CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/18

In the matter between:

ALLAN LONG Applicant

and

SOUTH AFRICAN BREWERIES (PTY) LIMITED First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

M MBULI N.O. Third Respondent

and

In the matter between

ALLAN LONG Applicant

and

SOUTH AFRICAN BREWERIES (PTY) LIMITED First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

DUMISANI SONAMZI N.O. Third Respondent

Neutral citation: *Long v South African Breweries (Pty) Ltd and Others* [2018] ZACC 7

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Theron J (unanimous)

Decided on: 19 February 2019

Summary: Labour Relations Act 66 of 1995 — fair labour practices — hearing prior to precautionary suspension

Labour Relations Act 66 of 1995 — costs — adverse costs orders

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ORDER

On appeal from the Labour Court:

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

JUDGMENT

THERON J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J and Petse AJ concurring):

Introduction

[1] This is an application for leave to appeal against a decision of the Labour Appeal Court. That Court refused leave to appeal against a judgment of the Labour Court

relating to two review applications, one concerning the applicant's dismissal and the other his suspension prior to dismissal, which were consolidated.[1]

Parties

[2] The applicant is Mr Allan Long, previously employed by the first respondent, South African Breweries (Pty) Limited as its district manager for the Border District. The second respondent is the Commission for Conciliation, Mediation and Arbitration (CCMA). The third respondent in the dismissal review application is Mr Malusi Mbuli, a commissioner of the CCMA. The third respondent in the suspension review application is Mr Dumisani Sonamzi, a commissioner of the CCMA.

Facts

[3] The applicant had been employed as district manager since 1 January 2008. Among his responsibilities was to ensure that the first respondent complied with all legal requirements in respect of its operations in the Border District, including the requirements in respect of a fleet of vehicles.

[4] In December 2012, the applicant was informed about certain irregularities in respect of the Border District vehicle fleet. This included fraudulent activities relating to the licensing of the vehicles, some of which were being operated unlicensed and without the necessary maintenance. On 21 December 2012, the applicant instructed the fleet and depot managers to rectify the irregularities.

[5] There was subsequently an investigation by the first respondent which revealed various discrepancies in the fleet records, and that many vehicles and trailers were unlicensed or not roadworthy.

[1] Though the applicant formulated his papers as an appeal against the Labour Appeal Court's decision, that Court gave only an order without reasons. The reasoned judgment which ought to have been appealed is the decision of the Labour Court and this judgment proceeds on that basis.

[6] On 10 May 2013, a trailer was involved in a fatal accident. This vehicle was in a state of disrepair and unlicensed. This accident prompted a further investigation by the first respondent. On 15 May 2013, the first respondent advised the applicant that he was being investigated for dereliction of duties and gross negligence as a result of the accident.

[7] The first respondent conducted a fleet audit on 19 May 2013. This revealed that several vehicles were still not roadworthy and did not display valid license discs. It also revealed that no corrective action had been taken following the 10 May 2013 accident. The first respondent then conducted an intensive investigation in the Border District. The applicant and the fleet manager were suspended to ensure the investigation was unhindered.

[8] On 19 August 2013, the applicant was given notice to attend a disciplinary enquiry on 28 August 2013. The three charges against him were (a) gross dereliction of duties, (b) gross negligence, dishonesty and derivative misconduct, and (c) bringing the company name into disrepute. All of these charges related to the applicant's failure to properly manage the fleet. The dishonesty charge related to the applicant presenting false information on 17 May 2013 to management.

[9] The disciplinary hearing commenced on 28 August 2013. On 11 October 2013, the applicant was acquitted on the charge of dishonesty but found guilty in respect of dereliction of duties, gross negligence and bringing the company name into disrepute. He was dismissed on 14 October 2013. He filed an internal appeal and his dismissal was upheld on appeal.

Litigation History

CCMA

[10] The first arbitration concerned the applicant's suspension on 21 May 2013, pending disciplinary proceedings. The arbitrator concluded that there was a valid

reason to suspend the applicant, but that the applicant had not been given an opportunity to make representations to show why he should not be suspended. This he found to be an unfair labour practice. The arbitrator concluded that the suspension was unreasonably long and had become punitive and unfair. The arbitrator awarded the applicant compensation equivalent to two months' remuneration.

[11] The second arbitration related to the applicant's dismissal. The applicant alleged that disciplinary action was applied inconsistently by the first respondent, that he did not commit the misconduct concerned and, if he had, dismissal was too harsh a sanction. The arbitrator found that the applicant had failed to make out a prima facie case of inconsistent application of disciplinary action. The arbitrator was of the view that the issue he had to decide was whether the failure to take appropriate action to remedy the problems with the fleet could be attributed to the applicant. The arbitrator found that the applicant did not commit misconduct as the failures alleged did not fall within his responsibility. The arbitrator also found there had been no breakdown in the trust relationship and that there was no valid reason to dismiss the applicant. The arbitrator held that the dismissal was substantively unfair though procedurally fair. The first respondent was directed to reinstate the applicant with retrospective effect to the date of dismissal, 14 October 2013.

Labour Court

[12] The first respondent took both the suspension compensation and the retrospective reinstatement decisions on review to the Labour Court. The Labour Court held that where a suspension is precautionary, there is no requirement that an employee be given an opportunity to make representations.[2] Instead, the suspension must be linked to a pending investigation and serve to protect the integrity of that ongoing process. There is an additional consideration of prejudice, though this can be

[2] *South African Breweries (Pty) Ltd v Long*; *South African Breweries (Pty) Ltd v Sonamzi NO*, unreported judgment of the Labour Court of South Africa, Port Elizabeth, Case No PR 121/16 and PR 122/16 (8 June 2017) (Labour Court judgment) at para 52.

ameliorated by a salary being paid during the period of suspension. The Labour Court concluded that the arbitrator's reasoning, that the suspension was unduly long (three months) and became punitive, was flawed.[3] In addition, the Labour Court held that the arbitrator had erred in his consideration of the nature of a pending investigation.[4] The Labour Court held that the arbitrator's conclusions were materially irregular and that any prejudice to the applicant was mitigated by the fact that he was fully paid while on suspension.[5] The Labour Court held that the suspension was not an unfair labour practice and that the arbitrator's decision was unreasonable.[6]

[13] With regard to the dismissal, the Labour Court held that there was only one issue: whether the applicant had failed in his duties and responsibilities relating to management of the fleet to a degree that amounted to dereliction of his duties.[7] The Labour Court further held that the arbitrator's award constituted a gross irregularity, in that he failed to deal with or even consider material evidence, did not reasonably and rationally evaluate and determine the evidence, and made no proper probability findings regarding which of the mutually contradictory versions of the parties should be accepted and why.[8] In his findings, he simply regurgitated parts of the evidence and made conclusions without deductive reasoning.

[14] The Labour Court held that on the evidence and taking into account the seniority and nature of the applicant's position, he was guilty of dereliction of duties and, as a result, the arbitrator's award was unreasonable. The Labour Court held that there had been a breakdown of the trust relationship and that the misconduct was serious.[9] The dismissal was fair and the arbitrator's decision fell to be reviewed and set aside. The

[3] Id at para 64.

[4] Id at para 123.

[5] Id at para 70.

[6] Id at paras 131-4.

[7] Id at para 78.

[8] Id at para 92.

[9] Id at paras 123-4.

Labour Court decided not to remit the matters to the CCMA and substituted awards that the suspension was not an unfair labour practice and that the dismissal was substantively fair. The Labour Court ordered that the applicant pay the first respondent's costs in both matters on the grounds that the parties both contended that costs should follow the result.

[15] Following the decision in the Labour Court, the applicant filed a petition for leave to appeal in the Labour Appeal Court. It is unclear whether he first sought leave to appeal in the Labour Court. On 21 February 2018, the Labour Appeal Court refused his petition with no order as to costs. The applicant then filed an application for leave to appeal in this Court.

In this Court

[16] The applicant submits that the Labour Court's finding that employees are not entitled to a pre-suspension hearing does not pass constitutional muster. The applicant further submits that the Labour Court focused only on the flaws of the arbitrators' decisions rather than considering whether they were reasonable. The applicant submits further that the matters should have been remitted by the Labour Court to the CCMA. The applicant also contends that the Labour Court made erroneous factual findings and failed to evaluate the evidence correctly.

[17] The applicant submits that the Labour Court's finding on pre-suspension hearings goes against existing case law. The applicant also submits that the arbitrator's finding that the length of the suspension was punitive should be read as a finding that it was unfair. In respect of the dismissal, the applicant submits that the Labour Court misdirected itself and failed to deal with the reasonableness of the arbitrator's decision. The applicant also submits that the Labour Court ought to have remitted the matter to the CCMA.

[18] The first respondent supports the judgment and order of the Labour Court.

[19] On 19 September 2018, the Chief Justice issued directions inviting the parties to make submissions on whether the costs order of the Labour Court should be set aside. Specifically, the parties were invited to make submissions only if they opposed an order setting aside the costs order. The first respondent filed submissions in response to these directions.

[20] The first respondent opposed the setting aside of the costs order. It relied on *East Rand Gold,*[10] where the Supreme Court of Appeal analysed the discretion afforded to a Court in respect of costs orders and outlined the factors to be considered in determining whether a costs order ought to be set aside in terms of section 17C(2) of the 1956 Labour Relations Act[11] and stated—

> "[t]he following considerations . . . may be relevant in relation to costs:
>
> 1. The provision that 'the requirements of the law and fairness' are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.
> 2. The general rule of our law that in the absence of special circumstances costs follow the event is a relevant consideration. However, it will yield where considerations of fairness require it.
> 3. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it especially where there is

[10] *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* [1991] ZASCA 168; 1992 (1) SA 700 (A) (*East Rand Gold*).

[11] 28 of 1956. The 1956 Labour Relations Act was subsequently repealed by the Labour Relations Act 66 of 1995 (LRA). Section 17C(2) of the 1956 Act read:

> "After hearing an appeal, the Appellate Division may confirm, amend or set aside the decision or order against which the appeal has been noted or make any other decision or order, including an order as to costs, according to the requirements of the law and fairness."

> a genuine dispute and the approach to the court was not unreasonable . . . .
>
> 4. Frequently the parties before the industrial court will have an on-going relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally affect industrial peace and the conciliation process.
> 5. The conduct of the respective parties is obviously relevant especially when considerations of fairness are concerned.
>
> The aforegoing considerations are in no way intended to be a numerus clausus. A very wide discretion is given by the Act to the three courts with regard to the exercise of their powers and no less in respect of orders for costs. Such a discretion must be exercised with proper regard to all of the facts and circumstances of each case."[12]

[21] The first respondent submits that it was successful in its litigation and considerations of fairness militate against overturning the costs order. The first respondent places particular emphasis on the fact that the applicant was a Chief Executive Officer of a large division, he had found alternative employment at Coca-Cola, that the CCMA proceedings concerned shares worth R40 million that the applicant claimed should vest in him and that his misconduct justifies a costs order. Further, the first respondent submits that the Labour Court properly exercised its discretion in respect of costs.

Condonation

[22] The application was filed three days late. The applicant explains that he was away on official duty in Mozambique until 16 March 2018. The delay was fairly short and the explanation reasonable. In addition, it does not appear that the delay caused any prejudice to the first respondent. Condonation should be granted.

[12] *East Rand Gold* above n 10 at 739.

Jurisdiction and leave to appeal

[23] This case concerns fair labour practices in terms of section 23 of the Constitution and specifically whether there is a requirement for a pre-suspension hearing in the case of a precautionary suspension. This Court's jurisdiction is engaged.

[24] In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one.13 This is supported by Mogale,14 Mashego15 and Gradwell.16 Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application.17 Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

[25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee.18 The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound.

[13] Labour Court judgment above n 2 at para 47.

[14] *SAMWU v Mogale City Local Municipality* 2014 JDR 2216 (LC) (*Mogale*) at paras 31-2.

[15] *Mashego v Mpumalanga Provincial Legislature* (2015) 36 ILJ 458 (LC) at para 10.

[16] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* [2012] ZALAC 8; (2012) 33 ILJ 2033 (LAC) at para 44.

[17] Id.

[18] Labour Court judgment above n 2 at para 55.

[26] The Labour Court carefully considered whether to order substitution and determined that it was in as good a position as the arbitrator to make the decision. In addition, the delay had been substantial. The reasoning of the Labour Court was sound and there is no basis to interfere with its decision to substitute. For these reasons, there are no reasonable prospects of success in respect of the merits and leave to appeal on the merits should be refused.

Costs

[27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply.[19] This principle is based on section 162 of the LRA, which reads:

> "(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."

[19] *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] (6) BCLR 686 (CC) at para 24 referring to *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) at para 19 which states:

> "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."

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

> "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. 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."[20]

[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 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.

[30] The question is then: what costs order would be fair? The first respondent in its submissions strongly urged that the applicant's senior position in the company, and his commensurate responsibility, as well as his remuneration package, took this case out of the ordinary. It submitted baldly that the applicant's conduct warranted an adverse costs order, but did not explain why. In the absence of any reasons why the principle in *Zungu* should not apply, there is no basis to make an adverse costs order.

[31] Each party achieved a measure of success in this Court. There should be no order as to costs.

[20] *Zungu* above n 19 at para 25.

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

1. The application for condonation is granted.
2. Leave to appeal is granted only against the costs order of the Labour Court.
3. The appeal is upheld and the costs order granted by the Labour Court is set aside.
4. No order as to costs is made in this Court.

For the Applicant:	Kirchmanns Incorporated
For the First Respondent:	G C Pretorius SC instructed by Bowman Gilfillan Inc