IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D 574/16
Not Reportable

In the matter between:

BIDVEST PROTEA COIN (PTY) LTD	**Applicant**
and	
NOKUPHIWA MAYABA AND 3 OTHERS	**First Respondent**
ADV COLIN MUNKS N.O.	**Second Respondent**
CCMA	**Third Respondent**

Application heard: 25 August 2022
Delivered: 14 October 2022 (Electronically)
Summary: Reviews - Practice Manual – when the 60 day period commences to run – from date received first Rule 7A(5) notice

JUDGMENT

WHITCHER J

Introduction

[1] This is an application to have reviewed and set aside the default arbitration award and the rescission ruling made by the commissioner[1] in favour of the first respondents (the respondents). The applicant also seeks condonation for the late filing of the review application in respect of the default arbitration award. The

[1] Second Respondent.

respondents contend that review application has fallen foul of clauses 11.2.2 and 11.2.3 of the Practice Manual of the Labour Court (Practice Manual), alternatively it has no merit.

The Practice Manual

[2] Clause 11.2 reads:

11.2 Applications to review and to set aside arbitration awards and rulings

11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

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11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given.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

11.2.4 If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.

1.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.

[3] It has been suggested that the time period referred to in clause 11.2.2 does not commence to run until such time as the complete and/or correct record has been made available by the CCMA/Bargaining Council to the applicant in review proceedings. This is not correct.

[4] The Practice Manual provides clear directions regarding what is required to be done if the applicant is having problems securing the record and is unable to deliver the record upon which it intends to rely. (Clauses 11.2.3 and 11.2.4)

[5] If the time period in the Practice Manual for the delivery of the record was only intended to apply in circumstances in which a complete and proper record had been made available by way of a Rule 7A(5) Notice at the outset, the remaining provisions of Clause 11.2.3 would be rendered meaningless, as would Clause 11.2.4.

[6] I say this for the reason that if the provisions of clause 11.2.3 were to be ignored in situations in which the record which has been made available is imperfect, there would be no obligation upon a litigant in review proceedings to take any further steps as there would be no applicable time period and therefore no consequences. It is difficult to conceive of a situation in which an extension of time would be required to be sought in circumstances other than where the record is incomplete or otherwise deficient.

[7] For that reason, 'the record' referred to in Clause 11.2.3 can only by 'the record' referred to in clause 11.2.1, whatever that may be. Should it be hopelessly deficient, the applicant has a remedy in clause 11.2.4. Should it be capable of

remediation, but with an additional period of time beyond the 60 day period allowed, the applicant has a remedy in clause 11.2.3.

[8] The above approach finds support in a recent judgment from the Labour Appeal Court.[2] On the matter before the Court, Sutherland JA held:

> The registrar, in terms of para 11.2.1 of the Practice Manual, advised the appellant (not later than) on 14 May 2019 that the 'record' was ready. This 'notification' means no more than whatever the Bargaining Council had sent to the registrar was available for collection and could then be included by an applicant in the record to be filed for the review application. Not all the material that was required by the appellant for the application had been delivered by the Bargaining Council as parts of the transcript of the arbitration hearing leading to the award were missing. This is an occupational hazard of long-standing and is the very reason why clause 11.2 of the Practice Manual was formulated to include a form of relief for an applicant experiencing such a predicament; i.e., to seek direction from the Judge President to ameliorate the practical difficultie
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> An incomplete 'record' was lodged on 19 June 2019 consisting of what was available at that time.
>
> The 60-day period mentioned in Para 11.2.2 of the Practice Manual expired on 8 August 2019. *Ergo,* a complete record had not been filed by that date.
>
> The appellant did not follow the prescripts of clause 11.2.3 of the Practice Manual.

[9] Sutherland JA went on to find that in the circumstances, the review was deemed withdrawn and a substantive application to overcome the deemed withdrawal of the review application was necessary.[3]

<u>The critical facts</u>[4]

[2] *The South African Police Services v Coericius and Others* (CA 11/2021) (29 September 2022) at para 4.2 to 4.5. See also in the judgment paragraph 9 which refers to the Labour Court judgment.
[3] As to what may constitute a substantive application, see para 12 of the judgment.
[4] Certain of these facts, including critical dates have been uplifted from the Court file because the Applicant conveniently failed to disclose same in its papers.

[10] The default award was received on 29 September 2015 and the rescission ruling on 7 April 2016.

[11] The review application was initiated on 19 May 2016.

[12] According to the court file: the CCMA notified the applicant on 31 May 2016 by fax that it had dispatched the record to the registrar; the registrar sent a Rule 7A(5) notice to the applicant on or about 7 June 2016; the CCMA dispatched to the applicant on or about 7 June 2016 an affidavit by the commissioner detailing what had occurred in both proceedings; and, on 11 July 2016, the applicant collected the record from the registrar.

[13] On 22 July and 8 August 2016, the applicant informed the CCMA that it had sent the wrong audio recording.

[14] According to the court file, the CCMA did a 'further' filing and notified the applicant of this on 18 August 2016.

[15] On 13 October 2017, in relation to an application filed by the applicant on 19 February 2017, the court ordered the CCMA to file the correct record, alternatively conduct a reconstruction within 10 days.[5]

[16] On 24 November 2017, the applicant and the respondents attended a reconstruction meeting where the commissioner read out his handwritten notes on the evidence and submissions led during the arbitration.

[17] It was agreed that the applicant would produce a typed version and send same to the respondents for approval, which they did on 11 December 2017.

[18] On 4 January 2018, the respondents responded with corrections/amendments and instructed the applicant to attend to the service and filing of the record and their supplementary affidavit "so that the matter can be finalised".

[5] By then, as discussed further on, the review application was deemed to have been withdrawn in terms of the Practice Manual.

[19] On 2 May 2019, the respondents filed a rule 11 application to dismiss the review application.

[20] In response, the applicant filed their supplementary affidavit on 7 May 2019 and on 14 May 2019 a record consisting of the commissioner's transcribed handwritten notes, the default arbitration award and the rescission ruling.

[21] According to the respondents the record was not served on them.

[22] The applicant averred in its supplementary affidavit that on perusal of the commissioner's typed notes, it observed that the notes pertained only to the evidence led during the arbitration and was not inclusive "of *the evidence"* lead during the rescission proceedings. As a result, it had written to the CCMA for a further reconstruction meeting. It did so in March, April and September 2018, but there was no response. The applicant submitted that the absence of the above record is extremely prejudicial to its review application and the Court should set aside "the arbitration award", alternatively remit the matter back to the CCMA for a new "arbitration".

[23] It is noted that on 24 November 2017 the applicant's representative was present at the reconstruction meeting where the commissioner read out his notes and would have been aware at the time that the notes did not pertain to the rescission proceedings, which in any event was an application (a 'paper case'). It is also noted that the commissioner had long since (in June 2016) served and filed a detailed affidavit on the proceedings of the rescission application and the rescission ruling itself was also very detailed.

[24] In their heads of argument, the applicant now claims that the record does not constitute a complete and proper record of the evidence led at the *arbitration* and "on which [the commissioner] based the default award, and this is extremely prejudicial to its review application and the Court should set aside the award, alternatively the matter be remitted `back to the CCMA for a new arbitration.

[25] It is noted that at the reconstruction meeting and when the parties exchanged notes on the typed notes of the commissioner, no such allegation was made.

Findings

[26] It is self-evident from the facts above that the review application has fallen foul of clauses 11.2.2, 11.2.3 and 11.2.4 of the Practice Manual. The record was not filed within the sixty-day period and the applicant did not follow the prescripts of clauses 11.2.3 and 11.2.4 at all, never mind within the relevant time periods. The application was thus deemed withdrawn under the Practice Manual.

[27] It follows that a substantive application to overcome the deemed withdrawal of the review application was necessary.

[28] There is no such application before me.[6] There is no notice of motion or prayer in any affidavit seeking reinstatement of the review application and such was not suggested at the hearing. It would therefore not be appropriate to conjure up such an application even though it would have ideal particularly for the respondents to have a final determination on the review application.

Costs

[29] It is appropriate to order the applicant to bear the respondents legal costs. The respondent have been denied a final determination of this matter owing to the conduct of the applicant. The same situation applied at the CCMA. The applicant was given timeous notice of the scheduled date of the arbitration and provided no reasonable and satisfactory explanation for their absence. Their excuse in their rescission and review application is that they forwarded the notice to their labour consultant. That's all they did: forward the notice. There were no follow up to enquire about the matter and no explanation about this conduct in their rescission application. The Constitutional Court reaffirmed the long-standing two-part test for rescission. First, the applicant must provide a reasonable and satisfactory

[6] See: *The South African Police Services v Coericius and Others* (CA 11/2021) (29 September 2022) at para 12.

explanation for its absence or default. Second, the applicant must show that it has a bona fide defence (or grounds of opposition) which exhibit reasonable prospects of success in the matter. The court stated that both requirements must be met before an order can be rescinded.[7]

Order

[1] The review application is struck from the roll.

[2] The applicant is ordered to pay the first respondents' legal costs.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: Lancaster Kungoane Attorneys

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[7] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).