OF INTEREST

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO: P 805/01

DATE OF HEARING: 21/08/2002

DATE OF JUDGMENT: 21/08/2002

In the matter between	
AKHONA NTLOKO	Applicant
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	First Respondent
TELKOM SA	Second Respondent
VUYANI KLAAS N O	Third Respondent
D WILLIAMS	Fourth Respondent

J U D G M E N T

PILLAY, J

[1] This is an application to review and set aside the decision of the first respondent commissioner who refused to condone a late referral of a dispute for a conciliation.

[2] The pleadings before me run into about a 155 pages and lengthy heads of argument were submitted on almost every possible point that could have been taken.

[3] This matter was set down for hearing yesterday. The representatives attended court but there was no electricity. The Court used the opportunity to point out certain difficulties it had with the applicant's case and raised at least three issues which it asked Gqamana, who appeared for the applicant, to consider. The court encouraged Mr Gqamana and Mr Ngaga, who appeared for Telkom, the second respondent, to explore the possibilities of settling the matter. The settlement negotiations failed and hence this matter is before me today. The matter is opposed on almost every issue that was pleaded and raised in the heads of argument, with further argument being prepared on the issue of costs. It became clear as the court questioned Mr Gqamana about all the issues that it had raised with him the day before, that there was no possible defence that the applicant could raise on the prospects of success on the merits. This concession was made only today despite the fact that it was raised yesterday with Mr Gqamana.

[4] The concession arises because the applicant made two statements, one to the police the other to his employers. The statement to the police, he alleged, was made under duress. Mr Gqamana was asked to consider yesterday whether he, as an officer of the court, could seriously suggest that that statement was made under duress. This morning, after much prodding, he conceded that that conclusion could not reasonably be made, but that those were his instructions.

[5] He was given time to consider and compare both statements

and, following that, he conceded that there is a common thread between

both statements, namely an admission that the applicant had made an illegal connection of a telephone for which he was illegally rewarded by a member of the public which was indisputable on his own version.

[6] That led to the concession that, on the substance, the prospects of success at arbitration were non-existent. Then Mr Gqamana submitted that there were prospects of success on procedure. I indicated to Mr Gqamana that for the sake of argument if one were to accept that there were prospects of success on procedural grounds, could he, on any basis, submit that an arbitrator would reasonably exercise his or her discretion to award compensation in the circumstances. The circumstances that I referred to were that the applicant had defrauded a public entity and took money from a member of the public. No commissioner, in my view, could reasonably award compensation in those circumstances. That concession was also made eventually during the hearing today.

[7] The next issue then was the question of costs. Mr Gqamana submitted that there should be no order of costs against the applicant's attorney and that he should instead be barred from obtaining any remuneration from the applicant for this case. His further submission was that it would not be permissible for thecourt to make any order of costs against the applicant and the attorney jointly and severally upon a reading of section 162 of the

Labour Relations Act No.66 of 1995 (“LRA”) and the relevant authorities. I disagreed with these submissions.

[8] Inasmuch as the applicant failed in this review and the usual consequence of that is that he should pay the costs, as a member of the public and the user of professional services, he is entitled to some protection from the court against those who profess to provide those services efficiently. As this court is the body that ensures fairness to litigants, it must do so with due regard to the interests of both parties. In this case the court observes that at least in three respects the applicant’s attorney misled the applicant or conducted himself without due diligence or regard for his duties as an attorney.

[9] The first indication of this is in the order prayed. The applicant seeks an order reinstating him to his previous employment with Telkom. That is not relief competent in an application to review a ruling. An attorney exercising reasonable care ought to have known that.

[10] The second is that the applicant repeats at several places in the pleadings that he is not a lawyer but a lay-person and therefore was dependent on the advice of his attorney. There are submissions, it was conceded, that could only have emanated from

the attorney, not from the applicant. The attorney's advice and opinion does not manifest the degree of care that can reasonably be expected of a professional.

[11] Thirdly, the attorney made several typographical errors which he attempted to correct by filing a notice of amendment. I accept without hesitation that English may not be his first language. However, if he wanted to correct the papers, then he should have done so at his own cost and his own convenience, not at the inconvenience of the court, the other side or the applicant. What he should have done was to have filed amended pages so that the court did not waste its time going through all the amendments to effect the corrections. The papers, to say the least, were very difficult to read in parts because the grammar was hard to follow. I do not hold that against the attorney. However, the fact that he failed to complete the corrections, is the reason for this reproach.

Those are at least the three grounds on which the attorney per se is responsible for the poor state of this case.

[12] The applicant himself is also not free of blame for it is he who

believed that he had an arguable case. It is he who knew whether

he had committed a wrong or not. It is he who made two statements which contradicted each other, one of which, he had falsely submitted, was made under duress. There may be other

reasons for holding the applicant responsible for the state of these papers and the allegations made. He therefore cannot escape liability himself

for the outcome of this decision.

[13] Insofar as this court has authority to make an order of costs de bonis propriis, jointly and severally against the applicant and his attorneys, the relevant provisions of the Act provide as follows in section 162 of the LRA:

> "1. The Labour Court may make an order for the payment of costs according to the requirements of law and fairness."
>
> .....
>
> 3. The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the court."

[14] In CHEMICAL WORKERS INDUSTRIAL UNION & ANOTHER v RYAN & OTHERS, an unreported case, Labour Court Case No. D335/99, which is cited in Practice in the Labour Court by Landman and Van Niekerk, this court held that attorneys may be held jointly liable for the other party's costs of opposing an application. As a matter of logic and interpretation of provisions of section 162(3), if an order for costs can be made against a party or a person who represented that party, there appears to be no reason why such an order

cannot be made against both a party and their representative jointly and severally.

[15] In those circumstances, the order I make is as follows:

1. The application for review is dismissed.
2. The applicant's attorney is denied all his costs otherwise payable by his client.
3. The applicant's attorney is ordered to refund any such costs received to the applicant forthwith.
4. The applicant and his attorney are each ordered to pay 50% of the respondent's taxed or agreed costs.
5. Neither party may claim any costs for the proceedings of 20 August 2002 when there was no electricity in court.

D PILLAY

JUDGE OF THE LABOUR COURT

REPRESENTATIVES

For the Applicant : Advocate N.W. Gqamana

Instructed by : Sipho Ntloko and Co.

For the Second Respondent: Solomon Ngaga

(Labour Relations Officer of Telkom)