

SOUTH AFRICA / JUDGMENT

Stilhoek Boerderey (Pty) Ltd v Botha and Others (JR 1785/19) [2023] ZALCJHB 34 (1 March 2023) [2023] ZALCJHB 34

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

JR 1785/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR

1785/19

In

the matter between:

STILHOEK
BOERDEREY (PTY) LTD Applicant
and
FREDERICK
JACOBUS BOTHA First
Respondent
COMMISSIONER
N SONO N. O Second
Respondent
THE
CCMA Third
Respondent

Heard:

22 February 2023

Delivered:

01 March 2023

Summary: Application seeking to reinstate a deemed withdrawn and lapsed review application. The applicant took two years to launch the reinstatement application which effectively is a condonation application and offered no explanation why that is the case. A party is obliged to approach a Court for condonation as soon as the need to do so arises. The review application is hopeless and lacks prospects of success. Even if reinstated, it shall in due course be dismissed.

Held: (1) The application to reinstate is dismissed. (2). A section 158 (1) (c) of the LRA application is granted with no order as to costs. (3) The applicant is to pay the costs of the reinstatement application.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed application seeking to reinstate a review application that had acquired a status of having been deemed withdrawn and archived and regarded as having lapsed in terms of the provisions of the practice manual of the Labour Court.

Background

facts

[2] It is obsolete for the purposes of this judgment to recount all the facts appertaining the present dispute. It suffices to state that the applicant, Stilhoek Boerdery (Pty) Ltd (Stilhoek) received an unfavourable arbitration award on 13 August

2019. Disenchanted thereby, on 15 August 2019, launched a review application, seeking to review and set aside the unfavourable arbitration award. Around 18 October 2019, Stilhoek was informed that the record of the proceedings to be reviewed and set aside was available. In terms of the practice manual, 60 days after being so informed, Stilhoek was obliged to serve and file the record, failing which, the review shall be deemed withdrawn. Stilhoek only served and filed a limping record on 2 October 2020. At that time, the prescribed 60-day period had long lapsed. Thus the review application acquired a status of being deemed withdrawn.

[3] For a period of time, Stilhoek engaged in a process of regularizing the limping record. At that point, Stilhoek was fishing behind the net because, the review application had acquired a status of being deemed withdrawn on or about 18 December

2019. Of significance, the practice manual also provides that all the documents excluding heads of argument must be served and filed within 12 months. Thus, all the documents must have been filed by 15 August
2020. If that does not happen, the review application acquires another status of being archived.
- [4] That notwithstanding, on or about 30 November 2020, the first respondent, Mr. Frederick Jacobus Botha (Botha), served and filed an answering affidavit. Significantly, in that affidavit, Stilhoek was alerted to the fact that the review application has been archived within the contemplation of clause 11.2.7 of the practice manual. Despite being so alerted, only on 8 July 2022 did Stilhoek launch the present application. No explanation was proffered as to why it took Stilhoek almost two years to launch the present application.

Evaluation

- [5] It is by now settled law that this Court lacks jurisdiction to entertain a deemed withdrawn and/or lapsed review. In order for this Court to regain the jurisdictional power, an application to reinstate must be launched. It has been authoritatively held that an application of this nature is effectively an application to condone the non-compliance. It is trite that condonation is not there for the taking. An applicant for condonation is compelled to explain each and every day of the delay. In casu, Stilhoek was obliged to bring a reinstatement application after August 2020 when the application acquired a status of being deemed

withdrawn. It is trite principle that a party seeking condonation must do so immediately after the need to do so arise. The need arose in August 2020, however instead of approaching this Court for an indulgence, Stilhoek busied itself with regularizing the record. This was an exercise in futility because there was no more a review application.

- [6] Effectively, in taking those steps, Stilhoek was flogging a dead horse or fishing behind the net. By taking those steps as detailed in the founding affidavit, Stilhoek was putting the cart before the horses.
- [7] Assuming that Stilhoek was unaware that it was flogging a dead horse, there was no need, from its perspective to launch a condonation application. Although it was perspicuously busy fishing behind the net, it may have held a view that the fish would miraculously jump into the net at some point of its tireless fishing excursion.
- [8] Sadly, for that assumption, on 30 November 2020, Botha made Stilhoek smell the coffee. Having been made to smell the coffee, the need arose for Stilhoek to approach this Court for an indulgence. For reasons not explained at all, Stilhoek launched the present application almost two years later.

- [9] A cardinal principle of motion proceedings is that a party makes its case in the founding affidavit. In the founding affidavit, the deponent, who happens to be a practicing attorney, is completely mum about, when did the need for the condonation application arise. The deponent does not even acknowledge that after August 2020 the review application was deemed withdrawn, nor does she acknowledge that after 15 August 2020, the review application lapsed.
- [10] Yet again, regard being had to the founding affidavit, from 30 November 2020, Stilhoek busied with flogging its' dead horse. Nowhere does the deponent explain why after 30 November 2020, when the need arose, did Stilhoek take almost two years to approach this Court. As Mr. Basson, appearing for Botha felicitously submitted, Stilhoek took a supine approach. What it allegedly busied
- itself with was an exercise in futility and in sheer ignorance of the red flag raised by Botha. There is not even a decency to explain why 8 July 2022 was randomly chosen to launch the present application.
- [11] When regard is had to the explanation of the delay, Stilhoek sparsely recites as it were the steps it took in flogging a dead horse. That is insufficient. A party must fully explain each and every day of the delay. In doing so, the first step is to acknowledge that on a particular date, the review application acquired a status of deemed withdrawal and or lapsed. Once that is acknowledged, axiomatically a logical and full explanation would unfold. A party must not simply recite events but must provide a plausible explanation for the delay. At the time a limping record was served and filed, the prescribed 60-day period had already expired on 18 December 2019.
- [12] Regard being had to the founding affidavit, it was only on 23 January 2020, that an event occurred. From 18 December 2019 to 23 January 2020, there is no explanation as to what was happening. The only inference to be drawn is that Stilhoek laid supinely during that period. From 23 January 2020 to 19 February 2020, Stilhoek did absolutely nothing. From 18 March 2020 to 2 September 2020, Stilhoek did absolutely zilch. Therefore, for a considerable period of over seven months, Stilhoek provides no plausible explanation of the delay. In the absence of a plausible explanation prospects of success are meaningless.
- [13] Taking into account the interests of justice, it is not in the interest of justice to indulge a party who dismally fails to provide a plausible explanation.
- [14] Although prospects of success are meaningless in this regard, this Court takes a firm view that this is one of those hopeless cases. Stilhoek is not possessed of any prospects at all. The Commissioner provided a detailed and well-reasoned arbitration award. His impeccable findings are justified when regard is had to the evidence presented before him. The case of Stilhoek was predicated on assumptions than facts. Having considered those assumptions, the Commissioner still emerged with a reasonable finding that Stilhoek failed to prove on a balance of probabilities that Botha was indeed guilty of breaching the rules in question.

[15] That being the case, Mr. Basson, pitch-perfectly submitted that reinstating this hopeless review application would be an exercise in futility. The application was doomed to fail. In the circumstances, the present application must fail.

Section 158 (1)(c) application

[16] Before me also served an unopposed section 158 (1) (c) of the Labour Relations Act[1] (LRA) application issued under case number J2291/19. The application stands unopposed. There is nothing that stands in the way of this Court to grant such an application. What then remains is the issue of costs.

Costs

[17] Turning to the issue of costs, this Court possesses a wide discretion when it comes to the award of costs. Law and fairness remain the beacon. Section 162 allows the Court to take into account the conduct of the parties in litigating. The present application was launched almost two years later with no reasonable explanation why. Such conduct is inappropriate. The practice manual has been in place for almost a decade now. The practice manual provides solutions for each and every eventuality in the review journey. With regard to the record quandaries, it provides that within the prescribed period, a frustrated party may seek consent of the other party and if not given consent approach the Judge President of this Court for a directive. Stilhoek did neither. Within the

period, Stilhoek operated as a loner, in the circumstances where Botha and the Judge President exists. Clearly, Stilhoek is the author of its own misfortune. It was legally represented from the get go.

[18] In the circumstances, it is unfair to mulct Botha with the costs of this application, which application in the exercise of due diligence would have been obviated. The conduct of Stilhoek smacks of vexatiousness and frivolity. The dictates of fairness justify an award of costs. Accordingly, a cost order is warranted in respect of this application.

[19] In order to remove any doubt, the cost order is limited to the reinstatement application. With regard to the review application, owing to the fact that this Court refuses to reinstate it, it remains deemed withdrawn and archived and regarded as lapsed and dismissed. When it comes to the costs associated with it, the provisions of rule 13 (1) (b) of the Labour Court rules must apply.

That is that Botha must on notice apply for costs, unless Stilhoek tenders the wasted costs. The review application is deemed withdrawn,

regarded as lapsed and dismissed.

[20] In the circumstances, the reinstatement application falls to be dismissed with costs. The section 158 (1) (c) application is granted with no order as to costs.

[21] In the results, I make the following order

Order

1. The application to reinstate the deemed withdrawn and lapsed review application is dismissed.
2. The arbitration award issued by the CCMA under case number LP9515-18 on 6 August is made an order of this Court in terms of section 158 (1) (c) of the LRA with no order as to costs.
3. The applicant must pay the costs of this application.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr. M Meyer

Instructed by:

Angi Germishuys Attorneys, Bela-Bela.

For the First Respondent:

Mr. J L Basson

Instructed by:

Coetzer and Partners, Arcadia.

[1] No. 66 of 1995, as amended.

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Prepared on 10 October 2026 · Esheria