

SOUTH AFRICA / JUDGMENT

Sampson v Minister of Justice and Constitutional Development (PR85/21) [2024] ZALCPE 43 (12 November 2024)

[2024] ZALCPE 43

COURT

Labour Court Port Elizabeth

BEFORE

MZN Lallie

CASE / FILE NUMBER

PR85/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

CASE

NO: PR85/21

In

the matter between:

PSA

obo DARREN ROGGER SAMPSON

Applicant

And

THE

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Respondent

Heard:

15 August 2024

Delivered:

This judgment was handed down electronically by circulation to the Applicant's and Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 16h00 on 12 November 2024.

JUDGMENT**LALLIE, J**

- [1] The applicant launched this application in terms of section 158(1)(h) of the Labour Relations Act[1] (the LRA) seeking an order reviewing and setting aside a decision taken by the respondent as the individual applicant's employer.

The application is opposed by the respondent. The answering affidavit was filed out of time and the respondent filed an application for condonation of the delay. The condonation application is opposed by the applicant.

Condonation

- [2] It is common cause that the answering affidavit was filed 355 days late. The test for condonation is expressed as follows in *Grootboom v National Prosecuting Authority* [2]:

‘[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.’

- [3] In the same judgment the Constitutional Court held that all the relevant circumstances must be considered when an application for condonation is determined. Condonation is sought for the late filing of the answering affidavit. The applicant elected to bring the review application in terms of Rule 7 of the old Labour Court Rules and gave the respondent 10 days to file the answering affidavit. Nothing precluded the applicant from requesting the registrar to enrol the application for hearing after the agreed date for the filing of the answering affidavit had passed. The applicant acquiesced to the inordinate delay and may therefore not rely on it to justify the dismissal of the condonation application.

- [4] The explanation the respondent proffered for the delay in filing the answering affidavit is that the state attorney misinterpreted the provisions of Rule 7(4)(b) of the old Labour Court Rules which were applicable at the time. She entered the notice to oppose the review application only and omitted to file the answering affidavit either simultaneously with it or shortly thereafter. The error on its own is not enough to negate the reasonableness of the explanation. I, however, accept the applicant's submission that the team which assisted the respondent in opposing this application failed to act at a reasonable pace. The rules of this court provide no special dispensation for the State. The State is therefore required to comply with the rules and act within the set time frames. It must therefore align its efforts of ensuring good governance in enlisting the services of legal practitioners with its obligation to comply with the rules.

- [5] I have noted the prejudice the applicant stands to suffer should this application be granted. The worst will be a delay in the finalisation of the matter. The prejudice may be addressed by an appropriate order. A dismissal of this application will deny the respondent the right to ventilate her case fully thus limiting her right to be heard. This court does not take the decision to curtail a constitutional right lightly. The respondent will therefore suffer more prejudice than the applicant in the event of the dismissal of this application.
- [6] The respondent has established reasonable prospects of success in the review application in that she made allegations which if proved may lead to her success. The allegations include the defence of *lis pendens* and the absence of the decision that forms the subject of the review application. I have considered the authorities the parties

sought to rely on. Most are distinguishable in that they are based on condonation of the late filing of founding papers. A consideration of all the relevant factors and balancing the factors in favour of each party points to the conclusion that fairness to both parties will be achieved by granting condonation. The respondent has therefore shown good cause to have the delay in filing the answering affidavit condoned.

The review application

- [7] In the review application the applicant seeks an order reviewing and setting aside the respondent's decision dated 18 March 2021 which the applicant construed as discharging the applicant in terms of section 17(3)(b) of the Public Service Act, Proclamation 103 of 1994. It also seeks the individual applicant's reinstatement with retrospective effect from the date of his discharge.
- [8] The factual background to this dispute is that on 21 February 2020 the sheriff of the court served the individual applicant with the following letter dated 17 February 2020:

‘UNAUTHORISED ABSENCE: YOURSELF

It has been reported you have not been reporting for duty for a very long period of time to date, without authority. You are hereby instructed to report for duty on the 24 February 2020.

Subsequent to the above, several communications have been made with you but you failed to report for duty up to date. See attached documents. Failure to report to the employer within the specified time, as indicated above, it will leave the employer with no choice but to terminate your service in terms of section 17(3)(a)(i) of the Public Service Act as amended. Your salary will be stopped with immediate effect.

I trust you will take note of the seriousness of your actions and the consequences thereof.’

[9] On 17 April 2020, the respondent terminated the individual applicant's employment in terms of section 17(3)(a)(i) of the Public service Act (the PSA) for alleged desertion and stopped paying his salary. On 18 April 2020, the applicant made representations to the respondent in terms of section 17(3) of the PSA. As a result of the respondent's failure to take a decision on the

representations the applicant filed an application at the Free State Division of the High Court in Bloemfontein in an attempt to compel the respondent to take the decision in terms of section 17(3)(b) of the PSA. On 18 March 2021 the court issued the following order:

'1. Directing the Respondent consider the presentations of the Applicant in terms of sec17(3)(b) of the Public Service Act, Proclamation 103 of 1994.

2. Directing the Respondent furnish rational reasons for his decision as contained in paragraph one, in terms of sec. 5 of the Promotion of Administrative Justice Act 3 of 2000.

3. Directing that the Respondent furnish his decision(s) within 15 (fifteen) days form the granting of this order alternatively, within a reasonable time deemed reasonable by the Honourable Court.'

[10] On the same day the Free State Division of the High Court issued the order, namely, 18 March 2021, the respondent addressed the following letter to the individual application:

'FEEDBACK IN RESPECT OF YOUR REQUEST FOR REINSTATMENT FOLLOWING YOUR
ABSCONDMENT IN THE DEPARMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

The subject matter refers

I was advised that you challenged your abscondment in the Pretoria High Court, it was further conveyed to me that the courts dismissed your applications for reinstatement thus confirming that the Department was correct to abscond you.

It is trite in law that once the courts have decided, no person including myself can unilaterally change the courts judgment.

In my view of the above, I abide by the courts decision.'

[11] It is the respondent's decision in the letter dated 18 March 2021 the applicant seeks this court to review and set aside. The applicant's grounds for review are that the respondent's decision to dismiss the individual applicant from the public service on 18 March 2021 is irrational. The respondent raised a number of preliminary points in opposing the review application. The first, which may be dispositive of this matter is that there is no decision which can be the subject of review as envisaged in section 158(1)(h) of the LRA. The basis of the preliminary point is that on 24 August 2020 the applicant lodged an application at the Free State High Court in Bloemfontein seeking an order compelling the respondent to take the decision in respect of his reinstalment application. On 18 March 2021, the court issued an order directing the respondent to consider the applicant's representations in terms of

section 17(3) (b) of the PSA, Proclamation 103 of 1994. The court further ordered the respondent to furnish reasons for his decision within 15 days or within a reasonable time deemed reasonable by that court. On the day the Free State High Court order was issued, the respondent addressed a letter to the individual applicant. In the letter, she purported to rely on a court order of the Pretoria High Court which had dismissed the individual applicant's applications for reinstatement. She expressed the view that the order confirmed the correctness of her decision on the abscondment. Lastly, the respondent informed the applicant that she would abide by the court's decision.

[12] The respondent submitted that the letter of 18 March 2021 was overtaken by the court order of the Free State High Court. The applicant launched this application before the respondent could comply with the court order of 18 March 2021. It is the respondent's

case that the order of 18 March 2021 compelling her to take the decision on the applicant's submissions is valid. As the

respondent has not complied with the order no decision on the applicant's representations has been taken. She contended that

there is, in the circumstances, no decision to be reviewed and set aside in terms of section 158(1)(h) of the LRA.

[13] The applicant opposed the preliminary point. The opposition consists of an attack in the manner in which the respondent handled the applicant's matter including the court orders issued by different courts. All the criticism did not vitiate the respondent's submission that the decision the applicant seeks this court to review and set aside has not been taken. The decision the respondent was ordered by the Free State High Court to take is a jurisdictional fact that must exist before the Labour Court can exercise the powers vested in it in section 158(1)(h) of the LRA. In the absence of the decision, there is no basis for exercising the powers. The preliminary point is therefore upheld.

[14] In light of the decision on the first preliminary point, dealing with the remaining issues will not be necessary.

[15] Although the respondent sought a costs order against the applicant on the basis that these proceedings are vexatious, the Constitutional Court has warned the Labour Court against using costs orders to deter employees from approaching it. While the applicant trade union could have pursued a different route in assisting the individual applicant, I am not convinced that it acted unreasonably in bringing this application. Granting a costs order in the circumstances will not be appropriate.

[16] In the premises, the following order is made:

1. The application for condonation of the late filing of the answering affidavit is granted.
2. The point in limine that there is no decision to be reviewed and set aside is upheld.

3. The application for review is dismissed.
4. There is no order as to costs.

MZN. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate J. P. van den Berg Instructed by Lovius Block Attorneys For the
Respondent: Advocate T.A Modisenyane Instructed by The State Attorney

[1] Act 66 of 1995 as amended.

[2]

(2014) 2 SA 68 (CC).

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Prepared on 10 October 2026 · Esheria