THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS633/13

In the matter between:

NKGADIMANG EUGINIA KABE **Applicant**

and

NEDBANK LTD **Respondent**

Heard: **23-24 April 2018**
Delivered: **8 May 2018**

Summary: A referral in terms of which the applicant allege that she was automatically unfairly dismissed. An employee who alleges automatically unfair dismissal is required to produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal. Ordinarily, the employer is the one knowing the reason why it dismissed an employee. In *casu*, the respondent states that it dismissed the applicant for misconduct. The applicant on the other hand alleges that the true reason for her dismissal is that because she had made a protected disclosure or alternatively that she took action against the respondent, thus automatically unfairly dismissed within the contemplation of section

187 (1)(d) and (h) of the LRA[1] as amended. An employee must produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal before an employer is behoved to show that the dismissal is not for a prohibited reason. Should an employee fail to do so, absolution from the instance is an appropriate order to be made. As to costs, the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and others*[2] did not necessarily strip this court of its discretion to award costs against employees. All it did was to remind this court of what was said by the LAC in *MEC for Finance: Kwazulu Natal and another v Dorkin NO and another*[3]. Where the referral is frivolous and vexatious an order awarding costs is appropriate, particularly where an employee unreasonably refuses a with prejudice offer of settlement. Held: (1) Absolution from the instance is hereby granted. Held: (2) The applicant to pay the respondent's costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191 of the Labour Relations Act[4] ('the Act'). The applicant alleges that the respondent subjected her to an automatically unfair dismissal within the contemplation of section 187 (1)(d) alternatively (h) of the Act as amended. On the other hand, the respondent disputes that the applicant was subjected to an automatically

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[1] Act 66 of 1995, as amended.

[2] (CCT136/17) [2018] ZACC 1 (22 January 2018)

[3] [2008] 6 BLLR 540 (LAC)

[4] Ibid 1 above

unfair dismissal. Instead, the respondent contends that the applicant was dismissed for misconduct.

Background facts

[2] The essential facts are that at the time of dismissal, the applicant was employed as an Assistant Relationship Governance and Compliance Officer. On or about October 2011 a 'Tip-off' anonymous was compiled by the applicant and other two employees. This followed a meeting with one Dlamini where guidance was sought in reporting alleged irregular conduct by one Ms Brenda Chetty ('Chetty'). The Tip-off was forwarded to the Ethics Officer with an instruction to lodge it with the Deloitte and Touché anonymous line.

[3] On 18 November 2011, a Tip-off anonymous meeting was held. In attendance was the Employment Equity Chairperson: Nedbank Group and the Human Resources Risk Executive. On the same day, the applicant and the other two employees addressed a letter to Mr Phillip Wessels ('Wessels') requesting protection. In the said letter the applicant and others alleged that the respondent was failing in its legal duties. Wessels provided a response to that letter on 22 November 2011.

[4] On 16 December 2011, the applicant was requested to provide a Financial Services Board ('FSB') rejection report for the period 16-31 December 2011. Following that, the applicant lodged a grievance of victimisation against Mr Beyers ('Beyers') and also referred a dispute of an alleged unfair labour practice to the Commission for Conciliation Mediation and Arbitration ('CCMA'). On 24 February 2012, such a referral was withdrawn.

[5] On 4 January 2012, upon request to provide feedback on the request by Beyers, the applicant indicated that she had not performed the task as she did not consider the task to be critical. On 6 January 2012, the applicant was instructed to submit minutes of the departmental meetings held on 20 and 21 December 2011. The said minutes were delivered on 25 January

2012. On 18 January 2012, the applicant lodged a second grievance against Beyers alleging victimisation. The respondent rejected the grievance as it fell outside the scope of the grievance policy. On 23 January 2012, Beyers issued a written warning against the applicant for unacceptable behaviour during a meeting. Following that the applicant referred a dispute to the CCMA regarding the second grievance against Beyers. On 24 January 2012, she withdrew the referral.

[6] On 1 February 2012, the applicant lodged a third grievance against Beyers. On 3 February 2012, the applicant failed to provide minutes of the meetings within seven days of the meeting being held. Following a discussion with her, she undertook to deliver minutes of meetings within seven days of a meeting as required.

[7] On 19 March 2012, the applicant distributed the FAIS Governance Forum minutes to the incorrect person despite having been informed of the attendees on 2-6 March 2012. The applicant provided shoddy work which resulted in the department missing the review deadlines.

[8] On 19 April 2012 a performance discussion took place with the applicant and Human Resources aimed at addressing the applicant's shortcomings. On 16 July 2012, it was decided that the applicant would be placed on a performance programme known as PCP. On 30 July 2012, an attempt was made to finalise a three months PCP. The applicant thwarted this attempt and opted to lodge another grievance against her manager. The respondent elected to proceed with the PCP but the applicant refused to take part. This despite numerous requests for her to partake.

[9] On 3 August 2012, a meeting was scheduled to discuss the PCP programme to which the applicant sought a postponement. Thereafter the applicant continued to refuse to partake in the programme. Her performance did not improve. In the meanwhile, the applicant had lodged a fourth grievance against Beyers on 16 July 2012.

[10] On 7 August 2012, the Grievance Committee appointed Advocate Mosime ('Mosime') to investigate and resolve the grievance. On 10 August 2012, Mosime issued a report pertaining to the grievance. He made findings and recommendations therein.

[11] On 03 October 2012, the applicant lodged yet another grievance against Beyers. On 9 November 2012, the applicant escalated her alleged harassment claim to the respondent's Chief Executive Officer ('CEO'). On 11 November 2012, the applicant was arraigned to attend a disciplinary hearing on allegations of poor work performance. On 14 November 2012, the hearing commenced. Following the conclusion of the hearing the applicant was found guilty and dismissed.

[12] Aggrieved by her dismissal, the applicant referred an alleged unfair dismissal (dubbed an ordinary dismissal) to the CCMA on 13 December 2012. On 9 January 2013, the said dispute was conciliated and remained unresolved. The applicant requested the CCMA to resolve the dispute through arbitration. The applicant was legally represented at the time of the referral. The arbitration hearing was scheduled for 5 March 2013. It was subsequently postponed at the instance of the applicant. It was then scheduled for three days on a date mutually agreed upon.

[13] An attempt to settle failed as the applicant rejected the respondent's proposal. The arbitrator narrowed down the issues. Owing to absence of the applicant's bundle of documents, the hearing was stood down to the following day. At the agreed time, the applicant failed to provide the bundle. The applicant then made a *volte face* and decided to refer an automatically unfair dismissal dispute to this court. Resultantly, the arbitrator issued a ruling declining jurisdiction to arbitrate the newly formulated dispute.

[14] On 30 July 2013, the applicant filed a statement of case in this court. On 23 October 2013, the matter was enrolled for a *point in limine* hearing. My sister, Justice Lallie granted a postponement with an order to pay the wasted costs. The matter was again enrolled before my brother Justice

Lagrange on 12 March 2014. On 24 March 2014, Justice Lagrange issued a judgment and an order condoning the late referral, declining jurisdiction to entertain allegations of any unfair labour practice based on alleged occupational detriment which occurred prior to 11 December 2012, being the date of dismissal, upholding an exception to the statement of claim and granting the applicant leave to amend the statement of case.[5]

[15] On 5 December 2014, my brother Justice Steenkamp issued an *ex tempore* judgment and order condoning the late amendment, granting the applicant further leave to amend her statement of case and issued directions on the further conduct of the matter. He reserved the issue of costs. On 24 February 2015, my sister Justice Whitcher endorsed that the parties filed a pre-trial minute. On 7 August 2017, the matter was crowded out and was postponed to the 23rd April 2018. The matter was then allocated to me.

[16] Prior to the commencement of the trial I issued an order upholding the points *in limine* raised by the respondent. The reasons for the order were given *ex tempore*. It is not necessary to repeat them in this judgment. In addition, the respondent openly made an unconditional offer to pay to the applicant the sum of R200 000.00 in full and final settlement. In an open court, the applicant rejected the offer for reasons that in her own calculations 12 months' remuneration amounts to R204 000.00. She did not make any counter offer. Instead she retorted that she was willing to take a risk despite a potential order of costs. The respondent submitted that at the end it would be praying for costs since the referral is vexatious and frivolous and the rejection of an open offer was wholly unreasonable. In retort, the applicant stated that she is willing to take that risk.

[17] The applicant, for reasons better known to her, had caused a *subpoena* to be issued directly to Justice Baqwa. The learned Justice, correctly so, addressed correspondence to this court indicating that the *subpoena* ought to have been served on the Judge President of the High Court as

[5] Written judgment delivered on 24 March 2014 per Lagrange J.

opposed to him directly. He added that he had nothing to add as he had left Nedbank some 7 years ago. May I state upfront that the *subpoena* of irrelevant witnesses was used as a stratagem by the applicant to scare, as it were, the respondent. Unfortunately, this stratagem has for reasons that shall follow later earned her a costs order.

Evidence Led

[18] I may state upfront that what I had recorded under background facts was in fact common cause facts[6], which automatically served as evidence before me. The plan of the applicant was to lead evidence of the *subpoenaed* witnesses and not lead evidence herself as she had presented a bundle to the court. The applicant became the only witness in her own case. Owing to the fact that she was unrepresented, although qualified in law, I was at pains to direct her to the issues relevant to the matter before me. She was burdened to furnish evidence which raises a credible possibility that the real reason for her dismissal was one that is prohibited and that the respondent has subjected her to an automatically unfair dismissal.

[19] Despite these efforts, the applicant canvassed issues of a case she consciously abandoned at the CCMA. She read back her statement of case. She was argumentative and did not present facts that supports her case. For that reason, it may not be necessary to punctiliously recount her evidence in chief.

[20] In cross-examination she testified that she completed her law degree and had in fact litigated against her principal to interdict the termination of her contract as a candidate attorney. Such an application was dismissed with costs, which she has still not paid. She further testified that the tip-off and the string of grievances she lodged amounts to a disclosure in terms of the Protected Disclosures Act[7] (PDA). She agreed that the last grievance was irrelevant because at the time disciplinary steps were commenced

[6] See Pre-trial minute signed on 24 February 2015 paragraphs 5-55.
[7] Act 26 of 2000.

against her. She conceded that when she lodged the grievances she was seeking a resolution of a grievance as opposed to reporting any unbecoming conduct. She admitted that effectively the tip-off was more of a grievance against Chetty. She attempted to refute the common cause facts laid out in the pre-trial minute.

[21] She admitted that at the disciplinary hearing a spreadsheet[8] supported by close to 500 pages was presented by the respondent. She accepted that the transcript of the hearing was a true reflection of what transpired. The transcript reveals that she and her representative at the hearing conceded that the respondent had a legitimate cause for concern.[9]

[22] She was ambivalent when it was put to her that what she is suggesting was the respondent together with Mosime were part of a greater conspiracy and the disciplinary hearing and the grievance investigation were all shams. Classic, she sought permission to re-examine herself. She then closed her case without calling any further witnesses.

Application for absolution from the instance

[23] At the close of the applicant's case, the respondent through its representative, Advocate Orr ('Mr Orr') launched an application for an absolution from the instance. The application was pegged on two legs. Firstly, that the grievances do not amount to a disclosure within the contemplation of the PDA. Secondly, the applicant failed to cross the first hurdle in an automatically unfair dismissal claim. He cited authorities emanating from this court and the Labour Appeal Court ('LAC') in support of those two legs.

[24] In opposing the application, the applicant relied on her written heads she had filed in 2017. As it shall be expected when reliance is placed on heads which predates this application, the applicant argued as if the

[8] Pages 5-9 Volume 1 of the respondent's bundle.
[9] Volume 7 pages 692-3 and Volume 8 page 741.

entire merits were heard. She conceded though that with regard to her alternative claim no *iota* of evidence was led by her in that regard.

[25] Mr Orr pressed on the issue of costs and submitted that punitive cost order was warranted. He submitted that the applicant as a trained lawyer ought to have known that her referral was frivolous and vexatious. She initially referred an ordinary dismissal and wrongly dragged the respondent to this court after the third day of arbitration. A reasonable offer was made which would have averted trial costs. The offer remained open until the end of the applicant's evidence in chief.

Evaluation

[26] The applicant's case is that she was subjected to an automatically unfair dismissal principally because the real reason for her dismissal was that she had made a protected disclosure in terms of the PDA.[10] In the alternative her case is that the reason for her dismissal is that she had referred an unfair labour practice dispute to the CCMA.[11] She attempted to bolster this alternative claim, from the bar of course, by suggesting that when she lodged the grievances she was exercising her rights conferred by the Act.

[27] This alternative claim can be quickly disposed of in that she conceded that there was no evidence to remotely suggest that that was the reason why she was dismissed. On the common cause facts, she withdrew the referral to the CCMA months before her dismissal. Again on the common cause facts Mosime did something about her grievance although to her mind he did not investigate the grievance. She went to the lengths of reporting Mosime to the Bar Council, an act which is wholly unjustified. If the respondent was unhappy that the applicant had exercised her rights

[10] Section 187 (1) (h) provides that…if the reason for dismissal is (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.
[11] Section 187 (1) (d) provides that…if the reason for dismissal is (d) that the employee took action…against the employer by (i) exercising any right conferred by this Act, or (ii) participating in any proceedings in terms of this Act.

by lodging a grievance, it would not have taken the trouble to enlist, at a cost, the services of a senior member[12] of the bar to listen to the grievance. The first hurdle in respect of this alternative ground has not been crossed and therefore the respondent is not behoved.

Are the grievances disclosures?

[28] Section 187 (1)(h) is clear. It refers to disclosures as defined in the PDA. Therefore, the starting block is the definition section of the PDA. Section 1 of the PDA provides thus:

> 'Disclosure means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
> (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;
> (d) That the health or safety of an individual has been, is being or is likely to be endangered;
> (e) That the environment has been, is being or is likely to be damaged;
> (f) Unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000; or
> (g) That any matter referred to in paragraphs (a)-(f) has been, is being or is likely to be deliberately concealed.

[29] The grievances by the applicant do not meet the definition set out above. At a workplace, it is awaited that employees would be aggrieved now and then. It is for that reason that a good practice dictates that an employer should have in place a dedicated procedure to deal with employees' grievances. Some grievances have merit whilst others do not. Regard

[12] Advocate Mosime has acted as Justice in this court.

being had to the preamble[13] of the PDA, it was not enacted to allow employees to disparage[14] their employers. Ordinarily, grievances are more about personal feelings of employees. The PDA is not intended to deal with personal feelings but with criminal and irregular conduct. It is largely concerned with more serious breaches of legal obligations.

[30] The common cause facts has shown a tendency of the applicant to fend off request to perform her duties by lodging a grievance. She was quick to lodge a grievance at a drop of a hat. That cannot be disclosures but personal gratification steps. The applicant bore the *onus* to show that her grievances amount to disclosures as defined. She failed to show that. The fact that the legislature used the phrase "any disclosure of information"[15] does not suggest that even unmerited and merited for that matter grievances amount to a disclosure. The section must be interpreted purposefully and contextually.

[31] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[16], the SCA had aptly said the following:

> 'Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production'. [My underlining and emphasis].

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[13] And in order to-

- Create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner…
- Promote the eradication of criminal and other irregular conduct in organs of state and private bodies. [My underlining and emphasis].

[14] Ross v Commissioner Stone No and others.
[15] Section 1 of the Protected Disclosures Act.
[16] Ibid 37.

[32] Since the applicant failed to show that the grievances amount to a disclosure, application for absolution is good on this reason alone.

Did the applicant cross the first hurdle?

[33] Even if I were to assume, an assumption I am not making, that the grievances amount to a disclosure, that is not the end of the enquiry. In order to behove the respondent, the applicant was burdened to produce evidence that demonstrates a credible possibility that the respondent committed an automatically unfair dismissal. To my mind the applicant has failed to cross this first hurdle.

[34] It is common cause that the applicant did not perform as expected. In terms of section 188 of the Act, misconduct and incapacity are fair reasons for dismissal. The applicant chose to abandon a case that would have compelled the respondent to prove those reasons as obligated by section 192 of the Act. The alleged disclosures on the evidence before me, applying the causation test, cannot be the reason for the dismissal. The tip-off was made in October 2011 and the applicant was dismissed in December 2012, a year and some months later. The reaction of the respondent instead was to hold a meeting on 18 November 2011. Even after the applicant and others disclosed their identity on 18 November 2011, nothing happened to the applicant and others.

[35] On the applicant's own version, the other employees were transferred instead. She was not transferred and she was unhappy. Even when she lodged grievance after grievance, the conduct of the employer was to deal with the grievance as opposed to dismissing her. Therefore, the disclosures are not the real reason for her dismissal.

[36] Determining the reason or the principal reason of a dismissal is a question of fact. As such it is a matter of either direct evidence or of inference from the primary facts established by evidence. The reason for dismissal consists of a set of facts, which operated on the mind of the

employer when dismissing an employee[17]. They are within the employer's knowledge. The employer knows better than anyone else in the world why it dismissed an employee.

[37] When an employee positively asserts that there was a different and automatically unfair reason for his or her dismissal, he or she must produce some evidence supporting the positive case, such as having made a disclosure or taken action. An employer who dismisses an employee has a reason for doing so. He or she knows what it is and must prove what it is.[18]

[38] What applies is the test set out in *Kroukam v SA Airlink (Pty) Ltd*[19]*,* which is that*,* the employee must produce credible evidence that shows that an automatically unfair dismissal has occurred. This, I call, the first hurdle. Should an applicant fail to cross this hurdle such an applicant must to my mind fail as well.[20]

[39] Recently the Labour Court per Lagrange J in *Bakulu v Isilumko Staffing (Pty) Ltd and another*[21], had the following to say, to which I associate myself with:-

> [9] Thus, in order to establish a basis for his case of automatically unfair dismissal, Bakulu needed to adduce some evidence that would tend to suggest that the real reason for his dismissal was not incapacity, which was the reason given by Isilumko, but was possibly race
>
> [15] …But he has brought his case to this court on the basis that the real reason was because of his race and he needed to raise a credibly possibility that his dismissal in question fell within the scope of section 187(1) (f). [My emphasis]

[17] *Abernethy v Mott, Hay and Anderson* [1974] ICR 323. See also *K Screene v Seatwave* Ltd Appeal No. UKEAT/0020/11/RN delivered on 26 May 2011.
[18] See *Kuze v Rouche Products Ltd* [2008] EWCA Civ 380 (17 April 2008)
[19] [2005] 26 ILJ 2153 (LAC).
[20] Tshivhase-Phendla v University of Venda Case JS 1145-12 delivered 12 October 2017.
[21] Case JS 105-16 delivered on 15 November 2017

[40] The applicant has failed to cross the first hurdle. For this reason too, absolution from the instance is justifiable and ought to be granted.

The issue of costs

[41] What remains is the issue of costs. Since the judgment of *Zungu*[22] there seem to be a growing view that this court has been stripped of its discretion to award costs against employee parties. This view is incorrect. What the Constitutional Court did was to remind this court of what was said in *Dorkin*[23]. The discretion to award costs remains intact.

[42] As a reminder, the LAC in *Dorkin* had the following to say:

> [19] With regard to costs I have been tempted to award costs against the second respondent because the second appellant has had to come to court to seek to alter the sanction imposed upon the second respondent but, I think that, having obtained a sanction of final written warning which was not his decision but that of the first respondent- he was entitled to come to Court and seek to defend it. Indeed, he was successful in the Court below. 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 cost orders are not made unless those requirements are met. In making decisions on cost 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. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach

[22] Ibid 2
[23] Ibid 3

> these Courts with their disputes. 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 Courts for adjudication.

[43] The LAC was acutely aware that what is required is not a blanket approach but a striking of a balance, a process that is not easy. To my mind if the evidence is overwhelming that the case is frivolous the scale must tip in favour of making an order as to costs. Allowing parties to bring frivolous cases does not only affect the opposing party but it also affects the administration of justice, the business of the court and judges. The resources of this court, judges that is, are thinly spread country wide. If this court were to allow those thinly spread resources to be abused, then the provisions of section 34 of the Constitution[24] will be severely compromised.

[44] The applicant before me is not a lay person. She is a qualified lawyer. She has a penchant of litigating without fear and or reprieve. She has even litigated against her principal as a candidate attorney and was mulcted with costs. She did not learn from that experience. At the CCMA, she was legally represented and she chose to fire her legal team only to undo what she was advised to do – to challenge the "ordinary dismissal".

[45] Had she continued with the arbitration, even if she would have failed to disprove as it were the fairness of the dismissal, she would have left without a cost order. Her decision to approach this court with a frivolous case was unwise. I hasten to mention that the order of costs is not to punish her for the unwise decision but to confirm that indeed her case in this court was frivolous.

[46] Judging by the manner she litigated this matter, I am of a firm view that this case lacked merits from the get go. The team that represented her and subsequently fired by her must have been aware of this fact hence the referral from the get go was that of an "ordinary dismissal". They

[24] Constitution of the Republic of South Africa, 1996

were right if it all they advised so because workers should not be discouraged from bringing their matters to the correct forum – the CCMA. The applicant amended her case a number of times. This is indicative of the fact that she had no case from the get go. She struggled to fashion out her case that she finally placed before me. I agree with Mr Orr that the automatically unfair dismissal claim was nothing but an afterthought.

[47] In litigation, the interest of the opposing party matters too, particularly, when it comes to costs. Litigation is not cheap. The opposing party cannot in fairness be dragged to a court of law to defend a case without merit. It cannot be said that the opposition of this matter was unwarranted, since to my mind this referral was frivolous. The applicant knew that her case in this court was manifestly insufficient or futile. I was tempted to award punitive costs. However, there is no sufficient evidence before me that the applicant was egregiously careless.

[48] What made matters worse is the applicant's refusal of what was patently a generous and reasonable offer. Again, I hasten to say that the applicant is not punished as it were for having refused to settle. Settling a dispute saves parties' litigation costs. In a settlement there is no winner or loser. Both parties become winners with regard to litigation costs. The applicant openly refused the offer and contented with the risk attached to litigation-to be mulcted with costs.

[49] In *Kopel v Safeway Stores PLC*[25], the Appeal Tribunal in rejecting an appeal aptly said the following:

> 18 From those decisions and from a reading of the Rule itself, it does not follow that a failure by the appellant to beat a **Calderbank** offer, should by itself, lead to an order for costs being made against the appellant. The Employment Tribunal must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the

[25] [2003] UKEAT 0281-02-1104 (11 April 2003)

exercise of its discretion under Rule 14[26]. We respectfully adopt and repeat the observations of Lindsay P in **Monaghan** when he observed that:

"Whilst we would not want to deter the making and acceptance of sensible offers, it became a practice such that an applicant who recovered no more than two thirds of the sum offered in a rejected Calderbank offer was, without more, then to be visited with costs of the remedies hearing or some part of them, Calderbank offers would be so frequently used that one would soon be in a regime in which costs would not uncommonly be treated as they are in the High Court and other Courts. Yet it is plain that throughout the life of the Employment Tribunals the legislature has never so provided. It can only be that that was be that that was deliberate."

19 This case was, however, far removed from the circumstances considered by the Appeal in Monaghan. This appellant had claimed $ 22, 000 and awards for injury to feelings and aggravated damages. She had a generous offer and had included in her claim a manifestly misconceived claim under Article 3 and 4 of the European Convention on Human Rights. The Employment Tribunal in fact, concluded that the rejection of the offer was unreasonable. Subject, therefore, to the alleged error of fact, which we consider in a moment that was a conclusion to which the Employment Tribunal was entitled to come.

[50] To my mind, the rejection of the offer of settlement was wholly unreasonable. Section 162[27] of the LRA involves exercise of discretion. In exercising my discretion, I choose to take the unreasonable rejection

[26] **Rule 14** Where, in the opinion of the Tribunal, a party has in bringing the proceedings, or a party or a party representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived, the Tribunal shall consider making, and if it so decides, may make- (a) an order containing an award against that party in respect of the costs incurred by the other party.

[27] Section 162 (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 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 Court; and
    (ii) During the proceedings before Court.

into account. For all the above reasons, I am minded to award costs against the applicant.

[51] In the results, I make the following order:

Order

1. The respondent is absolved from the instance;
2. The applicant is to pay the costs including those reserved on 5 December 2014.

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GN Moshoana,

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : In Person

For the Respondent : Advocate C Orr
Instructed by : Cliffe Dekker Hofmeyer, Sandton.