

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

Case no.:NH11/2/24237

Appeal case no.:JA 73/98

In the matter between:

Nicholas Antony Lambert-Williams

Appellant

and

Sign Company Sign writers (Pty) Ltd

Multivision

Respondent

Judgment

Ngcobo AJP

[1] Mr Lambert-Williams, the appellant, alleged in the Industrial Court that he had been dismissed by Sign Company Sign writers (Pty) Ltd, the respondent, in circumstances which amounted to an unfair labour practice. Apart from denying the alleged unfair labour practice, the respondent denied that it had employed the appellant. It alleged that he had been employed by Multivision CC.

[2] In the court a quo the parties agreed that the issue of whether the respondent was the

employer should be determined first. After evidence on this issue was led, the court a quo found that the respondent was not the employer. As the disposal of this issue meant the disposal of the dispute between the appellant and the respondent, the application was dismissed. The present appeal is against the finding that the respondent was not the employer.

[3] The record of the appeal and the heads of argument were filed late. In its heads of argument filed on 19 March 1999, the respondent took the point that the record had not been filed timeously. On 10 May 1999 the attorneys of record for Lambert-Williams purported to file the application for condonation of the late filing of the record. Mr Sean Snyman of that firm deposed to an affidavit in support of such application. What emerges from that affidavit is the following.

[4] Since 29 September 1997 the attorneys had written eight letters to Lambert-Williams urging him to furnish them with funds to enable them to pay for the record. When no response was received from the appellant after the fifth letter, on 20 April 1998 the attorneys addressed the sixth letter to him and said "Should we not hear from you within 30 days we shall close our file". On 5 June 1998 they wrote the seventh letter and said "As you have not contacted the writer, we shall close our file in 30 days". Then on 14 July 1998 they wrote the last letter and said "Our file in this matter is now closed".

[5] The affidavit goes on to say:

"4.7 Ultimately and on or about the 11th of September 1998 we were telephonically contacted by the appellant, which was the first he had contacted us since 1997, and the appellant then telephonically instructed us to proceed with the appeal. Based upon an undertaking by the appellant that he would pay the amount of R889,20 for the record of the appeal into our trust account, we immediately proceeded to obtain the record and pay for the same;...

4.9 Since such date, we have not yet again been contacted by the appellant and have been unable to procure further particulars from him with regard to why it took him almost a year to contact us and furnish us with the instructions to proceed with the appeal, notwithstanding the correspondence aforesaid. We are therefore unable to add or submit anything in addition to the abovementioned submission".

[6] It is apparent from the affidavit of Snyman that the appellant did not comply with his undertaking to pay the said sum of R889,20 into their trust account as he had undertaken to

do. Instead the attorneys paid for the record. It is also apparent from the affidavit that the attorneys were not given any instructions to make the application for the condonation of the late filing of the record. The appellant was not told that the appeal was coming up before court on 3 June 1999.

[7] The contents of the affidavit of Snyman raise a question as to whether the attorneys had the authority to proceed with the appeal and to make the application for condonation of the late filing of the record.

[8] The appellant disappeared for a period of one year. Numerous letters were written to him and these letters did not evoke any response from him. As a result the attorneys closed their file. One year later he “telephonically contacted” his attorneys and “telephonically instructed” them to proceed with the appeal, undertaking to pay the costs of the record. Thereafter he disappeared again without keeping his promise to pay for the record. He has never been heard of since those telephonic instructions. There is no explanation for his disappearance either before or after the alleged telephonic contact. The need to make the application for condonation for the late filing of the record was never discussed with him. When he last contacted his attorneys, the appeal had not yet been set down. He is, therefore, not even aware of the fact that the appeal came before court on 3 June 1999.

[9] Having regard to the disappearance of the appellant and his failure to comply with his undertaking to pay for the record, it cannot be suggested that the attorneys had the authority either to proceed with the appeal or to make the application for the condonation of the late filing of the record. It is plain from the affidavit of Snyman that the attorneys had no instructions to make the purported application for the condonation of the late filing of the record. There is, therefore, no application for condonation of the late filing of the record.

[10] In the result the appeal must be struck off the roll.

[11] That is not the end of the matter. The respondent is seeking an order for costs *de bonis propriis* against the attorneys.

[12] In Blou v Lampert & Chipkin, N.N.O., and Others 1973 (1) SA 1 (A), the court considered the liability of the trustees of an insolvent estate for costs *de bonis propriis* where the trustees had purported to bring an application on behalf of the insolvent estate when they had no authority to do so. Holmes JA had the following to say at page 14B - 15A:

“There are several judicial decisions dealing with the circumstances in which a party litigating in a representative capacity will be condemned to pay costs *de bonis propriis*. (I rather think that there is something to be said for using the

modern expressions of “out of his own pocket”, or “uit eie beurs”). For example, it has been held that such an order will be made where he acted in bad faith, or negligently, or unreasonably. See, for example, *Re Estate Potgieter*, 1908 T.S. 982 at p. 1002, and the cases collected in a recent compilation, Cilliers on *Costs* (with its engaging foreword by Mr. Justice van Winsen) at pp. 203 *et seq.* I would think that these examples are all comprehended within the basic notion of material departure from the responsibility of office. Counsel for the trustees earnestly besought us to hold that, although they may have acted wrongly, their conduct did not fall within the limits of judicial censure. In my view the matter falls [sic] to be decided on a somewhat different basis. The trustees were held by the Court *a quo* to have instituted the proceedings without *locus standi* to do so. See the *ratio* of the judgement of the Court *a quo* reported in 1970 (2) S.A. 185 at pp. 200 (last line) to p. 214F. There is no appeal or cross-appeal against that decision. This means that they had no authority to represent the insolvent estate in the proceedings; and that, *de jure*, the insolvent estate was not before the Court, and did not litigate, and cannot be ordered to pay costs. The right persons to be mulcted in costs for the abortive application are the trustees who purported to bring it on behalf of the estate without right or authority to do so. This seems to me logically inescapable. It was also the approach of the Court in *Ashley v. S.A. Prudential Ltd.*, 1929 T.P.D. 283, to which counsel for Harlingen referred us. There the proceedings were brought in the name of Ashley by one Matthews, claiming to be authorised to do so by power of attorney. It was held that the document did not confer on him the power to bring the proceedings.

Tindall, J., said at p. 286, *in fin.*, to p. 287 -

“Matthews ... should not be allowed to escape the consequences of having sought battle in the motion Court without having made certain that he was fully accoutred for the fray ... I think there must be no order on the application, and R.T. Matthews is ordered to pay the costs personally.”

Similarly in *Town Council of Brakpan v Cohen and Others*, 1938 W.L.D. 146, a petition in the name of the town council was signed by the acting town clerk by virtue of a resolution authorising him to apply for an interdict against the first respondent only. Schreiner, J., held that the acting town clerk had no authority to bring proceedings against the other two respondents. The learned Judge added, at p. 149 *in fin.*,

“In regard to the costs of these two respondents the logical course would be to make the acting town clerk pay such costs (cf. *Ashley v S.A. Prudential*, 1929 T.P.D. 283)”.

Only the gracious consent of counsel saved the unhappy official from that exacting fate.

See also *Toubkin, NO., v Doenges, NO.*, 1951 (3) S.A. 72 (T) at p. 75B.

It seems to me therefore that the Court *a quo* was right in ordering the trustees to pay costs *de bonis propriis*.”

[13] In my view, there is no reason both in logic and principle why the principle enunciated in Blou v Lampert & Chipkin, NNO., and Others, *supra*, should not be applicable in the case of an attorney who purports to represent a litigant when the attorney has no authority to do so.

[14] In an attempt to explain the conduct of his firm in acting without authority, Snyman informed us that he feared that “he might be dragged before the Law Society” for abandoning his client. He informed us that he was acting in terms of “the last instructions from his client” to prosecute the appeal. I am unable to understand how, if he had withdrawn timeously as an attorney of record and after due notice to Mr Lambert-Williams, this would have resulted in him “being dragged before the Law Society”. What Snyman should have done was to advise the appellant that it was necessary to make an application for condonation for late filing of the record; call upon appellant to furnish him with an explanation for the delay in the filing of the record in order to prepare such application; indicate to the appellant that if no such explanation is given, he will be compelled to withdraw as an attorney of record and advise the appellant of the consequences of withdrawal as attorney of record. If such an explanation was not forthcoming from the appellant, the proper course for the attorneys to have followed would be to give the appellant notice of their withdrawal as attorneys of record. The attorneys chose not to follow this course but instead brought the application for condonation without the appellant’s authority and sought to proceed with the appeal. In these circumstances the attorneys must face the consequences of acting without authority.

[15] The right person to be mulcted for costs in the appeal and the abortive application for condonation is the firm of attorneys which purported to bring the application and prosecute the appeal without right or authority to do so. They cannot escape this.

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

a) The appeal is struck off the roll;

b) The firm of attorneys Snyman & van Heerden is ordered to pay the respondent’s costs *de bonis propriis*.

Ngcobo AJP

I agree

Conradie JA

I agree

Nicholson JA

Date of hearing: 3 June 1999
Date of judgement: 24 June 1999

Appearances:

For appellant: Mr Snyman of Snyman Van Der Heever Heyns, Inc

For respondent: Mr A de Kock of Hofmeyer Herbstein Gihwala Cluver & Walker Inc