

SOUTH AFRICA / JUDGMENT

Mogale and Another v Tshifhiwa N.O and Others (JR821/16) [2024] ZALCJHB 468 (18 November 2024) [2024] ZALCJHB 468

COURT

Labour Court Johannesburg

BEFORE

S M Shaba

CASE / FILE NUMBER

JR821/16

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

No: JR

821/16

In

the matter between:

MALOSE
SIMON MOGALE
First
Applicant
NGOAKO
HERENCE MPE
Second
Applicant
and
MYTHELA
IRENE TSHIFHIWA N.O
First
Respondent
COMISION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second
Respondent
MOGALAKWENA

PLATINUM MINE

Third

Respondent

Heard: 9

October 2024

Delivered:

The judgment was handed down electronically by circulation to parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for the handing down is deemed to be on 18 October 2024.

Summary:

Application for reinstatement of the main section 145 review application - Consequences of review application being archived in terms of the Practice Manual-Reinstatement application effectively a condonation application that can only be granted on good cause shown.

JUDGMENT

SHABA, AJ

Introduction

- [1] The applicants seek an order, reinstating their main review application, which is deemed to be withdrawn, lapsed and archived in terms of the then applicable Practice Manual of this Court (Practice Manual).[1] The Third Respondent opposes the application.

Background

- [2] The First Respondent issued an award on 1 February 2016 wherein the dismissal of the Applicants was found to be substantively fair.
- [3] The Applicants only launched a review application on 25 April 2016, which was out of time.
- [4] The Applicants have since delivered a condonation application for their late main review application on 28 April 2016 which is opposed by the Third Respondent. Such main review and condonation applications are not before this Court.
- [5] On the Applicants' own version, the Registrar of this Court (the Registrar) notified them on 26 May 2016 that the record was delivered by the First Respondent and ready for collection.
- [6] The Applicants collected the record on an unspecified date and caused the transcription thereof by first, I Africa and thereafter, Digital Audio Recording, with the latter, having made the transcripts available to the Applicants on 16 March 2017.
- [7] On 19 May 2017, the Third Respondent served a deemed withdrawal notice to the Applicants based on Clause 11.2.3 of the Practice Manual.

- [8] Despite the availability of the transcripts and the deemed withdrawal notice as aforementioned, the Applicants still went ahead and on their own version, collected the transcripts from Digital Audio of Recording only on 30 September 2021.
- [9] The 60-day period for the Applicants to deliver the record of proceedings had already lapsed on 16 March 2017.
- [10] According to the Third Respondent, the Applicant served it with an incomplete record of the arbitration proceedings on 30 September
2021. Only the transcribed record of the proceedings and not the additional documents that served at arbitration proceedings and, that form part of the then Rule 7A (3), of this Court, were served.
- [11] The Applicants on their own version, filed the record, that the Third Respondent claims to be incomplete, on 5 October 2021.
- [12] On 5 October 2021, the Third Respondent advised the Applicants that their main review application was archived on 19 May 2017, and that this warranted a reinstatement application as their review is deemed to have been withdrawn.
- [13] Despite the Third Respondent's e-mail of 5 October 2021 as aforementioned, the Applicants only served this reinstatement application to the Third Respondent and other Respondents on 16 February 2022 and filed on 3 March 2022. This was approximately four and half months late.
- [14] The Applicants have, at the time of the hearing of this application, not delivered a notice that they stand by their papers or supplement them in their main review application in terms of the then Rule 7A(8)(a) or 7A(8)(b) of this Court.

Practice Manual

- [15] The critical Clauses in the then applicable Practice Manual are:

'11.2.2 For the purposes 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.

...

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 for 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 not be archived or be removed from the archive.

16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

- in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;
- in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and
- when a party fails to comply with a direction issued by a judge within the stipulated time limit.'

The law on reinstatement applications

[16] In *Aspen Pharmacare Ltd v Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Tabata* 7 another,[2] it was held that:

‘[39] In the important judgment of *Overberg District Municipality v Independent Municipal & Allied Trade Union on behalf of Spangenberg & others*, Lagrange J seemed to accept that operation of the above clauses created the same result whether the Practice Manual deemed a review

application to have been “withdrawn”, “lapsed” or “archived”. Insofar as this was indeed the learned judge’s assessment, I concur, and I will use the umbrella term “archived” to refer to all three scenarios.’

[17] Based on the above authorities, the words “withdrawn”, “lapsed” and “archived”, will be used interchangeably to mean archived in relation to the Applicant’s main review application, in these proceedings.

[18] Once a main review application has been archived, it is obligatory for an application for its reinstatement to be delivered (served, filed and issued) expeditiously.

[19] In *Macsteel Trading Wadeville v Van der Merwe NO & others*[3], the effect of the occurrence of the “archiving event” was addressed:

‘[20] A primary object of the Act is to promote the effective resolution of labour disputes, integral to which is the speedy resolution of disputes. As stated by the Constitutional Court in *Toyota*:

“Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but ultimately, also to the employer who may have to reinstate workers after many years.”

[20] In *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch & others*[4] (*E Tradex*), the need to finalise matters in this Court as expeditiously as possible by practitioners was once more emphasized as it was held

inter alia that:

‘[14] The case law on the application of the Practice Manual has consistently applied its provisions strictly. The rationale is patent and rooted in the advent of the Practice Manual as a gloss on the Rules of the Labour Court. In a busy court inundated by cases, discipline on the part of practitioners is a critical virtue if good order and respectable turnaround times are to be achieved.’

[21] There are stringent requirements for the nature and content of reinstatement applications to reinstate main review applications. Reinstatement applications are now deemed to be condonation applications based on the authorities dealt with further.

[22] The requirements for an application for reinstatement were addressed inter alia in *Samuels v Old Mutual Bank*[5] wherein it was held that:

‘In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised’ (emphasis added).

[23] In *Bidvest Protea Coin (Pty) Ltd and SATAWU and others*[6] it was held that:

‘[10] From the above authorities, it is clear that the enquiry to be conducted is that which would be applied in an application for condonation, and that the period between the date of filing of a review application and the expiry of the 60-day period within which the record is to be filed, as well as events after that date, must be taken into account.’ (emphasis added).

[24] The above principle was followed in the *City of Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council and others*[7] wherein it was held that:

‘[5] In an application to reinstate a review deemed withdrawn, the applicant must demonstrate good cause. This is so in that such applications are akin to seeking condonation for the failure to comply with stipulated time-lines. When considering whether good cause has been demonstrated, the court exercises a discretion having taken account of inter alia the degree of lateness, the explanation therefor, the prospects of success and the importance of the case.’ (emphasis added).

[25] Regard being had to the applicable Practice Manual and authorities above; it is now trite that an application for the reinstatement of a main review application must fall in all four corners with the requirements of a condonation application.

Whether the applicants have shown good cause?

Length of delay

[26] It is common cause that the Applicant’s main review application was delivered late and that condonation application related thereto, is opposed by the Third Respondent. Both merits of such main review and condonation applications, are not before this Court for adjudication.

[27] The arbitration award relevant herein was issued as far back as 1 February 2016[8]. The Applicants are silent on when they received such award and only mention that they “issued” their main review application on 26 April 2016[9]. The delivery of the Applicant’s main review application was thus out of the six weeks[10], hence they delivered a condonation application related thereto, which is not a subject matter of these reinstatement proceedings.

[28] On their own version, the applicants were informed by the Registrar on 26 May 2016 that the record related to their main review application was ready for collection[11]. They had to collect such record within 7 (seven) days and did not do so.

[29] The 60 days within which to file the record or ask for an extension related thereto, expired on 23 August 2016. They did neither of the two as at such date.

[30] Despite having been made aware by the Digital Audio recording that the transcribed record, was available on 16 March 2017[12], the Applicants only collected the transcribed records on 30 September 2021 and filed same on 5 October 2021[13]. This is an excessive delay of four and a half years or so.

[31] According to the Third Respondent, the record filed by the Applicants is still incomplete as the Applicants did not serve it with the relevant bundle of documents that were used in the arbitration proceedings relevant herein[14].

[32] It is common cause that the Applicants became fully aware of the fact that their main review application was archived on 19 May 2017[15]. They regardless of same, served the alleged incomplete record on 30 September 2021 and filed it on 5 October 2021. Effectively, four years and five months or so.

[33] The Applicants, eight years after their main review application was delivered, did not take further steps to prosecute their review

application as they only failed to deliver a complete record, but the then 7A(8)(a) or 7A(8)(b) notice, which phenomenon renders the Third Respondent unable to answer the Applicants founding papers[16].

[34] Despite the Applicants' main review, having been archived as far back as 19 May 2017 as aforementioned. The Applicants only served their reinstatement application 4 years and 5 months, late on 16 February 2022[17].

[35] In *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*, [18] and in emphasizing the importance of expeditious resolution of disputes, the Court said the following:

'[187] Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation the Labour Court* held:

"It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes..."

[36] In *Groenewald and Another v National Transport Movement* [19], it was held that:

'[23] Dealing with the issue of the delay per se, the longer the delay, the worse it is for an applicant seeking condonation. An excessive delay could in itself be seen to be faced with the issue of good cause. As a general benchmark, delays in excess of two months after the expiry of the time limit can generally be described to start becoming excessive.'

[37] Inordinate and excessive delays by the Applicants to file the complete record and all the papers in relation to the further prosecution of their main review application, including having delayed in launching this reinstatement application, warrant refusal of condonation for their reinstatement application, by this Court based on the above authorities.

Explanation for the delay

[38] Failure to give an adequate, reasonable, acceptable and satisfactory explanation for excessive and inordinate delays, attracts refusal to grant condonation.

[39] I am persuaded by the Third Respondent's submissions that the Applicant have failed to provide a compelling and convincing explanation covering the entire period of the excessive delays in prosecuting their main review application and lodging this reinstatement application.

[40] In *Colett v Commission for Conciliation, Mediation and Arbitration and others*, [20] expounding the principles applicable when dealing with a condonation application, the Labour Appeal Court stated that:

[38] There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In NUM v Council for Mineral Technology, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in Melane v Santam Insurance Co Ltd 1962

(4) SA 531 (A) at 532C–D [also reported at [1962] 4 All SA 442 (A) – Ed] should be followed but:

“(T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”(emphasis added).

[41] There is no explanation at all before me why:

41.1 The Applicant’s main review application was filed outside the required six weeks even though such subject matter is still for consideration in the condonation of the main review application,

41.2 The Applicant failed to collect the record within 7 days after the Registrar notified them of its availability on 26 May 2016,

41.3 The Applicants did not file the record within the required 60 days or at least, requested an extension to do so, from the Third Respondent,

41.4 The Applicants did not collect the transcribed record that was made available to them by the Digital Audio recording on 16 March 2017, and only did so on 30 September 2021, save for the unsubstantiated financial difficulties,

41.5 I Africa could not continue to transcribe the record before the transcription was done by Digital Audio recording as well as that,

41.6 Being fully aware that their main review application was archived on 19 May 2017, they only served the reinstatement application that is the subject matter of these proceedings only on 16 February 2022.

[42] In South African Transport and Allied Workers Union v Algoa Bus Company (Pty) Ltd and others [21] it was held that:

[12] The third respondent had an obligation to explain the full extent of the delay. It did not. It omitted essential dates and left portions of the delay unaccounted for... The absence of reasonable explanation for inordinate delay constitutes sufficient grounds for the refusal of a condonation application.’ (emphasis added).

[43] The onus lies on the Applicants to account for each and every period of the excessive delays relating to the delivery of the record in their main review application and their reinstatement application. The inescapable conclusion is that they failed to discharge such onus.

[44] In Ntsele Commission for Conciliation Mediation and Arbitration[22] (draft note: in paragraph 27 of the 3rd Respondent's heads it was held that:

'[9] In this case, the Commissioner commented that the delay was extremely excessive, and the applicant had correctly also conceded that this was the case. The Commissioner further had regard to the reasons for the delay, which he regarded as central to the decision regarding condonation. It is trite that in order to assist an arbitrator in properly exercising his or her discretion in such matters, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation for each period of the delay. Any period of delay that is unaccounted for, will result in condonation being refused.

[45] The Applicants' reliance on the MEC: Department of Health Eastern Cape Province v PHSDSBC and Others[23] attached to their heads, cannot take their application for reinstatement any further. Firstly, the factual matrix and circumstances of such a case are distinguishable from those of the Applicant's reinstatement application. Secondly, such a case has since been superseded by inter alia the E Tradex supra.

[46] The Applicants situation is exacerbated by the fact that 8 years, or so, after the delivery of their main review application, they still have not delivered the complete record and all the necessary papers for such review.

[47] Regard being had to all the above, the inescapable conclusion that this Court arrives at, is that the Applicants failed to show good cause to have their reinstatement application granted, as they inter alia failed to provide a satisfactory, reasonable, acceptable and adequate explanation for the excessive delays in failing to further

prosecute their main review application and bringing their reinstatement application late before this Court.

Prejudice

[48] The Applicants do not deal with the requirements of prejudice that stands to be suffered by the Third Respondent.

[49] The Applicants merely state that "the Respondents will not be prejudiced since they knew that a main application has been issued against them and has not been decided"[24].

[50] The Applicants further submit in their heads of arguments that "the main application was already opposed by the 3rd Respondent which will imply there is no prejudiced (sic) against them if this matter proceeds to revive the main application[25]".

[51] I am persuaded by the Third Respondent inter alia, that 8 years have lapsed and it is still involved in endless litigation with associated costs under circumstances where the Applicants have still not taken any steps to properly prosecute their review application[26]. Save for this reinstatement application.

[52] In MEWUSA obo Mahatola and Others v F and J Electrical[27] (MEWUSA), it was held that:

‘[20] I appreciate that if the applicants were ultimately successful if the matter was allowed to proceed they are being prejudiced by the proceedings been curtailed, whereas the respondent faces the prospect of defending a dismissal seven years after the event. It is an inherent risk of failing to obtain condonation for the late referral of disputes that applicants will not have their dispute ventilated before an independent forum. That is always an important consideration. However, while the LRA provides remedies for unfair dismissal those remedies must be invoked timeously. Once a party is late it should make every effort to ensure that the lateness is not prolonged. It cannot be expected that respondents must patiently wait for an indefinite period until applicants take all the necessary steps to finalise their referrals. As much as the applicants are prejudiced by forfeiting the independent adjudication of their dispute, respondents are prejudiced by the lack of timeous finality.’ (emphasis added).

[53] The prejudice that the Third Respondents stand to suffer, is exacerbated by the fact that the Applicant’s main review application, is still non-compliant with the applicable provisions of the then Practice Manual and the Rules of this Court 8 years after 2016.

[54] On the ground of prejudice to the Third Respondent, the Applicants’ reinstatement application stands to fail.

Prospects of success

[55] Given the excessive and inordinate delays and the unsatisfactory and inadequate explanation by the Applicants related thereto, the Applicants’ reinstatement application has to fail based solely thereon without having to consider the requirements of prospects of success.

[56] That the above should to be the case was held inter alia in Zwane v Samson N.O and others[28] that:

‘[14] In light of the above findings – that the applicant has failed to provide a reasonable and bona fide explanation for the excessive delays in the prosecution of the review, there is no requirement for this Court to consider the applicant’s prospects of success in the review application.’

[57] In Makuse v Commission for Conciliation, Mediation and Arbitration and others[29], it was held that:

[20] ... (T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation. for the delay, an application for condonation should be refused.

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.

[21] In the light of this dictum, given that the applicant has not provided a reasonable and acceptable explanation for the delay and is guilty of a flagrant and gross failure to comply with the prescribed time-period (the application being eight months late), her prospects of success are immaterial, and thus need not be considered.'

[58] In *Grootboom v National Prosecuting Authority and another*[30], it was held amongst others that:

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.' (emphasis added).

[59] In *MEWUSA* it was also inter alia held that:

[13] It is also well established that without a reasonable and acceptable explanation for delay, a court may, in the exercise of its discretion, refuse condonation irrespective of the prospects of success.'

[60] Regard being had to all the authorities above, the circumstances of this case are such that, prospects of success of the Applicants with their main review application, are not to be considered by this Court.

[61] Even if I may be wrong in not considering the prospects of success in the Applicants main review application, the Applicants failed to set out the material facts regarding their prospects of success with their main review application. The Applicants merely made a bold and unsubstantiated conclusion that... "indeed they have a strong case against the 3rd Respondent"[31].

[62] In any event, the Applicants did not even attach, the arbitration award which is a subject matter of assailment in the main review application let alone the bundle of documents that may or may not be indicative of the Applicants' prospects of success with their main review application.

Conclusion

[63] For all the reasons set out above, this Court arrives at the inescapable conclusion that the Applicants have not shown good cause why their main review application must be reinstated by this Court.

[64] Taking account of all the relevant facts and circumstances and having regard for the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I exercise my discretion as to costs accordingly.

[65] In the premises, I make the following order:

Order

1. The application for the reinstatement of the main review application is dismissed.
2. Condonation for the late filing of the record for the main review application is refused.
3. There is no order for costs.

S M Shaba

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Instructed by: T D Mashabane Mashabane Inc For the Respondent: Instructed by: Lynsey Foot Cliff Dekker Hofmeyr Inc

[1] Clause 11 and 16 of the Practice Manual of 2 April 2013 (Practice Manual).

[2]

[2024] 45 ILJ 2024 (LC);

[2024] ZALCPE 16 at para 39.

[3]

[2019] 40 ILJ 798 (LAC); [2018] ZALAC 50 at para 20.

[4]

[2022] 43 ILJ 2727 (LAC);

[2022] ZALAC 106 at para 14.

- [5] [[2017] 38 ILJ 1790 (LAC);
- [2017] 7 BLLR 681 (LAC) at para 17. See also *Govender & Others v CCMA & Others*
- [2024] ILJ 1197 (LAC) at 23.
- [6]
- [2020] JOL 48504 (LC) at para 10.
- [7]
- [2023] JOL 59388 (LC) at para 5.
- [8] Para 7 of the Third Respondent's answering affidavit (answering affidavit).
- [9] Para 9 of the Applicants founding affidavit (founding affidavit).
- [10] Section 145 (1)(a) of the Labour Relations Act (LRA), Act 66 of 1995, as amended.
- [11] Para 11 of the founding affidavit.
- [12] Ibid at para 12.
- [13] Ibid at para 13.
- [14] Para 15 of the answering affidavit.
- [15] Para 4.1 of the Applicants' heads.
- [16] Para 20 of the
- [17] Para 1.11 of the Third Respondent's heads.
- [18]
- [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC) at para 187.
- [19]
- [2024] ZALCJHB 35 at para 23.
- [20]
- [2014] 6 BLLR 523 (LAC); (2014) 35 ILJ 1948 (LAC) at para 38.
- [21]
- [2016] 7 BLLR 711 (LC); at para 12.
- [22]
- [2017] ZALCJHB 161 at para 9.
- [23]

[2020] ZALCPE 4.

[24] Para 19 of the founding affidavit.

[25] Para 5.5 of the Applicants' heads.

[26] Para 71 of the Third Respondent's affidavit.

[27]

[2016] ZALCJHB 167 at para 20.

[28]

[2019] JOL 45479 (LC) at para 14.

[29]

(2015) 12 BLLR 1216 (LC); [2015] ZALCJHB 265 (LC) at paras 20 – 21.

[30]

[2014] 1 BLLR 1 (CC); 2014 (2) SA 68 (CC) at para 51.

[31] Para 5.6 of the Applicant's heads.

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