

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ☒ NO ☐
(2) OF INTEREST TO OTHER JUDGES: YES ☐ NO ☒
(3) REVISED.

20/05/2020
DATE

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Number: JR 388/16

In the matter between:

GEORGE MABONA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER M SINGH N.O.

Second Respondent

AKANI EGOLI (PTY) LTD t/a GOLD REEF CITY

Third Respondent

Heard on: 9 JANUARY 2020

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by email on the 20th May 2020

Summary: Review of Arbitration Award – Third Respondent raising issue – Jurisdiction of this Honourable Court to entertain a lapsed Review Application – Applicant delivered review application on 4 March 2016 but failed to comply with Clause 11.2.7 of the Practice Manual in that he failed to file all necessary papers within 12 months – review application ought to have been archived and

regarded as lapsed unless good cause is shown as to why the application should not be achieved or be removed from the archive.

Despite a condonation application by the Applicant for such non-compliance good cause not shown – Court lacks jurisdiction and application struck from Roll with no order as to costs.

JUDGMENT

RAMDAW, A J

Background

- [1] The Applicant was employed as a Club Operations Manager for approximately 17 years by the Third Respondent. He was charged with 3 counts of misconduct relating to misconduct and/or gross dereliction of his duty of care, honesty and integrity owed by him to the Third Respondent and/or breach of Company policy and procedures and/or abuse of sick leave and/or gross breach of the Company's code of conduct. He was found guilty at the disciplinary enquiry and dismissed. He challenged both the procedural and substantive fairness of his dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA). The second Respondent, a Commissioner acting under auspices of the first Respondent found that the dismissal was fair. The Applicant seeks to review and set aside the aforesaid decision. The Third Respondent opposes this application. Both the Applicant and the Third Respondent filed heads of arguments which is summarized hereunder.

Legal argument

- [2] The Applicant received the arbitration award on 4 January 2016 and filed his review application in terms of section 145 of the Labour Relations Act¹ (LRA) two months and eight days from date of receipt of the said award. The same

¹ No. 66 of 1995, as amended.

was filed outside the six weeks period and the Applicant seeks condonation for the late filing of the review application. The extent of the delay is not great as the Applicant showed good cause for such delay.

- [3] The Applicant filed his rule 7A (8) notice late and also sought condonation for same. The records were also filed late as the Applicant awaited the Legal Aid Board to pay for same. The Applicant contends that the prospects of success favours the Applicant's case as this application meets the review test adopted by our courts adequately and therefore this application should be granted with costs.
- [4] The Third Respondent raised the following issues in its heads of arguments. It contends that the Applicant's dismissal was both procedurally and substantively fair. Further, they oppose the condonation application for the late filing of his review application outside the six weeks period.
- [5] In his supplementary affidavit the Applicant applied for condonation for the late delivery of the records of the arbitration proceedings in that he failed to deliver the records within the 60 days' time period provided for in clause 11 of the Practice Manual of the Labour Court² (the practice manual) as same was delivered in November 2018.
- [6] The Third Respondent opposes same as they contend that the Applicant failed to ensure that all papers were filed within 12 months of the date of the award of the launch of the review application which resulted in the application being archived. The Applicant failed to adequately address this issue in his founding or supplementary affidavits filed or at all.
- [7] They further argue that the Applicant failed to meet the test for good cause in his application for condonation which involved the consideration of the factors enunciated in *Melane v Santam Insurance Co Ltd*³ being: degree of lateness;

² Effective April 2013.

³ 1962 (4) SA 531 (A).

explanation for the lateness; the prospects of success; the prejudice that may be suffered by any of the parties.

- [8] It is the third respondent's contention that this application fails to meet the test for reviews as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*⁴, and *Head of Department of Education v Mofokeng and Others*⁵, as well as *Shoprite Checkers v CCMA and others*⁶. In their supplementary heads filed the Third Respondent argues that this Court lacks the jurisdiction to entertain this application which has lapsed as set out in *Petro Chem Technical Service (Pty) Ltd v Motor Industry Bargaining Council Dispute Resolution Centre v others*⁷ and *Macsteel Trading Wadeville v Van der Merwe NO and others*⁸. They therefore sought that the application should be dismissed with costs.

Analysis

- [9] The Applicant failed to comply with Clause 11.2.7 of the Practice Manual and as such the Application ought to have been archived and regarded as lapsed unless good cause is shown as to why the application should not be archived or be removed from the archives.
- [10] The Third Respondent failed to bring a rule 11 Application to dismiss the review application, nor did the Applicant bring a proper application to remove the application from archives as it is deemed to have lapsed per clause 11.2.7 of the practice manual. It is quite clear that this matter must first be adjudicated upon whether “a good cause” was shown as to why the application should not be deemed to have been archived or be removed from the archive if it was indeed archived.

⁴ 2008 (2) BCLR 158 (CC).

⁵ (2015) 1 BLLR 50 (LAC).

⁶ (2015) 10 BLLR 1052 (LC).

⁷ 2019 ZALCJHB 310. Unreported decision. Case number: J1744/16 (Delivered: 14 November 2019).

⁸ (2019) 40 ILJ 798 (LAC).

[11] In *Petro Chem Technical Services (Pty) Ltd v MIBC DRC*⁴ the this Court held:

“It is a well-established principle of this Court that in terms of the Labour Court 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”.

[12] Section 145 (5) of the LRA requires an Applicant in a review application to apply for a set down date within six months from the date on which the review application was launched. This was not done by the Applicant.

[13] The Court in *Petro Chem*⁴ held that “..... *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 and to ignore the fact that no formal request or application has been made is indeed a big task which the Court cannot attend to.*”

[14] This approach is consistent with the Labour Appeal Court’s (LAC) decision in *Macsteel Trading*. Both discussions are fairly recent discussions.

[15] The Applicant’s approach towards the review application has been nothing but lax. He encountered a problem with paying for the transcripts which was filed over 2 years and 7 months late. The initial delay in lodging the review application was slight and stands to be condoned as it was a mere 18 days outside the prescribed 6 weeks’ period. However, the Applicant delivered his notice in terms of rule 7A (8) and his supplementary affidavit almost 2 years and 9 months after he delivered his review application. No proper case has been made out in the condonation application seeking condonation for the late delivery of the rule 7A(8), nor was proper consent attained from the Third Respondent with regards to the late filing of the record. These are material non-compliance with the Practice Manual of this Court.

[16] In terms of clause 11.2.3 of the Practice Manual if an Applicant fails to file the record within the prescribed period and does not obtain the Respondent’s

consent to an extension of time, alternatively does not deliver an application to the Judge President for an extension of time the review application is deemed to be withdrawn.

- [17] The Applicant failed to do both. The Applicant in its condonation application failed to explain the delay in every step and/or the reasons for the same. The test as set out in *Malelane v Santam Insurance*⁹ has not been complied with.
- [18] It is quite clear that there has been tardiness and/or laxity even negligence on the Applicant's attorneys part in complying with the prescribed time limits or prosecuting this review to finality. The decision in *Khan v Cadbury South Africa (Pty) Ltd*¹⁰ does not support the Applicant's case for condonation on the grounds as set out in his affidavits.
- [19] The second leg of the adjudication is the merits of the review application read with the prospects of success. The Applicant was employed in the gaming industry which is a highly regulated industry. The Applicant was employed as a Club Operation Manager which is a senior supervisory position carrying a lot of responsibilities. He had a duty to act in good faith, with due care and honesty displaying integrity at all times. He breached the Employer's Code of Conduct and failed to report for duty and/or explain his absence with proper documentary evidence in the form of an acceptable sick note. He is alleged to have displayed rude and arrogant behaviour towards his manager. I agree with the decision of the Second Respondent that the dismissal was both procedurally and substantively fair as her decision is that of a reasonable decision maker. Even if this Court enjoyed the jurisdiction to entertain the review application, the same would have failed given the abundance of jurisprudence on the "review test" as enacted by our Courts.
- [20] The Applicant must demonstrate that the Second Respondent's reason and the result of the Award are unreasonable. However, the award is a very detailed

⁹ Id fn 3.

¹⁰ [2010] ZALC 175. Unreported decision. Case number: C965/08. (Delivered: 17 November 2010).

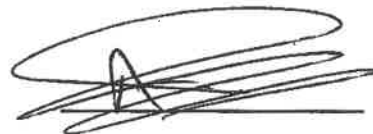
award dealing with the evidence of all the witnesses and the conclusions arrived at were based on good and solid reasons. There has been material contradictions in the Applicant's evidence which has dented his credibility as highlighted by the Third Respondent's counsel in their heads of arguments. The Applicant failed to challenge material evidence led at the arbitration and the Third Respondent discharged the burden of proof in showing that the dismissal was for a fair reason after following a fair procedure.

[21] It is quite clear that when this matter was set down for hearing same had been archived and regarded as lapsed. If it has lapsed then there can be no review application unless good cause has been shown or there has been a revival application to reinstate the lapsed application. It is quite clear that there has been material non-compliance with the Practice Manual in particular clause 11.2.7 which resulted in the review application having lapsed and being archived. This Court cannot determine the review application when this Court does not have the jurisdiction to do so.

[22] In the premises the following order is made:

Order

1. The Application is struck from the roll.
2. There is no order as to costs.



A. Ramdaw

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Frank Moloi of FM Moloi Attorneys

For the Third Respondent: Advocate Stacey Manie

Instructed: Edward Nathan Sonnenbergs