



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 306/15

CARLOS VASCO SITOE

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

NEO MOLOI N.O

Second Respondent

MPONENG MINE

Third Respondent

Enrolled: 6 May 2020

Delivered: 22 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 22 May 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to re-instate his pending review application.
- [2] The Third Respondent (Respondent) opposed the application.
- [3] The matter was enrolled for hearing on 6 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.
- [4] I have considered the papers filed as well as the written heads of argument submitted.

The re-instatement application:

- [5] The Applicant was dismissed by the Respondent on 22 July 2014 and he referred an unfair dismissal dispute to the First Respondent on 19 September 2014. The Applicant also applied for condonation for the late referral of his unfair dismissal dispute. On 16 October 2014 the Second Respondent (arbitrator) issued a ruling wherein he dismissed the Applicant's condonation application.
- [6] On 5 May 2015, the Applicant filed an application to review and set aside the ruling of 16 October 2015.
- [7] On 3 May 2016, the Respondent filed an application in terms of the provisions of Rule 11 of the Labour Court Rules to dismiss the review application, alternatively for an order to declare that the review application had lapsed in terms of the provisions of the Practice Manual of the Labour Court¹ (the Practice Manual).
- [8] On 2 August 2016, this Court granted an order as per the Respondent's draft order, declaring that the review application had lapsed in terms of paragraph 11.2.3 of the Practice Manual.

¹ April 2013.

- [9] There is no bar, either in the Rules of this Court or the Practice Manual to the filing of an application seeking to have a review application reinstated. This would obviously not be the case where the Court has dismissed a review application for the lack of prosecution.
- [10] On 18 July 2018, almost two years later, the Applicant filed an application to reinstate his review application.

The review application

- [11] Section 145(1)(a) of the Labour Relations Act² (LRA) provides that a review application should be brought within six weeks of the date that the award was served on the applicant. Section 145(1A) provides that the Labour Court may condone the late filing of a review application on good cause shown. The same period applies to rulings reviewed in terms of section 158(1)(g) of the LRA.
- [12] The Applicant filed an application with this Court to review and set aside the ruling of 16 October 2014 on 5 May 2015. The review application was served on the Respondent by facsimile on 30 July 2015.
- [13] In *Mbatha v Lyster and Others*³ the Labour Appeal Court (LAC) held that the provisions of sub-rule (1) of Rule 7A of the Labour Court Rules provides that the applicant in a review application is obliged to 'deliver a notice of motion to the person or body and to all other affected parties'. It follows, reading Rule 7A together with the effect of the definition of 'deliver' in Rule 1 of the Labour Court Rules, that an application is made within six weeks of the publication of the award only if it is delivered to all the respondents and filed with the Registrar of the Labour Court within such period.
- [14] Considering the *dicta* in *Mbatha*⁴, the review application *in casu* was thus delivered on 30 July 2015.

² Act 66 of 1995, as amended.

³ (2001) 22 ILJ 405 (LAC).

⁴ *Ibid.*

- [15] It concerned me that the ruling which is subject to review, is dated 16 October 2014 and that the application to review and set aside the ruling was only filed on 5 May 2015 and served on the Respondent on 30 July 2015. It is evident that a period of more than nine months elapsed between the date of the condonation ruling and the filing and serving of the review application.
- [16] It was not clear from the papers when the ruling dated 16 October 2014 was served on the Applicant and as this matter was adjudicated without a hearing, I instructed my secretary to contact the Applicant's legal representatives and to request them to obtain an instruction from the Applicant as to whether he was present when the condonation ruling was issued and if not, how and when the ruling came his attention.
- [17] This is extremely relevant as the question whether the review application had been filed within the prescribed six-week period, is a fact or element which goes to establishing the jurisdiction of this Court to adjudicate and hear the application.
- [18] In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵ this Court has held that:
- 'Where the non-compliance relates to a statutory provision, ie as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time-limits relate to jurisdiction) an application must be made to court to condone the non-compliance. In circumstances where the time-limit is prescribed by the *rules*, this court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time-limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court.'
- [19] The late filing of a review application constitutes a failure to comply with a statutory provision and not a time limit prescribed by the rules.

⁵ (2002) 23 ILJ 1282 (LC) at para 13.

[20] The Applicant's legal representatives indeed obtained an instruction from the Applicant as follows:

‘ The applicant instructs us as follows in response:

- 2.1. On 16 October 2014, he attended the CCMA for his unfair dismissal dispute. He had requested an interpreter for the hearing, but none was provided.
- 2.2. As a result, he was told to sit in the waiting room and nothing further was communicated to him that day.
- 2.3. While he was present at the CCMA on 16 October 2014, he was not present in the hearing room when the ruling was issued, nor was a copy of the ruling issued to him at the time.
- 2.4. He returned to the CCMA on 17 November 2014, to follow up on the outcome of his dismissal dispute. On the same day, he became aware of the outcome of his dispute for the first time when he was handed a copy of the ruling.’

[21] In view of the Applicant's instructions, I accept that he was handed a copy of the ruling he seeks to review on 17 November 2014. The Applicant had to file his review application within the prescribed period of six weeks, thus no later than 29 December 2014. The Applicant's review application was evidently filed far outside the six-week period.

[22] The failure to comply with the prescribed period goes to the issue of jurisdiction. The late filing of the review application constitutes a failure to comply with a statutory provision and the Applicant had to apply for condonation.

[23] *In casu*, there is no application for condonation and more than five years after the expiry of the prescribed period within which the review application had to be filed, the Applicant has not taken any step to apply for condonation.

[24] In *SA Transport and Allied Workers Union v Tokiso Dispute Settlement and Others*⁶ the LAC confirmed that where a party is out of time and has to take the jurisdictional step of applying for condonation but failed to do so, a court

⁶ (2015) 36 ILJ 1841 (LAC).

cannot come to the party's assistance. The LAC held that in the absence of an application for condonation, the court cannot assist the party.

[25] The same principle applies *in casu* where the reality is that the Applicant had to apply for condonation for his failure to comply with a statutory time period and he had failed to do so. It follows that absent an application for condonation, this Court has no jurisdiction and cannot come to the Applicant's assistance.

[26] This Court cannot grant relief to re-instate a review application that was filed late where there is no application for condonation.

[27] The Applicant's application for review has to fail for lack of jurisdiction.

[28] I am not inclined to postpone this matter in order to allow the Applicant an opportunity to file a condonation application as this matter relates to a dismissal that dates back to 2014, almost six years ago. The Applicant's litigation is fraught with delays and any postponement of this matter would undermine the purpose of the LRA, namely the speedy resolution of labour disputes. In terms of the Practice Manual⁷ a review application is regarded as an urgent application and in terms of section 145(5) of the LRA, a party who brings an application for review must apply for a date for the matter to be heard within six months of delivery of the application. This is indicative of the fact that a review application needs to be prosecuted and finalised without delay and with due observation of the ultimate aim to resolve labour disputes speedily. This application for review was filed in 2015 and in 2020 it is not one step closer to finality. It is a matter that was not prosecuted with the aim to resolve it speedily and effectively.

[29] In so far 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. In my view the interests of justice will be best served by making no order as to costs.

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

⁷ April 2013.

Order

1. The application is dismissed for lack of jurisdiction;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Ms Jessica Lawrence of Lawyers for Human Rights

For the Third Respondent: Henk Wissing Attorneys

APPEARANCES:

On behalf of the Applicant: Advocate P R Cronje

Instructed by: Van de Wall Incorporated Attorneys

On behalf of the Third Respondent: Mr M Makhura of Cheadle Thompson & Haysom Attorneys