



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,**

**HELD AT CAPE TOWN**

**Case no: C811/2016**

In the matter between:

**LAZANNE TRUTER**

**Applicant**

**And**

**TRAVELSTART ONLINE TRAVEL OPERATIONS (PTY) LTD**

**Respondent**

**Date of Hearing:** 7 July 2020

**Date of Judgment:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 4 September 2020.

**Summary:** (Application to retrieve a file from archives –judgment previously refusing to condone non-compliance with the practice manual – condonation ruling *res judicata* and dispositive of retrieval application – plea of *res judicata* upheld)

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**JUDGMENT**

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## LAGRANGE J

### Background

- [1] This is an application framed as an application to retrieve the case file of a referral of an unfair discrimination claim. The application was launched on 22 May 2019.
- [2] By agreement the application was determined in chambers on the papers, in light of the prevail Covid-19 precautionary measures.
- [3] The applicant filed her unfair discrimination claim on 1 December 2016. On 19 December 2016, the respondent filed a notice of intention to except to her statement of claim on the basis that it was allegedly vague and embarrassing and failed to make out a cause of action. At that stage, the applicant did nothing to amend her statement and on 26 January 2017 the respondent filed a notice of exception to her statement of case.
- [4] It was only on 13 June 2017, more than six months after she had filed her statement of case, that her attorneys filed a notice of intention to amend her statement of case. The amended statement of case itself was eventually filed on 8 February 2018, followed the next day by an application for condonation for the late filing thereof.
- [5] On 13 February 2018 the respondent gave notice that it objected to the delivery of the amended statement of case and application for condonation on the basis that they constituted irregular steps. The ground for this contention was that in terms of clause 16.1 of the Labour Court Practice Manual a referral must be archived if more than six months has elapsed from the date of delivery of a statement of case or since the last court process was filed. In this instance, more than six months had elapsed between the time the applicant filed a statement of case and her notice of intention to amend the statement, and a further six months had passed from the last mentioned court process and the filing of the amended statement of case.
- [6] The respondent opposed the application for condonation but did not file an answering affidavit.

- [7] The original condonation application was heard on 21 November 2018 by Judge Steenkamp. In an *ex tempore* judgment, he dismissed the application for condonation and ordered the applicant's attorneys to pay costs on a *de bonis propriis* basis.
- [8] The basis for this application is that the applicant claims that the court was unaware of the efforts she had personally made to pursue her claim, which her erstwhile attorneys had failed to bring to the court's attention. In effect, the application for retrieving the referral from the archives is based on new evidence explaining her own efforts to ensure that the case was prosecuted during the same period of delay which was the subject matter of the original condonation application considered by Steenkamp J.
- [9] The respondent opposes the application and also raises an *in limine* point that when the court refused to condone the late filing of the amended statement of case, it effectively refused to revive the referral. Accordingly, the respondent claims that the subject matter of the revival application concerns a matter that the court already determined when dismissing the condonation application and cannot be revisited in this application under the principles of *res judicata*. A copy of the *ex tempore* judgment was provided in support of this contention. If the objection is correct, it is fatal to the application. Consequently, it must be determined first.

*In limine point - res judicata*

- [10] In the course of Steenkamp J's judgment, after considering the authorities and the two periods of delay of more than six months each during which nothing was done to pursue the applicant's referral, he held "*In this case, the applicant has not complied with the provisions of the practice manual, it should be deemed archived, and in the absence of any application on affidavit for the retrieval of the file, as provided for in paragraph 16.2, it should arguably be dismissed for that reason alone. I will, nevertheless, deal with the application for condonation on its merits*" (emphasis added).
- [11] The respondent contends that the only way to interpret this statement is that the court was prepared to consider the condonation application even

though a formal application for retrieval of the file had not been made. In other words, instead of dismissing the application because no application to retrieve the file had been made, the court considered the merits of the application, which effectively was tantamount to considering whether the referral could be retrieved.

- [12] It is trite law that for a matter to be treated as *res judicata* or, in other words, a matter that has already been determined by a court cannot be revisited in fresh proceedings, barring an appeal against the judgment, the following criteria must be met: there is already a judgment on the matter, the litigation is between the same parties and, the previous judgment concerns the same subject matter and same cause of action and relief. See, e.g. *SA National Defence Union and Another v Minister of Defence and Others*; *SA National Defence Union v Minister of Defence and Others*.<sup>1</sup>
- [13] The respondent argues that an application to retrieve an archived referral requires a court to determine whether the failure of a party to comply with the prescribed time periods for prosecuting a matter should be condoned and that is just what the court did. In declining to condone the applicant's delay in taking further steps in the referral by not pursuing the amendment of her statement claim timeously, the court declined to condone the applicant's noncompliance with the practice manual.
- [14] In motivating her application to retrieve the archived referral, the applicant canvasses the same delays in prosecuting the matter that were covered in the condonation application before Steenkamp J. The only difference is that she now seeks to put her side of the story of delay to try and demonstrate that she played no role in the delays and, on the contrary, was constantly dealing with her legal representatives about the referral. By so doing, she seeks to persuade the court to condone the very same delays that Steenkamp J refused to condone, but on new evidence that

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<sup>1</sup> (2003) 24 ILJ 2101 (T) at 2109H-J. See also *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H; *Makhanya v University of Zululand* (2009) 30 ILJ 1539 (SCA) at para 45, 46 and 98; *Score Supermarket Kwathema v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 215 (LC) at para 29 – 31.

was not placed before him by her attorneys of record, but should have been.

[15] It stands to reason that if this court now entertains this retrieval application it would have to make another ruling on whether the dilatoriness in prosecuting the matter should be condoned. If the court were to do so and to rule in her favour, it would mean that there would be two conflicting decisions of the court on the same question of condonation. I understand that the applicant wishes to raise facts which were not part of the original condonation application prepared by her representatives, but nonetheless the court would be revisiting an issue that has already been decided on the evidence that was presented at the time. Very exceptionally, leave may be granted for introducing fresh evidence on appeal<sup>2</sup>, but this application is not an appeal proceeding.

[16] As this court cannot return to the question of condoning the applicant's non-compliance with the practice manual, which has already been decided, it cannot independently of that consider the retrieval application. In *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC), the LAC held that an application for retrieving an archived matter is inseparable from an application to condone non-compliance with the provisions of the practice manual:

[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.<sup>3</sup>

[17] A corollary of this is that it would be completely illogical for a court to condone the non-compliance that led to a matter been archived, but refuse

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<sup>2</sup> See, e.g. *Rail Commuters Action Group And Others v Transnet Ltd T/A Metrorail And Others* 2005 (2) SA 359 (CC) at 388-9, paras [41]-[43].

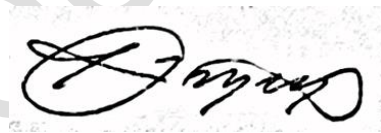
<sup>3</sup> At 1796-7.

to reinstate the case, unless it had to consider other conduct of the dilatory party unrelated to the period for which condonation is sought.

[18] In any event, at least in relation to the decision whether or not the delays should be condoned, the principle of *res judicata* must apply and this court cannot revisit that issue which is a pre-condition for the success of the application for retrieval.

Order

- [1] The respondent's *in limine* objection that the application is *res judicata* is upheld.
- [2] The retrieval application is dismissed.
- [3] No order is made as to costs.



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**Lagrange J**  
**Judge of the Labour Court of South Africa**

**Representatives -**

**For the Applicant:**

**For the Third**

**Respondent:**

**In person**

**S Harrison of Edward Nathan**

**Sonnenbergs**