

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**HELD AT JOHANNESBURG****CASE NO JA 35/98**

In the matter between

J MAHLANGU AND OTHERS**APPELLANTS**

and

FEMCO (PTY) LTD**RESPONDENT****JUDGEMENT****Nicholson JA**

[1] 104 ex-employees of the respondent brought proceedings in the Industrial Court in terms of section 46(9) of the Labour Relations Act, 28 of 1956, for their reinstatement, after being retrenched. A further 15 employees were added to the number of applicants for the said relief, after the consolidation of a case involving employees, retrenched by the respondent at the same time. The matter was opposed by the respondent. After hearing evidence, the Industrial Court dismissed the application and made no order as to costs on 30 November 1997.

[2] A notice of appeal was filed on 24 March 1998 - out of time - and there is an

application for condonation for the late filing thereof. The application for late filing of the notice of appeal is supported by an affidavit of Sarah Ramaswe in which she states that all the applicants in the court a quo, presumably the 119 I have mentioned, indicated to her that they were desirous of appealing against the judgement of the Industrial Court and that an attorney Mr Joep Joubert of the firm Joubert and Carstens was approached and he informed Miss Ramaswe of the right of appeal and the costs. Miss Ramaswe contacted numbers of the erstwhile applicants and collected various sums of money to finance the appeal which are set out in annexure “B” to her affidavit. This annexure contains 94 names and the amounts paid which vary from R300 to R100, totalling R 24 950.

- [3] The respondent has perused the list of 94 names and can only link 42 to the original 119 applicants, who brought the application in the Industrial Court. Evidently many of the contributors were not appellants but well-wishers. The respondent’s attorneys of record wrote to the attorneys mentioned above, namely Joubert and Carstens, on 16 March 1999, explaining that it was not clear who the appellants in the case were, given the facts outlined above. By letter dated 24 March Joubert and Carstens wrote to respondent’s attorneys and indicated that all the applicants in the court a quo were appellants, apart from one or two who had subsequently died. These were not named.
- [4] The rules regulating the conduct of the proceedings of the Labour Appeal Court were published in GN R1666 of 14 October 1996, and have been amended by Government Notice R962 in Government Gazette 18142 of 11 July 1997, with effect from 11 July

1997, and Government Notice 1101 in Government Gazette 19196 of 4 September 1998, with effect from 4 September 1998. Rule 6(1) of these rules provides that a power of attorney authorising a representative to prosecute the appeal or the cross-appeal must be delivered within 10 days of the delivery of any notice of appeal or cross-appeal. This sub-rule applies to appeals from the Industrial Court. See *Leonard Dingler (Pty) Ltd v D.D. Ngwenya* 1999 (5) BLLR 431(LAC) at 435D-E. There are no powers of attorney in respect of any of the alleged appellants in this case. There is no explanation for the failure by the ‘appellants’ to file any such powers of attorney and no application for condonation in regard thereto. There is no suggestion that the list containing the names of persons who contributed to the costs of the projected appeal, constitutes a power of attorney. The list contains no signatures and does not authorise anyone to prosecute the appeal. Moreover, many of the persons named on the list were not applicants in the industrial court.

- [5] The point taken by the respondent in the present appeal is not merely directed at the non-filing of powers of attorney. Mr van Aswegen argued on its behalf that there was no indication of any authorisation by any of the litigants to the attorneys to act on behalf of any of them. Authority is customarily proved by a power of attorney. Without a power of attorney there may nevertheless well be, and normally is, authority to act. Where it appears from the papers that there is authority to act (although there is no proof thereof in the form of a power of attorney) or the adversary does not dispute the authority of a person to conduct proceedings on behalf of a litigant, the court would more easily grant condonation of the defaulting party’s

failure to comply with the rule relating to the filing of a power of attorney. There appears to be uncertainty in the profession about the filing of powers of attorney in the Labour Appeal Court. A perusal of the files in the registrar's office indicates that no powers of attorney have been filed in a large number of appeals, not only from the industrial court but also from the labour court. In the matters where no powers of attorney have been filed and the point has not been taken by either of the parties the court has required that powers of attorney be filed and an application for condonation be brought. I understand that a practice note will be issued by the Acting Judge President in this regard. In this matter no power of attorney has been filed at any stage nor has condonation been sought. The point has been taken and we are therefore obliged to decide it.

- [6] In the High Court the failure to file a power of attorney has led in the past to a divergence of opinion in the Transvaal and the Cape Provinces. These cases must, however, be approached on the basis that at the time no written rule of court governed the position. In the Transvaal the failure by an appellant to file a power of attorney has led to the appeal being struck off the roll. See *Solomons v Allie* 1965 (4) SA 755 (T) and *Combrinck v Maritz*, 1951 (4) SA 288 . In the latter case Price J traced the practice in the Transvaal court at page 290 B - 291B from *Howe v Church* 1914 TPD 611 and *Gamsu v Kotze*, 1914 TPD 294. In the last mentioned case the Court stated that it was very undesirable that any laxity should be shown in this practice and the result might be that difficult questions of liability for costs might arise. An attorney may quite honestly set down an appeal for argument in the belief that he has authority

from his client to do so. The case may be heard and the appeal may be dismissed with costs. The respondent may then seek to recover his costs from the appellant to be met with the objection that the appellant had not authorised the appeal to be proceeded with. The respondent would then have to consider whether the attorney was liable for those costs and he might find himself unable to bring home the liability either to the attorney or the client.

[7] This approach was followed in *Dollar v New Eersteling Gold Mining Co Ltd* 1927 TPD 472, and in *Saley v Julay* 1945 TPD 221. In the latter case the Court laid down that even if the point was not taken by the respondent's counsel the Court would itself order the appeal to be struck off the roll.

[8] In the Cape Provincial Division in the case of *Hopley & Bronner (Prop.) Ltd v Stephen McQueen*, 1931 CPD 263, it was held that a written power of attorney is only one form of evidence of authority and that other evidence may be provided. In that case there was a written power of attorney which was dated two days after the appeal had been set down. The Court granted relief which in effect amounted to condonation of the two days' delay. Then in *Finbro Furnishers (Pty.) Ltd v Peimer*, 1935 CPD 378, there was merely oral authority to prosecute the appeal but the Court granted relief.

[9] I am of the opinion that the more relaxed Cape approach should be followed. In the vast majority of cases a representative has authority to act on behalf of a litigant even

though this may not be manifested by a power of attorney. The instances where the winner is unable to recover costs because the loser demonstrates that an appeal was conducted without authority, must, in the nature of things, be very rare. The harm to be guarded against is not so great that this court need insist on a rule as strict as that enunciated in the Transvaal cases referred to above. It seems to me that where rule 6 of the Labour Appeal Court rules speaks of a power of attorney it is clearly intended that such be in the form of a document signed by the litigant authorising an attorney to act on his behalf. The use of the word 'delivered' clearly militates against any oral authorisation being regarded as sufficient and the implication is overwhelming that such a power of attorney should be signed by the litigant.

[10] Where an attorney's authority to conduct an appeal is questioned by the opposing party and he does nothing to prove such authority by way of filing a power of attorney, there is very little scope for condoning such failure. Ordinarily the challenge would have to be taken up, and in the present case it decidedly should have been. No power of attorney has been filed in court in this matter at any stage. The appeal must accordingly be struck from the roll. There remains the question of costs. Obviously the erstwhile applicants in the Industrial Court cannot be ordered to pay the costs, as they have not authorised the appeal. The respondent has clearly incurred costs and the question which arises is whether the attorneys must be ordered to pay such costs.

[11] 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. See *Blou v Lampert, Chipkin NNO and Others 1973 (1) SA 1 (AD)*. In that case Holmes JA gave examples of instances where such an order has been made in our law. These include where he acted in bad faith, or negligently, or unreasonably. (See, for example, *Re Estate Potgieter 1908 TS 982* at page 1002). The learned judge of appeal went on to say at page 14 C - 15 A

“ 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 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 judgment of the Court a quo reported in 1970 (2) SA 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 insolvent 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 SA 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 a 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*

SA Prudential, 1929 T.P.D. 283).'

Only the gracious consent of counsel saved the unhappy official from that exacting fate. See also Toubkin, N.O., v Dönges, N.O., 1951 (3) SA 72 (T) at p. 75B.”

- [12] I have made mention of the rules of the Labour Appeal Court which require a power of attorney to be filed. No attempt was made to comply with rule 6, nor was any explanation given as to why a power of attorney was not filed. The respondent’s attorneys drew the attention of Joubert and Carstens to the uncertainty of the identity of the appellants. This should have alerted Joubert and Carstens to the problem. Despite this no attempt was made to consult the rules or comply with them. The attorneys must therefore bear the costs *de bonis propriis*.
- [13] I conclude this judgement by remarking that the ‘appellants’ in this case have suffered no hardship. The appeal was ill-advised. I have never encountered a dismissal for operational reasons which has been executed with such meticulous fairness and such scrupulous attention to the retrenchment guidelines. In some respects the respondent went well beyond what was required of it.
- [14] I therefore make the following order
- a)The appeal is struck off the roll.
 - b)The costs of appeal are to be paid by the attorneys Joubert and Carstens *de bonis propriis*.

NICHOLSON JA

I agree.

FRONEMAN DJP

I agree.

CONRADIE JA

Date of hearing:

11 May 1999

Date of judgement:

September 1999

Attorneys for Appellants:

Joubert and Carstens

Attorneys for Respondent:

Sutherland et Grobbelaar Association

Counsel for Respondent:

Adv J van Aswegen

This judgement appears on the internet <http://www.law.wits.ac.za>