IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: DA30/15

In the matter between:

RUMBA SAMUELS **Appellant**

and

OLD MUTUAL BANK **Respondent**

Heard: **25 August 2016**

Delivered: **25 January 2017**

Summary: Application to retrieve a file archived in terms of the Labour Court Practice Manual –Practice Manual having binding effect and its purpose is to enforce and give effect to the Labour Court Rules, the Labour Relations Act as well as case law. The Labour Court exercising discretion in considering the provisions of the practice manual on good cause shown by the party seeking the revival of the file. The overwhelming evidence showing that the appellant played an active role to file the record and that CCMA responsible for the delay by failing to file a full record resulting in the appellant filing the record in a piecemeal fashion. -Labour Court misdirecting itself in dismissing application – Appeal upheld with costs and employee granted leave to proceed with the review application.

Coram: Tlaletsi DJP; Ndlovu JA *et* Hlophe AJA

JUDGMENT

Tlaletsi DJP,

[1] The appellant is appealing against the order of the Labour Court (per Whitcher J) which dismissed her application to have her file pertaining to an application for review removed from the archives. Her file had been archived in terms of Clause 11.2.7 of the Practice Manual of the Labour Court of South Africa issued by the Judge President. The directive came into operation with effect from 2 Aril 2013.

[2] Clause 11.2.7 is part of Clause 11 dealing with case management of Motion Proceedings provided by Rule 7 and 7A of the Rules of the Labour Court. It provides that:

> '11.2.7. A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.'

[3] Clause 16 of the Practice Directive also provides for archiving files in circumstances not covered by clause 11.2.7. Clause 16.1 provides that:

> '16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:
>
> - In the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed.
>
> - In the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any

steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and

- When a party fails to comply with a direction issued by a judge within stipulated time limit'.

[4] In order for a file to be brought back to life, an interested party has to act in terms of Clause 16.2 which requires that an application, on affidavit, for the retrieval of the file on notice to all other parties to the dispute to be launched. The provisions of Rule 7 will apply to such an application. This is such application brought by the appellant in the court *a quo*. Clause 16.3 provides that:

> 'Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.'

[5] A brief background to the dispute is necessary to contextualise the issues on appeal. The appellant was employed by the respondent commercial bank as a clerk at its Durban office from 15 October 1981. She held various clerical positions over a period of 26 years. She was dismissed on allegations of misconduct on 23 May 2001. She was at the time assigned to the reception. She referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA). After failed conciliation of the dispute, the appellant referred it to arbitration.

[6] The arbitration proceedings commenced on 18 October 2007 and sat for a period of 28 days during the period 2008, 2009, 2010 and were finalised on 7 March 2011. The Arbitration award was issued on 4 April 2011. The arbitrator found that the respondent had failed to discharge the *onus* of showing that the appellant's dismissal was fair. However, in lieu of reinstatement awarded the appellant compensation equivalent to her 12 months' salary at the time of dismissal.

[7] Aggrieved by the award, the appellant instituted review proceedings on 13 May 2011 seeking *inter alia* an order that the award of compensation be reviewed and set aside and be substituted with a reinstatement order. What

happened thereafter led to her file being archived and causing her to institute the application which is the subject of this appeal.

[8] It cannot be disputed that the appellant encountered difficulties with the filing of the complete record for the review application. Her difficulties came largely from the CCMA which could not produce a complete record, causing the record to be filed piecemeal over a long period.

[9] What follows is a summary of the chronology of events that transpired from the lodging of the review application which are common cause. These facts have been extrapolated from affidavits filed by the parties as well as other documents forming part of the appeal record.

91 On 1 August 2011 the CCMA confirmed that it had dispatched the record of proceedings to the Labour Court.

9.2 On 22 August 2011 the appellant instructed the transcribers to proceed with the transcription.

9.3 On 15 November 2011 the appellant notified the Registrar of the Labour Court (Ms Bothma) that the transcript would take "approximately 3 to 4 weeks more to be completed".

9.4 On 20 April 2012 the appellant was advised that one Marcus at the CCMA was trying to locate missing tapes of the arbitration proceedings.

9.5 On 31 May 2012 the appellant delivered the first batch of the transcripts.

9.6 On 11 July 2012 the appellant addressed a letter to the respondent advising of some discrepancies in the transcripts.

9.7 On 16 and 17 July 2012 the appellant and the respondent exchanged correspondence concerning some issues relating to the exhibits.

9.8 On 17 September 2012 the appellant addressed a letter to the respondent advising that the transcription process was on-going.

9.9 On 19 April 2013 the appellant addressed a letter to the respondent updating it on the transcription process and expressing her intention to proceed with the review.

9.10 On 28 May 2013 the appellant addressed a letter to the Registrar of the Labour Court (Ms Bothma) advising that the missing portions of the record were being attended to.

9.11 On 29 May 2013 the Registrar addressed a response to the appellant in which she stated, *inter alia,* that "(the) matter has been referred to the Registrar/Judge for his/her attention... (and that) ... (we) will endeavour to respond to your enquiry within a reasonable time" – the appellant received no response.

9.12 On 12 and 16 August and 3 September 2013 respectively, the appellant addressed three letters to the CCMA's Lesley Murray enquiring about the exhibits that the CCMA had failed to furnish to the Labour Court.

9.13 On 3 September 2013 the appellant addressed a letter to the respondent concerning the exhibits and suggested *inter alia* that the respondent utilise its own set of exhibits.

9.14 On 5 September 2013 the appellant delivered a further portion of the record.

9.15 On 12 September 2013 the respondent addressed a letter to the appellant in which it stated *inter alia* that it continues "to reserve (its) rights concerning the delay in the prosecution of the matter".

9.16 On 4 April 2014 the appellant delivered a further portion of the record.

9.17 The complete record of the arbitration proceedings was delivered on 16 May 2014.

9.18 The respondent, in a letter dated 21 May 2014 and addressed to the Registrar of the Labour Court, sought a directive that the applicant complies with the Practice Directive 16.

9.19 On 30 May 2014 the appellant delivered a Rule 7A(8) notice, and a supplementary affidavit.

9.20 By way of a directive dated 30 May 2014 Shai AJ directed that the appellant complies with Practice Directive 16.

9.21 The appellant delivered her application to retrieve the file from the archives on 24 July 2014.

[10] The application to have the file retrieved from the archives was heard on 23 April 2015. On that day the Labour Court dismissed the application with no order as to costs. Written reasons for the order were only provided on 18 September 2015. However, the written reasons record that on 22 April 2015 *"[the Judge] gave brief reasons for my order primarily based on the detailed submissions of the respondent. The [appellant] requested further and written reasons"*. The transcript of the brief reasons referred to above is not part of the appeal record. We are therefore unable to consider them as they remain unknown to us.

[11] In the written reasons, the court *a quo* found no merit in the appellant's contention that the Practice Manual should not apply to her case because the manual only came into operation in April 2013 whereas her review application was filed as far back as May 2011. The court *a quo* reasoned that the manual is based on the Rules of the Labour Court as well as the principles established by case law long before the manual came into effect. Further, that even if the 60-day period only operated from April 2013, the record was still filed a year late. The Labour Court was further concerned that the dismissal occurred seven years ago and that the entire purpose of the review application was to secure reinstatement; that for the appellant to succeed with the application she was required "*to prove an exceptional explanation, exceptional prospects of success, a material injustice and no prejudice to the respondent*".

[12] The Labour Court accepted that the CCMA was partly to blame for the delay in that it failed to provide the full record on time and that the appellant had to conduct a search for the missing parts thereof. However, the Labour Court held, her legal representatives could have approached the respondent's representatives for collaboration on "*crafting an appropriate record"*. Further that there were various stages of inactivity where no steps were taken by the appellant and she has provided no real explanation for same; that this application was also brought almost two months after being directed to do so.

[13] The Labour Court was also not persuaded that the appellant had "excellent" prospects of success in the review application "*considering the strict test for setting aside an award on review; that nowhere has the appellant alleged or established that the commissioner was not permitted in law to take into account the factors he considered*"; and that:

> '*In summary, there is not much evidence of any material misdirections on the part of the commissioner that entirely distorted the outcome or that the commissioner mostly relied on "bad reasons" for making the award (to employ the phrase used by SCA in Sidumo).*
>
> *The last factor which militates against granting condonation is the respondent's right to finality. It cannot be fair that more than three years after the CCMA gave its award, the review is still being processed by applicant and thus far from finality. There must be a time limit beyond which a litigant may not be permitted to rely on excuses, even acceptable ones, and the respondent's right to finality assumes more weight'*.

[14] The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, *inter alia*, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution.

[15] The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act[1] as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore, are binding. The Labour Court's discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the court.[2]

[16] Clause 16.2 does not specifically state that in an application for the retrieval of the file, a party who brings that application must show good cause why the file must be retrieved from the archive. It however states in no uncertain terms that the provisions of Rule 7 will apply in an application brought under the Clause 16.2. Clause 11.2.7 applicable to Rule 7 and 7A applications requires that a party who applies for a file to be removed from the archive must show good cause why the file must be removed from the archive. Furthermore, an applicant who applies for a file that has been archived for failure to comply with an order by a Judge to file a pre-trial minute, to be removed from archives, has to show good cause why such a file should be removed from the archives. There is therefore no doubt that showing good cause is a requirement for a file to be removed or retrieved from the archives in terms of Clause 16.2.

[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the Court Rules, timeframes and directives. Showing good cause demands that the application be *bona fide*; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application[3], and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to

[1] Labour Relations Act 66 of 1995.
[2] See *Tadyn Trading CC t/a Tadyn* Consulting Services v Steiner and Others (2014) 35 ILJ (LC) at para 10-11*; Melikaya Lulumile Ralo v Transnet Port Terminals and Others* Case no: P136/2014 delivered on 17 June 2015; *Edcon (Pty) Ltd v CCMA and Others: In re Thulare and Others v Edcon (Pty)* Ltd (2016) 37 ILJ 434 (LC) at paras 23-24.
[3] *Van Wyk v Unitas Hospital and Another* 2008 (4) BCLR 442 (CC) at para 22; *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC) at paras 19-23; *Edcon (Pty) Ltd v CCMA* supra at para 26.

establish reasonable prospects of success. It is sufficient to set out facts which, if established would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.

[18] The respondent has not challenged the appellant's *bona fides* in bringing this application. Neither did the court *a quo* find that the application is not made *bona fide* by the appellant. I have no doubt that given the financial expense and effort put by the appellant to pursue her review application that the application for retrieval of the file from achieve is *bona fide*.

[19] The main challenge to the application is the delay of seven moths in filing copies of the exhibits and the general delay in filing the complete record for the review application. The appellant has devoted the bulk of her 33 paged founding affidavit to explain the difficulties she encountered in having the record prepared to the standard required by the Rules and directives of the Labour Court. It is evident from the chronology set out above that she did not sit back and do nothing to have a complete and proper record prepared and filed. The appellant played an active role to have the record prepared. There were exchanges of correspondence and attendances between the appellant, her attorneys of record, the CCMA and the transcribers all aimed at having a complete record produced. The fact that the appellant and her attorneys kept the respondent and the Registrar's office abreast of the difficulties she experienced and the progress made is not disputed. These exchanges evince reasonable and diligent steps taken by the appellant to prosecute her review application.

[20] The true reason for the delay in having the complete record to be produced lies squarely at the conduct of the CCMA which at times failed to respond to inquiries made by the appellant. The criticism that there were various stages of inactivity which have not been pointed out is in my view not supported by the evidence on record as well as the circumstances in which the appellant operated. In this case, the delay in filing a complete record was unavoidable.

[21] It is indeed correct that the entire delay in hearing the review application is excessive. We however know what caused the delay. It would be unfair under the circumstances to punish the appellant for the delay for which she is not to blame. The court *a quo* was correct to find that the respondent has a right to have the dispute finalised without delay. However, such a right cannot supersede the appellant's right not to be unfairly dismissed. Furthermore, the appellant is similarly entitled to have the matter finalised in a fair and just manner.

[22] With regard to prospects of success, it is not advisable at this stage to delve in detail into the merits of the review application which has not been considered by the Labour Court. As pointed out already, it is sufficient for the appellant at this stage to place facts that if established will entitle her to a successful review application. The following remarks and findings by the commissioner who arbitrated the dispute and found her not guilty of any misconduct are pivotal to the appellant's claim for reinstatement as opposed to compensation awarded by the commissioner:

- There was substantial evidence that the charges against the appellant were preferred immediately after she had lodged a grievance against Prem Naidoo (one of her managers).

- It is common cause that no shred of evidence was presented at the arbitration to support the charges.

- Although the Chairperson of the disciplinary hearing found her guilty of four out of the nine charges, he failed to come to the arbitration to substantiate his findings and his decision to dismiss the appellant.

- "Prem Naidoo, who was the "*main item from day one of the arbitration up to the conclusion of the evidence, attended the arbitration proceedings religiously and she heard all the accusations that were levelled against her by some of the [appellant's] witnesses and the [appellant] herself but she decided not to bat an eyelid. She sat so quietly like a statue*".

- No reasons were advanced for her reluctance to offer testimony or to defend herself from the "*vicious character assassination*".

- "*It is probable that Prem's failure to testify would confirm the [appellant's] perception that the charges were trumped up by Prem in order to get rid of her since they had a bad relationship*".

[23] It is for the court on review that would be in a position to adjudicate on the review application once all the necessary papers have been filed. It must be emphasised that the Practice Directive, in particular the provisions relating to archiving and retrieval are there to facilitate expeditious but fair adjudication of the disputes in the Labour Court. The manual should not be used to enable a party to gain an unfair advantage over the other. In this matter, the refusal of the application to retrieve the file from archives would mean that an employee who has served her employer for a period of 26 years, who is not guilty of any misconduct, and elected to exercise her constitutional rights to fair labour practise is dismissed at will through trumped up charges by her senior manager. That would indeed be a wrong message to send.

[24] We were referred to the decision of this Court in *Tshongweni v Ekurhuleni Metropolitan Municipality*[4] in support of the contention that the appellant's review application is a disguised claim for damages since it would not be possible for her to tender her services if reinstated due to the fact that she would have reached her retirement age. The retirement age is disputed by the appellant. It would be speculative and improper to pronounce on these issues at this stage and they should be left to the review court when all papers have been filed should the matter reach that stage. Furthermore, the court hearing the review application would be at large to determine the relief afresh given the circumstances of the appellant's case.

[25] For the above reasons, I am satisfied that the court *a quo* misdirected itself in its reasons in support of the dismissal of the application to retrieve the file from archive. It would in addition be in the interest of justice and fairness that the non-compliance be condoned. The appeal should therefore succeed. Both

[4] (2012) 33 ILJ 2847 (LAC).

parties contended that costs should follow the result. I agree that it would be in accordance with the requirements of the law and fairness that costs follow the result.

[26] In the result, the following orders are made:

a) The appeal is upheld with costs;

b) The order of the Labour Court is set aside and substituted with the following:

'1. The applicant is granted leave to proceed with the review application

2. The respondent is to pay costs.'

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Tlaletsi DJP

Ndlovu JA et Hlophe AJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

For the Appellant: T E Seery

Instructed by: Jay Reddy Attorneys

For the Respondent: C B Edy

Instructed by: Bowman Gilfillan inc.