

SOUTH AFRICA / JUDGMENT

Hospersa obo Swartz v Department of Transport, Eastern Cape (P24/2022)

[2023] ZALCPE 24 (15 November 2023)

[2023] ZALCPE 24

COURT

Labour Court Port Elizabeth

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

P24/2022

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

Case

No: P24/2022

In

the matter between:

HOSPERSA

obo P SWARTZ

Applicants

and

DEPARTMENT

OF TRANSPORT, EASTERN CAPE Respondent

Heard: 01

June 2023

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website. The date and time for hand-down is deemed to

be on 15 November 2023

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicants approached this Court in terms of section 158(1)(c) of the Labour Relations Act[1]. They seek that an arbitration award dated 18 November 2021 issued by an Arbitrator acting under the auspices of the GPSSBC be declared an order of this Court. They further seek interest on the amount payable in terms of the arbitration award.

[2] The employee (Mr Swartz), a member of HOSPERSA, had lodged an unfair labour practice dispute against the respondent (Department). In the arbitration award, the Arbitrator had found that the Department had

committed an unfair labour practice against Swartz related to benefits by failing to place him on salary level 7 since July 2009

in accordance with a Circular issued by the Department. The Arbitrator ordered the Department to pay to Swartz, an amount of R643 248.00, and to further place him at a correct salary scale with effect from January 2022.

[3] The requirements for an arbitration award to be made an order of Court under section 158(1)(c) of the LRA are that (a) “the agreement or award is sufficiently clear to enable the defaulting party to know exactly what it should do to comply with it” and (b), “the defaulting party has failed to comply with the terms of the agreement or award”. Once these two requirements are met, this Court will then exercise its discretion as to whether such an order should be granted, taking into account all relevant facts and circumstances that are necessary to satisfy the demands of law and fairness.[2] The relevant facts and circumstances of this case are as follows;

[4] The arbitration award was issued on 18 November 2021. The Department subsequently launched a review application under case number PR31/22 in February 2022. The applicants filed a Notice of Opposition on 23 February 2022. In the present application, the applicants contended that the review application was defective as it was launched outside of the statutory time frames and without an application for condonation. They had further pointed out that the Department failed to furnish security as contemplated in section 145(7) and (8) of the LRA. The applicants further contended that the review application has been deemed withdrawn under the provisions of clause 11.2.3 of the Practice Manual of this Court, since the transcribed record of proceedings in terms of Rule 7A(6) of the Rules of the Court was only filed on 25 October 2022, and outside of the 60

day period.

- [5] Other than the defects with the review application as pointed out above by the applicants, a further basis upon which an order in terms of section 158(1)(c) of the LRA was sought was that the Department was indebted to Swartz, and that he continued to suffer prejudice as long as there was non-compliance with the terms of the award.
- [6] This application having been served and filed on 10 March 2022, the Department's answering affidavit was filed on 15 November 2022. Despite it being filed out of time, the Department failed to seek condonation in that regard. As I understood the Department's arguments, condonation was not sought for the late filing of the answering affidavit because a bond of security was subsequently furnished on 22 March 2022, and after the lodging of this application.
- [7] The Department's contentions as to the reason that condonation was not sought are clearly without merit. A mere compliance with the provisions of section 145(7) and (8) of the LRA did not in any manner

absolve the Department from filing a proper answering affidavit in respect of the application in terms of section 158(1)(c) of the LRA. I therefore agree with the applicants' contentions that since the answering affidavit was filed late and without an application for condonation, it is not properly before the Court.

- [8] Other than the above hurdles, the applicants had on 25 October 2022, informed the Department that its review application was in any event deemed withdrawn on account of its non-compliance with the time frames set out in clause 11.2.3 of the Practice Manual read with Rule 6 of the Rules of the Court, and further that a Rule 7A(8) Notice had not yet been filed. Notwithstanding this warning, the Department had not as at the date of the filing and service of the current

application, still not filed any application to have the review application reinstated. The application to reinstate the review as also confirmed by the applicants was only filed and served on or about 14 March 2023, which the applicants have opposed.

- [9] There is no doubt in this case that the arbitration award in question is sufficiently clear to enable the Department to know exactly what it should do to comply with it, and that it has failed to do so. The issue that remains to be determined is whether in the light of the factors pointed out above, the Court should exercise its discretion

in favour of making the award an order of Court.

- [10] To the extent that the Department had conceded that the review application was deemed withdrawn (by its filing of an application to reinstate it), it follows that any contentions and explanations in respect of the delays that occasioned the non-compliance with Rule 7A(6) of the Court's rules read with clause 11.2.2 of the Practice Manual[3], are for the purposes of this application unnecessary to deal with. This is so in that if indeed there were circumstances that prevented the timeous filing of the record, these ought to have been dealt with by either seeking an indulgence from the applicants or from the Judge President

of this Court as contemplated in clause 11.2.3 of the Practice Manual. To the extent that it is common cause that this was not done, a proper application to seek a revival of the review was required ought in my view have long been filed if the Department was serious in expediting the finalisation of the review.

- [11] Taking the above into account, it needs to be pointed out that the Department's approach to its review application was replete with inertia and procedural failures at each turn. This is evident from a lack of condonation application in respect of the review application and the non-compliance with the provisions of section 145(7) and (8) of the LRA. Furthermore, it was not in dispute that the applicants informed the Department as far back as 25 October 2022 that the review application was deemed withdrawn. It nonetheless took the Department until 14 March 2023 to file an application to reinstate that review application. This was so despite having filed the transcribed record as late as 25 October 2022 according to the applicants. Furthermore, the Department despite receipt of the current application, elected not to file an answering affidavit, and only did so some six months later, and yet again, without an application for condonation. In the end, the review application, despite it being said that it was properly before the Court, the Department has yet to file a Rule 7A(8) Notice.
- [12] A further hurdle the Department is faced with is that given the fact that the review application was filed on 4 March 2022, that application is ordinarily archived and regarded as having lapsed under the provisions of clause 11.2.7 of the Practice Manual[4]. This is so to the extent that the Department has not filed and served all the necessary papers within the twelve months period of the date of the launch of the application.
- [13] As already indicated, whether an award should be made an order of Court involves an exercise of a judicial discretion, taking into account inter alia, the impact that such an order would have on the parties' rights. It has been said that in such cases, a party's entitlement to bring an application for reinstatement of the review application[5] ought to be considered.
- [14] To the extent that procedural failures on the part of the Department in prosecuting the review application and in further opposing this application were pointed out elsewhere in this judgment, it was held in *South African Police Services v Coericius and Others*[6] that in such cases, a fair-minded examination of all the circumstances was required, and that the penalty for procedural blunders lie in costs orders rather than an outright dismissal of an application.
- [15] In this case, notwithstanding all the procedural failures already mentioned, what is common cause is that albeit the review application remains archived, a condonation application in respect of its late filing has been filed and served, and a security of bond has since been furnished. Furthermore, the Rule 7A(6) has since been filed and served, as well as an application to reinstate the review application.

- [16] Against the above factors, it is taken into account that an award sounding in money was granted to Swartz in terms of the arbitration award, and who as at the date of the hearing of this matter, remained in the employ of the Department. Viewed objectively, the relevant facts and circumstances of this case are such that it is the Department that stands to suffer more prejudice rather than Swartz, should the order sought be granted. This is so in that any amounts payable to Swartz in terms of the award remains due and with interest, until the review application is disposed of at some point. The demands of law and fairness therefore in the light of the factors pointed out dictate that the Department be afforded an opportunity to have its application for the reinstatement of the review application be heard, and for the current application to be postponed.
- [17] Having had regard to the requirements of law and fairness, it is my view that the Department ought to be mulcted with punitive costs. This is so due to not only its dilatoriness in prosecuting the review application, but for also as a result thereof, compelling the applicants to bring this application in circumstances where they had at each turn, implored the Department to expedite the review application without much success.
- [18] Accordingly, the following order is made;

Order:

1. The applicants' application to make the arbitration award issued by the second respondent an order of Court in terms of section 158(1)(c) of the Labour Relations Act is postponed sine die.
2. To the extent that the Respondent had brought an application in accordance with clause 16.2 of the Practice Manual of this Court to reinstate the review application, which application is opposed, it is ordered to file a Rule 22B within 21 days of the date of this order.
3. The respondent is ordered to pay the costs of the applicants' application in terms of section 158(1)(c) of the Labour Relations Act, on a scale as between attorney and client.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

Appearance:

For the Applicants: CLJ Jessop of Brown Braude & Vlok INC

For the Respondent: Adv N James, instructed by the State Attorney, Gqeberha.

[1] Act 66 of 1995, as amended.

[2] See *Greater Taung Local Municipality v South African Local Government Bargaining Council and Others*

(2023) 44 ILJ 761 (LAC) at para 15.

[3] The full text of clause 11.2 reads; ‘11.2 Applications to review and to set aside arbitration awards and rulings; 11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days. 11.2.2 For the purpose of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received. 11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent’s consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time and consent has been given. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.’

[3] The full text of clause 11.2 reads;

‘11.2 Applications to review and to set aside arbitration awards and rulings;

11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

11.2.2 For the purpose of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent’s consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time and consent has been given. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.’

[4] Which provides; ‘11.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation of hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should be archived or be removed from the archive.’

[4] Which provides;

‘11.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation of hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should be archived or be removed from the archive.’

[5] See *Greater Taung Local Municipality v South African Local Government Bargaining Council and Others*

[2023] ZALAC 1; (2023) 44 ILJ 761 (LAC).

[6]

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

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