

SOUTH AFRICA / JUDGMENT

Nhlapo v Sambo N.O. and Others (JR1451/2018) [2023]

ZALCJHB 169 (18 May 2023)

[2023] ZALCJHB 169

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR1451/2018

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1451/2018

In the matter between:

R
S NHLAPO
Applicant
And
MARTIN
SAMBO N.O
First
Respondent
THE
GENERAL PUBLIC SERVICE
SECTORAL
BARGAINING COUNCIL
Second
Respondent
THE
DEPARTMENT OF CORRECTIONAL SERVICES
Third
Respondent

Heard:

9 May 2023

Delivered: 18 May 2023
This judgment
was handed down electronically by consent of the parties'
representatives by circulation to them via email.
The date for
hand-down is deemed to be 18 May 2023.

JUDGMENT

PRINSLOO J

Introduction

[1] One of the primary objects of the Labour Relations Act[1] (LRA) is the effective resolution of disputes. The Constitutional Court, in the opening paragraph of *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[2] (Toyota) held that:

‘Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute-resolution

dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA)

introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious

resolution of labour disputes which, by their nature, require speedy resolution. 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 an employer who may have to reinstate workers after many years.’

[2] The scheme of the LRA is that, if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right.[3]

Background facts

[3] The Applicant is employed by the Third Respondent (Department) since 2011 in the position of ‘operational manager nursing’. In 2013, the Applicant referred an unfair labour practice dispute to the Second Respondent (GPSSBC) and the dispute was arbitrated on 10 June 2013. According to the Applicant, the presiding arbitrator did not make a ruling and he never received any outcome subsequent to the arbitration hearing. In May 2017, the Applicant approached his attorneys for assistance. It is not explained why the Applicant

waited from June 2013 until May 2017 to take any steps to make enquiries or follow up on the outcome of the arbitration or why

nothing was done earlier to obtain the outcome of the arbitration.

- [4] On 3 July 2017, the Applicant's attorneys addressed a letter to the GPSSBC, acting on behalf of the Applicant. It appears from the letter that after the conclusion of the arbitration hearing in 2013, the parties were requested to submit closing arguments, but the Applicant's former legal representative did not submit closing arguments and as a result, no ruling had been made on the outcome of the matter. The Applicant's attorneys requested that the record of the proceedings of 2013 be made available and that the Applicant be permitted to file his written closing arguments. The Applicant's attorneys were informed that the presiding arbitrator had passed away and that there was no recording of the arbitration proceedings available. The GPSSBC proposed that the matter be set down for a hearing de novo.
- [5] The dispute was set down for arbitration de novo on 5 October 2017. The First Respondent (arbitrator) presided. The matter was not heard de novo but instead, the parties submitted written closing arguments. It is evident from the arbitration award that the arbitrator recorded that "the parties opted to send written heads of argument since they insisted there was no necessity to lead oral evidence. The parties agreed to send the bundles with the arguments".
- [6] The arbitrator found that there was no unfair labour practice committed and the Applicant's case was dismissed. The arbitration award is dated 3 March 2018. The Applicant received a copy of the arbitration award on 11 April 2018 and he filed his review application on 18 July 2018, outside the prescribed period of six weeks. The Applicant applied for condonation for the late filing of his review application on 18 July 2018.
- [7] The Registrar issued a Rule 7A(5) notice on 31 August 2018, but the Applicant alleges that he did not receive the Rule 7A(5) notice. Instead, his attorneys made enquiries with the GPSSBC on 26 February and 2 April 2019 regarding the record. The record was made available to the Applicant's attorneys on 10 April 2019 and it comprised of a bundle of documents and no recording that needed to be transcribed.
- [8] The record and the Rule 7A(6) and (8) notices were filed with the Registrar on 28 June 2021.
- [9] On 30 September 2022, the Applicant filed an application to reinstate his review application and for the late filing of the record and the late request for a hearing date to be condoned.
- [10] The first issue to be decided is whether the review application is to be reinstated. The application for condonation for the late filing of the record can only be considered in the event that the review application is reinstated.

The applicable principles and provisions

- [11] The purpose of the LRA is inter alia the effective resolution of labour disputes and the processes introduced by the LRA are intended to bring about the expeditious resolution of labour disputes. The detrimental implications of delays are obvious.[4]
- [12] This Court has accepted that a review application is, by its nature, an urgent application and that it requires prosecution with diligence and urgency.[5] This is supported by the Practice Manual of the Labour Court[6] (Practice Manual) wherein an applicant in a review application is required to ensure that all the necessary papers in the application are filed within twelve months of the date of the launch of the application and where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown as to why it should not be archived.
- [13] This Court and the Labour Appeal Court (LAC) have considered the status of the Practice Manual[7] and held that, in essence, the manual promotes uniformity and consistency in practice and procedure and sets guidelines on the standards of conduct expected of those who practise and litigate in the Labour Court and it promotes the statutory imperative of expeditious dispute resolution. The provisions of the Practice Manual are binding and should be adhered to and it is not to be adhered to or ignored by parties at their convenience.
- [14] The amendments to section 145 of the LRA, which took effect on 1 January 2015, are specifically aimed at expediting the prosecution

of review applications and inter alia requires that an applicant on review must apply for a hearing date within six months of launching the review application.

- [15] A review application requires urgent prosecution without undue delay and that had always been the case.

Late filing of the record

- [16] Rule 7A(6) of the Rules provides that the applicant in a review application 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. The applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.
- [17] The serving and filing of the record in a review application is provided for in clause 11.2 of the Practice Manual as follows:

‘11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

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. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.'

[18] Clauses 11.2.1 and 11.2.2 of the Practice Manual provide for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the consequences should an applicant fail to file the transcribed record within the prescribed period.

[19] A proper interpretation of clause 11.2.3 shows that there are three possibilities if the record is not filed within 60 days of the date on which the applicant is advised by the Registrar that the record has been received. The first possibility is the easy and obvious one, namely for the applicant to request the respondent's consent for an extension of time and consent has been given. The second possible scenario arises only in the event that consent was sought from the respondent but is refused. In such an event, the applicant may, on notice of motion supported by affidavit, apply to the Judge President for an extension of time. The application must comply with Rule 7 and affidavits are to be filed within the time limits prescribed by Rule 7.

[20] The third possible scenario arises when the applicant in a review application failed to file the record within the prescribed 60-day period and failed to obtain the respondent's or the Court's consent for the extension of time. In such a case, the review application is deemed to be withdrawn.

[21] In *Ralo v Transnet Port Terminals and others*[8] (*Ralo*), the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of *Municipal Council of the Municipality of Windhoek v Marianna Esau and another*[9] where the Court held that the word 'deemed' is considered to have a conclusive effect[10]. This Court concluded by stating the following:

'...The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application.'

[22] In *casu*, the record of the arbitration was made available on 31 August 2018 when the Registrar issued the Rule 7A(5) notice and it had to be filed within 60 days. Even if I were to accept the Applicant's version that his attorneys did not receive the Rule 7A(5) notice and only received the record from the GPSSBC on 10 April 2019, the record had to be served on the Department and filed with the Registrar by no later than 5 July 2019. The Applicant has not filed the record within the prescribed 60 day period, had not approached the

Department for consent for an extension of time, nor was the Judge President of the Labour Court approached, as provided for in the Practice Manual.

[23] The delay in filing the record is from April 2019 until June 2021, a period in excess of two years.

Clause 11.2.7 and Clause 16 of the Practice Manual

[24] Clause 11.2.7 of the Practice Manual provides that:

‘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 argument) 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 to be archived or be removed from the archive.’

[25] Clause 16 of the Practice Manual provides for archiving of files as follows:

‘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.

16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

16.3 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.’

[26] The issue of archiving was considered by the LAC in *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch and others*[11] (Tradex), where it was confirmed that:

[9] The notion of a case being ‘archived’ was invented by the drafters of the Practice Manual as a penalty for dilatoriness and to relieve the burden of carrying dormant cases indefinitely. The consequence of a case being archived is serious. Upon archiving, in terms of clause 11.2.7, a matter is ‘regarded as lapsed, unless good cause is shown why the application should not be archived or be removed from the archive’ (emphasis added). To add to that provision, clause 16.3 states unequivocally that: ‘Where a file has been placed in the archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed’ (emphasis added). Moreover, clause 16.2 is equally unequivocal: ‘A party to a dispute in which the file has been archived may submit an application on affidavit, for the retrieval of the file.’ There can be no plausible doubt that once the case is ‘archived’ it requires the intervention of the court to ‘un-archive’ it. There is no room to read into these provisions a role for the registrar to ‘resuscitate’ the case.

[10] The use of the term ‘archived’ is peculiar to the Labour Court Practice Manual. In the general civil courts, for example, the failure to prosecute an appeal timeously results in the appeal having lapsed.[12] The effect of that is that the case shall not be dealt with by a court unless an application to reinstate the appeal is made. It is, in our view, plain that the archiving of a Labour Court case was intended to have the identical effect; indeed, clause 16.3 goes even further, to equate the consequence of an archiving of a case to be understood to mean the application is ‘dismissed’, albeit that a procedure exists to reinstate the case on good cause shown.

[11] It must therefore follow that the archived case acquires a peculiar status which requires the delinquent party to justify why it should be reinstated and thereafter be entertained by a court in the wake of a lack of expeditious prosecution. The Labour Court a quo, treated the ‘archiving’ as an administrative act, not as a matter of status. The significance of this distinction between status and an administrative act is that the acquisition of a peculiar status means that upon a given event, the status

automatically adheres to the case. That status has legal consequences which a mere administrative act by the registrar cannot undo.

[12] On these facts, on 16 January 2021, when the 12-month period since the launch of the application in terms of clause 11.2.7 had expired, automatically the case acquired the status of being archived; ie having lapsed or having been dismissed. The belated attempt to file a replying affidavit is, prima facie, a tacit acknowledgment that not ‘all the necessary papers in the application’ were filed in time. The absence of a document in which ‘the registrar is informed in writing that the application is ready for allocation for hearing’ as required by clause 11.2.7 means that the condition that might have saved the case from the peril of archiving was equally absent.’

[27] In *Samuels v Old Mutual Bank (Samuels)*, [13] the LAC held that:

[16] Clause 16.2 does not specifically state that in an application for the retrieval of the file, a party who brings that application must show good cause why the file must be retrieved from the archive. It however states in no uncertain terms that the provisions of Rule 7 will apply in an application brought under the Clause 16.2. Clause 11.2.7 applicable to Rule 7 and 7A applications requires that a party who applies for a file to be removed from the archive must show good cause why the file must be removed from the archive. Furthermore, an applicant who applies for a file that has been archived for failure to comply with an order by a Judge to file a pre-trial minute, to be removed from archives, has to show good cause why such a file should

be removed from the archives. There is therefore no doubt that showing good cause is a requirement for a file to be removed or

retrieved from the archives in terms of Clause 16.2.

[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, timeframes 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.'

Remedies

[28] It is evident from the provisions of the Practice Manual and the applicable authorities that when an applicant is unable to file the record within the prescribed period of 60-days or fails to ensure that all the necessary papers in the application are filed within twelve months of the date of the launch of the application, specific legal consequences would follow. However, an applicant finding him or herself in such a position is not without a remedy.

[29] In the event that the review application is deemed withdrawn due to the failure to file the record timeously or is being archived and regarded as lapsed, with the same consequences as to the matter having been dismissed, an applicant still has recourse. The LAC made it clear that the effect of lapsing or archiving of a matter is that the case shall not be dealt with by a court unless an application to reinstate or to retrieve the file from the archive has been made.

[30] The LAC confirmed that a procedure exists to reinstate the case on good cause shown. The deemed withdrawn or archived case acquires a peculiar status which requires the delinquent party to justify why it should be reinstated or retrieved from the archive and thereafter be entertained by a court. The deemed withdrawn or archived application must be resuscitated before it can proceed on its merits. This is achieved by the filing of a

reinstatement or retrieval application, which is akin to a condonation application and in which the applicant must show good cause.

This application

- [31] It is evident from the papers before this Court that the Applicant had filed his review application and applied for condonation for the late filing thereof on 18 July 2018.
- [32] The Registrar had issued a Rule 7A(5) notice on 31 August 2018, but the Applicant alleges that he never received the Rule 7A(5) notice. Instead, his attorneys received the record on 10 April 2019 and it comprised of a bundle of documents. Even if the Applicant only received the record from the GPSSBC on 10 April 2019, the record had to be served on the Department and filed with the Registrar by no later than 5 July 2019. It was served on the Registrar only in June 2021.
- [33] After the review application was filed on 18 July 2018, the Applicant failed to ensure that all the necessary papers in the application were filed within twelve months of the date of the launch of his review application, the Registrar has not been informed in writing that the application is ready for allocation for hearing and a period far in excess of six months has elapsed, without the Applicant taking any further steps. The effect of this is that the application was archived and an application in terms of Clause 16.2, for the retrieval of the file from the archives, was necessary.

Expeditious resolution of labour disputes

- [34] One of the primary objects of the LRA is the effective resolution of labour disputes.
- [35] The Constitutional Court, in the opening paragraph of *Toyota*,^[14] held that:
- ‘Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. 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 an employer who may have to reinstate workers after many years.’
- [36] The Rules of the CCMA or bargaining councils, the Rules of this Court and the Practice Manual navigate litigation that may arise within the realm of labour relations and disputes. Central to all of this, is the expeditious resolution of labour disputes.

Analysis

[37] The relevant legal principles to be applied in an application for condonation are well established and will be applicable in an application such as the present one.

[38] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides.[15]

[39] In *Melane v Santam Insurance Co Ltd*,[16] it was held that:

‘...Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach

incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting

condonation... What is needed is an objective conspectus of all the facts.’

[40] In this, Court, however, the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant’s prospects of success are immaterial. The courts have held and emphasised that an applicant must necessarily act with the degree of diligence required by the Rules of this Court and the Practice Manual, thus giving effect to the statutory imperative of expeditious dispute resolution.

[41] This Court has conventionally applied the approach that, in the absence of a satisfactory explanation for a delay, the applicant’s

prospects of success are ordinarily irrelevant.[17] This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children’s Home*[18] where the LAC held that without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial.

[42] In *Colett v Commission for Conciliation, Mediation and Arbitration and others*,[19] the LAC confirmed 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.

[43] The onus is on the applicant seeking condonation to satisfy the court that condonation should be granted. In employment disputes, there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry’s Metals (A Division of Zimco Group) and others*[20]:

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the backdrop of this fundamental principle in employment law.’

- [44] The fundamental requirement of expedition is not to be ignored. In Toyota,[21] the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.
- [45] In summary: the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.
- [46] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application, such as the present, seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.
- [47] It is in this context that this application for reinstatement/retrieval stands to be determined. The degree of lateness and the explanation tendered
- [48] The first issue to be considered is the degree of lateness.
- [49] The Registrar’s Rule 7A(5) notice is dated 31 August 2018, the Applicant’s attorney received the record on 10 April 2019, yet the record was only filed on 28 June 2021.
- [50] The delay in filing the record is excessive and as a result, the review application is deemed to be withdrawn. That is however not the end of the Applicant’s difficulties. The review application has been archived in terms of Clause 11.2.7 of the Practice Manual in that the Applicant failed to ensure that all the necessary papers were filed within twelve months of the date of the launch of the application.
- [51] This delay is no doubt material, given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes, more so where the Practice Manual expressly states that a review application is by its nature an urgent application.
- [52] What is aggravating, is that the Applicant applied for the reinstatement of the deemed withdrawn review application on 30 September 2022, more than four years after the review application was filed and more than a year after the record had been filed.

- [53] The LAC held that showing good cause in an application such as this one demands that the applicant provide a reasonable explanation which covers the entire period of the default. The Applicant has to explain every period of delay to satisfy the requirements he has to meet for the relief he seeks.
- [54] The gist of the explanation is that the Applicant's attorneys only received the record from the GPSSBC on 10 April 2019. It is worth mentioning that the record so received comprises a bundle of documents (approximately 45 pages) only and there was no recording which had to be transcribed before it could be filed.
- [55] The Applicant explained that the record was served on the State Attorney on 9 May 2019 by way of facsimile. However, the Applicant's attorney of record as well as their correspondent attorneys tried to contact the Respondent telephonically during the period April 2019 until March 2020 to confirm receipt of the record in order to depose to a service affidavit. In March 2020, the country went into a national lockdown due to the Coronavirus pandemic. Due to the lockdown, the Respondent could not be reached telephonically or physically until February
2021. The Applicant's attorneys continued to try and obtain telephonic confirmation from March 2020 until February 2021 from the Department that they had received the Rule 7A(6) and (8) notices, but to no avail. The Applicant's attorneys attended the offices of the Respondent on 18 February 2021 to confirm that they had received the record and the Rule 7A(6) and (8) notices.
- [56] The explanation tendered is astonishing and incredible. The record was available on 10 April 2019, no time was required to have it transcribed as the only record to be served and filed, was a small bundle of documents. It was allegedly sent to the State Attorney in May 2019, but there is no service affidavit to confirm that it was indeed so served. Telephonic attempts to confirm receipt of the record were made from "April 2019 until March 2020", on the Applicant's version. The Applicant explained that those attempts were to reach the Respondent, being the Department, to confirm receipt of the record. The receipt of the record had to be confirmed with the State Attorney and not the Department. It is unbelievable that an attorney could make telephonic attempts for a period of almost one year to confirm receipt of a record. There is not a single detail provided as to who made those attempts and when they were made, but in my view, it is far-fetched and preposterous that an attorney could make attempts for almost one
- year to confirm receipt of a record telephonically and not be able to reach anyone on any occasion for such a lengthy period. What is more astonishing is that, if the telephonic attempts seem to be futile or completely unsuccessful, why no alternative method of service was employed. Instead, someone was stuck to the phone between April 2019 and March 2020, without any success and without any consideration of an alternative method to serve the record or to confirm receipt thereof.

- [57] The further explanation is that due to the lockdown, the Respondent could not be reached telephonically or physically until February 2021 and that the Applicant's attorneys continued to try and obtain telephonic confirmation from March 2020 until February 2021 that the Rule 7A(6) and (8) notices were received, but to no avail. I find this explanation just as astonishing and unbelievable as the explanation with regard to the period between April 2019 and March 2020. The country was not in lockdown for the entire period between March 2020 and February 2021 and this explanation is disingenuous, more so where an attorney once again tried to obtain telephonic confirmation between March 2020 and February 2021, another year of unsuccessful attempts.
- [58] Effectively the Applicant's attorneys made telephonic attempts to confirm receipt of the record from April 2019 until February 2021, a period of almost two years, without any success and without providing any detail as to when those calls were allegedly made.
- [59] The Applicant's attorneys attended the offices of the Respondent on 18 February 2021 to confirm that they had received the record and the Rule 7A(6) and (8) notices. Why this step was not taken much earlier, remains unexplained.
- [60] The Applicant only served the record and the Rule 7A(6) and (8) notices on the Registrar on 28 June 2021. The Applicant submitted that the delay was due to a failure by the Department and the State Attorney to confirm receipt of the record and the Rule 7A(6) and (8) notices and the national lockdown. These explanations are far-fetched – there was no duty on the Department or State Attorney to confirm receipt of the aforesaid documents and the period of the national lockdown does not cover the lengthy period of the delay in filing the record and the Rule 7A(6) and (8) notices.
- [61] I have to consider the reasonableness of the delay by having regard to the explanation for the delay. As the LAC has held, the explanation has to be compelling and convincing and the Applicant must provide a reasonable explanation which covers the entire period of the default.
- [62] As the Applicant seeks an indulgence from the court and bears the onus to satisfy the court that condonation should be granted, it is incumbent to provide the court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court properly to assess the reasonableness of the explanation.[22]
- [63] The delay in this matter is no doubt material, given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes. Where the delay is as material as it is in this instance, the explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.

- [64] It is evident from the explanation tendered for the delay, that there are material and significant periods for which no explanation is tendered. The Applicant failed to provide an explanation that covers every period of the delay.
- [65] The Applicant dismally failed to place facts before this Court to show what steps were taken to ensure that his case was pursued and finalised expeditiously. The Applicant provided no detail of his efforts or those of his attorneys and certainly did not paint a picture of a diligent litigant who took a serious interest in this matter and who took active steps to have this matter finalised. Material periods are not explained at all and this Court is not placed in a position to properly understand the reasons for the delay and the in-action for a material and lengthy period. Where an explanation is tendered, it is bereft of detail or substance and is wholly inadequate.

Prospects of success

- [66] Having found that the delay in prosecuting this matter is material and the explanation tendered inadequate, it leaves the issue of prospects of success.
- [67] I already alluded to the fact that the courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.
- [68] This was also confirmed in *Grootboom v National Prosecuting Authority and another*[23] where the Constitutional Court held that:

‘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.’

- [69] In view of my finding that the delay is material and the explanation tendered not satisfactory, the Applicant’s prospects of success are immaterial and thus need not be considered. However, even if this Court were to adopt a lenient approach and consider the Applicant’s prospects of success, it would not have been adequate to convince this Court that the relief sought should indeed be granted.
- [70] It is necessary to say something about the Applicant’s prospects of success and the way it had been addressed in this application. The Applicant did no more than state that the prospects of success are evident from his review application, which should be incorporated into this application.

- [71] The approach taken by the Applicant is wholly inadequate and is of no assistance to this Court. The Applicant seeks an indulgence and he has to make out a case for the indulgence he seeks. A vague averment to the effect that the prospects of success appear from the review application does not assist this Court at all to assess the Applicant's prospects of success.
- [72] The review application sets out the facts of the case and the legal grounds for the relief sought in the review. It does not deal with prospects of success and such prospects do not automatically 'appear' from the application. It seems as if the Applicant has an expectation that this Court would embark on a 'prospects of success finding mission' to find what his prospects of success are, without being told by the Applicant what those prospects are.
- [73] Furthermore, the Department has filed a notice to oppose the review application. It follows that this Court cannot simply have regard to the contents of the review application, as filed by the Applicant, and conclude that there are prospects of success when that will be disputed by the Respondent. More is required but has not been provided.

Prejudice

- [74] The Applicant on the issue of prejudice, stated that he would be severely prejudiced if this application is not granted as he would be denied the opportunity to present his case. He submitted that it would be in the interest of justice that his matter be allowed to proceed and that the doors of justice should not be closed to him. The Respondent on the other hand would not suffer any prejudice.
- [75] I accept that the Applicant has the right to review an arbitration award and to file such an application with this Court for adjudication, but that right is not an unfettered one without the responsibility to do so within the confines of the law, the Rules and the Practice Manual and to ensure that the matter is pursued diligently and expeditiously. The refusal to retrieve the review application from the archive and to reinstate it will have the result that the Applicant will be denied the opportunity to pursue its case before Court.
- [76] The unfair labour practice dispute was arbitrated for the first time in 2013, thus this matter relates to a dispute that is more than ten years old. This application challenges the outcome of an arbitration award that was issued in March 2018 and more than five years later, this matter is no closer to finality. The Applicant dragged his feet in prosecuting the review application and

he failed to finalise the application expeditiously, where the Practice Manual provides that a review application is regarded as an urgent application. The arbitration award was issued more than five years ago and evidently, the review application has long outlived the urgency underpinning a review application.

- [77] The applicable timeframes were not complied with and the Applicant made no convincing attempt to explain the non-compliance with the said timeframes. Material periods are not explained at all and this Court is not placed in a position to properly understand the reasons for the delay and the non-compliance with the prescribed timeframes.
- [78] In my view, the prejudice that the Department may suffer if the relief sought is granted outweighs any prejudice to the Applicant. In argument, Mr Higgs conceded that there is indeed a real possibility that the Department would suffer financial prejudice, caused by the delay in prosecuting the review application, as the Applicant seeks to be paid the difference between the salary he was paid and the higher salary he believes he is indeed entitled to.
- [79] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides. While the refusal to reinstate the review application will have the result that the Applicant will be denied the opportunity to pursue his case before this Court, the Department's prejudice outweighs the Applicant's prejudice in that it might be ordered to arbitrate the dispute de novo or compensate the Applicant retrospectively and that on an alleged unfair labour practice that occurred more than 10 years ago.
- [80] The Applicant has not pursued this matter diligently in circumstances where a review application is to be treated as an urgent application and where a date for adjudication has to be applied for within six months after filing of the review application.
- [81] I have to endorse the aim of the LRA, namely to resolve labour disputes speedily and without delay. Granting the relief sought in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution, another factor that weighs heavily in the Department's favour.
- [82] On an objective conspectus of all the facts, the Applicant's application for retrieval falls hopelessly short of the mark. The Applicant did not discharge the onus to show good cause and to provide an acceptable and plausible explanation for a material delay.
- [83] The notion that litigants will be denied access to a court to ventilate their case cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made, or the consequences of inaction and tardiness are that opportunities to pursue the matter are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes and it is no failure of justice if their journey culminates in a dead end.[24]
- [84] This application is a sad example of the detrimental and devastating consequences that follow when labour disputes are not pursued and resolved expeditiously.

Costs

[85] In so far as costs are concerned, this Court has a broad discretion in terms of the provisions of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. This application was not opposed and a cost order will not be appropriate.

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

Order

1. The application for retrieval and reinstatement of the review application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant: Mr C Higgs from Higgs Attorneys Inc.

- [1] Act 66 of 1995, as amended.
- [2] (2016) 37 ILJ 313 (CC) at para 1.
- [3] Steenkamp and others v Edcon Limited 2016 (3) BCLR 311 (CC) at para 130.
- [4] Commercial Workers Union of SA v Tao Ying Metal Industries and others (2008) 29 ILJ 2461 (CC), where the Constitutional Court held at para 63 that: “[t]hese disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on the employer who may have to reinstate workers after a number of years”.
- [5] Lehola v Nkadimeng N.O and others unreported judgment under case no: JR1912/2012 delivered 25 January 2016.
- [6] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.
- [7] Ralo v Transnet Port Terminals and others [2015] 12 BLLR 1239 (LC) (Ralo); Tadyne Trading CC t/a Tadyne Consulting Services v Steiner and others (2014) 35 ILJ 1672 (LC); Samuels v Old Mutual Bank [2017] 7 BLLR 681 (LAC) (Samuels).
- [8] Ralo supra.
- [9] LCA 25/2009, 12 March 2010.
- [10] Ralo at para 10.
- [11] (2022) 43 ILJ 2727 (LAC) at paras 9 – 12.

- [12] Rule 49(6)(a) and (b) of the Uniform Rules of Court.
- [13] Samuels *supra* at paras 16 – 17.
- [14] Toyota *supra* at para 1.
- [15] D Harms, ‘Civil Procedure in the Superior Court’, (LexisNexis South Africa) at B27.6.
- [16] 1962
- (4) SA 531 (A) at 532C - F.
- [17] See NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC).
- [18] (2004) 25 ILJ 2195 (LAC) at para 23.
- [19] [2014] 6 BLLR 523 (LAC).
- [20] (2015) 36 ILJ 232 (LC) at para 25.
- [21] Toyota *supra* at para 1.
- [22] See Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others
- (2010) 31 ILJ 1413 (LC).
- [23] (2014) 35 ILJ 121 (CC) at para 51.
- [24] Edcon Ltd v Steenkamp and others (2018) 39 ILJ 531 (LAC) at para 34.

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