

**In the National Bargaining Council for the Road Freight Industry
Held at Johannesburg**

In the arbitration between:

Z. M. Tyuthwana

Applicant

and

Driver Bothers CC t/a Cargo Works

Respondent

DISMISSAL AWARD

Case Number: D1534/JHB/0000/05A

Date/s of arbitration: 15 February 2007

Date of award: 26 February 2007

Arbitrator: K. Gunase

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Details of Hearing and Representation

This matter was scheduled for arbitration on 15 February 2007 at 09h00 and the proceedings were mechanically recorded. Mr. L. Cellier represented the respondent. There was however no appearance by or on behalf of the applicant at the appointed time of 09h00, or after a half hour grace period afforded by the Council. This was the case despite notification that had been served, *via* fax, on 25 January 2007 according to the proof of service on file. At the hearing, which commenced at 09h35, Mr. Cellier sought an opportunity to address me and this was afforded to him. Furthermore I decided to hear evidence from the respondent's HR Manager, Mr. B. Jordan. This was because his personal knowledge on the respondent's efforts to contact the applicant as well as resolve the dispute had a bearing on the matter at hand.

Summary of Evidence

Mr. B. Jordan (Jordan) testified that, as the respondent's HR Manager, he was charged with this matter together with Mr. Cellier. Thus his involvement entailed him representing the respondent at conciliation, holding a pre-arbitration meeting with the applicant's attorney and compiling the minutes thereof. Jordan noted further that a few weeks prior to this hearing he received a notice of withdrawal from the applicant's representative, Motsile Attorneys (pp.5-7, Respondent's Bundle). In this regard I note that the fax imprint on the document bears the date of 'JAN.30.2007'. Consequently he contacted 'Legalwise' telephonically because this entity's details were provided on the aforesaid correspondence. After much effort in this regard Jordan spoke to one Seemane during early February 2007 in order to ascertain who was handling the applicant's case seeing that the matter had been set down. At the time Seemane advised that there was a problem in establishing contact with the applicant. However during a subsequent conversation he indicated to Jordan that the applicant would be at his office on Monday 12 February 2007. Jordan thus telephoned on the day at which point he was advised that the applicant was present. A settlement discussion ensued but the matter could not be resolved. Jordan noted further that the applicant was well aware that the matter was on the roll and that Legalwise was to revert to the respondent regarding the appointment of any new legal representative. Notwithstanding this the respondent heard nothing further from the applicant or Legalwise.

Summary of Submissions

Mr. Cellier submitted that the matter should be dismissed with costs. In this regard he noted that the respondent was present at much expense and inconvenience. In support of this contention he alluded to:

- The correspondence that the respondent received from the applicant's attorney on 30 January 2007 noting its withdrawal.
- The respondent's efforts in contacting Legalwise, as well as in trying to establish whether there was any alternative legal representative.
- The respondent's endeavours on 12 January 2007, which were aimed at resolving the matter and thereby avoiding costs.
- The fact that the applicant was aware of the set down.

Mr. Cellier submitted further that because the applicant was not amenable to the settlement proposed on 12 February 2007, the respondent had attended at this hearing ready to proceed. To this end it had secured the attendance of witnesses as well as himself as its representative. In this regard he referred to the respondent having incurred the cost of an air ticket from Durban to Johannesburg for one Mr. van Aswegen. He also noted that the respondent's managing member, Mr. M. Driver, was present. Further, there were his costs as the respondent's representative and the preparation of a comprehensive bundle that included the minutes of the disciplinary enquiry, which had to be transcribed. Accordingly Mr. Cellier submitted that the applicant's absence was wilful because neither he nor anyone from Legalwise was present at the hearing despite being aware that the matter had been set down.

Determination

Section 138(5)(a) of the Labour Relations Act No. 66 of 1995, as amended ('the Act'), regulates that if a party to the dispute fails to appear in person or to be represented at the arbitration proceedings and that party had referred the dispute, the commissioner may dismiss the matter. Having considered the facts before me both from the Council file and the evidence of Jordan I am inclined to exercise my discretion to dismiss the matter for the following reasons. Firstly the notice of set down for the hearing scheduled for 15 February 2007 was faxed to the applicant's representative of record, Motsile Attorneys, on 25 January 2007. Secondly the notice of withdrawal that the respondent referred to has apparently not been filed with the Council, as there is no record of same on file. I add that there is absolutely no indication from the document itself as to the manner of its filing (p.7), nor any proof in respect thereof. This is significant because the notice ought to have been filed at the Council, following service on the respondent, in order for it to have been properly before me so that I could take cognisance of it. Thirdly even if Motsile Attorneys had withdrawn as the applicant's representative it is noteworthy that this occurred only *after* the notice of set down was served on it, as aforesaid. I say this

because based on the facts before me the notice of withdrawal was apparently served on the respondent on 30 January 2007 i.e. some five days after Motsile Attorneys were notified of the arbitration hearing. Further if the notice had been filed with the Council this could only have occurred following service on the respondent, which it is evident, occurred on the aforementioned date. Thus the fact that the notice of set down was served on Motsile Attorneys at the time when it was done cannot be faulted. Furthermore, based on Jordan's evidence it is clear that the applicant was aware of the hearing scheduled for 15 February 2007.

I turn now to the issue of costs. Costs carry a punitive connotation. Section 138(10) of the Act specifies the basis on which costs may be awarded. Further, item 5(3)(l) of the Council's Dispute Resolution Collective Agreement also regulates the issue in this forum. In both instances it is patent that an award as to costs is discretionary. Mr. Cellier's argument for costs is not without merit. However in the instance I am cognisant that should such an order be granted it would have to be made against the applicant, Mr. Tyuthwana, who is a layperson. In this regard it is significant that should it be the case that Motsile Attorneys have withdrawn as the applicant's representative of record, there is no indication before me as to if and when the applicant was apprised hereof. Also, the reasons for the withdrawal are not readily apparent.

I note further that Jordan referred to his interaction with Seemane at Legalwise. Given his testimony it would not be unreasonable to infer that this entity was involved in appointing Motsile Attorneys as the applicant's representative. It would further appear that Seemane was made aware that the matter had been scheduled, as well as that the respondent should be apprised of the appointment of any new legal representative. Given Jordan's evidence there can be little doubt that Legal wise ought to have emphasised to the applicant the importance of attending this hearing even if Motsile Attorneys had withdrawn as his representative of record, as well as the implications should he fail to do so. Further, it may be that Legalwise has failed to discharge its responsibilities to the applicant whether by not keeping abreast of his whereabouts, appointing a new attorney or even making a concerted effort to resolve the matter in the circumstances. Whilst such actions may be worthy of censure I am mindful of the fact that Legalwise has not gone, or been on record in the instance. In light of this I reiterate that the costs order sought would have to be against the applicant himself. This, in turn, would imply that he would have to bear the brunt of conduct that may possibly be attributable to Motsile Attorneys or Legalwise and, in circumstances where there is no

indication that he appreciated the potential cost implication of his non-attendance at this hearing.

Thus for the aforesaid reasons I am disinclined to grant the respondent's petition in respect of costs.

Award

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

Thus signed at Johannesburg on this 26th day of February 2007

K. Gunase