

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG  
JR1785/2001

CASE NO:

In the matter between:

ADVOCATE LEGODI JOSIAS BOALE  
Applicant

and

NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA

First  
Respondent

MR LUPHONDO  
Respondent

Second

MR K R MATHENJWA  
Respondent

Third

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JUDGMENT

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FRANCIS J

1. The applicant, who is employed as a prosecutor, was charged by the first respondent with ten acts of misconduct. He is currently on suspension on full pay. He appeared at an internal disciplinary hearing and at the end of the first respondent's case, applied for an acquittal in terms of section 174 of the Criminal Procedure Act 51 of 1977. The application was refused by the second respondent. On 22 November 2001, the applicant brought an application to review and set aside the second respondent's decision in refusing to acquit him.

1. On 18 January 2002, the first respondent filed a record of the proceedings which consisted of 38 audio cassettes in terms of Rules 7A(2)(B) and 7A(3) of the Rules of this Court ("the Rules").

1. On 30 May 2002, the first respondent brought an application in terms of Rule 11 of the Rules for an order to dismiss the review application *alternatively* for an order to direct the applicant to comply with Rule 7A(5), Rule 7A(6) and Rule 7A(7) of the Rules. On 13 June 2002, the applicant served and filed a portion of what he deemed to be the relevant portion of the record of the disciplinary proceedings. The remaining nineteen audio cassettes were not transcribed.

1. The application to dismiss the review application was set down for a hearing on 24 June 2003. Mr Donald Graham appeared for the applicant. I raised with Mr Graham at the commencement of the proceedings, the applicant's failure to file the entire transcript of the disciplinary proceedings. Mr Graham conceded that the entire transcript of the disciplinary proceedings was not filed and could

provide no explanation why it was not filed. It was at that stage that the applicant terminated the mandate of his counsel and attorney and proceeded to represent himself. He applied for a postponement which application was opposed. He stated that the counsel who he wanted to represent him was not available and that he had instructed Mr Graham to represent him. I reserved judgment and postponed the matter to 23 July 2003 to enable the parties to attempt to resolve the dispute. These attempts have failed.

1. It is trite that there is a duty on an applicant to provide a review court with a full transcript of the proceedings that he wishes to have reviewed. The applicant has failed to provide this court with a full transcript of the proceedings that he wishes to have reviewed. Where an applicant fails to provide a full transcript of the proceedings, the review application must be dismissed. The only exceptions would be where the tape cassettes are missing or where the parties are unable to reconstruct the record. Where an applicant is furnished with all the audio cassettes and fails to transcribe the audio cassettes, this court must follow only one route which is to dismiss the application.

1. The applicant has not provided any reasonable explanation why the entire transcript of the disciplinary proceedings was not filed with this Court. In terminating the mandate of his counsel, the applicant has used one of the oldest tricks used by parties to attempt to obtain a postponement. I believe that the

applicant terminated his counsel's mandate as a ploy to get a postponement and to give him more time to have the audio cassettes transcribed and filed with the court. The applicant should have done so as early as 18 January 2002 when he was informed by the first respondent that the audio cassettes were available. The applicant, who is a prosecutor and who informed this court that he has now been appointed as a magistrate, knew that the writing was on the wall when Mr Graham could give no explanation why the entire transcript of proceedings was not filed with this court and decided to terminate the counsel's mandate. The application for a postponement is needless to say opportunistic.

1. The applicant contended that the counsel that he wanted was not available on the date of the hearing of this matter. This in itself is not a ground for a postponement. I believe that even if the counsel that the applicant had wanted to use was available, he would not have been of any assistance to the applicant. The applicant was required to make available the record of the transcript of the proceedings which he did not do. It is of no assistance to the applicant to hide behind his attorneys or to put the blame on them for failing to make the transcript available.

1. I do not believe that it will be in the interest of justice or fairness or equity to grant the applicant a postponement. One of the primary objects of the Labour Relations Act 66 of 1995 is to resolve disputes effective and speedily. This

matter has a long history. The applicant is currently on suspension on full pay. He is paid a salary of R122 721,00 per annum. On 18 June 2001, the applicant was served with a charge sheet in which he was charged with ten counts of misconduct. The disciplinary hearing commenced on 2 July 2001 before the second respondent. The first respondent closed its case against the applicant on 21 November 2001. The applicant made an application before the second respondent for a discharge in terms of section 174 of the Criminal Procedure Act alternatively absolution from the instance. The application was refused by the second respondent on 21 November 2001. On 22 November 2001 the applicant brought the review application. The disciplinary hearing was postponed on 15 January 2002 pending the outcome of the review application. It is clear from the facts that the applicant has sought deliberately to delay and protract the proceedings of the disciplinary hearing against him and deliberately failed to comply with the provisions of Rule 7A. These actions are indeed working to the applicant's advantage in that he continues to be on suspension on full pay. He is receiving a salary every month without rendering any service to his employer. The South African taxpayer is suffering.

1. I am bound by the decision of *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & Others* [2001] 3 BLLR 300 LAC. The LAC dismissed the review application on the grounds that the applicant had failed to transcribe the tapes. These tapes were made available to the applicant in that case who did not transcribe it. The *Lifecare Special Health Services (Pty) Ltd t/a Ekhuhlangeni Care Centre v CCMA & Others* [2003] 5 BLLR 416 (LAC) case deals with a reconstruction of a record. The Labour Appeal Court allowed an appeal and granted a

postponement to enable the applicant to conduct an investigation and to file a reconstructed record of the arbitration proceedings. The present facts are different from those of *Lifecare Special Health Services* since the applicant in the present case was provided with the audio cassettes.

1. The applicant was represented by an attorney who is knowledgeable in labour matters. He has not filed the entire record of the proceedings. No proper explanation was given why he has since 18 January 2002 not filed the entire record of proceedings. The review application stands to be dismissed.

1. I am also of the view that the prospects of success in the review application are extremely remote. I have some grave doubts whether the second respondent's decision is reviewable.

1. There is no reason why costs should not follow the result.

1. In the circumstances I make the following order:

1. The application for a postponement is refused.

1. The review application is dismissed.

1. The applicant to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : IN PERSON

FOR THE RESPONDENTS : ADVOCATE BUIRSKI INSTRUCTED BY  
STATE ATTORNEY

DATE OF HEARING : 24 JUNE 2003

DATE OF JUDGMENT : 23 JULY 2003