



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 285/06

In the matter between:

COLIN LUKE AGULHAS

Applicant

And

THE DISPUTE RESOLUTION CENTRE

First Respondent

WIKUS RIEKERT N.O.

Second Respondent

BOSAL AFRICA

Third Respondent

Heard: 17 October 2013

Delivered: 12 December 2014

Summary: When the notice of motion is signed by a person who lacks the necessary locus stand it is defective and the application is not properly before court until the defect is cured.

JUDGMENT

LALLIE J

- [1] The applicant filed an application to review and set aside a ruling in which the second respondent ("the arbitrator") refused to condone the late referral of the applicant's dispute to the first respondent. The review application is opposed by the third respondent. When the review application was set down for hearing on 23 August 2011, the respondent raised a point *in limine* that the application was fatally defective in that the notice of motion was signed by a person who lacked the *locus standi* to sign it. The third respondent also

disputed the applicant's membership of TAWU, the trade union on behalf of which the notice of motion was purportedly signed. The applicant acknowledged the defect and an order was granted postponing the matter *sine die* to afford the applicant an opportunity to file his review papers and ensure that they are properly before court. The applicant tendered the costs occasioned by the postponement.

[2] On 9 September 2011, the applicant filed an amended notice of motion and an affidavit in which he sought condonation of the late amendment of the notice of motion. The application is opposed by the third respondent which filed its answering affidavit late and applied for condonation. The amended notice of motion and the applicant's condonation application was faxed to the third respondent on 7 September 2011. The third respondent received it on 18 October 2011 because its fax facility was faulty. The applicant gave a detailed explanation of how and when it is realised that its fax facility was faulty. The applicant furnished no factual basis for disputing the third respondent's explanation. He submitted that it was unlikely. Without a factual basis the conclusion that the explanation is unlikely cannot stand. The third respondent filed its answering affidavit shortly after receiving the condonation application which was forwarded to it by registered mail. The explanation for the delay is reasonable, the third respondent has reasonable prospects of success and the delay did not prejudice the applicant. In the premises the condonation application must succeed.

[3] The applicant raised a number of points *in limine*. I deem it appropriate to first deal with the point *in limine* that the notice of motion is defective as it does not comply with Rule 7 read with Rule 7A of the rules of this court. It is imperative that an application is properly before court. The attack on the notice of motion is that it lacks the necessary information and no affidavit setting out the grounds for review is attached to the amended notice of motion.

[4] The filing notice is signed by the applicant's attorney and the name and address of his firm is written under his signature. The amended notice of motion reads thus:

‘1. Condoning the late filing of the applicant's amended notice of motion.

2. Reviewing and setting aside the second respondent's ruling.
3. Condoning the applicant's dispute referral to the first respondent.
4. Directing the first respondent to set down the applicant's dispute for conciliation.
5. Further and/or alternative relief.'

[5] The contents of the notice of motion for a review application are governed by by Rule 7A which provides as follows:

- '(1) a party desiring to review a decision or proceedings of a body or person performing a reviewable function justifiable by the court must deliver a notice of motion to the person or body and to all other affected parties.
- (2) the notice of motion must-
- (a) call upon the person or body to show cause why the decision of proceedings should not be reviewed and corrected or set aside
 - (b) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done; and
 - (c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.'

[6] A reading of the notice of motion revealed non-compliance with rule 7A (2). The purpose of filing the amended notice of motion was to correct the defect in the original one. The applicant was required to file an amended notice of motion reflecting that he had cured the defect. The third respondent submitted that the applicant did more than just cure the defect but filed a notice of motion with fresh and fatal defects. Non-compliance with rule 7A (2)(a) and (b) may be condoned but non-compliance with rule 7A (2)(c) is fatal. See

*Country Fair v CCMA*¹. The applicant failed to comply with Rule 7A (2)(c). He may not rely on the fact that non-compliance with rule 7A (2)(c) was not attacked. He was required to file a proper self-standing notice of motion. He may not rely on the amended notice of motion read with parts of the defective one.

- [7] In the condonation application the applicant submitted that in terms of his own investigation, contrary to the third respondent's allegation that Mr George ("George") acted fraudulently in signing the applicant's original notice of motion as an official of TAWU, the allegations of fraud were not proved and the criminal case against George was dropped. He submitted that the contents of the letter the respondent received from TAWU advising that George lacked *locus standi* was devoid of the truth. He added that the notice of motion was not amended and that the court directive, it would appear that he is referring to the court order of 23 August 2011, was required. The third respondent submitted that the applicant did not dispute averments raised about George in the answering affidavit to the review application. He in fact conceded in court on 23 August 2011 that his notice of motion was defective. The explanation given by the applicant for not amending the notice of motion was alleged to be inadequate by the third respondent.
- [8] In the point *in limine* which led to the order being issued on 23 August 2011, the third respondent raised George's lack of *locus standi* and disputed that the applicant was a member of TAWU at the time the notice of motion was signed. The respondent submitted that the applicant was a member of NUMSA and NUMSA referred a dispute on behalf of the applicant and three other employees to the first respondent on 11 January 2006 challenging the fairness of their dismissal for operational requirements of the third respondent. The above averment was not rebutted.
- [9] Even if I can accept that George had the authority to sign the notice of motion in his capacity as an official of TAWU, the applicant failed to prove his TAWU membership which was disputed by the third respondent. The applicant did not deal with the question of his TAWU membership. The source of the *locus*

¹ [1998] 6 BLLR 590 (LC) at 580E-F

standi of a TAWU official to sign a notice of motion of a NUMSA member was not disclosed. In terms of section 161 of the Labour Relations Act 66 of 1995 (“the LRA”), a person may be represented by a member, office bearer or official of that party’s registered trade union. Section 200 of the LRA enables registered unions to act on behalf and in the interest of any of its members. As the applicant has failed to prove his TAWU membership particularly at the time George signed the notice of motion, he failed to prove that George had the necessary *locus standi*. He therefore failed to comply with the order of 23 August 2011 and his review application is still not properly before court.

[10] The following dictum in *Grootboom v NPA*² is apposite:

‘The language used in both *Van Wyk and eThekweni* is unequivocal the warning is expressed in very stern terms. That picture depicted in the two judgements is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous irregularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all the prejudice caused to the court is self-evident. A message must be sent to litigants that the rules and the courts directions cannot be disregarded with impunity.’

[11] The requirements of law and fairness justify a costs order against the applicant. He was afforded an opportunity to cure his papers and he unreasonably failed to seize it and the third respondent incurred costs in the process.

[12] In the premises, the following order is made:

12.1 The third respondent’s late filing of the answering affidavit is condoned.

² [2014] 1 BLLR 1 (CC) at page 9 E-F

12.2 The application is struck from the roll with costs.

Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

For the Applicant: Mr Malgas of Malgas & Associates

For the Third Respondent: Mr Gruss of Henk Wissing Inc

LABOUR COURT