

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR837/15

In the matter between:

NOHAYAZE ANGELINA TLADI**Applicant**

And

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION****First Respondent****COMMISSIONER: TSILISO SHASHA N.O.****Second Respondent****LOCAL GOVERNMENT SECTOR EDUCATION
TRAINING AUTHORITY****Third Respondent****Heard: 20 February 2020****Delivered: 13 March 2020**

JUDGMENT

NIEUWOUDT, AJ**Introduction**

- [1] There are three opposed applications before Court; the applicant applies for reinstatement of her review application, the third respondent applies for the

dismissal of the review application in terms of Rule 11 and the applicant applies that the award under case number FSBF3528/14, handed down by the second respondent on 12 March 2015 be reviewed and set aside.

- [2] The parties were in agreement that, on the facts of this matter, the application in terms of Rule 11 would have to fail if the application for reinstatement succeeded and that the converse would be true if the application for reinstatement failed.
- [3] The Court enquired from both parties whether they only wished to argue the reinstatement application and the Rule 11 application, or whether they wished to argue the review application too. Both parties indicated that they wished to argue the full matter.
- [4] It is necessary to record that the documentary record of the arbitration proceedings was not available to the Court. Mr Masihleho who appeared on behalf of the applicant assured the Court from the bar that the complete record had been filed, and the Court accepted this assurance. In order to avoid further delays in the matter, the Court suggested that the parties argue the matter on the basis that they would refer the Court to any extracts from the record on which they wished to rely, on the basis that the Court would read those extracts later. As it turned out, no reference was made to the documentary record and the complication need not delay the decision in this matter.

Background

- [5] The applicant was employed by the third respondent as its regional manager for its Free State and Northern Cape regions. She was dismissed on 22 July 2014 for alleged acts of misconduct after a disciplinary hearing that ran over a

number of months. For purposes of this judgment it suffices to record that, on the face of it, the misconduct appears to be serious.

- [6] She referred a dispute to the first respondent and this dispute was arbitrated over a number of months. On 12 March 2015 the second respondent found that the dismissal of the applicant was substantively and procedurally fair. She received the arbitration award on 19 March 2015. The review application was filed on 12 May 2015. It was slightly late and the applicant applied for condonation. This application was not argued by either of the parties and the Court grants the condonation.
- [7] The first respondent filed the record of the arbitration proceedings with the registrar on 18 June 2015. It is not clear when the registrar informed the parties of this fact, but both parties accepted that it must have been within a few days. The transcript of the arbitration proceedings was completed on 15 April 2016. It is this period of approximately 10 months which was the focus of the argument before Court as far as the period of the delay in progressing the matter is concerned.
- [8] There were further periods of delay:
- 8.1 The notice in terms of Rule 7A (6) was served on 7 July 2016 and filed on 19 July 2016.
 - 8.2 The supplementary affidavit was only deposed to on 30 September 2016.
 - 8.3 The notice in terms of Rule 7A (8) was also dated 30 September 2016.
- [9] However, the application for reinstatement was served on 7 July 2016 and filed on 11 July 2016.

Application for reinstatement

[10] The applicant had failed to comply with the provisions of paragraph 11.2.2¹ of the Practice Manual² by failing to file the record of the proceedings within 60 days and she was thus, in terms of paragraph 11.2.3,³ deemed to have withdrawn the application.

[11] The consequences of the deeming provision have been dealt with a number of times and is settled law. In *Ralo v Transnet Port Terminals and Others*⁴ the Court found that a review application would be deemed to have been withdrawn as a consequence of the fact that the applicant had not filed the record within the prescribed 60-day period and stated the following:

‘...the word ‘deemed’ means ‘considered’ or ‘regarded’ and is used to denote that ‘something is a fact regardless of the objective truth of the matter’⁵...

The Court further held that the applicant may apply for condonation of the late filing of the record. Thus, the default may be cured by a condonation application.⁶

[12] In *Colett v Commission for Conciliation, Mediation and Arbitration and Others*⁷ the Labour Appeal Court dealt with the remedies that an applicant had when a matter had been archived. It held that the principles that were normally applicable to condonation applications would apply when considering an application for retrieval.

[13] In *Grootboom v National Prosecuting Authority and Another*⁸, the Constitutional Court in a majority decision held that:

¹ 11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

² Effective April 2013.

³ 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...

⁴ (2015) 36 ILJ 2653 (LC).

⁵ Id fn 5 at para 10.

⁶ Id fn 5 at para 11.

⁷ (2014 18 ILJ 367 (LAC).

⁸ (2014) 35 ILJ 121 (CC)

‘... the standard for considering an application for condonation is the interest of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.’⁹

[14] In *Colett*¹⁰ the LAC added the following:

‘There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court, condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-D should be followed but:

‘There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’

And further¹¹:

‘The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.’

⁹ Ibid at para 22.

¹⁰ Id fn 11 at para 38.

¹¹ at para 39.

[15] It has to be noted that the decision in *Grootboom* does not mean that all the elements of the test are applicable in every case. Ordinarily, the adjudicator would consider the period of the delay, the explanation for the delay and the prospects of success. Both parties focused on these factors and the Court shall consider them.

[16] Mr Masihleho submitted that the fact that the application for reinstatement was *bona fide* should play a role in assessing whether good cause had been shown. He referred the Court to *Samuels v Old Mutual Bank*¹² in this regard. The LAC did not do away with the three factors; *bona fides* is an element of assessing prospects of success. The LAC in *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others*¹³ held that:

‘It has also been held in respect of rule 27 of the High Court Rules, that the applicant should satisfy the court on oath that it has a bona fide defence. In this regard, it has been held that the least that the applicant must show is that his or her defence is not patently unfounded and that it is based on facts which, if proved, would constitute a defence.’

[17] It also serves to be mentioned that in that matter the applicant had gone to great lengths to try and secure the co-operation from the CCMA in order to finalise the record.

[18] Mr Shangisa, in turn, relied on *Matsha & others v Public Health & Social Development Sectoral Bargaining Council & others*¹⁴ and in particular to its referral to the following passage in *Ferreira v Die Burger*¹⁵

‘I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters

¹² (2017) 38 ILJ 1790 (LAC)

¹³ (2014) 35 ILJ 1512 (LAC) at para 8.

¹⁴ (2019) 40 ILJ 2565 (LC)

¹⁵ (2008) 29 ILJ 1704 (LAC) at para 8

which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant a violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

- [19] It is trite law that labour disputes ought to be resolved expeditiously and this is a factor that the practice manual gives effect to. However, the facts in that matter are also somewhat different; the appellant had failed to file the complete record on appeal for a period of two years and had not responded to repeated requests from the respondent's attorneys to do so. In fact, the appellant's attorneys were ordered to pay the costs of the matter.

Period of the Delay

- [20] For the purpose of this judgment, the Court will, as the parties had done in argument, focus on the delay of approximately 10 months. The delay is long given the fact that the record is required to be filed in 60 days.

Explanation for the Delay

- [21] There is no direct explanation for the lapse of 10 months. The applicant explains the delay after the record had been transcribed on 15 April 2016 but does not do so for the period before that date. The further delay was caused by two factors, her counsel declined the brief to continue to act in the matter and she had difficulty in paying her legal expenses due to the fact that she was unemployed.

- [22] Mr Masihleho urged the Court to find that her unemployment had commenced from the date that she had been dismissed and that her difficulties in having the record prepared was caused by this fact. In the absence of direct evidence on the issue, the Court has to decide whether there are sufficient

facts before it to draw an inference and if so, whether this inference is the most plausible or natural inference to be drawn from the proven facts.¹⁶

- [23] It would seem that the applicant had never abandoned her application. In her founding affidavit, she annexed the invoice from her then counsel, for an amount of R112 000 for preparing the review application and condonation application. This invoice is dated 18 May 2015. It is probable that her attorneys had also rendered an account for their work. This is quite a large amount of money for an individual to pay. In the light of this, the most plausible or natural inference to be drawn is that a lack of funds delayed the progression of the delivery of the record.
- [24] The bulk of the employees who bring applications to this Court are unemployed. This fact cannot excuse an indefinite delay in the finalisation of labour disputes. As already stated, that has to be done expeditiously.
- [25] The Court accordingly finds that there is an explanation for the delay and that, although it may not be a good one, it is not so poor that it precludes the Court from considering the prospects of success of the applicant.

Prospects of Success

- [26] The Court is in the unusual position that it has heard full argument on the merits of the matter. It would serve no purpose to deal with this aspect twice. Suffice to say that, as will appear from later in this judgment, the applicant has very good prospects of success.

Conclusion

- [27] The period of the delay is long, the explanation for the delay is not particularly good but the prospects of success are very good. Accordingly, the application for reinstatement of the review ought to be granted.

¹⁶ See *Govan v Skidmore* 1952 (1) SA 732 (N) at 733H - 734B

Review

[28] The applicant has relied on a number of grounds of review to show that the decision of the second respondent that her dismissal was procedurally and substantively unfair, was one that a reasonable decision-maker could not reach. She also relied on the fact that the second respondent had improperly interfered in her cross examination, that he had advised her to withdraw the dispute and that he had said that she was going to lose the case. The second respondent when so far as to call her husband in this regard.

[29] Due to the Court's conclusion on the last ground, it is not necessary to deal with the other grounds in any degree of detail. It is the Court's view is that there is not much merit in them:

28.1 The delay in instituting the charges against the applicant was caused, and is explained, by the fact that the third respondent was dysfunctional to the extent that an administrator had to be appointed to try and salvage it.

28.2 The final written warning that the erstwhile CEO of the third respondent had imposed on the applicant was questionable on at least two grounds, namely that it referred to an incorrect date and that it was copied to a person who was not in the employ of the third respondent on the date that it was issued.

28.3 The fact that the superiors of the applicant did not take issue with the appointment of her niece and her domestic to the employment of the third respondent is, to say the least, startling and does not excuse or mitigate her misconduct.

28.4 The fact that her superiors rubberstamped her failure to comply with the procurement policy of the third respondent also does not excuse her misconduct.

28.5 Mr Masihleho referred the Court to a number of extracts in the transcript in support of his submission that the second respondent had unduly interfered in the cross examination of the chair of the disciplinary hearing by the applicant. The Court has perused these extracts and they do not support this ground of review. To the contrary, they show that the second respondent was at pains to try to assist the applicant in confining her cross examination to relevant questions.

Misconduct

[30] The applicant contended that the second respondent had misconducted himself in relation to his duties as an arbitrator by putting pressure on her to withdraw the dispute and telling her that she would lose the case.

[31] These allegations are clearly and unambiguously made in the founding affidavit. The third respondent baldly denied them. The parties accepted that any disputes of fact stood to be resolved by the application of the *Plascon Evans* rule. Thus, the allegations must stand.

[32] In *Kasipersad v Commission for Conciliation, Mediation & Arbitration & others*¹⁷ the Court dealt with an arbitrator giving advice to a party and held as follows:

‘Even if a commissioner is invited by a party to give advice, such an invitation should be resisted. A commissioner has to be even handed in dealing with the parties. If she gives advice to one party, she would have to do likewise for the other party. That would create conflicts of interest for the commissioner. A commissioner who puts herself in such a situation would have great difficulty in acting with honesty, integrity and impartiality. Ethically, it is therefore untenable.’

[33] This *dictum* was quoted with approval in *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation & Arbitration & others*¹⁸. One of the

¹⁷ (2003) 24 ILJ 178 (LC) at para 27

issues in that matter was that the arbitrator had told a party that it would lose if the arbitration proceeded. The Court held¹⁹ that, in so acting, the arbitrator had placed himself in a position where his impartiality and integrity could be called into question. It does not matter that the arbitrator acted with the best intentions in the world.

[34] The Court was not referred to any authority that contradicts the position set out above. Applying the test, the Court finds that the arbitrator committed misconduct in relation to his duties as an arbitrator and that this ground of review must succeed.

[35] The effect of this finding is that the matter ought to be remitted to the first respondent for a hearing *de novo* by a commissioner other than the second respondent.

Costs

[36] The parties were *ad idem* that this was not a matter where costs should be awarded.

[37] I make the following order:

Order:

1. The application to retrieve the review application is granted.
2. The application to dismiss the review application is dismissed.
3. The award under case number FSBF3528/14 handed down by the second respondent on 12 March 2015 is reviewed and set aside.
4. The dispute is referred back to the first respondent for a hearing *de novo* by a commissioner other than the second respondent.
5. There is no order as to costs.

¹⁸ (2017) 38 ILJ 658 (LC)

¹⁹ At para 30

H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Peter T. Masihleho

Instructed by: Phatshoaneheny Attorneys

For the third Respondent: S.L. Shangisa

Instructed by: Kgokong Nameng Tumagole Inc