Long v South African Breweries (Pty) Ltd and Others**[6] the employee, following his suspension, was dismissed by his previous employer, South African Breweries (Pty) Ltd (SAB), after he was found to have been derelict in his duties as district manager, grossly negligent in his management of SABS's fleet of vehicles and guilty of bringing the name of the employer into disrepute. Aggrieved by his suspension and eventual dismissal, the employee found success in the Commission for Conciliation, Mediation and Arbitration (CCMA) after the arbitrator found that his suspension amounted to an unfair labour practice and his dismissal was substantively unfair. SAB took both arbitration awards on review to the Labour Court (LC). The LC set aside both arbitration awards and ordered the employee to settle the legal expenditure incurred by SAB in both matters. The LC made the adverse costs order against the employee on the basis that both parties had argued that costs follow the result. When the matter came before the Labour Appeal Court (LAC), the LAC was tasked with determining whether it was correct for a party to incur an adverse costs order merely on the basis that he/she (sic) was unsuccessful.

It is therefore clear that when considering whether costs should be allowed or not under the circumstances, number of factors have be considered and one will have to determine whether these facts are applicable or not?

In the interest of parties, it may not be advisable to order costs where there is an ongoing relationship. In that case the Labour Courts have found on numerous occasions that parties must either bear their own costs or no cost order was awarded to any party. Where a party does not take care and use the Court to delay its obligations, it may be required to pay costs.

Advocate Henk Horn
Member of the NBCSA, CEO Labourinfo.co.za

[6] [2019] 6 BLLR 515 (CC)

9 May 2021 Version 1.1