IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Of interest to other judges

Case no: JR 483/14

In the matter between:

SAMWU OBO K SHONGWE & 45 OTHERS **Applicant**

And

COMMISSIONER LUCKY MOLOI (*N.O*) **First Respondent**

COMMISSION FOR CONCILIATION
MEDIATIONS AND ARBITRATION **Second Respondent**

THE CITY OF JOHANNESBURG **Third Respondent**

Heard: **06 June 2018**

Delivered: **24 May 2019**

Summary: **(Review application – Rule 11 – Despite good merits extraordinarily dilatory prosecution of claim – non-compliance**

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with practice manual – condonation refused – review application dismissed)

JUDGMENT

LAGRANGE. J

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Introduction

[1] Apart from applications for condonation the two substantive applications before the court when this matter was heard was a review application of a jurisdictional ruling filed on 26 March 2014 and an application to dismiss the review application.

[2] The condonation applications concern the late filing of the record, which was a few days late, and the supplementary affidavit, which was at least 38 days late and, for the reasons which follow, more probably more than a year late.

Background

[3] This matter has a long history. The underlying dispute concerned the employment of various members of the applicant union ('SAMWU') in the Johannesburg Metro Police Department. A strike over terms and conditions of employment resulted in an agreement concluded on 27 June 2008. The pertinent provisions of that agreement read:

> "Whereas the City of Johannesburg Metropolitan Municipality is an employer, and whereas the members of SAMWU raised a number of concerns on behalf of their members employed at the Johannesburg Metro Police Department (JMPD), in order to resolve the current impasse, parties record their agreement herein.
>
> 1. In relation to the payment of minimum salaries to Metro Police Officers (MPOs), the parties agree that;

1.1.1 Newly appointed Trainees will attend a course at the Academy for the period of 6 months in order to conclude theoretical aspects and will receive a stipend of R2 000.00 per month.

1.1.2 Upon completion of the 6 months theoretical training, a Trainee MPO will be placed as a trainee for a further period of 6 months, during which period he/she will be paid an amount of R4 200.00 per month.

1.1.3 Upon a successful completion of both theoretical and practical training, the MPO will be appointed on the permanent structure of JMPD and be paid the applicable minimum salary.

1.2 In principle, the employer commits that none of its employees will be paid below the minimum salary of the grade applicable to the position.

1.3 In relation to employees who have been in the service of the employer for long, parties agree that these will be treated as follows:

1.3.1 Employees who have been in the service of the employer at JMPD for a period of six years to twelve years, shall be placed on the median range of the salary scale;

1.3.2 Employees who have been in the service of the employer at JMPD for more than twelve years, shall be paid at the maximum salary of the salary scale.

2. The parties agree that the provisions of clauses 1.3.1 and 1.3.2 of this agreement shall apply once off only to permanent members of staff employed by JMPD, and shall not serve as a precedent nor can it be used against any other parties in any future disputes, engagements and or negotiations.

3. The parties agree that this agreement shall supersede any other agreements relating to the issues contained therein.

(emphasis added)

[4] When it came to implementing the terms of the agreement a number of disputes arose as to whom the agreement applied to. The earlier proceedings are summarized in a labour court judgment by Tlhotlhalemaje J, dealing with one of those disputes, which was handed down on 25 February 2016.[1] That application concerned a claim for payment allegedly due to 25 individual

[1] *Shongwe and Others v City of Johannesburg Metropolitan* Municipality (JR483/14) [2016] ZALCJHB 67 (25 February 2016)

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applicants arising from the collective agreement. The court found that the claim was essentially a duplication of the case in which an arbitration ruling was issued. That ruling is the subject matter of this application. The court upheld the municipality's pleas of *lis alibi pendens* and *res judicata* and consequently dismissed the claim.

[5] At the time Tlhotlhalemaje J's judgment was handed down, the application to review the arbitration ruling had been launched but not yet enrolled. Leave to appeal against the judgment was refused by the learned judge on 11 August 2016.

[6] For the sake of contextualizing this application, the court's summary of the history of the matter as set out in the judgment is repeated below:

> "[4] In the light of the dispute pertaining to whether the individual applicants were entitled to payment or not in terms of the agreement, they had then on their own referred a dispute to the CCMA under case number GAJB18002-13 on 17 July 2013. In that referral, they had cited SAMWU as the second respondent. The dispute was referred in terms of section 24 (2) of the Labour Relations Act.
>
> [5] Following the failure of conciliation proceedings on 2 August 2013, the matter came before an arbitrator on 1 October 2013. At the arbitration proceedings, the individual applicants sought to join SAMWU as the co-applicant. The respondent had opposed the application for a joinder, and further raised a preliminary point to the effect that the CCMA lacked jurisdiction to determine the dispute on the basis that the applicants lacked *locus standi* to refer it. The preliminary issue raised was premised on the contention that the individual applicants on their own were not party to the collective agreement which was the subject matter of the dispute, and could thus not refer that dispute.
>
> [6] In the award issued on 11 October 2013, Commissioner Duduzile Madubanya had found that the individual applicants, even though bound by the terms of the agreement, were however not parties to it in their individual capacities for the purposes of a referral. The Commissioner had accordingly refused to join SAMWU as a co-applicant in the matter and further found that the CCMA lacked jurisdiction to determine the dispute before it on account of lack of *locus standi*.
>
> [7] SAMWU then referred another dispute under case number GAJB27117-13 pertaining to the interpretation or application of a collective agreement to the

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> CCMA on behalf of the individual applicants. The matter came before another arbitrator on 4 February 2014. At those proceedings, the respondent raised yet another preliminary point, contending that the individual applicants' claim had prescribed. In terms of a ruling issued on 6 February 2014, Commissioner Lucky Moloi had found that the individual applicants' claim had prescribed, and that the CCMA lacked jurisdiction to determine the dispute.
>
> [8] On 26 March 2014, SAMWU on behalf of the individual applicants filed an application to review and set aside the ruling issued by Commissioner Moloi. The respondent opposed that application and has also since filed an application in terms of Rule 11 of the Rules of this court, to have that review application dismissed on account of lack of diligent prosecution. These two matters are pending before this court under case number JR483-14, which curiously is also the same case number under which the statement of claim was filed.

[7] This case concerns the review application filed on 26 March 2014 and the subsequent application to dismiss it filed on 28 July 2014. The matters were originally enrolled for a pre-enrolment hearing on 11 August 2016. At that hearing both applications were set down for a hearing on 2 February 2017. However, on 2 February 2017 the applications were postponed *sine die* with the applicants in the review application ('SAMWU') being ordered to pay the costs of the postponement. The applications were only re-enrolled for hearing on 6 June 2018.

The arbitrator's ruling

[8] The dispute which had been referred to conciliation by the union was identified as an 'Interpretation/Application of Collective Agreement' in the tick box identification of the 'Nature of the Dispute' in paragraph 3 of the 7.11 referral form. In summarizing the facts of the dispute referred in the same paragraph, the union described those in the following terms:

> "Failure by the employer to interpret the collective agreement of 28 June 2008 in a manner that covers the applicants."
>
> (emphasis added)

[9] In the referral form, the dispute was identified as having arisen on 15 May 2013. In the form referring the dispute to arbitration the description of the

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issues in dispute repeated the formulation contained in the 7.11 form, which is cited above.

[10] At the arbitration hearing, the municipality raised a special plea of prescription. The basis of this plea was that the settlement agreement was a 'once-off' arrangement and any claims arising from it had expired in June 2011. The jurisdictional question concerned whether or not the claims of a certain group of employees based on the settlement agreement had prescribed. According to the arbitrator, the municipality contended that the period for the applicability of the agreement or its enforcement had prescribed. Nevertheless, for the sake of the proceedings, the municipality conceded that the agreement was applicable to the group of employees mentioned in the referral.

[11] Clause 6 of the agreement stated that the agreement would take effect with effect from 1 July 2008.

[12] The union's representative had contended that a dispute of interpretation or application could not prescribe.

[13] The arbitrator found that the issue of whom the agreement applied to was no longer in dispute and had become moot because of the municipality's concession. The crux of the arbitrator's reasoning is found in the following paragraphs of his ruling:

> 6.6 Let us look at the purpose of referring a dispute about interpretation or application of the collective agreement. The intention may be of understanding the meaning of the words contained in the agreement or to seek compliance with the terms of the agreement. The applicants' representative was clear in that the applicant sought to understand as to who falls within the agreement. The respondent's representative argued that even if the applicants fell within the meaning of "employees employed by JMPD" enforcement cannot be entertained as the agreement had prescribed. Again, clause 6 of the agreement must be borne in mind. This clause brings in a limitation in terms of duration. It is binding on the parties and clarifies the application duration of the agreement.
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> 6.7 The respondent's representative had conceded to the agreement being applicable to employees, but submitted that the application or enforcement

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period had prescribed. The argument supports that of the applicants' representative, thus declaring the argument as to who is the employee in terms of the agreement, a moot point.

6.8 Therefore, the argument of interpretation is declared moot by the respondent's representative's concession. The only issue left is that of the application. As indicated in paragraph 6.6, application deals with compliance with the agreement, and in a way the enforcement of the agreement taking into consideration section 142A read with section 158 [1] [c] of the Labour Relations Act.

6.9 The desired outcome was that of interpretation of the agreement. The respondent's representatives' argument on "*who is an employee of JMPD*?" has been answered by the concession made by the respondent's representative.

6.10 On the issue of application, one cannot rule the same as section 15 of the Prescription Act requires judicial interruption of prescription. It must also be mentioned that as per the respondent's submission, this matter was initially referred to the South African Local Government Bargaining Council on 21 November 2012. By then, the issue of prescription was not raised by the same respondent's representative. It was successfully argued that only the CCMA has exclusive jurisdiction over this matter.

6.11 I specifically mentioned the date of 21 November 2012 because it may count as a date of judicial proceedings which may interrupt the running of prescription. Clause 6 of the agreement makes mention of application as 1 July 2008, thus outside the three years prescribed within which to launch the judicial proceedings. …

7 RULING

7.1 I, therefore, rule that even if the applicants were employed by JMPD as conceded by Mr Sandile July, the respondent's representative, the claim has prescribed. CCMA lacks jurisdiction to deal with application of the agreement as per section 15 of the Prescription Act.

7.2 The application is dismissed."

(*sic*).

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[14] The arbitrator also found that the union was aware or ought to have been aware of the claim of the individual applicants but had failed to institute it within the period prescribed by the Prescription Act.

Condonation applications

[15] There are two condonation applications which require consideration. The first is for the late filing of the review application itself. The second is for the late filing of the Rule 7A(8)(b) notice. The dismissal application brought by the municipality is inextricably connected to the second condonation application and the failure to file a record timeously.

Grounds of review

[16] The applicants review of the ruling may be summarised thus:

16.1 The arbitrator failed to determine the interpretation dispute, when he accepted the concession by the employer that the individual applicants were employees of JMPD at the time the agreement was concluded. Their contention is that the concession necessarily ought to have resulted in a finding that the settlement agreement applied to the individual applicants.

16.2 Further, in terms of the dispute actually referred to arbitration, he was not required to determine if the applicants had a claim pursuant to the correct interpretation of the agreement. The applicants contend that the issue of enforcing the agreement was an entirely separate matter which was not before the Commissioner. To express it differently, in effect they claim he misconceived the issue he had to decide.

16.3 Because the jurisdictional question was an *in limine* issue before the Commissioner it was inappropriate and misconceived for him to have expected evidence of steps taken to interrupt prescription at that point in the proceedings.

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16.4 The fact that clause 6 of the agreement stated that "its application will be with effect from 1 July 2008", did not mean as the Commissioner appeared to think, that this was the payment date.

16.5 The arbitrator erroneously failed to appreciate that the agreement did not prescribe a cut-off for claims.

[17] For its part, the respondent raises the following substantive defences to the review application:

17.1 It disputes that the dispute referral merely sought a declaration on the meaning of the agreement. It contends that disputes relating to the application of the collective agreement are tantamount to a request for enforcement.

17.2 In any event, there would be no point in determining the dispute if the CCMA had no jurisdiction because of the prescription ruling.

17.3 A complete cause of action for the recovery of the debt in the sense of the facts necessary to prove the claim existed long before the referral to the CCMA and had existed for a period of three years prior to 28 June 2011.

[18] The municipality correctly points out that the review of a jurisdictional ruling is different to an ordinary review in that the question for the court to determine is whether the arbitrator was right or wrong, not whether the decision was reasonably justifiable.

[19] Before the grounds of review can be addressed, the condonation applications and dismissal application must be dealt with.

Condonation applications and Rule 11 application

The late launching of the review

[20] The ruling of the Commissioner was issued on 6 February 2014, but was only received by the applicants on 10 February 2014. The review application was

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launched on 26 March 2014. Accordingly, the review application was only two days late. The delay in relation to this stage of the proceedings was minimal and the municipality did not complain of any prejudice suffered as a result, nor did they oppose the application.

[21] I am satisfied this delay was trivial and no serious prejudice could have been caused to the respondent. Irrespective of the merits of the dispute, the late filing of the review ought to be condoned.

The late filing of the record, supplementary affidavit and the dismissal application

[22] Whether or not the delays in the subsequent steps of prosecuting the review should be condoned is the subject matter of the Rule 7A(8)(b) condonation application and the Rule 11 dismissal application.

[23] The material chronology of the review application after the initial launch thereof is as follows:

23.1 25 March 2014: The review application is launched.

23.2 30 March 2014: The municipality serves a notice of opposition to the review application.

23.3 2 April 2014: CCMA delivered the record to the registrar.

23.4 17 April 2014: The applicants claim, though this is uncorroborated by their erstwhile attorney, Mr Mngomezulu of CHSM Incorporated ('CHSM'), that he consulted with counsel on this day about the course of action the applicants should pursue, after obtaining an opinion of counsel in which he proposed that the applicants should simply sue for payment of what they claimed to be due to them under the settlement agreement.

23.5 30 May 2014: The applicants' attorneys advised the municipality's attorneys that they had uplifted the record but the compact disc of the proceedings was blank. The letter recorded that the CCMA had been requested to provide another CD and asked for an indulgence pending

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this being done and advising that they would consider an application to compel the provision of the record if the CCMA was not forthcoming.

23.6 17 June 2014: The municipality's attorneys responded that they do not see the need for a transcript of the proceedings as the issues raised in the review were legal in nature. Accordingly, they requested the applicants to expedite the review.

23.7 On or about 27 June 2014: the applicants instruct new attorneys to take over the matter.

23.8 30 June 2014: the applicants' new attorneys request CHSM to hand over the documents by 1 July 2014.

23.9 01 July 2014: CHSM demands payment of final accounts before relinquishing files.

23.10 15 July 2014: Applicants' new attorneys, Maenetja Attorneys, obtain files from CHSM.

23.11 18 July 2014: Maenetja attorneys consult with counsel and resolve to institute action for payment of salaries allegedly outstanding as a result of the settlement agreement.

23.12 24 July 2014: The municipality launches the Rule 11 application, noting that a period of 81 days had passed since the review application was launched. The dismissal application was served on CHSM as the municipality's attorneys had not been advised that they were no longer attorneys of record for the applicants. Later the same day, CHSM notified the municipality's attorneys that CHSM were no longer the attorneys of record for the applicants.

23.13 25 July 2014: A letter of demand is issued to the municipality for payment of salaries, amounting to approximately R 22 million.

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23.14 31 July 2014: The candidate attorney at Maenetja Attorneys, who was assigned to handle the matter under the supervision of a senior partner of the firm, leaves the firm.

23.15 5 August 2014: The municipality rejects the applicant's claim for payment of salaries on the basis that the arbitration award handed down renders the subject matter of the demand *res judicata*.

23.16 6 August 2014: Applicants claim to be first made aware of the Rule 11 application served on CHSM.

23.17 15 August 2014: The applicants filed an answering affidavit in the Rule 11 application.

23.18 22 August 2014: the municipality files a replying affidavit in the Rule 11 application.

23.19 The applicants claim that the mechanical record of the CCMA proceeding was received during August and forwarded to transcription services.

23.20 30 September 2014: The transcription of the record was completed.

23.21 February 2015: The applicants claim to have received the transcribed record during this month.

23.22 13 February 2015: The applicants serve a Rule 7A(6) notice on the municipality.

23.23 16 February 2015: The applicants file the Rule 7A(6) notice with registrar.

23.24 25 February 2016: Tlhotlhalemaje J dismisses the application for payment of unpaid wages.

23.25 3 March 2016: The applicants file a Rule 7A(8)(b) notice, confirming that they stand by their original notice of motion.

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23.26 14 March 2016: The municipality objects to the late filing of Rule 7A(8)(b) notice.

23.27 25 July 2016: The applicants apply for condonation for late filing of Rule 7A(8)(b) notice.

23.28 August 2016: The applicants withdraw their mandate from Maenetja Attorneys and appoint Mkize Attorneys as their new attorneys of record.

23.29 10 January 2017: The applicants apply for an extension of time to file the record.

[24] In opposing the Rule 11 application, the applicants contended that it was crucial for the purposes of the review that the oral submissions made by the legal representatives at the hearing namely; about the nature of the dispute to be adjudicated, what was before the arbitrator, submissions and concessions made, and the like, which would be reflected in the transcript of the proceedings, ought to be before the court. In this regard, what is bizarre is that the only transcript which was ultimately filed was of an earlier proceeding before another commissioner and not the transcript of the argument in the hearing which led to the ruling under review in this application.

The periods of delay

[25] Assuming a transcript was necessary, which does not seem to be the case, and leaving aside the fact that the correct transcript was not even filed, the critical periods of delay which require explanation are:

25.1 the delay between receiving the original deficient record at the end of May 2014 and filing the record in February 2015, a period of over eight months, or more than 10 months after launching the review proceedings.

25.2 The delay in finalising the review application by complying with Rule 7A(8) only in April 2015 or March 2016, after the record was filed in February 2015. The applicants claim that:

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24.2.1 The Rule 7A(8)(b) notice was served and filed by 14 April 2015, which was 38 days late.

24.2.2 However, seeing that there was no response to this notice by the municipality, and because the 'first notice could not be located', a 'second notice' was served and filed on 3 March 2016.

[26] In terms of clause 11.2.2 of the Labour Court Practice Manual, the transcript ought to have been filed within 60 days of the applicant being advised by the registrar that the record has been received. On the applicants' own version this came to the attention of Mngomezulu attorneys at least by 30 May 2014, though it was probably earlier considering that the applicant's attorney supposedly consulted with counsel on 17 April. However, assuming 30 May was the date the applicants were advised by the registrar of the receipt of the record, the record ought to have been filed by 30 July 2014. At best for the applicants it was filed in February 2015, about seven months beyond the 60-day deadline.

[27] In terms of clause 11.2.3 of the manual a review application is deemed withdrawn in the absence of consent by the opposing party or a ruling by a judge affording the applicant an extension of time to file the record. In the circumstances, the review application might be disposed of on this basis alone.

[28] However, on 10 January 2017, shortly before the applications were enrolled to be heard on 2 February 2017 by Whitcher J, the applicants belatedly filed an application for extension of the time period for filing the record. This was nearly two and a half years after the expiry of the 60 day period. The application was not formally opposed but clearly falls to be considered as a factor in determining the dismissal application. In any event, the delay in filing the record was extreme.

[29] If the Rule 7A(8)(b) notice was served in mid-April 2015, it was served four times later than it should have been which is a considerable delay. However, that also glosses over the absence of any explanation why the transcript was

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only obtained by Maenetja attorneys in mid-February 2015 if it had been finalised by the end of September 2014. On the other hand, if the Rule 7A(8)(b) notice was only filed in March 2016, it was extremely late. In this regard there was no evidence of service of that notice on the municipality.

[30] To compound matters, whereas the applicants received an objection to the late filing of the notice in mid-March 2016, they took over four months to file the condonation application, for which no explanation was tendered.

Explanations for the delays.

[31] The applicants contend they pursued the review diligently but were hampered by the failings of their former attorneys of record and subsequently by the delay in obtaining a transcript of the proceedings. They also contend that the dismissal application was merely a response to their letter of demand for payment of the claimed outstanding wages, as it was launched one day after receiving the letter of demand.

[32] In the affidavit filed in support of the condonation application for the late filing of the Rule 7A(8)(b) notice, the applicants claimed:

32.1 they could not file the said notice within 10 days of filing the record, because they had still not received “the entire file” from CHSM attorneys, ostensibly because the former attorneys would not release the file owing to outstanding payments;

32.2 the complete files were only received ‘during the month of April 2015’, and

32.3 the application to compel payment of the unpaid wages ‘contributed greatly’ to delaying the finalisation of the review application.

[33] Leaving aside the fact that the request for an extension of time to file the record was only filed nearly two years after the record was filed, Maenetja Attorneys were already apprised of the review and had received the files from CHSM attorneys by mid July 2014. They claim, somewhat vaguely, to have

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received the complete record in August, and only transcribed the record by the end of September 2014.

[34] There is still a further unexplained delay from September 2014 until February 2015, which they assert is when they received the transcript. Although Maenetja Attorneys were now acting in the review proceedings for the applicants, their consultations with counsel did not appear to deal with the review proceedings at all, but with the new line of attack they were devising in the form of launching the application for unpaid wages which came before Tlhotlhalemaje J. The inescapable impression gained is that it was this fresh enforcement application which was engaging the efforts of the applicants' attorneys and counsel. Indeed, the applicants see no difficulty in trying to justify the delay in prosecuting the review proceedings because of the time being devoted to launching the new application.

[35] Assuming that the Rule 7A(8)(b) notice had been served in April 2015, the applicants sought to attribute the 38 days' delay to Maenetja Attorneys not yet having obtained complete files from CHSM attorneys. However, when Maenetja Attorneys mentioned receiving the files on 15 July 2014 from CHSM they made no mention that the files received from CHSM on 15 July 2014 were still incomplete. The only complaint they made at the time was about the state of the two lever arch files received from CHSM Attorneys, not about missing material. Further, the applicants do not take the court into their confidence about which portions of the files were supposedly missing in February 2015 that made it impossible for them to file the Rule 7A(8)(b) notice at that stage. Such a perfunctory rationalisation is not an acceptable explanation for the delay. The delay on account of the supposedly missing material is all the more inexplicable bearing in mind that the applicants ultimately made no additions or changes to their original founding papers.

[36] There is also the curious service of a 'second' Rule 7A(8)(b) notice shortly after Tlhotlhalemaje J's dismissal of the unpaid wages application. This can only be plausibly explained by the applicants developing a renewed interest in the review application. But a party in review proceedings cannot simply leave an application in a 'pending' state and then pursue it when the time suits it.

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The applicants aver that the 'second' notice was served on the municipality because no notice of opposition or answering affidavit was forthcoming from it, but that explanation is insufficient to be credible. To accept this version, the applicants would have the court believe that their attorneys patiently waited nearly eleven months, knowing they were entitled to have received opposing papers within 10 days of filing the Rule 7A(8)(b) notice on 14 April 2015. The far more probable explanation is that the applicants simply did not pursue the review application pending the outcome of the enforcement application in the Labour Court, and it was only when their hopes were dashed by the outcome of that application that they took steps to revive the review application.

[37] All in all, the condonation applications are lacking in any meaningful detail to explain the lengthy delays. The attitude of the applicants towards their own dilatoriness borders on the indifferent and presumptuous. The fact that the individual applicants are lay persons does not explain why the union did not take a more active interest in monitoring the progress of the review application particularly if it knew the applicants had been ill served by the attorneys initially appointed in the matter. Ordinarily, I would be inclined to dismiss the review application with costs, in view of the extraordinarily lackadaisical approach to the delay and the length of time taken to pursue the review application.

[38] However, the effects of leaving a manifestly wrong ruling intact, in my view, outweigh these considerations.

Merits of the review

[39] Essentially, the applicants argue that the arbitrator incorrectly collapsed the distinction between the interpretation of the settlement agreement and its enforcement.

[40] S 24(2) of the LRA provides:

> (2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if —

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(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

[41] In ***Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal*** [2], the LAC stated the minimum distinguishing characteristics of interpretation and application disputes respectively:

> Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.[3]

[42] Although the applicants cast the dispute as an interpretation dispute, interpreting who is covered by the agreement obviously has implications for invoking it. The applicants sought a determination that the settlement agreement applied to the individual applicants in question. They carefully cast the dispute in the narrowest terms. The municipality conceded that the agreement did cover the individuals in question, albeit for the purpose of hoping to get rid of the dispute by relying on prescription. In terms of the narrow dispute that was before the arbitrator, the concession should have resolved the dispute. Indeed, the arbitrator partly recognised this when he correctly noted that the municipality's concession rendered the interpretation question moot.

[43] However, because the concession was made in the context of simultaneously raising the prescription plea the arbitrator was enticed to entertain the

[2] (2016) 37 *ILJ* 1839 (LAC)
[3] At 1845, para [17].

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prescription issue. By following the municipality's lead, the arbitrator misdirected his enquiry by believing he was then required to deal with the issue of application. Though the practical implications of the applicants succeeding with the review are doubtful because the prescription issue would still arise either in relation to the life of the agreement itself or the periods for which any remuneration might have been claimed by the individual applicants, the applicants ought to have succeeded in the arbitration.

Conclusion

[44] Although the merits of the review appear strong albeit on the narrow issue to be decided, I am of the view that the dilatory prosecution of the review cannot be condoned. Not only was the review application deemed withdrawn in terms of clause 11.2.3 of the Practice Manual it also ought to have been archived and deemed lapsed because the applicants only complied with Rule 7A(8) nearly twelve months after the one year period for finalising the review papers in clause 11.2.7 of the Practice Manual.

[45] In any event, even if the practice manual did not exist, the applicants' prosecution of the review is characterised by appalling delays and poor explanations therefor. This is not a case where the merits of their case can outweigh the indifferent attitude with which they approached the matter.

[46] The applicants' conduct of the review also has a bearing on whether costs should be awarded. Notwithstanding an ongoing relationship, the manner in which the applicants conducted the litigation resulted in the respondents incurring needless legal expenses.

Order:

1. The condonation application for the late filing of the review application is condoned.
2. The condonation for the late filing of the Rule 7A(8)(b) notice is dismissed.
3. The review application is dismissed.

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4. The applicants are jointly and severally liable for the respondents' costs of opposing the review application, the dismissal application and the opposed condonation applications, the one paying the other to be absolved.

_____

Lagrange J

Judge of the Labour Court of South Africa

Appearances:

For the applicant: L. P Mkize of CDM Mkize Attorneys

For the respondents: Advocate X Matyolo

Instructed by Werksmans Inc

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