



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 234/21

In the matter between:

SUN INTERNATIONAL – MASLOW HOTEL

Applicant

and

TEBOGO RIKHOTSO

First respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

Second Respondent

COMMISSIONER MUSLOWA RAPALALANE N.O.

Third Respondent

Heard: 18 March 2025

Delivered: 10 April 2025

JUDGMENT

KIRSTEIN, AJ

Introduction

[1] The applicant seeks an order reinstating the main review application which is deemed to be withdrawn, lapsed and archived in terms of the then applicable Practice Manual of this Court (Practice Manual). The first respondent opposes the reinstatement application.

Background

[2] On 31 December 2020 the third respondent issued an arbitration award under Case No GAJB4496-20 where the following award was made:

“37. The dismissal of the Rikhotso Tebogo (Applicant) by Sun International – Maslow Hotel (Respondent) was substantively unfair and procedurally fair.

38. The Respondent (Sun International – Maslow Hotel) is ordered to re-instate the Applicant (Rikhotso Tebogo) in its employ on terms and conditions no less favourable than those that governed the employment relationship immediately prior to his dismissal.

39. The re-instatement in paragraph 38 is to operate with retrospective effect from 14 January 2020.

40. As at the end of the award the remuneration due to the Applicant (Rikhotso Tebogo) as a result of retrospective operations of the re-instatement, amounted to R24 000-00 minus such deductions as the employer is in terms of the law entitled or obliged to make.

41. The amount referred to in paragraph 40 is to be paid to the Applicant (Rikhotso Tebogo) within fourteen days of the Respondent (Sun International – Maslow Hotel) being notified by this award.

42. The Applicant (Rikhotso Tebogo) is to tender his services to the Respondent (Sun International – Maslow Hotel) on 18 January 2021.”

[3] On 5 February 2021 the applicant filed a review application for an order that the said arbitration award be reviewed and set aside.

[4] The applicant failed to file the record of the arbitration proceedings in terms of clause 11.2.2 of the Practice Manual within 60 days of the date on which the applicant was advised by the Registrar of the Labour Court that the record has been received. The review application was deemed to have been withdrawn on 24 May 2021. The applicant failed to pursue the review application in terms of clause 11.2.7 of the Practice Manual, whereafter the review application was archived on 5 February 2022. The applicant served the reinstatement application on 4 September 2023. On 2 October 2023 an incomplete record was filed. The sequence of events relating to the reconstruction of an incomplete record, are as follows:

- 4.1. On 23 February 2021 the second respondent informed the applicant's attorneys of record that the record was not submitted to the Labour Court because the second respondent was awaiting the record from the third respondent;
- 4.2. On 21 April 2021 a reconstruction meeting was attended at the second respondent where the parties could not agree on a version of events regarding rulings and the third respondent undertook to search for the recordings;
- 4.3. On 28 April 2021 the third respondent confirmed that he could not find the recording and the applicant's attorney requested the third respondent to set down the matter for a second reconstruction hearing;
- 4.4. The second reconstruction hearing set down for 24 May 2021 was postponed due to a double booking of the applicant's attorney;
- 4.5. On 10 September 2021 the applicant's attorney requested from the second respondent a date to finalise the reconstruction of the record;
- 4.6. On 5 October 2021 the second respondent requested the parties if a reconstruction meeting can be conducted on 27 or 28 October 2021;
- 4.7. On 20 January 2022 the second respondent again requested whether the matter should be set down for reconstruction;
- 4.8. On 30 August 2023 the applicant's attorney requested the CCMA to set down the matter to finalise the reconstruction of the record;
- 4.9. On 13 September 2023 a reconstruction meeting was conducted, but the first respondent's representatives informed the applicant's attorneys that the third respondent had no intention to participate in the reconstruction of the record;

4.10. During September 2023 the attorney seized with the matter on behalf of the applicant, was diagnosed with depression and a mental illness which hindered the attorney from executing tasks timeously.

Analysis

[5] The requirements for an application for reinstatement were addressed *inter alia* in *Samuels v Old Mutual Bank*¹ wherein it was held that:

“In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.”

[6] From April 2021 until September 2023 the parties engaged with the second respondent in an attempt to reconstruct the arbitration record. The efforts were not successful in that the applicant delivered an incomplete record on 2 October 2023. It is accepted that the applicant's attorney responsible for the prosecution of the review application, were incapacitated with effect from September 2022 that must have had an impact on the execution of his duties. It is accepted that a number of parties are involved in the arrangement of the reconstruction meeting, but there are periods between April 2021 and August 2023 that show that there was no diligent effort to reconstruct the arbitration record.

¹ (2017) 38 ILJ 1790 (LAC) at para 17.

[7] There is no indication that the applicant attempted to utilise the extension provision set out in clause 11.2.3 of the Practice Manual, where the applicant could have requested consent from the third respondent, alternatively if consent is refused, approaching the Judge President on application for extension. The failure of the applicant to utilise the extension provision in clause 11.2.3, should be considered in determining the reinstatement of the review application:²

“[64] Where a party fails to make use of clause 11.2.3’s saving provision either by (i) not seeking the respondent’s consent at all; (ii) in seeking the respondent’s consent and in the event such consent is refused, the applicant then fails to approach the Judge President on application for an extension; or (iii) seeks the respondent’s consent but only after the 60-day period has expired, then a court would be correct in taking this factor into consideration when determining the reinstatement of the review application as it speaks to the steps taken by the applicant in duly prosecuting their dispute. It does not matter whether the Respondent, as it here claims, would have given its consent had the request been made timeously, this is simply an irrelevant consideration and rather gratuitous in light of the vigour with which condonation was opposed.”

[8] The delay in the delivering of the arbitration record is excessive. However, both parties were involved in the failed efforts to have the arbitration record reconstructed. The indication is that the applicant only delivered the reinstatement application once it realised that there will be no success in the reconstruction efforts after the first respondent indicated that he will no longer participate in reconstruction efforts. The explanation for the delay in delivering the arbitration record, is based on the reconstruction efforts from April 2021 to August 2023. The incapacity of the applicant’s attorney of record since September 2022 to some extent contributed to the delay. In the matter of *Govender and Others v Commission for Conciliation, Mediation and Arbitration and Others*³ the Labour Appeal Court stated the following:

“[69] It is trite that there is a limit to which a litigant can escape the result of his attorney’s lack of diligence, as was held in *Saloojee and Another NNO v*

² *Govender and Others v Commission for Conciliation, Mediation and Arbitration and Others* (2024) 45 ILJ 1197 (LAC) at para 64.

³ (2024) 45 ILJ 1197 (LAC) at para 69.

Minister of Community Development 1965 (2) SA 135 (A) (Saloojee), however, it is equally true that the facts of a matter will dictate whether or not the actions (or inactions) of a litigant's representative can be imputed to the litigant."

[9] Although the delay in the delivery of a record was excessive, the reconstruction of the record must be accepted as a *bona fide* effort and the incapacity of the applicant's representative was unavoidable and therefore the delay cannot be imputed on the applicant.

[10] The Labour Appeal Court in *Samuels* stated that a retrieval application is in the nature of a condonation application and it is required to set out facts, if established, would result in success. The review grounds raised by the applicant concern *inter alia* the failure to be given an opportunity to present evidence specifically in relation to the appropriateness of the sanction of dismissal. There is no indication what affect the incomplete record will have on the adjudication of the review grounds raised by the applicant. The absence of a complete record can, however, not prevent the applicant from its right to challenge the arbitration award.

[11] The applicant is indeed prejudiced by the failure of the third respondent and/or the second respondent to deliver a complete record. The first respondent will not be prejudiced if the review application is dismissed. The first respondent remains entitled to the relief granted in the arbitration award.

Conclusion

[12] In the case of *Grootboom v National Prosecuting Authority and Another*⁴ the Constitutional Court again emphasized that the various factors to be taken into consideration in a condonation application are not individually decisive, but all needs to be taken into account to arrive at a conclusion as to what is in the interest of justice. For all the reasons set out above, the conclusion is that the applicant has shown good cause why the review application must be reinstated.

⁴ [2014] 1 BLLR 1 (CC)

[13] In *Govender*⁵ *supra* the Labour Appeal Court stated the following:

“[80] While it is often said that where a delay is significant and the explanation poor, the prospects of success do not play a significant role and if the delay is short but the explanation is unsatisfactory and reasonable prospects of success exist, condonation should be granted. This is a matter where the delay is significant and the explanation demonstrates nothing less than a failure by both the attorneys and the union to provide proper and adequate service to their clients and members and as such, the door cannot and will not be closed for a proper consideration of the merits of the appeal to determine whether condonation should or should not be granted.”

Costs

[14] Having taken into consideration relevant facts and circumstances and having regard to the requirement of law and fairness, it would not be appropriate to make a cost order.

[15] In the premise the following order is made:

Order

1. The application for reinstatement of the main review application is granted.
2. There is no order as to costs.

P.H. Kirstein

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant :

Adv A P Omar

Instructed by:

Cliffe Dekker Hofmeyr Inc.

⁵ Id fn 3 at para 80.

For the first respondent:

A. Roskam of Haffegge Roskam
Savage Attorneys Inc.

LABOUR COURT