

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case No: C1034/2018

In the matter between:

SAPU obo H C VENTER

First Applicant

and

**THE SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

COMMISSIONER MAODI (N.O.)

Second Respondent

THE SOUTH AFRICAN POLICE SERVICES

Third Respondent

Date of Set Down: 12 May 2021

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 30 June 2022.

Summary: (Review – Condonation application for late filing of the record – though necessary, court not having jurisdiction to entertain the matter, in the absence of an application to reinstate the review application deemed withdrawn in terms of the practice manual – appropriate relief to finalise any prospective reinstatement application made)

JUDGMENT

LAGRANGE J

Background

[1] This is an opposed application to review and set aside an arbitration award, in which the arbitrator found that the applicant, Colonel H C Venter, was guilty of two of three charges of misconduct and that his dismissal was substantively and procedurally fair.

[2] In terms of court practice under the prevailing Covid 19 regulations the parties elected to have the application determined on the papers without oral argument.

The late filing of the record and the court's jurisdiction

[3] The award was issued on 5 September 2018 and the review application was launched timeously on 25 October 2018. However, finalising the transcription of the evidence became a problem for the applicant because the bargaining council did not provide an audible digital record for some time.

[4] Although the registrar issued a notice under rule 7A (5) for the collection of the digital record on 31 October 2018, of the record, the compact disc received did not contain the recording of the evidence. After persistent efforts to obtain the record, it was eventually available from the transcribers on 8 July 2019. Ultimately, the record was served on the Third Respondent and filed with the court on 2 September and 16 October 2019, respectively.

[5] The applicant filed a condonation application for the late filing of the record. Up to 8 July 2019 when the record was made available by the transcribers, the applicant appears to have reasonably diligently attempted to retrieve the entire digital record. It appears also that the SAPU official handling the application was indisposed owing to medical treatment between 1 and 21 August 2019, and as soon as he returned to service the record and supplementary affidavit was sent to head office for filing. There is a gap in the explanation for the delay between 8 July and the beginning of August 2019 which is not explained.

[6] SAPS points out that clauses 11.2.2 and 11.2.3 of the Labour Court Practice Manual ('the manual') stipulate that:

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."

(emphasis added)

[7] From the condonation application it appears that SAPU did notify SAPS on 19 May 2019 of its difficulties in obtaining the record, though it did not formally seek agreement to an extension of time from it, or approach the court for such extension, if SAPS was unresponsive. While I am satisfied that SAPU has sought condonation for the late filing of the record, the LAC held in *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 798 (LAC) that:

"(24) Macsteel had raised NUMSA's undue delay in prosecuting the review application in its answering affidavit in the review application, but since that application had in effect lapsed and been archived, the Labour Court had no jurisdiction to determine the issue of the undue delay raised there. In the circumstances, Macsteel would have been required to bring a separate rule 11 application for the review application to be dismissed or struck from the

roll on the grounds of NUMSA's undue delay in prosecuting it. But a rule 11 application was not a prerequisite for the Labour Court, in this particular instance, to consider whether, on the grounds of undue delay, the review application should be dismissed or struck from the roll.

(25) As indicated, the review application was archived and regarded as lapsed as a result of NUMSA's failure to comply with the Practice Manual. There was also no substantive application for reinstatement of the review application, and no condonation sought for the undue delay in filing the record. As contended for by Macsteel, the Labour Court was, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction, alternatively, give Macsteel an opportunity to file a separate rule 11 application demonstrating why the matter should be dismissed or struck from the roll on the basis of undue delay."

[8] In this instance, the record was clearly filed outside the 60 day period stipulated in clause 11.2.2 of the manual and is deemed withdrawn. The court appreciates that SAPU has filed a condonation application for the late filing of the record and, I would be inclined to grant condonation notwithstanding concerns about the prospects of success in the review. However, because of the dictum in *Macsteel* above concerning the court's jurisdiction, there is not a 'live' review application before the court to consider, until SAPU successfully applies to reinstate the review application, even if the condonation sought will be central to that application.

[9] In the circumstances, regrettably I have no choice but to strike the application of the roll. However, the order makes provision for expediting a reinstatement application if the applicant still wishes to pursue the review application.

Order

[1] The review application is struck off the roll for want of jurisdiction.

[2] In the event the applicant wishes to bring an application to reinstate the review application, he must file it by 31 July 2022. Should the applicant file such an application, the affidavits already filed in the condonation application for the late filing of the record may serve as part of the record of that application.

[3] To expedite matters, unless either party requests an oral hearing in writing, the court will determine any application to reinstate the review application on the papers and, in the event of reinstating the application, will likewise determine the merits of the review application on the papers.

[4] Parties must file any supplementary heads of argument within 10 days of the time period for filing all pleadings in the reinstatement application having expired.

[5] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

30 June 2022

(On the papers)

No appearances