

SOUTH AFRICA / JUDGMENT

Hans v Passenger Rail Agency Of South Africa Soc Ltd t/a Metrorail (C513/2019)

[2023] ZALCCT 72 (5 December 2023)

[2023] ZALCCT 72

COURT
Labour Court Cape Town

BEFORE
Lagrange

CASE / FILE NUMBER
C513/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE
LABOUR COURT OF SOUTH AFRICA,
HELD
AT CAPE TOWN

Case:	C513/2019 Of interest to other judges In
the matter between:	EWERT HANS First Applicant And PASSENGER RAIL AGENCY OF SOUTH AFRICA SOC LTD t/a METRORAIL First Respondent F A CRAFFORD N.O. Second Respondent THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent Date of Hearing: 5 October , adjourned to 11 November 2022 Date

of Judgment: 05 December
2023

Summary:

(Application to condone late
filing of review application – no application to condone late
filing of record to revive the
application – Applicant aware of
objection based on the deemed withdrawal of the application, but
failing to make any effort
to obtain condonation for non-compliance
with the 60 day time limit for filing a record – review
application still deemed
withdrawn – court unable to consider
condonation application or to consider whether or not to reinstate
the review application
– Applicant’s inaction in
attempting to reinstate the application to blame for wasteful
proceedings – costs payable
before any further steps can be
taken – application struck off the roll)

JUDGMENT

LAGRANGE J

Background

[1] The applicant, Mr E Hans (‘Hans’), wishes to review and set aside the arbitration award issued by the arbitrator, the second respondent, on 28 July 2017. The award upheld the dismissal of the applicant by the first respondent, PRASA t/a Metrorail (‘PRASA’). The applicant was dismissed on 12 September 2016 after being charged with 14 charges of misconduct. The applicant was found guilty of charges 4 to 14 inclusive and was consequently dismissed.

[2] The applicant was an employee of PRASA as a Senior Technician/Engineer since 2001 and was dismissed on 12 September 2016

after he was found guilty of all the charges pertaining to misconduct during a disciplinary hearing process.

[3] The applicant initially referred an unfair dismissal dispute to the Third Respondent for conciliation on 20 September

2016. The dispute could not be resolved at conciliation and proceeded to arbitration.

- [4] The second respondent, the arbitrator, found the applicant guilty as charged on three of the charges regarding the unauthorised use of a company vehicle. Furthermore, the arbitrator found the dismissal to be substantively fair. The arbitrator confirmed that the sanction of dismissal on 28 July 2017 was substantively fair.
- [5] PRASA opposed the applicant's condonation application for the late filing of the review application and raised a further point in limine regarding the late filing of the record of the arbitration proceedings by the applicant because it argues the application is deemed withdrawn. The First Respondent seeks an order that the applicant's application for condonation and review application be dismissed.

Preliminary matters – late filing of review application and late filing of record

- [6] Before the merits of the review application can be addressed, the court first needs to decide if the applicant's late referral of his review application should be condoned. If the late referral should be condoned, it will still be necessary to decide if he should be allowed to proceed with his review application even though he was also late in filing the record of the review proceedings.
- [7] Where an applicant takes longer than 60 court days to file a record after the Registrar advises an applicant they may uplift the court record, the entire review application is deemed withdrawn unless the court permits an applicant to reinstate it. PRASA raised an in limine objection in these terms. In order to determine the merits of the review application the applicant needs first to succeed in persuading the court that his lateness in both respects should be excused. If he fails to persuade the court that either the late commencement of the application or the late filing of the record should be excused, then the review application cannot proceed. As things stand he only applied to have his delay in launching review proceedings on the basis that he claims to have a justifiable explanation.

Late filing of the record

- [8] In terms of clause 11.2.2 of the Labour Court Practice Manual ('the manual'), a review applicant must comply with Rule 7A(6) of the Labour Court Rules, by providing the Labour Court registrar and the other parties with a copies of record within 60 days of being advised by the registrar (under Rule 7A(5)) that the record has been received from the relevant bargaining council or the CCMA. Clause 11.2.3 penalises an applicant who takes longer than sixty days to file the record, by deeming the review application is withdrawn. Clauses 11.2.2 and 11.2.3 were introduced to prevent the object of expeditious dispute resolution being thwarted by parties who dragged their heels in prosecuting reviews. Clause 11.2.3 prevents a review application pending indefinitely because a record has not been filed. It is similar to Rule 17 of the Labour Appeal Court Rules, which also deem an appeal withdrawn if the appeal record has not been filed within 60 days. Like Rule 17, clause 11.2.3 of the manual a party may file the record later if the respondent party has agreed to extend the period for filing it, or an extension has been granted by a judge in chambers.

- [9] The CCMA filed the record of the arbitration proceedings on 27 August 2019 and the applicant was made aware, by the registrar, that the record of the arbitration proceedings had been filed. Accordingly, he ought to have filed it by 20 November 2019. However, he only uplifted the record on 17 February 2020 which was already 59 (fifty-nine) days late and provided no explanation for only uplifting the record of the arbitration proceedings on this day. It then took him until 5 May 2020, some 111 (one hundred and eleven) days after the 60 (sixty) day period lapsed to serve the record on the respondent. The transcript was incomplete and the remainder of the record of the arbitration proceedings was only filed by the applicant on 15 June 2020. He then re-served his notice in terms of Rule 7A (8) on PRASA on 18 June 2020 which was 140 (one hundred and forty) days outside of the prescribed time frame.
- [10] At present, the review application is still deemed withdrawn. There is no formal application made by the applicant to reinstate his review application, though the Labour Appeal Court has said that if the substance of a reinstatement application and condonation application is before the court it should consider the question of reinstatement, even though the formalities of a separate reinstatement application have not been complied with[1]. In *Coericus* the applicant had at least made out some attempt to explain the lateness of filing the record in his replying affidavit and had very belatedly filed a notice of motion applying for reinstatement of the review application. In this case, the applicant did not even file a replying affidavit and made no attempt to explain the late filing of the record in any document.
- [11] Instead, the applicant argued that because the respondent still filed an answering affidavit after it eventually received the complete record, it had tacitly consented to the late filing of the record, even though it had expressly raised the in limine point. No legal authority was advanced in support of this argument.
- [12] Clause 11.2.3 of the manual does permit a respondent to agree to an extension of time for filing the record, provided this is done within the 60 court day window for filing the record. However, if no consent is granted during that period, then the deeming provision kicks in. I cannot see how the conduct of the respondent long after the deeming provision has taken effect can tacitly agree to waive the effect of a deeming provision, which is not just enacted for the benefit of a respondent in a review application, but also for the broader policy purpose of expediting review proceedings. In my view, apart from the fact that PRASA expressly raised the in limine objection, it could not consent to the revival of the application without the court's agreement. Consequently, the applicant's attempt to revive the withdrawn application based on waiver must fail.
- [13] The applicant also requested direction from the court on how the matter should proceed if the court rejected this argument. This request is disingenuous. There was no legal authority advanced for the applicant's contention that the effect of the deeming provision can be waived by a respondent, expressly or tacitly. The Labour Court Practice Manual is clear that an applicant whose review application is deemed withdrawn must make an application to

reinstate the review if it wishes to proceed. Instead of taking the obvious precaution of making such an application in advance of the hearing, knowing that the in limine point was going to be raised, the applicant adopted a high-risk strategy of betting solely on a tenuous legal argument to try and avoid the consequence of not having brought such an application.

- [14] The only application for condonation the applicant brought concerns the original delay in filing the review application before it was deemed to have been withdrawn.

Late filing of the review application

- [15] The arbitration award was issued on 28 July 2017. In terms of s 145(1)(a) of the Labour Relations Act, 66 of 1995 ('the LRA'), the applicant should have applied to review the arbitration award within six weeks of receiving it. Therefore, the application should have been filed on 11 September 2017 because the applicant received the award on 31 July 2017. However, he only filed his review application on 8 August 2019 which was 99 (ninety-nine) weeks or 23 (twenty-three) months late. Accordingly, he took more than 16 times longer than he should have. A delay of this magnitude is extraordinarily long and requires a very good explanation accounting for the whole period of the delay.
- [16] It was already at least nine weeks after obtaining the award, that the applicant took a first step in October 2017 when he approached an attorney, Mr V Seymour ('Seymour'). He claims he instructed him to launch review proceedings. However, a review application was never instituted and the applicant then approached Erasmus Ranchod & Associates, his previous attorneys of record, on 22 May 2019. As it happened, Seymour happened to be in court for another application, when this one was heard. He was given an opportunity to file an answering affidavit in the condonation application given that the applicant had largely blamed him for the delay. The finalisation of the application was postponed pending the filing of his affidavit, a replying affidavit from the applicant, and supplementary heads from both of the parties. In his answering affidavit, Seymour explained that he was no longer working for Hilton Moodaley Attorneys, which was the firm he worked for when the applicant consulted him. None of the staff working there when he worked there was still employed and the main partner had suffered a stroke and only recently returned to work when he made enquiries to try and recover the applicant's file to confirm his consultations with him. A paralegal was trying to locate the file but apparently had not been successful when Seymour deposed to his affidavit.
- [17] What is the applicant's explanation for this exceptional delay? Firstly, he pleads that he is a lay person and would not have known about the 6 (six) week time limit for bringing review proceedings. He further notes that the CCMA arbitration award failed to advise him on the time frame to institute review proceedings if he wished to take the matter further.
- [18] However, Seymour claims he drew Hans's attention to the six week requirement at the first consultation he had with him, contrary to Hans's claim that he did not. Seymour said he did so, because that is the first thing he would check, knowing it would entail a condonation application. He noted Hans's claim he had provided him with 'financial instructions' at that

stage, but could not confirm that in the absence of confirmatory documentation. Hans claimed that at some unspecified stage, Seymour told him the court had issued a case number, so he was under the impression that a Seymour had instituted a review application and that all the necessary steps were taken. Seymour said he would not have obtained a case number and then done nothing about it. It is obvious he did not request one because, the case number was only issued in 2019.

- [19] Hans denied Seymour advised him of the processes which needed to be followed to prosecute the review application, except that at some stage he would have to sign an affidavit Seymour would draft. He also stated in his replying affidavit that: “The only part of the court process that Mr Seymour explained to me is that he would start with an affidavit in my name, which I must come and sign when he is done.”
- [20] Hans claims he had frequent communications with Seymour from the first meeting in October 2017 until their second meeting in January 2018, during which he was enquiring about the review application. However, Hans claims that he changed his phones during January 2018 so he lost all his messages with Seymour. Seymour recalls having a few consultations with Hans up to January 2018, some of which were at his office in Mitchells’ plain. Seymour recalled that he wanted to examine a copy of PRASA’s Company Vehicle Policy, a policy that was central to the misconduct charges, in order to draft a review application, but only obtained it in January 2018 from the applicant’s union. This had been arranged by a PRASA colleague of Hans, whom he had previously acted for and who had referred Hans to him. In his replying affidavit, Hans disputes this and claimed he had provided the bundle of documents that were used in the arbitration hearing to Seymour when they first met in October 2017. The vehicle policy was included in those documents.
- [21] Hans claims he paid R 5,000 to Seymour on 19 February 2018, and that the latter messaged him to enquire what time he could come and see him at his law office on a particular Friday. Hans does not explain if he confirmed a meeting with Seymour, but says, he received a message from him stating that he had received the money and would let him know of the way forward. He says that not long after this Seymour told him that it would take about a year to get a hearing date, so he patiently waited to be told of the hearing date. Seymour could not confirm receipt of the payment without any confirmatory documentation but maintains that in February 2018 he advised Hans of his prima facie view of prospects of success in a review application on the information available to him, and invited him to obtain another opinion if he felt he had not properly considered his case. He agrees he might have told Hans that the entire review process could take a year but would also have explained the processes that needed to be followed, including filing a condonation application.
- [22] Hans agreed he received Seymour’s prima facie view of his case, but according to him this occurred nearly a year later when he had a meeting with Seymour on 31 January 2019. He had asked for the meeting as he was getting ‘more concerned’ and wanted to discuss the matter with Seymour. When he met him, Seymour advised him his case was difficult and if

he lost it, he could lose his house. Seymour advised him to write to the chief executive officer of PRASA explaining his dismissal and asking for reinstatement. Seymour insists that he never saw or heard from Hans since their last encounter early the previous year.

- [23] Despite the lack of any demonstrable progress by January 2019, Hans insists that he still was 'under the impression' that his application had been launched. Seymour maintained that he discussed the merits of the case with Hans in February or March 2018.
- [24] He also alleges that between 31 January 2019 and 22 May 2019 he struggled to get in touch with Seymour, but the latter disputes this claiming he could simply have come to his office and waited to see him like most of his clients did. He confirms not seeing or hearing from Hans from around February or March 2018.
- [25] Hans said that Seymour 'went quiet again' after January 2019, and 'after another long delay without any news from Seymour' he decided to approach another attorney whom he consulted with on 22 May 2019, who advised him to find out if Seymour had launched the application and to obtain his file from him. He only messaged Seymour on 4 June 2019. He subsequently learnt that he was no longer at the Mitchells Plain legal practice. He claims Seymour arranged to come and see him but never did. It was at that stage because he could not get a case number from Seymour that he realised no review had been instituted.
- [26] He claims that he tried to find out whether any review proceedings were instituted and believes that Seymour was dishonest with him between October 2017 and June 2019 by not disclosing no review had been instituted. He therefore, blames Seymour for the extent of the delay.

Evaluation

- [27] On the face of it, considering the merits of the condonation application for the late filing of the review, is matter that ought to be considered after first deciding if the review application should be resuscitated at all. However, as a decision to reinstate a review application depends in part on the merits of the review application, then the success or failure of the condonation

application can be decisive on whether the review should be reinstated. With that in mind I was of the view that it would

make sense to first consider the merits of the condonation application for the late filing of the review application and I began

to evaluate the case for condoning the late filing of the review application, an issue which both parties had canvassed extensively in argument.

[28] However, faced as I am with an un-resurrected review application, it is not appropriate to make a condonation ruling in a review application which does not even have the status of a pending matter. I am not even able to apply the generous principles mentioned in the Coericius judgment because the applicant made no effort to advance reasons why he should be excused his significant non-compliance with the 60-day requirement. There is no semblance of a basis to condone it before the court.

Conclusion and costs

[29] In the upshot, the review application remains dormant and the condonation application for the late institution of the review proceedings cannot be decided despite the amount of time devoted to the issue in the papers and in argument. I am compelled to strike the matter of the roll despite the waste of court time this has entailed.

[30] Nonetheless, the way the applicant has conducted this matter is largely to blame for these inconclusive proceedings and the time wasted. In the circumstances he should at least pay the costs of the application before he undertakes any further litigious steps in this matter.

Order

[1] The application to condone the late filing of the review application is struck off the roll as the review application is deemed withdrawn.

[2] The Applicant must pay the Respondent's wasted costs of preparation and representation at the hearing on 5 October 2022 and may not take any further steps in this matter until he has done so.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives For the Applicant A de Lange of Laäs & Scholtz Inc. For the Respondents G Cassells of Maserumule Attorneys

[1] South African Police Services v Coericius and Others [2023] 1 BLLR 28 (LAC) at paragraphs [12] – [14].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCCT/2023/72.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hans-v-passenger-unknown-topic-alcct-2023>

Prepared on 9 October 2026 · Esheria