

SOUTH AFRICA / JUDGMENT

Mahabo and Others v South African Local Government Bargaining Council (SALGBC) and Others (JR70/19) [2024] ZALCJHB 389 (25 September 2024)

[2024] ZALCJHB 389

COURT

Labour Court Johannesburg

BEFORE

Myburgh, AJ

CASE / FILE NUMBER

JR70/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR70/19

In

the matter between:

MALEBO
AUGUSTINE MAHABO AND 2 OTHERS
Applicant
And
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL (SALGBC)
First
Respondent
MMAMAHLOLA
GLORIA RABANYANA N.O.
Second
Respondent
JOHANNESBURG
METRO POLICE
DEPARTMENT
(JMPD)
Third

Respondent

Heard: 12 September 2024

Delivered: 25 September 2024
(This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 25 September 2024.)

JUDGMENT

MYBURGH, AJ

Introduction

[1] There are two applications before me: an application to review a condonation ruling issued by the second respondent (commissioner) in which she refused to condone the late referral of the applicants' unfair dismissal dispute to the first respondent (bargaining

council); and a rule 11 application brought by the third respondent (JMPD) for the dismissal of the review application on account of the undue delay in the prosecution thereof.

[2] It warrants mention that the applicants are unrepresented. Despite their best endeavours (no doubt), some of their papers are difficult to follow, with things being exacerbated by their haphazard indexing and pagination of the court file. I have tried my best to reorder the file in an attempt to make sense of things.

[3] From what I can gather, the material facts and sequence of events is this:

(i) the three applicants appear to have been engaged as recruits and trainees by the JMPD; (ii) in March 2017, they were dismissed; (iii) on 1 November 2018, they referred an unfair dismissal dispute to the bargaining council and simultaneously brought an application for condonation for the 18-month delay in doing so; (iv) the condonation application was unopposed and was heard on paper by the commissioner; (v) on 5 January 2019, the commissioner issued a condonation ruling in which she refused the application for condonation; (vi) on 22 January 2019, the applicants filed a review application in terms of section 158(1)(g) of the LRA; (vii) on 26 February 2019, the applicants filed the review record (comprising of their referral and condonation application in the bargaining council and the commissioner's

ruling); (viii) on 28 February 2019, the JMPD filed an answering affidavit; (ix) on 9 September 2021 – 2 ½ years later – the JMPD filed a rule 11 application seeking the dismissal of the review application for want of timeous prosecution; (x) on 20 September 2021, the applicants filed their replying affidavit in the review[1] together with an application for condonation for the late filing thereof; and (xi) on 23 February 2023, Prinsloo J granted an order removing the matter from the roll and directing the Registrar to enrol the review and rule 11 applications for simultaneous

hearing on the opposed motion roll.

- [4] When the matter was called on 5 September 2024, there was no appearance by JMPD's attorneys. Enquiries made by my secretary revealed that their email address had been incorrectly spelt with the result that the notice of set down miscarried. Nevertheless, Mr Kapalu (of the JMPD's attorneys) made his way to court and managed to present argument despite not having had much time to prepare. It was in these circumstances, and in the light of some questions from the bench, that I afforded both parties an opportunity to file further submissions in the rule 11 application, which they did on 9 and 12 September 2024, respectively.

The commissioner's condonation ruling

- [5] To place the commissioner's condonation ruling in context, it warrants mention that the affidavit filed in support of the application was sparse. Having recorded that the delay was 18 months, the deponent described the reason for lateness as being: "not aware of timelines; waiting for the outcome internally; went to seek advice from CCMA & union". In addressing prospects of success, this is all he said: "dismissal procedures were not followed; loss of career development; loss of income; loss of benefits". And he then contended that the employer would not be prejudiced because evidence was still available (witnesses and documentation).
- [6] Turning to his ruling, having summarised the applicants' case, the commissioner found as follows:

"7. The applicants failed to persuade me on the reason for the long delay. Having gone to the union and CCMA for advice does not justify the excessively long delay. If they sought advice early, they would not be having this problem. I am not convinced that they took the dispute seriously. The long delay was self-created and not justified.

8. As for the prospects, the applicants failed to convince me on how their dismissal was procedurally unfair. They did not even address me on substantive fairness.
11. I have considered all the aforementioned factors collectively. The degree of lateness is excessive. The applicants failed to convince me on the reason for the long delay. The lack of justified reasons for the long delay deems it unnecessary to even consider the prospects of success [the commissioner having earlier on cited three judgments in support of this], which in any event are slim. Granting condonation would amount to contravention of the court's decisions in the mentioned cases. Therefore, the applicants have failed to show good cause why condonation should be granted."

The rule 11 application

- [7] The review application was ripe for hearing six days after the JMPD filed its answering affidavit on 28 February 2019 (i.e. by 5 March

2019) – this being the day after the applicants’ replying affidavit was due. (They had five days within which to file it.)

[8] The essence of the JMPD’s rule 11 application is that, from 28 February / 5 March 2019, no further steps were taken by the applicants to prosecute the review application. The matter was ripe for hearing, but the applicants did not index and paginate the court file, set the matter down for hearing, or file heads of argument. Furthermore, for a period of in excess of 2 ½ years, they did not communicate with the JMPD as to why the matter was being delayed. They only resuscitated the review application on 20 September 2021 (when they filed their replying affidavit in the review), after the JMPD filed its rule 11 application.

[9] The prosecution of the review was regulated by the old Practice Manual, which the applicants have fallen foul of. Firstly, in terms of clause 16.1, the applicants were required to take steps to progress the review within six months after the filing of the JMPD’s

answering affidavit (on 28 February 2019), but they failed to do so for 2 ½ years, resulting in the matter being archived.

Secondly, in terms of clause 11.2.7, the applicants were required to ensure that all the necessary papers in the review application were filed within 12 months of the date of the launch of the review (i.e. by 22 January 2020) and inform the Registrar in writing by such time that the application was ready for allocation for hearing, which they failed to do, resulting in the matter also being archived. And in terms of clause 16.3, where a file is archived, this has the same consequences as to the further conduct of the matter “as the matter having been dismissed”, albeit that a procedure exists to reinstate the case on good cause shown.[2]

[10] The LAC has held that: (i) where a review application has been archived and regarded as lapsed (and there is no application to reinstate it), this court lacks jurisdiction to entertain the review; and (ii) in such circumstances, this court is, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction, alternatively, give the respondent an opportunity to file a separate rule 11 application demonstrating why the matter should be dismissed on the basis of undue delay in prosecuting it.[3] Following a review of the authorities,[4] Meyerowitz AJ recently held in *Aspen Pharmacare* that a rule 11 application is thus required in order for the review to be “finally dismissed”. [5] This appears to accord with LAC authority, and I thus concur.

[11] In the present case, the JMPD took the initiative and brought a rule 11 application as far back as September 2021. In circumstances where the applicants have not brought an application to reinstate the review, where they have not opposed the rule 11 application, where the rule 11 application demonstrates flagrant inaction on the part of the applicants to prosecute the review for in excess of 2 ½ years (30 months) and inherent prejudice to the JPMD, I am satisfied that the JPMD has made out a case for the dismissal of the review application. I hold accordingly.

The review application

[12] In the circumstances, the review application does not stand to be determined. However, given that the applicants are lay people, I consider it appropriate to mention that if I had been seized with the review application, I would not have found the commissioner's condonation ruling to be reviewable for two fundamental reasons. Firstly, in their founding affidavit in the review, the applicants make out no case at all as to why the ruling is reviewable (and simply repeat the contents of their cryptic condonation application that served before the commissioner). Secondly, on the material before him (see above), the commissioner's decision patently falls within a range of reasonable outcomes – in fact, it is difficult to conceive of any commissioner having granted the applicants condonation on the basis thereof.

Order

[13] Accordingly, I make the following order:

1. the rule 11 application is granted;
2. the review application is dismissed;
3. there is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicants: in person

For the third respondent: Mr I Kapalu of Moodie & Robertson

[1] There is more than one iteration of this document in the court file.

[2] E Tradex (Pty) Ltd t/a Global Trade Solution v Finch & others

(2022) 43 ILJ 2727 (LAC) at para 10.

[3] Macsteel Trading Wadeville v Van der Merwe NO & others

(2019) 40 ILJ 798 (LAC) at para 25; cited with approval in E Tradex at para 15.

[4] Including Macsteel and E Tradex.

[5] Aspen Pharmacare Ltd v CEPPWAWU obo Tabata & another

(2024) 45 ILJ 2024 (LC) at paras 53-54.

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Prepared on 13 October 2026 · Esheria