

SOUTH AFRICA / JUDGMENT

Companies and Intellectual Property Commission v Commission Mavuma N.O. and Others (JR2617/22) [2024] ZALCJHB 195 (23 April 2024)

[2024] ZALCJHB 195

COURT

Labour Court Johannesburg

BEFORE

M Naidoo

CASE / FILE NUMBER

JR2617/22

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case No: JR 2617/22

In

the matter between:

COMPANIES
AND INTELLECTUAL PROPERTY
COMMISSION
Applicant
and
COMMISSION
D MAVUMA N.O. First
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION Second
Respondent
MAHOMED
YACOOB Third
Respondent

Heard:

5 March 2024

Delivered:

23 April 2024

JUDGMENT

NAIDOO, AJ

Introduction

- [1] The applicant seeks to review and set aside an award, dated 11 February 2020, issued by the first respondent and in favour of the third respondent.
- [2] The applicant has filed a condonation application, in respect of what it perceives to be late filing of the record and supplementary affidavit. The period it seeks condoned is from 1 September 2020 to 26 May 2021, being the date, the applicant filed its supplementary affidavit.
- [3] The third respondent's condonation application for the late filing of his answering affidavit is also before the Court.

Background

- [4] The applicant filed its review application on 28 February 2020, whereafter the second respondent filed what was purported to be the full record, on 13 July 2020.
- [5] Material to this application is the fact that a rule 7A(5) notice of the Labour Court Rules[1] was not, nor has been served on the parties.
- [6] On 1 September 2020, the applicant's attorney received the transcribed record. It became apparent that the transcribed record did not include the parties' opening statements, as well as the first witness's cross-examination. Additionally, the record filed did not include the applicant's bundle or the first respondent's handwritten notes.
- [7] On the same day, the applicant's attorney dispatched a letter to the third respondent's attorney, informing the latter of the missing portions of the record and requesting an extension of the 60-day period as recorded in clause 11.2.3 of the Practice Manual[2].
- [8] What transpired thereafter, were numerous attempts by the applicant's attorney to obtain the missing portion of the record. While such endeavours proved successful in part, the second respondent was called upon to set down a date for parties to meet in an attempt to reconstruct the missing part of the record. The set down date was 11 December 2020, however, the process was postponed due to the first respondent's absence.
- [9] On 28 January 2021, the aforementioned parties met in a further attempt to reconstruct the missing portion of the record. It was on this occasion that it became clear to the parties that the first respondent's handwritten notes, which had not been previously filed, were crucial to the reconstruction exercise. On 12 February 2021, that the first respondent's handwritten notes were received.

- [10] On the same day, the applicant's attorney sent a letter to the third respondent's attorney wherein two proposed amendments in respect of the first respondent's handwritten notes, were recorded and put to the third respondent's representative for approval.
- [11] It was only on 20 April 2021, that the third respondent's attorney communicated his consent to the applicant's attorney, whereafter the applicant filed the complete record on 23 April 2021.
- [12] On 26 May 2021, the applicant filed its supplementary affidavit. The delay in doing so appears to be caused by a miscommunication between the parties' representatives.
- [13] On 9 June 2021, the applicant filed a condonation application in respect of the late filing of the record as well as its supplementary affidavit. The third respondent opted not to oppose the condonation application and instead filed a notice to abide by the decision of this Court.
- [14] On 3 September 2021, the applicant's attorney, in writing, advised the registrar that the court file had been indexed and paginated and requested the matter be set down. Although the third respondent filed a notice to oppose the review application it appears that no such affidavit was forthcoming prior to 3 September 2021.
- [15] On 15 December 2021, the third respondent did file his answering affidavit which included an application to condone the late filing of same. The applicant filed a replying affidavit on 24 December 2021.
- [16] Both condonation applications, as well as the review application, were set down for hearing on 5 March 2024.

Evaluation

- [17] An application to condone the late filing of a record is intrinsic to a failure to file a record in terms of clause 11.2.2 of the Practice Manual. The question thus arises as to whether the applicant's review application is deemed withdrawn as a consequence of the operation of clause 11.2.3 of the Practice Manual?
- [18] On the above facts, the complete record was filed on 23 April 2021.
- [19] Mr Beckenstrater, for the applicant, submitted that the 60-day period recorded in clause 11.2.2 of the Practice Manual is only triggered when a complete record has been filed. In casu, and for reasons advanced above, a complete record was only available on 20 April 2021 and filed on 23 April 2021. This according to Mr Beckenstrater meant the review application did not fall foul of clause 11.2.2 and hence is not deemed to have been withdrawn as per clause 11.2.3 of the Practice Manual.
- [20] I need not address this argument. As mentioned, no rule 7A(5) notice was issued. It is this notice, once served, which triggers the 60-day period in clause 11.2.2. Put differently, without the notice being issued, the 60-day time period does not commence whereafter the deeming provision in clause 11.2.3 cannot operate.

[21] In *SA Social Security Agency v Hartley & others* (2023) 44 ILJ 1334 (LC),[3] the Court held the following:

‘[87] However, in *casu*, no rule 7A(5) notice was ever sent out by the registrar, thus the 60-day period within which the record had to be filed, was not triggered.’

[22] The rules of this Court do not stipulate a time frame in which an applicant has to file the transcribed record, which may well have been the underlying reason why clauses 11.2.2 read with 11.2.3 were introduced. Nevertheless, there was no need for the applicant to file a condonation application in respect of when it filed the record. I do however accept that the late filing of the applicant’s supplementary affidavit is addressed in its condonation application.

[23] Does clause 11.2.7 of the Practice Manual nevertheless find application to the facts in *casu*? The consequence of which will directly impact the Court’s jurisdiction to hear the review application.

[24] Being a jurisdictional point, the Court *mero motu* raised clause 11.2.7. However, as neither party was forewarned, prior to the hearing, that this point would be raised, the Court issued a directive for parties to submit written submissions to address the Court on whether the applicant’s review application had lapsed pursuant to clause 11.2.7 of the Practice Manual.

[25] The applicant duly complied with this directive, while the third respondent unfortunately did not.

[26] I pause to mention that it was for the first time in the applicant’s written submissions, that the Court came alive to the fact that the applicant’s attorney requested the registrar to set down the matter on 3 September 2021. Prior to this, the Court understood that such a request was only made after the applicant filed its replying affidavit. For this reason, the second enquiry recorded in the Directive stands to fall aside.

[27] Prior to addressing the applicant’s submissions, it is important to reiterate the fact that the applicant’s review application was filed on 28 February 2020, after which the applicant requested the Registrar to set the matter down on 3 September 2021, that being 18 months later. Clause 11.2.7 affords an applicant 12 months from when launching a review application, to ensure that all affidavits, or at the very least a founding affidavit, supplementary affidavit or a notice in terms of rule 7A(8)(b), in the case of an unopposed review application; be filed and a request to have the matter set down to be made, failing which the review application shall lapse.

Applicant’s written submissions

[28] The applicant firstly submits that if this Court were to grant its condonation application, in respect of the late filing of the record; then the period condoned would equate to a 7-month period (i.e. 1 September 2020 to 23 April 2021). The net result of which, according to Mr Beckenstrater, would mean that the applicant would be in a position to comply with clause

11.2.7. Simply put, the review application was launched late in February 2020 and but for the 7-month delay occasioned by the second respondent and in respect of the missing portions of the record; the applicant would have been in a position to request the Registrar to set the unopposed matter down for hearing, sometime in February 2021, that being within the 12-month period contemplated in clause 11.2.7.

- [29] Having earlier found that there was no need to apply for condonation when filing the record, this Court cannot grant condonation, following which, the applicant's argument stands to fall. In any event and as will become apparent further on, the period in which the condonation application deals with, differs from the period in which a reinstatement application ought to cover.
- [30] Secondly, and presumably if found that clause 11.2.7 had been breached; the applicant submits that unlike clause 16.2 which contemplates a formal reinstatement application, clause 11.2.7 does not require a formal reinstatement application be made. From this standpoint, the applicant contends that its condonation application, which speaks to the timing of when the record was filed, ought to be considered for purposes of a reinstatement application, without the need for the applicant to formally apply for reinstatement.
- [31] In general terms, I cannot agree with the contention that a formal application is not required when a review application falls short of clause 11.2.7. The applicant seeks to divorce clause 11.2.7 from clause 16.2 of the Practice Manual, which respectfully, is erroneous. Clause 11.2.7 records the circumstances in which a review application has lapsed while clause 16.2 speaks of the remedial pathway a litigant ought to embark on in order to reinstate a lapsed review application. A litigant's remedy, as set out in clause 16.2, is by way of a formal reinstatement application.
- [32] Having made this point, I do however accept that when interpreting and applying the provisions of the Practice Manual, this Court ought to adopt a purposive approach and in doing so, this Court has a discretion to deviate from a mechanical interpretation of the Practice Manual, so as to achieve the objectives of the Manual.
- [33] In *Adams v National Bargaining Council for the Road Freight & Logistics Industry & others*, [4] on this very point, the Labour Appeal Court held:

'[16] Although it is highly desirable for good order that rules be complied with on their own terms, the function of the rule is the paramount

consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way. Mechanical thinking is anathema to our law: *cessante ratione legis cessat et ipsa lex*. The objectives of the Labour Relations Act 66 of 1995 inform the context of interpretation and its penumbra of pragmatism. Our law is not an ass.'

- [34] In *Macsteel Trading Wadeville v Van der Merwe NO & others (Macsteel)*, and speaking to this Court's discretion when applying the Practice Manual, the Labour Appeal Court held;

[22] The underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the Rules of the Labour Court and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court.’[5]

[35] The culmination of both a purposive interpretation as well as the Court’s discretion in applying the provisions of the Practice Manual were incorporated in *South African Police Services v Coericius & Others*[6] (Coericius), as referred to by the applicant.

[36] In that matter, the first respondent was in breach of the 60-day period in which to file the record. This prompted the appellant to file a rule 11 application seeking to dismiss the review application. Although not filing an answering affidavit to the rule 11 application, the first respondent did, in his supplementary affidavit to the review application, record detailed reasons in support of condoning the late filing of the record. The Labour Court found that the review application was deemed to have been withdrawn and took the view that there was no reinstatement application before it, despite the averments by the first respondent in his supplementary affidavit. Criticising this mechanical approach, the Labour Appeal Court held:

[12] But a fair-minded examination of all the circumstances should have led to an appreciation that, despite the untidiness of the papers, the substance of a reinstatement and condonation application was before the court...

[13] The policy objectives of the Practice Manual do not require a mechanical application of its provisions. A purposive interpretation

of the Practice Manual cannot lead to such an outcome as illustrated in this case...

[14] In our view, the Labour Court ought to have found, on a charitable view of the papers, that a reinstatement application was before it and as such, was the answer in opposition to the respondent’s Rule 11 application.’[7]

[37] Returning to the facts before the Court, if the period of delay which ought to be addressed in a reinstatement application, was the exact same period which the applicant’s condonation application does address; then, on a purposive approach and in exercising this Court’s discretion; I would be willing to consider the applicant’s condonation application as though it was a reinstatement application. Under those circumstances, it would be futile to find that the applicant needs to make a formal reinstatement application seeking to condone a period of delay, whereas the very same period of delay is explained in a condonation application which serves before the Court albeit for a different purpose. This would lead to an undue delay in bringing this matter to finality and would run contrary to the objectives of the Practice Manual, as stated in *Macsteel and Coericius*.

- [38] Unfortunately for the applicant, the period of delay which it needs to justify in a reinstatement application, differs from the period its condonation application seeks to condone. The applicant's condonation application, as mentioned, covers the period 1 September 2020 to 26 May 2021. The period it must justify in a reinstatement application is from 28 February 2021 (the expiry of the 12-month period contemplated in clause 11.2.7) to 3 September 2021 (the date on which the applicant requested the matter be set down).
- [39] I accept that there is an overlap between the two periods however, material to this dispute, is the fact that the applicant's condonation application does not cover the period from 27 May 2021 to 3 September 2023, which period must be addressed in its reinstatement application. As stated in *Samuels v Old Mutual Bank*[8], an applicant in a reinstatement application is obliged to account for the full period of delay.
- [40] A further reason why I feel it prudent to adopt this approach is due to the fact that when choosing not to oppose the applicant's condonation application, the third respondent could not have been aware that the same facts, would serve in support of a reinstatement application. The third respondent may well seek to oppose the applicant's reinstatement application.
- [41] A review application which has lapsed in terms of clause 11.2.7, suffers the same legal consequences as a review application which is deemed dismissed in terms of clause 11.2.3, with the same remedial option open for applicants to pursue. In *Coericius* the LAC held: 'No good reason exists to suppose the consequences of "deemed to be withdrawn" and "regarded as lapsed" should bear substantively different meanings. Both these provisions are contained in clause 11.2. Both address related aspects of delay in the prosecution of a review application. Both forms of default must be capable of remediation by an application to reinstate.'[9]
- [42] Once the applicant's review application lapsed, its application seeking to condone the late filing of its supplementary affidavit, as well as the third respondent's condonation application in respect of the late filing of his answering affidavit; are not before this Court to consider.
- [43] In *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others*[10], the Court held the following: 'In casu the Applicant 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 withdrawn application.'[11]
- [44] For reasons advanced, I find that the applicant's review application is in breach of clause 11.2.7 of the Practice Manual and hence has lapsed. The applicant's recourse would be to make a formal application to reinstate its review application, which if made, ought to address the period from 28 February 2021 to 3 September 2021.

Order

1. The applicant's review application has lapsed.
2. There is no order as to costs.

M Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Beckenstrater from Moodie Robertson Attorneys

For the Respondent: Ms PR Sogoni

Instructed by:

Malahlela Attorneys

[1] GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

[2] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

[3]

(2023) 44 ILJ 1334 (LC); [2023] ZALCJHB 193 at para 87.

[4]

(2020) 41 ILJ 2051 (LAC); [2020] 9 BLLR 867 (LAC) at para 16.

[5]

(2019) 40 ILJ 798 (LAC); [2018] ZALAC 50 at para 22.

[6]

[2023] 1 BLLR 28 (LAC); [2022] ZALAC 104.

[7] Ibid at para 12 to 14.

[8]

(2017) 38 ILJ 1790 (LAC); [2017] ZALAC 10 at para 17.

[9]

[2023] 1 BLLR 28 (LAC); [2022] ZALAC 104 at para 10.

[10] [2017] ZALCPE 11; [2017] JOL 38065 (LC).

[11] Ibid at para 29.

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