

SOUTH AFRICA / JUDGMENT

Stephens v South African Local Government Bargaining Council and Others (PR 169/20) [2023] ZALCPE 8 (26 April 2023) [2023] ZALCPE 8

COURT

Labour Court Port Elizabeth

BEFORE

Prinsloo

CASE / FILE NUMBER

PR 169/20

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Source record

THE

LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

Case

no: PR 169/20

In

the matter between:

SAVRIANO
NEIL STEPHENS
Applicant
and
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL
First Respondent
SHARON
MALGAS N.O
Second Respondent
NELSON
MANDELA BAY MUNICIPALITY
Third Respondent

Heard:

20 April 2023

Delivered: 26 April 2023
This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email.
The date for hand-down is deemed to be 26 April 2023.

JUDGMENT

PRINSLOO, J

Introduction

[1] One of the primary objects of the Labour Relations Act[1] (LRA) is the effective resolution of disputes.

[2] The Constitutional Court, in the opening paragraph of *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[2] held that:

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

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

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

resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.'

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

[4] This application is a sad example of the detrimental and devastating consequences that follow when labour disputes are not pursued and resolved expeditiously.

Background

facts

- [5] The Third Respondent (Respondent or Municipality) employed the Applicant in November 2017 as a general assistant. He was dismissed on 4 December 2019 after he was charged with misconduct and found guilty of unauthorised possession of municipal property (brass water meters) and attempting to sell such meters. SAMWU, acting on behalf of the Applicant, subsequently referred an unfair dismissal dispute to the First Respondent (SALGBC) and the dispute was arbitrated.
- [6] On 28 September 2020, the Second Respondent (arbitrator) issued an arbitration award wherein she found that the Applicant's dismissal was substantively and procedurally fair.
- [7] On 6 November 2020, the Applicant filed a review application under case number PR 169/20, seeking the review and setting aside of the said arbitration award.
- [8] The SALGBC filed the record with this Court on 11 December 2020 and a Rule 7A(5) notice was issued by the Registrar on 14 December 2020.
- [9] The record of the arbitration proceedings, a supplementary affidavit and a notice in terms of Rule 7A(6) and (8) were filed on 31 August 2022. The Applicant also filed an amended notice of motion, wherein he sought the following relief:
- 'Condoning the late filing of the Applicant's amended supplementary affidavit in terms of Rule 7A(8)(a) of the Rules of this Honourable Court and the late filing of the record of the proceedings sought to be set aside in terms of Rule 7A(6) of the Rules of this Honourable Court.'
- [10] On 6 September 2022, the Respondent's attorneys addressed a letter to the Applicant's attorneys wherein it was recorded that the Applicant's application for review was deemed to be withdrawn and as a result, there was no lis before the Court. The Applicant's attorneys were advised that his supplementary affidavit as well as the record of the arbitration proceedings were not properly before Court until such a time as the Applicant has applied for the reinstatement of his review application.
- [11] The Applicant did not file an application for the reinstatement of his review application, nor did he amend his notice of motion to include a prayer for such relief. Instead, his attorneys addressed a letter to the Respondent's attorneys, insisting that his application complies with the Rules of this Court[4] and he filed a replying affidavit.
- [12] Before I deal with the merits of this application, it is necessary to set out the principles applicable to review applications in general.

The applicable principles and provisions

- [13] The purpose of the LRA is inter alia the effective resolution of labour disputes and the processes introduced by the LRA are intended to bring about the expeditious resolution of labour disputes. The detrimental implications of delays are obvious.[5]
- [14] This Court has accepted that a review application is by its nature an urgent application and that it requires prosecution with diligence and urgency.[6] This is supported by the Practice Manual[7] wherein an applicant in a review application is required to ensure that all the necessary papers in the application are filed within twelve months of the date of the launch of the application and where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown as to why it should not be archived.
- [15] The amendments to section 145 of the LRA, which took effect on 1 January 2015, are specifically aimed at expediting the prosecution of review applications and inter alia requires that an applicant in a review must apply for a hearing date within six months of launching the review application. A review application requires urgent prosecution without undue delay.

Filing of the record

- [16] Rule 7A(6) of the Labour Court Rules provides that the applicant in a review application must furnish the Registrar and each of the other parties with a copy of the record or a portion of the record, as the case may be. The applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.
- [17] The serving and filing of the record in a review application is provided for in clause 11.2 of the Practice Manual as follows:

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

11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent’s consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.’

- [18] This Court and the Labour Appeal Court (LAC) have considered the status of the Practice Manual[8] and held that in essence, the manual promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practise and litigate in the Labour Court and it promotes the statutory imperative of expeditious dispute resolution. The provisions of the Practice Manual are binding and should be adhered to and it is not to be adhered to or ignored by parties at their convenience.
- [19] Clauses 11.2.1 and 11.2.2 provide for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the consequences should an applicant fail to file the transcribed record within the prescribed period.
- [20] A proper interpretation of clause 11.2.3 shows that there are three possibilities if the record is not filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received. The first possibility is the easy and obvious one namely, for the applicant to request the respondent's consent for an extension of time and consent has been given.
- [21] The second possible scenario arises only in the event that consent was sought from the respondent but is refused. In such event, the applicant may, on notice of motion supported by affidavit, apply to the Judge President for an extension of time.
- [22] The third possible scenario arises when the applicant in a review application failed to file the record within the prescribed 60 days period and failed to obtain the respondent's or Court's consent for the extension of time. In such a case the review application is deemed to be withdrawn.
- [23] In the event that a review application is deemed withdrawn, it has specific legal consequences. In *Ralo v Transnet Port Terminals and others*[9] (*Ralo*), the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of *Municipal Council of the Municipality of Windhoek v Marianna Esau*[10] where the Court held that the word 'deemed' is considered to have a conclusive effect. This Court concluded by stating the following:

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

Clause 11.2.7 and Clause 16 of the Practice Manual

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

'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure

that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application

(excluding Heads of 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.’

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

‘16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

- in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;
- in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and

- when a party fails to comply with a direction issued by a judge within the stipulated time limit.

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

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.’

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

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

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

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

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

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

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

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

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

retrieved from the archives in terms of Clause 16.2.

[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the Court Rules, timeframes and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

Remedies

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

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

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

[31] In *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and others*,^[14] (Sol Plaatjie) this Court has held that:

'[27] There is however no bar, either in the [Rules] of this Court or the Practice Manual to the Applicant filing an application in which it seeks to have the review application reinstated. Logic dictates that the review should be reinstated and be alive before the late filing of the record could be condoned. An application to have the review application reinstated could be filed together with an application in which condonation for the late filing of the record is sought.

- [28] I accept that this application was an attempt to get the review application back on track. The Applicant however should have filed an application wherein the order sought is for the review application to be reinstated.
- [29] In casu the Applicant sought condonation for the late filing of a record without an application to reinstate the review application. Condonation for the late filing of a record cannot be granted in respect of a withdrawn application.'

This application

- [32] In casu, the review application was filed on 6 November 2020, the SALGBC filed the record with the Court on 11 December 2020 and a Rule 7A(5) notice was issued by the Registrar on 14 December 2020.
- [33] Applying the provisions of the Practice Manual, the record had to be filed within 60 days from the date on which the Rule 7A(5) notice was issued, thus by mid-March 2021. The record of the arbitration proceedings, a supplementary affidavit and a notice in terms of Rule 7A(6) and (8) were only filed on 31 August 2022, more than 17 months late.
- [34] On the Applicant's version, he only received the Rule 7A(5) notice in January 2022 and the record was uplifted on 18 January
2022. Even if this Court were to accept the Applicant's version and take a lenient approach to calculate the period within which the record had to be filed from the date the record was uplifted, the record had to be filed by no later than mid-April 2022. The record was still filed 5 months late.
- [35] The Applicant was represented by SAMWU and Adv. Blundin, his legal representative, during the arbitration proceedings and they assisted him in the drafting and filing of his review application. The Respondent was notified that Adv. Blundin would act as the Applicant's legal representative for purposes of the review application.
- [36] Adv. Blundin advised the Applicant after the filing of the review application (on 6 November 2020) that the SALGBC was obliged to dispatch the record of the proceedings within 10 days after receipt of his review application and that SAMWU would be notified if the record had been dispatched. A month later, Adv. Blundin advised the Applicant to attend at the offices of SAMWU in order to check if they had received any notice from the SALGBC or the Registrar. SAMWU officials advised him that they had not received any notice from the SALGBC or the Registrar. He confirmed his details and the details of his legal representative with SAMWU in order to be notified as soon as the notice was received.

[37] No further steps were taken until July 2021, when Ms Allison, who assisted the Applicant at the request of his mother, contacted his legal representative to enquire whether he or SAMWU had received the record or the notice in respect of the record. Adv. Blundin advised that he had not received any notice. In August 2021, Ms Allison attended the Court and was advised by the Court that the review application's status was 'withdrawn' as the record was not filed timeously. At that stage, Ms Allison advised

the Applicant's mother that he should rather get alternative legal representation. His mother continued to pay Adv. Blundin to provide legal services in accordance with the Applicant's instructions, but on his version, she had started to raise funds to appoint private legal representatives.

[38] No further steps were taken until November 2021, when Ms Allison sent an email to the Registrar, recording that she had attended Court in order to enquire about the status of the Applicant's review application and that she was advised that the matter has the status of 'withdrawn'. Ms Allison stated that "the applicant's mother still has an appetite to proceed with the captioned matter and thus would like for a Judge to make a decision regarding same. Please advise whether this is possible and when a Judge will be able to review the file?"

[39] The Registrar responded to Ms Allison on 10 November 2021 that "when the matter is deemed to be withdrawn, the applicant may file an application for reinstatement and condonation to have it [retrieved]

from the archive". The Registrar also attached a copy of the Practice Manual to the email, to assist Ms Allison.

[40] It is evident that Ms Allison, who acted for or assisted the Applicant, was made aware in August and November 2021 that the review application was deemed to be withdrawn, due to non-compliance with the requirement to file the record within 60 days and that it was necessary to file an application for the reinstatement of the application.

[41] Nothing was done until January 2022, when the record was uplifted and no explanation is tendered for this period of inaction.

[42] The Applicant's mother uplifted the record from the Registrar's office on 18 January 2022 and on the same day, his mother provided the transcribing company, Inlexso (Pty) Ltd, with the record to be transcribed. Inlexso provided the Applicant's mother with the transcribed record on 30 March 2022.

[43] The Applicant instructed Bezuidenhout Attorneys as his new legal representatives on 14 February 2022.

[44] Notwithstanding the fact that the Applicant had instructed new legal representatives on 14 February 2022 and that the transcribed record was available on 30 March 2022, the record was only filed on 31 August 2022.

- [45] It is evident that the Applicant was legally represented throughout – during the arbitration hearing and drafting of the review application until January 2022, when SAMWU authorised Adv. Blundin to collect the record on the Applicant's behalf. He was represented by Adv. Blundin and from February 2022 onward he is represented by Bezuidenhout Attorneys. It is clear from the Applicant's version that SAMWU was dealing with his matter until his mother decided to terminate SAMWU's involvement in the Applicant's case. Be that as it may, the Applicant did not deal with the matter on his own as an unassisted layperson, but he was at all material times represented by lawyers.
- [46] On 11 March 2022, the Applicant's attorneys of record addressed a letter to the Respondent's attorneys, indicating that the Applicant has not complied with Rule 7A(6) of the Labour Court Rules and that as soon as they were 'financially instructed' by the Applicant, they would serve and file the record in terms of Rule 7A(6), supplementary papers in terms of Rule 7A(8) and a condonation application. From this correspondence, it is clear that all the parties involved were aware in March 2022 that there was no compliance with the prescripts around the filing of the record and that the record had to be filed. The Respondent's attorneys made follow-up enquiries and on 28 April 2022 the Applicant's attorneys confirmed that the condonation application and supplementary papers would be filed "as soon as our client is in a financial position to provide us with the necessary instructions, as per our indication to yourselves in terms of our letter dated 11 March 2022".
- [47] During the course of July 2022, the Applicant's attorneys gathered information for the purposes of preparing his condonation application, which was filed on 31 August 2022.

Difficulties in the Applicant's case

- [48] There are a number of difficulties in the Applicant's case, which I will deal with in turn.

The provisions of the Practice Manual

Deemed withdrawn

- [49] In casu, the record of the arbitration was made available on 14 December 2020, when the Registrar issued the Rule 7A(5) notice and it had to be filed within 60 days, thus by mid-March
2021. Even if this Court were to accept the Applicant's version that he only received the Rule 7A(5) notice in January 2022 and the record was uplifted on 18 January 2022, the record had to be filed by no later than mid-April 2022.
- [50] The record of the arbitration proceedings, a supplementary affidavit and a notice in terms of Rule 7A(6) and (8) were only filed on 31 August 2022. This was more than 17 months late if the date of the Rule 7A(5) notice is accepted, alternatively, if it is calculated on the Applicant's version, the record was still filed 5 months late. Either way, the record was filed more than

one year and 9 months after the filing of the review application.

[51] The Applicant has not filed the record within the prescribed 60-day period, had not approached the Respondent for consent for an extension of time, nor was the Judge President of the Labour Court approached, as provided for in the Practice Manual. The review application is therefore deemed to be withdrawn in terms of the provisions of the Practice Manual.

[52] In *Robor Tube (Pty) Ltd V Metal and Engineering Industries Bargaining Council and others*, [15] it was held that:

‘In my view, there ought to be no reason, in principle, why an application that has been withdrawn ought not to be capable of reinstatement. First, the Labour Court is established as a court of law and equity, with the inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a division of the High Court has under its jurisdiction. The court therefore has the

inherent jurisdiction to regulate its own proceedings and control its own process.’

[53] The prevailing authority is that the withdrawal of a matter is not a bar to the reinstitution of the proceedings.

[54] This was confirmed by the LAC in *Ellies Electronics (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[16] where it was held that:

‘The withdrawal of a matter at the instance of a party is a unilateral act which results in the matter being removed from the roll in the same manner as if absolution from the instance had been granted. The fact that a matter has been withdrawn does not in principle bar either the reinstitution of proceedings or the institution of fresh proceedings (in which case the absolved defendant may not raise the defence of *res judicata* if sued again on the same cause of action). In finding differently, the Labour Court erred. Faced with an application to have the matter reinstated, it was for a court to determine whether or not to grant such application having regard to the relevant facts and issues of prejudice, while recognising that employment disputes by their nature are urgent and require speedy resolution.’

[55] It is evident that the Applicant had to file an application to have his deemed withdrawn review application reinstated. As already alluded to, in *Sol Plaatjie* it was held that an application to have a review application reinstated could be filed together with an application in which condonation for the late filing of the record is sought, but that the review should be reinstated and be alive before the late filing of the record could be condoned.

[56] The Applicant was informed (through Ms Allison) in August 2021 that the status of his application was ‘withdrawn’. In November 2021 the Registrar advised him that “when the matter is deemed to be withdrawn, the applicant may file an application for reinstatement and condonation to have it retrieve(d)

from the archive”. Only on 31 August 2022 did the Applicant file a condonation application, almost a year after he was made aware of the fact that his review application was deemed withdrawn and nine months after he was advised to file an application for reinstatement and condonation. In September 2022, the Respondent’s attorneys advised the Applicant that he should file an application to have the review

application reinstated.

[57] Notwithstanding the applicable authority, the advice from the Registrar and indications by the Respondent’s attorneys that an application for reinstatement had to be filed, the Applicant persisted that such was not necessary. In his replying affidavit he stated that he need not ask for reinstatement, but only for condonation for the late filing of the record, because, so he reasoned, the Court’s time would be wasted by having to adjudicate two identical applications. This argument is without merit as there was no need to bring two separate applications, but the relief to reinstate the application had to be prayed for and it was not, not even when I canvassed this issue with Mr Mnyani, for the Applicant, in Court. The Applicant further submitted that by only applying for condonation, his review application would be finalised more expeditiously. Why this was so, had not been explained. The reality is that without an application for reinstatement, the review application remained ‘deemed withdrawn’ and could not be adjudicated at all.

[58] The Applicant further explained that he was not in a financial position to instruct his representatives to lodge two identical applications and in practical terms, if he were to succeed with his application for reinstatement, that success would have been an empty victory as his finances would have been exhausted and he would not be in a position to pursue his review application any further. These submissions are ill-advised and indicative of a lack of understanding of the need to resuscitate a ‘deemed withdrawn’ application before this Court is in any position to grant condonation for the non-compliance of any timeframes as subsequent relief. I reiterate, there was no need to file two separate applications, but there was a need to seek the relief of reinstatement of the deemed withdrawn review application.

[59] The application is fatally defective in that the Applicant failed to seek the reinstatement of his deemed withdrawn review application and without that application being resuscitated, there is no live lis before this Court to adjudicate. In view of the fact that the review application is deemed withdrawn, the relief seeking to condone the late filing of a supplementary

affidavit and the record, as sought by the Applicant, cannot be granted.

Failure to file all the papers within twelve months

- [60] Item 11.2.7 of the Practice Manual expressly states that a review application is by its nature an urgent application and that an applicant in a review application is required to ensure that all the papers in the application are filed within twelve months of the date of launching the application.
- [61] 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.
- [62] The Applicant failed to ensure that all the necessary papers in his review application were filed within twelve months of the date of the launch of his review application and the Registrar has not been informed in writing that the application was ready for allocation for hearing. The consequence is that the application was archived and an application in terms of Clause 16.2, for the retrieval of the file from the archives, was necessary.
- [63] No application for the retrieval of the file from the archives was filed and Clause 16.3 of the Practice Manual provides that where a file has been placed in the archives, it shall have the same consequences 'as to further conduct by any respondent party as to the matter having been dismissed.' Absent an application to retrieve the file from the archives, the status of the application remains as per the provisions of Clause 16.3 of the Practice Manual.

Section 145(5) of the LRA

- [64] Section 145(5) of the LRA provides that an applicant for review must apply for a date for the matter to be heard within 6 months of the delivery of the application, and the Labour Court may, on good cause shown, condone the late application for a date for the matter to be heard.
- [65] It is evident that since the filing of the review application in November 2020, the Applicant has not, within 6 months, applied for a date for the review application to be heard and no application to condone such had been made.

Expedition resolution of labour disputes

- [66] In casu, the Applicant was informed by Adv. Blundin, in November 2020, that the record should be made available within 10 days of the date of filing of the review application. He was thus aware of the fact that the record was expected soon after the review application was launched. Notwithstanding being aware of this and being legally represented, he waited until July 2021, when Ms Allison made enquiries about the status of the matter. As far back as August 2021, the Applicant was made aware of the fact that his review application was 'deemed withdrawn' due to the fact that the record was not filed, in November 2021, this was confirmed by the Registrar and he was advised to file a reinstatement application.
- [67] The Applicant was made aware during 2021 that there was a problem with his application – the record was not filed and his application was 'deemed withdrawn'. Only in January 2022 was the record collected and the Applicant's mother managed to have the record transcribed

by the end of March 2022. At that point, the Applicant had new legal representatives on board and he should have been acutely aware of the fact that the filing of the record was long overdue and that his application was already deemed withdrawn. This was more so since the Respondent's attorneys sent letters to the effect that there was no compliance with the prescribed timeframes and that there was a need to prosecute the application. It should have been evident to the Applicant that there was no compliance with the prescribed 60-day period, yet no urgent action was taken to ensure that the record was filed as a matter of priority or urgency.

- [68] The Applicant litigated at his own pace and only filed the record and supplementary affidavit and condonation application on 31 August 2022, more than eight months after the record was uplifted and five months after the record was actually transcribed.
- [69] The applicable timeframes were not complied with and the Applicant made no attempt whatsoever to explain the non-compliance with the said timeframes. Where an explanation is tendered, it is bereft of any detail or substance and is wholly inadequate. Material periods are not explained at all and this Court is not placed in a position to properly understand the reasons for the delay and the non-compliance with the prescribed timeframes.
- [70] Where the delay is as material as it is in this instance, the explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay. The Applicant had to provide the Court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court properly to assess the reasonableness of the explanation for the delay.[17]
- [71] The Applicant made no effort to place facts before this Court to show what steps were taken to comply with the timeframes as alluded to. The Applicant provided no detail of his efforts and certainly did not paint a picture of a diligent litigant who took a serious interest in his matter and who followed up regularly on the progress and the

reasons

for the delay and who took active steps to have this matter finalised. In fact, it seems from the papers that the Applicant's

mother took a greater interest in pursuing his case and that he took a backseat in the litigation process.

Prejudice

- [72] I accept that the Applicant has the right to refer his case to this Court for adjudication, but that right is not without the responsibility to do so within the confines of the law, the Rules of this Court and the Practice Manual and to ensure that the matter is pursued diligently and expeditiously. However, it is evident that he has not pursued this application diligently.

[73] The Applicant was dismissed in December 2019 and more than three years later, this application in respect of an arbitration award that was issued in September 2020, is still not one step closer to finality. The Applicant dragged his feet to finalise this application expeditiously, more so where the Practice Manual also provides that a review application is regarded as an urgent application. Evidently, this review application has long outlived the urgency underpinning a review application.

[74] The notion that litigants will be denied access to a court to ventilate their case cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more

especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made, or the consequences of inaction and tardiness are that opportunities to pursue the matter are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes and it is no failure of justice if their journey culminates in a dead end.[18]

Conclusion

[75] A review application should be reinstated and be alive before the late filing of the record could be condoned. An application to have the review application reinstated could be filed together with an application in which condonation for the late filing of the record is sought, but an application to condone the late filing of the record, cannot be considered in circumstances where the review is deemed withdrawn, without an application for its reinstatement.

[76] In *Randburg Towers (Pty) Ltd v Masilo and others*[19] (*Randburg Towers*), the Court was also faced with a deemed withdrawn review application and held that:

Simply put, there is no longer a review application that serves before the court. In those circumstances, in my view, the applicant in the present application is entitled to a declaratory order that gives effect to the consequences visited by clause 11.2.3 on an applicant that fails to comply with the time limits within which to file a record of proceedings sought to be reviewed.

[77] The Practice Manual is not merely a guideline which litigating parties may or may not comply with at their leisure, but it has binding

force.[20] I am in agreement with the view taken in *Randburg Towers* and I can see no reason why this Court should not grant a declaratory order to the effect that the Applicant's review application is dismissed, which will give effect to the consequences visited by clause 11.2.3 of the Practice Manual, where time limits are not complied with.

[78] The fact that the review application was left unattended from November 2020 until the record was eventually filed in August 2022, is indicative of an applicant who was not serious to pursue and finalise the review, but it displayed the conduct of a litigant who had no regard for the prescripts of this Court or the provisions of the LRA and who had no intention to pursue his application expeditiously and within the confines of the applicable timeframes.

Costs

[79] In so far as costs are concerned, this Court has a broad discretion in terms of the provisions of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[80] Mr Voulto for the Respondent submitted that there is no reason as to why a cost order in favour of the Respondent should not be made. The Respondent is a municipality that operates on public funds and the manner in which this matter was pursued, justifies a cost order. Mr Mnyani for the Applicant submitted that the Applicant was a desperate

man, unemployed and in no position to afford to pay a cost order against him.

[81] In *Zungu v Premier of the province of KwaZulu-Natal and others*,^[21] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[82] This is a case where a cost order is indeed justified and the Respondent's submissions in respect of the issue of cost are not without merit. However, I am alive to the fact that the Applicant is an unemployed individual, who will in all probability not have the means to pay a cost order. A cost order against the Applicant will not only be one that will be difficult to execute, but will also cause harm to the Applicant, which is a factor that has to be considered in fairness.

[83] In my view, the interest of justice and fairness would be best served by making no order as to costs.

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

Order

1. The application for condonation is dismissed;
2. The review application is declared to be withdrawn;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant:

Advocate M Mnyani Instructed by:

Bezuidenhout Attorneys On behalf of the Third Respondent: Advocate L Voultos Instructed by:

W. Langson and Associates Inc Attorneys

[1] Act 66 of 1995, as amended.

[2] (2016) 37 ILJ 313 (CC) at para 1.

[3] Steenkamp and others v Edcon Limited 2016 (3) BCLR 311 (CC) at para 130.

[4] GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

[5] Commercial Workers Union of SA v Tao Ying Metal Industries and others

(2008) 29 ILJ 2461 (CC), where the Constitutional Court held at para 63 that: “These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years”.

[6] Lehola v Nkadimeng N.O and others unreported judgment under case no JR 1912/2012 delivered 25 January 2016.

[7] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

[8] Ralo v Transnet Port Terminals and Others [2015] 12 BLLR 1239 (LC) (Ralo); Tadyne Trading CC t/a Tadyne Consulting Services v Steiner and others (2014) 35 ILJ 1672 (LC); Samuels v Old Mutual Bank [2017] 7 BLLR 681 (LAC) (Samuels).

[9] Ralo supra at para 10.

[10] LCA 25/2009, 2 March 2010.

[11] (2022) 43 ILJ 2727 (LAC) at paras 9 – 12.

[12] Rule 49(6)(a) and (b) of the Uniform Rules of Court.

[13] Samuels supra at paras 16 – 17.

[14] (2017) JOL 38065 (LC) at paras 27 – 29.

[15] (2018) 39 ILJ 2332 (LC) at para 7.

[16] [2020] JOL 47535 (LAC) at para 12.

[17] See Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others

(2010) 31 ILJ 1413 (LC).

[18]

(2018) 39 ILJ 531 (LAC) at para 34.

[19] [2021] JOL 49828 (LC) at para 5.

[20] Matsha and others v Public Health and Social Development Sectoral Bargaining Council and others (2019) 40 ILJ 2565 (LC).

[21]

(2018) 39 ILJ 523 (CC) at para 24.

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