IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR1346/2016

In the matter between:

JULIAN MARURE RAMADIE	**First Applicant**
NKWAILA KWAKWA	**Second Applicant**
and	
THE DEPARTMENT OF HEALTH: MPUMALANGA	**First Respondent**
PHSDSBC	**Second Respondent**
JAMES MATSHEKGA	**Third Respondent**

Heard: **22 July 2020**

Delivered: **11 August 2020**

Summary: **Review of arbitration award – practice and procedure – Practice Manual of the Labour Court –– delays in filing record – failure to progress review application – no answering affidavit filed - the application had lapsed and been archived – applicants should have sought court's indulgence for the undue delay – Labour Court lacks the jurisdiction to hear the review application – costs awarded**

JUDGMENT

DEANE AJ

Introduction

[1] This is an application to review and set aside the ruling made by the Third Respondent dated 10 July 2015 under PHSDSBC Case No PSHS 156-14/15.

[2] The Applicants seek to have the matter referred back to arbitration as they contend that the arbitration hearing was conducted irregularly and without due notice to themselves.

[3] They further seek that the arbitration be enrolled for hearing on the earliest date available by the Second Respondent; and that the late filing of the review application be condoned.

[4] The application is opposed by the First Respondent on the following basis:

4.1 The review application is considered withdrawn as the first Applicant has failed to comply with clause 11.2.2 and 11.2.3 of the above Labour Court's Practice Manual after failing to file the records within a period of 60 days as required by the Practice Manual. No condonation application for the late filing of the records of the arbitration hearing was and has been made before this Court.

4.2 In addition, the review application has lapsed as it was not prosecuted within a period of 12 months as contemplated by clause 11.2.7 of the Practice Manual.

4.3 The first Applicant has failed to make an application for revival or for the removal of the review application from the archives.

4.4 Without the above applications, the Court has no jurisdiction to entertain the review application and the relief sought is that the matter be struck from the roll for lack of jurisdiction

[5] It is a well-established principle in this Court that, in terms of the Labour Court Practice Manual (Practice Manual), a review application is urgent, and

that the prosecution of a review must be completed in 12 months. Where this does not happen, the review application lapses and is archived.

[6] The Practice Manual however does provide litigants with some relief, as it provides that if this period cannot be complied with, then at least good cause must be shown in order to resuscitate the review application – i.e., a proper condonation application must be brought, explaining the reason for the delay.

[7] In his judgment in the matter of *Matsha & others v Public Health and Social Development Sectoral Bargaining Council & others,*[1] Snyman AJ, confirmed the following when confronted with review applications which have been excessively delayed on the part of the Applicant:

> '*In Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* the court expressed the following sentiment:
>
> *"[1] Excessive delays in litigation may induce a reasonable belief, especially on the part of a successful litigant, that the order or award had become unassailable. This is so all the more in labour disputes."*[2]
>
> *[2] However, and despite this sentiment, this court is still being inundated by applications in terms of rule 11 of the Labour Court Rules to dismiss review applications for a lack of diligent prosecution thereof by litigants. Not only does this unnecessarily clog up the court roll, but it leaves a dispute which was always intended to be expeditiously resolved, hanging in the air. This kind of situation creates uncertainty, may compound liability and serves to disappoint parties before this court seeking nothing else but justice. After all, justice delayed is justice denied.'*

[8] The operative effect of a review application which has lapsed in terms of clause 11.2.7 of the Practice Manual, is that it is no longer properly before this court, and the court lacks the requisite jurisdiction to determine the review application, unless good cause has been shown, and the matter is re-instated by an order of this court.

Material Background Facts

[1] (2019) 40 ILJ 2565 at paras 1 -2.
[2] (2016) 37 ILJ 313 (CC) at para 45.

[9] The Applicants referred an unfair labour practice dispute in terms of section 189 of the Labour Relations Act 66 of 1995 (LRA) against the First Respondent to the Second Respondent.

[10] The dispute was allocated to Commissioner Faith Gumede for arbitration after it remained unresolved at conciliation. The dispute arose out of an alleged concern around the interpretation and/or application of a collective agreement; Resolution 1 of 2009 of the Occupational Specific Dispensation (OSD) for Social Workers. The issue before the Commissioner was whether the collective agreement was correctly implemented to the Applicants.

[11] Both Applicants are employed as social workers. The Applicants sought re-instatement of 1 July 2008 increase (pay progression) as per the provisions of the Department of Public Service and Administration (DPSA) guidelines of the OSD.

[12] The arbitration hearing was set down for 31 October 2014. The Applicants were represented by Mr Leon Liebenberg, a Union Official from HORSPERSA and the First Respondent was represented by Ms Matlakala Mahlangu.

[13] Commissioner Gumede found that the First Respondent had correctly implemented the OSD and issued an award to the effect that the First Respondent had correctly interpreted and applied Resolution 1 of 2009 in relation to the Applicants.

[14] The First Applicant then proceeded to lodge a rescission application against the award. The Second Applicant was not party to the rescission application.

[15] The essence of the First Applicant's rescission application was that she was notified that the arbitration hearing would take place on 31 October 2014 but the hearing took place on 30 October 2014. Thus, she alleged that the arbitration hearing took place in her absence.

[16] The Third Respondent determined the rescission application and concluded that the First Applicant's allegations that the arbitration took place in her

absence was factually incorrect because the notice of set down stated that the hearing will take place on 31 October 2014; the attendance register that was filed was signed by the parties and show that the arbitration hearing took place on 31 October and; the arbitration award also confirms that the hearing took place on 31 October 2014.[3] Accordingly, the rescission application was dismissed based on the decision that the application was lacking factual and legal merit.

[17] The First Applicant brought an application in terms of Section 145 of the LRA requesting the Court to review and set aside the Third Respondent's rescission ruling. The review application was filed on 12 August 2016.

[18] The ground for the review application is that the Second Respondent's decision that the First Respondent had correctly implemented the OSD is one that a reasonable decision-maker would not have made had the First Applicant been afforded an opportunity to state her case to the Bargaining Council.

[19] What follows is a brief summary of the chronology of events that transpired after the Rescission Ruling dated 10 July 2015; and from the lodging of the review application filed on 12 August 2016. These facts have been extrapolated from affidavits filed by the parties as well as other documents forming part of the record.

- The review Application was meant to be filed within a period of six weeks from the date of the Rescission Ruling but as mentioned above, the application was filed on 12 August 2016; which is approximately a year later.
- An application for condonation of the late filing of the review application was also filed on 12 August 2016.
- The founding affidavit of the First Applicant was filed on 12 August 2016 in support of the application for review. The reasons for the late

[3] Originals of the Notice of Set Down and the Register are filed in the Index to Bundle: Record of Proceedings. The Arbitration Award is also filed on record.

condonation for the application review of 12 August was given on pages 9-10 of the Founding Affidavit.

- The Applicants' Heads of Arguments has many inconsistencies regarding filing dates, I confirm therefore the dates as follows.

Whilst the Applicants' Heads of Argument dated 31 May 2017 references the Respondent's Notice to Oppose as being filed on 26 October 2016, the date on the Notice to Oppose is 3 October and this court records the documents as being received on 31 October 2016.

- No Answering Affidavit was filed.
- The Applicants then filed a Notice in terms of Rule 7A sub-rule 8(b)[4] dated 16 January 2017 and the date recorded as being received by this court is 20 January 2017.
- They subsequently filed the Index to Bundle: Record of Proceedings on 28 March 2017.
- On 28 March 2017, the First Applicants failed to file the complete transcribed records of the hearing of 31 October 2014 in court.
- The Applicants' Heads of Argument dated 25 May 2017 was then filed and received at the Labour Court on 31 May 2017. Such Heads was accompanied by a condonation application together with reasons for the late filing thereof. The Heads of 25 May 2017 was not paginated, nor did it contain its own page numbers.
- The review application was set down for hearing on 4 September 2018 wherein the First Respondent raised a point that the First Applicant has failed to file complete records of the arbitration proceedings and as such the review application was not ripe for hearing.

[20] As a result, the parties agreed to the following:

[4] Indicating that they stand by its Notice of Motion.

(i) That the First Applicant files the transcribed records as well as the Third Respondent's hand written notes on or before 27 September 2018;

(ii) That parties hold a meeting and reconstruct the records if same was missing; and

(iii) The meeting in paragraph (ii) above be held within a period of 30 days from 27 September 2018.

[21] It was confirmed to this court that by agreement between the parties, the above was made a court order.

- The Transcribed Records was however only filed on 15 July 2019, some 10 months later.
- No application for the late filing of the records was made.
- The First Respondent filed Heads of Arguments on 19 July 2020.
- The matter was heard on 22 July 2020.

Issue for determination

[22] Whether this court has the requisite jurisdiction to determine this review application.

Filing of the record

[23] Rule 7A(6) of the Labour Court Rules provides that the Applicant in a review application 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. The Applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.

[24] The serving and filing of the record in a review application is provided for in clause 11.2 of the Practice Manual.[5] Clauses 11.2.1 and 11.2.2 provide for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the consequences should an applicant fail to file the transcribed record within the prescribed period.

[25] This court and the Labour Appeal Court (LAC) have considered the status of the Practice Manual[6] and held that, in essence, the Practice Manual promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practise and litigate in the Labour Court (LC) and it promotes the statutory imperative of expeditious dispute resolution. The provisions of the Practice Manual are binding and should be adhered to and it is not to be adhered to or ignored by parties at their convenience.[7]

[26] A proper interpretation of clause 11.2.3 shows that there are three possible options available to the party if the record is not filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

(i) The first possibility is for the applicant to request the respondent's consent for an extension of time and consent has been given.

[5] Clause 11.2.1 states that "Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.
11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.
11.2.3 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 prescribed 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 respondent should be afforded to file the record."

[6] *Ralo v Transnet Port Terminals & others* (2015) 36 ILJ 2653 (LC) ZAECPEHC 68 (17 June 2015), *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others* [2014] 5 BLLR 516 (LC), (2014) 35 ILJ 1672 (LC), *Rumba Samuels v Old Mutual Bank* Case no DA30/15 handed down on 25 January 2017.

[7] *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and others* (PR192/15) (2017) ZALCPE 11 (13 June 2017).

(ii) The second option arises only in the event that consent was sought from the respondent but is refused. In such event the applicant may, on notice of motion supported by affidavit, apply to the Judge President for an extension of time. The application must comply with Rule 7 and affidavits are be filed within the time limits prescribed by Rule 7.

(iii) The third possibility arises when the applicant in a review application failed to file the record within the prescribed 60 days period and failed to obtain the respondent's or court's consent for the extension of time. In such a case the review application is deemed to be withdrawn.

[27] On the papers before me none of these possible options were exercised by the Applicants in the late filling of the records. From the record before me and from the date of the initial review application of 12 August 2016, no further steps were taken by the Applicants to progress the review application until they submitted the Transcribed Records in July 2019.

[28] So, despite a court order, and for reasons which are unclear the First Applicant filed the Transcribed Records on or about 15 July 2019, a period of 10 months after the date required in terms of the court order, without seeking any condonation for the inordinate delay in doing so. The Applicants have failed to seek any indulgence from the court or from the First Respondent to extend the time period for filing a record and the time for taking such a step in terms of paragraph 11.2.3 of the Practice Manual has long passed. In terms of that provision, the application was deemed withdrawn in the absence of such indulgence.

[29] Even when oral arguments were made before me, in his argument on why this court should hear the matter in the absence of the requisite indulgence being sought, the Applicants representative indicated that this is a court of equity and fairness and we are therefore enjoined to hear this matter but failed to provide any reasons relating to good cause and for their failure to apply for this indulgence.

[30] In terms of paragraph 16.1 of the Practice Manual, a matter is also archived if no further steps have been taken to prosecute a review application for a period of six months. A party that wishes to revive the matter must make an application on notice of motion in terms of paragraph 16.3 of the Practice Manual for the file to be retrieved. I will now turn my discussion to this aspect.

Failure to revive application

[31] The First Respondent suggested that the Applicants also failed to bring an application to revive the review application which ought to be considered dismissed until such time as such an application was brought and succeeded.

[32] The pertinent provisions of the Practice Manual relating to the archiving of the review application are the following:

> '*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.'*

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

> "*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.*"

[34] It follows that the Applicants were obliged to comply with clause 11.2.7. Compliance means, in the context of the current matter, that the record had

to have been filed within 12 months of the date when the Applicants brought the review application.

[35] Failing which, and 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.[8] The provisions of Rule 7 will apply to such an application. In addition, 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.'*

[36] *In casu*, the Applicants were required to comply with clause 11.2.7 in order to avoid its review application lapsing. They were granted an indulgence in terms of a court order and were meant to file the record on or by 27 September 2018. They failed to do so.

[37] The Applicants do not at any stage inform the Registrar that the application is ready for allocation for hearing, be it on the opposed or even the unopposed motion roll.

[38] Furthermore, it appears from the papers in this matter that the First Respondent only served and filed their Notice to Oppose the review application on 31 October 2016 but did not file an answering affidavit. It is my view that despite this failure, the Applicants should have progressed the review application within the requisite 12-month period with due regard to clause 11.4 of the Practice Manual which reads:

> *'11.4.1 If the respondent has delivered a notice of intention to oppose but fails to deliver an answering affidavit within the prescribed time limit, the registrar must at the request of the applicant, enrol the application on the opposed motion roll and serve a notice of set down to all parties.'*

[8] Clause 16.2 states that: "A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision."

[39] Upon the expiry of the time period, it caused the review application to lapse, and following on, the archiving thereof. The result of this was described in *Macsteel Trading Wadeville v Van der Merwe NO & others*[9] as follows:

> '*As indicated, the review application was archived and regarded as lapsed as a result of NUMSA's failure to comply with the Practice Manual. There was also no substantive application for reinstatement of the review application, and no condonation sought for the undue delay in filing the record. As contended for by Macsteel, the Labour Court was, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction, alternatively, give Macsteel an opportunity to file a separate rule 11 application demonstrating why the matter should be dismissed or struck from the roll on the basis of undue delay.*"

[40] Reverting to the facts of this case, the date of the review application was 12 August 2016, the Applicants should have therefore filed complete records within a period of 60 days which is on or before 12 October 2016.

[41] The Applicants have not filed the record within the prescribed 60-day period, despite a court order to do so[10] and has not approached the First Respondent for consent for an extension of time.

[42] The initial review application on 12 August 2016 was filed late and condonation was applied for. The reasons provided therein for the late condonation related specifically to the period between the date of the Rescission Ruling (in July 2015) and the date of the review application (dated 12 August 2016).

[43] Thereafter the Heads filed on 31 May 2017 seeks condonation for the period between 2016 and 2017.

[44] I would like to point out that for the hearing set down on 22 July 2020 before me the Applicants relied on the application for condonation made on the 31

[9] (2019) 40 ILJ 798 (LAC) at para 25.
[10] A copy of this Court Order was not attached to the bundle of documents although it remains common cause.

May 2017 Heads of Argument. No additions or amendments to those reasons were given or received. In *NUMSA v Hillside Aluminium*[11] Murphy AJ wrote:

> *"…to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits."*

[45] In this case what this means is that because the reasons were meant to cover a different period, between 2016 and 2017, the condonation does not deal with the reasons for the delay in bringing the application for the whole period for which condonation is being sought which would include the period from May 2017 to July 2020.

[46] Furthermore, the Applicants were meant to apply to reinstate the review application but they only seek condonation. No explanation was given or pardon requested from this court in this regards.

[47] The First Respondent's representative denied receiving notice of set down of this case and proceeded to argue that as far as they were concerned the matter had been withdrawn for failure on the part of the Applicants to proceed with condonation applications and requesting their indulgence to file the prescribed record late. A reasonable belief in my opinion taking into account the timelines discussed above as well as the dicta in the *Toyota SA Motors* case. The Applicants were required to adequately address the issues relating to condonation and seeking the court's indulgence, issues arising from the First Respondent's Heads of Argument of 19 July 2020. However, in my view, they did not do so adequately and their failure to provide this court with reasons for the entire period of delay is a serious oversight on their part. I, therefore, do not need to consider the timelines, let alone consider any resemblance of a condonation application for good cause. There were no submissions made to me concerning the time periods, to which I could have applied my mind to.

[11] (2005) ZALC 25; [2005] 6 BLLR 601 (LC) at para 12.

[48] According to Lallie J, in *Kula v Nxuba Local Municipality and another*, *"in the absence of reasonable explanation for the delay, there is no need to consider the prospects of success.*[12]

[49] In the absence of an application to reinstate the review application, the court cannot exercise its discretion in a vacuum. To therefore request the court to exercise its discretion in terms of equity and justice, and to ignore the fact that no formal request or application has been made cannot be a reasonable request that this court can accede to.[13]

[50] The law is quite clear in that should I determine the review in the absence of a substantive reinstatement application, I would be doing so without having the requisite jurisdiction.[14] The *dictum* in *Ferreira v Die Burger*[15] has particular relevance *in casu*, where the court said "*where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations."*

[51] Therefore and following the *dicta* of *Macsteel*, the correct approach would have been for the Applicants to request a postponement of the matter, and to bring a substantive Rule 11 application. I will however not enter into the merits for the Rule 11 application as that is not a matter I am required to decide on.

[52] However what I can make a decision on is that the excessive delay, the failure to comply with the Practice Manual, and the complete absence of good cause being shown, must bring an end to the proceedings, by way of the dismissal of the review application.

Conclusion

[12] [2016 1 BLLR 55 (LC) at para 7.
[13] *South African Municipal Workers Union obo Mlalandle v South African Local Government Bargaining Council and others* (2017) JOL 37418 (LC) at para 11.
[14] *Macsteel Trading Wadeville v Francois van der Merwe N.O & others* (JA67/2016) (2018) ZALAC. 50; (2019) 40 ILJ 798 (LAC) at para 25.
[15] (2008) 29 ILJ 1704 (LAC) at para 8.

[53] Taking into account all the circumstances as set out above, there is no need to prolong this matter further. The actual need is to bring it to an end. It is in the interests of justice and in line with the requirement of the expeditious resolution of employment disputes that the review application must be finally dismissed.

[54] I find that the inordinate delay in proceeding with this matter and in the absence of the Applicants seeking this court's indulgence together with the requisite applications for condonation and revival, this court lacks the jurisdiction to hear this review application; this application having lapsed in terms of clause 11.2.7 of the Practice Manual.

[55] This then leaves the issue of costs to be decided upon.

[56] Costs should be considered against the requirements of the law and fairness.

[57] The requirement of law has been interpreted to mean that the costs would follow the result.

[58] In considering fairness, the conduct of the parties should be taken into account, unreasonableness and frivolousness are factors justifying the imposition of a costs order.[16]

[59] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and* others[17] it was emphasised that:

> *"……unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings."*

[60] I feel compelled to make some comments about this case and the manner in which the Applicants approached this entire matter as well as their flagrant

[16] *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and others*.
[17] (2012) 33 ILJ 2117 (LC).

disregard for the Rules of this court. Firstly, looking at the history and evidence of this case and applications, it is one of those applications which pursuit of is ill-advised. Furthermore, the Applicants did not timeously comply with their own earlier undertaking and a court order to file the record. They did nothing, for approximately 10 months, then proceeded to file the record without a proper condonation application showing good cause. In this regard, I am mindful of the case of *Matsha & others v Public Health and Social Development Sectoral Bargaining Council & others*[18] where the Judge stated that:

> '*In my view, this kind of attitude adopted by litigants is a side effect of the notion of fairness that underlies all decision making in this Court. Judges want to be seen to act fairly, and are often loathe to visit a litigant with the culling of the matter on the merits because of failures committed by the litigant in the course of the litigation process. Often, legal practitioners who so fail, plead that their individual clients should be prejudiced by this and will suffer if the Court does not come to their aid. That way, litigants get away with things they should not get away with, and this creates the fertile soil in which this kind of conduct continues to thrive. At some point one has to say – enough is enough. The Practice Manual has been in effect for six years. It says a review application is urgent. It also says the prosecution of the review must be completed in 12 months. It provides that if this cannot be complied with, then at least good cause must be shown – i.e. a proper condonation application must be brought. Where this does not happen, and the other party asks for the dismissal of the review, then fairness to the review applicant and its right to review must for once sit in the back seat and the review application must be dismissed.'*

[61] In this case, I, therefore, see no reason to deviate from the ordinary rule that costs should follow the result.

[62] For all of the reasons as set out above, I make the following order:

Order

[18] (JR2380/2016) (2019) ZALCJHB 128; (2019) 40 ILJ 2565 (LC) at para 28.

1. The review application under case number JR1346/2016 has lapsed and been archived in terms of the Practice Manual.

2. This Court lacks the jurisdiction to hear the review application.

3. The Applicants' application is consequently struck from the roll.

4. The Applicants are ordered to pay the costs of the application.

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T Deane

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Sizwe Snail of Snail Attorneys

For the Second Respondent: M Kgatla instructed by The State Attorney