



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA 11/2023

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES

Appellant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

ADV KEVIN PERUMAL N.O.

Second Respondent

MNIKELWA NXELE

Third Respondent

Heard: 15 November 2024

Delivered: 18 November 2024

Coram: Savage ADJP, Van Niekerk JA et Govindjee AJA

JUDGMENT

VAN NIEKERK, JAIntroduction

[1] The appellant appeals against a judgment by the Labour Court (Mthlane AJ) delivered on 2 November 2022, when the Court dismissed, with costs on a punitive scale, an application by the appellant to reinstate a review application deemed withdrawn in terms of clause 11.2.4 of the Practice Manual. The Labour Court's order was varied on 26 January 2023 to make clear that the subject of the order was the application for reinstatement and not the underlying review application.

Background

[2] The present dispute is one of many involving the same parties that have, regrettably, occupied the time and resources of the bargaining council, the Labour Court and this Court for some eight years. In 2016, the third respondent was subjected to a precautionary suspension and charges of misconduct in circumstances where he averred that he had made a protected disclosure in terms of the Protected Disclosures Act, 26 of 2000 (PDA). On 16 March 2016, the Labour Court set aside the third respondent's precautionary suspension on the basis that it constituted an occupational detriment in violation of the PDA. On 18 December 2018, the Labour Court set aside the disciplinary enquiry against the third respondent and directed that the hearing be converted into an inquiry by an arbitrator in terms of s 188A of the LRA. In December 2019, the third respondent was again placed on precautionary suspension pending various charges of misconduct by the then commissioner, Mr Fraser. On 3 December 2019, the Labour Court set aside the disciplinary proceedings and directed that the disciplinary enquiry be converted into an inquiry in terms of s 188A. On 2 March 2020, the third respondent was again suspended. On the same day, filed an urgent application to declare his suspension unlawful. On 10 March 2020, the Labour Court declared the third respondent's continued suspension invalid. An application for leave to appeal

against that order was dismissed. A petition for leave to appeal was granted, but the appellant failed to prosecute the appeal. Despite the Labour Court's judgment a new disciplinary hearing was convened, when the appellant sought to extend the third respondent's suspension. On 26 May 2020, the chair of the disciplinary hearing granted the extension sought. On 10 June 2020, the third respondent again approached the Labour Court, which granted an order on the same day declaring the chairperson's ruling invalid and setting it aside, with costs. An application for leave to appeal was dismissed. On 14 July 2020, a second disciplinary enquiry was convened which on application, was converted into an inquiry by an arbitrator in terms of s 188A (11) of the LRA. On 17 July 2020, Mr Fraser again suspended the third respondent. Panelist Wabile (Wabile) was appointed to deal with the inquiry. Despite two judgments of the Labour Court declaring the third respondent's suspension unlawful, the appellant again sought the extension of that suspension. Wabile dismissed the application. Despite this ruling, Mr Fraser addressed a letter to the third respondent extending his precautionary suspension pending the finalisation of the inquiry by the arbitrator. The third respondent referred an unfair labour practice dispute to the bargaining council. On 26 April 2021, the second respondent (arbitrator) found that the third respondent's suspension constituted an unfair labour practice and ordered that the appellant pay him compensation equivalent to three months' remuneration as a solatium for the impairment of his dignity, and pay the costs of the arbitration proceedings (the Perumal award).

[3] On 3 May 2021, the appellant filed an application to review the Perumal award. The appellant failed to comply with the requirement in terms of Rule 7A read with clause 11.2.2 of the Practice Manual that the record of the proceedings under review be filed within 60 days of the filing of the review application. The appellant did not seek an extension of time for the filing of the record as provided in the Practice Manual. Instead, the appellant's attorney wrote to the Judge President indicating that the appellant would bring an application to compel the bargaining council to file a complete record. No such application was brought and no extension was granted by the Judge President. In the

absence of a record and any extension of the period within which to file the record, the 60-day period lapsed on 31 August 2021.

[4] On 3 September 2021, the third respondent's attorney advised the appellant that in terms of the Practice Manual, the review application was deemed withdrawn, and that he intended to report for work. On 7 September 2021, the appellant filed an application to reinstate the review application. On 21 October 2021, the Labour Court suspended the operation of the arbitration award pending the outcome of the review application.

[5] On 2 November 2021, the s 188A inquiry proceeded before Wabile. On 7 February 2022, Wabile issued a ruling in which he acquitted the third respondent on all but one minor charge brought against him. That charge carried a penalty of a written warning. Wabile ordered that the third respondent's suspension be uplifted and that he return to work on 14 February 2022. On 13 February 2022, the appellant filed an application to review and set aside Wabile's ruling. On 21 February 2022, the Labour Court dismissed with costs an application brought by the appellant to interdict the third respondent from returning to work. On 22 February 2022, the appellant served a letter on the third respondent calling on him to furnish reasons why he should not be suspended. On 23 February 2022, the Labour Court dismissed an application brought by the third respondent to interdict his suspension, and on 28 February 2022, the third respondent was placed on suspension pending the outcome of a disciplinary enquiry. On 28 March 2022, the third respondent referred an unfair labour practice dispute to the bargaining council. The dispute was referred to arbitration on 1 April 2022 and set down for hearing on 5 May 2022. The appellant objected to the bargaining council's jurisdiction, a point that was overruled. On 17 May 2022, the appellant filed an application to review and set aside the certificate of outcome issued by the bargaining council and the arbitrator's ruling dismissing its point in *limine*. On the same date, a charge sheet was served on the third respondent relating to what the appellant alleged was misconduct committed on 14 February 2022.

[6] On 20 May 2022, the appellant filed an urgent application in the Labour Court in which he sought an interim order interdicting the appellant from continuing with a disciplinary hearing scheduled for 24 May 2024, converting the enquiry into an inquiry in terms of s 188A (11), and also declaring the suspension imposed on the third respondent on 28 February 2022 to have lapsed. On 22 July 2022, the matter came before the Labour Court by way of a return date. On 2 August 2022, the Labour Court confirmed the interim order, declared that the third respondent's suspension had lapsed, and ordered that the disciplinary enquiry be converted into a s 188A inquiry and that the appellant pay the costs of the application.

[7] In the interim, on 1 July 2022, the Labour Court heard argument in in the application to review the Perumal award and reserved judgment.

Labour Court

[8] In its judgment, delivered on 2 November 2022 the Labour Court held that there was no live controversy between the parties and that there would be no purpose served in pursuing the review application. It was not in dispute at the time that the reinstatement application was heard after an enquiry by an arbitrator conducted in terms of s 188A, the third respondent had been acquitted (by Wabile) on all serious charges brought against him, and reinstated into the appellant's employ.

[9] The Labour Court concluded that the case was moot, since the third respondent had undergone a disciplinary hearing that had been finalised. In relation to costs, the Labour Court noted that the appellant had been warned in a letter addressed to it by the third respondent's attorney on 28 June 2022 that the matter had become moot, but nonetheless decided to proceed with the application. Given that the appellant elected to proceed notwithstanding the warning, the Court considered that a punitive costs order was warranted.

The appeal

[10] The notice of appeal was filed late. The appellant has filed an application for condonation for the late filing of the notice. Leave to appeal was granted by way of petition on 19 May 2023. The notice of appeal was to have been filed within 15 days, by no later than 9 June 2023; it was filed on 15 June 2023. The notice states no more than that the appellant seeks an order setting aside the Labour Court's judgment, and substituting the order with an order reinstating the review application with costs to be costs in the cause.

[11] Although the period of the delay in filing the notice of appeal is not significant and the explanation proffered for that delay not unreasonable, the appellant's lack of prospects of success, viewed with a number of failures properly to comply with the Rules, militate against the granting of condonation.

[12] The notice of appeal does not set out any grounds for appeal; it simply records the order sought. While this may not in itself constitute a breach of the applicable Rule, it was only at the hearing that the appellant's attorney articulated the basis for the appeal, which appears to concern the award of compensation and the order of costs made by the arbitrator. As I understood the submission, even if the issue of the third respondent's return to work had been overcome by events, the appellant submits that it remained entitled to pursue the reinstatement of its review application to the extent that the review related to the award of compensation and costs.

[13] Even if the award of compensation and costs remained live issues before the Labour Court, this does not in itself establish any prospects of success in these proceedings. An application for the reinstatement of a review application deemed withdrawn in terms of clause 11.2.2 of the Practice Manual is in essence an application for condonation. It is incumbent on an applicant seeking to reinstate a review deemed withdrawn to set out sufficient facts that if established, would result in success.¹

¹ *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC).

[14] The record before the Court does not extend to the review application (which served before the Labour Court), nor, until the morning of the hearing of the appeal, did it contain a complete record of the reinstatement application. The record filed by the appellant did not include the third respondent's answering affidavit in the reinstatement application. This correct affidavit was uploaded only hours before the commencement of the hearing. It was also only at the hearing of the appeal that the Court was apprised of the appellant's contention that what was primarily in issue were the arbitrator's awards of compensation and costs. This is not apparent from the notice of appeal, nor the appellant's heads of argument. The appellant's attorney further confirmed, from the Bar, that the third respondent had been permitted to return to work in September 2022, more than two years ago, in terms of the order of the Labour Court granted subsequent to the Perumal award and after the third respondent's acquittal on all but one of the charges against him. Finally, and fatally for the appellant, it does not appear from the record before us that the relatively small amount of compensation and an order for costs incorporated in the Perumal award were ever the subject of challenge in either the review or the reinstatement application.

[15] The appellant's shortcomings in the preparation and filing of the record are such that it is not possible for this Court to take an informed view on any prospects of success the appellant may have in the application to reinstate the review application deemed withdrawn on account of the appellant's failure to file the record timeously in that application. Little point would be served in striking the appeal from the roll to enable the appellant to file the complete record – the suspension that was the subject of the review application was determined some three and a half years ago to constitute an unfair labour practice. This ruling must be viewed in a context where the third respondent was subsequently acquitted of all serious charges against him and where the Labour Court declared that the second precautionary suspension implemented on 28 February 2022, a suspension that significantly post-dated the suspension that was the subject of the Perumal award, had lapsed. By the time that the reinstatement application came before the Labour Court, it is manifestly clear that the subject of that application (ultimately the review of the Perumal award) had long since become

academic, and was no longer the subject of a live dispute. As I have indicated, to the extent that the appellant has attempted in these proceedings to resurrect those elements of the award that comprised the orders of compensation and costs as a live issue, the appellant has failed to put us in a position to consider the merits of those components of the award, assuming that they were raised in the review and reinstatement applications at all. The interests of justice and the demands of expeditious dispute resolution are best satisfied by an order refusing condonation for the late filing of the notice of appeal and dismissing the appeal.

Costs

[16] Finally, in so far as costs are concerned, the fact of the defective record was noted in the heads of argument filed on the third respondent's behalf on 20 October 2023, a year ago, when the third respondent's attorney observed that the answering affidavit filed as part of the record related to another matter. It was only hours before the hearing commenced that the appellant uploaded the correct affidavit, without any explanation or application for condonation. The cumulative shortcomings in the preparation of the record and in particular, the absence of the record of the application for review, demonstrate lapses that have had the consequence of frustrating the proper and efficient conduct of these proceedings. The appellant litigates with the backing of the public purse. The third respondent has been the victim of a sustained campaign of what borders of an abuse of legal process for nebulous ends, and has had to incur legal costs at every step. In these circumstances, an award of costs is warranted. The conduct of the appellant and its attorney justifies an award of costs on the scale as between attorney and client.

[17] I make the following order:

Order

1. Condonation for the late filing of the notice of appeal is refused.
2. The appeal is dismissed.

3. The appellant is to pay the costs of the appeal on the scale as between attorney and client.

van Niekerk JA
Savage ADJP *et* Govindjee AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv T Tshabala

INSTRUCTED BY:

State Attorney

FOR THE THIRD RESPONDENT:

Mr B Mgaga, Garlicke & Bousfield Inc

LABOUR APPEAL COURT