



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 54/16

In the matter between:

FREDERICK TAKALASI

Appellant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

PEARL MBEKWA NO

Second Respondent

NICRO INDUSTRIAL (PTY)

Third Respondent

Heard: 16 May 2017

Delivered: 18 October 2017

Summary: The Labour Court, in the absence of the applicant and an application for condonation for the late delivery of the application for the review of an award, *mero motu* granted condonation and reviewed and set aside the award. Held that the Labour Court was not entitled to consider an application that was delivered out of time unless condonation had been applied for and granted.

Coram: Tlaletsi AJP, Landman JA and Kathree-Setiloane AJA

Neutral citation: **Takalasi v Nicro Industrial (Pty) Ltd** (LAC JA54/2016)

JUDGMENT

LANDMAN JA

- [1] Mr Frederick Takalasi, the appellant, a former employee of Nicro Industrial (Pty), the third respondent, appeals against a judgment of the Labour Court (Fourie AJ) delivered on 7 July 2015 that reviewed and set aside an award made by Pearl Mbekwa NO, the second respondent acting under the auspices of the Metal and Engineering Industries Bargaining Council, the first respondent. The appeal is with leave of the court *a quo*.

The background

- [2] The appellant was employed by the third respondent. He suffered an injury that was not work related. The medical practitioner treating him recommended that he be provided with light duties. On 3 February 2012, the appellant left his workplace and referred a dispute concerning his alleged unfair dismissal to the relevant Bargaining Council. After an attempt at conciliation, the dispute was arbitrated. The arbitrator issued an award on 22 October 2012 in which she found for the appellant and awarded him compensation.
- [3] The third respondent was aggrieved by the award and launched an application to review and set aside the award as well as an application to stay the execution of the award.
- [4] The appellant opposed the review application and brought an application in terms of Rule 11 to have the review application dismissed. In this application, the appellant avers that the review application was launched some six-months late

and that the third respondent has not applied for condonation for its failure to launch the application timeously.

- [5] When the matter was called in the court *a quo*, there was no appearance for the third respondent. The appellant was in attendance. The court *a quo* decided to adjudicate the review application even though the third respondent was not represented. The court *a quo* appreciated that the review was brought out of time but said that the delay was “slight” and *mero motu* condoned the lapse.
- [6] The appellant’s representative decided not to move the Rule 11 application. Instead, the appellant’s representative decided to argue the appellant’s opposition to the review application. The court *a quo*, in an *ex tempore* judgment, found that the application was a good one and set the award aside. This was not what the appellant desired; hence this appeal.

Evaluation

- [7] When an application is delivered late, a court has no jurisdiction to hear the matter until the delay is condoned. In this case, there was no application for condonation. Any delay especially, if there was a six-month delay, calls for a reasonable explanation for the delay and for there to be good prospects of success.
- [8] The correct approach, if the court had notice of the set down, would have been to hear and decide the application in terms of Rule 11 to dismiss the review application for lack of prosecution.
- [9] In the absence of a consideration of the Rule 11 application, the court should have struck the review application from the roll with an appropriate order as to costs. Alternatively, the court *a quo* could have “dismissed” the review

application, with an appropriate order for costs, provided it is made clear that the dismissal of the application was not made on the merits.¹

[10] It follows that the appeal must be upheld. The parties are free to enroll their respective applications for hearing in the Labour Court.

Costs of the appeal

[11] The appellant seeks an order that the third respondent pays the costs of appeal. The necessity for an appeal followed from the appellant's failure to argue its Rule 11 application and its unsuccessful attempt at persuading the court *a quo* to dismiss the review application on its merits. In my view, the third respondent should not bear these costs.

Order

[12] I make the following order:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced by an order that reads:

‘The application to review and set aside the award of the second respondent issued under case number MEGA35854 is struck from the roll with costs.’
3. There is no order for the costs of the appeal.

A A Landman

Judge of the Labour Court

¹ See *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana* [2013] 3 BLLR 225 (LAC); (2013) 34 ILJ 1138 (LAC).

Tlaletsi AJP and Kathree-Setiloane AJA concur in the judgment of Landman JA

APPEAREANCES

FOR APPELLANT: Ms Thandi Moyo of Snyman Attorneys

FOR THE THIRD RESPONDENT: No appearances