

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1463/2021

In the matter between:

LUCKY NKOSI

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING
COUNCIL**

First Respondent

COMMISSIONER AMOS MATHINYANE N.O.

Second Respondent

JOHANNESBURG METROPOLITAN MUNICIPALITY

Third Respondent

ROGER GAHNES

Fourth Respondent

Heard: 27 February 2024

Delivered: 27 February 2024

EX TEMPORE JUDGMENT

PHEHANE, J

[1] The applicant brings a review application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award by the second respondent dated 20 October 2020 and received by him on 22 October 2020.² The second respondent issued a jurisdictional ruling dated 20 October 2020, in terms of

¹ Act 66 of 1995, as amended. See also: notice of motion on p 1.

² See: para 2.2 of the founding affidavit in the condonation application at p 514.

which he ruled that the bargaining council lacks jurisdiction to determine the applicant's claim as it was launched out of time.

[2] It is unclear when the review application was delivered to this Court, as the notice of motion bears no Court stamp. The Rules of this Court³ define the word 'deliver' as meaning to serve on other parties and to file with the Registrar. Rule 5 provides for the manner in which documents may be filed with the Registrar.

[3] The review application was delivered to the respondents on 21 July 2021. Were the applicant to be given the benefit of doubt that this review application was delivered to the Registrar at approximately the same time as it was delivered to the other parties, the review application is in any event, delivered well beyond the statutorily prescribed period of 6 weeks.⁴

[4] On 7 October 2021, the applicant delivered an application for condonation for the late filing of his review application.

[5] The review application and condonation application are opposed by the third respondent.

Condonation application for the late filing of the review application.

[6] The reasons proffered by the applicant for the late delivery of the review application is due to him making attempts to obtain the record of the arbitration proceedings from the bargaining council and upon receiving such record, he "*used great time and effort going through the transcripts to ensure the correctness thereof*"

³ Rules for the Conduct of Proceedings in the Labour Court as promulgated by GN 1665 in GG17495 of 14 October 1996.

⁴ Section 145 (1)(a) of the LRA provides that a review application ought to be launched within six weeks of the date that the arbitration award was served on the applicant. Section 145(1A) of the LRA provides that this Court may on good cause shown, condone the late filing of a review application. It is now trite that the time frame within which to launch a review application is 6 weeks be it a review application or a ruling. I state this noting that the applicant in any event, does not bring this application in terms of section 158 of the LRA.

*before making the Review Application in this Honourable Court as the Applicant believes that he has a strong and winnable case”.*⁵

[7] In summary, the reasons for the delay is that the applicant went back-and-forth with the transcribers to have the record transcribed - he had no funds to pay the transcribers and this delayed in him obtaining the transcript. Further delays were caused by mistakes in the transcription. The applicant does not state with any measure of clarity when the record was filed as contemplated in rule 7A(6) read with items 11.2.2 and 11.2.3 of the Practice Manual.⁶ No notice in terms of rule 7A(6) has been filed by the applicant. This is conceded by Mr. Jason Govender for the applicant. This is the basis of the preliminary point that the third respondent raises in its answering affidavit and accordingly contends that the review application is deemed withdrawn.

[8] In my view, the reasons for the delay as proffered by the applicant are unsound. The applicant is legally represented and was legally represented when this application was launched. In the circumstances, the applicant ought to have been aware of the timeframe within which to launch this application as well as the timeframe within which to file the record as contemplated in rule 7A(6) read with item 11.2.2 and 11.2.3 of the Practice Manual. The ineptitude of the applicant's attorney of record in failing to launch the application timeously and in failing to have regard to the provisions of section 145(1) of the LRA and the provisions of applicable rules and Practice Manual does not constitute a sound reason for the delay.⁷

Application for leave to file a supplementary affidavit

[9] Approximately 2 years and 4 months later, and after the pleadings in the condonation application had closed and after this matter was enrolled for hearing, the applicant's attorney of record delivered an application on 15 February 2024 for leave to file the supplementary affidavit. The supplementary affidavit sets out averments that the Covid-19 pandemic prohibited the applicant from filing his review

⁵ Founding affidavit, condonation application, at para 13.1 on p 519.

⁶ Effective 2 April 2013.

⁷ See: *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A).

application timely. It is averred for the first time, that the review application was delivered on 22 July 2021 *together with* the record. What the applicant falls short of, is providing an explanation why his supplementary affidavit is filed more than two years after his founding affidavit was delivered, as the facts he now wishes to put forward after much time has passed, are facts that were known to the applicant when he filed his condonation application in October 2021. It is trite that an applicant is to make out his case in his founding papers. The applicant failed to set out these facts in his founding affidavit. No explanation is provided why it took more two years to supplement his founding papers. Worse still, being legally represented, there is no explanation in the founding affidavit why the condonation application was not launched together with the review application on 22 July 2021. In a condonation application, it is trite that every period of delay must be explained.

[10] The third respondent contends that it has been denied the opportunity to oppose the application for leave to file a supplementary affidavit. I mention that this supplementary affidavit is not one as contemplated in rule 7A(8)(a), as a notice in terms of rule 7A(8)(b) was filed on 16 November 2021. There is no explanation by the deponent to the supplementary affidavit, being the applicant's attorney of record why the supplementary affidavit is filed more than two years later. It would have been prudent for the applicant's attorney of record to simply file a confirmatory affidavit to the founding affidavit in the condonation application explaining the delay. Launching a separate application to admit a supplementary affidavit to bolster a condonation application that was filed two years prior is an abuse of Court process.

[11] For the afore-going reasons, the application for leave to file the supplementary affidavit cannot succeed.

[12] The applicant's prospects of success in the review application are slim. He avers in his grounds of review that the preliminary point on jurisdiction as raised in the proceedings before the first and second respondent "*cannot be raised after the applicant has closed his case.*" From the transcribed record filed -although incomplete as the record of the date to which the proceedings were postponed has not been filed - it transpires that the preliminary point on jurisdiction was raised at the start of the proceedings. The second respondent heard evidence on when the

dispute arose and found that it arose in 2015 and the applicant launched his unfair labour practice dispute to the bargaining council out of time. In the circumstances, the merits of the review application are slim.

[13] I have already stated that the reasons proffered for the delay are unsound. In the premises, there is no need to consider the prospects of success.⁸ I have considered them in the interest of justice and find them to be slim. The prejudice to the third respondent far outweighs that of the applicant, given the time that the applicant took to launch this application. It is worth mentioning that the applicant's attorney of record informed the third respondent by way of letter dated 12 November 2020 that the applicant intended to file a review application in terms of section 145 of the LRA, however, the application was launched in July 2021 due to failure to comply with the rules and Practice Manual.

Costs

[14] A review application is an urgent application.⁹ In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*¹⁰ the Constitutional Court stated that when determining the reasonableness of the delay, regard must be had to the purpose of the LRA regarding the expeditious resolution of disputes. It has been overstated that the rules and provisions of the Practice Manual are binding on litigants and practitioners.¹¹

[15] The attorney of record of the applicant has blatantly failed to comply with the provisions of section 145(1) of the LRA in an attempt to obtain the transcribed record, when this is not the procedure as set out in rule 7A. On the applicant's own admission, the record was received on 12 November 2020 but was only delivered it would seem, on 22 July 2021. However, no notice in terms of rule 7A(2), (3) or (6)

⁸ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

⁹ See: item 11.2.7 of the Practice Manual, 2013.

¹⁰ (2016) 37 ILJ 313 (CC).

¹¹ See: *Macsteel Trading Wadeville v van der Merwe N.O. and Others* (2019) 40 ILJ 798 (LAC). See also: *Samuels v Old Mutual Bank* [2017] ZALAC 10 (25 January 2017).

has been delivered. The record is not one from the bargaining council, but that of the applicant. It is not for the applicant to file a record outside the rules.¹²

[16] The review application ought to have been filed before attempts to obtain the record were made. This is what the procedure in rule 7A provides. The applicant has chosen to file the review application in accordance with his own rules and to file the record simultaneously with his application. This is an applicant who has no regard for the rules of this Court.

[17] As stated above, the applicant is legally represented. I see no reason why the applicant's legal representatives should not be ordered to pay the costs of the review application, condonation application and application for leave to file a supplementary affidavit, *de bonis propriis*. The applicants' legal representative was afforded the opportunity to make representations to the Court as to why costs *de bonis propriis* should not be made, particularly as it became evident as the proceedings progressed, that the legal representatives of the applicant appear to be oblivious as to the provisions of rule 7A. The reasons provided are that the attorney of record of the applicant filed a supplementary affidavit setting out reasons why it was unable to comply with the rules in respect of review applications.

[18] In view of the afore-going, the following order is made:

Order

1. Condonation for the late filing of the review application is refused.
2. The review application is struck off the roll.
3. The application for leave to file a supplementary affidavit is dismissed.
4. The applicant's attorney of record, Smith van der Watt Inc. is to pay the costs *de bonis propriis*.

M. T. M. Phehane
Judge of the Labour Court of South Africa

¹² See: *Solidarity obo Du Plessis and others* [2022] JOL 55188 (LC).

LABOUR COURT