

SOUTH AFRICA / JUDGMENT

Mashiane v Safety and Security Sectoral Bargaining Council and Others (JR1623/21) [2024] ZALCJHB 432 (13 November 2024)

[2024] ZALCJHB 432

COURT

Labour Court Johannesburg

BEFORE

M Naidoo

CASE / FILE NUMBER

JR1623/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: JR 1623/21

In

the matter between:

TOTAL

MASHIANE

Applicant

and

SAFETY

AND SECURITY SECTORIAL

BARGAINING

COUNCIL

First

Respondent

COMMISSIONER

L NAIDOO

Second

Respondent

SOUTH

AFRICAN POLICE SERVICE

Third

Respondent

Heard: 7

November 2024

Delivered: 13 November

2024

JUDGMENT

NAIDOO, AJ

Introduction

[1] The applicant seeks to review and set aside an arbitration award delivered by the second respondent wherein the applicant's

dismissal was found to be substantively fair. The matter is opposed by the third respondent, the South African Police Service (SAPS).

Before this court, there is also a condonation application brought by the SAPS for the alleged late filing of its answering affidavit. In its application, the SAPS has raised two points in limine, the legal consequence of either one being upheld, will be that the applicant's review application is deemed withdrawn. Parties

agreed that the court first determine the in limines.

[2] The SAPS first in limine is that the applicant has failed to file the full record of the arbitration proceedings within the 6 months envisaged in clause

11.2.2 of the now defunct Practice Manual[1]. Furthermore, the applicant has failed to obtain the SAPS consent to extend the 60-day period. Following these facts, the SAPS submits that the applicant's review application is deemed withdrawn as per clause 11.2.3 of the Practice Manual. It bears mentioning that in terms of the new Labour Court rules[2], the SAPS in limine falls squarely within the provisions of rule 37(12)[3] read with 37(15),[4] and hence be determined within the confines of the new rules.

[3] The second in limine is that the applicant has fallen short of clause 11.2.7 of the Practice Manual, which stipulates that a review application will be archived and regarded as lapsed should an applicant fail to ensure that all the necessary papers in the review application (with the exception of heads of argument) are filed within 12 months of the review application being launched.

[4] I brought to the attention of SAPS counsel, Ms Bismilla, that there does not appear to be a similar provision in the new rules, which provides for that which is the same or similar to clause 11.2.7 of the now non-operative Practice Manual. Ms Bismilla conceded this point but submitted that at the time the SAPS raised this provision, the Practice Manual was in force. Counsel further submitted that this court should exercise discretion to enforce the repealed Practice Manual on a case-by-case basis. This is so, presumably in respect of the pending application, wherein a point of law has been taken in terms of the then Practice Manual.

[5] I accept that at the time the SAPS raised this argument on paper, the Practice Manual was alive and enforceable, however, at the time this court is called upon to determine this in limine, the new labour court rules are in operation.

[6] Regrettably, I cannot agree with the submission that this court has the discretion to rely upon and enforce the Practice Manual which has since been replaced. Counsel's submissions overlook the fact that in terms of the new rules and under the heading "COMMENCEMENT OF RULES AND REPEALS", reads the following:

'(1) These rules will come into operation on the day announced in the Government Gazette

(2) These rules repeal all of the existing rules for the Labour Court and the Practice Manual that came into effect on 1 April 2013.'

[7] The new rules came into operation on 17 July 2024 and at the time repealed the old rules as well the Practice Manual. Consequentially, the Practice Manual ceased to be operative as of 17 July 2024 and hence this court does not have any discretion to enforce the provisions of the Practice Manual post 17 July 2024.

[8] Ms Bismilla did not pursue the SAPS second in limine any further.

Evaluation of first in limine

[9] With regard to the first in limine, it is common cause that the applicant filed an incomplete record sometime in 2021 and to date, has failed to file the outstanding portions of the record, which includes the applicant's evidentiary bundle used at arbitration.

[10] In attempting to explain this omission, counsel for the applicant, Mr Aphane, submitted that the applicant's current legal team were not on brief when the incomplete record was filed and only became aware of this fact when the SAPS raised this point with them in correspondence.

[11] However, Mr Aphane could provide a cogent reason as to why steps were not taken by the applicant and his legal representatives, to address the fact, that to date, the full record had not been filed.

[12] Counsel attempted to argue that the SAPS were not blameless in this situation and sat back for nearly two years before raising the issue of an incomplete record. The problem with such an argument is that it loses sight of the fact that an enquiry as to whether rule 37(12) and

(15) have been breached, is a factual enquiry. Either the complete record was filed or not and if not, was consent obtained to extend the 60-day period or did the applicant approach the Judge President within the 60-day period, if consent was not forthcoming. If all these questions are answered in the negative, then axiomatically the legal consequence follows, that being the matter is deemed withdrawn. The applicant's argument in respect of the SAPS alleged dilatory conduct in bringing to the applicant's attention that the full record has not been filed, is best served in a reinstatement application when seeking to explain the delay in

filing the complete record.

- [13] Mr Aphane then sought to rely on the wording of the old rule 7A(6)[5] which stipulated an applicant should only file the relevant portions of a record for purposes of a review application. This argument falls short when counsel conceded to the fact that without having sight of the missing portion of the record, the applicant nor his representatives, are in a position to determine whether the missing portion is relevant to the applicant's review application or not.
- [14] In any event, as stated earlier, the old rules have been repealed and replaced with the new rules.
- [15] It is noteworthy to mention, that unlike rule 37(12), rule 7A(6), did not specifically direct an applicant to file the complete record when attempting to have an award set aside on grounds that an arbitrator's decision was unreasonable. However, in keeping with the authorities raised by Ms Bismilla, it has always been the case that an applicant is obliged to file a complete record when attacking the award on grounds of reasonableness. The rational being that a reviewing court must have sight of the totality of the evidence before an arbitrator when deciding whether or not an applicant has met the threshold which warrants the reviewing court's intervention. Rule 37(12), which now specifically sets out an applicant's obligation to file the complete record in support of a finding that an arbitrator arrived at a decision no reasonable arbitrator could have arrived at, merely codified an existing and binding principle at the time.
- [16] Having considered the above facts, it is clear that the applicant has failed to file the complete record within the 60-day period as prescribed and has further failed to seek any indulgence from the SAPS or direction from the Judge President. The applicant's review application is therefore deemed withdrawn. The applicant is not left without a remedy and may institute an application to reinstate his review application should he wish to do so in terms of Rule 37(18).
- [17] Despite Ms Bismilla's efforts in attempting to persuade me that costs ought to be granted in favour of the SAPS, I am not convinced that this matter warrants a cost order.

Order

1. The SAPS's first point in in limine is upheld.
2. The applicant's review application is deemed withdrawn in terms of rule 37(15) of the Labour Court rules.
3. There is no order as to costs.

M Naidoo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Instructed by: Mr MM Aphane Siebani Attorney For the First Respondent:
Instructed by: Ms S Bismilla Office of the State Attorney

- [1] Practice Manual of the Labour Court of South Africa, effective 1 April 2013, repealed with effect from July 2024.
- [2] GN 50608 of 3 May 2024: Rules for the conduct of proceedings in the Labour Court.
- [3] Rule 37(12): “The applicant must transcribe and make copies of the record and file only those portions of the record as may be necessary for the purposes of the review, and certify each copy as true and correct. If the applicant contends that the decision under review should be set aside because it is unreasonable or irrational in relation to the evidence that served before the decision-maker, the complete record must be transcribed”.
- [4] Rule 37(15): “If the applicant fails to file a transcribed 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. Any consent given must be expressed in writing and filed with the registrar”.

- [5] Rule 7A(6) reads: “The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body”.

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Prepared on 11 October 2026 · Esheria