

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**HELD AT BRAAMFONTEIN****CASE NO:** JA45/13**DATE:** 2014-05-16

In the matter between

GEORGE, MOHLALA MAKGAU AND ONE OTHER

Appellant

and

SOUTH AFRICAN POLICE SERVICE AND OTHERS

Respondent

CORAM: TLALETSI DJP, MOLEMELA AJA, COPPIN AJA

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J U D G M E N T

MOLEMELA, AJA:

This is an appeal against the judgment of the Labour Court, Rabkin-Naicker J, dismissing an application for review with costs. The appellants were dismissed from the services of the second respondent. They referred an unfair labour practice dispute to the Safety Security Sectoral Bargaining Council. Conciliation having been unsuccessful, that the dispute was arbitrated by Commissioner Boyce, the third respondent, who found that the dismissal was fair.

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The appellants then approached a firm of attorneys, known as Maringa Attorneys, and instructed them to review the third respondent's award. When there was no progress regarding their matter. The appellants lodged a complaint against Maringa Attorneys at the Law Society. The Law Society subsequently advised the appellants to give instructions to Mashego

Attorneys.

In the meantime, the appellants' erstwhile attorney, Mr Maringa, was struck off the roll. The record shows that he had up to that stage only filed an application for review and had not taken any further steps in the matter.

After taking the matter over, Mashego Attorneys filed a Notice of Motion, dated 12 May 2011. In terms of which they applied for the granting of condonation for the late filing of the review application and leave for the filing of supplementary affidavits.

On 20 March 2012, the matter served before the Labour Court. The
10 record of what transpired during the proceedings has not been attached, but the text of the Labour Court judgment makes reference to the application for condonation.

The crisp issues in this appeal are: one, whether the Labour Court erred in dismissing the review application on the basis that it was fatally flawed; and two, whether the Labour Court erred in ordering the appellants' present attorney, Mr Mashego, to pay costs *de bonis propriis*.

The Labour Court delivered an *ex tempore* judgment which was subsequently transcribed. In delivering its judgment, the Labour Court *inter alia* stated as follow:

20 "The application for condonation must be dismissed because the application for review is fatally defective. On perusing the file, what came to my attention is the extraordinary circumstance that a review application has been launched without a copy of the award in question annexed to the application. Without the award the review application is fatally defective."

Section 145(1) of the Labour Relations Act provides that a party that alleges that there is a defect in arbitration proceedings may bring an application for review of such proceedings within six weeks from the date of service of the arbitration award. In terms of section 145(2), the Labour Court may, on good cause shown, condone the late filing of the review application.

It is clear from Rule 7(A)(5) of the rules for the conduct of proceedings in the Labour Court that the party that it is responsible to see to it that a proper record of the proceedings sought to be set aside is before the review in court is the applicant. It is evident that in any application for review
10 of an award, the award itself is the very foundation of the application as the review application is directed at determining the reasonableness of the award.

It is common cause that when the Labour Court in this matter considered the application, the arbitration award did not form part of the record that served before the Labour Court, and as such the record of the arbitration proceedings was incomplete yet the application for condonation that served before the Labour Court was directed only at the failure to review the award within six weeks.

The Labour Court correctly took into account that the appellants had
20 filed an application for condonation and that that application ought to fail also. It is trite that an application for condonation entails the consideration of prospects of success on the merits. It is also trite that an applicant in an application for condonation must establish facts that show that there is sufficient cause for condoning non-compliance with the rules. The Founding Affidavit in respect of the condonation application was bare in respect of vital

element of prospects of success. The appellants failed to set out any facts demonstrating that they had reasonable prospects of success and merely said the following:

“We have excellent prospects of success in the application as the arbitrating commissioner failed to apply his mind correctly to the facts and evidence properly placed before him, thereby committing a reviewable irregularity when conducting the arbitration hearing.”

10 In this matter, the determination of prospects of success was very crucial especially because the degree of lateness was severe. Without the award being part of the record, the Labour Court would not have been in a position to properly consider whether there were good prospects for setting the award aside on the basis that the decision that was made was not one that a, reasonable decision maker could reach. Clearly then, the appellant’s application for condonation failed to adequately deal with the prospects of success, was ill-conceived and thus fell to be dismissed.

Instead of dismissing the application for condonation, the Labour Court dismissed the review application. This means that a wrong order was granted. The wrong order granted by the Labour Court thus stands to be set
20 aside. I now turn to the cost order granted by the Labour Court, that is *de bonis propriis*. It is trite that the determination of the cost order constitutes an exercise of a discretion and such discretion must be exercised judicially. It is undisputed that on the day of the hearing of the matter the appellants’ attorney of record was not at court. The appellants were represented by counsel.

The unfortunate history of the matter regarding the appellants’ legal representation has already been canvassed earlier in the judgment. It is clear that

the attorneys that represented the appellants at that stage were not the ones that had drafted the review application. The attorney that drafted the review application was subsequently struck off the roll of attorneys and Mr Mashego became involved in the matter after the intervention of the Law Society.

On the day of the hearing, counsel was instructed on a *pro bono* basis. Mr Mashego evidently tried to right the wrongs that were committed by the erstwhile legal representative of the appellants and his efforts were apparently seriously hampered by the fact that he was unable to obtain the appellants' file from those attorneys.

10 In the end, the matter was placed on the roll even though the record was incomplete. Fairness dictates that all these factors should be taken into account when determining whether a cost order *de bonis propriis* is appropriate. I am of the view that the discretion exercised in respect of the cost order was not exercised judicially as the circumstances of the case did not warrant such a drastic court order. Having considered all these factors, I am of the view that the circumstances of the matter were such that no order of costs ought to have been made.

In view of all of that, the following order is given:

[1] The appeal is upheld.

20 [2] The order granted by the Labour Court is set aside and replaced with the following order:

“The application for condonation is dismissed.”

[3] No order is made as to costs.

Molemela AJA

Acting Judge of Labour Appeal Court

Tlaletsi DJP and Coppin AJA concurred

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APPEARANCES:

For the Appellants: Mr R.K Mashego from Mashego Attorneys Inc

For the Respondent: Advocate M. Zondo

Instructed by: The State Attorney