



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: Pr115/15

**SOUTH AFRICAN MUNICIPAL WORKERS UNION obo
NOMAVA MLALANDLE**

Applicant

And

**THE SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL
NIEL A PAULSEN N. O
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY**

First Respondent

Second Respondent

Third Respondent

Heard on: 27 October 2016

Delivered: 02 November 2016

JUDGMENT

TLHOTLHALEMAJE, J

- [1] The Applicant approached the Court in terms of the provisions of section 145 of the Labour Relations Act, to seek an order reviewing and setting aside an arbitration award issued by the Second Respondent on 28 March 2016. In the award, it was found that the dismissal of Mlalandle fair. The application is opposed by the Third Respondent. There are also two preliminary points before the court, of which only one will be dealt with.

- [2] The review application was launched outside of the time periods stipulated in section 145 (1) of the LRA. The Applicant sought condonation in that regard. This judgment however is not concerned with that application.
- [3] It was common cause that the Applicant had not complied with the provisions of clause 11.2 of the consolidated Practice Manual of this Court, which provide as follows;

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- 11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given.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

- [4] The Third Respondent's contention was that the matter ought to be struck off the roll as in terms of the above provisions, the review application is deemed to have lapsed. It is common cause that the Applicant was initially advised by the Registrar of this Court on 16 October 2015 that the record of proceedings was available. The record was to be filed within 60 days after the Applicant was informed of its availability. It was however filed on 9 February 2016, some three months outside of the sixty days' period.
- [5] The provisions of clause 11.2 of the Practice Manual have received attention in several decisions in this court¹. Emanating from these decisions, the consistent approach of this Court in regards to the provisions of the Practice Manual is as follows;

¹ Minister of Justice & Correctional Services v Mashiya and Others (J16/14) [2015] ZALCJHB 68 (5 March 2015); Tady Trading CC t/a Tady Consulting Services v Steiner and Others (J 2845/13) [2014] ZALCJHB 7; (2014) 35 ILJ 1672 (LC); Ralo v Transnet Port Terminals & others (2015) 36 ILJ 2653; Shaik v Commission for Conciliation, Mediation and Arbitration and Others (JR874/13) [2016] ZALCJHB 239 (8 July 2016)

5.1 They contain a series of directives, which the Judge President is entitled to issue. The manual sets out what is expected of practitioners, so as to meet the imperatives of respect for the Court as an institution, and the expeditious resolution of labour disputes.

5.2 While the Manual acknowledges the need for flexibility in its application, its provisions are not cast in the form of a guideline to be adhered to or ignored by parties at their convenience²;

5.3 The Practice Manual is a procedural tool meant to facilitate the management of review applications, and does not trump any of the rules of the Court. Thus, a failure to comply with the provisions of Practice Manual will ordinarily result in the application for a review being deemed to have been withdrawn. A defaulting party is nonetheless entitled to apply for condonation for the non-compliance³.

5.4 To the extent that the defaulting party may contend that it would suffer prejudice on account of any application of clause 11.2.3 of the Practice Manual, or that it would be deprived of its right to access to court and to have its application fully ventilated, the proper order is to strike the review application from the roll. Once a matter has been struck off the roll, nothing prevents a party from filing an application to have the review application reinstated, together with an application in which condonation for the late filing of the record is sought;⁴

[6] Recently in *MJRM Transport Services CC v CCMA & others*⁵, this court had an opportunity to revisit of the provisions of the manual in question and came to the following conclusions;

6.1 The Provisions of the Manual must be understood within the context of its objectives as outlined in its 'Introduction'⁶;

6.2 The Manual is not a substitute for the Labour Court Rules. Its purpose is to fill in gaps not adequately catered for in either the Rules or the provisions of the LRA for the proper functioning of the court and expeditious resolution of disputes;

² Ralo at para [9]

³ Minister of Justice and Correctional Services v Mashiya and Others at para [16]

⁴ Ralo at para [11]

⁵ Case no: JR1171/14 delivered on 20 September 2016

⁶ Which is to;

to promote access to justice by all those whom the Labour Court serves; to promote consistency in practice and procedure; to set guidelines on the standards of conduct expected of those who practise in this Court; to tell representatives and litigants how things are done in this court, and what is expected of them; to address the need to maintain respect for the court as an institution; to promote efficiency in the adjudication of disputes; to improve the quality of the court's service to the public, and to promote the statutory imperative of expeditious dispute resolution

- 6.3 Inasmuch as the provisions of the manual call for flexibility in their application where required, litigants are nevertheless bound by them. To hold otherwise would lead to a dysfunctional court system, where parties can litigate in any manner that they deem fit, simply because it suits them to do so;
- 6.4 Clause 11.2.3 of the Practice Manual makes it clear that if the Applicant fails to file the record of proceedings within the prescribed period of 60 days, 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 granted;
- 6.6 Where no extension is consented to, it therefore follows that the application remains withdrawn until such time that the Applicant has filed the necessary papers as contemplated in the manual, to seek an extension from the Judge President, which essentially entails seeking an indulgence;
- 6.7 By all accounts, and to the extent that the Manual requires the Applicant to apply to the Judge President for extension by way of notice of motion supported by an affidavit, and to serve such an application, and further to the extent that answering and replying affidavits may be filed within the time limits prescribed by Rule 7, it can only be inferred that the extension sought can only be akin to an ordinary application for condonation as Van Niekerk J correctly pointed out in *Ralo*;
- 6.8 The Applicant will therefore still have the right to file an application to reinstate the review application, together with an application for condonation for the late filing of the record where none had been filed as at the hearing of the request for an extension.
- 6.9 An extension sought from the Judge President must thus be in the form of an application for condonation, and such an application will be dealt with by a Judge in Chambers. Where a record has been filed *albeit* out of time, it is for the court to issue any further directives in regards to the matter. Such matters should therefore not be placed on the already overburdened motion roll, as they can be disposed of in chambers. (However, where no such an application is made, the issue of non-compliance can still be dealt with in open court)
- 6.10 It was never the intention of the Practice Manual that whenever the provisions of clause 11.2.3 were to be invoked, the respondent party could by necessity, implore

the Court to dismiss the main review application. Respondent parties can therefore not bypass the other provisions of the Rules of this Court (in particular Rule 11) where there is an allegation of a failure to timeously prosecute a review application, and if they seek a dismissal of the review application;

- [7] In this case, it was common cause that the Applicant had neither requested an extension from the Third Respondent to file its record of proceedings out of time, nor had it approached the Judge President for such an extension as contemplated in clause 11.2.3 of the Practice manual. It was further common cause that the only application for condonation on file is in respect of the late filing of the review application in view of the failure to file within the time periods contemplated in section 145 (1) of the LRA.
- [8] Mr. Grogan's submissions on behalf of the Applicant in this regard were to the effect that the deeming provisions were not a bar to having the review application being considered, moreso since the court was in a position to exercise its discretion to hear the application even in the absence of an application to de-archive.
- [9] The Third Respondent's contention was that there was no longer a *lis* before the Court because the review application was deemed to have been withdrawn. To this end, the Applicant was obliged to have brought an application for the reinstatement of the review application, alternatively, an application for condonation.
- [10] I agree with the submissions made on behalf of the Third Respondent, and this approach is in line with the authorities as referred to elsewhere in this judgment. Accordingly, by virtue of the fact that there was non-compliance with the 60-day period contemplated in clause 11.2.2 of the Practice Manual, the review application as filed by the Applicant is deemed to have been withdrawn.
- [11] In the absence of an application to reinstate the review application, or further in the absence of an application for condonation as inferred from the provisions for such non-compliance, 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 have been made is indeed a big ask, which the court cannot accede to. To do so would make a mockery of practices in this court which are meant to ensure its smooth and efficient running. It is not for this court to willy-nilly grant extensions or indulgences where no formal applications have been made in that regard.

[12] Lastly, in regards to the issue of costs, the Third Respondent's contention was that to the extent that the matter would be struck from the roll, an appropriate cost order should follow. I have had regard to the requirements of law and fairness in considering costs, and having done so, I am of the view that a cost order is not warranted in this matter.

Order:

- i. The application for review as brought by the Applicant is deemed to have been withdrawn by virtue of the provisions of clause 11.2.3 of the Practice Manual of this Court.
- ii. The matter is accordingly struck off the roll.
- iii. There is no order as to costs.

Tlhotlhemaje, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. JG Grogan
Instructed by:	Wheeldon Rushmere & Cole
For the Third Respondent:	Adv. P Kroon SC
Instructed by:	McWilliams & Elliot INC

LABOUR COURT