

SOUTH AFRICA / JUDGMENT

Moloto v Department of Infrastructure Development and Others (JR 1825/2018) [2023] ZALCJHB 91; (2023) 44 ILJ 1765 (LC) (21 April 2023)

[2023] ZALCJHB 91

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JR 1825/2018

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THE

LABOUR COURT OF SOUTH AFRICA, HELD AT JOHANNESBURG

Of interest to other

judges

Case No: JR 1825/2018

In

the matter between:

MOLOTO,
NOKO ALBERT
First Applicant
and
DEPARTMENT
of INFRASTRUCTURE DEVELOPMENT
First
Respondent
GENERAL
PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (“GPSSBC”)
Second
Respondent
NGAKO
P M, N.O.
Third
Respondent

Heard:

18 April 2023

Delivered:

21 April 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 21 April 2023

Summary: (Rule

11 Application to dismiss a review application – Applicant in review application prosecuting matter timeously

to begin with but

then failing to follow through and enrol the matter timeously –

Review application unopposed – Applicant's delay

compelling Respondent employee to initiate Rule 11 proceedings –

Rule 11 application opposed – Applicant

in review failing

to explain long delays in prosecuting matter despite prospects of

success – Mere fact application unopposed

no excuse for

dilatory prosecution of review – consequence of applicant's

inaction leaving status of award and employee

in limbo – Such

conduct strongly deprecated despite dismissing Rule 11 application –

Punitive cost order and other

remedial steps ordered.)

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is a Rule 11 application to dismiss a review application on the basis that the applicant in the review application, the Department of Infrastructure ('the department'), has failed to prosecute its case diligently and timeously.
- [2] The arbitration award which is the subject matter of the review application was handed down on 9 July 2018. The arbitrator concluded that the third respondent in the review application, Mr. A Moloto ('Moloto') was not guilty of various charges pertaining to the preparation of resource packs for a number of events in May 2018 and reinstated him with back pay equivalent to 9 months' remuneration.
- [3] The nub of the review application concerns the arbitrator's refusal to postpone the arbitration on a second occasion. The main witness of the department, was the head of the department and Mr Moloto's supervisor. He was due to testify on the substantive fairness of the dismissal.

[4] The arbitration was enrolled on 18 April

2018. On 14 April 2018, and quite unrelated to the arbitration, the MEC for Finance had requested permission for attendance at a multinational conference in Mauritius titled the Africa Energy Forum. Following an initial postponement on 18 April 2018, owing to the illness of one of the department's witness, the hearing was re-enrolled for three days commencing on 20 June 2018.

[5] On 26 April 2018, the provincial premier gave permission for senior officials to attend a conference in Mauritius scheduled to take place on 19 to 22 June 2018. It was envisaged that the delegation would include senior officials responsible for infrastructure planning. As such, it was envisaged that the HOD of infrastructure development ought to attend.

[6] The department alleges that at the time its representative agreed to the postponement on 18 April, he was quite unaware of the unfolding conference attendance plans. He claims he only became aware on 11 June. The next day he sent a letter to the bargaining council requesting the second postponement of the hearing in June which overlapped with the conference. The bargaining council advised the department on 19 June the postponement application was dismissed as it did not comply with the rules for postponement applications.

[7] Nonetheless, an application was moved at the hearing on 20 June, seemingly on the basis that the HOD's attendance at the conference was important and the only other witness who was available could testify on procedural unfairness. The arbitrator refused the application and the hearing proceeded by default in the absence of the department's representative.

[8] On 24 July 2018 the arbitrator issued his award though it is not clear when it was received by the department. The review application was launched on or about 5 September 2018, and might have been one day late, but the delay is so minimal condonation, if necessary, would in all probability be granted. No issue in this regard was raised by either party.

[9] On 18 September 2018, the bargaining council lodged the record of the proceedings with the Labour Court and the department filed the record on 22 October 2018, but did not file a notice or supplementary affidavit in terms of rule 7A (8). On 13 December 2018 Moloto's erstwhile attorney's issued a notice in terms of rule 12 (2) calling upon the applicant to comply with the rule 7A (8) within five days. On 20 December 2018, the applicant filed a notice under rule 7A (8) stating that it stood by

its original submissions in compliance with the notice. At this point the department had acted timeously in its prosecution of the review application.

- [10] However, despite an allegation that there was something defective in the record filed, Moloto did not file any answering affidavit and the department understood that the matter was unopposed. In passing, I must mention that the objections raised to the record were relatively trivial and this was not an issue raised by his counsel when the dismissal application was heard. After receiving the Rule 7A (8) notice he did nothing further at that stage.
- [11] There followed a long delay before another step to advance the review application was taken. On 20 August 2019 Moloto terminated the mandate of his erstwhile attorneys and appointed his current attorneys of record in their place. On the same day the department filed heads of argument. It is possible these might have been sent to the erstwhile attorneys in June but the department does not allege that to be the case. In any event, the interval during which there was no steps taken by the department exceeded six months and in terms of Clause 11.2.3 the review application was deemed to have been withdrawn at that stage.
- [12] Just under a year later on 7 July 2020, the applicant served a supplementary index of the record, a further unexplained delay of 10.5 months.
- [13] On 9 September 2020, the third respondent filed his dismissal application and a notice of opposition was filed by the applicant two days later. Following the exchange of certain correspondence, the applicant filed its answering affidavit on 23 September 2020 and the third respondent filed his replying affidavit on 1 October 2020.
- [14] On 5 October Moloto requested the enrolment of the dismissal application on the unopposed role, but was removed on 29 October on the basis it had become opposed. On 9 November 2021, he repeated the request for its re-enrolment.

Evaluation

- [15] The two long gaps between filing the Rule 7A(8) application and the heads of argument, and between filing the heads and supplementary index are excessive. In answer to the dismissal application, the department did not even have the courtesy to furnish a perfunctory explanation for the delay. Its counsel could only offer speculation as an explanation. What is odd is that the department did act timeously in setting the review in motion and in opposing the dismissal application. However, the inference that it dragged its heels for significant periods without justification cannot be avoided. In fact, its ability to act timeously when it chose to begs the question why it was unable to do anything further during long periods. It cannot excuse that conduct on account of the

review application being unopposed. By not proceeding with the application it left Mr Moloto's future with the department in an indeterminate state.

- [16] It was only when Moloto filed his dismissal application two months later that the department acted timeously again. What is remarkable is that at no stage did the Department request the enrolment of the review application ever since the last steps it took at the end of 2018. Had it not been for Moloto taking the initiative to dismiss the application,

there is every good reason to believe, the department would have done nothing. It is precisely to prevent a party using review proceedings as a dilatory tactic to avoid compliance with an award that the provisions of the Labour Court Practice Manual were issued.

- [17] In the absence of bringing an application to reinstate the review application to be heard simultaneously with the dismissal application, at the very least the department should have provided an explanation to explain its lengthy bouts of extreme lassitude. The LAC has cautioned this court about being too procedurally exacting in not considering averments in the affidavits which make out a case for condoning non-compliance with the Rules and Practice Manual in order to permit a party to pursue its review application without bringing a formal reinstatement application.[1]
- [18] The department's counsel, Mr C Mqushulu, could only advance his client's prospects of success as a reason why the court should overlook its abject failure to justify its dilatoriness. It is true that this is a factor a court will consider in any condonation application or equally in an application to revive a dormant review application. However, it is an extraordinary proposition to expect the court to consider the merits in the absence of any explanation whatsoever for lengthy delays and without even asking for its conduct to be condoned.
- [19] Insofar as the merits are concerned, I note that the primary reason the commissioner had refused to postpone the matter was that he did not consider the circumstances sufficiently "exceptional". It is trite that the proper test was whether justice and fairness required a postponement. The principles that an arbitrator ought to consider in exercising their discretion whether or not to grant a postponement, which must be exercised judicially, on substantial grounds, and on the right principles, are: to direct their attention to all the relevant facts and principles, including good cause - no factor is individually decisive; determine if the application was made timeously or as soon as the circumstances become known to the applicant; find that the application must be bona fide and not be used as a tactical maneuver for purposes of obtaining an advantage to which the applicant is not legitimately entitled. Lastly, the arbitrator must decide if the postponement will cause prejudice to the other party, and if such prejudice could be fairly compensated by an appropriate costs order.[2]
- [20] It is evident the arbitrator dismissed the application for postponement for two reasons. Firstly, he found that the department knew from around 19 April and attendance was approved on 26 April but only applied for a postponement on 12 June. Secondly, the HOD knew from 26 April that the matter was set down for hearing from 20 June and the Premier's letter did not specifically say he had to attend.
- [21] The arbitrator's frustration was understandable and it was not unreasonable for him to have believed that the Mauritius conference probably did not require the HOD's personal attendance. However, the importance of the HOD's evidence was self-evident and it was

clear that, without hearing it, the evidence on the substantive issues would be a one sided affair. Moreover, the position of Moloto was that of a director in the department. The implications of terminating his service and of reinstating him would not be insignificant. I accept that the arbitrator correctly noted that postponements should not be so readily granted in arbitration proceedings. Nonetheless, he could have granted the postponement with a punitive cost order and a caution to the department that if the HOD did not appear at the next hearing the arbitration would proceed in his absence. The consequence of the ruling is that the continued employment of a senior official has been decided on his account of the fact alone. This is a prima facie view of the merits of the review application and since the review application was not enrolled simultaneously with the dismissal

the court cannot make a final pronouncement on this.

- [22] An unusual and significant facet of this case is that Moloto never opposed the review application. Had the department pursued its case timeously it would have been decided by default and the matter would in all probability have been remitted for rehearing a long time ago. That said, if Moloto had not incurred the expense of launching the dismissal application, the ultimate status of the arbitration award in his favour would still be languishing in a state of limbo. Even so, it is true that the department's dilatoriness opened an opportunity for him to use a new channel to effectively oppose the review which he previously had not done. If he had opposed the review application from the start, I would be inclined to dismiss the review application.
- [23] In the somewhat unusual circumstances of this case, I believe that the dismissal application should be dismissed. However, because of the department's inexcusable conduct in delaying the prosecution of the review and its failure in opposing the dismissal application to even defend its conduct of the review, I believe that a punitive cost award is appropriate a mark of the court's displeasure with the department's conduct of the case, even though the applicant qualified its initial request for a punitive cost. The judgment will also be referred to the Auditor General, as it appears that the department has incurred wasteful and unnecessary expenditure in opposing the dismissal application, which was a direct consequence of its own failure to prosecute the matter timeously, in circumstances where it is evident it was quite capable of acting timeously when it chose to.
- [24] As the review application was unopposed, I am of the view that its stands to be determined on an unopposed basis, and can be determined on the papers, which will be more expeditious than waiting for it to be enrolled on the clogged Johannesburg court roll

Order

- [1] The dismissal application is dismissed.
- [2] The First Respondent in the dismissal application must pay the Applicant's costs of the dismissal proceedings on an attorney own client scale.

- [3] The Registrar is directed to serve a copy of this judgment on the Auditor General and on the Director General of the First Respondent for their attention and consideration.
- [4] The First Respondent must advise the court in writing within 10 court days of this judgment, whether or not it has any objection to the unopposed review application being determined in chambers on the

papers as opposed to being enrolled on the ordinary unopposed roll for an oral hearing. In the absence of any representation to the contrary, it will be assumed it has no objection.

Lagrange J

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Adv. Keneilwe Lefaladi Instructed: Malahlela Attorneys For the Respondents: Adv Charles Instructed by: The State Attorney Instructed by: Hendrè Conradie Inc Attorneys

- [1] South African Police Services v Coericius and others [2023] 1 BLLR 28 (LAC) at paras [11] – 12].
- [2] See e.g. Keerom Casa Hotel v Heinrichs & another [1999] 1 BLLR 27 (LC); [1] Erasmus NO v Commission for Conciliation, Mediation & Arbitration & others (2012) 33 ILJ 1670 (LC)

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