



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1390/20

In the matter between

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Applicant**

MZONYANE, J AND 18 OTHERS **Second Applicant**

and

**THE METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL** **First Respondent**

LIYANDA NKWENKWE DUMISA N.O. **Second Respondent**

ATLAS PLASTICS (PTY) LTD **Third Respondent**

Heard: 13 February 2025

Delivered: 13 February 2025

Reasons: 02 April 2025

REASONS FOR ORDER

PHEHANE, JIntroduction

[1] On 13 February 2025, this Court issued the following order:

- '1. The revival application launched on 8 August 2022 is dismissed.
2. The applicants' attorney, Serene Chetty Inc. is to pay the costs *de bonis propriis*.

[2] Brief reasons for the order follow below.

Background

[3] The first applicant is a trade union, representing its members cited as the second applicant in these proceedings. The applicant members were dismissed from the employ of the third respondent on 18 September 2019 for gross misconduct relating to their participation in an unprotected strike action and for inciting fellow employees to breach a Court order interdicting the strike action.

[4] In an arbitration ruling dated 16 September 2020, the second respondent found that the dismissal of the applicant members was both procedurally and substantively fair.

[5] On 29 October 2020, the applicants launched an application in terms of the provisions of section 158(1)(g) of the Labour Relations Act¹ (LRA) to review and set aside the decision of the second respondent, on the ground that he had decided the dispute between the parties without hearing oral evidence.

[6] The applicant members were represented by Mr. Vuyisile Mpetsheni, a union official at the arbitration proceedings. Mr Mpetsheni has since been dismissed from the union – he was dismissed in February 2021. It is common cause that the parties

¹ Act 66 of 1995, as amended.

concluded a pre-arbitration minute which recorded that the applicant members were only challenging the harshness of the penalty and not the misconduct. The applicants contend that Mr. Mpetsheni did not properly read the pre-arbitration minute before appending his signature and they allege that there was no agreement that they conceded that they were guilty of misconduct. The ground of review, recorded as “*grounds for relief sought and submissions*” in the founding affidavit in the review application, is that the second respondent accepted a signed pre-arbitration concluded between the parties and determined that the hearing of oral evidence was not necessary. He directed the parties to submit written submissions, which he considered before making his finding. In light of the foregoing, the applicants contend that “*a defects [sic] existed in the proceedings before the Second Respondent, as contemplated by Section 158(1)(g) of the Act, in the following respects:-*”

- a. The arbitration ruling made by the Second Respondent is not consistent with the prescripts of fairness as contemplated by the Act and must be reviewed and set aside and to be remitted back to the 1st Respondent for a rehearing before another Commissioner.”

[7] The first respondent delivered its notice in terms of then-Rule 7A(2) and (3)² on 15 October 2020.

[8] The Rule 7A(5) notice records that the applicants received the notice on 30 October 2020. Therefore, in terms of the provision of item 11.2.2 read with 11.2.3 of the now-repealed Practice Manual³, the applicants were to file the record within 60 days of receipt of the Rule 7A(5) notice and that is, by 27 January 2021, on my calculation.

[9] The applicants aver that they received an incomplete record on 15 October 2020 and that on 7 January 2021, the review application was deemed withdrawn for

² GN 1665 of 1996: Rules Regulating the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

³ Practice Manual of the Labour Court of South Africa, effective 2 April 2013 (repealed, effective 17 July 2024).

failure to file the report of the arbitration proceedings within the prescribed time frame.

Revival application

[10] On 8 August 2022, the applicants, represented by Serene Chetty Inc., launched this present application to revive the review application. This application is opposed by the third respondent.

[11] The relief sought in the notice of motion is stated as follows:

- ‘1. That the [Applicants’] application for review, under the aforementioned case number, be retrieved from archives;
2. That, in the event of opposition from the respondent, the respondent pays the costs of this application;
3. Further and/or alternative relief.’

[12] The applicants, represented by the same firm of attorneys simultaneously filed a “*condonation application*” on the same date, in which they sought the following relief:

- ‘1. **CONDONING THE LATE FILING** of the record and the [applicants’] supplementary affidavit;
2. **ORDERING** such respondents who oppose this application to pay the cost of this application, jointly and severely, the one paying and the other to be absolved.
3. That such further and/or alternative relief be afforded to the Applicant as the Honourable Court may deem fit.’

[13] The founding affidavits in support of both the condonation and revival applications are deposed to by the same individual. The founding affidavits are similar if not identical.

[14] The third respondent filed a practice note on 31 October 2025, in which it clarified that the revival application was enrolled for determination before the Court.

[15] The Labour Appeal Court (LAC) has stated that an application to reinstate or revive a review application is a condonation application.⁴ Therefore, as two applications essentially seeking the same relief were filed on the same date before this Court, I required the applicants' counsel to clarify which of these two applications was before the Court for determination. Counsel for the applicants confirmed with certainty that the application that was before the Court to determine was the revival application, brought in terms of item 16.2 of the former Practice Manual.⁵

[16] During oral argument, it was conceded by the applicants' counsel that the applicants failed to approach the Judge President of this Court in terms of the provisions of the former item 11.2.4 of the now repealed Practice Manual of this Court, which was operative at the time, for directions regarding the further conduct of the review proceedings in light of the missing portions of the record.

[17] It was further conceded by the applicants' counsel that the applicants failed to comply with the provisions of item 11.2.3 of the Practice Manual to seek consent from the third respondent for an extension to file the record, and in the absence of such consent, to apply to the Judge President for an extension to file the record.

⁴ See: *Samuels v Old Mutual Bank* [2017] ZALAC 10; (2017) 38 ILJ 1790 (LAC), where the LAC held as follows at para [17]:

'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, timeframes 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.'

⁵ See: founding affidavit at para 6 on p5.

[18] The respondent avers that the review application was archived by operation of the law on 7 April 2021.⁶ The last process filed in the review application was a notice in terms of the former Rule 7A(2) filed by the first respondent on 15 October 2020. The applicants filed a notice in terms of Rule 7A(6) and a notice in terms of Rule 7A(8)(a) on 8 August 2022, the same date on which they filed this present application. As no further steps were taken by the applicant for a period of six months since the filing of the last process on 15 October 2020, the review application lapsed by operation of the law as contemplated in item 16.1. of the Practice Manual. This revival application was launched approximately 16 months after it was archived.

[19] As stated above, a revival application is a condonation application, therefore the applicants must show good cause for failure to comply with the Rules and Practice Manual of this Court in prosecuting their review application, which Rules and Practice Manual were binding.⁷

[20] In the circumstances of the present case, the applicants failed to approach the Judge President in terms of the provisions of item 11.2.4 of the Practice Manual for directions in the further conduct of the review application, as, on their version, portions of the record were missing. In addition, the applicants failed to file the record within the 60-day time frame as contemplated in item 11.2.3 of the former Practice Manual, with the consequence that the review application was deemed withdrawn.

Extent of the delay

[21] The applicants do not mention the extent of the delay in their founding affidavit. The third respondent avers that the applicants took more than 15 months to launch this application after it lapsed by operation of the law as contemplated in item 16.1 of the Practice Manual.

Reasons for delay

⁶ Answering affidavit at para 11 on p 83.

⁷ *Macsteel Trading Wadeville v Francois van der Merwe N.O and Others* [2018] ZALAC 50; (2019) 40 ILJ 798 (LAC) at para [22].

[22] The applicants explain that they did not prosecute their review application timely due to having received an incomplete record, the bargaining council being uncooperative in providing the missing portion of the record and being uncooperative in reconstructing the record. They aver that the disciplinary hearing concerning Mr Mpetsheni contributed to the delay. In addition, they needed to consult with the applicant members who live in distant locations to inform them of the dismissal of Mr. Mpetsheni and managed to consult with the applicant members in April 2021. Further, they needed to instruct a firm of attorneys and instructed their attorney of record in May 2021, to provide an opinion on the prospects of success in the review application, which I mentioned, had already been launched six months prior. The applicants further explained that their attorney required the complete records, which were provided to her, but were corrupted. After having stated in paragraph 22 of the founding affidavit that the first respondent ignored Mr. Mpetsheni's demand that it filed a complete record with the Registrar, the applicants aver in paragraph 28 and following, that their attorney required a complete record and it was provided to her, but was unfortunately, corrupted. *When* the complete record was obtained, on their version, is unexplained. Much is said about toing and froing regarding a reconstruction meeting between the applicants' attorney and the first and second respondent in September 2021, no further details are provided of the dates when this toing and froing occurred, and the dates when consultations were held with the applicant members thereafter. In March 2022, counsel was briefed, documents were provided to counsel and an opinion was received from counsel on 24 June 2022, and on 6 July 2022, the applicants' attorney was instructed to proceed with the review application. I point out that at this stage, with two opinions already sourced from legal practitioners on the applicant's own version, the review application had long lapsed.

[23] The applicants aver, without providing details of dates, that their attorney advised them that the review application would have been archived. Explanations are provided without any detail and without any dates, about information being sourced and gathered, and communication *"continuing for a few days longer"* until their attorney was *"appraised with as much information as could be sourced in the circumstances and at that time"* and *"upon obtaining all available information from the NUMSA [sic] in respect of the unfolding of events prior to instructing Serena*

Chetty attorneys, Ms Chetty finalized this application on 28 July 2022". The applicant's assertions cannot get any more vague.

[24] The applicants in essence aver that the review application could not be ventilated without a proper investigation into the merits of the matter in circumstances where Mr. Mpetsheni had been dismissed, and the recordings were not proper.⁸

[25] This application ought to have been launched as soon as possible after the applicants were aware that they needed to apply for condonation. On their version, this was in early July 2022, although the applicants do not take this Court into confidence and explain when Ms Chetty advised the union that this condonation or revival application must be launched. Sourcing and gathering information for the period of one month in July 2022 to bring this revival application is not a reasonable explanation for why the applicants, represented by a trade union, and legal practitioners, delayed in bringing this application.

[26] I now deal with the applicant's failure to seek condonation for failure to file the record by 27 January 2021, which resulted in the review application being deemed withdrawn. The record is filed 19 months late. This delay is egregious.

[27] The applicants do not explain when they received the notice by the Register as contemplated in the former Rule 7A(5), that the record had been delivered and they are to uplift it. The Rule 7A(5) notice was served on the applicant union on 30 October 2020. The 60-day time frame within which to file the record as contemplated in item 11.2.3 of the Practice Manual thus expired on 27 January 2021.

[28] The applicants explain that they received the transcribed record on 9 November 2020, and on 10 November 2020, the union's legal department "*realized that there was an issue with the recordings*" and informed Mr. Mpetsheni, who in turn, made "*various telephone calls*" to the first respondent "*to request the outstanding recordings, but to no avail*". The delay in the period between 31 October

⁸ Founding affidavit at para 72 on p 16.

to 8 November 2020 is unexplained. No details are provided by the applicants regarding the time when these “*various telephone calls*” were made by Mpetsheni. No confirmatory affidavit by Mr. Mpetsheni is annexed to the founding affidavit to confirm the allegations made concerning him. No detail is explained as to what portions of the record were missing.

[29] Three months later, on 3 February 2021, the applicants aver that Mr. Mpetsheni sent a letter to the first respondent demanding that it file the “*missing portion of the record*” with the Registrar within 10 days.⁹

[30] I point out that when the letter of 3 February 2021 was sent to the first respondent, the review application was already deemed withdrawn for failure to file the record within the 60-day time frame as contemplated in item 11.2.3 of the former Practice Manual.

[31] When faced with an incomplete record on their version, not only did the applicants fail to seek consent from the third respondent for an extension to file the record, but they did not apply to the Judge President for an extension. Thus they failed to comply with the provisions of item 11.2.3 of the Practice Manual. In addition, the applicants failed to approach the Judge President for directions as to the further conduct of the review application when they realised in November 2020 that the record was on their version incomplete.

[32] The founding affidavit in the revival application falls woefully short of seeking condonation for non-compliance with the provisions of 11.2.3 and 11. 2.4 of the Practice Manual, the revival application is fatally defective. No reasons were proffered for the non-compliance with the aforesaid provisions of the Practice Manual. The result is that no good cause is shown whatsoever by the applicants for the grant of condonation for non-compliance with the aforesaid Rules and Practice Manual of this Court that were operative at the time. In my view, in the glaring absence of a reasonable explanation for the non-compliance of the Rules and

⁹ Founding affidavit at para 21, on p 7 and annexure “KR3” on pp 21 to 22.

Practice Manual of this Court that related to the time frame within which to file the record, the prospects of success are immaterial.

[33] The third respondent contends that the applicant has failed to set out accurate and detailed reasons for the delay over the entire period of delay. I agree. The third respondent contends that the prospects of success on review are non-existent, as the ground of review is premised on the second respondent accepting the pre-arbitration agreement, which is binding and has not been set aside.¹⁰

[34] In my view, the applicants have not proffered a full, detailed and satisfactory explanation for the delay and this is fatal to their application,¹¹ irrespective of the prospects, which, I agree with the third respondent, are non-existent.

[35] An applicant in a condonation application seeks the indulgence of the Court. Condonation is not for the mere asking. A full, accurate and detailed explanation for every period of delay must be provided. Failure to account for the entire period of the delay is tantamount to no reasons being proffered for the delay.

[36] The applicant blaming Mr. Mpetsheni for the delay in prosecuting their review application does not assist them – this explanation does not constitute good cause for the delay.¹² Mpetsheni left the union in February 2021. Much of the excuses put forward by the applicant cannot be laid at his door.

[37] In the circumstances, the revival application does not succeed.

¹⁰ See: paras 27 and 28 of the third respondent's head of argument and the authorities cited therein.

¹¹ See: *Seatlolo & Others v Entertainment Logistics Serve (A Division of Gallo Africa Ltd)* (2011) 32 ILJ

2206 (LC) at para [11], where this Court stated thus:

'In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. See *NUMSA & Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.' (Own emphasis added).

¹² In *SATAWU obo Mathisho and Others v Pride Bulk Logistics (Pty) Ltd* [2018] ZALCJHB 200 (22 May 2018), this Court stated thus at para [14]:

'There is a point beyond which an applicant cannot blame delays purely on the failure of their representatives to act promptly.'

Costs

[38] The ethos of the LRA is that disputes must be resolved expediently. This is an applicant, a trade union which ought to be well versed with the Rules and Practice Directives of this Court, and legally represented that flagrantly ignored the processes built into the Practice Manual to assist applicants who face challenges in filing a record timely or who are faced with an incomplete record.

[39] The applicants, fully aware that their review application was deemed withdrawn with the consequence that it is dismissed, went roughshod ahead and simultaneously filed a condonation application to condone the late filing of the record and supplementary affidavit. The third respondent contends that the condonation application ought not to have been filed in circumstances where the review application has been archived.

[40] In her address in reply, the applicant's counsel informed this Court that, depending on the outcome of this application, the applicant intends to pursue the relief sought in its condonation application for the late filing of the record and its supplementary affidavit. The third respondent is correct in stating that this condonation application ought not to have been filed in circumstances where the review application is archived with the consequences that it is dismissed. Counsel speaking for the applicants conceded that the condonation application and this application ought to have been dealt with as one application. This however does not assist the applicants. I have already stated that the founding affidavit in the condonation application is identical to this application and condonation is not sought for failure to comply with the Rules and Practice Manual. In my view, it is simply an abuse of Court process.

[41] The applicant was afforded an opportunity to make submissions why its attorney of record should not be ordered to pay the costs *de bonis propriis*. I have considered the submissions against such an order, which are that the applicants' attorneys tried to get the applicants' case "*through the door*" and that their attorney should not be faulted for trying to get relief for the applicants, particularly in circumstances where she was instructed in May 2022, when this review application

was already deemed withdrawn. This submission is wanting, as it is the attorney who assisted the applicants in launching this application and a *further identical* application. There is no plausible explanation as to why this application was not launched soon after she was instructed. It took a further three months for this application to be launched and no reasonable explanation is provided why this occurred.

Conclusion

[42] It is for the aforesaid reasons that the aforesaid order was made.

M. T. M. Phehane

Judge of the Labour Court of South Africa