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15/9/20
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1697/18

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY **Applicant**

and

ADV T L MABUSELA *N. O.* **First Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Second Respondent**

MANDLA MAGAGULA **Third Respondent**

Heard: **17 January 2020**

Delivered: **15 September 2020 (Due to Covid-19 lockdown, this judgment was handed down by emailing a copy to the parties and the 15th September 2020 shall be deemed to be the date of hand down)**

Summary: **Consideration of an application to dismiss a review application in terms of Rule 11 of the rules of this Honourable Court and the principles associated therewith in circumstances where it is alleged that the party bringing the review application was dilatory in doing so and conducted itself in a manner that fell outside the scope of the relevant provisions. Application for the review of a decision given by a commissioner, the First Respondent, employed as such**

under the auspices of the Second Respondent, the South African Local Government Bargaining Council. The principles related to a review of this nature restated.

JUDGMENT

SNIDER, AJ

[1] There are, in essence, two allied applications before me. The first one is a review application and the second one is an application to dismiss a review application brought in terms of Rule 11 of the rules of the Labour Court.

[2] The parties in these two closely allied applications have used two different pleading headings and the parties are thus differently described in the two allied matters mentioned above.

[3] In order to avoid confusion the parties will thus be referred to, for the purposes of both applications, as set out below:

1. Ekurhuleni Metropolitan Municipality (being the Applicant in the review application and the First Respondent in the Rule 11 application) will be referred to as "the Municipality";
2. Adv T L Mabusela *N.O.* (who is the First Respondent in the review application and the Third Respondent in the Rule 11 application) will be referred to as "the Commissioner";
3. The South African Local Government Bargaining Council (which is the Second Respondent in both applications) will be referred to as the "Bargaining Council"; and
4. Mandla Magagula (who is the Third Respondent in the review application and the Applicant in the Rule 11 application) will be referred to as "Mr Magagula".

Introduction

[4] Mr Magagula is currently employed by Ekurhuleni Metropolitan Municipality in the capacity of Superintendent at the Ekurhuleni Metro Police Department Head Office located in Kempton Park. Mr Magagula was first employed by the Municipality in 2002 as a Constable in the Metro Police. He was promoted to his current post in 2009. During 2015 the Municipality advertised the position of Deputy Chief of Police: Security Services. Mr Magagula applied for this position and was short listed. He was also interviewed for the position.

[5] Ultimately, he was not appointed to the advertised position under circumstances which are dealt with in detail below. As a result of not being appointed to the position, Mr Magagula referred an unfair labour practice dispute to the Bargaining Council which was, in due course, referred to arbitration. The arbitration was adjudicated by the Commissioner.

[6] The hearings took place over an extensive time period between 15 February 2017 and 21 June 2018 for what appears to be a period, in aggregate, of over three weeks.

[7] On or about 12 August 2018, the Commissioner rendered his award ('the award"). For ease of convenience I set out the finding of the Commissioner hereunder.

> **"AWARD**
>
> 6.1 The Respondent has committed an unfair labour practice relating to promotion against the Applicant;
>
> 6.2 The Applicant must be promoted to the position of Deputy Chief of Metro Police: Security Services retrospectively as from 1 January 2017, with all benefits associated with it;
>
> 6.3 The Respondent is ordered to comply with the above order within 21 days of receipt of this award;
>
> 6.4 I am satisfied that all days were used for the purpose they were booked for, thus an order for wasted costs is waived."

[8] The Municipality duly launched a review application in respect of this award on

21 August 2018, well within the stipulated time period for delivering such an application.

[9] However, notwithstanding the initial application being timeously delivered within the provisions of the Labour Relations Act[1] (LRA) Mr Magagula, as a result of further delays in the matter, launched an application in terms of rule 11 of the Rules of the Labour Court to dismiss the Municipality's review application.

[10] There are also further interlocutory applications relating to condonation for the late filing of various papers. Firstly I will deal with the application in terms of rule 11 and, thereafter, to the extent necessary, I will deal with the main review application.

The application in terms of rule 11

[11] Rule 11 merely constitutes the adjectival provision in the Rules of this Court in terms of which interlocutory applications are brought. In regard to the requirements for such an application to be successful, regard must be had to the Practice Manual of the Labour Court of South Africa which came into effect from 2 April 2013. The relevant provisions of the practice manual appear from paragraph 11.2 which for ease of reference readas follows:

> "11.2 Applications to review and to set aside arbitration awards and rulings
>
> 11.2.1 Once the registrar has notified an applicant in terms of Rule 7(A)(5)[2] that a record has been received and may be uplifted, the applicant must collect the record within 7 days.
>
> 11.2.2 For the purposes of rule 7(A)(6), records must be filed within 60 days of the date of 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 respondents consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice

[1] No. 66 of 1995, as amended.
[2] To the rules of the Labour Court

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 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.

11.2.4 If the record of the proceedings has been lost, or if the record of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a Judge for a direction which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.

11.2.6 . . . . .

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 argument) 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 be archived or be removed from the archive.

11.2.8 A review application must be indexed and paginated ..."

[12] It appears that the Registrar of this Court issued a notice in terms of Rule 7A(5) on or about 12 September 2018 and it can be regarded as common cause that this is the date from which the 60 day period referred to in clause 11.2.2 of the practice manual must be counted.

[13] In terms of the definition section in the practice manual "day" means a day other than a Saturday, Sunday or public holiday, and when any particular number of

days is prescribed for the doing of any act, the number of days must be calculated by excluding the first day and including the last day.

[14] It does not appear that either Mr Magagula or the Municipality have considered what the time period actually was within which the record had to be filed, bearing in mind this definition. According to my rough calculations the record had to be delivered, in terms of Rule 7A (6) of the rules and 11.2.2 of the practice manual, by approximately 6 December 2018.

[15] In its affidavit opposing the application in terms of Rule 11 the Municipality sets out what steps were taken by it in relation to the production and the delivery of the record from 12 September 2018, when it apparently uplifted the recordings from the Registrar of this Court. The Municipality does not, in its answering affidavit, deal with the time periods set out in the practice manual. As set out above, on my calculation the 60 days period provided for in the practice manual expired on or about 6 December 2018.

[16] The Municipality should have been acutely aware of this time period and, mindful of the impact that it would have on the prosecution of the review. The Municipality, similarly, ought to have had regard to paragraph 11.2.3 of the practice manual in terms of which, if it fails to comply with the 60 days period the review application is deemed to be withdrawn.

[17] In terms of the Rules, the Applicant has the opportunity to request the Respondent's consent for an extension of time and if it does not obtain that consent the Applicant may, on notice of motion, supported by affidavit, apply to the Judge President in chambers for an extension of time. There is no explanation in the answering affidavit of the Municipality why none of these steps were taken. At the time that the 60 days time period expired, the transcripts that had been provided by the transcription services had been collected from the transcribers and the matter lay dormant in the hands of the Municipality's attorneys, but for them having requested an instruction from the Municipality to appoint counsel, until that instruction was received on 11 February 2019. The 60 days period lapsed during this time.

[18] As set out above, at any time during the 60 days period, when it came to the attention of the Municipality that the record may not be capable of being delivered within 60 days, it had the option of requesting Mr Magagula's consent to an extension in that regard.

[19] In the circumstances, had the attorneys perused the transcript upon receiving it, and given the allegation as to how much of the transcript is missing, it would swiftly have realised that there was a difficulty and at any time between 20 November and 6 December 2018 could have approached Mr Magagula and his representatives, alternatively the Judge President, pursuant to their remedies set out in paragraph 11.2.3 of the practice manual.

[20] In my view the fact that subsequently, and during February 2019, it came to counsel's attention that the transcript was missing portions, cannot *ex post facto* remedy the Municipality's failure to deliver the record within 60 days, alternatively seek consent from Mr Magagula for an extension of time or approach the Judge President in this regard. There is no question that the Municipality is at fault in this regard.

[21] The Municipality did not seem to have regard to the relevant 60 days period or do what was required of them, including requesting an indulgence from Mr Magagula and/or approach the Judge President during that time period.

[22] At paragraph 6.5 of his founding affidavit in the Rule 11 application, Mr Magagula pointedly repeats the provisions of clause 11.2.3 of the practice manual, as referred to above, yet in its answering affidavit the Municipality simply fails to deal with this issue at all.

[23] In essence the Municipality's answering affidavit does not in any way address the pertinent issues. The Municipality has simply failed to take any steps whatsoever in terms of the rules and practice manual of this Court to expunge its non-compliance in respect of the delivery of the record.

[24] It is also the case that this application was served on the Municipality's attorneys on 29 January 2019. This was during the relatively long time period between obtaining the transcript and instructing counsel. As set out above,

counsel was only briefed in mid-February 2019 and it was only then that the defects in the transcript came to light.

[25] All of this could have been achieved at a much earlier date, and, if the Municipality had difficulties during the time period to achieve same it had its remedies which it elected not to pursue.

[26] The Municipality, at a very late stage, on 15 January 2020, launched an application, when the matter was to be heard on 17 January 2020, seeking condonation for the Applicants late filing of the record and reinstating it so far as necessary. The argument raised by the Municipality in the affidavit supporting this application is as follows –

1. that the purpose of 11.2.3 of the Practice Manual is to allow the Registrar to archive a file on which there is no activity. It is not designed to non-suit a party that is manifestly prosecuting its review;
2. the purpose of paragraph 11.2.4 of the Practice Manual is to allow an applicant who has been denied an extension by a respondent to seek such extension in chambers but that this is not the only method by which an extension may be sought. There is nothing stopping an applicant who realises for the first time after the record should have already been filed that it is out of time, to apply for condonation to this Court; and
3. paragraph 11.2.7 affords the party seeking relief to show cause why the application should not be archived or regarded as lapsed.

[27] In respect of paragraph 11.2.3, same manifestly and obviously provides a mechanism for a party to obtain an extension within which to deliver the record, whether by way of the consent of the other party or by way of approaching the Judge President to allocate the matter to a Judge of this Court for a ruling. The clear underlying premise is that a party should monitor the progress of the production of the record after upliftment from the Registrar and timeously become aware of any difficulties which may lead to a situation where the said party requires an extension of the 60 days period provided for in clause 11.2 of the Practice Manual. There is nothing in this paragraph to suggest that it is designed as an aid to the Registrar, whether solely or at all.

[28] There would, in an event, from the perspective of the Registrar, have been no activity on the file from the time when the record was uplifted until well after the 60 day period had expired. It is not apparent from the history of this matter that the Municipality have had every intention to prosecute its review application.

[29] As set out above the Applicant brought the application to dismiss the review application while the transcribed record was in the possession of the Municipality's legal representatives, but nothing had been done in respect of same. Paragraph 11.2.4 of the Practice Manual deals with the situation where a record is lost or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible. Similarly the Applicant may approach the Judge President for a direction. Again this was simply not done by the Municipality even if the current set of circumstances do fall within the preview of 11.2.4. There is a distinction between 11.2.4 and 11.2.3. Paragraph 11.2.2 provides for the 60 day period within which a record must be filed. Paragraph 11.2.3 deals with the consequences of failing to do same and the manner in which this issue can be dealt with to obtain an extension during the 60 days period, whereas paragraph 11.2.4 deals with the situation where a record has been lost or the recoding is of such poor quality that the tapes are inaudible, which is not the case here, and under which circumstances the Applicant may approach the Judge President for a direction.

[30] Paragraph 11.2.7 deals with a different scenario altogether and this is where the applicant must ensure that all the necessary papers in the application are filed within twelve months of the date of the launch of the application (excluding heads of argument) and the Registrar is informed in writing that the application is ready for allocation for hearing. Here, if this is not done the Applicant can apply on good cause to show why the application should not be archived or removed from the archive.

[31] Accordingly, the only aspect of this argument that requires adjudication is whether an applicant, who realises for the first time after the record should have already been filed, that it is out of time, may apply for condonation.

[32] Before going into the jurisprudence on this issue, I remark that it is entirely unexplained as to why, from the time that the Applicant came into possession of the transcriptions, until counsel was briefed, no attempt was made by the attorney to peruse the transcript, which, given the volume of the transcript that could have been expected, would immediately have led to the realisation that the transcript was deficient. This would have triggered the relevant request for an extension or approach to the Judge President as the case may have been.

[33] I am mindful of the decision in *Tradyn Trading cc t/a Trading Consulting Services v Steiner and Others*[3] where this Court held that the correct approach in respect of Practice Manuals in respect to the force and effect of same, i.e. a practice directive like that contained in clause 11.2.3 of the Practice Manual, was that in law the Judge President was entitled to issue practice directives relating to the procedure of the setting down of matters on the roll. Although the Practice Manual makes no provisions for condonation for non-compliance with the time frames provided therein, it was not disputed, correctly so, that an application for condonation can be inferred. This approach was followed by the Labour Appeal Court in *Samuels v Old Mutual Bank*[4] where it was held that:

> "[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 as well as various decisions of the court on the matters addressed in 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."

[34] Reading these two decisions together it appears that it is necessary for this Court to have regard to the condonation application. As set out above there can be no real question that the Municipality failed to comply with the provisions of

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[3] (2014) 35 ILJ 1672 LC at para 11.
[4] (2017) 38 ILJ 1790 (LAC)

clauses 11.2.2 and 11.2.3 of the Practice Manual.

[35] As set out above, belatedly, on 15 January 2020, the Municipality sought condonation for the late filing of the record of the arbitration proceedings.

[36] Although there are a number of difficulties with the condonation application and the stage of the proceedings at which it has been brought, I must nevertheless consider the application and, it is trite, the Court has a discretion in relation to the condonation application which it must exercise judicially and in light of various factors.

[37] The requirements for a condonation application are notoriously well known in our law and were already settled in *Melane v Santam Insurance Co Ltd.*[5] In *Chetty v Law Society of Transvaal*[6] the then Appellate Division set out the principle that it is not sufficient if only one of the two requirements (here an explanation and prospects of success) is met. That is to say good prospects of success, for instance, are irrelevant in the absence of any reasonable or satisfactory explanation for the applicant's default.

[38] It is also that the prejudice to the parties ought to be taken into account and is trite that an application for condonation should be brought as soon as a party is aware of the need for such an application.

[39] The affidavit in support of the condonation application brought by the Municipality are neither comprehensive nor do they deal properly with the requirements set out in *Santam* (*supra).*

[40] In the first instance the degree of lateness is not dealt with. As set out above the record should have been filed, bearing in mind the 60 days time limit set out in the Practice Manual, by no later than approximately 6 December 2018. The explanation is required for the time period between 6 December 2018 and the

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[5] 1962 (4) SA 531 (A)
[6] 1985(2) SA 756 (A) at 756

date of filing of the record. The Municipality has referred me, in the condonation application, to its answering affidavit in the rule 11 application, which it refers to as the interlocutory application. It appears from the affidavit referred to that as of 20 November 2018 the transcript of the proceedings, whether complete or incomplete, was in the possession of the Municipality's attorney. There was then a delay of in excess of two and half months before the Municipality's attorney instructed counsel to prepare a supplementary affidavit in the review application.

[41] It was counsel who discovered that there were substantial portions of the record missing. What is not explained is why the Municipality's attorney did not discover this, but simply left the matter is abeyance from 20 November 2018 to 11 February 2019, during which time the 60 day period referred to above, expired. The failure to receive instructions on which the Municipality seeks to rely is not explained. There is no correspondence attached which demonstrates that either the Municipality's attorney or the Municipality itself were cognisant of the rapidly approaching deadline and the subsequent passing of the deadline to file the record.

[42] It does however appear that subsequent to counsel advising the Municipality's attorneys of the deficiencies in the transcript, the Municipality did act with some expedition to remedy the situation.

[43] It is accordingly necessary to examine the merits of the review application in order to determine the prospects of the Municipality being successful in this matter and if they do have prospects, to then finally determine the review application. If they do not have prospects of success which sufficiently redress their dilatory conduct, then the condonation application will be refused.

The merits of the review application

[44] If regard is had to the Municipality's founding and supplementary affidavits in the main review application, on the face of it, there appear to be nine grounds of review. However, in the Municipality's heads of argument in the main

application, very limited grounds are relied on.

[45] It is valuable in considering this review application to have in mind the test set out for a review application to be succesful in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[7] being "*whether a decision reached by a Commissioner is one that a reasonable decision maker could not reach*".

[46] The critical issue for determination in this matter is whether, under all the circumstances, paragraph 7.1.9 of the recruitment and selection policy of the Municipality was interpreted by the Commissioner in a reasonable manner and that the decisions was not one that a reasonable decision maker could not reach. Same reads as follows:

> "7.1.9 In order to expedite the filling of positions in exceptional circumstances, an alternative recruitment and selection method procedure may be determined by the divisional head work force capacity management."

[47] The argument is made by the Municipality based on the evidence of one of its witnesses, Ms Manzana Mokoena, that a deviation of the sort described in paragraph 7.1.9 of the policy could only be undertaken at the outset of the process.

[48] The Commissioner reached the conclusion that clause 7.1 could be interpreted to mean that such a deviation could be introduced at any time during the recruitment and selection policy.

[49] What is clear is that the deviation from the policy was not made on a whim but that it was the subject of deliberation on the part of Advocate Yawa, the Acting Head of Department, Human Resources Management and Development and the City Manager Mr Kaya Ngema. This much appears from a memorandum addressed by Advocate Yawa to Mr Kaya Ngema on 29 July 2016.[8]

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[7] (2007) 28 ILJ 2405 (CC).
[8] Page 109 of the arbitration bundle, bundle 1

[50] Whereas, in interpreting clause 7.1.9 it may be argued that the wording "*An alternative recruitment and selection method / procedure*" could refer to the entire process from advertising to final appointment, the phrase can also be interpreted to mean an alternative process to the recruitment and selection methods / procedure that had been employed and any part thereof.

[51] Such an interpretation does not stretch the bounds of reasonableness to the extent that the decision is one that a reasonable decision maker could not reach. The question of right or wrong does not arise.

[52] As set out above very limited grounds were advanced by the Municipality in its heads of argument. It was submitted that at a narrow level the arbitrator had to interpret the Municipality's policy and in particular clauses 7.1.9 and 7.4.2.11 of the policy. I have dealt with the issue of whether a deviation could only be undertaken at the commencement.

[53] The submission is made that what was done was inherently unfair yet, if regard is had to the memorandum submitted by Advocate Yawa to Mr Kaya Ngema where he states that unfairness would result where "*candidates who had an initial exposure may be seen as were advantaged to all other*".

[54] It is clear from the memorandum that the necessity for a speedy closure of the process dictated that an entire rerun from the recruitment stage was highly undesirable and that the conclusion can reasonably be reached that this was an exceptional circumstance where Mr Magagula had all but passed the initial phase of the interview and the essence of the newly adopted procedure was to allow candidates to be assessed for competence on a descending order even, in the case of Mr Magagula, where he fell marginally short of the standard applied in the interviews.

[55] Paragraph 7.4.2.11 which states that – "*The successful candidate is determined by the panel after the interview is finalised.*" Suffers the same fate when regard is had to paragraph 7.1.9 and, in addition, this clause cannot be taken at face

value as the competency assessment is a key element of the recruitment process and it seems that the meaning of this clause is simply that the candidate is successful for the purpose of moving onto the next stage. Not that the candidate is successful for the purposes of appointment.

[56] In relation to the submission made by the Municipality that clause 7.1.9 of the recruitment of the policy did not apply because the deviation could only be determined by the Divisional Head: Workforce Capacity Manager, being Ms Manzana Mokoena; the decision was made, not by the Municipal Manager but by the City Manager, Mr Kaya Ngema as per his signature to the memorandum referred to above.[9] In this situation the powers are delegated to the divisional heads: workforce capacity through the City Manager and it is, trite that these powers could accordingly be exercised by the City Manager. The City Manager is responsible in law for all aspects of the Municipality's personnel, including the recruitment and selection of suitable candidates for appointment and promotion.[10]

[57] The aspect of conditionality of the appointment as submitted by the Municipality, in relation to the Chief of Police's concerns, does not arise in circumstances where, it appears, although it is not submitted in the heads, that reference is made to his involvment in various parts of the evidence at the arbitration. The Chief of Police was repeatedly requested to give his reasons for opposing the appointment of Mr Magagula and did not do so timeously. The condition could not have been a condition that was impossible of fulfilment. The Chief of Police simply never made his concerns known with any specificity or particularity in respect of the appointment of Mr Magagula. At the very worst, the Police Chief's failure to provide commentary constituted fulfilment of the condition.

[58] It is of course significant that the two individuals who met the 24 point threshold set for the interview process were both unsuccessful in the competency

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[9] At page 109 of the first arbitration bundle
[10] See section 55(1) (e) of the Local Government: Municipal Systems Act 32 of 2000.

assessment conducted by COGTA. Similarly, neither of them had the bachelor's degree that was required for the position and which Mr Magagula did have, being a BA degree in criminology.

[59] The deviation from the policy was something that the Acting City Manager was authorised to do. This by virtue of the fact that he was, as noted earlier, legally the head of the Municipality's Administration, which includes the personnel encompassing recruitment, selection and appointment. Effectively, and in this regard I accept the submission made on behalf of Mr Magagula, by determining a deviation the divisional head refers to does so as a delegate of the City Manager and accordingly it cannot be argued that such a deviation could not be determined by the City Manager him or herself. Ordinarily an official who delegates a function to a subordinate is not divested of the capacity to exercise that function.

[60] Having regard to all of the above I am of the view that the Municipality had reasonable prospects of success in bringing this application and accordingly their non-compliance in relation to the various time limits is condoned. In addition the late filing of the various affidavits is also condoned. This must necessarily follow where the main application for condonation is granted.

[61] I further find that the decision of the Commissioner was not one that a reasonable decision maker could not reach.

[62] As far as the issue of costs is concerned, I am bound by the decision in Zungu v Premier of the Province of KwaZulu-Natal & others[11] where it was held:

> *"[23] The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may*

[11] (2018) 39 ILJ 523 (CC) at paras 23 to 24

be awarded in the Labour Court. Section 162 provides:

> *"(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.*
>
> *(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —*
>
> > *(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and*
> >
> > *(b) the conduct of the parties —*
> >
> > > *(i) in proceeding with or defending the matter before the Court; and*
> > >
> > > *(ii) during the proceedings before the Court."*

[24] The rule of practice that costs follow the result does not apply in Labour Court matters. In Dorkin, Zondo JP explained the reason for the departure as follows:

> *"The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on*

the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court."

[63] In light of the above, I regard the conduct of the Municipality to have been dilatory in relation to prosecuting the review and causing a situation to unfold which led to Mr Magagula bringing the rule 11 application and the subsequent condonation application. I think it would be most unfair to mulct Mr Magagula with those costs.

[64] In relation to the balance of the costs, the Municipality did have a case to bring before the Bargaining Council that was not without merit. In accordance with the principles set out above concerning costs I believe it is in accordance with the principles of law and fairness that the parties pay their own costs in respect of the main review application.

Accordingly, the following order is made:

Order

1. The rule 11 application is hereby dismissed.
2. The condonation application for the non-compliance with the 60 days time period referred to in rule 7(A)(6) is hereby condoned.
3. The review application is dismissed.
4. The Municipality is to pay Mr Magagula's costs including the cost of two counsel where used in respect of the rule 11 application and the condonation application brought by the Municipality in respect of its non-compliance with the 60 day time period provided for in rule 7(A)(6).

PP Ethotlhalemaje

Snider, AJ
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	G I Hulley SC with L Mngomezulu
Instructed by:	Mogaswa Inc

For the Respondent:	Paul Kennedy SC
Instructed by:	Ramafalo M Attorneys