

SOUTH AFRICA / JUDGMENT

Overberg District Municipality (ODM) v IMATU obo Spangenberg and Others (C 157/18) [2020] ZALCCT 38 (10 June 2020) [2020] ZALCCT 38

COURT
Labour Court Cape Town

BEFORE
Lagrange

CASE / FILE NUMBER
C 157/18

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REPORTABLE
THE
LABOUR COURT OF SOUTH AFRICA,
HELD
AT CAPE TOWN
CASE
NO: C 157/18
In

the matter between: OVERBERG
DISTRICT MUNICIPALITY (ODM)
APPLICANT
AND
IMATU
OBO SPANGENBERG AND OTHERS
FIRST RESPONDENT
SOUTH
AFRICAN LOCAL
GOVERNMENT
BARGAINING COUNCIL
SECOND RESPONDENT
COMMISSIONER
D DU PLESSIS N.O.
THIRD RESPONDENT

Heard: 27 May 2020

Delivered:	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 hand-down is deemed to be 10h00 on 10 June 2020. In view of the regulations and directives issued pursuant to the Disaster Management Act this matter was determined in chambers.
Summary:	(Application to reinstate review application deemed withdrawn in terms of clause 11.2.3 of Labour Court Practice Manual – effect of deeming provisions - condonation for non-compliance triggering deeming provision inextricably bound up with application for reinstatement – consideration of other steps taken while application is defunct which also require condonation if the application is revived – costs – failure to invoke provisions of clause 11.2.3 to be discouraged)

JUDGMENT

LAGRANGE J

Background

- [1] This is an opposed application to reinstate a review application of an award handed down on 17 January 2018. A hearing was conducted using the Zoom application and recorded by the applicant's counsel.
- [2] The applicant municipality seeks the following substantive relief:
- 2.1 reinstatement of the review application which was deemed withdrawn in terms of clause 11.2.3 of the Labour Court Practice Manual ('the manual') on 29 June 2018,
- 2.2 condonation of the late filing of the record of the arbitration which was filed on or about 9 July 2018
- [3] The award concerned an unfair labour practice arising from the failure of the municipality to comply with a job grading exercise. The arbitrator found in the employees' favour and ordered the employer to comply with the job grading exercise as ratified by the relevant Provincial Audit Committee (PAC) and to grant any benefits accruing therefrom to the individual respondents, with retrospective effect to one May 2015. In addition, he awarded each of the individual respondents amounts of R 15,000 as compensation for infringement of their right to fair labour practices. The individual respondents' union, IMATU, acts on their behalf in the application.

- [4] There was also an application to condone the late filing of the applicant's heads of argument, but at the hearing, counsel for the respondent's Ms S Harvey did not press the court on this issue. Somewhat late in the day, the municipality, also lodged a security bond shortly before the hearing to satisfy the requirement of s 145(7) of the Labour Relations Act ('the LRA'). It did so because IMATU had objected to its failure to do since the review application had been launched, but without conceding it was obliged to in law.

Narrative of the prosecution of the review and related applications

- [5] On 28 February 2018, the municipality timeously filed its review application together with an application to stay enforcement of the award pending the outcome of the review. As mentioned, no security to stay the enforcement of the award in terms of section 145(7) of the LRA was lodged at the time.
- [6] On 8 March 2018, the bargaining council lodged the record of the hearing with the registrar and the municipality was notified of this at the same time.
- [7] On 21 June 2018, IMATU, wrote to the registrar of the court pointing out that the record should have been filed by the municipality within 60 court days of being advised that the record was received in terms of clause 11.2.2[1] of the Labour Court Practice Manual ('the manual') and that since this had not been done, the application was deemed to be withdrawn in terms of clause 11.2.3[2] of the manual. The record ought to have been filed roundabout 24 May 2018
- [8] On 29 June 2018, apparently in response to IMATU's letter, a directive was issued by judge Rabkin-Naicker effectively confirming that the review application was deemed to have been withdrawn in terms of clause 11.2.3 of the manual.
- [9] The record was eventually filed by the municipality on or about 9 July 2018. At that stage it was still ignorant of the directive.
- [10] On 2 August 2018, being equally unaware of the deemed withdrawal, IMATU filed an answering affidavit to the founding affidavit of the municipality, on the basis that the review application was still 'live' and that the municipality had failed to supplement its founding affidavit within 10 days of filing the record in accordance with Rule 7A(8) of the Labour Court Rules. The municipality ought to have complied with Rule 7A(8) by 25 March.
- [11] Sometime towards the end of August 2018, the time period within the municipality ordinarily ought to have requested the application to be set down for hearing in terms of section 145 (5) of the LRA had expired.
- [12] On 20 September 2018, the union requested that the review application be set down. It was still not aware of the directive at that stage. It was at this point the municipality became aware that IMATU had already filed an answering affidavit, when an associate of the municipality's firm of attorneys attended the labour court and perused the file. It seems likely that it was IMATU's request for the matter to be set down which prompted this inquiry.

The reason the municipality claims it was unaware of IMATU's answering affidavit, is that their corresponding attorneys had failed to forward the document to their instructing attorney.

- [13] On 25 September 2018, nearly two months after IMATU filed its answering affidavit and six months after it ordinarily should have filed it under Rule 7A(8), the municipality filed its supplementary affidavit, accompanied by an application for condonation of the late filing of that and the record, together with an application to reinstate the review application. The supplementary affidavit invited the union to file a further supplementary affidavit in answer to its supplementary affidavit.
- [14] On 8 October 2018, the union wrote to the registrar asking for clarification of the status of the review application. The letter stated that the union only became aware of the directive deeming the review to have been withdrawn when it received the condonation application from the municipality. The union advised that it wish to commence enforcement proceedings.
- [15] On or about 22 March 2019, the union launched contempt proceedings relating to the municipality's non-compliance with the award, on the basis that the review application was withdrawn.
- [16] On 22 April 2019, the municipality filed its answering affidavit in the contempt application. It took the view that since the reinstatement application was pending it was not obliged to comply with the arbitration award. It also pointed out that the union had not filed any answering affidavit to the reinstatement and condonation applications.
- [17] On 31 January 2019, IMATU had the arbitration award certified and initiated contempt proceedings on 22 February 2019. The contempt application was withdrawn on 25 April 2019 following a settlement in which the parties agreed to a timetable for filing further affidavits.
- [18] On 29 May 2019, IMATU then filed its answering affidavit in the reinstatement and condonation applications. This was done by agreement with the municipality as part of a settlement of the contempt application.

Legal principles

The deeming provisions in the Labour Court Practice manual

- [19] Prior to the advent of the practice manual, an applicant in review proceedings was not bound to any fixed timetable for the filing of the record, once it had been uplifted for transcription. A party that was pursuing the review purely for dilatory purposes might delay matters by not filing the record. The only way the respondent party could bring matters to a head was to apply under rule 11 to dismiss the application, after putting the applicant on terms. An application which had not been prosecuted timeously could be dismissed on account of the excessive delay, taking into account the explanation for the delay and the prejudice suffered by the applicant party.[3]

[20] A feature of the Labour Court Practice Manual, which was introduced in 2013, are provisions to try and ensure that a review application could not languish unattended and unresolved, until a respondent party felt compelled to bring a rule 11 application to dismiss it. In *MJRM Transport Services CC v Commission for Conciliation, Mediation & Arbitration & others*[4], Judge Tlhotlhlalemaje summarised the status of the practice manual:

‘(12) In *Ralo v Transnet Port Terminals & others*, Van Niekerk J in examining the status of the Practice Manual, and further in reference to *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others* held that:

‘I agree. The Practice Manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes (see clause 1.3). While the manual acknowledges the need for flexibility in its application (see clause 1.2) its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience.’

(13) The views expressed in the authorities above are on point and find support in the objectives of the manual, as can be gleaned from its 'Introduction' part which are essentially to promote access to justice by all those whom the Labour Court serves; to promote consistency in practice and procedure; to set guidelines on the standards of conduct expected of those who practise in this court; to tell representatives and litigants how things are done in this court, and what is expected of them; to address the need to maintain respect for the court as an institution; to promote efficiency in the adjudication of disputes; to improve the quality of the court's service to the public, and to promote the statutory imperative of expeditious dispute resolution.

(14) The manual as it states in its 'Introduction' is not a substitute for the Labour Court Rules. Its purpose is to fill in gaps not adequately catered for in either the rules or the provisions of the LRA for the proper functioning of the court and the expeditious resolution of disputes. Inasmuch as its provisions call for flexibility in their application where required, litigants are nevertheless bound by them. To hold otherwise would lead to a dysfunctional court system, where parties can litigate in any manner that they deem fit, simply because it suits them to do so.’[5]

(emphasis added)

[21] In *Samuels v Old Mutual Bank*[6], the LAC confirmed that:

‘(15) 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]

[22] In *Macsteel Trading Wadeville v Van der Merwe NO & others*[8], the LAC reaffirmed the proper interpretation of the manual in *Samuels*:

‘(22) The underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the Rules of the Labour Court and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court.’[9]

[23] Whether the practice manual has reduced protracted ancillary litigation relating to reviews which have not been prosecuted expeditiously is debatable. However, it has clarified those time periods, which are not contained in the court rules, within which certain steps in the prosecution of the review must be taken. Not only does the manual prescribe the acceptable time periods for performing such steps but attaches adverse consequences to non-compliance therewith by means of deeming provisions in clauses 11.2.3, 11.2.7 and 16.3. in terms of which a review application is deemed withdrawn, lapsed or dismissed. Those deeming provisions curtail the dilatory prosecution of a review and ought to make it unnecessary for a respondent party to launch an application to dismiss the review.

[24] The effect of a review application which is deemed to have been withdrawn, lapsed or dismissed in terms of the provisions of clauses 11.2.3, 11.2.7 and 16.3 of the manual respectively is that to all intents and purposes it ceases to exist as a pending application and this is not akin to a mere suspension or stay.[10] Nothing in the jurisprudence suggests that the legal consequences of the three different terms used to deem a review application inactive are any different from each other. If and when a review applicant succeeds in bringing an application to reinstate it or to retrieve it from its archival state, its status as a pending application will be restored.

[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.[11] 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.’[12]

[26] In 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.’[13]

[27] In Macsteel Trading the LAC also highlighted the effect of a lapsed an archived review application. In that matter, the labour court decided a review which had been enrolled six years after it had been launched. The court would not consider the respondent’s argument that the application should have been dismissed because of the dilatory conduct of the applicant, for which the latter had not even sought condonation, because the respondent had not brought an application under rule 11 to dismiss the application on this ground. The LAC held that the court a quo should not have declined to deal with applicant’s delay after failing to strike the application off the roll. At least the labour court should have given the respondent an opportunity to bring a rule 11 application to dismiss the review.[14] In any event, the LAC found the court had erred in entertaining the review application in the first place. It should have struck it off the roll for lack of jurisdiction :

‘(24) Macsteel had raised NUMSA’s undue delay in prosecuting the review application in its answering affidavit in the review application, but since that application had in effect lapsed and been archived, the Labour Court had no jurisdiction to determine the issue of the undue delay raised there. In the circumstances, Macsteel would have been required to bring a separate rule 11 application for the review application to be dismissed or struck from the roll on the grounds of NUMSA’s undue delay in prosecuting it. But a rule 11 application was not a prerequisite for the Labour Court, in this particular instance, to consider whether, on the grounds of undue delay, the review application should be dismissed or struck from the roll.’[15]

(emphasis added)

[28] A number of decisions of the labour court have dealt with review applications deemed withdrawn under clause 11.2.3. In *Dagane v Safety & Security Sectoral Bargaining Council & others*[16] the court concurred with the decision in *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others*[17] that a party whose matter is deemed withdrawn may apply for condonation for the late filing of the record when the respondent

party raised the deemed withdrawal as an in limine objection to the review application being heard. In *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council & others*[18], the court refused to entertain a review which was deemed withdrawn in the absence of a formal application for reinstatement or condonation for non-compliance with the practice manual. In *MJRM* the court held that the ordinary principles applicable to condonation applications would apply and that a party which had applied for condonation for non-compliance with clause 11.2.3 was not barred from doing so because the review application was deemed withdrawn or it had failed to request an extension of time to file the record from the Judge President.[19]. In a later decision by Prinsloo J, it was held that an application for condonation of non-compliance with clause 11.2.3 can only be considered if filed together with a reinstatement application.[20] Similarly, in *SA Police Union on behalf of Mnisi v Safety & Security Sectoral Bargaining Council & others*[21] Moshoana J held after considering other labour court decisions and the LAC judgment in *Samuels* that :

‘(11) Where a matter is withdrawn, there can never be a talk of a dispute that would require application of the law to decide. This court and other courts refuse to hear applications or matters that are moot. The same principle must apply. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. The dismissal of a review that has been withdrawn no longer affect the interest of the parties. It has no practical effect to the parties nor does it serve the interests of justice.’

[29] In the matter of *Mchunu v Rainbow Farms (Pty) Ltd, In Re: Rainbow Farms (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[22], the court dismissed a review application on the basis that the deemed withdrawal of the application did not mean it had actually been withdrawn and found that the employee was entitled to an order dismissing the employer’s review application as a precursor to making the award an order of court.[23] In *Mnisi*, Moshoane J differed with this approach:

‘(14) I do not entirely agree with my brother when he concludes that the legal fiction does not suggest that a review was actually withdrawn. This is at odds with what Van Niekerk J found in *Ralo supra*. A legal fiction is there to denote that something is a fact regardless of the objective truth of the matter. I do not entirely understand the contention of the interest of certainty. In my judgment, there was nothing that would have prevented *Mchunu* to have made the arbitration award an order of court, for the simple reason that there was no pending review. By way of an analogy, it was held that where an appeal had lapsed, there was nothing preventing execution steps¹⁴. It is indeed so that where there is a pending review, this court ordinarily refuses to exercise its discretion in terms of section 158(1) (c) of the LRA. In an instance where a review is deemed withdrawn, there is no pending review. To my mind where the review is withdrawn there is certainty.’

[30] In *MJRM* the court held that mere non-compliance with 11.2.3 alone does not entitle the respondent party to demand the dismissal of the review,

without bringing a dismissal application under Rule 11.[24] This approach was reaffirmed in *Mthembu v Commission for Conciliation, Mediation & Arbitration & others*[25], in which a review application was deemed withdrawn and the respondent successfully brought a Rule 11 application to dismiss it.[26] The court affirmed the right of a respondent to bring a dismissal application in such circumstances and in keeping with the dictum of the LAC in *Macsteel* on the apparent need for a respondent party to bring a Rule 11 application to dismiss an inactive review. The court declined to

follow contrary approach suggested in *Mnisi's* that the registrar should not enroll rule 11 applications to dismiss applications which are withdrawn.[27]

[31] It is obvious from the above that different approaches exist as to whether non-compliance with a practice manual time period which has the effect of deeming a review application defunct permits the party

in default simply to apply for condonation for non-compliance with the practice manual or whether a separate application to revive the review application must also be brought. If effect is to be given to the deemed status of the review application, it seems the correct approach is that the application must be reinstated and that a condonation application for non-compliance alone cannot be brought because an interlocutory application relating to a non-existent review application makes no sense. It appears that most judgements favour the approach that a reinstatement application has to be brought together with the condonation application.

[32] However, even though this approach seems to be formally correct, when it comes to deciding whether or not to reinstate the review application that decision will always be inextricably linked with whether or not the non-compliance with the manual should be condoned. It is difficult to envisage how any review application could be reinstated, unless the act of non-compliance is also condoned.

[33] In passing, it seems as long as the review application is no longer pending by virtue of one of the deeming provisions of the manual, nothing prevents the respondent party from taking steps to enforce the award, even if security was provided under s 145(7) as the provision of the security only stays execution of an application that

is pending. For an employee party, this is a way of achieving finality without having to first dismiss the review application, as noted in *Mnisi*.

[34] That said, it is less clear what role, if any, rule 11 dismissal applications have to play when a review has been rendered defunct by operation of a deeming provision. It was clearly an important remedy prior to the advent of the deeming provisions when a review was pending but was not being actively pursued. Where a deeming provision has de-activated a review, the only way an employer as a respondent party could be put at risk is if the applicant successfully brings an application to reinstate the application. That is very different from the situation prior to the practice manual's

introduction, when a review which had been dormant for years could suddenly be enrolled for hearing.

[35] This is not to say there might conceivably still be situations where it might be necessary for a frustrated respondent to have recourse to a dismissal application, in which case the ordinary principles applicable to such applications would apply. The LAC in MacSteel clearly envisaged that a rule 11 application might still be brought by a party prejudiced by the delay, but did not elaborate on

the circumstances when this would be appropriate. It is also arguable, that because the ratio of the LAC's decision was essentially on a very narrow basis, that the court's comments on a rule 11 application were obiter.

The relevance of steps taken after a review application is deemed defunct

[36] The next issue to consider for the purpose of this application is how the court is to deal with subsequent steps taken by an applicant to pursue the review application, after a review application is deemed defunct.

[37] Strictly speaking, once a review application's legal status as a pending application ceases by operation of one of the deeming provisions in the manual there can be no enforceable obligation on either party to file further court process in the main application. Should the inaction of an applicant party after the application has

become defunct, be a consideration in reinstating the application, or should the determination of reinstatement be confined essentially to whether the non-compliance which led to it being deemed such, should be excused?

[38] In my view, it would be odd that a party whose non-compliance had caused its application to become inactive, could then fold its arms until it's application for reinstatement was decided. While it might not be strictly obliged to take further steps, its bona fides in seeking to finalise the review would surely be questionable if it did nothing further to ready the matter for speedy resolution in the event its reinstatement application succeeds. To accept the passivity of such a party once their application is deemed

inactive, would also seem to promote further delay rather than curtail it, contrary to the principle that reviews should be dealt

with expeditiously. An applicant party that has been dilatory and is seeking an indulgence to revive the review application therefore

ought to satisfy the court that in the interim it has done what it can to remedy its failure which led to the application being deemed inactive in the first place and done whatever else it could reasonably do so that the matter would be ready for hearing if reinstated. In my view this would be in keeping with the condonation principles affirmed in Samuel's case. Accordingly, steps taken during the time the application is inactive should, in my view, have a material bearing on the success of attempts to revive it, and if the steps taken would also have led to the review

application being deemed withdrawn, they would have to be condoned if it is to be permitted to proceed.

[39] On the approach adopted, as one pre-condition for reinstatement, the court needs to be satisfied that the non-compliance with the manual which led to the application being deemed inactive, should be condoned. If that conduct should be condoned, its dilatoriness up to the point the application was deemed inactive will be excused. Further, if it is to ultimately succeed in reinstating the application it ought to demonstrate it acted promptly in launching the reinstatement application and set out what provisional steps it has taken in a bona fide attempt to ensure the expeditious finalisation of the review if reinstatement is permitted. To the extent that those further steps would also need to be condoned if the application is brought back to life, the court must determine if they should be. If not, that will sometimes prevent the reinstatement of the application, just as the failure to obtain condonation for the initial non-compliance would. However, if the dilatoriness relates to some step that is not a pre-condition for pursuing a review, such as the late filing of a replying affidavit, then that ought not be an obstacle to reinstating the review application, even if that step is not condoned.

[40] When deciding whether to reinstate a review, or to order its retrieval from the archives, or in deciding whether or not to condone

non-compliance with time periods stipulated in the manual, the court must apply the traditional test used in condonation applications,

save that the prospects of success need only be assessed on whether a case has been made out which could succeed if proven.[28]

Evaluation

[41] The cause of the review application been withdrawn in this instance was that the municipality filed the record of the review a month (or approximately 20 court days) after the expiry of the 60 day period stipulated in clause 11.2.2 of the manual. During the 60 day period, it made no effort to seek any extension of the time for filing the record either with the agreement of the union, or the permission of the court as provided for in clause 11.2.3. However, in

terms of the jurisprudence, it is still entitled to seek condonation for the late filing of the record in conjunction with the application for reinstatement.

[42] In this matter, the court needs to evaluate whether the municipality's late filing of the record and the timing of its subsequent filing of the supplementary affidavit whilst the review was dormant ought to be condoned. Since consideration of the merits and prejudice are matters which are common to both applications for condonation they are dealt with after looking at the respective delays and explanations therefor.

The explanation for the delay in filing the record

- [43] The record of the arbitration ought to have been filed about 7 June 2018. It was only filed on 8 July 2018, a month later. In terms of court days, the delay is about a third longer than the stipulated deadline. It is a significant delay, but not notably excessive.
- [44] The applicant's explanation for the delay is twofold. Firstly, it claims its internal supply chain management procedures, which it had to comply with to appoint a transcription service to transcribe the record, are lengthy but unavoidable in terms of section 111 of the Municipal Finance Act, 56 of 2003 ('the MFA'). Secondly, the length of the audio recordings accounted for part of the delay. Each portion of the explanation will be considered.
- [45] The municipality claims it began the procurement process "immediately" the record had been obtained from the registrar, but the tender process took two months to complete. The compulsory supply chain process entails setting out the specifications of the tender, advertising the tender for a specific time, evaluating the tenders, and recommending and awarding the tender all within the supply chain management process. On 8 May 2018, the tender was awarded to Adventek, but it transpired afterwards that it did not supply a tax clearance certificate within the time stipulated by the SCM procedures and the tender had to be awarded to another business, Translation and Advertising Services, which started transcribing the record at the end of May. The record was transcribed by 19 June.
- [46] The applicants state that it took so long to complete the transcription because the audiotape contained 22 hours of recording. IMATU disputes that it could have taken so long and attaches various quotations from other transcriptions services to support this claim. However, as Mr Oosthuizen SC, who appeared for the municipality pointed out, one of those quotations in fact indicated that on a 'rushed' turnaround time, the transcription service could transcribe one hour of the record per day, which supported the municipality's claim that the time taken by its transcribers was not unreasonable. It must also be said that the various services' quotations provided by IMATU varied widely in terms of the time within which they could urgently transcribe such a record, for which there could be various explanations including the volume of other work an agency had at the time. In any event, IMATU could not dispute that the transcription did take as long as the municipality claimed, and the time taken was not inherently improbable.
- [47] IMATU did not dispute the explanation offered relating to the supply chain management process but complained that it was inadequate given the lack of particularity and any supporting documentation.
- [48] I agree that the explanation could have been more detailed but essentially there is no true dispute of fact about the explanation, and it does not indicate that the municipality was tardy in taking steps to have the record transcribed. Had the first service provider not failed to provide a tax certificate there is good reason to believe the record would have been filed before the end of May and might even have been filed in time. The municipality could not have foreseen the tax certificate problem. While the explanation is vague about when the lack of a tax clearance became known and when the second service provider was appointed

I am satisfied that the explanation is not a wholly unsatisfactory one and does not appear inherently implausible.

[49] What is remarkable though is that the municipality does not seem to think that it is necessary to explain why it made no use of the provisions of clause 11.2.3 of the practice manual by requesting an extension of time in view of the difficulties it was experiencing, either from the union, or failing that from the court. It is as if the municipality just assumes that it owes the court no explanation for its abject failure to timeously use it. Had it done so this whole application and the delay necessitated by might well have been avoided. This is a factor I have taken into account when considering

costs.

The delay in filing the supplementary affidavit

[50] The supplementary affidavit was filed on 25 September 2018. In terms of rule 7A(8) the supplementary affidavit ordinarily would have been filed on or about 23 July 2018. However, it was filed over two months

later. That is an excessive delay relative the period within which it would had to have complied with if the application was still live. It is important to emphasise that the during this time, the municipality supposedly believed the review application was active.

[51] IMATU contends that even if the length of time in finalizing the transcript could be excused, the further delay in finalizing the supplementary affidavit was inexcusable and excessive and the municipality's explanation is highly questionable because it had been finalised within a couple of days of the municipality learning that the review application had been withdrawn.

[52] The municipality claimed that it had intended to file the record and supplementary affidavit simultaneously "for the sake of convenience and in order not to ratchet up costs." However, when it received notice of IMATU's inquiry to the registrar about the status of the application, it served the record on IMATU to demonstrate its bona fide intention that it was going to pursue the application and was not unduly delaying matters. IMATU argues that this explanation is at odds with what claims was stated by the municipality in the contempt application, namely that it was unaware of IMATU's letter to the registrar. However, a closer examination of what was said by the municipality in its answering affidavit in the contempt application is that it did not say that it had not received notice of IMATU's inquiry, but that it would have pointed out the problems it was encountering in obtaining the transcript to IMATU if it had been advised of the letter before IMATU sent it. While it might have been advisable on the part of the union to approach the municipality's attorneys before

approaching the court, the municipality seems to think that it was under no obligation to approach the union and if necessary the court about its difficulties. I have already referred to its complete failure to take steps under clause 11.2.3 above. In any event, all that the municipality is effectively saying is that it would have filed the record even later than it did. However, I fail to

understand how this in any way assists the municipality in explaining the delay in filing the supplementary affidavit together with the condonation application and the application to reinstate the review application.

[53] The municipality stated its explanation for the delay thus:

‘The process of perusing the record was lengthy as the applicant’s legal representatives did not represent the applicant during the arbitration proceedings. This necessitated intensive perusal of the record as well as extensive and various consultations with the applicant’s witnesses, all of whom are situated in Bredarsdorp. The fact that the arbitration proceedings were conducted in Afrikaans, protracted the exercise even further.’

[54] Further, the municipality claims that the applicant’s legal representatives were only able to settle the supplementary affidavit after several redrafts, once they had completed perusing the record and consulting with witnesses. This terse explanation is tendered for the entire period of over two months from the time the transcript was available. No details are provided about when and where the consultations took place, nor why extensive consultation with witnesses was necessary for the purposes of the review application.

[55] The union is sceptical of the municipality’s explanation of the delay and notes that the supplementary affidavit was filed very shortly after the municipality had learned of the supplementary affidavit filed by IMATU and of the directive deeming the application withdrawn. IMATU insinuates that the municipality was only galvanized

into action when it became aware of the situation. However, that is an inference the union draws, but does not directly dispute the explanation given. Nonetheless, it is a poor explanation at best and an unsatisfactory one at worst, given the lengthy time period it is intended to cover.

Prejudice

[56] The municipality argues that the individual respondents will suffer no prejudice as a result of the delays because if the municipality is unsuccessful, they will receive what is owed to them in terms of the award including the portion that is backdated. Moreover, it argued that the individual respondents are not unemployed, but remained employed by the municipality. It also argues that IMATU was also dilatory in filing its supplementary answering affidavit in the review application when it did so only on 29 May 2019.

[57] The municipality claims that it will suffer prejudice if the arbitration award is allowed to stand because it has far-reaching negative financial implications for its in relation to how the TASK job grading process is to be implemented.

[58] In the answering affidavit it is claimed that it is not sufficient just to look at the ultimate impact of the individual applicants receiving what is due to them under the award, but it is also necessary to look at the contingent disadvantages they suffer in the interim by not receiving the full benefit of the salary adjustments timeously. The failure to give effect to the award adversely affects their status, prospects and standard of living as long as they await

the finalization of the review. No specific circumstances of individual respondents were pleaded in this respect. There is also a reference to the fact that two of the individual respondents have suffered cancer, which though in remission, makes it desirous that the matter be finalized quickly.

- [59] In the circumstances, I am not satisfied that the prejudice to the individual respondents of waiting longer before receiving what is due to them under the award is so significant that it outweighs the prejudice to the respondent of not being able to set aside a potentially incorrect finding in law, which can have future financial repercussions and implications for the powers of the municipal manager in relation to job grading, if not resolved.

Merits of the review application

- [60] As stated above, the court must consider if the applicant would succeed should it be able to establish the grounds of review when the matter is argued.
- [61] In this case, the municipality contends that the arbitrator made an incorrect finding in law when he held that the municipal manager was bound by the outcome of a job evaluation process conducted by a job evaluation committee ('JEC') and the provincial audit committee ('PAC'). The respondent contends that the job evaluation process conducted in terms of a memorandum of agreement between the various municipalities in the Overberg district could deprive him of his powers under sections 1 and 66 of the Municipal Systems Act, 32 of 2000 ('the MSA') and section 62 of the Municipal Finance Management Act ('the MFMA').
- [62] Essentially the argument is a legal one and if the municipality is right that the arbitrator's findings were based on a mistake of law, and in particular an interpretation of a statute, the municipality will succeed.[29] IMATU does not contest that the municipality has not set out grounds of review, which if established, would entitle it to set aside the award.

Conclusion

- [63] I have indicated above that I accept the explanation for the late filing of the record by the municipality is a reasonable one, even though it is failure to invoke the procedure under clause 11.2.3 of the practice manual must be deprecated. Its explanation for the delay in filing the supplementary affidavit is unacceptable for lack of particularity given the period of the delay in question.
- [64] As mentioned, it is not disputed that the municipality has met the relatively low threshold required in setting out its prospects of success
- [65] After considering the factors bearing on whether to allow the reinstatement of the application, given the importance of determining whether the arbitrator's interpretation of the municipal manager's powers to alter the outcome of job evaluation exercises is correct, and given that considerations of relative prejudice the parties might suffer by allowing the review to proceed not, I am persuaded that, despite the deficiencies in explaining why it took so long in filing the supplementary affidavit, the review application should be

reinstated and that shortcomings in complying with time periods in the practice manual should be condoned.

Costs

[66] The municipality is ultimately successful. However, this entire application could have been avoided if it had taken it had steps to procure an extension of time for the filing of the record as provided for in clause 11.2.3 of the practice manual. It did not even communicate its difficulties to IMATU. This disregard of provisions in the manual designed to prevent this kind of application is a practice that should be discouraged. Had it invoked the provisions of that clause in all likelihood it would have obtained the extension it required. The respondents' opposition was also not

unreasonable. In the circumstances I consider it is appropriate that the municipality should at least bear half the respondents'

costs.

Order

- [1] The late filing of the applicant's heads of argument is condoned.
- [2] The review application is reinstated.
- [3] The late filing of the arbitration record is condoned
- [4] To the extent that it is necessary, the filing of the applicant's supplementary affidavit is condoned.
- [5] The applicant must pay half the respondents' costs of opposing the application.
- [6] The registrar is directed to enrol the review application on the opposed roll.

R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

A C Oosthuizen SC instructed by John

MacRobert Attorneys.

RESPONDENTS:

S Harvey instructed by MacGregor Erasmus

Attorneys

[1] 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.

[2] 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.

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[3] Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others

(2016) 37 ILJ 313 (CC) at 330, para (36) and Member of the Executive Council, Department of Sport, Recreation, Arts & Culture, Eastern Cape v General Public Service Sectoral Bargaining Council & Others

(2015) 36 ILJ 2893 (LC) at 2898-9, paras (25)-(26).

[4]

(2017) 38 ILJ 414 (LC)

[5] At 417-8

[6]

(2017) 38 ILJ 1790 (LAC)

[7] At 1796.

[8]

(2019) 40 ILJ 798 (LAC),

[9] At 804.

[10] In *Ralo v Transnet Port Terminals & Others*

(2015) 36 ILJ 2653 (LC), the court confirmed the effect of a deeming provision: '(10) To the extent that the applicant contends that the meaning of the word 'deemed' is such that the dispute between the parties remains unresolved and that the application has not been withdrawn, the meaning of 'deemed' in a context similar to the present has been the subject of an instructive judgment by the Labour Court of Namibia. While *Municipal Council of the Municipality of Windhoek v Esau* 2010

(2) NR 414 (LC) (LCA 25/2009 12 March 2010) concerned the lapsing of appeals, the wording of the rule under consideration in that instance is not dissimilar. Rule 17(25) of the Rules of the Labour Court of Namibia provide that an 'appeal to which this Rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed'. The word 'deemed' in this instance was clearly considered to have conclusive effect — in the absence of the prosecution of the appeal within the prescribed period the appeal was held to have lapsed. (See also *Pereira v Group Five (Pty) Ltd & others*

(1996) 4 All SA 686 (SE) at 698, where the court referred with approval to *Steel v Shanta Construction (Pty) Ltd & others* 1973 (2) SA 537 (T), in which Coetzee J stated that the word 'deemed' means 'considered' or 'regarded' and is used to denote that 'something is a fact regardless of the objective truth of the matter'.) 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.' See also *Mnisi*

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[11] 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 to be archived or be removed from the archive. In passing, it should be noted s 145(5) of the LRA has shortened the time period to six months, but non-compliance with the shorter time period does not mean the application is deemed to have lapsed at that stage but condonation must be obtained for a late application for a hearing date.

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[1] [12] At 1793, para (4). Note: Clause 16.2 of the manual provides that: '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.'

[1] [12] At 1793, para (4). Note: Clause 16.2 of the manual provides that:

'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.'

[13] At 1796-7.

[14] At 805, para (26).

[15] At 804-5.

[16]

(2018) 39 ILJ 1592 (LC) at 1597, para (13).

[17]

(2014) 35 ILJ 1672 (LC) at 1676, para (13).

[18]

(2017) 38 ILJ 477 (LC)

[19] MJRM at 419, para (16).

[20] Sol Plaatjie Local Municipality v SA Local Government Bargaining Council & others (PR192/15)

(2017) ZALCPE 11 (13 June 2017) at paras (28) and (29).

[21] Case no JR2597/201 (unreported and delivered on 19 August 2019).

[22] (D203/15) (2017) ZALCD 17 (12 June 2017)

[23] Mchunu at paras (11) – (12)

[24] MJRM at 419, para (18).

[25]

(2020) 41 ILJ 1168 (LC)

[26] See also Moisi v Commission for Conciliation Mediation and Arbitration and Others (JR2567/16) (2019) ZALCJHB 354 (17 December 2019)

[27] At 1173, paras (13) – (14).

[28] See Samuels at 1796-7, para (17) *supra*.

[29] See MacDonald's Transport Upington (Pty) Ltd v AMCU & Others

(2017) 2 BLLR 105 (LAC)

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