THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C337/2020
NOT REPORTABLE

In the matter between:

PSA obo SUSAN HYMAN AND 91 OTHERS	**Applicant**
and	
PUBLIC HEALTH AND SOCIAL DEVELOPMENT BARGAINING COUNCIL	**First Respondent**
MAUREEN DE BEER (*N.O.*)	**Second Respondent**
DEPARTMENT OF HEALTH – WESTERN CAPE	**Third Respondent**

Date of Set Down: 6 October 2022

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 14h00 on 4 May 2023.

Summary: (Review – Arbitrator unable to determine unfair labour practice despite stated case – Record not containing documents relied on by parties – Condonation application for late filing of review and filing of answering affidavit – reasonable though not entirely satisfactory explanations tendered for significant delays - Both parties failing to see that no review application pending

owing to elapse of various time limits in labour court practice manual – Application struck off the roll for lack of jurisdiction)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application brought by the Public Servants Association ('the PSA') to review and set aside an arbitration award by the second respondent ('the arbitrator'), in which the arbitrator dismissed the unfair labour practice claim brought by the PSA on behalf of its members.

[2] The matter had been decided on a stated case submitted by the parties. The nub of the dispute concerned a decision by the head of the Western Cape Department of Health during the 2016/2017 performance cycle that staff on salary levels 9 to12 would not qualify for cash bonuses but only for notch progressions. The bonus system was replaced with a system of awarding team recognition certificates for staff on those levels. The PSA disputed the authority of the HOD to stop awarding individual bonuses for staff who qualified in salary levels 9 to 12 and replacing it with team recognition certificates. Secondly, the union contended that the decision to exclude this class of employees from individual bonuses was unfair. The relief they sought, apart from a declaration that the decision was an unfair labour practice, was payment of individual bonuses for the performance management cycles of 2017/2018 and 2018/2019.

[3] The arbitrator noted that, despite the parties agreeing to reduce their case to a stated case and that they would submit argument on the interpretation of the relevant legislation, collective agreements and policies, both parties referred in their arguments to evidence which was not placed on record. This prompted the arbitrator to make a ruling that she could not make a fair decision on the closing arguments in the absence of sufficient oral evidence.

[4] When the arbitration reconvened after her ruling, she recorded that the parties still believed the matter could be determined without oral evidence,

whereas she was of the view that the unfair labour practice claim had to substantiated with evidence. When the parties made further submissions she recorded that it was agreed that not all the applicants qualified for the bonus. Accordingly, she requested a list of those who did. At the time of issuing her award she had not received such a list. Moreover, there was no agreement on the amounts that qualifying employees ought to have received as a bonus.

[5] The arbitrator then attempted to address the dispute as framed by the parties, yet mindful of the limitations she had noted. In evident frustration, she concluded that the failure to produce evidence identifying the applicants who did not qualify for the bonus or, alternatively, an agreement on the details of those who did, coupled with the parties' failure to provide evidence on the documents upon which their arguments were based, led her to conclude that she could not find that the applicant had established any unfair labour practice committed by the department. She further directed that the applicants should refer a case specifically for those who qualified for the bonus either under section 158 (1) (h) of the Labour Relations Act, 66 of 1995, ('the LRA') or, to refer a dispute about the interpretation or application of the collective agreements they relied on.

Procedural matters

[6] Shortly before the matter was due to be heard, the parties advised the court that they were in agreement that the court could decide the matter on the papers. No explanation was provided. Accordingly, the matter was removed from the roll for determination in chambers.

[7] The award was handed down on 19 March 2020, which is the date it was received by the PSA. The review application was only launched on 15 September 2020, whereas it should have been launched by 30 April 2020. Consequently, the application was four and a half months late, or nearly three times longer than it should have taken to bring the application. In the founding affidavit, the PSA set out its grounds for condonation.

[8] The department filed a notice of opposition on 30 September 2020. On 10 December 2021 the PSA filed its notice under rule 7A (8), having filed a transcript of the proceedings on 18 October 2021. The department only filed its answering affidavit on 14 March 2022 and a condonation application was filed in early May 2022. The PSA took exception to the late filing of the answering affidavit and condonation application.

The condonation applications

[9] The PSA explains the delay in bringing the review application as follows. Firstly, the award was received on 19 March a few days after the declaration of a national state of disaster owing to escalation of the Covid 19 epidemic. The first so –called 'hard lockdown' lasted from 27 March to 1 May 2020 and was the first cause of the delay. It is common knowledge that during this period personal movement was very restricted and only essential services were functioning.

[10] When the applicants took the first step to respond to the award it was on 2 June 2020, but instead of instituting a review, they sought to vary the award. The day before the arbitrator had issued the award she had asked the union for a list of those staff who had qualified for the usual performance bonus during 2017/2018 and 2018/2019. The union could not get the information to the arbitrator before she issued her award. It only received it from the department on 26 March 2020, which was a week after the award had already been handed down. The variation was sought because the PSA claimed that, during off the record engagements between the parties and the arbitrator, the parties conveyed to her that they wanted an outcome that could be practically implemented and all staff who met the qualifying criteria could then receive the bonus. The PSA recorded in the variation application that the arbitrator had '*noted this and then allowed us to then proceed*'. The applicant asserted that it was common cause that funds were available for the bonus payment and that only staff who met the qualifying criteria would receive the bonus. In essence, the PSA motivated the variation of the award on the basis that

the arbitrator would have awarded the bonus to staff who qualified if she had received the list of qualifying staff before she issued the award.

[11] Later, advice was obtained that a variation application could not achieve the result intended and lawyers were consulted in early August. The consultation process was drawn out over that month and drafting commenced on 18 August but was only completed after additional information had to be obtained resulting in the application being filed on 7 September 2020. The same month the department noted its opposition to the review application.

[12] More than a year later, the record was filed on 18 October 2021 and a Rule7A(8) notice filed somewhat later on 10 December 2021. The department only filed its opposing affidavit on 14 March 2022, about two and a half months' late. It opposed the PSA's condonation application on the basis that: no detail was provided of what the PSA did during the hard lockdown period; the delay in obtaining legal advice was slow and it should not have taken PSA's attorneys the whole of August to finalise the application.

[13] The department did not seek condonation for its own late opposing affidavit until 29 September 2022, several months later.

[14] The department claims the department was contacted by the state attorney as soon as the record was received and counsel was briefed to attend to the application on 25 November 2021. However, the Rule 7A(8) notice was received when all relevant persons were on leave. It claims the state attorney sought an extension of time until 21 January 2022 to file the opposing affidavit, though the letter was not annexed to the affidavit. The department's counsel realised that most of the bundles that were used at the arbitration were not part of the record filed by the PSA and only obtained these, which comprised 500-odd pages, on 8 February. The opposing affidavit was drafted by 24 February 2022 but was only deposed to on 10 March, partly owing to serious communication problems between

those involved which in part related to major IT problems with the State Attorneys office, which disrupted email communications.

[15] I am satisfied that somewhat unusual circumstances of the first lockdown could account for the PSA's initial delay. The poorest part of the explanation is the time between filing the variation application and instructing attorneys. Nonetheless, I am satisfied there was a misguided attempt to address what PSA saw as the problem with the award, and that it was intent on resolving it. I do not believe there was wilful neglect in initiating the review. As to the state's delay, I am satisfied that it was unrealistic to believe it could have dealt with the application when the Rule 7A(8) notice was filed late in December 2021, and that it proceeded reasonably expeditiously to instruct counsel so that by late February the opposing affidavit would have been filed were it not for the other problems which developed.

[16] In the upshot, the periods of delay and the explanations therefore are not such that condonation ought not to be granted.

The dormant application

[17] However, what neither party seems to have appreciated is that between 29 September 2020 when the notice of opposition was filed and the filing of the record on 18 October 2021, the review application was deemed withdrawn in terms of clause 11.2.3 of the Labour Court Practice manual, because the record was not filed within 60 days of it being made available by the registrar. Moreover, because more than six months elapsed since the founding affidavit was filed in September 2020 the application was already dormant as it was considered archived under clause 16 of the practice manual. To compound matters, the necessary papers to prosecute the application to conclusion had not been filed within twelve months of launching the application, so the application also can be considered to have lapsed under clause 11.2.7 of the practice manual.

[18] In *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch & others* (2022) 43 *ILJ* 2727 (LAC) the Labour Appeal Court made it clear that the status of a file being archive, lapsed or deemed withdrawn are an automatic consequence of the expiry of the relevant time periods in the practice manual and require no administrative action by the Registrar of the court:

> "[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."

[19] In the absence of a successful application to reinstate the review application the application cannot proceed. The LAC has allowed some leeway for the Labour Court to consider reinstating a dormant application in the absence of a formal application for reinstatement, but only when grounds for reinstatement have been advanced in the defaulting party's affidavits[1]. That is not the case here.

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[1] *South African Police Services v Coericius and others* [2023] 1 BLLR 28 (LAC) at paras [10] – [12].

[20] Consequently, even though the late filing of the review application might be something the court would be inclined to condone, there is absolutely no attempt to seek condonation for the long periods of inactivity which led to the review application being deemed non-existent, let alone a proper application for reinstatement thereof. Consequently, whether condonation might be granted for the late filing of the application and the opposing affidavit, it is irrelevant given the inactive status of the entire application.

[21] In passing, it must be said that the record filed clearly lacked the documents relied on by the parties in argument so the court would not even have been in a position to consider the merits on the existing record, if the application were revived. It is apparent also that the stated case does not contain enough information to determine issues such as the head of department's authority to alter the bonus payment regime. I appreciate that is a collateral issue, not strictly within the arbitrator's power to determine, but is something the arbitrator might have had to consider. It is evident that the arbitrator did not only complain about missing lists of those allegedly eligible for the bonus and what amount would apply to each of them but also that there was no agreement on what material she should consider, apart from one cited case. She also complained that the parties did not provide evidence of the documents they relied on.

[22] On a *prima facie* view it seems the written statement of facts was inadequate in placing all the information necessary before the arbitrator, and that she could not make a finding that the applicants had established the existence of an unfair labour practice on that document. In this respect I have considerable sympathy with the arbitrator and am not persuaded that there are reasonable prospects of success. However, this is purely an *obiter* observation, but one that might bear consideration in the event a belated effort is made to revive the review application.

[23] As things stand, the court has no alternative but to strike the review application off the roll in view of the applicant's non-compliance with the

various provisions of the practice manual mentioned above, which mean that there is no review application currently pending before the court.

Order

1. In the absence of a pending review application, the court has no jurisdiction to consider the condonation applications and the matter is struck off the roll.

2. No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

(In chambers)