IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA81/19

In the matter between:

SAMWU obo K SHONGWE & 45 Others **Appellant**

and

COMMISSIONER L MOLOI N.O. **First Respondent**

CCMA **Second Respondent**

CITY OF JOHANNESBURG **Third Respondent**

Heard (via Zoom): 19 November and 7 December 2020

Delivered: Deemed to be the date on which the judgment is e-mailed to the parties.

CORAM: Phatshoane ADJP, Coppin JA *et* Kathree-Setiloane AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against an order of the Labour Court (Lagrange J), with the leave of that court, dismissing both, an application for condonation of the late filing of a notice in terms of (Labour Court) Rule 7A(8)*(b)* and the related application to review a jurisdictional ruling of the first respondent, acting under

the auspices of the second respondent, and made in favour of the third respondent.

[2] The third respondent is the only party opposing the appeal. A cross-appeal noted by it, and in respect of which it has also filed an application for the condonation of its lateness, was expressly abandoned by counsel on its behalf at the hearing on 7 December 2020 and was not proceeded with.

Background

[3] The appellant union, SAMWU, acting on behalf of its members, Mrs. K Shongwe and 45 others, employed or formerly employed in the Johannesburg Metropolitan Police Department of the third respondent("JMPD") and then assigned to its Corporate and Shared Services Department, and the third respondent are in dispute about whether the said individual members are entitled to payment in terms of a collective agreement concluded between the appellant union and the third respondent on 28 June 2008 in respect of minimum salaries payable to Metro police officers ("the settlement agreement"). The third respondent has denied that the settlement agreement applies to Mrs K Shongwe and the 45 others.

[4] On 17 July 2013, the appellant referred the dispute, concerning the interpretation and application of the settlement agreement, to the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The referral form is dated 28 June 2013.

[5] Following an unsuccessful conciliation, on 2 August 2013, the dispute was referred for arbitration that was to commence on 4 February 2014 and to be presided over by the first respondent. At the arbitration, the third respondent raised a technical point at the outset to the effect that the claims of the individual employees (presumably arising from the settlement agreement) had prescribed and that the arbitrator, consequently, did not have jurisdiction to entertain the matter.

[6] On 6 February 2014, the arbitrator handed down a written jurisdictional ruling upholding the point ('the ruling"). In the ruling, the arbitrator describes the

issue that had to be determined as one which required him to "establish whether the claim had prescribed in terms of the Prescription Act and if so, whether the CCMA has jurisdiction to hear the matter". The arbitrator ruled, in particular, the following: (a) Even if he were to rule that the employees in question were employed by the JMPD, as conceded by the third respondent's representative, the claim had prescribed and the CCMA lacked jurisdiction to deal with the application of the settlement agreement "as per section 15 of the Prescription Act"; and (b) that the application was dismissed.

[7] Unaccepting of that ruling, the appellant launched proceedings in the Labour Court on 25 March 2014 to review and set it aside. The third respondent opposed that application.

[8] According to the appellant, the CCMA delivered the record of the arbitration proceedings, subsequently found to be defective, to the Registrar of the Labour Court on 2 April 2014. After the Registrar had notified the appellant's erstwhile attorneys (CHSM attorneys, Mr Sicelo Mngomezulu) that the record had been filed, those attorneys had communicated with the third respondent by letter dated 30 May 2014 informing it, *inter alia*, that the record was defective in that the compact disc (CD) that had been filed was empty, and had requested an indulgence to afford the CCMA a further opportunity to release complete records. The third respondent replied by letter dated 17 June 2014, *inter alia*, urging that the review application be expedited.

[9] During June 2014, the appellant terminated the mandate of their former attorneys and engaged new attorneys (Maenetja Attorneys) who requested the previous attorneys to hand over the appellant's files by July 2014. The former attorneys advised that the hand over could only occur upon settlement of their account.

[10] According to the appellant, the account was settled on 15 July 2014. The new attorneys (particularly, Mr Happy Magoma) then arranged a consultation with counsel for 18 July 2014.

[11] On 22 July 2014, allegedly acting on counsel's advice, the appellant, now assisted by new attorneys (Maenetja Attorneys) caused a letter of demand to

be served on the third respondent in which payment of monies was claimed, alleged to be owing to its members in terms of the settlement agreement and totalling more than R22 million.

[12] On 28 August 2014, supposedly in pursuit of that demand, the appellant filed a statement of claim in the Labour Court in which those monies were claimed from the third respondent.

[13] The third respondent defended the claim and successfully raised a plea of *lis alibi pendens*, resulting in the claim being dismissed by the Labour Court on that basis on 22 February 2016. An application for leave to appeal against that dismissal was refused on 11 August 2016.

[14] Shortly thereafter the appellant filed the record of the CCMA arbitration in the review proceedings that it had instituted earlier. The third respondent, in response, filed an application in terms of rule 11 of the Labour Court Rules in which it sought dismissal of the review application because of the delay in its prosecution. The appellant opposed that application and filed answering papers.

[15] As the review application the appellant had brought was late, and because the record and supplementary affidavit, and particularly the notice in terms of rule 7A(8)(b) of the Labour Court's Rules, had also been filed late, the appellant also brought an application(s) for condonation of the same.

Hearing in the court a quo

[16] The condonation applications, i.e., for the late bringing of the review, and for the late filing of the rule 7A(8)*(b)* notice, the rule 11 application, the application to dismiss it, and the appellant's review application were set down to be heard and disposed of by the Labour Court in the same sitting.

[17] In respect of the condonation for the late filing of the review, the Labour Court concluded the following: the ruling of the arbitrator was issued on 6 February 2014, but was only received by the appellant on 10 February 2014; the review application, which was launched on 26 March 2014, was only two days late;

the delay of two days was trivial and the late filing of the review ought to be condoned.

[18] The Labour Court reasoned that the rule 11 application for the dismissal of the review application and the second condonation application (i.e. essentially to condone the delay in the prosecution of the review) were "inextricably linked". Having considered the chronology of events, the Labour Court concluded that the record had been filed about seven months beyond the 60-day deadline and the rule 7A(8)*(b)* notice was served "four times later than it should have been ". The Labour Court regarded this as "extremely late".

[19] Taking into account that the appellant had also delayed in filing the condonation application; that the appellant did not pursue the review application in the time pending the outcome of the enforcement application (i.e. the claim for the actual payment of monies); and that "it is only when their hopes were dashed by the outcome of that application that they took steps to review the application", the Labour Court concluded that "ordinarily" it would have been "inclined to dismiss the review application with costs in view of the extraordinarily lackadaisical approach to the delay and the length of time taken to pursue the review application".

[20] Notwithstanding that remark, and significantly, the Labour Court, with reference to the ruling of the arbitrator, concluded: "However, the effects of leaving a manifestly wrong ruling intact, in my view, outweigh these considerations." The Labour Court then proceeded to consider the merits of the appellant's review application.

[21] As the Labour Court correctly stated, the test on review of such a jurisdictional ruling is not reasonableness, but whether it is correct in light of the objective facts[1]. In that regard, the Labour Court held the following:

> '[42] Although the applicants cast the dispute as an interpretation dispute, interpreting who is covered by the agreement obviously has implications for invoking it. The applicants sought a determination that the settlement

[1] See, inter alia, *Zeuna-Starker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC) para 6; *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and others* [2015] 9 BLLR 894 (LAC) para 20.

agreement applied to the individual applicants in question. They carefully cast the dispute in the narrowest terms. The municipality conceded that the agreement did cover the individuals in question, albeit for the purpose of hoping to get rid of the dispute by relying on prescription. In terms of the narrow dispute that was before the arbitrator, the concession should have resolved the dispute. Indeed, the arbitrator partly recognised this when he correctly noted that the municipalities concession rendered the interpretation question moot.

[43] However, because the concession was made in the context of simultaneously raising the prescription plea, the arbitrator was enticed to entertain the prescription issue. By following the municipalities lead, the arbitrator misdirected his inquiry by believing he was then required to deal with the issue of application. Though the practical implications of the applicants succeeding with the review are doubtful because the prescription issue would still arise either in relation to the life of the agreement itself or the periods for which any remuneration might have been claimed by the individual applicants, the applicant ought to have succeeded in the arbitration.'

[22] Thus, until that point the Labour Court had decided to deal with the merits of the review despite the delays, and in fact had dealt with the merits and had concluded that the review ought to succeed.

[23] Paradoxically though, as appears from the succeeding paragraphs of the judgment, and without any explanation, the Labour Court reached a second, contrary, conclusion. It refused to condone the delay and dismissed the review application. Paragraph 44 of the judgment states:

'Although the merits of the review appear strong albeit on the narrow issue to be decided I am of the view that the dilatory prosecution of the review cannot be condoned'.

and further paragraph 45 states:

'… This is not the case where the merits of the case can outweigh the indifferent attitude with which they approached the matter.'

[24] Having concluded that the appellant (i.e. the union, SAMWU, and the 46 employees) should be mulcted with the costs, the Labour Court then went on to make the (impugned) order: (a) condoning the late bringing of the review application by the appellant; (b) dismissing the application to condone the filing of the rule 7A(8)(b) notice and, consequently, the review application; and (c) ordering the appellant union and employees to jointly and severally pay the third respondent's costs of opposing the review application, as well as the costs of the two condonation applications.

On Appeal

[25] Even though the Labour Court's rationale for eventually dismissing the review application was essentially because of the delay in prosecuting it, it did not refer to this Court's decision in *City of Johannesburg Metropolitan Municipality and others v Independent Municipal and Allied Workers Union and others*[2] *["IMATU")*, which deals with the approach to the issue of delay in the prosecution of reviews under the Labour Relations Act 66 of 1995 (LRA). Similarly, no reference was made to the decision in the heads of argument filed by the respective parties in this appeal. They seem to have been unaware of the decision all along and also not to have made the Labour Court aware of it. This was pointed out to the participating parties on the first hearing date. In compliance with a request from this Court, the parties filed supplementary heads of argument, addressing the issue of the delay in the prosecution of the review, in light of that decision.

[26] In *IMATU,* this Court held in respect of the delay in the prosecution of a review brought in terms of the LRA, essentially, that the Labour Court has the discretionary power to dismiss a review for that reason, but it was a power that had to be exercised with circumspection and in exceptional circumstances, because of a litigant's rights in terms of section 34 of the Constitution[3] to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. It was held further there, that in the exercise of that discretion, the delay must not be considered in a

[2] [2017] ZALAC 43; (2017) 38 ILJ 2695 (LAC) (28 June 2017).
[3] The Constitution of the Republic of South Africa, 1996.

vacuum, but must be evaluated in light of all the relevant facts, including the prejudice to the parties, the possible consequences of granting, or of not granting the relief sought in respect of the merits, and the prospects of success, although there is no closed list. This Court also held that, ultimately, the interests of justice were paramount.

[27] It is apparent that in dealing with this matter, the Labour Court was not aware of the *IMATU* decision and, consequently, did not apply it, even though the Labour Court concluded (initially), seemingly consistent with aspects of that decision, that notwithstanding the delay, the wrong ruling could not be left to stand, and then went on to consider and decide the merits of the review. However, the Labour Court clearly erred in then contradicting itself, as pointed out earlier, in that immediately after deciding that the review should succeed, it concluded that the review ought not to be dealt with because of the delay in its prosecution. For those reasons interference by this Court is justified. As much was conceded by counsel for the third respondent.

[28] Counsel for the third respondent however still maintained that the appeal ought to be dismissed because of the extreme delay in the filing of the 7A(8)*(b)* notice ('the notice"), and because the appellant had abandoned the review only to try and revive it again when it failed in its monetary claim. Ultimately, according to this argument, upholding the appeal, would be of no practical value because the claims of the individual employees in terms of the settlement agreement had already prescribed in terms of the Prescription Act.

[29] The appellant's counsel submitted that: (a) the Labour Court erred in not granting the condonation pertaining to the filing of the notice and in dismissing the review application; (b) the delay in the prosecution of the review was satisfactorily explained and that, in any event, it was not in the interest of justice to allow the wrong ruling of the arbitrator to stand; (c) the referral to the CCMA did not and could not prescribe; (d) the monetary claims, in respect of which the issue of prescription was raised by the third respondent, were not before the arbitrator and his ruling in respect thereof was materially irregular; (e) that as payments in terms of the settlement were to be periodic, the claims in respect thereof could not have prescribed, at once, entirely, or at all; and (f)

the Labour Court erred in initially resolving that the review had to succeed, but subsequently coming to an inconsistent conclusion, which effectively negated its initial resolution.

Discussion

[30] The Labour Court was correct in its initial resolve to deal with the merits of the review notwithstanding the delay in its prosecution. Applying the decision of this Court in *IMATU*, in terms of which all the relevant facts have to be taken into account, including the factors that have been mentioned above, it is clearly in the interest of justice that the merits of the review be dealt with, otherwise the doors of the court would effectively and unjustifiably be closed to the appellant employees.

The delay

[31] The delay in the filing of the notice was principally due to the delay in the receipt, preparation and filing of the record. In terms of the rule, the notice had to be delivered within 10 days of receipt of the record. Following the debacle where an empty CD had been submitted by the CCMA to the appellant's (then) attorneys, CHSM Attorneys, and after a delay that related to the payment of the fees of the transcribers of the record, the transcribed record had eventually been received by Maenetja Attorneys on behalf of the appellant during February 2015 and was filed in the Labour Court on 16 February 2015. The sixty-day period for the filing of the record would have expired in about August 2014. The notice was delivered to the third respondent for the first time on 14 April 2014. It was thus about 38 days late. It was again served out of precaution on 3 March 2016 when a response from the third respondent's attorneys had not been received and in circumstances where the first notice could not be located.

[32] The appellant explained that these delays had been caused by certain of the various attorneys that they had engaged over the course of this matter. The appellant was not satisfied with the services rendered by CHSM Attorneys and terminated their mandate in July 2014. Maenetja Attorneys were then appointed to act on behalf of the appellant. The attorney at Maenetja

Attorneys, who had been unsatisfactorily handling the matter, unexpectedly and without notice resigned, resulting in further prejudice of the appellant. The mandate of those attorneys had also been terminated subsequently during November 2016. Mkize Attorneys were then appointed. Difficulties also ensued each time these changes occurred resulting in a lack of communication or miscommunication and a litany of other unfortunate setbacks and delays.

[33] Even though, generally, a party is not absolved from blame where its legal representative, through negligence, or otherwise, has not complied with time periods, an exception is made, generally, in circumstances where the party has not remained passive in the face of such non-compliance and has done something about it.[4]

[34] The appellant was not supine. They took measures to ensure that the review application is heard in the Labour Court. They not only engaged the Registrar and their attorneys regularly about progress in the matter, but also terminated the services of attorneys and promptly engaged new attorneys where they were not satisfied with the services they received.

[35] The third respondent did not suffer any serious or significant prejudice as a result of the delay. At the time it raised the plea of *lis pendens* in response to the claim brought by the appellant in the Labour Court, it had no misgivings about the status of the review. It must have regarded that application as being alive and pending, hence that plea. In its application in terms of rule 11 to dismiss the review, Mr Phillip Mmampou Lebelo, on behalf of the third respondent, avers that the respondent "has already suffered prejudice" in opposing the review "as it believes that there are no proper grounds for the review application". He does not articulate what exactly that prejudice is.

[36] Contrary to what the third respondent contends regarding the merits of the review, it has valid grounds and its prospects of success are unquestionable, as is elaborated upon below. If those merits are not dealt with it would

[4] See, inter alia, *Regal v African Superslate* 1962 (3) SA 18 (A) at 23 C-H; *Saloojee & another v Minister of Community Development* 1965 (2) SA135 (A) at 141 B-H.

effectively mean that the ruling of the arbitrator is left intact and the appellant is precluded from having their interpretation/application dispute determined by the CCMA, which has its ramifications, including unresolved discontent in the workplace. The interest of justice would not be served.

The merits of the review

[37] Even though the Labour Court was correct in its (initial) conclusion that the review was to succeed, it erred in so far as its reasons for that conclusion is concerned. As pointed out earlier, according to the Labour Court, the review had to succeed because there had been a concession on behalf of the third respondent at the arbitration that the settlement agreement applied to, or covered, the (appellant) employees in question, and that the concession ought to have resolved the interpretation/application dispute.

[38] As correctly submitted by counsel for the third respondent, the record shows that the concession was only made for the purpose of arguing the prescription point and was not intended to be a concession of the main dispute, if it had to be dealt with.

[39] Given the context in which the prescription point was made, it was bad. The actual monetary claims emanating from the settlement agreement, in which according to the third respondent's point, had prescribed, were not before the arbitrator. His ruling, in effect, on an issue that was not properly before him, was materially irregular. Further, the referral, or the actual dispute before him, which related to whether the settlement agreement covered the employees in question, could not have prescribed as it is not a "debt" as contemplated in the Prescription Act, such a debt being confined only to services to be rendered, monies to be paid, or something to be delivered.[5]

[40] The CCMA clearly had jurisdiction to deal with the interpretation/application dispute on its merits and the arbitrator's conclusion to the contrary, is wrong. For those reasons, the ruling of the arbitrator cannot stand.

[5] See, inter alia, *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 92-93.

[41] The Labour Court erred in its subsequent, contradictory resolve, that condonation should not be granted in respect of the filing of the notice and that the review ought to be dismissed for the delay in its prosecution.

[42] This Court, like the Labour Court, cannot, in effect, decide the issue of prescription of claims that were not before the arbitrator (or the Labour Court) and cannot, in fairness to the parties, anticipate and determine such an issue. In any event, the third respondent has not made out a proper case of prescription of those (anticipated) claims. Since those claims relate to the payment of salaries that fell and fall due on a monthly basis, and prescription only commences to run in respect of a debt from the time the debt is due[6], it was incumbent upon the third respondent to establish when each salary in respect of each affected employee became due and when the three-year period (supposedly the period applicable to such debts) had expired. Further, and in any event, it is by no means proved that prescription would have extinguished the entire claim of each of the affected employees whom the agreement may have covered.

[43] In the circumstances, the Labour Court ought to have found that the review should succeed and ought to have referred the parties back to the CCMA for another arbitrator of that body to resolve the merits of the interpretation/application dispute that had been referred to it by the appellant.

[44] In light of the ongoing relationship between the appellant and the third respondent, and taking into account all the other facts, including the law and fairness, there should be no costs order.

[45] In the result, the following is ordered:

45.1. The appeal is upheld.

45.2. The order of the Labour Court, refusing to condone the late filing of the rule 7A(8)*(b)* notice, dismissing the review, and ordering the appellant to pay the costs of the third respondent, is set aside and is substituted with the following order:

[6] See *Makate* (above) para 188.

'1. The application brought by the City of Johannesburg in terms of rule 11(1)(b) and (4) to dismiss the review application brought by the applicant's, is dismissed;

2. The late filing of the application to condone the late bringing of the review is condoned;

3. The late filing of the rule 7A(8)(b) notice and the delay in the prosecution of the review are condoned;

4. The ruling of the arbitrator in the award dated 6 February 2014 relating to jurisdiction of the CCMA, is reviewed and set aside and is substituted with the following: 'The point *in limine* raised by the respondent, that the applicant's claim has prescribed and that the CCMA has no jurisdiction to hear the matter, is dismissed.'

5. The parties are referred back to the CCMA for the resolution before a different arbitrator of the dispute concerning the interpretation and application of the settlement agreement;

6. There is no costs order.'

_____

P Coppin

Judge of the Labour Appeal Court

Phatshoane ADJP and Kathree-Setiloane AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: LM Mkize; and

AM Mafisa

Instructed by Mkize Attorneys

FOR THE THIRD RESPONDENT: AIS Redding SC; and

XD Matyolo

Instructed by Werksmans Attorneys