



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2431/19

In the matter between:

ELIA MOSHE KGATLA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSSIONER SERETSE MASETE

Second Respondent

GLENCORE OPERATIONS SA (PTY) LTD

Third Respondent

Heard: 28 March 2025

Delivered: 29 August 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] This is an opposed review application brought by the Applicant, Elia Moshe Kgatla in terms of section 145 (1) of the Labour Relations Act¹ (LRA) to review and set aside the condonation ruling issued by the Second Respondent (the Commissioner) under the auspices of the First Respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) under case no LP5045-19 issued on 09 September 2019, in favour of the Third Respondent (Glencore), in which the Commissioner dismissed the condonation application brought by the Applicant.

[2] This review application was lodged around November 2019. The Applicant's attorney was corresponding with Glencore Head Office officials around February and March 2020 regarding the review application. It appears from the court records that the Applicant filed the notices in terms of Rule 7A (6) and Rule 7(A)(8)² by email upon the Third Respondent on 26 February 2020 and 12 March 2020 respectively

[3] The Third Respondent filed notice of opposition on 19 October 2021 through its attorneys of record, Edward Nathan Sonnenbergs Inc and later filed an answering affidavit on 29 November 2021. On 2 December 2021, the Applicant filed notice of objection to the late filing of the Third Respondent's answering affidavit. The Third Respondent then filed a condonation application around 17 December 2021 and the Applicant also filed the replying affidavit on 04 February 2022, together with opposition of the Third Respondent's condonation application.

Background

[4] Kgatla was employed by Glencore as an Electrical Apprentice on a learnership agreement on 1 April 2014 at Glencore Lydenburg Smelter. In terms of the learnership agreement concluded between the Applicant and Glencore, the learnership was to be completed once the learnership is completed on 1 April 2017, whichever to occur first.

¹ Act No 66 of 1995, as amended.

² GN 4775B of 3 May 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court (effective 17 July 2024).

[5] On 3 March 2015, the Applicant was involved in an accident at work while performing his duties and he sustained serious injuries which led him to be permanently disabled.

[6] The Applicant was then charged for the negligent conduct as the Glencore alleged that he jumped into a moving hot charge car which was outside of his working area. He was subsequently dismissed on 19 February 2016 after the disciplinary hearing.

[7] The Applicant referred an unfair dismissal dispute to the CCMA on 22 February 2016; and also lodged an appeal against his dismissal. On 8 March 2016, his dismissal was overturned and a final written warning was issued to him and this could allow the Applicant to continue with his learnership.

[8] According to Glencore, as a result of his permanent disability, the Applicant was paid out a permanent disability benefit by Rand Mutual Assurance, the insurance service provider of Glencore and his learnership agreement terminated on 1 April 2017, and the Applicant disputed this version.

[9] However, the Applicant's attorneys referred on his behalf an unfair dismissal dispute to the CCMA again on 22 May 2019 with condonation application. This is the condonation application which was dismissed by the Commissioner on 9 September 2019. It is the Commissioner's condonation ruling that is the subject of this opposed review.

[10] Before the Court deals with the review application, it must deal with the condonation application filed by Glencore for the late filing of the answering affidavit, which is also opposed, by the Applicant.

Third Respondent's condonation for answering affidavit

[11] The Third Respondent made a condonation application to file the answering affidavit in terms of Rule 11 of the Court Rules, and the application was opposed by the Applicant.

[12] The Third Respondent also raised preliminary points in the condonation application. Firstly, that the Applicant's review application was never served on the Third Respondent in accordance with the Rules of this Court as it was served on the personal email address of Ms Zanele Nyembe on 6 November 2019, but there was no agreement between the parties that Ms Nyembe must accept service of documents on that email; and Ms Nyembe did not confirm receipt of the review application as that email address is incorrect, and further neither did the Applicant's attorneys file the service affidavits confirming the manner of service of the review application upon the Third Respondent. Ms Nyembe's correct email address is z[...]. It was further submitted that Glencore only became aware that the Applicant has lodged the review application when it was approached by the Applicant's attorneys by email with a notice in terms of Rule 7A(6) and the record of proceedings on email addresses r[...] and c[...] on 26 February 2020.

[13] It was submitted that the emails belong to Rembu Matodzi the former employee of Glencore and Conroy Van der Westhuizen the current employee of Glencore. The Applicant therefore has failed to comply with Rules 7(1) and 7A (1) of this Court.

[14] On the other hand, the Applicant opposed the condonation and indicated the defects in the affidavit and submitted that it does not show full names of the deponent who is made the affidavit. It only states '*I, the undersigned*', and then the signature of Arthee Naidoo at the end of the affidavit, and therefore not in compliance with regulations contained in the Government Notice R1258 of 21 July 1972, as amended and the Government Notice of R1648 of 19 August 1977, since the affidavit was not signed before the Commissioning of Oaths³. It was further submitted that the answering affidavit to the review application has the same defects and both affidavits should not be accepted by the Court.

³ GN R774 of 23 April 1982 Regulations governing the administering of an oath or affirmation reg 3 (1).

[15] The Applicant averred that the condonation application is not also in compliance with Rule 7 of this Court's Rules as it has not set out clearly the description of the names and addresses of the parties. The same applies to the answering affidavit to the review application as it has the same defects. There is no mention that the person who signed the affidavit has been authorised by the Third Respondent to file the affidavit.

[16] It was also argued that the Third Respondent should not have been brought in terms of Rule 11 read with Rule 12(3) of the Rules of the Court, as Rule 11 is for interlocutory applications. The Applicant submitted he has made attempts to alert the Third Respondent of those defects and proceeded to enrol the matter on an unopposed roll as the Third Respondent failed to file a proper answering affidavit.

[17] The Third Respondent in reply argued that there is no basis for the Applicant to raise the defects in the answering affidavit of the Third Respondent as Regulation 4 of the Justice of Peace and Commissioner of Oaths Act⁴ requires that the name of the deponent must be stipulated without indicating where in the affidavit, and the deponent signed the affidavit before the Commissioner of Oaths after answering the questions stated in the oath.

[18] In this Court's view, the Applicant's submissions regarding the defective affidavits is highly technical and elevates form over substance. The absence of the names of the parties in the affidavit and lack on mention of authorisation to depose the affidavit does not make the affidavit defective.

[19] It is clear that the affidavits have been properly commissioned by the Commissioner of Oaths, with the full name of the Commissioner of Oaths printed in full and signature, date stamp of South African Police Service with the designations and address of business area of Norwood for which the person holds the appointment or office. The deponent has signed above the full names above the oath.

⁴ Act 16 of 1963.

[20] There is a wealth of authority to the effect that the provisions of Regulation 4 are directory and not peremptory. In *Basson and Another v On-Point Engineers (Pty) Ltd and others*,⁵, Potterill J stated as follows

‘The Full Bench of this Division in *S v Msibi* 1974 (4) SA 821 (T) found that the compliance with regulation 4 is directory and a court can exercise its discretion in admitting such affidavit if there is substantial compliance with the regulation. The Commissioner did not provide a business address and the area the Commissioner held office and his/her designation. This is in fact a requirement of Regulation 4(2) and not 4(1) as complained of. The stamp of the Commissioner clearly indicated that the Commissioner was in the South African Police Services at the Management Information Centre, Rosebank. I cannot express myself better than in the words of Page AJ in the Dawood matter supra [1979 (2) SA361 (D and CLD)] at 367 C-E.’

[21] In deciding whether the non-compliance is of such a nature that the Court should refuse to entertain the affidavit it is clearly relevant to have regard to the nature and purpose of the requirement with which there has been failure to comply. In the present case it seems to me that the reason for the requirement that the commissioner should furnish his business address is to facilitate the task of anyone who might thereafter wish to locate him for any purpose connected with the affidavit and its execution. In the present case the information supplied is sufficient to enable anyone of ordinary intelligence to deduce that the business address of the commissioner of oaths is at the office of the SAPS Rosebank Management Information Centre.

[22] The commissioner is thus at minimum designated for the area of Rosebank ex officio. On this paltry defect This Court cannot refuse to accept the affidavit into evidence. The replying affidavit was commissioned at the SAPS Client Service Centre, Rosebank. The full names of the Commissioner on both the applicants’ affidavit are not printed. On the replying affidavit the force number of the Commissioner is printed and the Commissioner can be easily traced from this. The

⁵ Unreported case number 64107/2011 dated 7 November 2012 at para 4.3.

purpose of the requirement of the full names of the Commissioner can once again only be to identify the Commissioner for any enquiry pertaining to the attestation. This Court is certain that with little trouble the Commissioner of the founding affidavit will be located through visiting the Rosebank Management Information Centre of the SAPS and enquiring whose signature is on the document.”

[23] Similarly, in the present case, the Commissioner of the affidavit would be easily located through visiting the Norwood SAPS, if it has to be enquired whose signature was on the document. It is clear therefore in this Court’s view that there was substantial compliance with the provisions of regulation 4(2).

[24] In the result, this Court finds that there was substantial compliance with the regulation and, therefore, exercised its discretion in favour of allowing the Third Respondent’s affidavits.

[25] As regards the non-service of the review application by the Applicant, it is apparent from the court records that the Applicant’s attorneys also filed the service affidavit with the Court, stamped 12 March 2020 and also was filed service affidavit confirming service on Ms Nyembe and Rembu Matodzi, and Ms Nyembe has telephonically acknowledged receipt of the review application on 06 November 2019 at telephone number 013 230 6000. Besides the submissions that Rembu is the former employee of Glencore, it has not been submitted by the Third Respondent that Rembu Matodzi was no longer employed by Glencore at the time of service of the review application and the correctness of that email address used has not been disputed.

[26] The Court has observed that the Applicant served the review application by email, which is a method of service not recognised in the old Labour Court Rules⁶. Rule 4 (1) (b)(i) of the old Labour Court Rules regulated service of documents in this Court upon a company by serving a copy of the document on a responsible employee of the company at its registered office or its principal place of business within the Republic, or its main place of business within the magisterial district in

⁶ GN 1665 of 1996: Rules of the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

which the dispute first arose, or if there is no employee willing to accept service, by affixing a copy of the document to the main door of the office or place of business or by any other means authorised by the Court.

[27] The Applicant in his opposing and replying affidavit has not addressed the Court on the reasons he chose to use this method of service not authorised by the Court. In the interests of justice and the delays that may be caused if the Court is to direct the Applicant to use the proper method of service in terms of the old Labour Court Rules. The email method of service used by the Applicant to serve the review application is condoned and authorised as the proper method of service since the new Court Rules recognise the email as a method of service. Under the circumstances, the Applicant's review application was properly served on the Third Respondent.

[28] The Court will now deal with the second preliminary issue raised by the Third Respondent that the Applicant's review application has lapsed for failure to prosecute the review application.

[29] Secondly, it was contended by the Third Respondent that the review application is regarded as lapsed as the notice in terms of Rule 7A (8) was delivered by the Applicant on 7 March 2020 and the Applicant did not take any steps to prosecute the review application from 7 March 2020 until 12 October 2021, and a period of 18 months has lapsed since the review application was filed with the Court. It was submitted that the review application is deemed to be withdrawn and is achieved as it has lapsed in terms of clause 11.2.7 of the Practice Manual of this Court which provides⁷:

'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Wherein this time limit is not complied with, the application will be archived and be

⁷ Practice Manual of the Labour Court of South Africa, 2013 (repealed, effective 17 July 2024).

regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archive.’

[30] It was also argued that as there is no proper review application before this Court, as there was no application to revive the review application, and therefore it is not necessary for the Third Respondent to apply for condonation application of delivery of its answering affidavit.

[31] The Third Respondent averred that the only reason it has delivered an answering affidavit when it did was because the Applicant’s representative addressed correspondence to Glencore on 12 October 2021, in which he indicated that the Applicant intends requesting this Court to set the matter down for hearing on the unopposed motion roll. In the event the Court finds that the Applicant’s review application is not defective, and properly before this Court, then Glencore is required to make an application for Condonation, the Court must then consider its submissions on condonation application on the degree of lateness, reasons for lateness and prospects of success and any other relevant factors including prejudice.

[32] The Applicant denied that he delayed in prosecuting the review application but submitted that he was busy engaging with the Third Respondent, and was disturbed by the lockdown because there were no cases allocated to Polokwane High Court for hearing.

[33] The Applicant argued that the Practice Manual states that the review application can be withdrawn only if the Applicant failed to deliver records within 60 days from the date the Applicant received notice from the Registrar of the Labour Court.

[34] The applicable Practice Manual during the time this review was lodged in 2019 is the Practice Manual effective 2 April 2013, and archiving of files is regulated by Clause 16 of this Practice Manual, which provides:

‘16.1 In spite of any other provision of this manual, the Registrar will archive a file in the following circumstances:

- in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has lapsed without any steps being taken by the applicant from the date of filing the application, or the date of the last process filed;
- in the case of referrals in terms of Rule 6, when a period of six months has lapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claims was filed, or the date on which the last process was filed; and
- when a party fails to comply with a direction issued by a judge within the stipulated time limit.'

[35] The Applicant filed the notice in terms of Rule 7A (8) on 12 March 2020, which was the last step filed by the Applicant before the Third Respondent filed notice to oppose on 18 October 2021, and subsequently the answering affidavit on 29 November 2021.

[36] Nothing was done by the Applicant to prosecute the review application after filing Rule 7A (8) until the Third Respondent filed the notice to oppose, and therefore the 6 months referred to in Clause 16.1 of the Practice Manual lapsed around 12 September 2020. It is apparent that since 12 March 2020, the Applicant communicated with the Third Respondent's attorneys on 12 October 2021 indicating the intentions to set the matter down for hearing on an unopposed motion roll. This is some 13 months after the lapse of the review application.

[37] Although the Applicant denied that he delayed in prosecuting the review application and submitted that the Applicant was engaging the Third Respondent after realising that the Third Respondent was deliberately delaying the matter and advised the Third Respondent that he intends to set the matter down on the roll for hearing. The Applicant also made some lame excuses about the Court not allocating dates of hearings in Polokwane due to COVID-19. The Applicant has not shown any other steps he has taken to prosecute the review application in the 6 months after filing Rule 7A (8) or anytime afterwards before 12 October 2021, or even any attempts made with to request the Registrar to set the matter down on an unopposed basis.

[38] It is not clear why was the Applicant engaging the Third respondent and when did he make those engagements, and what steps he has taken to comply with the Rules of the Court and the Practice Manual. The Applicant was well within his rights to request the Registrar to set the matter down on an unopposed roll within the six months period if the Third Respondent failed to file the notice to oppose the review application and the answering affidavit once the prescribed period of ten days lapsed after the filing of Rule 7A (8), if there was no action or steps taken by the Third Respondent in that regard.

[39] Indeed, as correctly argued by the Third Respondent, the 12 months has lapsed since the launching of the review application when the Applicant set the matter down for hearing, and there is therefore non-compliance with clause 11.2 7 of the old Practice Manual of this Court and the application shall be deemed to be archived and regarded as lapsed.

[40] In *Lentsane and others v Human Sciences Research Council*⁸, The Court considered compliance with the Rules of the Court and held that:

‘The rules exist to facilitate disciplined litigation and their role as servant of that process is the point of departure for any examination of non-compliance.’

[41] The Third Respondent has succeeded to make a good case that the Applicant has failed to prosecute the review application within the prescribed timeframes set out by the Court Rules. The Applicant has not made an application on good cause shown why the application should not be archived.

[42] The end result of all of this is that as matters now stand, the Applicant’s review application has been archived and has lapsed. The Applicant has not applied for condonation, nor attempted to show good cause, in order to have her review application reinstated and properly placed before this Court for determination.

⁸ (JS1364/01) [2002] ZALC 149 at para 19.

[43] Since a period of six months had elapsed without any steps being taken by the Applicant from the date of filing the review application, thus the application was also archived. Clause 16.3 of the Practice Manual is clear that where a file has been placed in archives, it shall have the same consequences as to the matter having been dismissed. The Labour Appeal Court (LAC) confirmed that the consequence of an archiving of a case is to be understood to mean the application is dismissed. The LAC also made it clear that the effect of lapsing or archiving of a matter is that the case shall not be dealt with by a Court unless an application to reinstate or retrieve the file from the archive has been made.

[44] It is consequently not necessary for this Court to make a determination on the Third Respondent's condonation application for the late filing of the answering affidavit and subsequent merits of the review application.

[45] There is an important consideration of the particular requirement of expedition where it comes to the prosecution of employment law disputes. There exists a plethora of judgments that specifically emphasise the need for expedition in employment law disputes. Three judgments of the Constitutional Court (CC) are: *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*⁹, Skweyiya J said: '... the importance of resolving labour disputes in good time is thus central to the LRA framework.'. Further, Jafta J in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*¹⁰ held: '... Speedy resolution is a distinctive feature of adjudication in labour relations disputes ...'. And finally, in *National Education Health and Allied Workers Union v University of Cape Town and Others*¹¹ Ngcobo J said:

'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily ...'

⁹ (2014) 35 ILJ 613 (CC) at para 42.

¹⁰ (2011) 32 ILJ 2861 (CC) at para 76.

¹¹ (2003) 24 ILJ 95 (CC) at para 31.

[46] The above general principle of speedy resolution of labour disputes are then given practical application in Clause 11.2.7 of the Practice Manual. This is evident from the following dictum in *Samuels v Old Mutual Bank*¹², where the Court said, with specific reference to the Practice Manual: Clause 11.2.7:

‘... Its purpose is, *inter alia*, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court’s service to the public, and promote the statutory imperative of expeditious dispute resolution. ...’

[47] In *MacSteel Trading Wadeville v Van der Merwe No and Others*¹³, the LAC held that the review application in this case had been archived and was regarded as lapsed, where NUMSA filed the review record approximately 20 months after instituting the review application and where the application was set down six years after being instituted. In such circumstances, and in absence of NUMSA seeking condonation for the delay, the Labour Court had no jurisdiction to determine the review application. The LAC further held that a Rule 11 application was not a prerequisite for the Labour Court to consider whether the review ought to have been dismissed, or struck off the roll, on the grounds of undue delay. In the absence of NUMSA applying for the reinstatement of the review or seeking condonation for the undue delay in filing the record, the Labour Court was obliged to strike the application from the roll on the grounds of lack of jurisdiction where the relevant provisions of the Practice Manual had not been complied with by NUMSA. It is also worthwhile noting that the LAC stated that even if the Labour Court was not inclined to strike the matter off the roll, it ought to have given Macsteel an opportunity to bring a Rule 11 application rather than delving into the merits of the review.

[48] The Court in *Sepheka v Du Pont Pioneer (Pty) Ltd*¹⁴ held that the Practice Manual is not just some sort of guideline which litigating parties may or may not comply with at their leisure, but has binding force, just like the Labour Court Rules. It

¹² (2017) 38 ILJ 1790 (LAC) at para 14.

¹³ (2019) 40 ILJ (LAC) at paras 21 - 22.

¹⁴ (2019) 40 ILJ 613 (LC) at para 7.

follows that the Applicant was obliged to comply with Clause 11.2.7. of the Practice Manual.

[49] When the matter came before the Court, it remained lapsed and archived as held in *MacSteel supra*.

[50] As such, there is no review application properly before this Court to consider, and this Court has no jurisdiction to entertain the same as the file has been archived and it has the same status as a matter that has been dismissed.

Costs

[51] The Applicant has sought a cost order to be issued against the Respondents if opposing the matter. The Third Respondent has also prayed for the costs order relief against the applicant. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness. It is trite that in labour matters, the rule that costs follow the result does not apply. The Court should rather seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with, and on the other hand allowing those parties to bring to this Court cases that ought to have been brought to Court in the first place, in consideration of the requirements of law and fairness.

[52] In the Court's view, this is a case where the interests of justice will be best served by not making a cost order.

[53] In the premises, the following order is made:

[54] Order

1. The review application is struck from the roll.
2. There is no order as to costs.

G Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Patson Maswanganyi

Instructed by:

M Maswanganyi Attorneys

For the Third Respondent:

Dion Masher

Instructed by:

Edward Nathan Sonnenbergs Inc Attorneys

LABOUR COURT