**IN THE LABOUR COURT OF SOUTH AFRICA**
**HELD AT JOHANNESBURG**

**Case no:JR696/07**

**In the matter between:**

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| **MOMCILO RADOVANOVIC** | **Applicant** |
| **AND** | |
| **METAL AND ENGENEERING** | |
| **BARGAINING COUNCIL** | **1st Respondent** |
| **DAVID LEVY N.O** | **2nd Respondents** |
| **ALFRED TEVES BRAKE SYSTEMS** | |
| **(PTY) LTD** | **3rd Respondent** |

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**JUDGMENT**

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**Molahlehi J**

**Introduction**

[1] This is an application for leave to appeal to the Labour Appeal Court against the order made by this Court on the 22nd November 2007. In terms of that order this Court dismissed the review application of the applicant.

**Background facts**

[2] The applicant was prior to his dismissal employed by the respondent as a designer draftsman. One of his responsibilities was to conceptualise and design a production line for the manufacturing of brake callipers for the BMW cars.

[3] The applicant was dismissed by the respondent for poor work performance. The essence of the issue of poor performance arose from the task given to the applicant to separate the production lines for both the back and front calliper breaks of the BMW cars. Apparently because of the specifications by BMW there was a delay in the separation of the production lines which was supposed to have been completed by March 2005.

[4] According the respondent despite the promise by the applicant to deliver the line by June 2006 he failed to do so, and a decision was then taken to abandon the project which at that stage had cost the applicant R2.5 million.

[5] The applicant testified during the arbitration hearing that he was tasked to design and produce drawings which were to be used to manufacture a machine to produce the break callipers. He designed and produced the drawings but it turned out later that the parts of the machine had many faults which required regular repairs. The pallets were for instance incorrectly sized.

[6] The applicant contended during the arbitration hearing that he was dismissed for loss of production which had not yet started and therefore the reason for his dismissal was invalid. He further contended that the reason for his dismissal was to avoid having to pay his commission for work he had already completed.

**Grounds for review and the arbitration award**

[7] The commissioner found in his arbitration award that it was common cause that the production line had failed to live to its expectations and that the applicant was not blameless for these results. He further found that the evidence before him indicated that there were problems experienced on the manufacturing side but this had little to do with the applicant. In this regard the commissioner further found that the failure of the assembly line could not be attributed to the applicant alone and therefore the dismissal was unfair because the disciplinary proceedings were inconsistently applied in that only the applicant was charged for the poor results.

[8] Because the applicant had indicated that he did not wish to be reinstated, the commissioner in the light of his findings considered compensation in terms of section 194 of the Labour Relations Act 66 of 1995 (the Act). In this respect the commissioner took into account in compensating the applicant in the amount of R35 000,00, *"the likely role of the applicant in the matter that gave rise to the dispute as well as the his relative short period of his employment"* with the respondent. The compensation award was equivalent to one month's remuneration.

[9] The grounds of review as set out in the applicant's founding affidavit were as follows:

"*Commissioner Mr DG Levy awarded unfair dismissal and compensation in the amount of one month's remuneration package, explaining that I worked short time in the company.*

*I worked in the company 21 months, but I resigned in the previous company HUBCO Forgings, because of the great promises in the Alfred Teves Brakes systems. Unfortunately, I was unfair (sic) dismissed and for all the years of my honest work in other companies (that must be taken into consideration). I have got one salarie (sic)."*

[10] The applicant also complained that the commissioner criticised him when he challenged the questions which were being asked by the respondent. These are the questions he regarded as being "stupid". The applicant further complained that the commissioner failed to take into account that the real reason for his dismissal was because the respondent was avoiding having to pay him his 10% savings incentive.

[11] The respondent raised two points in limine during these proceedings. The one point related to the late filing of the review application by the applicant and the other one to the failure to deliver a proper record upon which the Court could consider the review.

[12] It is common cause that the arbitration award was faxed to both parties on the 8th January 2007 and therefore the 6 (six) weeks for filing the review application in terms of section 145 of the Labour Relations Act 66 of 1995 would have expired on the 19th February 2007. The applicant

filed his application on the 23rd March 2007 a delay of about 4 (four) weeks without applying for condonation for this delay.

[13] It is trite that condonation for the late filing of a review application can be granted on good cause shown for failure to comply with the prescribed time frame. In the present instance, the applicant failed to apply for condonation despite it being brought to his attention by the respondent that he needed to do so.

[14] In *Allround Tooling (Pty) Ltd v NUMSA (1998 ) 8 BLLR 847 (LAC)* the Court held that a litigant is obliged to apply for condonation for failing to comply with the time frames as required by the law as soon as he or she becomes aware of the delay.

[15] Therefore the applicant's application stand to be dismissed on the ground that the Court does not have jurisdiction to consider the application because it is outside the 6 (six) weeks period provided for in section 145 of the Act and the applicant has resolved not to apply for condonation for the lateness of his application.

[16] As concerning the inadequate record of the arbitration proceedings, it is clear from the record that there are certain portions of the transcription which is missing. It is also apparent that there is a substantial part of the transcription that is inaudible. The applicant was informed about this problem but chose to ignore it.

[17] In terms of rule 7A (6) of the Rules of this Court, the duty to ensure that a proper record is placed before the Court for purposes of review rests with

the applicant. The reason for a proper record is to assist the Court in determining in a fair manner the issues which were before the commissioner during the arbitration proceedings including the assessment of the reasonableness of the conclusion reached in the award.

[18] In dealing with the issue of the missing part of the record the Labour Appeal Court, in the case of *Papane v Van Aarde N.O &Others 2007 JOL 20412(LAC),* confirmed its decision in *Lifecare Special Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commissioner for Conciliation Mediation & Arbitration & others (2003) 24 ILJ 931 (LAC),* and per Kruger AJA said:

> *"In the ordinary course the appellant should first have endeavoured to establish, by way of further investigation and affidavits, whether or not the missing part was irretrievably lost. If not, then the parties and the commissioner should have endeavoured to reconstruct the missing part.*

[19] In the *Papane's* case (supra), on the facts the Court found that the appellant failed to initiate any step towards the reconstruction of the missing part of the record and to this extend the Court held that, the court a quo should have declined to hear the matter on its merit and should have either dismissed the application or struck it off the roll.

[20] It is therefore my view that the applicant has failed to place before this Court a complete record to enable the Court to assess and evaluate the reasonableness of the conclusion reached by the commissioner. In the

absence of an explanation as to why the applicant has failed to place before this Court a proper record and or what steps he took to address the problem of the defective record, the review application stands to be dismissed on that ground alone. .

[21] The other ground upon which the applicant's application stand to be dismissed, is on basis that he has failed to make out a case justifying interference with the arbitration award of the commissioner. The test to apply in this regard is the reasonable decision-maker test as enunciated in *Sidumo & Another v Rustenburg Platinum Mines (Pty) Limited & Others (2007) 12 BLLR 1097 (CC)*. The enquiry to be conducted in the application of the reasonable decision-maker test is that of determining whether the decision of the commissioner is one which a reasonable decision maker could not reach.

[22] In the present instance the decision reached by the commissioner to award the applicant compensation equivalent to a month's salary cannot, in my view, be said to be one which a reasonable decision-maker could not reach. The conclusion of the commission is reasonable because the reading of the arbitration award reveals very clearly that the commissioner appreciated the task he was confronted with and properly applied his mind as to the appropriate relief. His conclusion is supported by his reasoning which cannot be faulted for unreasonable. He arrived at the conclusion after analysing the evidence before him and evaluating what the appropriate sanction would be, in the circumstances of this case.

[23] It was on the basis of the above reasons that the review application of the applicant was dismissed.

**Leave to appeal**

[24] The applicant set out his grounds for leave to appeal as follows:

> *"I am asking the honourable court to consider my case very seriously. WHY? I must say that I did not see democracy or justice from the Labour Court, in my case. It looks to me that the justice system is designed to protect the companies and employers but not employees.*
>
> *In my case the Labour Court's judge Mr Molahlehi accepted the lies as a truth and this way helped the company to steal my money for the savings that I made (incentive) as well as to avoid the payment of contribution for the big damage they made to me and my family by unfair dismissal."*

[25] The other complaints of the applicant are set out in his application for leave to appeal which I do not deem necessary to repeat herein.

**Applicable principles- leave to appeal**

[26] In terms of s166(1) of the Act a party whishing to appeal to the Labour Appeal Court against a judgment of the Labour Court has to obtain leave to do so from the Labour Court. The test to apply when considering whether or not to grant leave to appeal is whether there is a reasonable prospect that another Court may come to a different conclusion to that of the Labour Court.

[27] I have carefully considered the purported grounds for leave to appeal as set out in the applicant's application for leave to appeal. I have also considered the above reasons for dismissing the review application of the applicant including the submissions made by both parties. I am not persuaded that another Court may come to a different conclusion to the one reached by me in this judgment.

[28] In the circumstances make the following order:

(i) The application for leave to appeal to the Labour Appeal Court against my decision of dismissing the review application of the applicant is dismissed.

(ii) There is no order as to costs.

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**MOLAHLEHI J**

**DATE OF HEARING** **:** 16 MAY 2008
**DATE OF JUDGMENT** **:** 10 OCTOBER 2008

**APPEARANCES**

For the Applicant : Applicant in person

For the Respondent: Mr Olivier of Brink Cohen Le Roux Inc