THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

Not reportable

CASE NO: **D 40/2017**

In the matter between:

DEPT OF HUMAN SETTLEMENTS	Applicant
and	
KESHREE KEMI *N.O.*	First Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Second Respondent
NUPSAW obo S NAIDOO	Third Respondent

Date of hearing: 18 February 2022

Date of judgment: 23 February 2022

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks to reinstate an application to review and set aside an arbitration award issued by the first respondent during December 2016. The review application was deemed withdrawn in terms of clause 11.2.2 of the Practice Manual when the applicant failed to file the transcribed record of the proceedings under review within the prescribed time limit. If necessary, and to the extent that the review application is also deemed to have lapsed in terms of clause 11.2.7 of the practice manual, the applicant seeks its reinstatement.

[2] The record was to be filed by no later than 29 June 2017. It was filed on 1 September 2017, in circumstances where the applicant had not sought consent to the late filing, nor had it sought any directive from the Judge President as contemplated by clause 11.2.

[3] Paragraph 11.2 of the Practice Manual reads as follows:

> 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 11.2.3 If the applicant fails to file the record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested that the respondent's consent for an extension of time and consent has been given.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, applied to the Judge President in Chambers for an extension of time.

[4] In *Overberg District Municipality v IMATU & others* (C 157/18, 8 June 2020), my colleague Lagrange J summarised the application of these provisions. He observed that prior to the advent of the practice manual, there was no time limit prescribed for the filing of a record of proceedings under review, and that the 60-day time limit was introduced to minimise delays in the prosecution of review applications. The Practice Manual is binding. In *Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC), the LAC stated:

(15) The Practice Manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the rules. Its provisions therefore are binding. The Labour Court's discretion in interpreting and applying the provisions of the Practice Manual remains intact, depending on the facts and circumstances of a particular matter before the court.'

[5] In *Macsteel Trading Wadeville v Van der Merwe N.O and others* (2019) 40 *ILJ* 798 (LAC), the LAC noted that the underlying objective of the practice manual is the promotion of the statutory imperative of expeditious dispute resolution (referring to the decision of the Constitutional Court in *Toyota Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2016] 3 BLLR 217 (CC)). At paragraph 23 of the judgment, the LAC noted '*It* [the practice manual] *is binding on the parties and the Labour Court'*

[6] It is also clear from *Samuels* and *Macsteel* that when a review application lapses, is deemed withdrawn or dismissed in terms of clauses 11.2.3, 11.2.7 or 16.3 respectively, it remains so unless and until the applicant succeeds in an application to reinstate or retrieve the application, thus restoring its status as a pending application (see *Overberg Municipality* at paragraph 24). *Overberg Municipality* concerned, as does this case, the application of clause 11.2.3, and a failure to file the record of proceedings under review within the prescribed 60-day period. Lagrange J said the following (footnotes omitted):

[25] In this application the applicable deeming provision is clause 11.2.3. To date, there are no decisions of the Labour Appeal Court dealing with the interpretation of clause 11.2.3 as such. However, the LAC has indicated its approach to review applications which are deemed to have lapsed if all the necessary papers in a review application have not been filed within twelve months' of launching an application. In, *Samuels* the LAC set out the steps to be taken:

'(4) In order for a file to be brought back to life, an interested party has to act in terms of clause 16.2 which requires an application, on affidavit, for the retrieval of

the file on notice to all other parties to the dispute to be launched. The provisions of rule 7 will apply to such an application. This is such an application brought by the appellant in the court a quo. Clause 16.3 provides that:

> 'Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.'

[26] In *Samuels* case, a review application had been archived after lengthy delays by the applicant, which were mainly the fault of the CCMA. The LAC granted the applicant leave to proceed with the review application. The court set out the approach to be adopted when considering whether to resurrect the file from its archived state:

> '(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.'

[7] An application for reinstatement of a review application deemed to have been withdrawn is, in essence, an application for condonation. It is incumbent on the applicant to show good cause why, in this case, the record of the proceedings under review was not filed within the prescribed time limit. Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR (CC)). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.

[8] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.

[9] In the present instance, the delay, some two months, is not insignificant but not excessive. The explanation for the delay is one that concerns a Ms. Pillai, employed by the office of the state attorney, to whom the file was handed after the second respondent had made the record available. Ms. Pillai, it is averred, is 'sadly infected with a chronic ailment which caused her to be absent from work for lengthy periods of time.'. The delay must necessarily be viewed in the context of subsequent developments the applicant filed a supplementary affidavit in terms of Rule 7A (8) on 12 September 2017. The third respondent was obliged to file any answering affidavit by 26 September 2017. An answering affidavit was filed on 18 June 2019, 21 months out of time. While an application to condone the late filing of the answering affidavit remains pending, the fact remains that for a period of almost 2 years, there was no discernible attempt by the third respondent to bring the review application to finality. In April 2019, the third respondent set the matter down for an arbitration hearing on quantification. There appears to have been some misunderstanding as to the dispute that was to be arbitrated, but it is common cause that there was some discussion on a possible settlement of the dispute. That appears to have come to naught and as I have indicated, an answering affidavit was filed on 18 June 2019.

[10] In so far as the prospects of success are concerned, the award under review is one to the effect that the third respondent be paid an acting allowance for the period May 2006 to August 2013, during which period he acted as a deputy director. The award was made on the basis that the applicant was found to be in breach of resolution one of 2002, regulating the payment of acting allowances. The applicant submits that it has prospects of success in the main application. It is not in dispute that in April 2003 the applicant, who was employed as a senior administrative officer, was appointed as an acting Deputy Director, at level XI.

The third respondent was paid an acting allowance up to and including April 2004. In May 2006, the third respondent lodged a dispute regarding the applicant's failure to pay him an acting allowance for the period during which he had continued to act. The dispute was referred to arbitration, when the applicant was directed to pay the third respondent an acting allowance for a period of 25 ½ months. In terms of the arbitration award, the applicant was directed to relinquish the third respondent from his acting duties and responsibilities. The third respondent alleged that the applicant had not complied and that for the period may 2006 to August 2013, he remained in the acting appointment. That dispute was also referred to arbitration, and is the subject of the award under review. The applicant's case is in essence that the arbitrator committed a reviewable irregularity by failing properly to interpret and apply the relevant resolution, which requires an acting appointment to be made and accepted in writing, and which places time limits on the duration of acting appointments. The arbitrator found that on a balance of probabilities, the third respondent had acted in the position of deputy director for the period that he claimed, and that it was 'highly unfair' for the applicant to claim that it did not recognise his acting status while allowing him to continue acting in the position. On the facts, the arbitrator found that the third respondent was appointed in writing to act, by a person duly authorised to offer the appointment, in respect of the post that was vacant and funded and which offer the third respondent accepted. The applicant contends that it had complied with the first arbitration award and terminate the third respondent's acting appointment, and that this termination had been confirmed in writing. The applicant contends that it was thus not open to the arbitrator to find that the third respondent had continued to act in the position after the award was issued, particularly where the written authorisation relied on by the arbitrator was issued in respect of the acting appointment that was the subject of that award.

[11] The threshold is one that requires the applicant to establish that it has prospects of succeeding in the main application, not that it will necessarily succeed. On balance, it seems to me that for the purposes of the present application, the applicant has met that threshold.

[12] In summary, the delay in filing the record of the proceedings under review is not excessive, the explanation for the delay is satisfactory, and the applicant has reasonable prospects of success. In these circumstances, the review application ought to be reinstated. For the same reasons, the application to reinstate the review application after it having lapsed in terms of clause 11.2.7 of the practice manual is granted. A particularly compelling factor in the present instance is the fact that the third respondent is hardly sought to oppose the review application with any degree of compliance with the Rules indeed; it appears to have litigated at leisure. As I indicated above, the applicant's failure to comply with the time limits relevant to the filing of the record and the relevant affidavits must necessarily be viewed in this context.

I make the following order:

1. The application for review filed under case number D40/2017 and deemed respectively to have been withdrawn and to have lapsed in terms of clauses 11.2.3 and 11.2.7 of the Practice Manual, is reinstated.
2. The arbitration hearing to quantify the arbitration award under review is stayed, pending the finalisation of the review application.
3. There is no order as to costs.

André van Niekerk
Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv S Giba, instructed by the state attorney

For the third respondent Union official: M Moodley; C Sithole