



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 09/13

In the matter between

KHAYALETHU RAYMOND KWANI

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER RIAAN DE LANGE N.O

Second Respondent

SCHNELLECKE SOUTH AFRICA (PTY) LTD

Third Respondent

Heard: 15 April 2015

Delivered: 11 December 2015

Summary: The applicant's failure to make averments of his prospects of success in the review application constituted a fatal defect to his application to have his review application reinstated.

JUDGMENT

LALLIE J

[1] The applicant approached this Court for an order in the following terms:

- ‘1. Reinstating the pending review application under case number PR 09/13 which is deemed to have been withdrawn in terms of paragraph 11.2.3 of the current practice manual.
2. Condoning the late filing of this application if necessary.
3. Granting an extension of time period in which the record is to be filed’.

The application is opposed by the third respondent. When this application was argued, it was submitted on behalf of the applicant that he sought an order in terms of the first two prayers.

[2] The facts of this matter as they appear in the founding affidavit are that the applicant was employed by the third respondent. Subsequent to his dismissal for misconduct he, with the assistance of his trade union, NUMSA, referred an unfair dismissal dispute to the first respondent where, on 28 February 2013, the second respondent issued an award in favour of the third respondent. Dissatisfied with the arbitration award, NUMSA, on 22 April 2013, filed an application at the Labour Court to have the award reviewed and set aside. Two days later the third respondent filed a notice of opposition. The applicant was under the impression that NUMSA would see the review application to finality.

[3] The applicant visited the offices of NUMSA on 1 July 2013 to enquire about the progress of the review application. Mr Baardman (“Baardman”), a NUMSA representative, handed him a letter the contents of which were that NUMSA would no longer represent him as it was of the view that this review application had no merit. In the same month he sought to enlist the services of an attorney. He was, however, unsuccessful as he could not afford the R7000.00 he was

required to pay. As he was looking for alternative employment, he secured a job for August, September and October 2013. His income was insufficient and he could still not afford the fees his attorney required. On 7 November 2013, he was advised by a neighbour to seek advice from the Labour Court where he was directed to the Legal Aid office. He applied for legal aid on the same day. On 11 December 2013, he received a letter from the Legal Aid office advising him of his appointment for 14 January 2014. From 14 January 2014, the Legal Aid office took the necessary steps to assist him. Part of the assistance was securing a quotation for the transcription of the arbitration record from a firm of transcribers. It advised that transcribing the record would cost R7000.00. It addressed a letter to the Labour Court and the third respondent's attorneys seeking consent to file the record late. He submitted that the letter was not answered. The respondent, however, tendered evidence of its response to the letter. The application at hand was eventually filed on 18 February 2014.

- [4] Opposing this application, the third respondent pointed out a number of defects to the applicant's case, some of which are fatal. Amongst them is the submission that the applicant made no submissions on his prospects of success in the review application. The legal aid office did not furnish a guarantee to pay for the transcription of the record should the review application be reinstated. The third respondent submitted that the applicant failed to explain the delay fully and left part of it unexplained. He did not disclose the income he generated from his alternative employment thus failing to prove whether he could afford to pay his attorney.
- [5] The third respondent submitted that the applicant erred in basing his application on paragraph 11.2.2 read with paragraph 11.2.3 of the Practice Manual of the Labour Court ("the practice manual") as paragraph 11.2.2 and 11.2.3 relate to the filing of the arbitration record within 60 days of the date on which the applicant is advised by the register of the availability of the record. Nothing precluded the applicant from filing an application for the reinstatement of the review application even though the delay in filing the arbitration record exceeds 60 days. The application at hand is in essence a condonation application. There was therefore a duty on the applicant to establish good cause, the test

which required the applicant to prove that he has prospects of success in the review application. His failure to make averments on his prospects of success is fatal to his application because absent prospects of success condonation may not be granted. In this regard see *NUMSA and Others v Western Holdings Goldmine*¹.

- [6] The purpose of this application is to reinstate the review application. The reason proffered by the applicant for his failure to prosecute the review application within the set time period is that he could not afford the R7000.00 the transcription of the record costs. The Legal Aid office which assists the applicant in this application gave no guarantee for the payment of the transcription costs as the applicant submitted that should this application be successful, the record will be filed, subject to the funds being allocated. There is therefore a possibility that even if this application is granted funds may not be allocated and the applicant will remain unable to pursue his review application. Failure to guarantee payment of the transcription costs defeats the purpose of this application. The applicant's failure to make submissions on his prospects of success in the review application and the absence of the guarantee by the Legal Aid office to pay the costs of the transcription of the record rendered the application fatally defective.

- [7] In the premises, the following order is made:

7.1 The application is dismissed.

Lallie,J

Judge of the Labour Court of South Africa

¹ (1994) 15 ILJ 610 LAC

APPEARANCES

For the Applicant: Ms Van Staden of the Justice Centre

For the Third Respondent: Advocate Partington

Instructed by: Chris Baker

LABOUR COURT