



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JOHANNESBURG

Not Reportable

Case no: JR716/07

In the matter between

DUDLEY REGINALD BOUGAARD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

FAZIEL MOOI N.O.

Second Respondent

JDG TRADING (PTY) LTD t/a BRADLOUWS

FURNITURE

Third Respondent

Heard: 30 June 2015

Delivered: 30 June 2015

Edited: 20 January 2016

Summary: Application for rescission of ruling refusing leave to appeal. No proper grounds placed before the court. Applicant relying on alleged filing of written submissions which could not be established by him. Merits in any event poor. Commissioner hearing condonation application clearly acting reasonably. Applicant on review seeking to rely on document that was found by the court not to have emanated from the first respondent.

EX-TEMPORE JUDGMENT

SNIDER, AJ

[1] This is an application for the rescission of a ruling of Bhoola, J made on 30 August 2012, dismissing an application for leave to appeal. The ruling appears at page 10 of the current application and states:

‘No submissions have been filed as directed by the court. The application for leave to appeal is dismissed.’

[2] At page 12 to 17 of the papers in this application written submissions do indeed appear. However, it is not possible to discern when, or if, they were filed. There is a faint outline of a stamp which appears as if it may be the stamp of this court. There is also a second copy of this document which was handed up to me in court, which similarly has a stamp which appears to be the stamp of this court. It is, however, not an original and it is similarly not possible to discern with any clarity what the date on it is.

[3] I am of the view that it would have been relatively simple for

the attorney for the applicant to ascertain that the document had indeed been filed; whether by perusing the archives of this court or otherwise. He would have had, in his file for the matter, an original stamped version, or stamped copy, of this document.

- [4] He has failed to provide such proof, and in addition thereto, Mr Bleazard has alerted me to the allegations contained in his answering affidavit in this application, where he says at paragraph 7.5.3 on page 25 of the papers:

‘Furthermore, the applicant makes the allegation that his attorney of record filed written submissions. There is no affidavit by the attorney of record of the applicant confirming that statement by the applicant. Accordingly, the allegation by the applicant is hearsay and there is no statement before this honourable court that the written submissions upon which the applicant now seeks to rely were ever filed in court.’

- [5] There is no replying affidavit in this matter and I am in any event bound by the general principle, in terms of which affidavits are evaluated, to the effect that it is the allegations made by the applicant that are admitted by the respondent that are generally to be accepted.
- [6] On the strength of that principle, it appears to me that indeed I cannot accept that the written submissions were filed.
- [7] Even if I am to look at the substance of the matter in relation to the judgment of Bhoola, J, and the original award of the Commissioner; the grounds for review are extremely thin.
- [8] The situation that pertained was that the application initially before the Commissioner was a condonation application where the applicant was represented by one Advocate Mapaleni and the respondent was represented by Mr

Bleazard. Papers were filed and oral submissions were made.

- [9] In concluding his award, the Commissioner states the following:

'The applicant argued that there are prospects of success as the procedure was not fair as there was no consultation and he was not furnished with the reasons for his dismissal. The letter incorrectly dated 2nd December 2005, Annexure D, is clearly headed 'notification: closure of repair centre'. From the start the applicant was aware of the reason for the retrenchment process. The letter also refers to a meeting that took place in which the employees were informed of the decision to close the repair centre. There is some basis for substantive fairness as the repair centre was indeed closed. Prospects of success are slim. Both sides will suffer a degree of prejudice and therefore not much can turn on this point. As the reason for the delay is not valid and the prospects of success are slim, an initial delay of almost three months and then a further delay of almost two months to submit the condonation application is excessively late.'

- [10] The Commissioner was not only concerned with the delay in referring the matter, but also the further delay in bringing the condonation application. It is very difficult, having regard to the award, to imagine a basis on which it could be reviewed. It is clearly a reasonable award. As it was the review was brought on a narrow and somewhat spurious ground, as dealt with below.

- [11] In relation to the issue of the condonation itself, the Commissioner neatly unpicks the applicant's version when he finds that the applicant was aware of his dismissal before he admits to having been aware of it. This emerged from a document that the applicant received called 'process flow'. The process flow document indicated when the retrenchment exercise would terminate, and that date was before the date

the applicant said he was dismissed. Clearly this is an anachronism and the commissioner correctly found against the applicant in this regard.

[12] This indicates again the extraordinary difficulties which the applicant faces in bringing this application.

[13] If I can then briefly refer to the judgment of Bhoola, J, dated 30 March 2012, the following passage which appears at paragraph 10 on page 4 of the judgment is relevant:

‘Even if it can be accepted on the probabilities that the ‘dismissal ruling’ was issued by the first respondent, it is patent that this was an error and had to be regarded as a bad cut and paste job that found its way to the applicant in circumstances that remain questionable. The applicant could at the very least have sought clarity from the first respondent in this regard. For the applicant to continue to rely on the ‘dismissal ruling’ in these circumstances is patently an exercise in futility, rendering this application misconceived from its very inception. Thus, in my view, the application borders on frivolous and vexatious and I am in agreement with the third respondent that costs on a special scale would be justified.’

[14] Bhoola, J then goes on to dismiss the application and grant costs on a scale as between attorney and own client. What Bhoola, J was referring to in this paragraph was a ruling of dubious origin which was found by the court not to have been issued by the first respondent.

[15] Under those circumstances, both from the perspective of the inability on the part of the applicant, notwithstanding a long opportunity to do so, to prove that the written submissions were filed; and the award of the Commissioner, who makes a proper evaluation of the evidence before him, I come to the conclusion that this application cannot be sustained.

Accordingly I make the order set out below.

Order

1. The application is dismissed.
2. There is no order as to costs.

Snider, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr. H Kgotleng of Kgotleng Attorneys

For the Respondent: Mr.B Bleazard of Brian Bleazard Attorneys