THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE REFERENCE NO. 109 OF 2020

(Arising from Labour Dispute No. KCCA/RUB/LC/328/2019)

JOSEPH KALULE::CLAIMANT

VERSUS

DEUSTCHE GESELLSCHAFT FUER INTERNATIONALE ZUSAMMENARBEIT (GIZ) GMBH::::::::::::::::::::RESPONDENT

BEFORE:

THE HON. JUSTICE ANTHONY WABWIRE MUSANA

PANELISTS:

1. Mr. JIMMY MUSIMBI
2. Ms. ROBINAH KAGOYE &
3. Mr. CAN AMOS LAPENGA

RULING

Introduction

[1] This ruling is in respect of a prayer for costs arising out of a dismissal of Labour Dispute Claim No. 109 of 2020 under Order Rule 22 of the Civil Procedure Rules S.I 71-1(CPR). The dismissal arose out of the Claimant's non- attendance when the matter was called for hearing. By way of brief background, when the matter came up for mention on the 11th day of October 2022, Mr. Timothy Lugayizi, appearing for the Respondent, prayed that the suit be dismissed. The Claimant and his Counsel were absent.

[2] Upon hearing the submissions of Counsel for the Respondent, we dismissed the claim. Counsel then made arguments for costs. We reserved our ruling on the prayer for costs which ruling, we now render.

Submissions of the Applicant

[3] In his oral address to the Court, Mr. Lugayizi submitted that the Respondent had been asked to serve the Claimant on three separate occasions. Counsel submitted that service had been effected both directly and electronically on the Claimant and his Counsel. The Claimant was absent on each successive occasion when the case was called before the Court.

[4] Aware of the practice of this Court in not granting costs, Mr. Lugayizi submitted that the Court record bore witness that hearings were set, a scheduling memorandum and trial bundles were filed and the respondent had expended resources in preparing for the hearing. It was Counsel's view that a claimant ought not to be encouraged to file a claim and sit back simply because the Court, as a matter of practice did not award costs. He submitted that it is the position of the law that costs should follow the event. He asked this Court to depart from the practice and award costs to the Respondent.

Analysis and Decision of the Court

[5] The short issue for determination is whether the Respondent should have costs as against the Claimant.

[6] As correctly pointed out during Mr. Lugayizi's address to the Court, costs follow the event. The principle is grounded in Section 27(2) of the Civil Procedure Act Cap. 71(CPA). The section provides that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.[1] The law appears to be very well settled. It may also be useful to add that costs follow the event subject to the discretion of the court or judge under Section 27(1). It is therefore discernible that costs follow the event at the judicial officer's discretion.[2]

[7] There has been some very reliable guidance from the Supreme Court of Uganda in the area of judicial discretion. In the case of **Kwizera v Attorney General (Constitutional Appeal 1 of 2008) [2017] UGSC 3** the Honourable Lady Justice Tibatemwa Ekirikubinza J.S.C posited that that if a court decides to depart from the general rule, the court is obliged to give reason for not awarding costs to a successful litigant. It is only then that it would be evident on record that in reaching its decision, the court has complied

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[1] Per Kainamura J in Kinyera v victoria Seeds Ltd (Civil Suit 604 of 2015) [2017] UGCommC 137 (16 October 2017);

[2] SDV Transami vs. Nsibambi Enterprises [2008] HCB 94.

with the statutory requirement that its departure from the general rule has been for *good reason*. In the case of **Candiru Alice v Amandua Fenisto & 2 Others (Civil Suit 19 of 2014) [2017] UGHCCD 139 (27 October 2017)** the Honourable Mr. Justice Stephen Mubiru found the exception to the general rule that costs follow the event to be some sort of misconduct on the part of the successful party including pre-litigation misconduct.

[8] The Industrial Court has not been known to grant costs. Indeed, under the **Labour Disputes (Arbitration and Settlement) 2006(LADASA),** there was no provision under which this Court could grant costs. This was to change with the 2020 amendment to LADASA. Under **Section 8(2a)(c)of the Labour Disputes (Arbitration and Settlement)(Amendment) Act, 2020,** the Industrial Court has powers of the High Court to make orders as to costs and other reliefs as the Court may deem fit. It follows therefore, that this Court is properly vested with the power to make orders as to cost.

[9] For purposes of understanding this Court's mind on costs, it is important to revisit the purpose for which the Industrial Court was set up and more specifically the procedure of the Court in attaining that purpose. The Industrial Court was established under Section 7 of the LADASA. The Court's functions include the arbitration of labour disputes referred to it and adjudication upon questions of law and fact arising from references[3]. The Court consists of the Head Judge and Judges empaneled to resolve disputes together with five independent members, five representatives of employers and five representatives of employees.[4] At any one sitting for which a decision is to be rendered, the panel is headed by the Head Judge or Judge and a panelist from each of the three categories. Decisions of the court are reached by consensus.[5] Under Rule 8 of the Labour Disputes (Arbitration and Settlement) (Industrial Court Procedure) Rules, 2012 a party may appear before the Court by themselves or by an agent, labour union or an employer's organization or by an advocate. The Court does not levy any filing fees and is not bound by the strict rules of evidence.

[10] What is discernible from the establishment provisions of the Industrial Court is that it was set up or designed to be easily accessible to people without the aid of legal counsel. The proceedings, while now borrowing heavily from the ordinary courts, were to be expeditious and simple. The logic of this simplicity in the arena of costs, would be the challenges associated with levying costs on a self-representing employee or an agent,

[3] Section 8 LADASA(As Amended)
[4] Section 10 LADASA(As amended)
[5] Section 14 LADASA(As amended)

a member of an employer's union or a labour union, they not having specialized understanding of the more complex procedural rules applied in the ordinary civil courts. It is important for a public understanding of the workings of this Court that, the Court was established as a specialized labour court accessed with relative ease.

[11] And the reasoning appears to be rooted in the nature of the employment relationship and relative bargaining power of the parties. In his book **"By God's Grace The Judge That I Was"** the Honourable Mr. Justice Asaph Ruhinda Ntengye[6] in his discourse on balancing the power of capital and the power of labour, had this to say;

> *" .....Whereas in the ordinary civil courts, costs follow the event, in the industrial court, grant of costs is an exception rather than the rule. The principal behind this is that whereas the employer has power of capital, and, therefore, can pay costs of litigation comfortably, the employee is in a precarious position after losing the job. Ordering costs against him/her would, in our view, condemn him/her to destitution..... Conversely, even if the employer is in an upper hand and with the ability to pay costs, it would equally be unjust to grant costs against him/her after losing the case since it would amount to unequal application of the principle. Therefore, in either case, it would be exceptional for either party to suffer costs of litigation by order of the court."*[7]

[12] The school of thought, above, is reflected in the decisions of the Industrial Court where costs are awarded against a party in the direst of circumstances. Indeed in the Candiru case(Supra) the Honourable Mr. Justice Mubiru posited that using costs as a penalty imposed on the unsuccessful party may discourage parties with plausible defences to suits filed against them from asserting them, yet in all litigation the version of one party will be right and that of the other will be wrong.

[13] We are persuaded by this reasoning and we think it is consistent with the reasons for which the Industrial Court was established to provide access to labour justice in less exacting circumstances than is the case in the ordinary civil courts.

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[6] The Honourable Mr. Justice Asaph Ruhinda Ntengye retired as head Judge of the Industrial Court in 17th February 2022. His book is published.

[7] Pages 176 -177.

[14] While in most of the cases before it, the Industrial Court has declined to grant costs to the successful party, in keeping with the principle elaborated by the Supreme Court in the Kwizera case (*supra*), the Court has given reasons for departing from the general rule, costs follow the event. A few examples will suffice:

(i) In the case of **Lydia Hategа vs Attorney General & Administrator General**[8] the Court granted costs to the Claimant following the inconvenience brought by the Respondent's conduct in the trial.

(ii) In **Jane Okello vs Entebbe Handling Services Ltd**[9] the Respondent only appeared in Court at the beginning of the case and at the time of submissions. Considering the time the case had spent in the Court system and the conduct of the Respondent, the Claimant was awarded costs.

(iii) In **MTN Uganda Ltd vs Anthony Katamba**[10] because of the failure of the Applicant to point out any justification whatsoever for extension of time, the Court awarded costs to the Respondent.

The common thread in these cases is that the unsuccessful party has been guilty of certain misconduct in order to warrant a grant of costs to the successfully party.

[15] Jurisprudence from other jurisdictions suggests that the labour courts or employment tribunals would be slow to grant costs to the successful party. In the United Republic of Tanzania, according to Section 50(6) of the Labour Institutions Act No. 7 of 2004 as amended by Section 19(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 and Rule 51 of the GN No. 106 of 2007 and Section 88(9) of the Employment and Labour Relations Act No. 6 of 2004 and Rule 34 of the GN No. 64 of 2007, Labour disputes are free of costs, interests and fees, however, costs are only allowed where there is the proof of frivolous and/or vexatious proceedings. In the case of **Tanzania Breweries Limited Vs. Nancy Maronie, Labour Dispute no, 182 of 2015 (unreported)** it was held that whether the dispute or application is before the Commission for Mediation and Arbitration or in the High Court of Tanzania, costs are awarded only where there is in existence of frivolous and/or vexatious proceedings. In the United Kingdom, an order of costs from an

[8] Labour Dispute Claim No. 019 of 2014
[9] Labour Dispute Claim No. 200 of 2014
[10] Labour Dispute Miscellaneous Application No. 004-2021

Employment Tribunal would only be granted where the employee has been *"vexatious, abusive, disruptive or otherwise unreasonable"* in the bringing or conduct of the claim or the legal representative has committed some *"improper, unreasonable or negligent act or omission"* causing loss to the other side[11]. Further afield, before the Fair Work Commission of Australia, a grant of costs against an employer would require the employee to show that the employer has fabricated evidence and made false claims against the employee and has acted vexatiously or without reasonable cause and that accordingly, costs should be awarded against the employer under section 611 of the Australian Fair Work Act 2009.[12] Again, a common thread permeates through the employment law practice. The grant of costs appears to be the exception rather than the rule and the bar is set at some form of misconduct, in some jurisdictions, the bar is quite high, at frivolous, vexatious, abusive, improper or unreasonable conduct.

[16] In the affidavit of service sworn on 23rd September 2022, by Mr. Yusuf Cocoga, Court Process Server, it is deponed that his attempts to effect service on Mr. Oscar Onder, Advocate, were not effectual. Mr. Onder declined service for want of instructions. The notice was then sent on to the Claimant via the WhatsApp messaging service on his telephone number. The Claimant did not appear in Court on the appointed day. A second affidavit of service sworn by Mr. David Kabanda indicates that the Claimant was served by telephone and WhatsApp. M/S Libra Advocates, previously on record, declined to accept service on the Claimants behalf. The pattern that emerges from this is that the Claimant was disinterested in prosecuting the claim and this properly justified the dismissal.

[17] As to whether the said conduct would warrant an award of costs against the claimant, we do not think so for three reasons; First, the Claimant's Advocates did not misconduct themselves by declining to accept service. It was well within their right although they might have sought a formal withdrawal Regulation 3 of the Advocates (Professional Conduct) Regulation S.I 267-2. Secondly, while the claimant's conduct was

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[11] David Whincup "The uses and abuses of "subject to costs" in employment litigation (UK)" https://www.employmentlawworldview.com/the-uses-and-abuses-of-subject-to-costs-in-employment-litigation-uk/ last accessed 24.01.2024 2:38pm

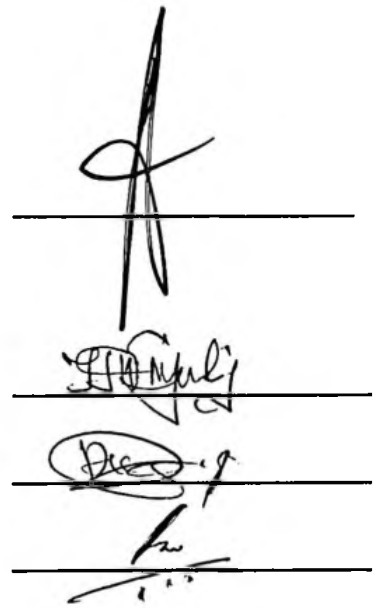
[12] M Blagojevch v Kaplan Services Pty Ltd [2000] AIRC 202 https://employmentlawonline.com.au/can-i-claim-legal-costs-if-i-won-my-case-at-fair-work-australia/ last accessed 24.01.2024 2.06pm

unexplained, he does not appear to have been motivated to file a frivolous or vexatious action. And lastly, the overriding objectives of the Industrial Court as explained in paragraphs 9-11 above do not make for a compelling reason to grant the order of costs.

[18] Mr. Lugayizi invited us to award costs to discourage parties from filing a claim and abandoning the same. If we were to take the Respondent's view, the award of costs to discourage parties from filing claims, would, in our humble view, defeat the purpose for which the Industrial Court was established. There has to be an overriding objective of encouraging access to justice.

[19] For the reasons advanced herein, we decline to grant costs to the Respondent in this case. The general rule is that the grant of costs is the exception rather than the rule.

Dated at Kampala this 6th day of February 2023



DELIVERED AND SIGNED BY:

ANTHONY WABWIRE MUSANA, Judge

THE PANELISTS AGREE:

1. **Mr. JIMMY MUSIMBI**
2. **Ms. ROBINAH KAGOYE**
3. **Mr. AMOS CAN LAPENGA**

Delivered to in open Court in the presence of:

Mr. Timothy Lugayizi for the Respondent

Court Clerk. Mr. Samuel Mukiza.