IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2767/18

In the matter between:

LEHUMANEGO T.R. **Applicant**

and

TRANSNET BARGAINING COUNCIL **First Respondent**

J. MASHIKA *N.O.* **Second Respondent**

TRANSNET FREIGHT RAIL (NORTHERN CAPE). **Third Respondent**

Heard: **24 January 2023**

Delivered: **17 February 2023**

JUDGMENT

MABASO, AJ

Introduction

[1] From the inception of the review application in December 2018, the Applicant has been represented by KBVS Attorneys ("Ms Du Plessis") based in Kuruman

in the Northern Cape; considering that the main Labour Court building is situated in Johannesburg, Ms Du Plessis appointed Motshegare Attorneys as correspondent legal practitioners ("Messrs Motshegare"). According to the founding affidavit in the reinstatement application, the latter was appointed "[i]n order to properly facilitate the process and adhere to the Rules of Court, …[the Applicant] was informed by Sunette Du Plessis that [Messrs Motshegare] instructed and entrusted to finalize and prosecute [the review] to finality in a proper and professional manner…". Considering the merits of this matter, it is essential to mention that it is not evident in the papers whether Messrs Motshegare was also expected to assist the Applicant with drafting the papers or only act as a messenger to facilitate the filing of the pleadings. It has to be mentioned that both the Applicant and Ms Du Plessis blame Messrs Motshegare in most parts of this matter. Consequently, this Court, unfortunately, finds itself faced with the conduct of practitioners taking centre stage, distasteful as it is, forlornly, there is no escape hatch.

[2] On 29 January 2019, the Registrar of this Court advised the parties that the arbitration records were available for collection, as envisaged in Rule 7A(5) read with clause 11.2.2 of the Practice Manual, which required the Applicant to collect the records within 7 days of notification thereof and such to be filed within 60 days from 29 January 2019; failure to comply with this time frame would result in the Applicant being "deemed to have withdrawn [the review]". The arbitration records were due on 26 April 2019 (calculating the court days, which exclude weekends and public holidays). The Applicant only managed to serve and file them on 24 April 2019 and 10 May 2010, respectively, the latter date being outside the timeframe set by clause 11.2.2 of the Practice Manual.

[3] As a result, the matter was deemed withdrawn. Whatever action thereafter became academic because the review *had been* "abandoned" as the Applicant no longer intended to seek relief in the review. *Cf South African Police Services v Coericius and Others* [2023] 1 BLLR 28 (LAC) ("SAPS") at para 9 and *Macsteel Trading Wadeville v Van der Merwe NO & others (2019) 40 ILJ 798 (LAC) at paras 14-6*; unless the Applicant before the expiry of the 60 days had launched either an application for extension of the time as per clause 11.2.3, or

successfully sought consent from the Respondent (s). However, suppose none of the latter has been done. In that case, nothing prevents an applicant from continuing with the filling of further necessary documents, because such action ordinarily works in favour of an applicant when this Court decides good cause for reinstatement, as this Court will only have jurisdiction to hear such review application once the good cause has been shown.

[4] This abandonment of the review by the Applicant has resulted in five applications being launched as he is seeking the following orders: (a) reinstating the review application; (b) condoning the late delivery of both the arbitration records and Notice in terms of Rule 7A(8); (c) condoning the late delivery of the replying affidavit; (d) condoning the late delivery of "the supplementary affidavit". Considering that the main application herein is the reinstatement of the review, and all the applications are interrelated, this Court proposes to deal with all the applications in the manner set out hereinafter.

Assessment and Analysis

Reinstatement application

[5] As the arbitration records were filed on 10 May 2019, they were six days out of the 60 days required by clause 11.2.2 of the Practice Manual, which is not an excessive period. Following the delivery of the records, the Applicant served and filed Rule 7A(8) notice, indicating that he stands by the founding papers on 31 May 2019 and 05 June 2019, respectively. The Applicant in the papers in this Court had miscalculated the time frames by including weekends and holidays; the correct times came about when this Court allowed the Applicant's representatives to calculate the periods correctly and when this Court realised that they kept on saying they "did not know when the records were filed" ,as they claimed that had relied on Messrs Motshegare's assistance, despite such information being available in the Court's file.

[6] The Applicant and Ms Du Plessis blame Messrs Motshegare for them not knowing when the arbitration records were filed. The latter's mandate was terminated in December 2019. Ms Du Plessis's handling of this matter resulted in Mr Moodley, who appeared for the Applicant, acknowledging that the Applicant's legal

representatives should have handled the matter better. This Court proposes not to make any comments about the entire conduct of the Applicant's legal representatives, save to confirm that Mr Moodley's statement has merits.

[7] Following the delivery of the arbitration records and Rule 7A(8) notice, the Third Respondent delivered an answering affidavit on 10 June 2019. The Applicant delivered no replying affidavit. No proper explanation is provided for what happened between the delivery of the answering affidavit and 25 May 2020, which is more than 11 months. The Applicant avers that Messrs Motshegare was discarded after,

> *"it became evident that … had failed to act payday instruction and completely stopped communicating... None of the relevant and necessary steps has been complied with, despite being instructed to do so. It came as a shock to find out that the file had been placed in archived, with not even the record of all the condonation applications properly filed."* (*Pleadings: 23, paras 3.19 and 3.22)*

[8] In responding to part of these allegations, the Third Respondent indicates that: these allegations are unsubstantiated as the Applicant has failed to explain as to which instructions Messrs Motshegare have failed to execute, as they submitted that at all material times, [Ms Du Plessis] had been the attorneys of record. They were the ones at all material times that were entrusted with the prosecution of the review application". Moreover, the Third Respondent submits that following delivery of their answering affidavit, "the pleadings have been closed as the parties exchanged all the necessary pleadings"(P 89, para 32.)

[9] In reply, the Applicant contends that:

> "*has tendered reasonable and acceptable explanations to the extent he can on the conduct of person or persons entrusted to handle his matter and the reasons for the delay, which delay is not to be imputed upon the applicant."* (Pleadings: 111, para 38.)

[10] For a review application to be reinstated, an applicant has to "show good cause" for non-compliance with the Rules/Practice Manual. The gravamen of the

Applicant is the alleged negligence by Messrs Motshegare. This Court deems it proper to follow the Supreme Court of Appeal (SCA) judgment of *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) in dealing with a matter that concerns procedural non-compliance with relevant law and considering the interest of justice, that court had the following to say:

> "'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the Applicant, and any contribution by other persons or parties to the delay and the Applicant's responsibility therefor." (Own emphasis)

And

> "The relevant circumstances must be assessed in a balanced fashion. The fact that the Applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved."

[11] As the issue under this rubric is mainly about the conduct of the Applicant's legal representatives, it is prudent for this Court to visit what the LAC said about similar situations, as in *Superb Meat Suppliers CC v Maritz* (2004) 25 ILJ 96 (LAC) at para 15 held thus:

> *" …The Court is hesitant to debar a litigant from relief, primarily where his attorney has been at fault. Meintjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 264A; Saloojee & another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 140H-141A. There are limits, however, even where the attorney is largely to blame for the delay, beyond which the courts are not prepared to assist an appellant.*

[12] *In casu*, the Applicant is blaming Messrs Motshegare for the non-compliance with the timeframes. This Court has noted that the filing sheet to the arbitration records that were subsequently filed was signed in Kuruman on 03 May 2019

and filed on 10 May 2019, despite being served on 26 April 2019. Clearly, this indicates that Ms Du Plessis only sent the arbitration records to Messrs Motshegare after 03 May 2019, which was outside the 60 days prescribed by clause 11.2.2 of the Practice Manual. Therefore the blame on Messrs Motshegare holds no water. So this Court agrees with the Third Respondent that the reasons advanced for the delay in filing the arbitration records is a thinly-veiled excuse and suprisingly Ms Du Plessis claims that her hands are clean despite being the Applicant's main legal represantatives in this matter.

[13] Despite what is stated in the preceding paragraph, and that clearly there is nothing happened between 10 June 2019 and June 2020, a period of a year, this Court takes note that the Applicant is challenging an arbitration award which concluded that his dismissal was substantively fair following a guilty finding on misconduct which emanates from negligence in driving the Third Respondent's train; as much as the Applicant appointed legal representatives of his choice, this is a Court of equity, the cause for the review to be deemed withdrawn is the Applicant's legal representatives failure to file the arbitration records by 5 days, which is not excessive.

[14] Debarring the Applicant from proceeding with the review application on the basis that his legal representatives filed the arbitration records after 5 days of the prescribed period, this Court opines that it will not be in the interest of justice, especially considering that upon the Applicant appointing the current correspondent legal representatives, Mr Moodley, who advised both the Applicant and Ms Du Plessis what to do, the Applicant immediately acted on such advice, which shows that he is still interested in pursuing the review application; it would be unfair not to grant the reinstatement of the review for someone who was dismissed for negligence at work, who feels the dismissal was not appropriate, and delay which was not caused by him directly.

[15] Relating to the condonation for the late delivery of the Rule 7A(8) notice, the Applicant, filed on 23 April 2019, asked for condonation; in such an application, the Applicant seems to misunderstand again when exactly this Notice was due, considering the Practice Manual read with the Rules of this Court. This Notice was filed on 31 May 2019, and there are no reasons advanced for such a delay.

This Notice was filed after the Applicant had already "abandoned" the review due to deeming provision; the filing of the answering affidavit was a step after the review had been abandoned. Considering the interest of justice that this Court has decided to reinstate the review application, see order 1 below, it seems the issue of delivery of this Notice and its date is insignificant, as at the time of delivery, the review was already withdrawn. Considering that this Court grants reinstatement of review now, then the Rule 7A(8) notice delivered out of time and that the answering affidavit has already being delivered, the two documents should stand, and whatever that was submitted after that should be scrutinised. This Court deals with such in the following rubric.

Supplementary affidavit /replying affidavit

[16] In *SuperB Meat supra*, the LAC, in explaining that "there are limits" in para 16, held thus:

> "*…In this Court…there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasized that the attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. See A Hardrodt (SA) (Pty) Ltd v Behardien & others (2002) 23 ILJ 1229 (LAC) paras [15]-[17]; Saloojee & another v Minister of Community Development at 141C-E; Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others 1985 (4) SA 773 (A) at 787G-H."* [Own emphasis]

[17] In this Court, once a review application has been delivered, an Applicant has the option of either supplementing the grounds of a review or standing by the founding papers; thereafter, the Respondents may deliver an answering

affidavit(s) when the former is executed as an option. If there is no further action, that will be regarded as the closing of the pleadings. The only set of an affidavit that might be delivered thereafter is a replying affidavit. After reading arbitration records, this process depends on what an appointed legal representative thinks. If, at a later stage, an Applicant submits an affidavit; such an applicant will have to explain why such was not done at the time the Rule 7A(8) Notice was delivered or expiry of 10 days thereafter.

[18] If an applicant has failed to deliver supplementary grounds of the review on time, then decides later to do so once a Respondent has delivered an answering affidavit, he will have to proffer a reasonable explanation for the failure to do so because such a step, if allowed, would mean the Respondent (s) will have an opportunity to deliver a second set of answering affidavit(s), the Applicant will have to reply ,if need be. This approach in this Court may temper with the purpose of the Labour Relations Act,[1] which calls for the speedy resolution of disputes.

[19] At this matter's commencement, the Applicant has been represented by Ms Du Plessis; Messrs Motshegare was instructed “to prosecute" the review professionally as stated in paragraph [1] above. The review application was delivered in December 2018, and on 05 May 2019, a Rule 7A(8) notice was filed. Almost a year later, the Applicant changed the Correspondent legal representative and appointed the current one, Nishlan Moodley Attorneys, in March 2020. The latter advised him that there was a need for “the supplementary affidavit”. The reason for this advice, he says, initially a decision was taken not to file a supplementary affidavit “until the condonation application was set down and adjudicated since [his] legal resources are limited”. Again the Applicant blames Messrs Motshegare. The Applicant again indicates that the only legal representative who had drawn his attention to clause 11 of the Practice Manual was Mr Moodley. Understanding this averment, in a way, he is saying initially he got incorrect legal advice from Ms Du Plessis.

[1] Act 66 of 1995, as amended.

[20] The Applicant chose Ms Du Plessis to represent him. It makes no sense why the Applicant was advised to wait for the finalization of condonation and not for such a condonation application to be heard together with the review application. Furthermore, this Court had considered such a condonation application, as indicated above, such condonation was delivered before the arbitration records were filed, and therein there is an untruthful statement that the arbitration records were served and filed on 18 April 2019 and that says nothing about the supplementary affidavit, except to say it partly provides that:

> "the records was provided to counsel on 17 April 2019, during late afternoon. However, counsel has indicated that she is in Children's Court in Germiston on 18 April 2019 and therefore only able to attend to the record and the possible ***amendment*** during the weekend…the late filing of the necessary Notice in terms of Rule 7A(8), and the Notice to be served and filed by no later than 24 April 2019."(Own emphasis)

[21] Considering the excerpt described above, the explanation provided now by the Applicant is not in line with the initial decision, so there is no reasonable explanation advanced. Allowing further "supplementary affidavit" to be delivered at this late stage will be prejudicial to the Third Respondent, as it states correctly that it is clear that the Applicant had no intention of delivering supplementary grounds; the Third Respondent submits that it would not be in the interest of justice to do so and they correctly indicate that the Applicants' legal representatives in a way were ignorant of the law. The Third Respondent correctly submits that the Applicant had the luxury of having law firms representing him all this time. Consequently, indulgence to file further affidavit is not granted due to poor explanation.

[22] If this affidavit is allowed now, it will open floodgates of such applications in this Court, especially when parties have appointed new legal representatives. The Applicant relied on the advice of his legal representative, and such an excuse is not reasonable.

[23] Relating to the replying affidavit, the Third Respondent, by delivering an opposing affidavit, objected to the submittal of the replying affidavit, now such process took place after the Applicant had withdrawn the review application(see

what is stated in paragraph 3 of this judgment). A replying affidavit must be delivered within five days after the answering has been submitted, meaning the Applicant had until 17 June 2019 to deliver the same. The replying affidavit is dated 12 June 2020, and yet after its due date, there is no reason in the papers why this was not done in June 2019. Taking into account the delay and the reasons advanced, ordinarly this Court would have refused the condonation.

[24] However, this Court considers that this step was done after the withdrawal of the review,technically, there was no need for objection and condonation application. These two latter steps were only necessary once the review has been reinstated. As this Court has granted the reinistatement of the review, it treats both the objection and condonation as steps post the reinstatement order . It has looked at the replying affidavit and concludes it raises no new points ,so it would be in the interest of justice to allow its submittal as the Respondents will not be prejudiced.

Costs

[25] The Applicant initially had asked for a cost order against any party opposing this application. Mr Moodley withdrew this prayer.The law requires this Court to give reasons when it wants to make a costs order. Since no costs order is made, no reasons are advanced.

[26] In the premises, the following order is made:

Order

1. The review application under the above case number is reinstated.
2. The application for delivery of the supplementary affidavit is refused.
3. The application for the late delivery of the replying affidavit is granted.
4. There is no order as to costs.

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Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Moodley

Instructed by: KBVS Attorneys c/o Nishalan Moodley Attorneys

For the Respondent: Ms T Makamu

Instructed by: Maserumule Attorneys