



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no: JR 904/17

NATIONAL UNION OF MINEWORKERS

First Applicant

MACHABA MARSHALL

Second Applicant

and

COMMISSION FOR CONCILIATION

First Respondent

MEDIATION AND ARBITRATION

Second Respondent

LAMEESAH JOOMA N.O

Third Respondent

SIBANYE GOLD LIMITED

Fourth Respondent

CCMA GOVERNING BODY

Enrolled: 7 May 2020

Delivered: 13 May 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 09h45 on 13 May 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicants filed an application in terms of sections 145 and 158(1)(g) of the Labour Relations Act¹ (LRA) and the relief sought is for the review and setting aside of an arbitration award, to review the performance of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) of any function provided for in the LRA on any grounds permissible in law and for an order to direct the Fourth Respondent (CCMA Governing Body) to remove the Second Respondent (the arbitrator) as a commissioner in accordance with section 117(7) of the LRA.
- [2] I will deal with the relief sought in turn.
- [3] The matter was enrolled for hearing on 7 May 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted.

The review application in terms of section 145 of the LRA

- [4] The Applicants seek to review and set aside an arbitration award issued on 30 March 2017 under case number GAJB 16761-16. The Applicants filed a supplementary affidavit which is titled "*supplementary cum condonation affidavit*". There is no notice of motion filed wherein relief related to condonation is sought, but it is apparent from the "*supplementary cum condonation affidavit*" that the Applicants seek condonation for the late filing of the transcribed record of the arbitration proceedings.
- [5] This application is opposed by the Third Respondent (Sibanye).
- [6] On 30 March 2017, the arbitrator issued an arbitration award wherein she found the Second Applicant's dismissal to be substantively fair.

¹ Act 66 of 1995, as amended.

- [7] On 11 May 2017, the Applicants filed a review application, seeking the review and setting aside of the said arbitration award.
- [8] The notice in terms of Rule 7A(3) of the Labour Court Rules was served on the Applicants on 17 May 2017.
- [9] The Applicants uplifted the record of the arbitration proceedings from the Labour Court on 21 June 2017.
- [10] On 29 March 2018, Sibanye's attorneys addressed a letter to the Registrar of this Court and to Mr Zwane of the National Union of Mineworkers (NUM), to request the Registrar to archive the file as there was no compliance with the time periods provided for in the Practice Manual of the Labour Court.²
- [11] Subsequent to Sibanye's request to have the file archived, the Applicants filed the transcribed record of the arbitration proceedings on 10 April 2018.
- [12] On 11 April 2018, the Applicants filed the supplementary affidavit seeking condonation for the late filing of the record. Sibanye opposed the application and in its answering affidavit, it raised the fact that due to the non-compliance with the provisions of the Practice Manual, the review application is deemed to be withdrawn.

Analysis

Filing of the record

- [13] Rule 7A(6) of the Labour Court Rules provides that the applicant in a review application must furnish the Registrar and each of the other parties with a copy of the record or portion of the record, as the case may be. The applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.
- [14] The serving and filing of the record in a review application is provided for in clause 11.2 of the Practice Manual as follows:

² April 2013.

“11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

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.

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.”

[15] This Court and the Labour Appeal Court (LAC) have considered the status of the Practice Manual³ and held that in essence, the Manual promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practise and litigate in the Labour Court and it promotes the statutory imperative of expeditious dispute resolution. The provisions of the Practice Manual are binding and should be adhered to and it is not to be complied with or ignored by parties at their convenience or discretion.

[16] Clauses 11.2.1 and 11.2.2 provide for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the

³ See: *Ralo v Transnet Port Terminals and Others* [2015] ZACPEHC 68 (17 June 2015), *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* [2014] 5 BLLR 516 (LC), (2014) 35 ILJ 1672 (LC), *Rumba Samuels v Old Mutual Bank* Case no DA30/15 handed down on 25 January 2017.

consequences should an applicant fail to file the transcribed record within the prescribed period.

- [17] A proper interpretation of clause 11.2.3 shows that there are three possibilities if the record is not filed within 60 days of the date on which the applicant is advised by the Registrar that the record has been received. The first possibility is the easy and obvious one namely for the applicant to request the respondent's consent for an extension of time and consent has been given.
- [18] The second possible scenario arises only in the event that consent was sought from the respondent but is refused. In such an event, the applicant may, by way of a notice of motion supported by affidavit, apply to the Judge President for an extension of time. The application must comply with Rule 7 and affidavits are to be filed within the time limits prescribed by Rule 7.
- [19] The third possible scenario arises when the applicant in a review application failed to file the record within the prescribed 60-days period and failed to obtain the respondent's or the Court's consent for the extension of time. In such a case, the review application is deemed to be withdrawn.
- [20] *In casu*, a notice in terms of Rule 7A(3) of the LRA was served on the Applicants on 17 May 2017 and the record had to be filed within 60 days thereof, thus by no later than 11 August 2017. The Applicants did not file the record within the prescribed 60-day period and they had not approached the Respondents for consent for an extension of time, nor did they approach the Judge President. Absent any action taken to seek an extension, it follows that the review application is deemed to be withdrawn.
- [21] In *Ralo v Transnet Port Terminals and others*⁴ (*Ralo*) the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of *Municipal Council of the Municipality of Windhoek v Marianna Esau*⁵ where the Court

⁴ *Ralo v Transnet Port Terminals and Others* [2015] ZAECPHC 68 (17 June 2015), [2015] 12 BLLR 1239 (LC), (2015) 36 ILJ 2653 (LC).

⁵ (LCA 25/2009, 2 March 2010)

held that the word 'deemed' is considered to have a conclusive effect⁶. This Court concluded by stating the following:

"...The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application"

- [22] *In casu*, the same fate meets the Applicants and the status of the review application is 'withdrawn'.

Relief sought by the Applicants

- [23] There is a distinction to be drawn between the provisions of Clauses 11.2.1 - 11.2.3 of the Practice Manual, which provide that a review application is deemed to be withdrawn when the record was filed outside the prescribed period and Clause 16 which provides for the archiving of files.
- [24] Clause 16 provides that the Registrar will archive a file in the case of a review application when a period of six months has elapsed without any steps been taken by the applicant from the date of filing the application or the date of the last process filed. Clause 16.2 provides that a party whose file had been archived, may submit an application, on affidavit and on notice to all the other parties to the dispute, for the retrieval of the file.
- [25] *In casu*, the Applicants' file was not archived by the Registrar, but is deemed to be withdrawn by operation of the provisions of the Practice Manual.
- [26] There is no bar, either in the Rule of this Court or the Practice Manual to the Applicants filing an application to have the review application reinstated in the event it was deemed to be withdrawn. Logic dictates that the review should be reinstated and be alive before the late filing of the record could be condoned.
- [27] The Applicants ought to have filed an application to have the review application reinstated, which they failed to do and instead they sought condonation for the late filing of a record without an application to reinstate the review application. Condonation for the late filing of a record cannot be granted in respect of a review application that is deemed to be withdrawn.

⁶ Id n 4 at para 10.

- [28] The Applicants' review application is deemed to be withdrawn and as a result no relief can be granted in respect of a withdrawn application.

The review application in terms of section 158(1)(g) of the LRA

- [29] The Applicants also seek to review the performance of the CCMA of any function provided for in the LRA and on any grounds permissible in law. The Applicants seek an order to direct the CCMA Governing Body to remove the arbitrator as a commissioner in accordance with section 117(7) of the LRA.
- [30] This application is opposed by the CCMA, the CCMA Governing Body and the arbitrator.

Analysis

- [31] The application calls for a closer consideration of the provisions of section 158(1)(g) of the LRA.
- [32] In *Valuline CC and Others v Minister of Labour and Others*⁷ the powers of the Labour Court to review, as per section 158(1)(g) of the LRA, was considered and it was explained as follows:

'The proper construction of section 158(1)(g) is that if the Labour Court has jurisdiction in respect of the subject matter of the litigation (specifically relating to any function provided for in the LRA as contemplated in section 158(1)(g)), that it will then have the power to grant the remedy of review in respect of such subject matter.'

- [33] Section 158(1)(g) of the LRA empowers this Court to review the performance of any function provided for in the LRA on any grounds permissible in law. What permissible grounds for purposes of section 158(1)(g) are have been defined and accepted as a review based on section 6 of the Promotion of Administration of Justice Act⁸ (PAJA), a review based on the principles of legality or common law grounds⁹.

⁷ [2013] 6 BLLR 614 (KZP) at para 32

⁸ Act 3 of 2000.

⁹ See: *Building Industry Bargaining Council (Southern and Eastern Cape) v CCMA* [2011] 4 BLLR 330 (LC).

- [34] In short, for the Applicants to succeed with this review application, they have to show firstly that the CCMA has performed a function provided for in the LRA and secondly they have to make out a case for review on a ground permissible in law.
- [35] The Applicants' case is that the arbitrator should be removed as a commissioner because she does not possess the required qualifications and that her conduct is not that of a person who is fit and proper to perform the functions required by the LRA, the Constitution and any other applicable law. The Applicants are of the view that the arbitrator is not independent or competent and that she has to be removed as a commissioner in terms of the provisions of section 117(7) of the LRA.
- [36] There are two material difficulties in the Applicants' case.
- [37] Firstly, the Applicant has to show that the CCMA or its Governing Body has performed a function which could be subjected to review.
- [38] Chapter VII of the LRA provides for dispute resolution and sections 112 – 126 deal specifically with the CCMA and *inter alia*, its establishment and functions. Section 116 establishes the Governing Body. Section 117 provides for the functions of the Governing Body in the appointment of commissioners, determining their remuneration, allowances and terms and conditions of service and the preparation of a Code of Conduct for commissioners and ensuring compliance with the Code.
- [39] For purposes of this application, the provisions of section 117(7) are particularly relevant. It provides that:
- ‘The governing body may remove a commissioner from office for-
- (a) serious misconduct;
 - (b) incapacity; or
 - (c) a material violation of the Commission's code of conduct.’

- [40] It is evident that section 117(7) empowers the CCMA Governing Body to remove a commissioner from office for specific reasons.
- [41] In its answering affidavit, the CCMA Governing Body explained that the exercise of the power to remove a commissioner from office can happen by way of two processes. The first is during a commissioner's performance review process, conducted by the convening senior commissioner during the course of the commissioner's performance or the CCMA Governing Body at the time of the commissioner's contract renewal process.
- [42] The second process available to remove a commissioner from office is through the process of complaints. The CCMA has a complaints department which receives complaints from users, employees or any other party who wishes to lodge a complaint about any process, staff member, commissioner or actions of the CCMA. Once a complaint is received, it is considered, evaluated and appropriate steps are then instituted. In the case of full time commissioners, a disciplinary process is followed and in respect of part-time commissioners, an independent party would conduct an investigation into the complaint and submit a report to the CCMA's human resources committee, which makes recommendations to the CCMA Governing Body.
- [43] The CCMA Governing Body makes a final decision on the appropriate sanction to be imposed, which may include the removal of the commissioner from office, as provided for in section 117(7) of the LRA.
- [44] In my view such a decision would constitute the performance of a function provided for in the LRA and could be subject to review.
- [45] The difficulty *in casu* is that the Applicants never lodged a complaint with the CCMA's complaints department, notwithstanding the fact that they were advised to do so. Absent a complaint, no process was followed in respect of the arbitrator and the CCMA Governing Body had not taken any decision in terms of the powers it has and more specifically section 117(7) of the LRA.
- [46] The provisions of the LRA are clear – the power to remove a commissioner from office, belongs to the CCMA Governing Body and it is a function

provided for in the LRA, thus subject to review. It is not for this Court to take a decision or to give an order for the removal of a commissioner in circumstances where the functionary empowered to do so, had not taken such a decision or performed such a function.

- [47] The powers of this Court are limited to the reviewing of the performance of the function, which was never performed.
- [48] The Applicants failed to meet the first requirement for review in terms of section 158(1)(g) namely to show that there was performance of a function provided for in the LRA.
- [49] Secondly, the Applicants failed to raise any grounds for review permissible in law. The Applicants raised no more than their own gripes and dissatisfaction with the arbitrator, no grounds for review had been raised in respect of the CCMA Governing Body's performance of a function. This is no surprise as no function had been performed that could be the subject of review in terms of the provisions of section 158(1)(g) of the LRA.
- [50] This Court is in no position to grant the relief sought by the Applicants namely to direct the CCMA Governing Body to remove the arbitrator in accordance with section 117(7) of the LRA and it follows that this application has to fail.

Costs

- [51] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.
- [52] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*¹⁰ it was emphasized that:

¹⁰ 2012 33 ILJ 2117 (LC).

‘.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.’

- [53] In *Zungu v Premier of Kwazulu-Natal and Others*¹¹ the Constitutional Court confirmed the principle that the rule of practice that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.
- [54] This is a case where the Court has to strike such a balance.
- [55] In their notice of motion, the Applicants sought costs against the Respondents in the event that the application is opposed, which is indeed the case.
- [56] The CCMA, the CCMA Governing Body and the arbitrator submitted that the Applicants’ case should be dismissed with costs. To substantiate the argument in favour of a cost order, they submitted that the Applicants were invited to use the appropriate processes in respect of complaints in order for the issue to be dealt with in the appropriate manner. This would have avoided the review application in terms of section 158(1)(g) of the LRA, would have facilitated the withdrawal of their opposition and avoided burdening this Court. The Applicants however were not amenable to follow the complaints procedure which they were advised to follow, but insisted to proceed with this application.
- [57] As a result of the Applicants’ conduct, the CCMA, the CCMA Governing Body and the arbitrator, who do not normally participate in litigation in this Court,

11 (2018) 39 ILJ 523 (CC)

were forced to oppose this application and to burden the Court to adjudicate an application that should not have been brought or persisted with in the first place.

[58] Sibanye sought a punitive cost order against the Applicants as they opined that the application was without merit.

[59] *In casu*, the Applicants filed a review application in May 2017 and did nothing to seek an extension to file the record outside the prescribed period and took no steps to prosecute the review until April 2018. The explanation tendered for that is in essence that the excessive delay was avoidable and is to be attributed to the NUM's bureaucratic management and negligence. The deponent to the Applicants' affidavit even called the explanation tendered for the delay 'laughable'. This is not the conduct of a trade union that is serious about pursuing litigation on behalf of the Second Applicant and it is certainly not conduct that is welcomed or could be condoned by this Court.

[60] In respect of the section 158(1)(g) of the LRA review application, the Applicants were forewarned not to proceed to Court with the application, as is evident from the letters written to the NUM by the CCMA. The Applicants however ignored that and stubbornly persisted to approach this Court with an application that should not have forced the CCMA *et al* to defend this application and should not have burdened this Court which operates with already limited resources.

[61] The Respondents were compelled to engage in litigation and oppose this application. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. This, the Applicants dismally failed to do and in my view this is a matter where a cost order is warranted.

[62] In the premises I make the following order:

Order

1. The application is dismissed;

2. The First Applicant is to pay the costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

LABOUR COURT