



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JR2510/17

In the matter between:

ISAIAH JM MACHABA

Applicant

and

DEPARTMENT OF ROADS AND TRANSPORT

Respondent

Heard: 1 July 2019

Delivered: In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 31 July 2020.

JUDGMENT

BOSWEL, AJ

Introduction

- [1] This is an opposed application in terms of Rule 11 of the Rules for the Conduct of Proceedings in the Labour Court¹ (the Rules) in which the applicant seeks an order dismissing the respondent's application to review and set aside an arbitration award issued by the General Public Service Sectoral Bargaining Council (GPSSBC) "*for want of proper prosecution*" and for an order in terms of section 158(1)(c)² of the Labour Relations Act³ (the LRA) making the arbitration award an order of the Labour Court.
- [2] The respondent in addition seeks condonation for the late filing of the record of the arbitration proceedings in its application to review and set aside the arbitration award as contemplated in rule 7A (8)(a) of the Rules read together with sub-clause 11.2.3 of the Practice Manual of the Labour Court (the practice manual)⁴.

Background

- [3] The applicant was employed in terms of a fixed term contract by the Department of Roads and Transport as a Director from 1 July 2009. In April 2010, the applicant was transferred to the position of Director: Security Management on a fixed term contract expiring on 30 June 2014.
- [4] Prior to the expiry of the applicant's contract, the contract was extended until 30 September 2014 and thereafter for two further consecutive periods of 12 months each, the last of which expired on 30 September 2016.

¹ Rule 11 of the Rules for the Conduct of Proceedings in the Labour Court published in terms of Government Notice 1665 of 14 October 1996, as amended.

² "*The Labour Court may— (c) make any arbitration award or any settlement agreement an order of the Court.*"

³ No. 66 of 1995

⁴ Paragraph 11.2.3 of the Practice Manual of the Labour Court of South Africa dated 1 April 2013.

- [5] Prior to the expiry of the applicant's fixed term contract, he was offered, and accepted a position of Director: Roads Maintenance and Fleet Services effective from 1 April 2016.
- [6] Despite accepting the offer of employment as Director: Roads Maintenance and Fleet Services the applicant was subsequently advised that the expiry date of his fixed term contract, had been extended from 30 September 2016 to 3 December 2016, his last day of employment.
- [7] On 6 January 2017, the applicant referred an unfair dismissal dispute to the GPSSBC. On 29 August 2017, the arbitrator issued an arbitration award finding that the applicant's dismissal both procedurally and substantively unfair awarding the applicant both re-employment and compensation.
- [8] On 8 November 2017, the respondent delivered a review application in terms of section 145 of the LRA, seeking to review and set aside the arbitration award together with an application for condonation⁵ for the late filing of the review application, which was 6 days late.⁶
- [9] On 21 November 2017, the GPSSBC filed a notice of compliance in terms of rule 7A(2)(b) of the Rules notifying the parties that it had dispatched the record of proceedings to the registrar of the Labour Court.⁷ On 23 November 2017, the respondent's attorney, the State Attorney uplifted the record from the registrar in accordance with rule 7A(5) of the Rules of the Labour Court.⁸

⁵ Section 145 (1A) "*The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).*"

⁶ Section 145 (1 (a) "*Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-within six weeks of the date that the award was served on the applicant...*"

⁷Rule 7A(2)(b) "*The notice of motion must call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done.*"

⁸ "*The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.*"

- [10] I pause to note that the purpose of the manual is to promote access to justice, consistency in practice and procedure and to set guidelines on standards of conduct expected of practitioners practicing in the Labour Court. Clause 11 of the practice manual deals with applications to review and set aside arbitration awards and rulings.
- [11] Clause 11.2.1 of the manual, determines that once the registrar notifies the applicant in terms of rule 7A(5) of the Rules that the record has been received and may be uplifted, the applicant must collect it within seven days, which the respondent did on 23 November 2017.⁹
- [12] Paragraph 11.2.2 of the manual, prescribes that for the purposes of rule 7A(6) of the Rules, the records must be filed within 60 days of the date on which the respondent is advised by the registrar that the records have been received, which in this case would have been 16 February 2018.
- [13] Despite the peremptory manner in which the conduct expected in clause 11.2.2 of the practice manual is phrased, the records were, however, only filed by the respondent on 8 June 2018, making the filing thereof just short of four months after the 60-day had period expired.
- [14] On 7 June 2018, the applicant filed the instant application seeking an order dismissing the respondent's review application for "*want of proper prosecution by the Respondent*", alternatively, that the arbitration award "*be made an order of the Labour Court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995*".
- [15] Almost two weeks later, on 20 June 2018, the respondent delivered a further application seeking an order condoning the late filing of the records of the arbitration proceedings. This application is opposed.
- [16] The respondent's reason for the late filing of the record is that the review was allocated to an Assistant State Attorney, and in May 2018, it was discovered

⁹ Rule 7A(6) "*The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.*"

during a routine office inspection, that the records had not been filed within the 60-day time-limit, as the Assistant State Attorney erroneously believed that the arbitration had been recorded, and was waiting for the GPSSBC to deliver an audio recording, and as a result, did not file the records uplifted on 23 November 2017.

- [17] The respondent admits in its condonation affidavit that the explanation is unsatisfactory as “*a mere perusal of the file*” and arbitration award would have made it clear that no *viva voce* evidence was led.
- [18] The respondent also states that the delay occasioned by the State Attorney was “*through no fault of the respondent*”, and that the respondent should not be “*punished*” by not condoning the “*failure to comply*” with the Practice manual.
- [19] The applicant, however in its affidavit states that on 8 January 2018, its attorneys wrote to the State Attorney advising it that the GPSSBC had filed the arbitration records in accordance with rule 7A(3) of the Rules of the Labour Court, and enquired when the rule 7A(8) notice and the records of the arbitration proceedings could be expected.
- [20] As no response to this enquiry was received, the applicant, again on 16 January 2018, enquired from the State Attorneys when it intended to file their rule 7A(8) notice.
- [21] As a result of the fact that no response was received from the State Attorney to either of these enquiries, the applicant’s attorneys attended on the Labour Court towards the end of January 2018 to inspect the court file discovering that the arbitration records had already been uplifted on 23 November 2017.
- [22] On 20 March 2018, the applicant's attorneys once again enquired from the State Attorney what their intentions were regarding the matter, stating that the applicant was being prejudiced by the respondent's total lack of action in the matter. I pause to note that this letter was specifically addressed to the specific Assistant State Attorney dealing with the matter. This letter explicitly

notes that the records of the arbitration proceedings had been filed on 21 November 2017. The Assistant State Attorney was also expressly asked to provide the records "*as soon as possible in order for us to prepare the first respondent's answering affidavit herein.*" Once again, no reply was received to this letter.

- [23] It was only shortly after the application to dismiss the review application was launched on 7 June 2018, that the respondent filed its application seeking condonation for the late filing of the records on 20 June 2018, which appears to be motivated by the applicant's application to dismiss, without making any mention of the applicant's dismissal application.

Analysis

Filing of the record and condonation

- [24] Rules 7A(5) and (6) of the Rules provide that the applicant in a review application must make available copies of such portions of the record as may be necessary for the purposes of the review, and must furnish the registrar and each of the other parties with a copy of the record or a portion of the record, as the case may be.¹⁰ The Rules of the Labour Court must be read in conjunction with the practice manual. The manual is concerned mainly with how the Rules are to be applied in the daily functioning of the Court.¹¹

- [25] That the directives contained in the practice manual must be strictly complied with is beyond doubt as is made clear in clause 4 of the practice manual which states that "*a failure to comply with the directives contained in this manual will be viewed in a serious light, and will be addressed by an*

¹⁰ Rule 7A(5) "*The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.*" and Rule 7A(6) "*The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.*"

¹¹ Paragraph 1.2 of the Practice Manual states that "*The Practice Manual is not a substitute for the Rules of the Labour Court. It is concerned mainly with how the Rules of Court are applied in the daily functioning of the court.*"

appropriate sanction which may include an order for costs de bonis propriis against the representative who failed to comply".¹²

- [26] Both this Court and the Labour Appeal Court (LAC) have considered the status of the practice manual and have confirmed that in essence it promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practice and litigate in the Labour Court as it promotes the statutory imperative of expeditious dispute resolution. The provisions of the practice manual are therefore binding, and it is not to be adhered to or to be ignored by the parties at their convenience.
- [27] Sub-clause 11.2.3 of the manual states that if the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion, supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties and answering and replying affidavits may be filed within the time limits described by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the applicant should be afforded to file the record.
- [28] Paragraphs 11.2.1 and 11.2.2 of the manual provide time frames within which the record should be filed, and paragraph 11.2.3 sets out the steps to be followed and the consequences resulting, should the applicant fail to file the record within the prescribed period.
- [29] On a proper interpretation of paragraph 11.2.3 three possibilities exist if the record is not filed within the prescribed 60-day period from the date on which the applicant is advised by the registrar that the record has been received. Firstly, the applicant may request the respondent to consent to an extension of time, which must be done during the sixty-day time limit. Secondly, even if

¹² Paragraph 4 of Practice Manual of the Labour Court of South Africa.

consent is refused, the applicant may on notice supported by affidavit apply to the Judge President for an extension of time in terms of Rule 7 of the Rules of this Court (an application for condonation). Thirdly, if the applicant fails to obtain the respondent's or Court's consent for an extension of time, the review application is deemed to be withdrawn. In this case the respondent did not request the applicant for an extension of time. It has however applied for condonation for the late filing of the record.

[30] Although the import of paragraphs 11.2.2 and 11.2.3 is that if the applicant fails to file the record within the prescribed period, the applicant will be deemed to have withdrawn the application, steps can be taken for an extension of time to file the record; whilst paragraph 11.2.7 provides that all the necessary papers in the application must be filed within 12 months of the date of the launch of the application, and where this time-limit is not complied with, the application will be archived and regarded as lapsed.

[31] The Court in *Ralo v Transnet Port Terminals and Others*¹³ held that the plain and unambiguous wording of clause 11.2.3 of the manual is to the effect that the applicant must be regarded as having withdrawn the review application, but that the applicant could apply to reinstate the review application, together with an application for condonation for the late filing of the record. The Court then in *Ralo* proceeded to strike the matter from the roll. As already stated, the respondent has in this case applied for the condonation of the late filing of the record.

[32] Whilst taking note of what the Court stated in *Ralo* regarding striking the matter from the roll, clause 2.2 of the manual also provides that "*it must be emphasised that no judge is bound by practice directives; this manual is not intended to limit judicial discretion.*"

[33] Therefore, I, in the circumstances intend to exercise my discretion to determine the application to dismiss the review application in light of the

¹³ [2015] 12 BLLR 1239 (LC).

respondent's undue delay in prosecuting the review, and their application to condone the late filing of the record.

Condonation for the late filing of the record.

[34] The application to dismiss the review application was served on the respondent on 6 June 2018. The respondent was to have filed its answering affidavit within 10 days thereafter. It, however, was also only filed on 28 June 2018, some seven days out of time.

[35] The respondent's condonation application for the late filing of the record is opposed by the applicant on the basis that the applicant is prejudiced by the total lack of action by the State Attorney despite the various letters addressed them on 8 and 16 January 2018 and 20 March 2018 in light of the fact that the records had already been uplifted on 23 November 2017. The applicant also states that the explanation proffered by the State Attorney is highly improbable as there is no explanation as to what was done after the record was uplifted from the Labour Court.

[36] Where an applicant fails to diligently prosecute a review application, the respondent may apply for the dismissal of the application based on the Latin maxim *vigilantibus non dormientibus lex subveniunt* which means the law aids those who are vigilant and not indolent. In *Pathescope (Union) of SA Ltd v Mallinik*¹⁴, Stratford AJA said the following about the maxim:

'That a plaintiff may, in certain circumstances be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well recognised in our Courts'.

[37] The dismissal of an application is drastic remedy which will only be granted in exceptional circumstances.¹⁵

¹⁴ 1927 AD 292 at 305.

¹⁵ See: *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and others* [2007] 1 BLLR 39 LC at para 10.

- [38] In the matter of *Sishuba v National Commissioner of SAPS* Molahlehi J stated that in considering whether to grant an order barring an employer from proceeding with a review application, the focal point must be the issue of justice and fairness to both parties. The question to be answered is whether the interests of the administration of justice dictates that the employer be barred from proceeding further with the review application.¹⁶
- [39] In considering the application to dismiss I must decide two main issues which are, whether the delay was unreasonable and if it was, whether the delay should be condoned.¹⁷
- [40] In the exercising of my discretion, the following factors need to be considered: the length of the delay, the explanation for the delay, the effect of the delay on the other party, the prejudice it may suffer if the claim is not dismissed as well as the respondent's prospects of success.¹⁸

Length of the delay

- [41] The relevant notice of compliance in relation to the filing of the record was filed by GPSSBC on 21 November 2017. As stated elsewhere above the respondent was required to file a copy of the record within 60 days. It only did so on 8 June 2018, and thereafter on 11 June 2018 filed its notice in terms of Rule 7A(8). The respondent seeks condonation for the late filing of these documents.
- [42] The length of the delay is excessive, and as appears from what follows hereunder the respondent in addition seeks to lay the blame for the delay squarely at the feet of its attorneys.

Explanation for the delay

¹⁶ See: *Sishuba v National Commissioner of SAPS* [2007] 10 BLLR 988 (LC) at para 16.

¹⁷ *Colett v Commission for Conciliation, Mediation and Arbitration and others* [2014] 6 BLLR 523 (LAC) at para 31

¹⁸ See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)

- [43] The respondent's explanation for the delay in filing the record in the notice is one that concerns its attorney's negligence.
- [44] In its opposing affidavit, the respondent lays the blame for the failure to diligently prosecute the matter at the feet of the Assistant State Attorney, who was dealing with the matter. The excuse offered up by the respondent is that the Assistant State Attorney laboured under the erroneous assumption that the matter had been recorded and was waiting for the audio recording, and this was the reason that she did not file the records which were uplifted on 23 November 2017. No confirmatory affidavit by the Assistant State Attorney was attached to the opposing affidavit. The opposing affidavit also ignores the applicant's various written enquiries and fails to provide any reason why these letters went unanswered.
- [45] The Head of the Office of the State Attorney conceded that the explanation for the delay provided by the Assistant State Attorney was wholly unacceptable, as the explanation was "*unsatisfactory and constituting misconduct in that, on a mere perusal of the file, it is clear that no viva voce evidence was led at the arbitration proceedings*".¹⁹
- [46] The respondent makes no attempt in its condonation application to explain what it did to "impute" itself of the negligence of the State Attorney as an excuse for the delay. There is therefore no explanation before this Court for the failure of the respondent itself to make any effort to pursue the matter or follow-up as to progress.
- [47] The Assistant State Attorney's work was unsupervised for a lengthy period of November 2017 until May 2018, and there is no explanation offered by the respondent for its attorneys' failure to do so. There is also no evidence that the respondent made any attempt to enquire as to the progress of the matter, and simply left the matter in the hands of the attorneys who made a half-hearted attempt to explain the delay. This is not therefore a case where a

¹⁹ At p. 75 para. 24.3.8 of the respondent's opposing affidavit.

litigant should escape the results of its attorneys' lack of diligence or the insufficiency of the explanation tendered.

[48] Regarding the delay, which is substantial, the Court in *Academic and Professional Staff Association v Pretorius SC NO and others*²⁰ regarded a three-week delay in the context of a review application as excessive. This court, like the High Court, has an inherent discretion to prevent an abuse of process, to dismiss proceedings where there has been an undue delay in the prosecution of a case. There is a long-standing rule that courts have the power to refuse a review application if the aggrieved party has been guilty of an unreasonable delay.²¹ If an applicant party has unduly delayed prosecuting the review application and has failed to provide acceptable reasons for the delay, the ultimate penalty of dismissing such application should be used in appropriate cases. The question then is this an appropriate case for doing so.

[49] The respondent was supine in prosecuting the review application for a period of six months, and its actions in this regard fall far short of what is expected from a litigant involved in a review application which is by its nature an urgent application.

[50] Condonation is not merely there for the asking, nor are applications for condonation a mere formality.²² The respondent bears the onus of satisfying this Court that condonation should be granted. *In Novo Norsdisk (Pty) Ltd vs CCMA and others*²³, the LAC observed the following:

"The party seeking condonation must satisfy the court that it has a reasonable explanation for its delay in failing to comply with the time limits applicable to that party. Its failure to put before the court a reasonable and acceptable explanation entitles a court to refuse condonation. Further, if a court takes the view that there are little prospects of success then, in my view, a court can justifiably refuse the indulgence being sought."

²⁰ (2008) 29 ILJ 318 (LC).

²¹ See: *Associated Institutions Pension Fund and others Van Zyl and others* 2005 (2) SA 302 (SCA).

²² See: *NUMSA vs Hillside Aluminium* [2005] 6 BLLR 601 (LC).

²³ [2011] 10 BLLR 957 (LAC) at para 28.

[51] In the matter of *National Union of Mineworkers vs Council for Mineral Technology*²⁴ the LAC stated the following:

"... Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an explanation for condonation should be refused."

[52] In the matter of *Foster v Stewart Scott Inc*²⁵ the Court held that:

"a slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success...may compensate for an otherwise perhaps inadequate explanation and a long delay."

[53] Policy considerations dictate that the statutory purpose of expeditious dispute resolution and the mechanisms provided for in the Rules and Practice Manual are to ensure that review applications are dealt with efficiently and within the specified time limits. The Practice Manual requires that a review application be prosecuted with the diligence of an urgent application.²⁶

[54] Although the respondent is not entirely to blame for the delay in filing the review application and the record of the proceedings, it has been consistently held in a long line of decisions by the courts, including the LAC²⁷ that an attorney's neglect of its client's affairs may be so inexcusable that condonation may, despite the blamelessness of the client be refused.

[55] In the matter of *Khan v Cadbury South Africa (Pty) Ltd*²⁸, Steenkamp J summarised the principles relating to attorney's negligence as follows:

²⁴ [1999] 3 BLLR 209 (LAC) at para 10.

²⁵ (1997) 18 ILJ (LAC).

²⁶ Paragraph 11.2.7 of the Practice Manual.

²⁷ See: *CF Salojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-H; *Darries v Sheriff, Magistrate's Court, Weinberg and another* 1998 (3) SA 34 (SCA) at 401-41E; *Zondi and Others v President of the Industrial Court and Another* [1997] 8 BLLR 984 (LAC) at 989 E-F; *Waverley Blankets Ltd vs Ndima and Others* [1999] 11 BLLR 1143 (LAC).

²⁸ (C965/2008) [2010] ZALC 175 (17 November 2010); [2011] JOL 27124 (LC).

“[18] Our courts have repeatedly held that there is a limit beyond which a litigant cannot escape the result of his or her attorney's lack of diligence.

[19] This court deals with applications for condonation on an almost daily basis. In some instances, the delays occasioned by unrepresented litigants. But all too often, the attorneys are to blame. It may be necessary to remind litigants and the attorneys of the words of Steyn CJ in Saloojee and another vs Minister of Community Development 1965 (2) SA 135 (A) 141 B-H more than 45 years ago:

"There are limits beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court...The attorney, after all, is the representative the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are... and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case in the circumstances I would find it difficult to justify condonation unless they are strong prospects of success."

Prospects of success

[56] Having regard to the respondent's prospects of success it appears from a perusal of the record as well as the arbitration award itself that the respondent has strong prospects of succeeding with the review not least of all due to the impermissible manner in which the award has been framed. In my view therefore, the respondent's prospects of success outweigh the length of the delay.

The effect of the delay on the applicant

[57] The fact that the applicant has an interest in the finality of this matter is beyond doubt, and as such will stand to suffer prejudice if condonation for the late filing of the record is granted. However, if the review is finally determined in its favour such prejudice will be of short duration.

[58] The prejudice that the Applicant will suffer if condonation is granted is in my view outweighed by the issue of justice and fairness to both parties, and the decided prejudice that the respondent will suffer if it is barred from proceeding further with the review application.

Condonation for the late filing of applicant's opposing affidavit.

[59] On 2 August 2018, the respondent filed a notice of objection, objecting to the applicant's late filing of its opposing affidavit in respect of the respondent's condonation application. On 3 September 2018, the applicant, filed an application together with a founding affidavit seeking condonation for the late filing of its opposing affidavit in respect of the respondent's application for condonation of the late filing of the arbitration records.

[60] This application was accompanied by a notice notifying the respondent that if it intended opposing the application it must deliver an opposing affidavit within 10 days after the application had been served. No opposing affidavit was filed within the time period or at all. The applicant's condonation application in this respect is therefore effectively unopposed. In view of the fact that the condonation is unopposed, condonation for the late filing of the applicant's opposing affidavit in respect of the respondent's condonation application is granted.

Costs

[61] The complete lack of action by the State Attorney in dealing with this matter in an expeditious manner has caused this application to be brought. In the

premises it is fair and just that the State Attorney be ordered to pay the applicant's costs in the proceedings which it caused to be brought on a punitive scale.

[62] In the circumstances and based only upon the apparent prospects of success in the review application, the following order is made:

Order

1. The application to dismiss the respondent's review application for want of proper prosecution is dismissed.
2. The respondent's application to condone the late filing of the records of the arbitration proceedings is granted.
3. The late filing of the applicant's opposing affidavit in respect of the respondent's condonation application is granted.
4. The State Attorney is to pay the costs of the applicant in the application to dismiss and the application for condonation of the late filing of the records of the arbitration proceedings on an attorney and client scale.

Boswel AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

R Grundlingh

Instructed by:

Bester and Rhodie Attorneys

For the Respondent: S B Nhlapo
Instructed by: The State Attorney

LABOUR COURT