

SOUTH AFRICA / JUDGMENT

**Govender and Others v Commission for
Conciliation, Mediation and Arbitration and Others
(DA 2/2022) [2024] ZALAC 6; [2024] 5 BLLR 453
(LAC); (2024) 45 ILJ 1197 (LAC) (26 February 2024)
[2024] ZALAC 6**

COURT

Labour Appeal Court

BEFORE

Waglay JP, Mlambo JA, Malindi AJA

CASE / FILE NUMBER

DA 2/2022

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Source record

FLYNOTES:

LABOUR – Dismissal – Misconduct –
Commission
found dismissal unfair – Labour Court found appellants
guilty of misconduct – Reviewed award –
Referred
matter back to commission to determine appropriate sanction for
misconduct – Failed to consider issues raised
by appellants
– Appellants showed remorse for conduct – Employer
does not have prerogative to determine fair
sanction –
Labour Court erred in concluding review was devoid of any merits –
Appeal upheld.
IN
THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN
Not Reportable
case
no: DA2/2022
In

the matter between: KRISHAVENI GOVENDER &
20 OTHERS
(BEING THE PERSONS
LISTED IN ANNEXURE
“KG1”) Appellant
and
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
NQOBILE
KENNETH DUBE N.O
Second Respondent
WNS
GLOBAL SERVICES (PTY) LTD Third
Respondent

Heard: 12 September 2023

Delivered: 26 February 2024

Coram: Waglay JP, Mlambo JA and
Malindi AJA

JUDGMENT

WAGLAY JP

Introduction

- [1] This appeal flows from an unfair dismissal dispute which began in 2016, some eight years later, it is yet to be finalised.
- [2] The dispute was arbitrated as early as 2017, and the dismissals of the individual appellants (Appellants) were found to be unfair. The award was taken on review to the Labour Court which partially reviewed the award and found that the Appellants were guilty of the misconduct with which they were charged and referred the matter back to the Commission for Conciliation, Mediation and Arbitration (Commission) to determine a fair sanction for the misconduct. The Appellants sought leave to appeal the order of the Labour Court, but this was refused. They then petitioned the Labour Appeal Court for leave to appeal and were unsuccessful. They then sought leave to appeal from the Constitutional Court and this was also refused.
- [3] The matter then went to arbitration in respect of the sanction. The arbitrator found the dismissals to be a fair sanction for the

misconduct. The Appellants then applied to review the award but failed to comply with the various time limits prescribed to prosecute

their review.

[4] Having failed to timeously file the record to review the arbitration award, the review was deemed to have been withdrawn. They then applied to “revive” their review (by way of a reinstatement application) and applied for condonation for the late

filing of their supplementary affidavit in the main review application as well as for the late filing of their replying affidavit in respect of the reinstatement application.

[5] The Labour Court dismissed these applications which is now before us, and it comes on appeal with the leave of the Labour Court.

Background

[6] The factual milieu leading up to this appeal is mostly common cause.

[7] The 21 individual Appellants were members of the Communication Workers Union (Union) and Ms Govender, the deponent to the affidavits before the Labour Court, was their shop steward. The employees were employed by Telkom SOC Ltd (Telkom) within its Call Centre operations and their services were tendered at Telkom’s premises located at the Old Mutual Building, Durban CBD.

[8] In 2014/2015, an agreement was concluded between Telkom and WNS Global Services (Respondent) resulting in a transfer in terms of section 197 of the Labour Relations Act[1] of the Appellants to the Respondent. The transfer was uneventful.

[9] A year later, in April 2016, discussions between the Respondent and the Union took place in respect of a proposed relocation of all the Respondent’s employees, including the Appellants, to new premises. The Respondent wanted its employees to move to its new premises on 1 June 2016. The Union and the Appellants had reservations about the proposed move as they disputed the suitability of the new premises and the application of the Respondent’s relocation policy in moving them to the new premises.

[10] The Respondent held firm to its position that the Appellants would begin working from the new premises from 1 June

2016. The Union opposed this and referred an unfair labour practice dispute to the Commission. The referral was made on 27 May 2016 – four days before the relocation was to take effect. The Appellants alleged that they were under the impression that, as they had referred a dispute to the Commission, the relocation to the new premises would be suspended pending the resolution of their dispute.

[11] On 1 June 2016, the Appellants reported for work, not at the new premises as directed, but at the old premises – Old Mutual Building – with the view of tendering their services there. The Appellants worked at the old premises until approximately

11h00, however, they encountered problems when their access discs were deactivated and they were no longer able to enter the building.

[12] The Appellants then gathered at the Union's office to attend a teleconference between the Union and the Respondent's representatives. During the teleconference, it was agreed that the Union would visit the site of the new premises the following day (2 June 2016).

[13] On 2 and 3 June 2016, the Appellants "continued to tender services" at the old premises despite not being permitted access to the building.

[14] On Friday, 3 June 2016, the Appellants were given an ultimatum by the Respondent and were instructed to report for duty, at the new premises, on Monday, 6 June 2016. The Appellants state that they were unable to seek the Union's advice on how to proceed considering the ultimatum (as it was the weekend) and decided to wait until Monday to meet with the Union at the Union's offices.

[15] On Monday, 6 June 2016, the Appellants planned to meet with the Union at their offices but this was, according to them, not possible because there were service delivery protests which made it difficult to travel to the Union's offices. The Union and the Appellants met the following day, 7 June 2016, and it was agreed that the Appellants would report for duty at the new premises.

[16] According to the Appellants, they were hampered by the continuation of the service delivery protests and thus took a decision to report for duty only the next day, Wednesday 8 June 2016, at the new premises – two days after the ultimatum had expired.

There was also no communication between the Appellants or the Union with the Respondent.

[17] Their failure to report for duty and failure to abide by the ultimatum culminated in the Appellants being dismissed by the Respondent for unauthorized absence from the workplace and for failure to obey reasonable and lawful instructions. An unfair dismissal dispute was referred by the Appellants, which resulted in an arbitration award that found their dismissals to be unfair and ordered their reinstatement.

[18] This arbitration award, as stated earlier, was taken on review by the Respondent and the Labour Court, in a judgment dated 14 June 2018, set aside the arbitration award, substituting it with a finding that the Appellants were guilty of the misconduct for which they had been dismissed. With regard to the issue of sanction, the Labour Court remitted the matter back to the Commission for determination of that issue.

[19] At the second arbitration hearing to determine what would be a fair sanction for the misconduct, the arbitrator found, inter alia, that the Appellants' clean disciplinary records and long service history did not mitigate the seriousness of the offences

committed, and, taking into consideration that the Appellants were (in the arbitrator's view) lacking in remorse for their

actions, the arbitrator found that the sanction of dismissal was fair.

[20] On 25 September 2019, aggrieved by the aforesaid award, the Appellants launched a review application but failed to file the record of the proceedings timeously.

[21] The record was due to be filed by 6 January 2020 and was only filed on 12 June 2020, some five months later. The late filing of the record resulted in the review application being deemed to be withdrawn in terms of clause 11.2.3 of the Practice Manual[2].

[22] The Appellants filed an application to reinstate or "revive" the deemed withdrawn review application and sought condonation for the late filing of the record. Further, the Appellants sought condonation for the late filing of their replying affidavit in the reinstatement application, and the condonation for the late filing of the supplementary affidavit in the deemed withdrawn review application.

[23] The Labour Court considered the reinstatement application and properly likened it to a condonation application. The court a quo held that the principles relating to condonation would apply in determining whether the reinstatement application should be granted.

The Judge a quo held that the principles set out in *Samuels v Old Mutual Bank*[3] (*Samuels*) would apply and that the reinstatement application (i) should be made bona fide; (ii) should set out a reasonable explanation which covers the entire period of the delay; (iii) the applicant must have reasonable

prospects of success in the main review application; and (iv) that it would be in the interests of justice to grant condonation.

[24] The court a quo, in considering the extent of the delay in the filing of the record and the reasons, found the reasons for the delay to be unreasonable;

that the Appellants' prospects of success were non-existent or weak; and that the prejudice suffered by the Appellants were of their own making. The Labour Court found that the Appellants failed to meet the requirements to succeed in their application to "revive" or reinstate the deemed withdrawn review application and that the Appellants were not entitled to condonation for the late filing of their replying and supplementary affidavits.

[25] Accordingly, the court a quo made the following order:

'(1). The application for the reinstatement of the review application under case number D 1262/19 is hereby dismissed.

- (2). Condonation for the late filing of the record in the review application is refused.
- (3). The application for condonation for the late filing of the Replying affidavit in this application is hereby dismissed.
- (4). The application for condonation for the late filing of the supplementary affidavit in the review application under case number D 1262/19 is hereby dismissed.
- (5). There is no order as to costs.'

[26] Aggrieved, the Appellants applied for leave to appeal, which was granted by the court a quo.

Appeal before this Court

[27] At the outset, the order under (4) was clearly erroneous. Absent an application for a review, the time limits in respect of the supplementary affidavit did not commence running, hence there was no need to file and seek condonation for its filing.

[28] Turning to the delay in filing the record, the Appellants do not impugn the court a quo's findings that the delay of five months was unreasonable, save to say that the court incorrectly calculated the delay as being six months and not five months. The Appellants' grounds of appeal are aimed, in essence, at the finding that the delay in the filing of the record and the replying affidavit should not be condoned.

[29] The explanation provided for the delay in the filing of the record; and the replying affidavit in the reinstatement application are set out in the supporting affidavit deposed to by the Appellants' attorney, Mr Richard Donachie (Donachie) of the firm HB&C Attorneys.

Delay in filing the record and supplementary affidavit

[30] HB&C had been instructed by the Union to represent the Appellants throughout the dispute, from the first review application to the launch of the Appellants' review application in 2019. The costs associated with the litigation fell wholly to the Union, including the costs of briefing counsel. It is made clear throughout the reinstatement application that the individual Appellants were unable to fund the costs associated with the litigation as they had been unemployed since their dismissal and further that the Union had expressly agreed to fund the litigation.

[31] Despite the Union's undertaking to fund the costs associated with the review application, a dispute arose between HB&C and the Union regarding the payment of outstanding fees. A payment arrangement was concluded between the Union and HB&C and,

on the strength of this agreement, the Appellants' review application was timeously launched on 25 September 2019.

- [32] On 8 October 2019, the Commission served and filed its notice in compliance with Rule 7A(3) read with 7A(2)(b) of the Rules for the Conduct of Proceedings in the Labour Court[4] (Rules). It is unclear on which date the parties received the notice in terms of Rule 7A(5) but it is common cause that the record was due to be served and filed by no later than 6 January 2020.
- [33] On 14 October 2019, HB&C requested a quotation from its transcribers in respect of the preparation of the transcript of the arbitration proceedings, however, it appears that due to, inter alia, confusion regarding the portions of the record that needed to be transcribed, a quotation was only provided on 6 November 2019. When the quotation was received, the quotation was incorrect and further engagements with the transcribers took place to ensure that they had the correct recordings resulting in a revised quotation being sent to the HB&C on 22 November 2019.
- [34] On the back of the payment arrangement reached between HB&C and the Union, the transcriber's quotation was sent to the Union for payment which payment was made to HB&C on 5 December 2019 and the transcribers were instructed to proceed with the transcription of the arbitration proceedings.
- [35] As conduct which is described by Donachie as an "oversight" on his part, HB&C failed to have regard to the fact that the deadline for the filing of the record would coincide with the closure of their offices for the Christmas holiday period and that the record would be filed late because of this. Further, it is unclear on which date the transcribers were instructed to begin work on the record and no detail is provided as to what transpired between the period 5 December 2019 and the date on which the transcribers were paid (17 January 2020), save to say that, upon Donachie's return to office (after his holiday), the transcribers had not yet completed transcribing the record. Curiously, at that stage, Donachie states that he was under the impression that the 60-day period had not yet expired. He does not indicate which date he believed the record was due to be filed, except to say that he "still had in mind that [he] was within the 60-day period but appreciated that the period would expire before the end of January". This impression was incorrect and by 17 January 2020, when the transcribers were paid, the time for the filing of the record had already expired and in accordance with the Rules, the review application was deemed to be withdrawn. I think it is instructive to note that, unlike the practice in the High Court and the Commission, dies non does not apply to the Labour Court.[5]
- [36] On 17 January 2020, Donachie, still under the impression that the 60-day period had not yet expired, addressed email correspondence to the legal representative of the Respondent, Mr Mendel Sass (Sass), and informed him that: (i) the record was not ready for service and filing due to delays over the Christmas period; (ii) that the transcribers had undertaken to provide the Appellants with the transcription by 29 January 2020; and (iii) should the transcription be ready on the aforementioned date, the Appellants undertook to serve and file the record on 31 January 2020. Donachie further asked Sass to advise whether he was "prepared to

consent to the late delivery of the record”. This is surprising because if he was under the impression that the record was only due at the end of January why did he believe it was necessary to seek the Respondent’s consent for the late delivery of the record which he said would be delivered by the end of the month?

[37] On 20 January 2020 and in response to Donachie’s correspondence, Sass informed him that the Respondent was under the impression that the review application had already been deemed withdrawn due to the failure to file the record within the prescribed period, that no request had been received for the Respondent’s consent for the extension of the time period for the filing of the

record and that such request for consent should have been received prior to the expiry of the 60-day period. Sass further informed

Donachie that, in the circumstances, the Respondent would continue to proceed on the basis that the review application had been withdrawn and that the matter had been finalised.

[38] Having realized now that the record was late and being under the impression that it was too late to seek an extension from the Judge President in terms of the Practice Manual, Donachie responded to Sass stating:

‘I refer to your attached email and advise that I do not believe that any useful purpose is served by me traversing the content thereof.

Suffice to say that our clients do most certainly intend persisting with the application, and once the transcribers have completed the transcript, which has been delayed due to the Christmas recess, we will apply to court for an order reinstating the review and condoning the late delivery of the record.’

No further correspondence passed between the parties in January 2020.

[39] In his supporting affidavit, Donachie further stated that he intended to launch an application for the reinstatement of the review application but would not be in the position to do so until the record was filed as he would not be able to deal with the question of the extent of the delay in the filing of the record without the record itself.

[40] On 28 January 2020, the transcribers informed the Appellants that the transcript was not yet ready and accordingly, the Appellants were unable to honour their proposal to provide the Respondent with the record on 31 January 2020.

[41] The record was only made available to the Appellants on 3 February 2020. To compound this delay, the payment dispute between HB&C and the Union once again arose as the Union had failed to honour the terms of the payment arrangement, which resulted in an impasse “with all matters standing in abeyance”. Due to this impasse, neither the record nor the supplementary affidavit could be prepared and filed. The Union had advised Donachie

that it would only be able to make the payment due to HB&C by the end of March 2020.

[42] Donachie was not prepared to proceed any further due to the outstanding fees and informed the Appellants that he was taking steps for HB&C to withdraw as their attorney of record. Ms Govender approached Donachie proposing for the individual Appellants to fund the preparation of the record themselves and that the issue of the outstanding costs incurred up until this point be separated

from the issue of the funding of the preparation and filing of the record.

[43] In this respect and after much debate and discussions, the Appellants had convinced HB&C to begin preparation of the supplementary affidavit in support of its Rule 7(8)(A) notice, notwithstanding the fact that the record had yet to be filed.

[44] The Appellants then focused their efforts on raising funds for the preparation of the record and in engaging the Union to settle its debt with the attorneys.

[45] Nothing is said by either Ms Govender or Donachie in their affidavits about how long the payment impasse and negotiation phase took place, save to say that on 18 March 2020, the Appellants' attorney agreed to prepare the record on the basis that the Appellants themselves had "made available funds to cover the costs associated therewith" and that the supplementary affidavit was signed by Ms Govender.

[46] According to Donachie, the record was ready to be served and filed on 25 March 2020 but due to the national lockdown implemented on 27 March 2020 in response to the COVID-19 pandemic, it was not possible to do so. The Appellants further allege that the Commission was not accepting service at its offices in the two weeks leading up to the lockdown and as the Respondent did not have a local

address at which service could be effected, it became necessary for the Appellants to arrange to courier the record to the Respondent's

office however, couriers were not accepting documents for delivery and they were unable to deliver the record to the Respondent before the national lockdown took effect. The record was ready for service two days before the national lockdown was implemented. It is unclear why the record was not served in that period or later by way of facsimile or by email given the restrictions brought on by the lockdown.

[47] In Donachie's affidavit, he alleges that he had tasked the responsibility of serving and filing the record with the firm's candidate attorney, a Ms Stoppel, who allegedly confirmed that the record had been prepared and that she would take steps to deliver same. Donachie states that he was under the impression that the record had been served and filed before the implementation of the national lockdown and that the issue relating to the service and filing of the record had been finalised. He then turned his efforts to the delivery of the supplementary affidavit.

- [48] Despite being signed on 18 March 2020 by Ms Govender, the supplementary affidavit was only served and filed on 21 May 2020 by way of email. Mr Donachie alleged that, due to the national lockdown and the resulting restrictions on movement, he did not have access to the original supplementary affidavit in order to send it to the Respondent by way of email or fax and could only do so once he had access to his offices in May 2020.
- [49] Following receipt of the supplementary affidavit and on 1 June 2020, Sass for the Respondent notified Donachie that, among other things; (i) the Respondent had not yet received the record; (ii) the Respondent had not received an application for the reinstatement of the withdrawn review application; (iii) the Respondent had not received an application condoning the late delivery of the record; and (iv) that the supplementary affidavit was served without any notice in terms of Rule 7A(8).
- [50] It was this correspondence from the Respondent dated 1 June 2020 that, according to Donachie, prompted him to launch an investigation into the status of the record and whether it had indeed been served and filed. It then came to light that Ms Stoppel had not served and filed the record prior to the national lockdown, instead, she had simply abandoned this task and concluded her articles of clerkship with the Appellants' attorneys. Adding to this, Ms Stoppel had left the record at her previous residence in Durban (she had since relocated) which resulted in Donachie experiencing challenges in retrieving the record.
- [51] In an email dated 4 June 2020, Donachie explained the above difficulties to the Respondent stating that:
- ‘... I have faced certain challenges with regard to ascertaining what became of the rule 7A(8) notice, the record, as well as the application that was to be made to reinstate the review application, in circumstances where the record had not been filed timeously.
- ...immediately upon the record becoming available, a former employee was tasked with delivering the record, with the rule 7A(8) notice, with an application to reinstate the review application. The employee is no longer with our firm and when I endeavoured to ascertain what became of the record, when I could not locate the proof of service, I was unable to contact her. I was finally able to contact her on Wednesday and was advised that she had been unable to serve the record and the other documents, as at the time when they became available, the lockdown had been initiated. Apparently, she has all of the documents with her and I am endeavouring to arrange for them to be collected, so that I can attend to the delivery thereof...
- From my side, I was blissfully unaware of the difficulties ...with regard to the service of the record. I proceeded with the delivery of the supplementary affidavit, which was only possible after the lockdown, on the understanding that the record had been delivered, along with the rule 7A(8) notice. This will, of course, necessitate a further application for condonation.’
- [52] There is no affidavit from Ms Stoppel confirming the contents of Donachie's affidavit insofar as it relates to her.

- [53] Five days later, Mr Donachie addressed further correspondence to the Respondent indicating that he had finally traced the long outstanding record but had discovered that the record had not been indexed and paginated and pages of the record were missing which necessitated its further preparation before it could be served. He indicated that the record would be served on the Respondent on Wednesday, 10 June 2020 and once served, the condonation application as well as the reinstatement application would be finalised and served on Thursday, 11 June 2020.
- [54] In response and on 9 June 2020, Sass invited the Appellants to file all further pleadings, notices, affidavits and the record via email as a cost-effective measure. No response to this invitation was received. In a subsequent email, Sass questioned Donachie on his approach to the service and filing of the belated record and the Rule 7A(8) affidavit in a deemed withdrawn review application prior to the launching of a reinstatement application and an order granting the reinstatement of said review application. He also cautioned Donachie that, the Respondent would potentially be required to file an answering affidavit and oppose a condonation application in relation to the deemed withdrawn review application at significant prejudice to it and further reserving its client's rights, inter alia, to seek a punitive cost order against the Appellants should they fail to follow the correct procedure in respect of the deemed withdrawn review application. In response, Donachie noted the contents of Sass' email and indicated the Appellants' intention to continue with the preparation of their application/s.
- [55] By the morning of 12 June 2020, the record had not been served on the Respondent despite the Appellants' undertaking to do so by Wednesday 11 June 2020. Sass, by email, indicated that he had not yet received the record; that Donachie had not accepted the Respondents' proposal to serve the record via email; and, asked Donachie to confirm whether the Appellants intended to make service of the record by hand either at the firm's offices in Durban or in Cape Town.
- [56] The record was finally served on 12 June 2020, together with the reinstatement application. The Respondent's answering affidavit was filed on 29 June 2020 and despite in ordinary circumstances being required to file its replying affidavit within 5 days of receipt of the answering affidavit, the Appellants' replying affidavit was filed on 16 July 2020, taking three times longer than the period within which they were required to file their reply.
- [57] A reinstatement application is, in essence, a condonation application[6] and accordingly, the principles applicable to condonation apply. The factors relevant in the consideration of the grant or refusal of condonation include the degree of lateness, the explanation therefor, the prospects of success and the importance of the case.[7] And in certain cases, the interest of justice may play a role.

- [58] Added to the factors applicable to condonation applications is the consideration that employment disputes should be dealt with expeditiously as a delay in the resolution of labour disputes undermines the object of the LRA[8] and “any determination of the issue of good cause must always be considered against the backdrop of this fundamental principle”[9] and further that review applications are by their nature, urgent and must be treated with a degree of diligence and promptness.
- [59] The degree of lateness in the filing of the record, a period of five months, is significant. Especially as the Practice Manual makes provision for the extension of the time for the filing of the record by approaching the respondent for consent and if consent is refused, by approaching the Judge President on application for an extension. However, consent must be sought before the expiry of the time set out in clause 11.2.2 as no purpose would be served in seeking consent for the extension of a time period that has already expired.
- [60] The Appellants’ explanation for the failure to make use of the extension provisions set out in clause 11.2.3 is simply put up as an “oversight” on the part of the Appellants’ attorney who had allegedly miscalculated the date on which the record would be due to be filed and failed to consider the impact the Christmas holiday season would have on the completion of the transcription of the record, thus approaching the Respondent for an extension of the time to file the record after the expiry of the 60-day period.
- [61] In the Appellants’ heads of argument, the Appellants argue that the court a quo had misdirected itself in considering the failure of the Appellants’ attorney to seek the Respondent’s consent for the late filing of the record as (i) there is no indication that, had the Respondent received the request for consent timeously, such consent would have been provided, and (ii) no reinstatement application would be needed if the request was made timeously and had been accepted.
- [62] Accordingly, the Appellants argue that the bringing of a reinstatement application is inevitable and as such, if the failure of a litigant to timeously seek consent to an extension is a factor to be considered when granting or refusing the reinstatement of a review application, the Practice Manual would not have made provision for such a reinstatement application to be brought. This argument is misconceived. Clause 11.2.3 provides a party with an opportunity to circumvent the consequences of its deeming provisions by first seeking consent from the respondent for the late filing of the record and if consent is not forthcoming, to approach the Judge President on application for an extension to the time for filing of the record. This saving provision in clause 11.2.3 has one proviso, the request for consent from the respondent and the application to the Judge President must be made before the expiry of the period

within which the applicant is required to file the record.

- [63] A respondent’s refusal to consent will not prevent an applicant from approaching the Judge President for a determination of the limited issue of the extension of the filing period and in fact, a respondent must first refuse their consent before an applicant can approach the

Judge President or else the application to the Judge President would be premature. The refusal of consent does not automatically mean that a reinstatement application will become 'inevitable' as there is the second option available, which is to approach the Judge President for an extension.

- [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.
- [65] Further, it has been held that an application for condonation must be made as soon as possible once a party realises that he has not complied with the time limits prescribed and that a full, detailed and accurate account of the cause of the delay and its effects must be furnished to the court.[10] I am of the view that this principle cannot hold for an application to reinstate a review application in circumstances such as in this matter. Here, the Appellants knew as far as back January 2020 that their application had been deemed withdrawn and they did not launch a reinstatement application but chose to delay the launching of the reinstatement application and bring it at the same time as its filing of the record. While this approach cannot be expeditious, it cannot be faulted. It would, in my view, be totally injudicious to bring an application to reinstate an appeal in circumstances where the record is not yet ready. I think it would be unacceptable for a party to apply for the reinstatement, alerting the court to the fact that it is not yet in possession of the record but has taken steps to expedite the preparation of the record, then set out what steps were taken and then at a later date, to bring a condonation application with the record once it is ready to be filed because absent the record, the court cannot or may not be in a position to grant the condonation. In the circumstances, I do not hold that the delay in launching the reinstatement application adds to any tardiness on the part of the Appellants or their attorney.
- [66] In the reinstatement application, the Appellants attempt to lay the blame for the delay in the filing of the record at the feet of the transcribers, the Union, the COVID-19 pandemic and the attorney's erstwhile candidate attorney and submits that the individual Appellants should not suffer the consequences of the delay. The Labour Court was not convinced of this. The failure to correctly calculate the time periods for the filing of the record upon receipt of the notice from the registrar and the failure to timeously request consent for the late filing of the record which resulted in the review application being deemed withdrawn fell solely within the responsibility of Donachie.

- [67] His failure to calculate the correct time periods for the filing of the record speaks to his own lack of diligence in prosecuting this matter. This is information which would have been readily available to him, but he failed to give due consideration to, it, which resulted in the Appellants not acting in time in terms of the provisions of the Practice Manual to attempt to save their review application before it was deemed to be withdrawn. This was compounded by financial difficulties which resulted in the Appellants having to fund the further prosecution of their dispute from their own pockets, a no easy feat considering that they were unemployed individuals.
- [68] Adding to this, Donachie then failed to exercise supervision and control over his candidate attorney who was tasked with the responsibility of finalising and serving the record, an important task given the consequences of continued delay. As stated by this Court in *Nampak Corrugated Wadeville v Khoza*,^[11] and as correctly stated by the court a quo, Donachie “as an attorney must take full responsibility for the conduct of his member of staff”.
- [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 Minister of Community Development*^[12] (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.^[13]
- [70] Here, the Appellants argue that they had taken steps to diligently file the record and that the delays occasioned by “other role players” should not be attributed to them. I cannot agree with this. Donachie and his firm are not merely some “other role player” that played an insignificant role in prosecuting the Appellants' review application. He is their attorney and “is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are”.^[14]
- [71] I do however, believe that this is a case where the lack of diligence on the part of Donachie, in first failing to correctly calculate the time periods for the filing of the record; and second in failing to exercise some sort of oversight over the actions of his candidate attorney which resulted in the further delay in the filing of the record, are actions that the individual Appellants should not be saddled with the consequences of.
- [72] The Appellants did not sit back and wait for the prosecution of their dispute. This is evident from the fact that they were at all times aware of the progress (or lack thereof) in their matter and, although assured by the Union that they would carry the costs of the litigation, when they realised the difficulty their attorney was having in obtaining his fees from the Union and the Union failing to meet its obligations in terms of the payment arrangement, notwithstanding their serious financial crisis from being unemployed for over five years at that time, they went out and raised money so that their attorneys could proceed with their

application. It should also not be forgotten that this was done during a period when many were faced with a severe crisis brought about by a pandemic that had engulfed all of us.

- [73] The Appellants submit that, although the Respondent's right to the finalization of the matter was affected, their right not to be unfairly dismissed supersedes this and accordingly, the Respondent was not prejudiced by the delay in the review application and that any prejudice suffered would flow from the possible reinstatement order which could be mitigated against by the court by limiting the period of back pay if reinstatement of the Appellants is ordered.
- [74] The court a quo was correct in its finding that the prejudice suffered by the Appellants was of their own making – it was the Appellants' attorney who failed to file the record on time and who failed to timeously seek the Respondents' consent in extending the deadline for the filing of the record. While I accept that the transcribers may have delayed in the preparation of the record, there is no indication of what steps Donachie had taken to ensure that the transcribers produced the record with some urgency. However, on the facts, Donachie's unsatisfactory conduct in the prosecution of the dispute cannot be imputed on them.

Delay in the filing of the replying affidavit

- [75] The Appellants argue that the court a quo did not, in refusing to grant condonation for the late filing of its replying affidavit in the reinstatement application, give due consideration to the applicable principles relevant when faced with a condonation application and accordingly, failed to exercise its discretion judicially. They further argue that had the court a quo exercised its discretion judicially, it would have found that it was in the interests of justice to grant condonation for the late filing of the replying affidavit.
- [76] In turn, the Respondent argues that, although the Judge a quo did not set out his reasons for refusing condonation in the main judgment, the court identified that it must deal with the issue of condonation of the replying affidavit in the introductory paragraph of the judgment and that this serves as an indication that the judge gave due regard to the issue of condonation in respect of the replying affidavit and duly refused to grant condonation.
- [77] The replying affidavit is filed late. The reason for the delay in the filing of the replying affidavit is due to the Respondent having filed a lengthy answering affidavit which made it difficult for the Appellants' attorney to prepare a response thereto within the time period provided. In addition, Donachie's attempts to finalise the replying affidavit were hampered by his increased workload, decreased staff complement due to the impact of the COVID-19 pandemic and loadshedding. He further decided to forgo discussing the prospects of success as this was discussed in the reinstatement application but insofar as it related to the issue of prejudice, he stated that the Appellants would be prejudiced as they would be unable to respond to the allegations contained in the answering affidavit whilst the Respondent would not be prejudiced in any way.

[78] In the heads of argument, the Appellants submit again that the delay in the filing of the replying affidavit cannot be attributed to the individual Appellants and that the court a quo should have found in accordance with this. Again, and on the basis of Saloojee and Turnball-Jackson and on consideration of the circumstances which led to the Appellants having to file a reinstatement application and the resulting delayed replying affidavit, I am convinced that the Appellants should not be saddled with the consequences of their attorney's slow prosecution of their reinstatement application especially when one takes into account the impact that COVID-19 had generally, additionally, the evidence shows that the Appellants remained engaged in the prosecution of their matter throughout and did not merely relegate the matter to their attorneys.

[79] This is a matter where the delay is substantial and the explanation for the delay is less than one that can engender any sympathy. Furthermore, the negligence in complying with the time limits is, in my view, entirely with the attorneys. The Appellants however had not abandoned their fate and left it to their attorneys to deal with the matter, their repeated enquiries both from the attorneys and the Union; their continuous consultations with them; and, crucially: the raising funds when their Union failed to meet its payment commitment to the attorneys so that this matter was not left in abeyance until the Union was forthcoming with the attorneys' fees is evidence of this.

[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.[15] 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.

Merits of dispute

[81] Turning to the merits, I must add that it is in my view always important to consider the merits of an appeal/application where condonation is sought because it is only in considering the merits that one can deal with the crucial issue of prospects of success, and this is cardinal in the determination of the granting of condonation. It is trite that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.[16] Furthermore, a failure to consider the merits of a matter would result in a failure to determine whether the interests of justice may play a role in determining the merits of the case and consequently the condonation application.

[82] In this matter, the arbitrator who was tasked with determining the sanction for the misconduct appears to have adopted the view that, since the Respondent found that the dismissal was the appropriate sanction, it must be the correct sanction. Added thereto,

so the arbitrator appears to have reasoned, the Union behaved disrespectfully to the Respondent and therefore he was not going to interfere with the sanction.

- [83] This is not the way to determine what is an appropriate sanction. Although the arbitrator does say the right things, including the fact that it is his task to determine the appropriate sanction, he fluctuated in his view on this. What was required of him was to consider the nature, magnitude, and impact of the misconduct on the employment relationship. The reasoning provided by the arbitrator displays a one-sided ill-considered view, going as far as to hold that the Appellants should have first complied with the instruction given and only then complained about their relocation. The arbitrator's view of "comply now – complain later" in the circumstances of the case has no place in our labour law sphere.
- [84] The arbitrator failed to consider the issues raised by the Appellants and went as far as finding irrelevant the issues raised by the Respondent which the Appellants refuted and disputed: the Respondent led evidence that the absence of the Appellants resulted in a deviance of service, causing it severe embarrassment with their client. This was one of the issues on the basis of which the Respondent held that dismissal was a fair sanction. The Appellants refuted this, indicating that the deviance caused by their absence was less than 1% and that in terms of the Respondent's contract with their client, a deviance of up to 5% was acceptable.
- [85] Given the fact that the Appellants were guilty of misconduct, the arbitrator failed to appreciate that the reason the Labour Court referred the matter back to the Commission was because it was the task of the Commission to properly determine what should be the proper sanction for the misconduct committed by the Appellants. The arbitrator seems to have relied on two issues which played a crucial role in his determining the sanction (if he did determine it) and then accepted that the sanction applied by the Respondent was fair.
- [86] The first issue was that the Appellants displayed no remorse and were contemptuous of the Labour Court order that found them guilty of misconduct: this was a total misreading of the evidence presented. The Appellants' evidence was essentially that they had believed that they had not acted wrongfully and that their action was driven and supported by their Union. The Union encouraged and supported them not to attend at the new premises. So, their evidence was that while they accepted the order of the Court, the context of their wrongdoing was explained, and they essentially expressed the view that their acceptance did not mean that they did not disagree with the judgment. There is nothing wrong in disagreeing with a judgment as long as there is abidance of it. Clearly, the Appellants were complying with the order albeit with sadness and anger, this is not a show of contempt or a lack of remorse. Their belief that the judgment of the Labour Court, which found them guilty of misconduct, was erroneous is fully displayed by the fact that they went up to the Constitutional Court seeking leave to appeal that judgment. The arbitrator's view in the circumstances, that the Appellants' lacked remorse, is clearly not justifiable and based on a failure to appreciate the evidence before him.

[87] The second issue was that of the “misbehaviour” of the Appellants and the Union at the virtual meeting that was held

between the Union and the employees on one hand and the Respondent’s representatives on the other. The meeting was called to deal with the impasse between the parties and to resolve the dispute regarding the relocation of the employees to the new premises. The discussions between the Respondent’s HR had continued for some time without much progress. A few crucial issues however became evident from the discussion, inter alia:

87.1 The Union had raised concerns about health and safety issues at the new premises. The Respondent’s management accepted that these issues were raised but had not responded to them;

87.2 The Union felt that the new premises were not fit for work and required a letter from the health authorities that it was safe to work from there. The Respondent had not provided this;

87.3 The Union raised a concern that the environment where the new building was situated was also unsafe as a snake was found inside the premises and had to be killed, this caused immense fear;

87.4 There were no appropriate shops or take-away stores in the vicinity of the premises; and

87.5 There was also non-compliance with the distance between individual working spaces as was required.

[88] The Respondent did not dispute that the Appellants had raised these complaints but stated that either all of the concerns were being attended to or would be attended to. The Union then proposed that the parties ask the Commission to urgently deal with the dispute (the unfair labour practice dispute) it had referred and that it would accept the Commission’s decision as final. The Respondent felt that the Appellants should report to the new premises and that the matter could then be taken from there. While the discussions were carrying on, one Warwick from the Respondent, intervened stating that the discussion was not going anywhere. This prompted the Union representative to state that Warwick’s intervention was simply taking the entire discussion back and that it was not only unhelpful but retarding the progress.

[89] The Union representative further added that Warwick should rather remain silent. This then led to the intervention by Leanne, another of the Respondent’s representatives who stated that she did not appreciate the comment made by the Union representative. The Union representative reacted, angrily because he saw this intervention as an attempt to distract attention away from the important discussion that was taking place. The Union’s representative was of the view that while the talks were continuing and the issues were properly put on the table with an acknowledgement by the Respondent that the Appellants and the Union had raised their concerns/complaints there was no indication that their concerns were addressed, more importantly, there was no response from the Respondent to these complaints and concerns. The interventions by Warwick and Leanne were, in the

circumstances, seen by the Union representative as an attempt to scuttle the discussion and as an attempt to simply tell the Appellants to report for work at the new premises or face the consequences. The intervention by Warwick and Leanne was seen as reducing the meeting to nothing short

of finally demanding that the Appellants report for duty at the new premises. The Union's representative's belief was

fortified when Leanne stated that if the Appellants did not report for work at the new premises "... we will take the necessary action...".

[90] The Union representative's belief that it and the Appellants were attending the meeting (albeit virtually) to try and find some middle ground to make inroads into the impasse and the intervention of Warwick and Leanne, raising what they did, was taking the meeting away from what it was intended for. In any event, after the heated exchange, Warwick and Leanne left the meeting and

the discussion between the Union representative and the head of the Respondent's HR continued with arrangements being made for a site visit the next day.

[91] While it is correct that the Union representative was raising his voice and was less than courteous to Warwick and Leanne, within the context of the meeting to say that this reaction was malicious is not reasonable. The meeting, though short on progress, may or may not have led to any compromise. Perhaps it was going nowhere rather slowly but that is the nature of that kind of meeting. Warwick and Leanne seem not to appreciate this, their intervention not only failed to contribute to the discussion but served to almost scuttle the meeting. It is not far-fetched to surmise that their intervention demonstrated intransigence in their demand for the Appellants to report for duty at the new premises irrespective of the legitimate concerns they had raised.

[92] In the circumstances, the arbitrator simply failed to appreciate that, while the Union representative might not have behaved in the most civil manner, it was the untimely interference compounded by rather provocative statements made by Warwick and Leanne that led to the deterioration of the meeting. This became demonstrably clear when the discussion continued once Warwick and Leanne left the meeting.

[93] In addition to the above two issues, the arbitrator also appears to have taken the view, as stated earlier, that it was the employer's prerogative to decide upon the sanction. Hence based upon (i) the employer's prerogative to decide on the sanction; (ii) that the Appellants failed to display any remorse, and (iii) that the Appellants were party to the discourteous conduct because they were "present" at the virtual meeting where the Union representative behaved brashly to the Respondent's representative, the arbitrator concluded that the dismissals of the Appellants were fair.

[94] None of these bases is proper or reasonable. It is not proper to take the view that the employer has the prerogative to determine a fair sanction in circumstances where you are required to determine a fair sanction, In fact, the arbitrator concludes the award by saying:

‘...the fact that the employees were found guilty as charged, in my view, does warrant the termination of their services. I am therefore not going to interfere with the employer’s decision to dismiss the employees. The employer’s decision to dismiss the employees was an appropriate sanction.’ [Own emphasis]

[95] Additionally, the arbitrator’s conclusion that the dismissals were appropriate because the Appellants were not remorseful was also not reasonable. The arbitrator’s reference to the fact that the Appellant’s apparent joy at the manner in which the Union representative addressed Warwick and Leanne played a pivotal role in the arbitrator’s decision in finding the Respondent’s decision to dismiss as appropriate. The arbitrator clearly failed to consider the fact that the Appellants were guided by their Union in their actions, inexcusable as it was (hence they were found guilty of misconduct), it had to serve as a factor for purposes of determining an appropriate sanction. Sight was also lost of the fact that the Respondent’s insistence, that the Appellants’ dismissal was fair because the absence of the Appellants caused service deviations which could not be tolerated by their clients, was less than candid. The arbitrator simply brushed this aside by saying it was not relevant but failed to consider that it was a crucial issue relied upon by the Respondent to demonstrate the seriousness of the misconduct and was essentially an infringement which was not going to lead to any breach of the service that the Respondent was providing to its client.

[96] The Respondent has more than 500 employees at the branch where the Appellants are employed and how the continued employment of the 21 Appellants will be intolerable is beyond comprehension. It should also be taken into account that the Union on behalf of the Appellants raised a number of concerns and complaints about the new premises which, in my view, warranted a response from the Responded but no response was given. The issue of health and safety was crucial and an unsafe working environment in which snakes can find their way into the workplace is not something that can engender a feeling of a safe working environment. Further, taking account of our socio-economic context, a lack of food facilities within the vicinity of the premises is also not to be ignored.

[97] In the circumstances, I am not satisfied that the decision arrived at by the arbitrator is one that an arbitrator confronted with the evidence presented at the arbitration could reasonably have arrived at. The decision is simply not reasonable based on the evidence before the arbitrator and as such it is liable to be set aside.

[98] In the result, the Labour Court erred in concluding that the review was devoid of any merits. It is also self-evident that the Labour Court failed to exercise its discretion judicially and misdirected itself on a number of facts in holding the arbitrator as being correct in respect of issues where he had erred. The Labour Court further arrived at a decision that was not reasonable and failed to apply the principles relevant to making the proper decision.

[99] In the circumstances, the decision of the Labour Court must be set aside and condonation be granted for the late filing of the replying affidavit the late filing of the record for review and the review be reinstated.

[100] Furthermore, all the evidence to determine a fair sanction is before me, I am of the view that a Commissioner acting reasonably, based on the evidence presented, would not have confirmed the Appellants' dismissal and no purpose would be served in delaying this matter any further by referring it back to the Commission for it to determine the sanction as it will be improper to allow parties to lead new evidence: they have said what they wanted to say and the evidence is dealt with in this judgment. Furthermore,

both parties were invited and given a full and proper opportunity to deal with this issue and they dealt with it. So, it is proper to substitute the woefully erroneous sanction with that of a final written warning valid for 12 months from the date of reinstatement.

[101] I say reinstatement because in terms of section 193(1) and (2) of the LRA reinstatement is the primary remedy where a dismissal is found to be unfair unless the circumstances set out in section 193(2) are present.[17] They are not present here: the Respondent's ipse dixit that several things have changed does not make reinstatement inappropriate, if the other employees could be trained, so can the

Appellants especially since there are also trainers from among the Appellants.

[102] However having regard to the fact that the dismissal took place nearly eight years ago and at least two or perhaps three years of the delay can be attributed to the Appellants' less than efficient conduct of the litigation and the fact that, if the Respondent is to be believed, training the Appellants to get up to speed may take a few months, I take the view that although the order of reinstatement should be backdated to the date of dismissal, the Appellants will only be entitled to their remuneration from 1 January 2023.

[103] In the result, I make the following order:

Order

1. The appeal succeeds with no order as to costs and the order of the Labour Court is substituted as follows:

“(i). condonation for the late filing of the record and the replying affidavit is granted and the review is reinstated.

(ii) The award handed down by the second respondent under the auspices of the first respondent (case number KNDB8260-16) is hereby reviewed and set aside and substituted as follows:

- (a) The dismissals of the applicants were unfair, and they are reinstated in their former positions at the remuneration they would have earned but for their dismissals.

- (b) the applicants are reinstated as and from the date of their dismissal but will only be remunerated from 1 January 2023 and must report for duty at the premises from which the respondent presently operates by no later than 11 March 2024.
- (c) the applicants will each receive a final written warning valid for 12 months relating to their absence from work without leave/permission.
- (d) there is no order as to costs.”

Waglay JP

Mlambo JA and Malindi AJA concur.

For the Appellant: Adv TE Seery

instructed by Henwood Britter & Caney

For the Third Respondent: M Sass and C Todd of Bowman Gilfillan Inc.

- [1] Act 66 of 1995, as amended.
- [2] Practice Manual of the Labour Court of South Africa, effective 2 April 2013.
- [3] [2017] 7 BLLR 681 (LAC).
- [4] GN 1665 of 1996 Rules for the Conduct of Proceedings in the Labour Court.
- [5] This will change with the implementation of the new rules where dies non will also apply to the Labour Court.
- [6] Samuels *supra* at para 17.
- [7] See: *Melane v Santam Insurance Co Ltd* 1962
- (4) SA 531 (A) at 532C – F.
- [8] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2016) 37 ILJ 313 (CC) at para 1.
- [9] See *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others* (2015) 36 ILJ 232 (LC).
- [10] See: *Chemical Workers Industrial Union and Another v Ryan and Others*
- [2001] 3 BLLR 337 (LC); *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] 3 All SA 520 (SCA) and *Allround Tooling (Pty) Ltd v NUMSA & others* [1998] 8 BLLR 847 (LAC).
- [11]
- [1999] 2 BLLR 108 (LAC) at para 7.
- [12] 1965 (2) SA 135 (AD)

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- [13] See *Turnbull-Jackson v Hibiscus Coast Municipality and others* (eThekweni Municipality as amicus curiae) [2014] ZACC 24; 2014 (6) SA 592 (CC) at para 26.
- [14] *Saloojee supra* at 527.
- [15] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) (NUM) at para 10.
- [16] See NUM at para 10.
- [17] *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC); 2022 (3) BCLR 265 (CC) at paras 53 – 62.
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