

SOUTH AFRICA / JUDGMENT

Mokhele v Rustenburg Platinum Mine and Others (JR95/19) [2022] ZALCJHB 312 (11 November 2022)

[2022] ZALCJHB 312

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1515/2019

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR 1515/2019

In

the matter between:

GALDWIN

MOKHELE

Applicant

and

RUSTENBURG

PLATINUM MINE

First Respondent

MOHALE

CALVIN LEBEA

N.O.

Second Respondent

COMMISSION FOR

CONCILIATION, MEDIATION

AND

ARBITRATION

Third Respondent

Heard: 1 November 2022

Delivered: 8 November

2022

(This

judgement was handed down electronically by circulation to the

parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 8 November 2022.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to reinstate an application to review and set aside an arbitration award issued on 4 June 2019.

[2] The material facts are not in dispute. The applicant was dismissed by the first respondent in May 2015 on a charge of accepting an amount of R7000 from a supplier. The applicant disputed the fairness of his dismissal and referred the matter to arbitration. After a protracted hearing, the arbitrator issued an award in which he found that the applicant's dismissal was substantively fair (procedural fairness not being in issue). The arbitrator correctly identified the primary issue in dispute as the purpose for which the applicant had received the money. The first respondent's version was that the applicant had received the money to do favours to the supplier by expediting payment of their invoices, an act of misconduct contrary to its policy on receipt of

gifts and its code of ethics and business principles. The arbitrator recorded that the applicant had admitted that he was responsible for processing invoices from the supplier and that he had further conceded dealing directly with Van der Merwe. Further, the applicant

had not denied that when initially interviewed regarding the incident, he had disputed receiving any money from the supplier and

that it was only when in his presence Van der Merwe was placed on speakerphone and asked whether he gave any money to the applicant,

that the applicant admitted to receipt of the money. The arbitrator concluded that the applicant had received money from the manager of a supplier who had dealings with the first respondent and that his conduct was inconsistent with that of the person who knew that receipt of money from a supplier was improper. Further, the arbitrator found that if indeed Van der Merwe was a friend who had agreed to grant a loan, the applicant should have called him as a witness to exonerate himself. Further, at the disciplinary hearing, the applicant had testified that he had no personal relationship with Van der Merwe, a version diametrically opposed to that which he gave at the arbitration hearing. The applicant was a senior accountant. In his position, he could not have been mistaken to think that he could receive money from a representative of a supplier with whom the first respondent had business dealings and view the matter as a personal one. In any event, the applicant had contravened the first respondent's policy on the receipt of gifts. Even if his version that the cash he received was a loan were to be accepted, his conduct (and in

particular, his failure to make a declaration required in terms of the policy), amounted to a contravention of the policy. In short, the arbitrator considered that the applicant's version was highly improbable, and that he had placed himself in a position where his personal interests conflicted with those of his employer. In regard to sanction, the arbitrator took into account the seriousness of the offence and in particular that the applicant's misconduct had rendered him untrustworthy. Further, the applicant had displayed no remorse and there was thus a likelihood that he would commit similar misconduct if reinstated. For these reasons, the applicant's dismissal was upheld.

[3] The applicant instructed his attorney at the time to institute review proceedings. He states that he was advised to pay the costs of the transcribed proceedings and after approaching Legal Aid (who advised him in January 2020 that they could not assist) paid for the transcription. The applicant's then attorneys withdrew on 18 March 2020. In the interim, on 17 March 2020, the first respondent's attorneys filed a notice of deemed withdrawal recording that the record of the proceedings under review had been received by the registrar on 26th of August 2019 and that the 60- day period within which the applicant was required to file the record in terms of clause 11.2 of the Practice Manual had elapsed.

[4] In terms of the Practice Manual, the review application is deemed to have been withdrawn, given the applicant's failure to file the record within the prescribed time limit. As I have indicated, in these proceedings, the applicant seeks to reinstate the application.

[5] Paragraph 11.2 of the Practice Manual reads as follows:

...

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 the record within the prescribed

period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested that 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, applied to the Judge President in chambers for an extension of time.

[6] In *Overberg District Municipality v IMATU & others* (C 157/18, 8 June 2020), my colleague Lagrange J summarised the application of these provisions. He observed that prior to the advent of the Practice Manual, there was no time limit prescribed for the filing of a record of proceedings under review, and that the 60-day time limit was introduced to minimise delays in the prosecution of review applications. The Practice Manual is binding. In *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC), the LAC stated:

The Practice Manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the rules. Its provisions therefore are binding. The Labour Court's discretion in interpreting and applying the provisions of the Practice Manual remains intact, depending on the facts and circumstances of a particular matter before the court.'

[7] In *Macsteel Trading Wadeville v Van der Merwe N.O and others*

(2019) 40 ILJ 798 (LAC), the LAC noted that the underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution (referring to the decision of the Constitutional Court in *Toyota Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*

[2016] 3 BLLR 217 (CC)). At paragraph 23 of the judgment, the LAC noted 'It [the practice manual] is binding on the parties and the Labour Court'

[8] It is also clear from *Samuels and Macsteel* that when a review application lapses, or it is deemed withdrawn or dismissed in terms of clauses 11.2.3, 11.2.7 or 16.3 of the practice manual respectively, it remains so unless and until the applicant succeeds in an application to reinstate or retrieve the application, thus restoring its status as a pending application (see *Overberg Municipality* at paragraph 24). *Overberg Municipality* concerned, as does this case, the application of clause 11.2.3, and a failure to file the record of proceedings under review within the prescribed 60-day period. Lagrange J said the following (footnotes omitted):

[25] In this application the applicable deeming provision is clause 11.2.3. To date, there are no decisions of the Labour Appeal Court dealing with the interpretation of clause 11.2.3 as such. However, the LAC has indicated its approach to review applications which are deemed to have lapsed if all the necessary papers in a review application have not been filed within twelve months' of launching an application. In, *Samuels* the LAC set out the steps to be taken:

'(4) In order for a file to be brought back to life, an interested party has to act in terms of clause 16.2 which requires an application, on affidavit, for the retrieval of the file on notice to all other parties to the dispute to be launched. The provisions of rule 7 will apply to such an application. This is such an application brought by the appellant in the court a quo. Clause 16.3 provides that:

'Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.'

[9] In the *Samuels* case, a review application had been archived after lengthy delays by the applicant, which were mainly the fault of the CCMA. The LAC granted the applicant leave to proceed with the review application. The court set out the approach to be adopted when considering whether to resurrect the file from its archived state:

‘(17) 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.’

[10] In the present instance, it is not disputed that the review application was filed on 11 July 2019, and that in August 2019, the record of the proceedings was dispatched to the applicant. The transcribed record had thus to be filed by no later than 25 November

2019. On 15 October 2020, the present application for reinstatement was filed (after the applicant’s notice having been drawn to his failure to file the record timeously and its consequences as far back as 17 March

2020. On 16 October 2020, the applicant filed an incomplete record of the proceedings under review.

[11] The applicant does not deny that the period of delay in filing the record is excessive. He also does not dispute that he did not avail himself of the measures contained in clause 11.2 of the Practice Manual either by seeking consent to the late filing of the record, or approaching the Judge President for a directive. The applicant states that after the Covid lockdown and after the withdrawal of the attorney who had represented him at the arbitration hearing, in April 2020, he called his current attorney of record to make inquiries about him being represented in a review application. The attorney informed him that the matter appeared not to be urgent and that he would consult with him after the lockdown. The applicant was contacted at the end of May 2020 when the attorney consulted with him and took instructions. At that stage, the attorney’s business was such that they were ‘trying to balance between long-term matters and matters with immediate cash flow’ and that when

business had improved, the applicant would be assisted to apply for condonation for the late filing of the record and for the reinstatement of the review. The applicant avers, without giving any substantive reasons, that to have appointed another attorney at this stage would have been prejudicial to him.

[12] In so far as his prospects of success are concerned, the applicant avers that the sole witness relied on by the arbitrator gave hearsay evidence that was never corroborated and that the witness answered ‘no’ to a question of whether the applicant was involved in fraud and corruption.

[13] The applicant's explanation for the delay is unsatisfactory. To some extent, the applicant's current attorney of record must take some of the blame (a proposition which he commendably did not dispute during the course of argument), but matters do not end there. The applicable principles require that the applicant demonstrates due diligence in his prosecution of the review. This he has failed to do. Indeed, the facts disclose that the applicant's failure to comply with clause 11.2 of the practice manual was nothing less than willful. He was aware as early as November 2019 of the requirement to file the record timeously, yet he allowed almost a year to go by without taking meaningful steps to ensure that the record was filed.

Further on his own version, there in an unaccounted period of delay between November 2019 and January 2020, and further, from January

2020 to March 2020. In the founding affidavit, the applicant's attitude is reflected in the following paragraph:

'Instead, of proceeding further, my strategy was to wait and see how far the transcribers would go. If, at some stage, I would have reached a stage to believe that the transcribers were not complying, I reserved my right to compel them to (sic).'

This reflects nothing less than a choice to litigate at leisure.

[14] In so far as the applicant's prospects of success are concerned, the award under review reflects a meticulous summary of the evidence. The evidence given by Mr. Bekker was that he interviewed the applicant after information had been received regarding the alleged unethical behavior on the part of the applicant. He gave evidence of the interview that he had conducted with the applicant and in particular, the recorded that in his presence the applicant had initially denied receiving R7000 from Van der Merwe but changed his version after Van der Merwe was put on speakerphone. Further, Bekker gave evidence regarding the first respondent's gifts declaration and registration policy and how the applicant's conduct, by receiving what amounted to a gift for the purposes of the policy, had breached that policy. In so far as the applicant suggests that the award is reviewable because Bekker 'answered "No" to a question of whether I was involved in fraud and corruption', that submission borders on the disingenuous. The record reflects that the applicant's attorney asked Bekker 'Did you find other fraud and corruption from the applicant?' Bekker replied 'Not fraud, but a corrupt relationship, strong indication, yes'. It warrants mention that the applicant had been charged with a breach of the first respondents policy on receiving gifts from suppliers, and not fraud.

[15] A reading of the award and the available record illustrates that at least for present purposes, the conclusion to which the arbitrator came was one that clearly falls within a band of decisions to which a reasonable decision-maker could come. The fact remains that the arbitrator found on the applicant's own version that he, a senior accountant, had received money from a supplier (an act prohibited by the applicable policy), thus committing an act of serious misconduct that warranted his dismissal. The arbitrator appreciated the nature of

the enquiry that he was required to conduct, he appreciated the nature of the dispute before him, he afforded the parties a full and fair hearing, and he dealt with the substantive merits of the dispute. The award is a model award and the applicant's prospects of success are slim, if they exist at all.

[16] Finally, the applicant's attorney made much of the issue of prejudice and in particular, the prejudice that will be suffered by the applicant should the application for reinstatement be refused. He submitted further that that on the other hand, there was no prejudice to the first respondent, but for the delay that had already occurred. These submissions take no account of what this court and the LAC have emphasised in matters of this nature – the statutory purpose of expeditious dispute resolution. In the present matter, the applicant was dismissed in May 2015, more than seven years ago. To reinstate the review and open the prospect of a review hearing in present circumstances would not only defeat the statutory purpose of expeditious dispute resolution, it would prejudice the first respondent's right to finality. It should be recalled that the state of the review application is such that what remains on record is an incomplete transcription, without any Rule 7A (6) notice having been filed, and without any supplementary affidavit or notice in terms of Rule 7A (8). The interests of justice also militate against the reinstatement of the review given that on the face of it, the case for review is a hopeless one.

[17] For all of these reasons, the application stands to be dismissed.

[18] In so far as costs are concerned, I have given serious consideration to an order for costs against the applicant. The present application has no merit, to the point of being misguided. However, I will accept that for the purposes of section 162 of the LRA, and given that the applicant is an individual who seeks recourse against his employer, I will afford him the benefit of the doubt and accept that the requirements of the law and fairness are best met by an order that each party should bear its own costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Chidi, Chidi Attorneys

For the first respondent: T Rapuleng, Cliffe Dekker Hofmeyr Inc.

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Prepared on 11 October 2026 · Esheria