

SOUTH AFRICA / JUDGMENT

**Petersen v Commission for Conciliation,
Mediation and Arbitration and Others.rtf**
(JR1316/22) [2024] ZALCJHB 251 (28 May 2024)
[2024] ZALCJHB 251

COURT

Labour Court Johannesburg

BEFORE

S Snyman

CASE / FILE NUMBER

JR1316/22

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Source record

THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JR 1316 / 22

In

the matter between:

GAVIN DEON
PETERSEN
Applicant
and
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
RENDANI EWART MATUMBA
N.O.
Second Respondent
SED PARTNERS (PTY)
LTD
Third Respondent

Heard:

1 November 2023

Delivered:	28 May 2024 This judgment was handed down electronically by circulation to the parties by email. The date and time for hand-down is deemed to be 28 May 2024
Summary:	CCMA arbitration proceedings – misconduct by arbitrator – test for review – s 145 of LRA 1995 considered CCMA arbitration proceedings – review of findings of fact by arbitrator – test for review – s 145 of LRA 1995 considered Condonation – non compliance with clauses 11.2.2 and 11.2.3 of Practice Manual – principles considered – no case for condonation made out – condonation refused Condonation – prospects of success considered – grounds of review relating to misconduct considered – commissioner properly conducting himself in course of proceedings – commissioner justly and properly discharging duties under the LRA – no misconduct established Dismissal – dismissal during probation – principles considered – employee not satisfying inherent requirement of position – employee not a proper ‘fit’ for position – employee having proper opportunity to prove himself – dismissal during probation justified – finding of commissioner unassailable Review application – condonation refused – Court consequently has no jurisdiction to decide review – review application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This matter concerns an application by the applicant to review and set aside an arbitration award by the second respondent, arbitrator

Rendani Ewart Matumba, in terms of which the applicant's dismissal by the third respondent was held to be substantively and

procedurally fair. This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

- [2] The applicant was dissatisfied with the finding of the second respondent that his dismissal was substantively and procedurally fair. In his notice of motion, he applied that the determination of substantive and procedural fairness made by the second respondent be reviewed and set aside. He sought consequential relief to the effect that a finding be made that his dismissal was substantively and procedurally unfair, and he be awarded an appropriate sum in compensation.
- [3] The arbitration award of the second respondent is dated 3 June 2022. It is not stated in the founding affidavit when the applicant received the award. Nonetheless, the applicants' review application was filed on 14 July 2022, which is within the six weeks' time limit as contemplated by section 145(1) of the LRA. In this context, the review application is properly before this Court for determination.

Condonation: The Record

- [4] However, and despite the initial review application being brought in time, the applicant failed to file the record of the proceedings within the time limit as contemplated by clauses 11.2.2 and 11.2.3 of the Practice Manual.[2] With the CCMA having filed the record of proceedings with Court on 29 July 2022, the record was due to be filed on 17 October 2022. It was only filed by the applicant on 14 March 2023. It is therefore some five months out of time. The result of this is that the review application is deemed to be withdrawn, unless the applicant can show good cause as to why it should be reinstated, with good cause in this context being shown in the form of a condonation application.[3] The applicant fortunately did file an application for condonation along with filing the record of the arbitration proceedings before

the CCMA.

- [5] The requirements for condonation are trite. In the well-known judgment of *Melane v Santam Insurance Co Ltd*[4] the Court held that these requirements are the length of the delay, the explanation for the delay, the importance of the case (prejudice)

and the prospects of success. These requirements are interrelated, and must be holistically considered, with the proviso that if there is no explanation for the delay, then the prospects of success may well become irrelevant.[5]

- [6] Applying these principles, the delay of some five months is substantial, and can in fact be described as excessive.[6] As such, it requires an excellent explanation, in order to prevent the applicant from being non-suited as a result. Turning to the explanation for the delay, and in my view, a proper explanation for the entire period of the delay is the most critical

component to any condonation application. As to how this explanation must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[7] provided the following guidance:

‘In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.’

[7] Unfortunately, the explanation offered by the applicant for the material delay is far from exceptional. In fact, it is completely lacking in any form of requisite particularity. In a nutshell, the explanation is squarely founded on the fact that the applicant was unemployed, and thus it was difficult to afford the legal costs relating to transcriptions. In this context, he also said that he had to feed his family and was a novice in Labour Court proceedings. That is the sum total of the explanation offered by the applicant.

[8] It has been held on numerous occasions in this Court that barring exceptional circumstances, the lack of funds explanation is no

explanation at all.[8] In addition, a mere bald statement of a lack of funds is insufficient. It is essential for the applicant to take the Court into the applicant’s confidence and provide a proper exposition as to what attempts the applicant has taken to secure the necessary funds and what the applicant’s actual financial position may be.[9] In fact, a lack of funds is surely commonplace with all employees pursuing cases where they have been dismissed, and in general there would be nothing unique or exceptional about it. Most litigants, despite such lack of funds, manage to prosecute their disputes within the time limits prescribed. In the end, I consider the following dictum from the judgment in *Du Plessis v Wits Health Consortium (Pty) Ltd*[10] as being apposite in casu:

‘... a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the Court into his or her confidence in seeking its indulgence by explaining "when" not only that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds. The "when" aspects of the explanation is important as it provided the Courts with the information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay ...’

[9] The applicant's explanation of a lack of funds consists of nothing but a bald statement, without any of the kind of particularity I have set out above. The applicant had demonstrated no exceptional circumstances that sets him apart from all the other dismissed litigants prosecuting their cases without having an income. As such, the applicant has effectively provided no explanation for the entire delay in this case.

[10] The second part of the explanation offered by the applicant is based on a contention of ignorance of the law. Again, it is trite that ignorance of the law is no excuse.[11] As said in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*[12]:

'Although the test applied in the criminal law in assessing the culpability of a citizen's ignorance has refinements not relevant to the present matter, the cases following on *R v De Blom* 1977

(3) SA 513 (A) are instructive. The duty to take reasonable steps to discover the law is a real one. Mere casual enquiry will not suffice to excuse ignorance. Compare *S v Lehmbeckers Transport (Edms) Bpk en 'n Ander* 1989

(2) SA 53 (A). The interests of the community as a whole require there to be certainty as to the law. I can think of no reason why the citizen should have a more onerous duty when his liberty is at stake than when it is merely his money that matters.'

And in *House of Tandoor Entertainment and others v TUHF Urban Finance (RF) Ltd and Others*[13] the Court succinctly said:

'... While no one is expected to know all of the law it is incumbent upon any person entering upon any sphere of the law to familiarise himself or herself with the applicable law. ...'

[11] The fact is that there are many unrepresented litigants conducting cases in this Court that comply with what is really quite simple provisions relating to prosecution of review applications in the Practice Manual. On his own version, the applicant collected the record shortly after receiving notice that it had been filed in Court, and there can be no excuse for him then simply reading the Practice Manual to ascertain what his deadline was, within which to prepare and file that record in Court. So, and again, there is effectively no explanation in this regard.

[12] In the absence of an acceptable explanation for a material delay, it is well settled that prospects of success are rendered an irrelevant

consideration.[14]

[13] For the above reasons, the applicant's condonation application falls to be refused. It follows that the applicant's review application should be dismissed for want of jurisdiction, as the review application remains withdrawn.

[14] But in the interest of being thorough, considering that the review and condonation applications were not opposed by the third respondent, and as an ex gratia gesture to the unrepresented and lay applicant, I will consider the prospects of success in the review application, as will now follow.

The relevant

background

- [15] The third respondent conducts business as a plumbing and home electrical repairs service provider. It employed the applicant as a plumbing manager on 14 March 2022, on a three months' probationary period. The applicant was employed on the basis that he was a skilled and experienced manager, fully familiar with plumbing services, and proficient in Microsoft related programs for the purposes of reporting.
- [16] According to the third respondent, proficiency in Microsoft Excel was especially important where it came to the applicant's duties, as he was required to prepare weekly Excel management reports. This report had to reflect an overview of income generated by service staff and external contractors engaged in the plumbing division.
- [17] Upon appointment, the applicant was trained and inducted in the third respondent's business model and procedures. There was no handover of duties to him, as the position into which he was appointed was vacant.
- [18] But from the outset, there appeared to be difficulties with the manner in which the applicant discharged his duties. Within a week, his staff expressed that they had no confidence in his abilities. He failed to execute an instruction given to him on 23 March 2022 relating to the Continued Professional Development (CPD) points of the main plumber in the Gqeberha region, Yusuf Johnson, which could result in the third respondent being unable to renew its PIRB licence for the region.
- [19] The applicant was subjected to a performance meeting on 1 April 2022. In this meeting, a number of performance concerns were raised with the applicant. This included:
- (1) he took an inordinately long time to complete his work; (2) he failed to adequately interact with staff; (3) he had still not resolved the issue with Yusuf Johnson's CPD points; (4) he failed to personally dispatch any claim, whilst he was required to at least personally dispatch one claim so he would become familiar with the process; and (5) there were a number of customer complaints about him. In the meeting, the applicant did not dispute these deficiencies. He in fact pleaded that he given three weeks to remedy these deficiencies. This extension was agreed to by the third respondent, subject to the specific condition that at the end of April 2022, he had to submit two reports. The first report was a proper plumbing division performance report for the month, and the second was a SANS presentation on how registered plumbers should install geysers.

[20] Following the performance meeting of 1 April 2022, the applicant submitted an incomplete weekly plumbing report in the staff meeting on 4 April 2022. He agreed in the meeting that he would submit a complete report every week going forward. However, and in the next meeting on 12 April 2022, he still did not have a report available. Again he was accommodated, and he agreed to have that week's report and well as the next week's report available, on 18 April 2022. The staff meeting ultimately did not take place on 18 April 2022, but on 20 April 2022, however still the applicant presented no report. He undertook to present a complete

report for the preceding three weeks, by 25 April 2022.

[21] It however appeared that the applicant was unable to prepare an Excel report. He did not submit the report for the three weeks he promised and agreed to submit, on 25 April 2022. He did not submit the reports he was tasked with in the meeting of 1 April 2022. As a result, a meeting was convened with him on 27 April

2022. In this meeting, held with the third respondent's CEO, Rashied Essop (Essop), the applicant admitted his Excel expertise was 'rusty', despite what he said in his interview and in his CV submitted to the third respondent. Essop stated that had he known at the time of appointment of the applicant of this lack of proficiency in Excel, he would not have appointed the applicant.

[22] On 27 April 2022, the applicant was issued with a notice of termination of employment. In this notice, it was recorded that the applicant did not have the required competencies for the position of plumbing manager, and his employment was thus terminated within the probation period.

[23] On 6 May 2022, the applicant referred an unfair dismissal dispute to the CCMA. It was referred as a dismissal relating to probation, and was set down for obligatory conc / arb on 25 May 2022, coming before the second respondent. An attempt at conciliation failed and a certificate of failure to settle was issued on the same date. Arbitration then commenced immediately thereafter. In the arbitration, the applicant and Essop testified. Essop also submitted a number of affidavits from various staff members at the third respondent concerning the applicant's poor performance.

[24] As stated above, the second respondent found against the applicant, and held that his dismissal was substantively and procedurally fair. Hence the current review application.

Prospects of success

[25] The proper point of departure in assessing prospects of success is to consider what the grounds of review were, as were raised by the applicant. In *Northam Platinum Ltd v Fganyago NO and Others*[15], it was held as follows:

.... The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit ...'

- [26] As a pleaded review ground, the applicant contends that the second respondent 'grossly misconducted' himself. The basis for this contention was: (1) the second respondent prematurely terminated the arbitration proceedings and asked for written closing argument; (2) he unnecessarily interrupted the applicant in the course of his testimony; (3) he stated the case for the third respondent;
- (4) he stated a *fait accompli* during the proceedings (whatever this may mean); and (5) he made disparaging remarks against the applicant.
- [27] The other grounds of review raised by the applicant is that the second respondent placed undue weight on irrelevant issues and failed to consider significant portions of the evidence. In this context, the applicant was in essence dissatisfied because the second respondent rejected the defences offered by the applicant in the arbitration, as being legitimate and justified defences. The applicant also had an issue with the second respondent allegedly relying on hearsay evidence.
- [28] Therefore, most the grounds of review raised by the applicant are principally based on alleged misconduct by the second respondent. In this regard, the review grounds are founded on the text of section 145(2)(a) itself.[16] If an arbitrator commits misconduct in the course of conducting the arbitration, it does not matter whether the outcome arrived at is reasonable, as the misconduct itself vitiates the proceedings, resulting in the award being set aside.[17] In *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others*[18] the Court held as follows:

'What this means is that where it comes to an arbitrator acting *ultra vires* his or her powers or committing misconduct that would deprive a party of a fair hearing, the issue of a reasonable outcome is simply not relevant. In such instances, the reviewable defect is found in the actual existence of the statutory prescribed review ground itself and if it exists, the award cannot be sustained, no matter what the outcome may or may not have been. Examples of this are where the arbitrator should have afforded legal representation but did not or where the arbitrator conducted himself or herself during the course of the arbitration in such a manner so as to constitute bias or prevent a party from properly stating its case or depriving a party of a fair hearing. The reason for reasonable outcome not being an issue is that these kinds of defects deprive a party of procedural fairness, which is something different from the concept of process related irregularity. ...'

- [29] Whether or not the second respondent committed the kind of misconduct complained of by the applicant is ascertained by having regard to whether this is evident from the transcript of the arbitration. I have considered the transcript, and I can find little indication of the second respondent having perpetrated misconduct as complained of by the applicant, for the reasons to follow.
- [30] It is clear to me that the second respondent did all he could to assist the applicant in the conducting of the arbitration. He first sought to determine and then limit the issues in dispute at the outset of the arbitration, as expected of him. He explained the procedure to be followed to the parties, and the applicant indicated that he understood the same. It is clear to me that having two unrepresented parties before him, the fairly large number of questions asked by the second respondent to the parties, throughout the arbitration, were simply of a clarifying nature and to guide the process. The applicant certainly never took issue in the arbitration with of the conduct of the second respondent in this regard, and in fact, after some assistance provided by the second respondent during the cross examination of Essop by the applicant, the applicant said: 'Yes Sir, I am happy you clarified'.
- [31] I could find no indication in the transcript that the second respondent made any disparaging remarks concerning the applicant. Similarly, the contention that the second respondent stated the case of the third respondent on its behalf is simply not true. Nothing contained in the transcript indicates to me that the second respondent was partial in favour of any of the two parties.
- [32] The second respondent also never prematurely terminated the arbitration proceedings. What in fact happened is that in the course of the cross examination of Essop, the applicant started testifying. The second respondent explained to the applicant that he was giving evidence, and sought to explain to him how this differed from cross examination. After some interaction between the second respondent and the applicant, the applicant considered his position, and decided to proceed with cross examination. In the course of the further cross examination by the applicant that followed, Essop was asked a number of questions that had nothing to do with the case at hand.[19] The second respondent explained that irrelevant questions cannot assist the determination of the case. The cross examination of Essop continued, however it again reverted to the applicant presenting testimony instead of cross examining Essop. The following exchange then took place:

'COMMISSIONER: Maybe you should take an oath and give evidence because at the end of the day between you cross examining and you giving evidence more, it is more than 50% of you saying things that should be said under oath.

MR PETERSEN: Thank you sir.

COMMISSIONER: Rather than cross examining, so I am just saying do you not think you should be giving evidence.

MR PETERSEN: I fully agree with you.

COMMISSIONER: No, I am not directing you. I am asking you.

MR PETERSEN: No, I appreciate your guidance. I do not feel coerced or intimidated in any way. I think I am not very good at this thing, but one thing about the truth Mr Commissioner, the truth will always prevail.

COMMISSIONER: But when you say I will give the truth, I will say the truth, it is contained within the oath.

MR PETERSEN: Yes Sir.

COMMISSIONER: Should we not be doing that, so that you can give the truth?

MR PETERSEN: Please.'

The second respondent then proceeded to swear the applicant in to testify.

[33] Considering the above, I find it difficult to accept that the second respondent committed misconduct. He did what was expected of him in the context of an arbitration with unrepresented litigants. His actions resorted well within the ambit of his powers under section 138(1) of the LRA.[20] Insofar as it can be said he curtailed the cross examination of the applicant, this was done in full consultation with the applicant, so to speak, considering the difficulties the applicant was having with conducting a proper cross examination of Essop. In the end, and with the proper guidance from the second respondent, he elected to end his cross examination and rather testify. This ground of review raised by the applicant concerning misconduct having been committed by the second respondent lacks substance, and falls to be rejected.

[34] As to the other grounds of review made out by the applicant, the applicant needed to make out a case that the conclusions the second

respondent arrived at on the facts of the case were unreasonable. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, [21] the Court held that 'the reasonableness standard should now suffuse s 145 of the LRA', and that the threshold test for the reasonableness of an award was: '... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[22]. This means that the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[23] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[24] In *Herholdt v Nedbank Ltd and Another*[25] the Court said:

'... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[35] In the context of the above review test, the findings made by the second respondent simply cannot be faulted. The second respondent

appreciated that he was dealing with a case of dismissal relating to probation. He referred to the judgment in *Ubuntu Education Fund v Paulsen NO and Others*[26], where the Court dealt with the purpose of probation and that it was competent, as part of a probation assessment, to determine whether an employee is suitable for a particular position. The second respondent also appreciated that a lesser standard of fairness would apply in the case of a dismissal in the course of probation.[27] The fact is that in *Ubuntu Education supra*, the Court made the following clear: [28]

‘It is trite that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of ‘fit’ — aspects of demeanour, diligence, compatibility and character.’

[36] The second respondent then applied the facts in this case to the legal principles as set out above. In this context, he had no regard to the content of the affidavits that Essop sought to admit in evidence. He only considered Essop’s own evidence. As such, the applicant’s criticism that the second respondent relied on hearsay evidence has no merit.

[37] Essop testified that the applicant in the interview process said he was ‘fluent’ in Excel and had a photographic memory, however it turned out he simply lacked the proficiency in Excel that was essential for him being able to carry out a primary function of his position, which was the preparing of the prescribed reports, and that this was an inherent requirement of his position. The second respondent accepted the testimony that the applicant was simply unable to submit the reports he was required to provide on a weekly basis, despite promising to do so. It may be added in this regard that the applicant, in the arbitration, was unable to produce a single report he may have prepared. The second respondent referred to the applicant’s own concession that his Excel experience was ‘rusty’, and that this contradicted his CV. The second respondent concluded: ‘... Bearing in mind that the Applicant was employed on the position of authority, it was expected of him that he would be able to compile the income report with summary as requested by the Respondent. It is clear that the Applicant did not have the necessary skills or expertise to execute the duties of a Plumbing Manager ...’ (sic). These findings of fact by the second respondent simply cannot be faulted and would certainly be considered to be reasonable, considering what was before him.

[38] It may be added that it appears from the transcript that Essop testified that there was no handover because there was no one in the position at the time of the applicant’s appointment, however he (Essop) had personally inducted the applicant. The applicant in the end never disputed this testimony, or testified to the contrary. Essop also testified as to the staff’s vote of no confidence in the applicant. Again, the applicant did not dispute this, but contended the staff were unduly hostile towards him. He did not provide a reason why

this would be so.

- [39] The performance meetings referred to in the evidence of Essop were not disputed. This showed that the applicant was clearly informed of his deficiencies, and what was required to remedy the same. It is also clear that he was given an adequate opportunity to achieve what was required, and in fact promised to have the reports ready by 25 April 2022, but did not produce the same. The second respondent considered this as well, and concluded that the applicant that had the opportunity to prove that he was 'fit' for the position, but failed to do so. Again, this conclusion, considering the undeniable facts, is unassailable on review, and reasonably arrived at,
- [40] As touched on above, and at the commencement of the arbitration, the second respondent sought to determine exactly what the case of the applicant was, where it came to substantive fairness. According to the applicant, his dismissal was substantively unfair because he was dismissed based on hearsay evidence. He added that he had no job description, there was not a proper job handover, he did not receive induction training and the staff was hostile towards him. He would be bound to this case, as so articulated.[29] This is the case discussed in this judgment, above.
- [41] But when presenting his defence in the course of giving evidence, the applicant raised a number of further issues. He suggested he did not have to compile the reports, because the fact that he was expected to do so was based on discrimination and racism. He raised that Muslim staff in the Western Cape are paid more than black staff (what this has to do with his performance in his position is unclear). He stated that where it came to the CPD points issue, he was asked to fabricate points, which he was not willing to do. This additional case, because it was not raised at the outset when issues in dispute were limited, would certainly entitle the second respondent to reject this part of the case.
- [42] Nonetheless the second respondent considered all of the contentions raised by the applicant, and rejected the same for a number of reasons. Firstly, the second respondent pointed out that these alleged concerns of the applicant were never raised before. He in fact considered the discrimination defence to be a 'lame defence', and that it was an unjustified excuse by the applicant for failing to discharge one of his most basic duties. He accepted that the applicant in fact failed to interact with his staff as required, and that his staff had expressed a vote of no confidence in him because of his lack of diligence and management competencies. I do not believe that any criticism of the second respondent in making these findings would be justified, and such findings were properly arrived at.
- [43] It is the duty of the second respondent to determine the truth of the case presented to him. [30] In this case, he properly decided that the defence the applicant sought to offer had no substance. It is a conclusion that was justifiably arrived at, considering what as before him. In the end, the applicant was simply unable to fulfil one of the core duties of his position. It is undeniable that he lacked the necessary competence and ability to compile and submit the required reports. That indeed meant he did not 'fit' the position, justifying his

termination of employment in the course of probation. The second respondent's conclusion to this effect must be upheld on review.

[44] For all the reasons as set out above, the applicant simply has no prospects of success on review. In the absence of prospects of success, there would equally be no basis to grant condonation.

CONCLUSION

[45] I therefore conclude that the applicant has failed to make out a case for condonation / reinstatement of his review application that is considered to have been withdrawn by virtue of his non compliance with clauses 11.2.2 and 11.2.3 of the Practice Manual. He has failed to submit any acceptable explanation for what is a material delay. Further, his review application has no prospects of success. The condonation application falls to be dismissed and consequently, this Court has no jurisdiction to entertain the applicant's review application.[31] In *Zono v Minister of Justice and Correctional Services; In Re: Minister of Justice and Correctional Services v Zono and Others*[32] the Court held:

‘... when a review application lapses, is deemed withdrawn or dismissed in terms of clauses 11.2.3, 11.2.7 or 16.3 respectively, it remains so unless and until the applicant succeeds in an application to reinstate or retrieve the application, thus restoring its status as a pending application ...’

[46] This matter was unopposed, and accordingly no issue of costs arises.

[47] In the circumstances, I accordingly grant the following order.

Order

1. The applicant's condonation application is dismissed.
2. The applicant's review application is dismissed for want of jurisdiction of the Labour Court to consider the application.
3. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Third Respondent: No appearance

[1] Act 66 of 1995.

[2] Clause 11.2.2 prescribes a time limit of 60 days. Non compliance with this time limit is dealt with in terms of clause 11.2.3 as follows: ‘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.’.

[3] As said in *Zono v Minister of Justice and Correctional Services; In Re: Minister of Justice and Correctional Services v Zono and*

Others [2020] 11 BLLR 1160 (LC) at para 17: ‘An application for reinstatement of a review application deemed to have been withdrawn is, in essence, an application for condonation. It is incumbent on the applicant to show good cause why, in this case, the record of the proceedings under review was not filed within the prescribed time limit. Condonation is not there merely for the asking, nor are applications for condonation a mere formality ...’. See also *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council and Others* (2017) 38 ILJ 477 (LC) at para 6.9; *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others*

(2017) 38 ILJ 414 (LC) at para 21.

[4] 1962

(4) SA 531 (A) at 532C-E.

[5] See *Moila v Shai No and Others* (2007) 28 ILJ 1028 (LAC) at para 34; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1948 (LAC) at para 38.

[6] *Compare Plastics Convertors Association of SA and Another v Metal and Engineering Industries Bargaining Council and Others* (2017) 38 ILJ 2081 (LC) at para 15; *Silplat (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*

(2011) 32 ILJ 1739 (LC) at para 24; *National Education Health and Allied Workers Union and Others v Vanderbijlpark Society for the Aged*

(2011) 32 ILJ 1959 (LC) at para 2; *Van Dyk v Autonet (A Division of Transnet Ltd)*

(2000) 21 ILJ 2484 (LC) at para 12.

- [7] (2010) 31 ILJ 1413 (LC) para 13.
- [8] See *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at paras 16 – 18; *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8; *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 37; *Balmer and Others v Reddam (Bedfordview) (Pty) Ltd* (2011) 32 ILJ 2121 (LC) at para 15.
- [9] See *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2019) 40 ILJ 827 (LAC) at para 23.
- [10] [2013] JOL 30060 (LC) at para 16.
- [11] See *Ruijgrok v Foshini (Pty) Ltd and Another* (1999) 20 ILJ 1284 (LC) at para 12; *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC) at para 23.
- [12]
- [1991] ZASCA 163; 1992
- (4) SA 202 (A) at 227B-D.
- [13] 2023 JDR 4026 (GJ) at para 30.
- [14] See also *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) at para 20; *Mgobhozi v Naidoo NO and Others* (2006) 27 ILJ 786 (LAC) at para 34.
- [15] (2010) 31 ILJ 713 (LC) at para 27.
- [16] Section 145(2) reads: ‘A defect referred to in subsection (1), means- (a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers’.
- [17] See *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 101.
- [18] (2014) 35 ILJ 1528 (LC) at para 18. See also *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 658 (LC) at para 14; *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 ILJ 1546 (LC) at para 13; *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1151 (LC) at para 27.

- [19] This included questions about staff being required to work excessive hours without being paid overtime, how Essop saw his own character, and the transport of another employee (Grootboom).
- [20] Section 138(1) of the LRA reads: 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.
- [21] (2007) 28 ILJ 2405 (CC).
- [22] Id at para 110. See also CUSA v Tao Ying Metal Industries and Others (2008) 29 ILJ 2461 (CC) at para 134; Fidelity Cash Management (supra) at para 96.
- [23] See Duncanmec (Pty) Ltd v Gaylard NO and Others (2018) 39 ILJ 2633 (CC) at paras 43.
- [24] Id at para 41.
- [25] (2013) 34 ILJ 2795 (SCA) at para 25. See also Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (2014) 35 ILJ 943 (LAC) at para 14; Monare v SA Tourism and Others (2016) 37 ILJ 394 (LAC) at para 59; Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (2015) 36 ILJ 968 (LAC) at paras 15 – 17; National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others (2015) 36 ILJ 2038 (LAC) at para 16.
- [26] (2019) 40 ILJ 2524 (LAC).
- [27] See item 8(1)(j) of the Code of Good Practice: Dismissal that reads: 'Any person making a decision about the fairness of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.'
- [28] Id at para 33.
- [29] In ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others (2013) 34 ILJ 2347 (LC) at para 62, the Court held: '... The effect of the events at the commencement of the arbitration, as specifically set out above, is similar to a pretrial agreement and has the same consequences. As there are no pleadings in CCMA arbitrations, the court has specifically dealt with the significance of opening addresses ...'. See also Fidelity Cash Management (supra) at paras 20 – 22; Tiger Brands Field Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others [2013] ZALCJHB 216 (13 August 2013) at para 71.

[30] As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and others*

(2011) 32 ILJ 723 (LC) at para 7: ‘... One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. ...’. See also *Solidarity on behalf of Van Zyl v KPMG Services (Pty) Ltd and Others* (2014) 35 ILJ 1656 (LC) at paras 7 – 8; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 30.

[31] *Macsteel Trading Wadeville v Van der Merwe NO and Others* (2019) 40 ILJ 798 (LAC) at para 24.

[32] [2020] 11 BLLR 1160 (LC) at para 9.

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