IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C46/2016

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD	**Applicant**
and	
SOUTH AFRICA ROAD PASSENGER BARGAINING COUNCIL (SARPAC)	**First Respondent**
COMMISSIONER HILARY MOFSOWITZ N.O.	**Second Respondent**
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA) obo T. MAHLWEMPU	**Third Respondent**

Date heard: 26 February 2020

Delivered: By email of scanned judgment 7 May 2020

JUDGMENT

RABKIN-NAICKER, J

[1] There are two opposed interlocutory applications before Court. First, the third respondent seeks to dismiss a review application under the above case number. Second, there is an application to revive the said review by the applicant.

[2] The applicant by seeking to revive the review acknowledges that it is deemed dismissed in terms of Clause 11.2.7 of the Practice Manual of the Labour Court. The application to revive the review was made subsequent to the application to dismiss. The matters are consolidated before the Court.

[3] The review application was launched on 29 January 2016. A transcribed record was delivered one day late in terms of the period required in clause 11.2.2 of the Practice Manual, i.e. on May 20 2016. In addition to this, the applicant did not notify the Registrar that the matter was ready to be allocated for hearing.

[4] On 23 January 2019, Numsa launched the application to dismiss setting out, inter alia, the failure to serve the transcribed record of the arbitration within 60 days. Given that no approach had been made to extend the 60 day period to NUMSA or to the Court, it averred that the application was deemed withdrawn.

[5] NUMSA also submitted that the transcribed record was filed incomplete in that the proceedings of 28 May 2015 was not included and that Intercape had instead unilaterally substituted the record of the said date with the typed notes of the arbitrator. This means, according to the union, that the record remains incomplete to date and it was never under an obligation to file an answering affidavit.

[6] Intercape concedes that there has clearly been a delay in the finalization of the review application. When the application to dismiss was launched on 23 January 2019, a period of just under 2 years had passed since the 12 month period referred to in paragraph 11.2.7 of the Practice Manual had elapsed.

[7] The submissions by Intercape in attempting to establish that the delay was not unreasonable include the following:

7.1 The review had originally been handed by Intercape's in-house counsel. Prior to her departure from employment, during 'mid 2017', she had advised the Industrial Relations Manager that the review application had been finalized and he took this to mean that it had already been heard at Court. No file on the matter had been left at the company by their in-house counsel.

7.2 It was only on receipt of the application to dismiss that the company was made aware of the status of the review.

[8] There is no confirmatory affidavit by Adv Roelien van der Walt, in-house counsel, or explanation as to why she was unable to prepare same or the precise date that she left the company. It is also pointed out by NUMSA that the company's Industrial Relations Manager deposed to the affidavits in the review and it is improbable having never had sight of a court order that he was under the impression that the matter was finalized.

[9] The record of the arbitration proceedings filed in the review application includes a bundle of documents submitted by the SARPBC including a notice of intention to oppose by NUMSA and its member, which was stamped by the Labour Court on the 15 July 2016.

[10] As stated above, the applicant did not invite the third respondent to reconstruct the record of the proceedings for the 28 May 2016. The typed notes of the arbitrator for that day are cryptic and include the evidence in chief and cross examination of respondent's first witness.

[11] In **Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration & others** [1] , the Court stated referring to the court a quo stated:

"[15] How should the court below have dealt with the matter? This is not a case such as Department of Justice v Hartzenberg 2002 (1) SA 103 (LAC); (2001) 22 ILJ 1806 (LAC); [2001] 9 BLLR 986 (LAC) where most of the record of the evidence before the Industrial Court was indisputably lost and where a reconstruction of the record was not considered to be feasible. That stage has not been reached yet in the instant matter, and may never be reached. I point out that we have no affidavit from Ms Benjamin regarding the CCMA's storage and record keeping system at Durban or that diligent search was made for the missing tapes. The commissioner has not indicated how many cassette tapes he handed over to the CCMA. No attempt has been made to reconstruct the missing part of the record using the commissioner's benchnotes as a starting point. Lifecare's rejection of those notes was premature inasmuch as they constituted a valuable source for the purpose of reconstruction.

[1] (2003) 24 ILJ 931 (LAC)

[16] Ngcamu AJ recorded in his judgment that: 'There is no application before me to have this matter postponed in order to have the handwritten notes transcribed.' The learned judge had earlier said that: 'the applicant is obliged to have transcribed the handwritten notes if the record is not complete'. Transcribing the commissioner's notes, as though they possibly constituted an alternative record, was not of itself the solution. In my view the court should have suggested to the parties that the matter be postponed in order: (a) to make the enquiries referred to in the previous paragraph; and (b) insofar as might prove necessary, to attempt a reconstruction. The latter would at least have been required for the part of tape 9 which was over-recorded, and may be required in respect of other tapes. It is not possible to speculate how Lifecare's legal representative in the court a quo would have reacted to such a suggestion had it been proffered from the bench.

[17] A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness."

[12] In **Moraka v National Bargaining Council for the Chemical Industry & others**[2] the Court stated that:

"[20] A party defending itself against an application to dismiss a review on account of undue delay is effectively asking the court to condone its dilatoriness and similar considerations which apply to the evaluation of applications for condonation ought to be relevant in the evaluation of these applications. In this instance, the long delay of nearly two years between the incorrect filing of the

[2] (2011) 32 ILJ 667 (LC)

transcript and the filing of the supplementary affidavit which added nothing to the merits of the review, is unexplained. A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay."

[13] Given that the review is deemed to have been withdrawn, the enquiry for the Court to make is, according to the LAC in **Samuels v Old Mutual Bank** [3], the following:

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

[10] In this matter there has been an excessive delay in enrolling the matter. The applicant has failed to provide the requisite evidence relating to its former in-house Counsel. Given there is no explanation as to why she was unable to provide a confirmatory affidavit or averments regarding attempts to contact her, if any were made, I am of the view that the explanation for the delay cannot not be considered reasonable. Surely a diligent Industrial Relations Manager would have ensured that a copy of the Court Order was obtained if indeed he believed the matter was finalized. Further, no mention is made in the papers of the notice

[3] Samuels v Old Mutual Bank (2017) 38 ILJ 1790 (LAC)

of opposition contained in the Record of the review application which record was prepared on behalf of the applicant.

[11] It is trite that a review is by its very nature urgent. The excessive delay in this case when taken together with the unreasonable explanation proffered cannot be accepted. In addition, the review is not ripe for hearing given the failure to duly reconstruct the record. There is no need for this Court to delve into the merits of the review in dealing with condonation of the delay itself given the above[4].

[12] In these circumstances I make the following order:

Order

The application to dismiss the review application of the Award under RPNT2718 is granted.

H. Rabkin-Naicker

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: ENS Africa

Respondents: Union Official

[4] NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC)