



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case number: JR2017/14

In the matter between:

SIBANYE GOLD LIMITED

Applicant

and

NUM obo THEMBILE MJODI

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

DESMOND LYNCH N.O.

Third Respondent

Heard: 19 July 2018

Delivered: 04 October 2018

JUDGMENT

KIRSTEIN, AJ

Background facts

- [1] This is an opposed review application in terms of section 145(1) of the Labour Relations Act¹ (the LRA). The applicant (Sibanye) seeks to review and set aside the arbitration award dated 25 August 2014 issued by the third respondent (the commissioner) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) under reference number GAJB12079-14.
- [2] Sibanye dismissed the employee, Mr T Mjodi (Mjodi) on 15 April 2014. The chairperson of the disciplinary enquiry had found Mjodi guilty of contravening a workplace rule against bringing excessive food onto premises and recommended a final written warning to be issued to him. However, Sibanye rejected this recommendation and dismissed Mjodi at an appeal process that is disputed by Mjodi.
- [3] Mjodi referred an unfair dismissal dispute to the CCMA. On 25 August 2014, the commissioner's award was issued, which read as follows:
- “52. The applicant's dismissal was procedurally and substantively unfair.
53. The respondent, Sibanye Gold Ltd – Corporate Office, must retrospectively reinstate Sibanye, Thembile Mjodi, in his previous (or similar) occupation with the same terms and conditions of employment he enjoyed previously, by 15 September 2014. The Final Warning he received should stand.
54. The respondent is also ordered to pay Sibanye R63 608.00 in full by 30 September 2014. This amount represents 8 retrospective emoluments of his monthly salary (8 x R7951.00 = R63 608.00).
55. I consider this award to be just and equitable in terms of the Act, considering his length of service, previously clear record, unjust ratification of the original sanction, and the scope of his responsibilities.”
- [4] Sibanye delivered a review application on 25 September 2014, in which it sought to have the commissioner's award reviewed and remitted for a hearing *de novo*, alternatively to be determined by this Court in terms of section

¹ Act 66 of 1995 as amended.

145(4) of the LRA. Mjodi served his notice of intention to oppose the review application on 06 October 2014.

- [5] Sibanye failed to comply with practice directives 11.2.2. and 11.2.7. of the Practice Manual², which require that a record must be filed within 60 days of the date upon which the applicant is advised that the record has been dispatched to the Registrar; and that an applicant in a review application is required to ensure that all necessary papers in the review application are filed within 12 months of the date of the launching of the review application.
- [6] On 01 June 2015, Mjodi delivered an application to dismiss Sibanye's review application on the basis that Sibanye had failed to deliver the record timeously. In response, Sibanye filed the incomplete transcribed record on 04 June 2015, followed by a notice of intention to oppose the dismissal application. The reconstructed record was filed on 26 October 2016. Then, on 27 January 2017, Sibanye delivered a condonation application seeking condonation for its late delivery of the record and for the late prosecution of the review application.

Condonation and Dismissal Applications

- [7] Before considering the substantive merits of the matter, I must have regard to the dismissal application and the condonation application.
- [8] Practice Directive 11.2.3 of the Practice Manual provides that:
- '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

² Practice Manual of the Labour Court of South Africa April 2013.

any extension of time that the respondent should be afforded to file the record.

[9] Practice Directive 11.2.7 of the Practice Manual provides that:

‘A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding heads of argument) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.’

[10] As Tlhotlhemaje J held in *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others*³, with reference to the judgment of Van Niekerk J in *Ralo v Transnet Port Terminals and Others*⁴ and *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others*⁵:

‘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*’.

[11] In *Ralo* Van Niekerk J held that,

‘The Practice Manual contains a series of directives, which the Judge President is entitled to issue. In essence, 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 (see clause 1.3). While the manual acknowledges the need for flexibility in its application (see clause 1.2) its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience.’

[12] Tlhotlhemaje J then continued thus:

³ (2017) 38 ILJ 414 (LC) at 17.

⁴ (2015) 36 ILJ 2653 (LC).

⁵ (2014) 35 ILJ 1672 (LC).

'in considering whether to grant an extension, the court would still be obliged to take account of the ordinary principles related to applications for condonation as set out in *Melane v Santam Insurance Co Ltd* and other authorities. Thus a judge determining whether an extension ought to be granted should in exercising his or her discretion, take into account the degree of lateness in failing to comply with the 60-day period, the explanation in that regard, the prospects of success and the importance of the case. We are reminded that these factors are interrelated and should be considered as such. A further consideration is that of the interests of justice.'

(Footnotes omitted)

[12] The following timeline appears from the various affidavits filed by Sibanye and Mjodi in the dismissal and condonation applications:

- 12.1 On 23 September 2014 Sibanye initiated the review application. Mjodi's notice of intention to oppose was served on 06 October 2014.
- 12.2 More than two months later, on 04 December 2014, Sibanye allegedly addressed a letter to the CCMA requesting compliance with Rule 7A(3). This letter was allegedly sent via e-mail and fax, but Van Ryneveld who was a director of Sibanye's then attorneys of record, Geldenhuys Van Ryneveld Incorporated did not attach proof of transmission to her affidavit.
- 12.3 Six weeks later, on 14 January 2015, Sibanye allegedly addressed a letter to ES Makinta Attorneys via e-mail, again without proof of transmission, stating that the CCMA had not complied with Rule 7A(3).
- 12.4 On 19 January 2015, Sibanye received the CCMA's Rule 7A(3) notice, dated 26 September 2014, and the Registrar's letter, similarly dated 26 September 2014, informing it that the record is available.
- 12.5 On 19 January 2015, Sibanye sent an e-mail to ES Makinta Attorneys acknowledging receipt of the Rule 7A(3) notice. Proof of transmission of this e-mail was provided.

- 12.6 On 04 February 2015 the transcription of the records were completed by iAfrica Transcriptions, as reflected in the certificate of veracity.⁶
- 12.7 On 28 May 2015, Van Ryneveld received Sibanye's file from Geldenhuys Van Ryneveld Attorneys.
- 12.8 On 01 June 2015, Mjodi delivered his application to dismiss Sibanye's review application on the basis that Sibanye had failed to deliver the record timeously.
- 12.9 On 04 June 2015, without having followed the procedure prescribed in clause 11.2.3 of the Practice Manual, Sibanye served the incomplete record on the first respondent. This was exactly four months after the transcription was completed.
- 12.10 Also on 04 June 2015, Sibanye served a notice of substitution of representative of Sibanye, appointing Van Ryneveld at Sibanye's own address as representative for the applicant.
- 12.11 On the same day Sibanye sent an e-mail to ES Makinta Attorneys informing them that Van Ryneveld had joined Sibanye as an employee and alleging that, as a result of this, there had been a "transition period in May 2015". In the same letter, Van Ryneveld mentioned for the first time that, "the record appears to be incomplete".
- 12.12 The applicant applied to the CCMA for the reconstruction of the record on 17 June 2015 and simultaneously gave notice of its intention to oppose the dismissal application.
- 12.13 A month later, on 16 July 2015, Sibanye addressed a letter to the CCMA requesting a date for the reconstruction meeting.
- 12.14 On 08 October 2015, almost three months later, Van Ryneveld sent an e-mail to the CCMA threatening it with an application to compel if the reconstruction meeting is not scheduled without delay.

⁶ Condonation bundle, page 159.

12.15 On 8 February 2016, despite this threat, Sibanye only addressed its new correspondence four months later when Solomon Holmes Attorneys sent an e-mail to the CCMA again requesting a reconstruction meeting. In this e-mail Sibanye's attorneys alleged that Mjodi's dismissal application was delivered as a consequence of the CCMA's failure to set the matter down for reconstruction after Sibanye's numerous applications for it to do so. This allegation was incorrect in two respects; firstly Mjodi's dismissal application was delivered on 01 June 2015, two days before Sibanye's reconstruction application was delivered. Secondly, Sibanye, on its own version, addressed only three letters over a period of eight months to the CCMA to follow up on its reconstruction application.

12.16 On 22 February 2016, the CCMA addressed a letter to Van Ryneveld and to ES Makinta Attorneys, informing the parties that the arbitrator would be available for the reconstruction meeting on 23 March 2016.

12.17 On 29 April 2016, Solomon Holmes Attorneys addressed a letter to the CCMA and to Makinta Attorneys in which they referred to the reconstruction meeting having taken place on 23 March 2016 and requesting the third respondent's handwritten notes.

12.18 On 20 July 2016 the CCMA filed its notice of further compliance in terms of Rule 7A(3) in respect of the third respondent's hand written notes.

12.19 On 26 October 2016 Sibanye finally files the reconstructed record, 38 days late.

12.20 On 08 November 2016, some three-and-a-half months later, Sibanye's Thomas Molamu deposed to Sibanye's supplementary affidavit under Rule 7A(8). This was 26 months after the review application was launched.

12.21 On 27 January 2017, Sibanye delivered a condonation application seeking condonation for its late delivery of the record and for the late prosecution of the review application.

12.22 It must be noted that the condonation application delivered by Sibanye is not an application in terms of practice directive 16.2 for the de-archiving of the review application.

[13] As to the explanation for the late filing of the record, Sibanye relies on three main reasons:

13.1 Administrative difficulties in providing proof of payment to iAfrica Transcription Services ⁷.

13.2 The failure by the CCMA to file the complete record;

13.3 Van Ryneveld's career transition from being Sibanye's attorney to being its employee ⁸.

[14] Van Ryneveld, in her opposing affidavit to the dismissal application, admits that iAfrica completed the transcription on 04 February 2015, but she avers that certain "Klaas" and "Lerato" refused to release the transcription without proof of payment. "Administrative difficulties" then delayed the proof of payment until the end of April 2015, i.e. for almost three months. Mjodi pointed out in his replying affidavit that Van Ryneveld failed to 'explain what she called "administrative difficulties", and how these delayed submission of proof of payment of the transcribers. Van Ryneveld failed to attach confirmatory affidavits by Klaas and Lerato to corroborate this version. It seems improbable that any administrative difficulty could take three months to resolve, particularly the simple matter of providing proof of payment already made - if indeed payment had been made. Whatever the facts may be, Van Ryneveld does not take the Court into her confidence by setting out the full facts and circumstances that caused these alleged administrative difficulties.

⁷ Condonation bundle, page 39 at para 5.3.5.

⁸ Condonation bundle, page 39 at para 5.3.6. m

- [15] On Sibanye's own version Van Ryneveld realized at the end of April 2015 that the transcription was incomplete. She offers explanation for her delay until 16 July 2015 to apply for the reconstruction of the record but the explanation is mainly limited to the transition of her career. She must have been aware that her client's review application was already deemed to have been withdrawn in terms of the Practice Manual. It would have been a simple matter of addressing a letter to Mjodi's attorneys of record, explaining the anticipated transition period in transferring the file to Van Ryneveld as an employee of Sibanye and asking their indulgence until this was achieved. However, this simple precautionary step was not taken. Mjodi was left in the dark. Sibanye acted as if it was not bound by the Rules and Practice directives of this Court.
- [16] In view of the patent urgency of the matter, it should also have been a priority for Van Ryneveld as an employee of Sibanye to expedite payment to Geldenhuys Van Ryneveld incorporated in respect of Sibanye's file in order that she may pursue the reconstruction of the record in all haste. Van Ryneveld simply tells the Court that "this was unfortunately an administrative process as payments are only made to attorney service providers once a month". This does not reflect any sense of urgency. It only confirms that neither Van Ryneveld, nor Sibanye had any sense of the dire urgency of the matter.
- [17] In a situation so patently urgent, it is inconceivable that Sibanye could take three months to address any administrative difficulty. Sibanye's vague explanation for the three-month delay amounts to no explanation at all. In view of the inordinately long delay in filing the record and the failure to explain the majority of this delay, the dismissal application should succeed on that ground alone and the condonation application should fail for the same reasons. However, I am obliged to consider the interrelated factors set out in *Melane v Santam Insurance Co Ltd*⁹ as a whole and not in isolation.

⁹ 1962 (4) SA 531 (A) at 531 A.

[18] As Nkabinde J said in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰, “Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.” The facts in *Toyota* resemble those in this matter. In *Toyota*, the Constitutional Court was scathing of Toyota’s lacklustre manner of pursuing the matter:

‘From the sequence of steps set out above, it is plain that in 22 months Toyota did very little to prosecute the review. The delay is wholly excessive. There is no explanation for the delays between 30 November 2011 and 24 January 2012, and 19 March and 23 August 2012. The approach to procuring a full record of the hearing was not diligent, the prosecution of the review was not expeditiously pursued and the explanation for the delays is not reasonable.

Toyota ought to have initiated steps to reconstruct the record as early as 2 February 2012, when it received an incomplete record from its correspondent attorneys. It did not. Instead, it sat back until March 2012 when it delivered the incomplete record. The respondents had requested that the outstanding transcribed record be delivered. Toyota replied to the respondent alleging incompleteness of recorded proceedings and informed the union that it was ‘being proactive in having the handwritten notes transcribed’. Unacceptably, without any sense of the need to act expeditiously, Toyota only followed up with its transcribers thereafter twice in a period of five months as to what progress was being made in the transcription.¹¹

Evaluation

[19] Applying the *dictum* above from *Toyota* to this matter, the quoted words of Nkabinde J above can be almost directly transposed to this matter, thus:

19.1 From the sequence of steps set out above, it is plain that in 26 months Sibanye did very little to prosecute the review.

¹⁰ (2016) 37 ILJ 313 (CC) at para 1.

¹¹ At paras 36-37.

19.2 The delay is wholly excessive.

19.3 There is no acceptable explanation for the delays between 06 October 2014 and 04 December 2014, between 04 December 2014 and 14 January 2015, between 04 February 2015 and 04 June 2015, between 04 June 2015 and 16 July 2015, and between 20 July 2016 and 26 October 2016.

19.4 The approach to procuring a full record of the hearing was not diligent, the prosecution of the review was not expeditiously pursued and the explanation for the delays is not reasonable.

19.5 Sibanye ought to have initiated steps to reconstruct the record as early as April 2015, when it received an incomplete record from the transcribers.

19.6 Sibanye sat back until 04 June 2015 when it delivered the incomplete record.

19.7 Mjodi had requested that the outstanding transcribed record be delivered.

19.8 Sibanye replied to Mjodi alleging incompleteness of recorded proceedings and informed Mjodi's attorneys that it was 'being proactive in having the handwritten notes transcribed'.

19.9 Unacceptably, without any sense of the need to act expeditiously, Sibanye only followed up with the CCMA three times in a period of four months and it then only paid its transcribers three months after it was informed that the transcription was ready.

[20] Although the CCMA is not blameless as to some of the delay, Sibanye cannot claim that it acted in all reasonable haste in pursuing its review application. The applicant failed to approach the Judge President for a directive on how to reconstruct the record as it should have done, it failed to apply for the reinstatement of the review application, and it filed a

condonation application some two years after it filed its review application. Sibanye wholly failed to explain some of the delays.

[21] Having regard to Sibanye's prospects of success on the merits, I am not convinced that these favour Sibanye. The applicant's case is that it was entitled to dismiss Mjodi for breaching the rule against bringing excessive food into the workplace. It appears to me that this rule is *prima facie* arbitrary. There is no objective measure of how much is too much. What is excessive could vary from day to day and from person to person. It is therefore inconceivable that Sibanye's rule could withstand scrutiny against the requirements of the Code of Good Practice: Dismissal and section 188 of the LRA. In any event, Mjodi denied knowledge of the rule, and it is common cause that the rule had been implemented only shortly before the date of the incident and had never previously led to the dismissal of an employee.

[22] All of this becomes academic if one has regard to the real reason for Sibanye's decision to dismiss Mjodi. The applicant claims that the third respondent was dismissed for being in possession of excessive food, which is in itself an arbitrary rule subject to an immeasurable standard. But the real reason for the dismissal is recorded in the outcome of the appeal hearing, the very occurrence of which Mjodi still denies. The chairperson of the appeal hearing, Andre du Plessis, whose designation is recorded on page 113 of the record bundle as "Mining Manager", recorded the reasons for his unilateral decision to dismiss Mjodi on page 126 of the record bundle as follows:

'Seriousness of the offence justify a dismissal as we know that our own employees are assisting illegal miners with food underground and Morvite/instant porridge being one of the preferred food types.'

[23] From this it is clear that the real reason for Mjodi's dismissal was his possession of Morvite instant porridge (Morvite), not an excessive amount thereof. There was nothing before the disciplinary hearing or before the Commissioner to indicate that there was a rule against possessing Morvite, or that Mjodi was about to share his meal with illegal miners, or that illegal miners preferred Morvite. All of that was pure assumption based on pre-

conceived mindset. But what is really astonishing is the fact that Mjodi was dismissed at the disputed appeal hearing simply because Sibanye's Mining Manager held the belief that illegal miners preferred Morvite, and Mjodi brought Morvite to work.

[24] There was in any event no admissible evidence before the Commissioner of how much any person, or Mjodi specifically could eat in a day. Mjodi's own uncontested evidence was that he would eat half a bottle at a time – one at the start of a shift and the rest later. There is no objective basis upon which Mjodi's version should be rejected as improbable. I am of the view that the rule that led to the disciplinary findings against Mjodi is inherently incapable of objective application and that it is arbitrary.

[25] It is important to note that the notice of 03 July 2013, on which Sibanye relies for the requirement of publication of the rule, stated that being in possession of excessive food could lead to dismissal. This implies that a level of discretion is still to be applied to the facts of the matter. If the sanction is wholly disproportionate to the offence, it cannot pass the requirements of fairness embodied in the Code of Good Practice: Dismissal for Misconduct, which in any event provides for progressive discipline. Mjodi declared that he would never again bring Morvite to work when he learned about the rule against excessive food. There seems to have been no compelling reason to dismiss Mjodi other than the assertion that Morvite was a preferred food for illegal miners.

Conclusion

[26] For the reasons set out above, I conclude that the review application is deemed to have been withdrawn in terms of clause 11.2.3 and archived in terms of clause 11.2.7 of the Practice Manual. The applicant should therefore have filed an application to the Judge President for an extension of time, as well as an application for reinstating the review application. The review application cannot be revived in the absence of those applications. However, having regard to the manner in which Sibanye pursued the review application, the inordinate length of delay in filing the incomplete record and

later the reconstructed record, the failure to explain the delays in a satisfactory manner, and the lack of merit in Sibanye's case, I am of the view that it is not in the interest of justice to condone the late filing of the record, or to reinstate the review application. For the same reasons, Mjodi's application to dismiss the review application must succeed.

[27] Nothing was advanced, and there is nothing in law or in equity to persuade me to deviate from the established principles relating to cost orders in the Labour Court.

[28] In the result, the following order is made:

Order

1. The applicant's application for condonation of the late filing of the record and for the late prosecution of the review application is dismissed;
2. The first respondent's application to dismiss the review application is granted;
3. There is no order as to costs.



P.H. Kirstein
Acting Judge of The Labour Court of South Africa

Appearances:

For the Applicant: Advocate. T Moretiwe

Instructed by: Solomon Holmes Attorneys

For the Respondent: Mr. MES Makinta of Makinta Attorneys