



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J16/14

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES

Applicant

M.W. MASHIYA (“EMPLOYEE”)

First Respondent

THE SHERIFF

Second Respondent

THE GENERAL PUBLIC SERVICES SECTORAL

BARGAINING COUNCIL (“GPSSBC”)

Third Respondent

Heard: 31 October 2014

Delivered: 05 March 2015

Summary: Applicant failing to file the record of arbitration proceedings within 60 days of the notice by the Registrar that the record has been filed. Failure to file record within 60 days of Registrar’s notice deemed withdrawn clauses 11.2.2 and 11.2.3 Practice Manual.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an interlocutory application in terms of which the applicant seeks a declarator in the following terms:

- ‘1. The review application under this case number is not deemed to be withdrawn;
2. In the event the event that this honourable Court finds that the review application is deemed to be withdrawn, a failure by the applicant to comply with the rules and the practice manual is condoned;
3. A late filing of the record in supplementary affidavit filed in July 2014 is condoned.’

[2] The main application in this matter is the review application in terms of which the applicant seeks to review an arbitration award which was made in favour of the first respondent (“the employee”).

[3] The applicant has also applied for condonation for the late filing of the record and the supplementary affidavit.

[4] The arbitration award which was made in favour of the applicant was in consequence of the unfair dismissal dispute, which the employee had referred to the third respondent (“the bargaining council”).

[5] Initially, the arbitration proceedings were conducted before arbitrator, Malebye (“the first arbitrator”), during the course of the hearing an application for his or her recusal was made. The application was dismissed. The application for the recusal seemed to have been

consequent a comment made by the first arbitrator that the employee's representative should stop irrelevant questions.

- [6] After listening to about seven witnesses, the first arbitrator recused herself. And, thereafter, arbitrator Matlala ("second arbitrator") was appointed to hear the matter. It is apparent that the second arbitrator proceeded with the matter from where the first arbitrator left it. In other words, the second arbitrator did not start the proceedings *de novo*.

- [7] The review application under case number JR 2740/13 was launched during December 2013. The Registrar in terms of the rules notified the applicant that the record was ready for collection on 26 February 2014. Thereafter, the applicant delivered the recording to I-Africa transcribers (Pty) Ltd ("I-Africa") on 28 February 2014.

- [8] On 09 January 2014, Steenkamp J made an order on an urgent basis staying the execution of the arbitration award pending the finalisation of the review application.

- [9] It does not seem necessary for me to over burden this judgment with the complex history of the litigation in this matter. The key issue in this matter is that it is common cause that there was a delay in the filing of the record.

- [10] The employee has raised the point that the review application be deemed to have been withdrawn because the applicant failed to comply with the provisions of clause 11.2.2 and 11.2.3 of the Practice Manual of the Labour Court which provides:

'11.2.2 For the purposes 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 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. 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] The essence of the above sub-rules of the manual is that the record of the arbitration proceedings in the review application has to be filed within 60 days of the Registrar advising of the arrival of the record. Failure to file the record within the 60 days will result in the application being deemed to have been withdrawn.
- [12] Miss Pillay, for the applicant, argued that the deeming provision of the Practice Manual was not in congruent with the provisions of the rules and more importunately, it is in conflict with provisions of section 34 of the Constitution. It submitted, in this regard, that the deeming provisions of the practice manual take away the constitutional right of access to court. In other words, the deeming provision has the effect of changing the substantive law. It is further argued on behalf of the applicant that the concept of "deemed withdrawal" was equivalent to the matter being finally being adjudicated upon or being judged.

Evaluation

- [13] In terms of section 173 of the Constitution, the Labour Court like all the other High Courts has the inherent power to protect and regulate its own process in the interest of administration of justice. The interest of administration of justice in labour disputes is underpinned by need for expeditious dispute resolution as required by the Labour Relations Act ("LRA"). The purpose of the Practice Manual is to address the delays in the prosecution of matters before the Court to ensure efficient and speedy resolution of disputes.

- [14] The competency and the legal force of provisions of Practice Manuals have recently received attention in various judgments. In *Greenberg v Khumalo and Others, Greenberg v Du Preez and Another*,¹ the South Gauteng High Court, held that the words of the Practice Manual contained a requirement additional to those of the relevant rules was procedural incompetent and had no legal force and effect. A different approach to this was adopted by Wepener J, in the South Gauteng High Court in “In Re-several judgment on the urgent roll 18 September 2012. In disagreeing with the *Greenberg* case, the Court held that there was no prohibition against the Judge President making rules in addition to those contained in the relevant rule.
- [15] The status and the value of practice manual provisions is explained by Sutherland J in *Le Car Autotradors v Degswa 1038 CC and Others*,² in the following terms:
- ‘[29] MR Omar invoked SGHC Practice Manual and brandished its provisions with vigor, stressing the sanctity of its contents and alleging that it must be strictly adhered to. In doing so, he was mistaken. The SGHC Practice Manual, introduced in 2009, serves a practical purpose. Its purpose and status are not matters which need to be guessed. Its purpose and status are not matters which need to be guessed. Chapter one expressly states that its aim is to promote uniformity in the functioning of the Court.’
- [16] I do not agree with Miss Pillay that the provisions of the directives of 11.2.2 and 11.2.3 of the practice manual has introduced changes to the substantive law. In my view, it is simply a procedural tool to facilitate the management of a review application. It does not trump any of the rules of the Court. This being the case it then means a party that fails to comply with the Practice Manual is entitled to apply for condonation for the non-compliance.

¹ (22258/02, 23302/02) [2012] ZAGPJHC 91 (11 May 2012) at para 24.

² (2011/47650) (2012) ZAGPJHC286 (14 June 2012).

[17] I now turn to the application for condonation for the late filing of the record by the applicant. The approach to adopt when dealing with the condonation application is now well established.

[18] The principles of condonation were established in *Melane v Santam Insurance Co Ltd*,³ where the Court held:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'

[19] The applicant attributes the delay in the filing of the record to I-africa. According to it; it repeatedly enquired to I-Africa as to the progress of transcribing the record and was told it was not ready. The employee contends that explanation for the delay is not truthful particularly when regard is had to the fact that the applicant did not attach any supporting affidavit from the person that I-Africa had communicated with regarding the progress of transcribing the record.

[20] The applicant claims that it has good prospects of success in the review application particularly when regard is had to manner and approach adopted by the second arbitrator.

³ 1962 (4) SA 531 (A) at 532C-E.

[21] I agree that the explanation proffered by the applicant is not satisfactory. However, I find that it is compensated for by the prospects of success. In this regard, it has not been disputed that the second arbitrator, in his consideration of the dispute, relied on the evidence which was presented before the first arbitrator and not him. It seems to me that there are excellent prospects that on review. In this regard it would appear that the Court is likely to find that the approach adopted by the second arbitrator amounted to gross irregularity.

[22] In light of the above, I am of the view that the applicant's condonation application stands to succeed. I do not, however, believe that costs should be allowed to follow the result.

Order

[23] In the premises, the following order is made:

1. The review application is reinstated.
2. The condonation application for the late filing of the record and supplementary affidavit is granted.
3. There is no order as to costs.

Molahlehi, J

Judge of the Labour Court Johannesburg

Appearances:

For the Applicant: L Pillay from The State Attorney Office in Pretoria.

For the Respondent: Advocate Ndziba.

Instructed by: Molebaloa Attorneys.