



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1820/12

In the matter between:

NKOSANA MAKHOB

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
& ARBITRATION**

First Respondent

B KHUMALO N.O.

Second Respondent

ESKOM HOLDINGS (SOC) LTD

Third Respondent

Heard: 12 July 2017

Delivered: 25 October 2017

Subject: Review application in terms of rule 7A of the Labour Court Rules and Section 145 of the Labour Relations Act, 66 of 1995, as amended.

Short note: Review brought late without sufficient reason or basis. Failure by applicant to file record timeously or deal with the practice manual. No prospects of success on review. Applications for condonation and review dismissed with costs excluding costs related to heads

of argument.

JUDGMENT

GOLDBERG AJ

Preliminary Issues

- [1] Prior to setting out my judgment herein I pause to mention that the Court file herein was not paginated in terms of the Practice Manual of the Labour Court.¹ A review application is meant to be organised into three (3) separate bundles: – pleadings, notices and record. Here the Court file was paginated from pages 1 to 324 whereas the only index on file went from pages 1 to 202. The pagination was continuous and went from review onto condonation as if all the pleadings were part of the same application. Some of the notices were just loose in the Court file.

Introduction

- [2] The applicant in his notice of motion² seeks in terms of section 145 of the Labour Relations Act³, as amended (the *LRA*) to review and set aside the arbitration award handed down by the second respondent on 16 May 2012 under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) brought under case number GAJB 33614-11.⁴
- [3] The applicant also seeks condonation for the late filing of his review application in that as set out by him, he did not bring same within the prescribed time.

¹ Effective 02 April 2013. See para 11.2.8 of the practice Manual of the Labour Court.

² In his heads of argument, the applicant sets out that the Notice of Motion has been amended but I could not find any amendment; there was anyway no notice of intention to amend filed.

³ , Act 66 of 1995

⁴ The arbitration award is at pages 16 – 22 of the review pleadings.

[4] Should the review application be granted the applicant seeks that this Court substitutes the two (2) main findings as per the arbitration award with an order that:

- (1) the third respondent did commit an unfair labour practice against the applicant by depriving him of his due benefit;
- (2) the third respondent is to remunerate the applicant for the shortfall in payment emanating from the sale of the applicant's property.

Pertinent facts

Comment: Most of the facts in this matter are common cause and are captured in the pre-arbitration minute.⁵ This is one (1) matter that could have been decided by way of a stated case. At arbitration, only three (3) issues were disputed: (1) was the relevant policy in effect at the time the applicant sold his property; (2) was the applicant aware of the policy or should he have been aware; and, (3) was the policy relevant to his situation.

[5] The applicant was employed by the third respondent on 01 May 2006 as the Senior Advisor: Human Resources for Capital Expansion Department ("CED") projects in the CED of the Enterprises Division based at Camden Power Station.

[6] In September 2008, the applicant was transferred from Camden to the third respondent's Head Office in Megawatt Park, Sunninghill, Johannesburg due to operational requirements and / or the completion of the project which he was working on.

⁵ The pre-arbitration minute is at pleadings pp22 – 25 and the common cause facts are at p23 of such bundle.

- [7] The applicant sold his property in Standerton prior to such transfer. The applicant maintains that this was as a consequence of the transfer.⁶
- [8] The Capital Expansion Division had no properties department.
- [9] After selling his house / property, the applicant sought to and did lodge a claim to the third respondent for a shortfall amount of R 90, 000. 00 (ninety thousand rand), alleging that he was forced to sell his property as a consequence of the transfer and that he sold it at a price which was R 90, 000. 00 (ninety thousand rand) below its market value.
- [10] The applicant's claim was rejected by the third respondent; such rejection was on the basis that the applicant had not followed the correct / applicable procedures and further that the third respondent was not obliged to pay an employee the shortfall; the policy allowed for a discretion.
- [11] The applicant then referred an unfair labour practice dispute to the first respondent, alleging that the third respondent had failed to pay him a benefit which was due to him.
- [12] Arbitration was held on 04 May 2012 and the second respondent issued the arbitration award on 16 May 2012.
- [13] The issue which the second respondent had to determine was whether the third respondent committed an unfair labour practice as contemplated in section 186 (2) (a) of the LRA..
- [14] The second respondent in his award found that the non-payment of a shortfall to an affected employee, from selling his property below the market value when all requisite policy provisions have been followed, falls within the scope of section 186 (2) (a) of the LRA and as such could amount to an unfair labour

⁶ The parties do not specifically set out whether the sale of the house came first or the transfer and I assume for purposes of this Judgment that the applicant was advised of the transfer prior to selling his property (this being to the applicant's favour).

practice. As such there is no need to quote this section of the LRA but the question that needed to be decided was did it apply in the circumstances of the case? This is; did the third respondent commit an unfair labour practice?

[15] Furthermore, the second respondent found that to equate the unfair labour practice to jurisdictions regarding benefits disputes, with contractual and statutory claims, seems to limit it unduly.

[16] The most salient part of the award⁷ and the part challenged by the applicant on review sets out: –

“3. The respondent is neither responsible for the shortfall payment emanating from the selling of the applicant’s house nor did the respondent commit an unfair labour practice against the applicant in the instant case.”

[17] The second respondent in finding that the third respondent herein had not committed an unfair labour practice ordered that the applicant’s matter was dismissed.

Parties’ Arguments

Applicant’s arguments

Condonation

[18] The applicant on review in seeking condonation for the late filing of his review application sets out that the reasons for the delay in the filing of his review application are:

“5.1 Due to my attorneys’ availability I only managed to consult with him, and supply him with all documents on 20 June 2012.

⁷ The arbitration award is at pleadings pp16 – 21. This finding is at pleadings p20 = Award p5/6.

5.2 *Further documents was required by my attorney, and I was only able to get same at him on 22 June 2012.*

5.3 *My attorney thereafter was only able to arrange a consult with an advocate and peruse all the necessary documents at that time.*⁸

[19] In respect of prospects of success, the applicant sets out that the second respondent considered irrelevant matters and came to an unreasonable decision.⁹ He further sets out that the “*Commissioner lost sight of the fact that the Respondent relied upon a prescribed procedure which was put into effect only after my property was sold*”¹⁰ and as such the second respondent should have come to a finding that the prescribed procedure was “*not yet in effect at the material time.*”¹¹

[20] In the applicant’s heads of argument he sets out that the review was filed about one (1) month late.¹²

[21] Further, and in a separate application brought on 16 February 2016, the applicant seeks condonation for the late filing of the reconstructed record.

The review

[22] The applicant seeks that the Court review and set aside the arbitration award made by the second respondent.¹³

[23] In his founding affidavit, the applicant at first, sets out general grounds of review without any particularity. He then expands on these grounds and sets out that in the second respondent’s finding that he should have followed the prescribed procedure despite the prescribed policy being dated with a date which was after he sold his property / house that the second respondent

⁸ Pleadings p10 par 5 (founding affidavit).

⁹ Pleadings p11 par 6.2 (founding affidavit).

¹⁰ Pleadings p11 par 6.3 (founding affidavit).

¹¹ Pleadings p11 par 6.4 (founding affidavit).

¹² Applicant’s heads of argument p12 para 22.

¹³ Pleadings p2 par 2 (notice of motion).

*“erroneously neglected to take cognisance of the fact that the alleged prescribed procedure was not in effect in the Applicant’s division at the time he was forced to sell the property.”*¹⁴

- [24] The other grounds of review mentioned by the applicant relate to the accusation that the second respondent failed to take cognisance or appreciate that the third respondent was meant to have advised its employees of the policies (seemingly in writing) but it failed to do so; that such prescribed policy was only raised as a defence by the third respondent belatedly after the applicant submitted a grievance;¹⁵ that the applicant was acting in accordance with his conditions of service; that such defence (the need to follow the prescribed procedures) was merely a technicality relied upon by the third respondent in order to evade the duty to pay out the applicant’s benefit. Because of the above, the applicant sets out that, the findings made by the second respondent are not those a reasonable decision maker could have come to in the circumstances; are illogical; and are not connected to the overall assessment of the evidence.¹⁶
- [25] Originally the applicant stood by his notice of motion; but then later he filed a supplementary affidavit, in which, he sought leave for the filing thereof.¹⁷
- [26] In his supplementary affidavit, the applicant sought to supplement his grounds of review and sets out that the second respondent erred in finding that the RPO2 form (the claim form used at the third respondent to apply for a claim) ought to have been completed at the time of his transfer.¹⁸ The applicant sets out that the evidence in this regard was limited to that which related to one Karin Haas, and to certain documents contained in an annexure to the respondent’s arbitration bundle and in particular the document marked as annexure “H1”.¹⁹

¹⁴ Pleadings p13 para’s 11.1 and 11.2 (founding affidavit).

¹⁵ The grievance was only raised on 07 September 2011 whereas the disapproval of the motivation was in November 2010.

¹⁶ Pleadings p13 para’s 11.3 – 11.10 (founding affidavit).

¹⁷ Pleadings p189 para 6 (notice in terms of rule 7(8) (a)).

¹⁸ Pleadings p194 para 2.2.1 (supplementary affidavit).

¹⁹ Pleadings p194 para’s 1 – 2 (supplementary affidavit) – for the document see pleadings pp55 – 63 and in particular p58 par H. The evidence of the Karin Haas issue is not contained in the record.

- [27] The applicant maintains that the second respondent further erred in accepting the evidence of Karin Haas in this regard in that the third respondent had conceded that the Capital Expansion Division (where the applicant was working) did not have a properties division; that in her case she (Karin Haas) was transferred to the Generation Division which had a properties department / division and thus her (Karin Haas) transfer would be accommodated by the process which involved the completion of an RP02 Form. The second respondent failed to appreciate that the form and the completion thereof was applicable to her as she was being transferred to a division which had a properties department whereas he (the applicant) was not to be transferred to a division that had a properties' division. In conclusion, the applicant reiterates that the RPO2 Form was not required in his division at the time of his transfer and was not a requirement of his actual transfer.²⁰
- [28] The further grounds of review raised by the applicant, in the alternative, concern the issue of the calculation of the shortfall and that the arbitration award should have sought that the shortfall be recalculated instead of finding that there was no case.²¹
- [29] A further ground of review raised by the applicant is that the second respondent failed to consider that in failing to provide the applicant with benefits due to him, the third respondent treated him differently from others that obtained the benefit.²²
- [30] Costs were sought against any party opposing.
- [31] The applicant's replying affidavit does not add to the issues and is simply an affidavit full of denials.

²⁰ Pleadings pp195 - 196 para's 2.2 – 2.2.6 (*sic*) (supplementary affidavit).

²¹ Pleadings p197 para 3 (supplementary affidavit).

²² This ground is seemingly raised by the applicant for the first time in the applicant's heads of argument. I cannot take cognisance of new issues or evidence raised in heads of argument - See the case of *Comtech (Pty) Ltd v Commissioner Shaun Molony N.O and Others* (DA 12/05) [LAC Durban 21 December 2007] at para 13 – 16.

- [32] The applicant's heads of argument set out *inter alia* that the argument that the second respondent's arbitration award is not logically connected to the overall assessment of the evidence, submissions and documents placed before him and that when looking at the totality of the evidence presented, the findings of the commissioner should have been that the third respondent had committed an unfair labour practice by not paying the applicant the shortfall.²³

Third respondent's arguments

- [33] In its answering affidavit the third respondent raises three (3) points *in limine*.

Condonation

- [34] The third respondent's first point *in limine* is that the applicant's review application was filed one (1) month late (late filing of the review application). The third respondent sets out that on this basis that the Court should dismiss the review application.²⁴
- [35] The third respondent later in its papers sets outs that whilst the applicant has applied for condonation for the late filing of the review application in this regard he has not made a proper case for condonation.
- [36] The third respondent challenges the reasons provided for seeking condonation and sets out that the applicant's condonation application fails to deal adequately with the factors required by the Court; that the explanation provided by the applicant is insufficient and as such condonation should not be granted. The third respondent sets out that the applicant has failed to explain the period of delay between 22 June 2012 and 26 July 2012. The only explanation provided for this period of over a month is that the applicant's attorney "...was only able to arrange a consultation with an advocate, and peruse all the necessary documents at their time." The third respondent points

²³ I repeat that I cannot take cognisance of new issues or evidence raised in heads of argument - See the case of *Comtech* as per ft. 20.

²⁴ The issue of the late filing of the review application is raised as a point *in limine* by the third respondent – see pleadings p233 para's 12 – 15.

out that the applicant fails to set out what he was doing during such period to advance his matter. Further the third respondent sets out that an individual applicant cannot simply sit by without regularly checking up on his matter.

- [37] In its second point *in limine*, the third respondent sets out that the applicant's review has not been processed properly (failure to take steps in the review proceedings) and raises the point that in terms of the Practice Manual of the Labour Court, the matter is to be considered withdrawn and archived and as such, is not properly before the above Honourable Court.²⁵
- [38] The third respondent sets out that the applicant has not made out a proper case for condonation of the late filing of the record of proceedings;²⁶ that the applicant has no prospects of success on review²⁷ and that the applicant has not demonstrated to the Court that he has grounds for review.
- [39] The third respondent raises the further issue that the applicant has failed to file a complete record within the prescribed time limits both using the commencement of the review application (July 2012) as a starting point and then also subsequent to reconstruction (failure to file a complete record within the prescribed time limits, subsequent to reconstruction) .²⁸
- [40] In respect of the reconstruction of the record I had to ascertain the events from what the third respondent sets out which was that a reconstruction meeting was held during November 2015 or December 2015. The parties signed the transcribed notes of the second respondent²⁹ which were then filed by the first respondent in terms of rule 7A (3) on or about 11 May 2016.

²⁵ The issue of the failure by the applicant to process his review is raised as a point *in limine* by the third respondent – see pleadings pp234 – 236 paras 16 – 30.

²⁶ See pleadings p243 para's 69 – 71 (answering affidavit). This is further elaborated on – the third respondent sets out that the applicant has failed to take the matter seriously from the outset and has unnecessarily delayed the matter – See Pleadings p245 para 80 (answering affidavit).

²⁷ See pleadings p243 para's 72 – 77 (answering affidavit).

²⁸ The issue of the failure to file a complete record is raised as a point *in limine* by the third respondent – see pleadings pp236 – para's 12 – 15 (answering affidavit).

²⁹ The parties signed the transcribed notes on 11 December 2015 – see transcribed notes at pleadings pp170 – 188.

- [41] The third respondent complains that a proper process of reconstruction should have taken place and that because the grounds of review raised by the applicant are related to the record and as such that without the full and complete record being placed before the Court there cannot be a “*full and fair review*”³⁰.
- [42] The third respondent sets out that it was prejudiced in that the arbitration bundles were not part of the record served upon it initially and that whilst the applicant set out that same were attached to his founding affidavit, which was served upon the third respondent, that this was not the case and that it only received the transcribed records, much later, on 31 January 2017.
- [43] Further mention is made that originally the applicant stood by his notice of motion and chose not to supplement but then later he sought to supplement his founding affidavit. Further the third respondent sets out that initially it did not receive any compliance with rule 7A (8) and that same was only received in January 2017.
- [44] Further the third respondent sets out that the applicant should have applied for the Court file to be retrieved from archives, as per the Practice Manual of the Labour Court, which he has not done.³¹
- [45] The third respondent has opposed the applicant’s application for condonation for the late filing of the record and raises points *in limine* concerning the issues of the deeming withdrawal provision as per paragraph 11.2.2 of the Practice Manual of the Labour Court;³² and, the issue of the incompleteness of the record.³³ Further it sets out that the explanation provided by the applicant in this regard is insufficient and that the applicant has failed to set out the reasons for each period of delay.

The review

³⁰ See pleadings p240 para’s 48 – 51 (answering affidavit).

³¹ See pleadings p238 para 39 (answering affidavit).

³² See pleadings p314 para’s 6 – 8 (answering affidavit on condonation).

³³ See pleadings p317 para’s 23 – 25 (answering affidavit on condonation).

- [46] The third respondent sets out that the applicant's "... grounds of review are *inter alia*, that the factual findings of the Second Respondent did not correspond with the evidence and documents placed before the Second Respondent, and that he did not apply his mind properly and rationally to the facts."³⁴
- [47] In respect of the applicant's review the third respondent sets out that the second respondent's finding was one that any reasonable commissioner in the second respondent's position would have reached in that he correctly found that the third respondent did not commit an unfair labour practice in the circumstances. In particular the second respondent correctly found that the relevant prescribed procedure applied to the applicant.³⁵ It sets out that such procedure was already implemented in 2007 and was used by a colleague of the applicant in August 2008. Further the third respondent sets out that the applicant was the custodian of the third respondent's policies in his capacity as the HR Manager and as such he should have been fully aware of such policy.
- [48] The third respondent in support of the arbitration award argues that the applicant should have applied timeously in terms of the policy, that the applicant only consulted after his claim was rejected;³⁶ that the applicant was meant to follow procedure;³⁷ and that it has a duty to treat all cases alike;³⁸ and further that the issue of whether or not the department that he was transferred to had a property department or not is not relevant³⁹ and that anyway the third respondent's policy was discretionary (and that this issue was not challenged at arbitration)⁴⁰.
- [49] The third respondent seeks that the applicant's review application should be dismissed, with costs.

³⁴ See pleadings p240 para 50 (answering affidavit).

³⁵ See pleadings pp243 – 244 para 73 (answering affidavit).

³⁶ See pleadings p247 para 97 (answering affidavit).

³⁷ See pleadings p247 para 98 (answering affidavit).

³⁸ See pleadings p249 para 118 (answering affidavit).

³⁹ See pleadings p249 para 117 (answering affidavit).

⁴⁰ See pleadings p250 para's 126 – 129 (answering affidavit).

Analysis

- [50] The applicant sets out that he received the arbitration award on 16 May 2012 and as such his review should have been lodged on 27 June 2012. The review application is brought approximately one (1) month late.
- [51] On condonation for the late filing of the review application, the applicant sets out that he consulted with his attorney and that his attorney consulted or met with an advocate and then sought to lodge his review. No proof of the reasons for such delay is provided.
- [52] The applicant failed to serve his review on the company and instead he sought to serve it on the attorneys that the company used at arbitration. No service affidavit is filed. In his founding affidavit, the applicant does not mention this issue and only sets out the third respondent's physical address in the description of the parties. There is no mention of attorneys and no mention that he has been given permission to serve on the third respondent's attorneys.
- [53] On condonation for the late filing of the review application, the applicant fails to set out how many days he is late. The explanation provided for the delay of approximately one (1) month⁴¹ is lacking in detail and fails to explain the time line adequately. Only two (2) dates are mentioned; the date he manages to consult with his attorney and the date it seems that his attorney seemingly goes to consult or meet with counsel.
- [54] The reason provided by the applicant is simply that the attorney was unavailable to consult with him until 20 June 2012 and that further documentation was obtained on 22 June 2012. There is no mention who this attorney is, no mention as to whether he was the only attorney at the firm, no mention even as to what this "*further documentation*" is. Documentation was attached to the applicant's founding affidavit (which appears to be the

⁴¹ In the applicant's heads of argument, he sets out that the review was filed one (1) month late – applicant's heads of argument p12 par 22.

arbitration bundles or at least the documents which made up such bundles; and, as set out such documentation was not served together with the founding affidavit upon the third respondent) and perhaps this is what the applicant is referring to?

- [55] The applicant seemingly wants to blame the delay on his attorneys and / or on counsel and their unavailability to attend to him and / or his matter. The applicant fails to set out why he specifically needed to use this attorney. The applicant fails to set out that he never knew that he was late [indeed he seemingly admits that he knew he was late] and / or why if he knew that he was late why he used and continued to use these attorneys where he should have known that he had a limited period of time within which to file the review application and seemingly admits to having such knowledge. The applicant fails to set out what he did to ensure that his review application was filed timeously. Further there is no confirmatory affidavit by the attorney and / or the counsel confirming the reasons for the delay and indeed the attorney and the counsel are not mentioned specifically by name.
- [56] On or about 05 December 2012 the applicant seemingly files a Notice in terms of rule 7A (6) containing what purports to be the record on review.⁴² Why I say seemingly is that there is no Court stamp on the rule 7A (6). Why I use the word “*purports*” is because the only part of the record that is filed in terms of such Notice is a copy of the second respondent’s handwritten notes (untyped).
- [57] The applicant initially filed a notice in terms of rule 7A (8) setting out that he stood by his notice of motion⁴³ but later the applicant sought to file a supplementary affidavit in terms of rule 7A (8) wherein he sought leave for the Court to consider same. At Court, on the day of the hearing, the applicant failed to seek leave from the Court in this regard. As such his supplementary affidavit is irregular; a party seeking to act as such should specifically apply both in its papers and in Court for such an indulgence. The applicant’s

⁴² The notice is dated 29 November 2012 but is only filed on 05 December 2012. There is service on the third respondent by hand on 05 December 2012.

⁴³ This notice was not in the Court file but is mentioned by both parties.

supplementary affidavit should be struck from the record of pleadings. Despite this and in the interest of finally disposing of this matter and because the third respondent answers thereto I have taken the applicant's supplementary affidavit into account.

- [58] Following on the timeline the parties next embarked on a reconstruction of the record, the parties meet for a reconstruction hearing, which culminates with the second respondent typing out his notes, which are signed by the parties and which are then filed at court on or about 11 December 2015.⁴⁴ [This reconstruction process takes about three (3) years]
- [59] On 11 May 2016 (five (5) months later) the first respondent files a "*Notice of Further Compliance i.t.o. Rule 7A (3) of the Labour Court Rules*" which contained "(1) *Respondent's Transcripts of the Commissioner's Handwritten Arbitration Notes (9 Pages)* (2) *Reconstruction of the Case Record of an Arbitration Award (10 pages)*".
- [60] In respect of the late filing of the record on review, the Practice Manual of the Labour Court reads as follows:

"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."

⁴⁴ Pleadings pp170 – 188.

[61] Based on the above quoted passage, the applicant's review application is accordingly deemed to have been withdrawn in that he failed to file the record on review within sixty (60) days from the date he was notified by the Registrar in terms rule 7A (5) that the record had been received by the Court and that it may be uplifted. Further the applicant was meant to apply to reinstate his review application but he only seeks condonation in this regard. The reasons given for the lateness here is set out as the withdrawal of the applicant's previous attorneys and the mistaken belief by the applicant and the applicant's present attorneys that the previous attorneys had complied with rules 7A (6) and (8).

[62] In the Labour Court case between *Samuels v Old Mutual Bank*⁴⁵ Tlaetsi DJP held the following with regard to the retrieval of a file from archives:

"[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the Court Rules, timeframes and directives. Showing good cause demands that the application be bona fide; that the Applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the Applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised."

[63] Whereas the applicant sought to apply for condonation for the late filing of the record in a separate application it is clear from what is set out above that he should have also sought to apply for the Court file to be retrieved from archives and dealt specifically with the issue of good cause. It is my firm belief that without such an application and without dealing with such issue that the applicant's review application remains withdrawn. Further such application for

⁴⁵ (DA30/15) [2017] ZALAC 10.

condonation is not paginated separately; same comes belatedly, and no condonation is sought for such further lateness (the late filing of such application itself).

- [64] The application for condonation for the late filing of the record only seeks condonation for a delay of a period of five (5) months, being the period from the filing of the second rule 7A (3) until 11 August 2016; the applicant fails to seek condonation for the entire period of delay which is from the filing of the first rule 7A (3) by the CCMA up until 11 August 2016, a period of over five (5) years. Similarly, the reasons provided for the lateness do not deal with the five (5) months of delay for which condonation is sought. The reasons provided are accordingly wanting as is the application itself. Further the applicant fails to deal properly with prospects of success, in such application, and just refers me to his founding affidavit on review. It is trite that an application for condonation must stand on its own two (2) feet. Anyway, for the reasons set out herein, I am of the opinion that the applicant's review application has no prospects of success.
- [65] In respect of the status of the record as filed; the third respondent sets out that the record, even though reconstructed, is incomplete and that the Court should have been provided with a more complete record. It further sets out that the missing parts of the record are material. I cannot say what exactly is missing from the record but it does appear to be a large portion. The typed version of the second respondent's notes are no substitute for the actual record, and it is evident that in order to provide the Court with the most complete record possible a better reconstruction process should have been done. The third respondent blames the applicant for such failure but it fails to set out why it then signed the reconstructed transcribed notes of the second respondent, seemingly agreeing that this could and should be used as the record of the arbitration proceedings going forward. Further the third respondent took no steps to provide the Court with a more complete record.
- [66] Despite the record being incomplete I believe that the review application can still be decided based on the arbitration award, the common cause issues, the

typed notes and the affidavits filed. The only problem I have in deciding the review, and as is pointed out by the third respondent, is that most of the grounds of review relate to the allegation that the second respondent failed to come to a reasonable finding or outcome based on the evidence that was placed before him. As I have no proper record of what was set out at arbitration before me, and the transcribed notes of the second respondent are no substitute therefore, these grounds of review cannot be truly assessed. If these grounds did have a basis I would have struck them from the pleadings in that I was unable to assess them. But as explained below these grounds have no basis so it is not necessary to strike them.

- [67] When I was given the Court file in preparation for the hearing of the matter on 12 July 2017 the pleadings and papers contained therein were not organised, indexed or paginated appropriately and the index on review only went as far as the applicant's supplementary affidavit. Had the Court file been properly indexed and paginated this would have allowed me to read the Court file easier and reach a judgment much more timeously. The applicant has caused a further delay in this regard.
- [68] The parties were requested by the Court to file heads of argument on 11 February 2017 by means of telefax. The applicant's heads were only filed on 07 July 2017 despite them being dated 06 February 2017. The third respondent filed its heads of argument and its practice note on 07 July 2017. The applicant failed to file a practice note.

Prospects of success on review / grounds of review

- [69] The applicant's review concerns the allegation that the third respondent deprived him of his due benefit. The simple question to be answered is was the benefit due?

[70] The applicant alleges that due to him being transferred to Campden, he was forced to sell his property / house in Standerton.⁴⁶ There is simply no basis to this allegation. The applicant could have chosen not to sell his house / property; he could have sold it for more; he could have bought a cheaper property; he could have rented; there was no immediate pressure placed on him by the third respondent to sell his property. The “*debt*” that he incurred was self-acquired.⁴⁷ While there was the issue of the transfer to head office (and from there he was to be sent to his new assignment) there was no pressure placed upon him to sell and the transfer was not the *sine qua non* reason which caused him to sell his property, and more so to sell it at a loss or below the market value. The manager, Peter Mashatola, specifically set out to the applicant (and as admitted by him) that the third respondent “*cannot use the valuated property price differences as the basis of calculating a loss because the property market is like that, people buy (sic) and sell their houses everyday below valuated price based on the property market movement at the time.*”⁴⁸ The manager never changed “*the process to be followed and the basis on which Eskom paid the benefits that were due to employees*”⁴⁹ as alleged by the applicant.

[71] Further no legitimate expectation was created by the third respondent that it would pay the applicant for the shortfall. The meeting between the applicant and the two (2) managers of the third respondent that took place was not a formal meeting whereat anything was promised and / or whereat a legitimate expectation could have arisen.⁵⁰ Even if a legitimate expectation had somehow arisen this did not change the situation; this was in that the applicant would have still needed to have completed the policy document

⁴⁶ See pleadings p171 (transcribed notes). This is what was put to him at arbitration in cross examination – see pleadings p174 paragraph 6 (transcribed notes). The third respondent never required that he purchase a house in Campden to facilitate the transfer. In cross-examination it was put to him that he could have rented (while waiting to sell his house at a better price) and according to the record the applicant conceded this.

⁴⁷ In evidence the applicant conceded that the decision to sell his house was his own – see pleadings p175 paragraph 1 (transcribed notes).

⁴⁸ See pleadings pp173 – 174 (transcribed notes).

⁴⁹ See pleadings p174 paragraph 1 (transcribed notes).

⁵⁰ See pleadings p176 paragraph 1 (transcribed notes) where it is noted that the applicant conceded that such meeting was informal.

before the sale to allow for the third respondent to assess the situation and the terms of the sale prior to the sale of the property.

- [72] Further the benefit that the applicant claimed was not a guaranteed /obligatory or due benefit. The Company's policy sets out that it may reimburse the employee⁵¹ where he is forced to sell his property / house due to a transfer.
- [73] In order to have claimed the benefit from the third respondent it is clear that an employee faced with a transfer must follow the policy document and complete the required forms before the sale of the property. The applicant failed to even complete the prescribed form – Form RP02. The third respondent was to be notified of the situation and its property division had to agree that the property should be sold; next the property needed to be evaluated in terms of the policy by agents appointed by the third respondent; the applicant could not appoint his own valuator and evaluate his own property.⁵² These requirements needed to be fulfilled.⁵³
- [74] The applicant claims that he never knew the policy and / or that it was not in effect at the time. An employee in the applicant's position as custodian of the HR policies should have known of the policy document and the need to complete same.⁵⁴ Even if he truly did not know of the policy document then it can be said that he should have known of it and / or could have easily found out what needed to be done.
- [75] What the true situation appears to have been was that the applicant found out about the policy only after he sold his property / house and then that he tried to take advantage thereof by belatedly submitting a claim. As such at the time the applicant sold his property / house he was willing to "*take a knock*" of R90,

⁵¹ See paragraph 7.1.5 H on pleadings page 58. Also see pleadings p175 paragraph 3 (transcribed notes) where this is conceded by the applicant who sets out that this is "*semantics*".

⁵² See pleadings p176 paragraph 1 (transcribed notes). The evaluation was done in February 2010. He conceded that he did not consult the third respondent at the time.

⁵³ This was conceded by the applicant at arbitration – See pleadings p175 paragraph 6 (transcribed notes). The applicant needed to approach the third respondent at the time he intended to sell and to complete all the required documentation at such time to allow for the third respondent to evaluate the property and even then there is a discretion as to whether the third respondent was to reimburse the employee.

⁵⁴ See pleadings p177 paragraph 3 (transcribed notes).

000. 00 (ninety thousand Rand) but then he sought to correct this when he realised that the third respondent had a policy that could cover for such a situation.

- [76] The further issues raised by the applicant are that there was no property division in his department (this was common cause at arbitration) and further that the policy only came into effect after he sold his property / house.
- [77] The applicant correctly does not challenge the finding of the arbitrator that the claim made in respect of a set policy fell within the prescript of an unfair labour practice.
- [78] The main thing that prevented the applicant from claiming was that he failed to timeously or otherwise follow policy and / or procedure and thus no legitimate expectation that he could claim the shortfall amount arose.
- [79] Even if the applicant had followed the policy, the third respondent could have still denied his claim. This is seen in that the policy uses the word “*may*”.⁵⁵ The third respondent would have obviously needed to have sound reasons for such rejection but this case does not get that far.
- [80] The applicant never completed the prescribed form at the time he sold his property (it should have been actually completed prior to the sale) and as such he was not even entitled to claim in terms of the policy. It was only after the applicant sold his property / house that he sought to claim. The applicant in claiming belatedly knew that he was taking a chance.
- [81] The grounds of review raised by the applicant are merely queries as to why the second respondent decided the matter the way he did. In my synopsis above I have explained the reasoning of the second respondent which was reasonable and logical.

⁵⁵ See paragraph 7.1.5 H on pleadings p58 of the policy document.

[82] The further ground raised by the applicant in his heads of argument, that is that the third respondent should not have treated him differently, cannot be considered in that a party must raise its grounds of review in its founding papers on review. I although note that this ground of review stands in stark contrast to the applicant's other grounds where he seeks to show that he should have been treated differently in that his case was different to that of Ms. Karin Haas and in particular, that the policy was not applicable to him or his department.⁵⁶ What this shows is that the applicant himself, is not sure of his case on review. The applicant as such should have done his homework and perhaps took the advice of the advocate which his attorney consulted with, which, in all probability, was that the arbitration award, while not being in his favour, is fair and reasonable.

[83] In respect of the ground of review raised that the commissioner miscalculated the amount or did not know how to calculate the amount that was due to the applicant for this ground to have any basis I would first have to find that the third respondent committed an unfair labour practice, which I do not.

Findings and other issues on review

[84] The applicant has no prospects of success herein and his reasons for the lateness of the filing of his review are simplistic and insufficient to allow me to grant condonation anyway. The applicant tries to shift the blame to his representatives. The applicant's review is without a shred of doubt the poorest review that I have encountered. It has no merit whatsoever. There is no legal point that seeks to be decided and the applicant's review seems to be one of Aesop's Fables, either the story of the Sour Grapes or the Boy who cried Wolf, I am not sure.

[85] The applicant has further failed to process his review diligently and as such his review is deemed to have been withdrawn as per the Practice Manual of the Labour Court. The Courts have set out that the Practice Manual is "*not a*

⁵⁶ The issue of Karin Haas is seemingly not part of the arbitration record.

*mere guideline to be adhered to or ignored by parties at (their own) convenience”.*⁵⁷

- [86] The applicant has failed to deal with the issue raised by the third respondent via its second point *in limine* that is that his review should be considered to have lapsed in terms of the Practice Manual of the Labour Court. As such even if the applicant’s review had merit I would first have needed to have been presented by the applicant with an application for the file to be removed from archives, wherein the issue of good cause would need to be dealt with. The applicant has not even bothered to apply for its review application to be “*removed from the archive.*”
- [87] The applicant’s review is without merit, there are zero prospects of success on review.
- [88] The third respondent in its heads of argument sets out that because the applicant’s explanation for the delay in bringing its review application is not reasonable or acceptable that I need not consider its prospects of success.⁵⁸ Here the applicant’s explanation (as set out in his application for condonation) falls short of what is necessary for a party seeking an extension or indulgence needs to set out. Further to blame one’s attorneys, where one fails to act cannot be an adequate or sufficient reason for delay⁵⁹ As such while the delay might not be lengthy the explanation is poor and as such there is no real need for me to consider the prospects of success. Despite this I have done so to ensure that this matter stops here.
- [89] In respect of the late filing of the record the applicant yet again failed to follow the rules / the Practice Manual time limits at all. For an applicant on review to

⁵⁷ See *MJRM Transport Services CC v CCMA and Others* (2017) 38 ILJ 414 (LC) which dealt specifically with this issue. In this regard also see the case of *Edcon (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others; In re: Thulare and Others v Edcon (Pty) Limited* (JR698/2013; J271/2015) [2015] ZALCJHB 392; (2016) 37 ILJ 434 (LC) (13 November 2015).

⁵⁸ See the cases of *MJRM Transport Services CC v CCMA & Others* (2017) 38 ILJ 414 (LC) which dealt specifically with this issue. Also see the case of *Collett v CCMA & Others* (2014) 35 ILJ 1948 (LAC), at para’s 38 – 39; and *Dichabe v Department of Local Government and Housing (North West) and Another* (JR 663/05) 2012 ZALC JHB (20 April 2012) are cited by the third respondent in this regard.

⁵⁹ See the case of *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (KAC) at para 16.

take four (4) years to file a record and not to ever during such period of delay seek an indulgence from the other side or to even advise the other side on a regular basis as to the status of the record or seek its approval of same cannot be condoned. The applicant as the *dominus litus* on review had a duty to properly reconstruct the record and to deliver an agreed reconstructed record within a reasonable period of time or where this was not possible he needed to approach the Judge President in terms of the Practice Manual where the third respondent would not give it an extension or agree to the record.⁶⁰ None of this was done; the applicant, it seems, failed to approach the third respondent in any respects concerning the issue of the record having gone missing. Such a delay is inordinate and shows protracted delay in the prosecution of the review.⁶¹ The delay can be said to be “*wholly excessive*”⁶².

- [90] Further as set out above the rule 7A (6) that was contained in the Court file was not having a Court stamp thereon. No explanation for this was provided for this in the pleadings or at Court when the matter was argued before me and I can only conclude that there was as such no Notice filed in terms of rule 7A (6).
- [91] Further when the record as filed is supplemented by the applicant with the typed version of the second respondent’s notes the applicant fails to file a second or further Notice in terms of rule 7A (6). As such we have no filed Notice. While this could be sought to be resolved the issue remains.

⁶⁰ See the case of *Toyota SA Motors (Pty) Ltd v CCMA and Others* [2015] ZACC 40 at para 45 where the Constitutional Court remarked that Toyota ought to have applied to the Labour Court to condone (in terms of rule 12 (3)) non-compliance with the period prescribed in the Labour Court Rules.

⁶¹ *Ibid* at para’s 18 – 35, where Constitutional Court referred with approval to the various findings and remarks of the Labour Court in respect of the delay and found that Toyota’s failure to file the record led to a protracted delay in the prosecution of the review despite Toyota’s various steps to reconstruct the record and that this was against the purpose of the LRA which inter alia advocates a “*simple, quick, cheap and informal approach to the adjudication of disputes*”. These disputes by their very nature require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years....” Also, see *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) 367 (CC); 2008 (3) BCLR 251 (CC). Also see the Reportable Judgment of *Nehawu obo Tebatso Johanna Leduca and National Research Foundation* (JS 1041/2010) Delivered 18 November 2016.

⁶² *Ibid* at para 36.

- [92] The third respondent is not without blame in respect of the delay/s in the filing of the record in that it seemingly did not involve itself properly in the reconstruction or seek to try to speed up the process. Further it did not seek to bring an application to dismiss the applicant's review. It did although set out in its answering papers on review in the form of a point *in limine* that the applicant had failed to take the (necessary) steps in the review proceedings and further that due to the applicant's failures in respect of the filing of a complete record timeously that I should strike the review from the roll. I do not believe I can strike a review application on such basis, anyway it matters not.
- [93] It seemed at least at some time prior to the filing by the applicant of the typed version of the second respondent's notes as if the third respondent thought the applicant's review was not being pursued and had fallen away and as such it did not act. But I only mention this in that the applicant never raised this issue and as alerted to above the applicant as the *dominus litis* he had the duty to provide to the Court the most complete version of the record and to do so within the time limits set out in the Practice Manual of the Labour Court. As such the only party who should be seen to be to blame for the delays herein should be the applicant and as set out he has failed to explain such delays properly and / or at all.
- [94] Further the applicant failed to apply for the review to be removed from the archive. Even if he had, this would not have aided his case on review, which as said, has no prospects of success. The record that was provided to the Court was incomplete as far as the transcript of the record of arbitration proceedings which amounted to a typed version of the second respondent's notes with no attempt to use same together with other sources (which would include the arbitration award) to provide the Court with a clear and easy to read transcript. Indeed, it seems that neither party referred to the transcribed notes in their respective pleadings.
- [95] The applicant's review as presented to the Court after so many years appears to be one where the applicant in particular showed no interest for lengthy

periods of time and where the substance and grounds raised border on frivolity.

[96] Due to all the above reasons and in particular the applicant's lack of prospects of success on review and the poor state of the applicant's review itself, I have no hesitation in dismissing the applicant's review and in awarding costs against the applicant.

[97] If the third respondent had acted timeously to file its heads of argument, I would have granted it costs in this regard as well.

[98] Should the third respondent have sought punitive costs I would have been at pains not to grant it same.

[99] In the premise, the following order is made:

Order

1. The applicant's applications for condonation for the late filing of its review and the late filing of the record on review are both dismissed.
 2. The applicant's review application is dismissed.
 3. The third respondent is entitled to the costs of all applications [the review application (including all notices) and the condonation applications] but it is not entitled to the costs of the drafting and / or perusing and / or delivery of either party's heads of argument.
 4. The applicant is to pay the costs of the third respondent's practice note and the delivery thereof on the scale of attorney-own-client.
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A Goldberg

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant : M Lefoka

Instructed by : CHSM Incorporated Attorneys

For the Third Respondent: A Patel of Cliffe Dekker Hofmeyer Inc