



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1695/15

In the matter between:

GILBERT TEBOGO GAOLEHELWE

Applicant

and

**SOUTH AFRICA LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

ADVOCATE CM REX N.O.

Second Respondent

SOL PLAATJE MUNICIPALITY

Third Respondent

Heard: 30 August 2018

Delivered: 20 September 2018

Summary: Review application – condonation and rescission rulings – matter is moot and a pronouncement on the merits is unnecessary.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The applicant approached the Court 1183 days (almost three years) late seeking an order reviewing and setting aside condonation and rescission rulings of the second respondent (the arbitrator) dated 6 March 2012 and 4 June 2012 respectively under case number NCD021202. The arbitrator granted the third respondent (Municipality) condonation for instituting disciplinary enquiry against the applicant outside of the prescribed time frame in terms of the Clause 6.3 of the South African Local Government Bargaining Council (SALGBC). He subsequently dismissed the application to rescind the condonation ruling.
- [2] The application is robustly opposed by the Municipality which in turn raises mootness as a point *in limine*.

Background

- [3] The applicant was a South African Municipal Workers Union (SAMWU) shop steward. He was suspended and charged with several allegations of misconduct with the leave of the arbitrator who had granted condonation. The disciplinary enquiry sat on 25 September 2012 and was postponed by agreement between the parties to 10 October 2012. In the applicant's own version, it was made clear to him that that postponement was the final one.
- [4] Irrespective, the applicant chose not to attend his disciplinary enquiry. Instead, he attended some SAMWU training organised by DITSELA. The disciplinary enquiry proceeded as agreed on 10 October 2012. The applicant was found guilty and dismissed on 2 November 2012. His appeal was unsuccessful. SAMWU referred an alleged unfair dismissal dispute to SALGBC. However, the matter was dismissed due to non-appearance by SAMWU. The dismissal ruling was never challenged.
- [5] As things stand, the applicant is dismissed from the employ of the Municipality. There is no explanation provided as to why the dismissal was never challenged.

Is the relief sought moot?

[6] I question the prudence of challenging the impugned rulings almost three years down the line when the applicant has clearly accepted his dismissal. In my view, the impugned rulings were not dispositive of the procedural issues. Nothing could have stopped the applicant from raising the alleged procedural irregularities with the chairperson of the disciplinary enquiry and later with the arbitrator. It is instructive that the applicant shunned at the opportunity to challenge the procedural irregularities by absenting himself from the disciplinary enquiry and the arbitration proceedings.

[7] In *South African Transport and Allied Workers Union v ADT Security (Pty) Ltd*,¹ confronted with the question of mootness of the matter, the Labour Appeal Court stated that:

[4] The principles relating to mootness have been well established in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC) in which the Constitutional Court said:

“A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.” (At 54 footnote 18).

[5] In *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC), the Constitutional Court held that, where there was no live controversy between the parties, and, in the absence of any suggestion that any order might have an impact on the parties, the disputes between the parties were moot especially since future cases inevitably presented different factual matrixes and hence no purpose would be served in resolving the dispute. See also *Radio Pretoria v Chairman of the Independent Communication Authority of South Africa and Another* 2005 (3) BCLR 231 (CC).’

¹ *South African Transport and Allied Workers Union v ADT Security (Pty) Ltd* [2011] 9 BLLR 869 (LAC); (2011) 32 ILJ 2112 (LAC) at paras 4 - 5.

[8] In this instance, the live controversy was the sitting of the disciplinary enquiry consequent to the impugned condonation ruling. As things stand, the applicant has since been dismissed, a dismissal he never challenged. The mootness of this application is therefore obvious. The disciplinary hearing that was meant to be barred by the setting aside of the impugned rulings has since occurred and its outcome remains unchallenged.

[9] I accordingly agree with the submission by Mr Venter, counsel for the Municipality, that the relief sought in this application is now impeccably academic.² On this point alone, the application stands to be dismissed.

Is there a justification to consider the merits, nonetheless?

[10] In *Sebola and Another v Standard Bank of South Africa Ltd and Another*,³ the Constitutional Court stated that:

‘...mootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interests of justice require that it be decided. One consideration is whether the Court’s order will have any practical effect on either the parties or others.’

[11] It is trite that it is only when presented with exceptional circumstances that the court would exercise its discretion to traverse the merits in a matter that is moot.⁴ In this instance, the converse is true. The applicant has an insurmountable huddle of justifying the grant of condonation. The delay is extensive and the explanation for the delay is unreasonable and unacceptable. The applicant attributes the delay to SAMWU. It is also worth mentioning that SAMWU instructed three different firms of attorneys to deal with the applicant’s matter. However, no further instructions were given to launch this application.

² *National Employers Association of South Africa (NEASA) v Metal and Engineering Industries Bargaining Council (MEIBC) and Others* [2015] ZALAC 11; (2015) 36 ILJ 2032 (LAC) at paras 6-7.

³ 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32.

⁴ *Supra* n 2 at para 14.

- [12] In my view, this is a typical case where it would be inappropriate to venture into the merits when the relief is patently moot.

Conclusion

- [13] In the circumstances, the matter is moot and a pronouncement on the merits unnecessary.

Costs

- [14] On the issue of costs, Mr Venter was adamant in his submission that the Municipality should be granted costs on a punitive scale as a token of disapproval of the applicant's conduct in pursuing a hopeless case. The applicant refused to withdraw the matter when invited to do so by the Municipality's attorneys of record. He also ignored the warning that should he proceed with the matter, a punitive costs order would be sought.

- [15] The applicant's submission in court was that SAMWU Office Bearers, cited as the fourth respondent and acting on behalf of SAMWU, should pay the costs. It is clear from the notice of motion that one of the orders sought by the applicant is that the SAMWU be ordered to pay the costs of this application because they failed to file his matter within the prescribed period. SAMWU is not opposing the relief sought against it despite being duly served with the applicant's founding papers on 19 October 2015.

- [16] The applicant is on point. Why should he be burdened with the costs when it is clear from the record that SAMWU has let him down in all his matters. However, I am not persuaded that a punitive cost order is warranted.

- [17] In the premises, I make the following order:

Order

1. The application is dismissed.
2. SAMWU is ordered to pay the Municipality's costs on a party and party scale.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Appeared in person

For the respondent:

Advocate F Venter

Instructed by:

Van De Wall Inc.

LABOUR COURT