



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: CA 11/2021

In the matters between:

THE SOUTH AFRICAN POLICE SERVICES

Appellant

and

GERHARD COERICIUS

First Respondent

THE SAFETY AND SECURITY SECTORAL

Second Respondent

BARGAINING COUNCIL

JM MTHUKWANE N.O.

Third Respondent

THUTHUZELANDZOMBANE N.O.

Fourth Respondent

Heard: 30 August 2022

Judgment: 29 September 2022

Coram: Sutherland JA, Coppin JA and Kathree-Setiloane AJA

JUDGMENT

SUTHERLAND JA

[1] The appeal is against this order made by the Labour Court on 30 August 2021:

'The review application of the ruling and award under case number PSSSS305 – 16/17 is dismissed with costs'.

[2] The cryptic allusions to the 'ruling' and the 'award' relate to the relief sought in the prayers of the notice of motion:

- '1. Prayer 3: a review of a ruling given on 14 October 2016 by an arbitrator granting the respondent condonation for a three-year delay in bringing an unfair dismissal claim; the dismissal was on 6 August 2013. (The appellant had not, at that stage when the ruling was given, sought to review it, and went into the substantive case about an alleged unfair dismissal.)
2. Prayer 2: a review of the award given by an arbitrator, on 5 March 2019, declaring the dismissal unfair.'

[3] The overall dispute has a long and convoluted history, most of which is irrelevant to the critical issue before this Court; i.e., has the review application fallen foul of clause 11.2.3 of the Practice Manual of the Labour Court¹ (Practice Manual), and if so, what are the consequences. Clause 11.2 reads:

'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 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 purpose 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11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given.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

¹ Effective 1 April 2013.

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 and consent has been given. 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.

...

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 of 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 be archived or be removed from the archive. (Emphasis added)

[4] The critical facts are these:

- 4.1 The review was initiated on 17 April 2019. The relevant relief sought was that cited above.
- 4.2 The registrar, in terms of para 11.2.1 of the Practice Manual, advised the appellant (not later than) on 14 May 2019 that the 'record' was ready. This 'notification' means no more than whatever the Bargaining Council had sent to the registrar was available for collection and could then be included by an applicant in the record to be filed for the review application. Not all the material that was required by the appellant for the application had been delivered by the Bargaining Council as parts of the transcript of the arbitration hearing leading to the award were missing. This is an occupational hazard of long-standing and is the very reason why clause

11.2 of the Practice Manual was formulated to include a form of relief for an applicant experiencing such a predicament; i.e., to seek direction from the Judge President to ameliorate the practical difficulties. The material relevant to the condonation ruling aspect was nevertheless entirely available to be filed in the record because, being all on paper, it required no transcript.

- 4.3 An incomplete 'record' was lodged on 19 June 2019 consisting of what was available at that time.
- 4.4 The 60-day period mentioned in Para 11.2.2 of the Practice Manual expired on 8 August 2019. *Ergo*, a complete record had not been filed by that date.
- 4.5 The appellant did not follow the prescripts of clause 11.2.3 of the Practice Manual.
- 4.6 The respondent launched a Rule 11 application on 13 May 2020. The relief claimed was:

'(i) The review application...is dismissed for lack of prosecution.

Alternatively;

(ii) The applicant [i.e. the appellant] is directed to comply with Rule 7A....'²

² Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court GN 1665 of 1996:

- (1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.
- (2) The notice of motion must –
 - (a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;
 - (b) 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; and
 - (c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.
- (3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.
- (4) If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.

- 4.7 The founding affidavit addressed the Practice Manual provisions cited above complaining about the non-compliance by the appellant and its implications.
- 4.8 No answering affidavit was filed by the appellant to this application.
- 4.9 On 10 May 2021 (two days before the hearing) the appellant filed a notice of motion, without a supporting affidavit, claiming this relief:
- ‘(i) Condonation of the late filing of the Rule 7A record and the supplementary affidavit dated 18 August 2020.
- (ii) Reinstatement of the review application, if necessary, in the event the court finds that the file was archived’.³
- 4.10 In the supplementary affidavit in the review application, an account was given by the appellant of the difficulties experienced in getting the transcript of the arbitration from the Bargaining Council and why the appellant was blameless in relation to the delays.⁴ The supplementary affidavit did not offer a specific explanation why the procedure in para 11.2.3 of the practice manual had not been followed.

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- (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.
- (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.
- (7) The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause.
- (8) The applicant must within 10 days after the registrar has made the record available either –
- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or
- (b) deliver a notice that the applicant stands by its notice of motion.
- (9) Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.
- (10) The applicant may file a replying affidavit within 5 days after receipt of an answering affidavit.’

³ The reference to the file being ‘archived’ is a misnomer. The drafter herein alluded to clause 11.2.7 of the Practice Manual. No material effect results from this misnomer.

⁴ Record Vol 2 at pp 92-102.

4.11 The hearing before the Labour Court took place on 12 May 2021.

- [5] The appellant contends that it had no need to act in terms of clause 11.2.3 in relation to the ‘condonation ruling issue’ because the whole of *that* record, was filed before the expiry of the 60-day period. Only the record in respect of the ‘unfair dismissal award issue’ was problematic because it was incomplete.
- [6] The first question that arises is what is meant by the filing of a ‘record’ as contemplated in the Practice Manual. Can this requirement allow for a distinction between that part of the record relevant to the condonation ruling issue and that part relevant to the unfair dismissal award issue? In our view, there is no room to invoke such a distinction. There is only one review application, not two. True enough, the court *a quo* alluded to ‘two applications in the pleadings’⁵ but this description is loose usage not an expression of a jurisprudential distinction; a fact made plain by the view taken of the matter in the judgment by the Labour Court.
- [7] Because two decisions are the subject matter of two separate prayers does not mean there are two ‘review applications’. The orderly hearing of an application must mean that the whole house must be in order. That is what clause 11.2.3 requires. It is intolerable to expect a respondent to meet only part of a case; such a piecemeal approach is an anathema. Once the distinction cannot be made, the substratum of the appellant’s contention to examine the case on the footing of two reviews is fatally compromised.
- [8] It follows that a substantive application to overcome the deemed withdrawal of the review application was necessary, contrary to the appellant’s principal contention.
- [9] Because the respondent had raised squarely the issue that the review application was, in terms of clause 11.2.3, “*deemed to be withdrawn*” and sought an order dismissing it, the Labour Court had to give an answer. What does “withdrawn” in the context of clause 11.2.3 mean? Plainly, it must be understood to mean that the

⁵ Judgment, para [1]; Record Vol 12 at p 1027.

application is abandoned and such an applicant is no longer intent on seeking the relief in the review application. The Labour Court held thus:

[12] The applicant is essentially arguing that it does not fall foul of clause 11.2.3 on the basis that it filed a part of the record within 60 days of launching the review. This simply cannot be correct. Clause 11.2.3 of the Practice Manual provides that an applicant is to request an extension of time to obtain the full record from a respondent, or approach the Judge President with an application for extension, if consent is not forthcoming, if it fails to file the record within the prescribed 90 day [sic] period. The notion that an applicant can file a record in 'dribs and drabs' and that the *dies* of 60 days only starts running when it is of the opinion that the record is adequate, militates against the principle that a review is by its very nature urgent. This principle of urgency is set out in Clause 11.2.7 of the Practice Manual and has been repeated in numerous judgments of this Court. Any interpretation of the Practice Manual that accords the word 'record' in clause 11.2.3, the meaning 'a part of the record', as submitted by the applicant is absurd on a plain reading of the Clause, and in addition would be contrary to its purpose.

[13] As the Labour Appeal Court has stated⁶:

"[22] The underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the Rules of the Labour Court and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court."

[14] Ultimately, it is submitted by the applicant, that the first respondent is putting form before substance and that a proper case has been made out in the supplementary founding affidavit for condonation for the non-

⁶ *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 798 (LAC).

compliance with “the prescripts of this Court”. As stated above, the supplementary affidavit contains averments supporting condonation to be granted for the its’ late filing, and in that respect provides detailed information as to the efforts of the state attorney to obtain the record of the ruling and arbitration sought to be reviewed.

[15] The Court was not favoured with a condonation application apart from the averments contained in the supplementary affidavit. There was also no opposition filed to the Rule 11 application. As I have recorded, a last minute Notice of Motion was filed, asking the Court to reinstate the Award ‘if necessary’ in the event the Court regarded the review application to be archived. The applicant stuck to its guns (as it had to, given its averments in reply), that the review could not be deemed dismissed, as the applicant had not been able to obtain the full record within the 60 -day period.’

[10] The Practice Manual, in clause 11.2.3 itself, does not address a mechanism to revive an application that has been ‘deemed to be withdrawn’. However, in clause 11.2.7, where the failure to comply with those provisions results in the application being “...regarded as lapsed”, that paragraph goes on to provide that the lapsing can be reversed if “*good cause is shown why the application should not be archived*”. No good reason exists to suppose the consequences of “deemed to be withdrawn” and “regarded as lapsed” should bear substantively different meanings. Both these provisions are contained in clause 11.2. Both address related aspects of delay in the prosecution of a review application. Both forms of default must be capable of remediation by an application to reinstate.⁷

[11] The gravamen of the appellant’s grievance with this judgment is described in the cited passages, i.e. that form was placed before substance. In this regard, the Labour Court placed emphasis on the absence of formal opposition to the respondent’s Rule 11 application. This criticism is wholly correct; the Rule 11 application was a bar to proceeding any further with the review application. Moreover, although a notice of motion seeking reinstatement was indeed filed, no

⁷ See: *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) at paras [14] – [16].

supporting affidavit setting out a rationale to condone was filed with it. A case for condonation was nevertheless contained in the supplementary affidavit in the review application. However, despite these circumstances, the Labour Court took the view that what was filed did not amount to a proper reinstatement application.

[12] There were indeed procedural blunders committed by the attorneys of the appellant. But a fair-minded examination of all the circumstances should have led to an appreciation that, despite the untidiness of the papers, the substance of a reinstatement and condonation application was before the court. We offer no comment on the merits of the reinstatement application.

[13] The penalty for procedural blunders that have no substantive implications lie in costs orders, not in the dismissal of the application. The policy objectives of the Practice Manual do not require a mechanical application of its provisions. A purposive interpretation of the Practice Manual cannot lead to such an outcome as illustrated in this case. As was remarked upon in *Adams v National Bargaining Council for the Road Freight and Logistics Industry & others*⁸:

‘Although it is highly desirable for good order that rules be complied with on their own terms, the function of the rule is the paramount consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way. Mechanical thinking is anathema to our law: *cessante ratione legis cessat et ipsa lex*. The objectives of the Labour Relations Act 66 of 1995 inform the context of interpretation and its penumbra of pragmatism. Our law is not an ass.’

[14] In our view, the Labour Court ought to have found, on a charitable view of the papers, that a reinstatement application was before it and as such, was the answer in opposition to the respondent’s Rule 11 application. Such an approach is consistent with the dictum by Kathree-Setiloane AJA in *Macsteel Trading Wadeville v Van der Merwe NO and others*⁹:

⁸ (2020) 41 ILJ 2051 (LAC) at para [16].

⁹ *Macsteel* supra fn 4 at para [22].

‘...The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court.’

- [15] The Labour Court, instead, dealt only with the unconvincing principal argument that clause 11.2.3 was not violated by part performance and rightly dismissed that proposition as untenable. The Labour Court then inappropriately rejected the contention that a reinstatement application was before it. The absence of formal opposition to the Rule 11 application by the respondent ought to have been considered in the context of the manifest opposition thereto evidenced elsewhere in the papers and not construed as unopposed. If pedantry was thought to be sufficiently important, the appellant should have been afforded an opportunity to re-jig the papers, albeit at its cost.
- [16] On behalf of the appellant, it was urged on us to hear the reinstatement application which the Labour Court did not entertain, grant it and thereafter hear the case to review and set aside the condonation ruling of the arbitrator, rather than remit the case to the Labour Court. This invitation is based on the incorrect premise that there are two review cases before us. The litigation has dragged on for a very long time. Nevertheless, despite the ostensible advantages that ensue from expediting this matter by this Court hearing the reinstatement issue and also the condonation issue, we take the view that it is preferable that the Labour Court deal with these issues.
- [17] This Court is at large to hear issues on review not dealt with by the Labour Court *a quo* under certain circumstances. The circumstances where that is appropriate were addressed extensively in *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others*¹⁰. Coppin AJA (as he then was) held:

¹⁰ (2014) 35 ILJ 954 (LAC) at paras [42] – [43].

[42] ...Giving s 174(b) of the [Labour Relations] Act,¹¹ or the latter part of that section, a restricted meaning, would, in practice, inhibit the expeditious despatch of litigation and, in certain cases, cause a miscarriage of justice. It is frequently the case with appeals before this court involving a review of an award that only one, or so, grounds, out of a number, were dealt with by the Labour Court and in respect of which it dismissed the application for review, or granted the application and set aside the award, but without saying anything about the other grounds of review. It would be incongruous to suggest that in every case where the appeal (involving the one ground) was successful, this court ought to remit the matter to the Labour Court to decide on the other grounds that it did not consider initially, even though such a course might result in an unacceptable prolongation of the matter, or otherwise cause a miscarriage of justice. It is likely that in many appeals, excluding those in *Joseph* and *Shoprite*, this court has, in appropriate circumstances, itself considered the other grounds of review and finalized the application, as the Labour Court ought to have done.

[43] In my view, in the light of the above, this court is legally competent, in terms of the latter part of s 174(b) of the Act, to finalize a matter on appeal before it and not remit the matter to the Labour Court if there has already been an inordinate delay in finalizing a matter, or its remittal would entail a further long delay and further costs, or if there is a reasonable possibility of a miscarriage of justice occurring due to a remittal. The exercise of the power would depend on the facts and circumstances of the matter before this court. In considering whether to finalize the matter itself, the remarks of the Constitutional Court in *Fleecytex* have to be taken into account. In matters involving a review of an award, the general rule is that it is the function of the Labour Court to review awards. A departure from that rule on appeal is exceptional and depends on whether, in a particular case, the interests of

¹¹ Section 174: 'The Labour Appeal Court has the power –

- (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and
- b) to confirm, amend or set aside the judgment or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require.' (Emphasis added)

justice and convenience will best be served by this court finalizing the matter and not remitting it to the Labour Court. Other factors of importance include whether the issues were fully canvassed in the papers before the Labour Court; whether there is likely to be prejudice if the matter is not remitted and whether finalization of the matter by this court is requested by the parties on both sides.’

[18] This view was endorsed by the Constitutional court in *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & Others*¹² at para [87]:

‘In *Powertech* the Labour Appeal Court held that the following factors bear on the question whether a remittal to the Labour Court is the best course to adopt. These are whether –

- (a) the interests of justice and convenience will best be served by the appellate court itself finalising the matter;
- (b) the issues were fully canvassed in the papers;
- (c) the parties are likely to suffer prejudice if the matter is not remitted; and
- (d) both parties requested the appellate court to finalise the matter.’

[19] There are three aspects to the controversy between the litigants: the merits of the reinstatement application, the merits of the arbitrator’s condonation ruling and the merits of the unfair dismissal award. In this Court, the reinstatement application aspect was argued chiefly in relation to whether there was such an application, rather than on the merits of the condonation dimension inherent in such an application. The merits of the arbitrator’s condonation ruling of the three-year delay in filing an unfair dismissal case were not argued. Lastly, the merits of the unfair dismissal award were not argued.

¹² (2019) 40 ILJ 773 (CC).

- [20] Prudence dictates that all these aspects ought to be dealt with by the same court. In our view, the conditions which would persuade this Court that the circumstances were exceptional such as to justify this Court dealing, at first instance, with these issues are absent. Indeed, the invitation to deal with the condonation aspect, but not the unfair dismissal aspect, holds within it the unpalatable risk that were this Court to endorse the condonation ruling the remaining aspect of the unfair dismissal would still have to be dealt with, an aspect not argued before us.
- [21] Accordingly, the matter as a whole must be remitted to the Labour Court.
- [22] As to costs, the issue is academic, owing to there being no legal costs incurred by the respondent who was represented by his union. Were it otherwise, it would have been appropriate to order the appellant to bear the respondent's legal costs, owing to its procedural unorthodoxy being the source of the controversy.

Order

1. The appeal is upheld.
2. The dismissal of the review application is set aside.
3. The reinstatement application and the review application are remitted to be heard by the Labour Court, composed differently, upon the remitted hearing.
4. There shall be no costs order.

Sutherland JA

Coppin JA and Kathree-Setiloane AJA concur.

APPEARANCES:

For the Appellant:

T Golden SC, with her, R Matsala

instructed by the State Attorney, Cape Town.

For the Respondent:

T Magwaza, a union official of POPCRU.

LABOUR APPEAL COURT