

SOUTH AFRICA / JUDGMENT

## Govender and Others v Commission for Conciliation, Mediation and Arbitration and Others (D1262/2019) [2021] ZALCD 83 (14 December 2021)

[2021] ZALCD 83

COURT

Labour Court Durban

BEFORE

I Moodley

CASE / FILE NUMBER

D1262/2019

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Not Reportable

CASE NO: D1262/2019

In the matter between

KRISHNAVENI GOVENDER & 20 OTHERS

(BEING THE PERSONS LISTED IN ANNEXURE 'KG1') APPLICANTS

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION FIRST RESPONDENT

NQOBILE KENNETH DUBE N.O. SECOND RESPONDENT

WNS GLOBAL SERVICES SA (PTY) LTD THIRD RESPONDENT

Heard: 2 July 2021

Delivered: 14 December 2021

**JUDGMENT**

1. The applicants have brought this application to reinstate their review application (“review”) which is deemed withdrawn. They did not file the record in the review, within the prescribed period. The Notice of Motion also includes a prayer condoning the late filing of the record. I am also required to determine a separate condonation application arising from the late filing of the replying affidavit, in this application, and the supplementary affidavit in the review.

**BACKGROUND**

2. The third respondent (“WNS”) dismissed the applicants for unauthorised absence from their place of work for more than five days and failing to obey a reasonable and lawful instruction. The charges arose because the applicants did not report for work when WNS relocated to new premises.
3. The applicants challenged their dismissal and the commissioner who arbitrated the dispute found the dismissals were unfair and ordered reinstatement. WNS launched a review application, and this Court found the applicants guilty of the charges. The issue of sanction was remitted to the first respondent (‘CCMA’) for determination. The applicants unsuccessfully sought leave to appeal. The Labour Appeal Court and the Constitutional Court dismissed the applicants’ petitions.
4. The Second Respondent (‘commissioner’) upheld the applicants’ dismissal. The applicants brought an application for the review of the commissioner’s award. The review application is deemed withdrawn in terms of Clause 11.2.3 of the Practice Manual (“Manual”).
5. The need to revive the review application arises because the applicants filed the record late. Clause 11.2.2 of the Manual requires the applicants to file the record within sixty days after a Rule 7(A)(3) notice is filed.
6. Clause 11.2.3 of the Manual provides for an extension of the prescribed period with the respondent’s consent, which must be requested within the prescribed period. The applicants requested an extension after the prescribed period expired. The applicants now seek reinstatement of the review application.
7. An application for reinstatement of a withdrawn review application is, in essence, an application for condonation. In *Samuels* [[1]] it was held that the elements to be established in such an application are that the application is bona fide; that the applicants have provided a reasonable explanation[1] which covers the entire period of the default; that they have reasonable prospects of success in the main application; and that it is in the interest of justice to grant the order.
8. The applicants launched the review application on 25 September 2019. The first respondent filed a Notice in terms of Rule 7(A)(3) on 8 October

2019. The sixty-day period within which the applicants were required to deliver the record expired on 6 January 2020. The record was ultimately delivered on 12 June 2020, some six months beyond the deadline. A delay of six months is substantial, if not excessive. It is convenient to assess the applicants' explanation for this excessive delay by classifying the cumulative delay into three phases. These are the extension phase, the pre-lockdown phase and the post-lockdown phase. I begin with assessing the reasons given for the delay in requesting an extension beyond the deadline.

#### THE EXTENSION PHASE

9. On 14 October 2019, about a week after the record was retrieved, a quotation for the transcript was requested and it was received on 6 November 2019. There was a delay caused by the identification of the relevant tapes and a revised quotation was received on 22 November
2019. The applicants' trade union ('CWU') paid for the transcript on 5 December 2019.
10. The applicants' attorney ('attorney') made a belated request for an extension on 17 January 2020, by which time the prescribed period had expired. He candidly accepts his 'oversight' or 'error' for not requesting an extension before the sixty-day period expired. He believed that the request was made within the prescribed period but is vague about the date he mistook for the deadline. Evidently, he failed to appreciate the precise date on which the sixty-day period expired. He does not give the reason for his belief. In *Glansbeck* [[2]] the Labour Appeal Court ('LAC') held that a reasonable explanation must be given for the oversight or mistake.
11. A request for an extension must be made within a reasonable time when it is anticipated that the deadline will not be met. *Segakweng* [[3]] It follows that there must be reasonable anticipation of when the transcript would be ready.
12. On the present facts, the attorney's anticipation came too late. He only realised that the transcript would not be ready on time, after the Christmas recess when the transcriber informed him that it would be ready on 29 January 2020. Yet, it was foreseeable the transcription might not be completed by that date.
13. The transcriber's quotation dated 22 September 2019 indicates that transcription would take six to eight weeks to complete. Transcription commenced on or about 6 December 2019 after payment was made. He ought to have anticipated that the transcript may not be ready until eight weeks later, at the beginning of February 2020. The transcript was in fact, received on 3 February 2020.
14. Consequently, the mistaken deadline is not the only oversight. The attorney did not appreciate the actual deadline and he also failed to realise that an eight-week period for transcription would be beyond his own mistaken deadline. Such lapses result in the failure to request an extension timeously and these have not been reasonably explained.

15. The applicants cannot absolve themselves from liability, in circumstances where the first applicant saw the quotation and was aware that completion of the transcript could take up to eight weeks. She does not disclose what steps she took to ascertain from her attorney whether there would be compliance with the deadline in that timeframe, despite such knowledge. In stark contrast, other engagements are disclosed, including pressurising the attorney to obtain the quotation. Had the applicants acted on this information, their attorney may well have been alerted to his oversights.
16. The reasons the applicants give for not filing the record in time are the delay caused by obtaining the transcriber's quotation and Christmas recess. While the delay in the transcription process may be a reasonable difficulty, what they are required to explain is why they did not anticipate that such a difficulty might prevent them from filing the record timeously. They have not done so, nor have they explained why CWU delayed the transcription by taking two weeks to make payment. In this respect, the applicants are themselves blameworthy. [[4]] This analysis leads to the conclusion that neither the attorney nor the applicants provide a reasonable explanation for their failure to request an extension timeously.
17. In Zono [[5]], this court was critical of a failure by applicants to resort to the remedies provided for in Rule 11.2.3 when seeking reinstatement of a review. In that case the applicant did not request an extension at all. In the instant matter, the applicants requested an extension after the deadline had passed. However, there is a substantial delay in preparing and delivering the record, after the attorney received the transcript. The two phases of this delay are considered next.

#### THE PRE--LOCKDOWN PHASE

18. The transcript was received by the applicants' attorney on 3 February 2020, a month later than 6 January 2020, when delivery of the record was required. No work was undertaken to prepare the record until 18 March 2020, about six weeks later. The reasons given by the applicants for this delay are their inability to pay the costs for preparing the record; their reliance on the CWU for its funding and the unwillingness of the attorney to commence preparation of the record until the CWU paid him outstanding fees accruing from services rendered in the prior litigation alluded to earlier.
19. In Gaoshubelwe [[6]], it was held that an inability to pay for costs may be a satisfactory explanation in particular circumstances. The circumstances surrounding the issue of funding are considered next.
20. The applicants do not provide an estimate of the costs for preparing the record. Any sense of the extent of their difficulty is not ascertainable. The applicants do not say that the CWU could not afford to pay. The explanation given is CWU's failure to 'honour its payment obligations' owed to the attorney. No details are disclosed about the costs for preparing the record while the first applicant was 'continually engaged' with CWU.

21. CWU paid R16,215 for transcription of the record on 5 December 2019, while the fee dispute persisted, but did not pay for the remaining costs of preparing the record, after the transcript was received. This anomaly is left unexplained. Details of the first applicant's engagements with CWU may have led to insight into whether CWU's attitude to funding changed after the review was deemed to be withdrawn.
22. The first applicant has not been forthright about the applicants' reliance on CWU funding. In her founding affidavit, she asserts that CWU provided the funds for previous litigation. However, in the replying affidavit, she says legal insurance available to some of the applicants was used to meet costs.
23. There are other weaknesses in their inability to pay as a reason for the delay in preparing the record. These emerge from the account that is given in relation to the preparation of the supplementary affidavit. It commenced on some undisclosed date and was signed on 18 March
2020. Preparation of the record only commenced on that day. Consequently, preparation of the record only started much later than that of the supplementary affidavit began. Two features related to this consequence deserve attention.
24. It appears that the attorney generously agreed to prepare the supplementary affidavit while the fee dispute remained unresolved. However, he only agreed to prepare the record after the applicants raised funds amongst themselves for this purpose. There is no explanation for why the fee dispute was an obstacle in preparing the record, but the existing fee dispute did not prevent the preparation of the supplementary affidavit. A significant portion of the delay appears to have arisen because of the differential application of the attorney's goodwill.
25. The first applicant's engagements with her attorney appear to be the reason for this misplaced prioritisation of the supplementary affidavit. It is evident that she expended efforts to persuade the attorney to prepare the supplementary affidavit first. In her description of these engagements with her attorney, she asserts, 'I was eventually able to persuade the applicants' attorneys, even though the CWU had still not made payment, to commence with the preparation of a supplementary affidavit...' Consequently, the applicants did not display a sense of urgency towards preparing the record.
26. The same can be said for the applicants' fundraising amongst themselves. Her vague chronology implies that the fundraising effort only commenced during the preparation of the supplementary affidavit and not when the transcript was received.
27. These flaws in the explanation indicate that the applicants' inability to meet the costs of preparing the record is not reasonable

in the circumstances of the instant case. The applicants' conduct smacks of inattention and a lack of any sense of the degree

of urgency required to prepare the record. Rule 11.2.7 of the Manual makes clear that a review application is urgent in nature. The rationale is provided in Macsteel [[7]] when the LAC explains that the underlying objective of the Manual is the promotion of expeditious dispute resolution, and its provisions are binding.

28. Failure to deliver the record before the lockdown is also open to criticism. Preparation of the record commenced on 18 March 2020 and was ready to be delivered on 25 March 2020. It took seven days to prepare the record. Yet, in his request for an extension on 17 January 2020, the attorney undertook delivery within two days of receipt from the transcribers. The applicants do not explain this delay of five days.
29. This brings me to whether the applicants' reliance on the lockdown to explain a delay of about two months is adequate. The lockdown would be a reasonable explanation under normal circumstances. However, the lockdown does not reasonably explain the delay in this case. The unexplained delay of five days which prolonged the preparation of the record would have been sufficient time to deliver the record before the lockdown, to at least WNS, on the applicants' version. Moreover, had there not been the persistent lack of urgency towards preparing the record during the seven weeks before the lockdown, the record could have been delivered well before the lockdown became an obstacle.
30. Stoppel, who was a candidate attorney at the firm was given the task of preparing the record. It was ready to be delivered on 25 March 2020. On an unspecified date, she informed the attorney that the record was prepared and that she was attending to delivery. The attorney explains that he was unaware that the record had not been delivered. It is perplexing that she was not supervised while she undertook these tasks. There was an even greater need for supervision because Stoppel was leaving the firm at the end of March 2020, twelve days after the preparation of the record commenced.
31. In Nampak [[8]] and Waverly Blankets [[9]], the LAC has held that an attorney must take full responsibility for the conduct of his staff. This principle is applicable here. Moreover, the attorney's explanation that his supervision of the preparation of the record was hampered by moving office on 1 March 2020 and by pre-lockdown Covid-19 restrictions is unsatisfactory. These impediments are likely to have prevailed during the preparation of the supplementary affidavit. Still, its preparation does not appear to have been affected because that affidavit was prepared and signed by 18 March 2020.
32. In conclusion, the applicants' cumulative explanation for the delay of almost seven weeks is unreasonable.

## THE POST-LOCKDOWN PHASE

33. Ultimately, the record was not served and filed before the lockdown commenced on 27 March 2020. Service was only completed on 12 June 2020, approximately two and a half months later. The applicants' attorney believed that the record had been delivered to the respondent before the lockdown. He became aware of the true position on 21 May 2020, only after serving the supplementary affidavit on WNS's attorney, who then informed him that he had not received it. There was a further delay of about three weeks until he received it.
34. Stoppel was unsupervised while working from home before the lockdown. The record was located at her house and not in the attorney's

office. The applicants attribute the further delay over delivery, to difficulties in retrieving the record from her home after the lockdown. Closer supervision would have averted such a situation. Consequently, the explanation for the further delay over the delivery of the record, after the lockdown is unreasonable.

35. The attorney's inattention to the supervision of the preparation and delivery of the record, together with his earlier lapses,

indicates that the limit has been reached when the applicants cannot escape liability, as was held in Autopax [[10]]. The applicants are not absolved from responsibility for the delay during this phase for this reason alone. Moreover, their role in the delay over delivery of the record is devoid of detail, given the information at their disposal. They were aware that delivery of the record had not taken place before the lockdown because they venture to explain this failure on impediments existing before the lockdown. They do not disclose the steps they took to pass this information to their attorney, who believed the record had been delivered or, if they did, none are disclosed.

36. To sum up, it is evident during each phase that the attorney's inattention to the matter is compounded by the applicants' inaction or misdirected or delayed action. For these reasons, I arrive at the conclusion that the explanation given by the applicants is unreasonable.
37. As a result, I am disposed to dismiss the application on this ground alone. My view is strengthened by a brief assessment of the applicants' prospects of success in the review application.

#### PROSPECTS OF SUCCESS

38. The main ground of the applicants' challenge to the commissioner's award is that he misconstrued the evidence. In essence, this ground is based on process irregularities that do not render the award reviewable for this reason alone. [[11]]
39. If such process irregularities are established, the inquiry must proceed to the next step to determine whether the result of the award is one that no reasonable arbitrator could have reached. [[12]]. The result of the award does not appear to fall outside the range of reasonableness.

40. The second ground of review is that WNS led no evidence to support the commissioner's finding that the employment relationship had broken down. Two decisions of the LAC, in Anglo-Platinum[[13]] and Department of Home Affairs[[14]] establish that such a conclusion can be reached by inference.
41. The third ground of review is that the commissioner justified the dismissals, inter alia, for a reason not relied upon by WNS. Sidumo [[15]] makes clear that a commissioner is not confined to the reasons given by an employer for a dismissal.
42. It was submitted, as the fourth ground of review, that the commissioner misconceived the nature of the inquiry. This submission is on weak ground. First, the applicants have not placed supporting facts which, if established, would lead to a successful review [[16]]. Second, nothing in the award suggests that it falls foul of the factors that must be considered in a review application [[17]].
43. For these reasons, I am of the view that the applicants' prospects of success are weak.
44. My finding in paragraph 36 leads to the conclusion that any prejudice suffered by the applicants is of their own making.
45. The applicants have failed to meet the requirements which justify reinstatement of the review application. Accordingly, I need not consider any of the other further relief that the applicants seek.
46. I have considered the expense incurred by WNS in opposing a review that is now deemed withdrawn. As a result, the applicants have no further avenue to challenge their dismissals. I do not believe it is in the interests of law and fairness, that a costs order is made.

## 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.

I Moodley

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: K Allen, instructed by Henwood Britter & Caney Attorneys.

For the third respondent: C Todd of Bowman Gilfillan Inc.

[1] The Constitutional Court in *Steenkamp v Edcon Limited* [2019] ZACC 17 appears to approve of a stricter test, that an explanation needs to be ‘convincing’ in applications for condonation related to unfair dismissal cases. I invited counsel to submit written representations on this point. For reasons that follow, it is not necessary for me to consider this issue further. I thank both counsel for their written representations.

[[1]] *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC) (2017); 38 ILJ 1790 (LAC) (25 January 2017) at paragraph 17

[[2]] *Glansbeek v JDG Trading (Pty) Ltd* (JA76/97) [1998] ZALAC 17 (13 February 1998) at paragraph 6.

[[3]] *Segakweng v CCMA & Others* (JR 848/15) [2020] unreported at paragraph 18.

[[4]] *Seatlolo and Others v Entertainment Logistics Service* (2011) 32 ILJ 2206 (LC) at paragraph 37.

[[5]] *Zono v Minister of Justice & Another* [2020] 11 BLLR 1160 (LC) at paragraph 23.

[[6]] *Gaoshubelwe v Pie Man’s Pantry* (2009) 30 ILJ 347 (LC) paragraphs 35 and 36.

[[7]] *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 798 (LAC) at paragraph 22.

[[8]] *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ (LAC) at paragraph 7

[[9]] *Waverly Blankets v Ndimba* (1999) 20 ILJ (LAC) at paragraph 10

[[10]] *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & others* (2006) 27 ILJ 2574 (LC) at paragraph 22.

[[11]] *Quest Flexible Staffing Solutions (Pty) Ltd v Lebogate* ([2015] 2 BLLR 105 (LAC) at paragraph 16.

[[12]] *Sidumo & Another v Rustenburg Platinum Mines LTD & others* 2008 (2) SA 24 (CC) at paragraph 110.

[[13]] *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC) at paragraph 19.

[[14]] *Department of Home Affairs and another v Ndlovu and others* [2014] 9 BLLR 851 (LAC) at paragraph 18.

[[15]] *Sidumo* at paragraphs 59, 61 and 79.

[[16]] *Samuels* at paragraph 22.

[[17]] GoldFields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at paragraphs 20(ii) and 20(iii).

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