THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1359/18

In the matter between:

NGWAKO ROCKY MODIKA **Applicant**

and

CCMA JOHANNESBURG **First Respondent**

THE COMMISSIONER CCMA **Second Respondent**

JOHANNESBURG WATER **Third Respondent**

Heard: 4 June 2021

Delivered: 9 June 2021

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 09 June 2021.

JUDGMENT

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PRINSLOO, J

[1] On 29 January 2018 the Second Respondent (arbitrator) issued a jurisdictional ruling, wherein she found that the First Respondent lacked jurisdiction to adjudicate the Applicant's dispute and directed that the file be closed.

[2] The Applicant filed a review application, seeking the review and setting aside of the said jurisdictional ruling.

[3] This application is a spectacular and shocking display of non-compliance. It displays how every applicable rule has been ignored and disregarded.

Non-compliance with the Rules of the Labour Court

[4] A review application has to be filed within six weeks of the date the award or ruling was served on the applicant. Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court (the Rules) provides specifically for review applications and Rule 7A (1) stipulates that an applicant in a review application must deliver a notice of motion to the person or the body that performed the reviewable function, and all other affected parties. If the application is filed outside the prescribed period, condonation has to be applied for, which application has to comply with Rule 7 of the Rules.

[5] *In casu* the jurisdictional ruling was received by the Applicant on 29 January 2018. The review application had to be filed within six weeks, thus by 9 March 2018.

[6] The aforesaid steps are the first steps in the review process. The Applicant failed to comply with the Rules from the onset and since the initiation of this application, the non-compliance is obvious and material. I will deal with all the aspects of non-compliance *infra.*

[7] Firstly, the review application was not served, as provided for in Rule 4 of the Rules, on any of the Respondent parties.

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[8] The Applicant has not filed a service affidavit, as required by the Rules and the Practice Manual of the Labour Court (Practice Manual), confirming when the review application was served on the First to Third Respondents. The Applicant included a single page printout, indicating that a review application was emailed, as proof of service. Service by email is not provided for in the Rules and there is no proof that the review application was properly served.

[9] The application was sent to the Third Respondent (the Respondent) only via email on 27 July 2018. As already alluded to, the Rules do not provide for service by email, thus there was no proper service on the Respondent and the First and Second Respondents were not served at all.

[10] Furthermore, the application that was sent by way of email to the Respondent, was not signed or commissioned, another material non-compliance with the Rules.

[11] Secondly, the review application was not brought within the prescribed six week period. The application was to be served and filed by 9 March 2018. A defective application was sent to the Respondent on 27 July 2018, evidently outside the prescribed period.

[12] As there is no service affidavit, there is no indication of when or how the application was served and filed at the Labour Court. The only proof of service is a Court stamp indicating that the application was filed on 18 August 2018.

[13] The fact that the Respondents were not properly served or that service by way of email is not permitted, aside, the question remains when was the review application made.

[14] In *Mbatha v Lyster and others*[1] *(Mbatha)* where the issue was whether the application was made on 17 March 1999 when the notice of motion and the

[1] (2001) 22 ILJ 405 (LAC).

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annexure thereto were delivered to the registrar of the Court or whether it was made when the third respondent received its copy of the papers. The Labour Appeal Court (LAC) held that the provisions of Rule 7A(1) put the matter beyond question. In terms of Rule 7A(1) the applicant in a review application is obliged to *'deliver a notice of motion to the person or body and to all other affected parties'*. It follows, reading Rule 7A together with the effect of the definition of *'deliver'* in Rule 1, that an application is made within six weeks of the publication of the award only if it is delivered to all the respondents and filed with the registrar of the Labour Court within such period.

[15] The review application should have been filed by 9 March 2018, but was filed with the Registrar on 18 August 2020, more than 29 months late. It was never delivered to all the Respondents.

[16] A delay of more than 29 months is no doubt material, excessive and inordinate given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes. The Practice Manual expressly states that a review application is by its nature an urgent application. Section 145(5) of the Labour Relations Act[2] (LRA) provides that an applicant for review must apply for a date for the matter to be heard within six months of the delivery of the application. In this context a delay in excess of 29 months is not insignificant.

[17] The need to file an application for condonation is obvious. The Applicant filed a '*condonation application*' on 18 August 2020. This application is defective in a number of respects: Rule 7(1) prescribes that an application should be brought on notice to all persons who have an interest in the application. *In casu* there is no notice of motion, thus no notice to any of the interested parties and no service of the '*application'* on any one of the Respondents.

[2] No. 66 of 1995, as amended.

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[18] The ‘condonation application’ states that the review application is 69 days late, when in fact it is two years and five months’ late, thus there is no explanation for a material period of the delay.

[19] Rule 7(3) prescribes that an application should be supported by affidavit, setting out the names, description and addresses of the parties. In addition to the fact that the ‘condonation application’ is not brought on notice, as per Rule 7(1), compliance with Rule 7(3) is also glaringly absent. There is no name, description or address of any party set out, there is no deponent and no affidavit.

[20] The ‘condonation application’ is fatally defective, to such an extent that it cannot be regarded or considered by this Court as an application at all.

[21] Thirdly, Rule 7A(6) of the Labour Court Rules provides that the applicant in a review application must furnish the Registrar and each of the other parties with a copy of the record or portion of the record, as the case may be. The applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.

[22] The serving and filing of the record in a review application is provided for in clause 11.2 of the 2013 Practice Manual as follows:

> “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

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> 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.

[23] This Court and the Labour Appeal Court have considered the status of the Practice Manual[3]and held that in essence, the manual promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practise and litigate in the Labour Court and it promotes the statutory imperative of expeditious dispute resolution. The provisions of the Practice Manual are binding and should be adhered to and it is not to be adhered to or ignored by parties at their convenience.

[24] Clauses 11.2.1 and 11.2.2 provide for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the consequences should an applicant fail to file the transcribed record within the prescribed period.

[25] Furthermore, notwithstanding the fact that the Rule 7A(3) notice indicated that there was one compact disc, the Applicant elected not to transcribe it, as he is of the view that it was irrelevant. Such an approach is not only reckless, but is not compliant with the Rules. Although the Rules provide for the relevant parts of the record to be filed, it cannot be interpreted to mean that the digital recording of the proceedings, which is subject to review, is irrelevant and thus not to be transcribed or filed.

[26] *In casu* the Applicant has not only failed to file the record within the prescribed 60 day period, the record is incomplete and had not been served on any of the Respondents.

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[3] See: *Ralo v Transnet Port Terminals and Others* [2015] 12 BLLR 1239 (LC), *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* [2014] 5 BLLR 516 (LC) and *Samuels v Old Mutual Bank* Case [2017] 7 BLLR 681 (LAC).

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[27] Fourthly, Rule 7A(8) provides that the applicant must, within ten days after the record is made available, deliver a notice to indicate whether he stands by his notice of motion, or file a supplementary affidavit or amended notice of motion. Up to the date of the hearing of this matter, the Rule 7A(8) notice had not been filed.

[28] *In casu* the non-compliance with the provisions of the LRA, the Rules and the provisions of the Practice Manual is concerning and shocking. From the onset of the litigation until adjudication, there was not a single Rule or provision that had been complied with.

Quo vadis?

[29] Mr Moolla, for the Respondent, submitted that the application should be dismissed, as the entire application is defective and displays wholesale non-compliance with the Rules and the prescripts.

[30] In *Osho Steel (Pty) Ltd v Ngobeni N.O and others*[4] the Court considered a case where the Rules in respect of review applications had not been complied with. The Court (per Tlhotlhalemaje J) concluded that, due to the non-compliance with Rule 7A, the review application ought to be dismissed on account of it being defective. It was held that[5]:

> "The rules of any Court are put in place for multiple purpses, chief amongst which is to prescribe the procedure, the time limits, and the forms to be used in the Court; to promote access to the court and to ensure the right to have disputes resolved and determined expeditiously and with minimum costs; to enable the business of the Court to be carried out in an orderly, uniform and consistent manner; and to set guidelines on the standards of conduct expected of those who practise in the Court.

[4] (2020) 41 ILJ 476 (LC).
[5] Ibid at para 14 and 16.

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> As it was correctly pointed out by Prinsloo J in *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others*, the purpose of the Practice Manual is to promote uniformity and consistency in practice and procedure, to set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court, and to further promote the statutory imperative of expeditious dispute resolution. This is line with the objectives of the Court rules as already alluded to."

[31] In my view, the same fate meets the Applicant's application. In summary, the application was not served on the Respondents, it was filed two years and five months late, there is no condonation application, the record was not served on the Respondents and a Rule 7A(8) notice was never filed.

[32] The non-compliance with the Rules is flagrant and blatant and the application before me, is defective and flawed, to an extent that it is unable to survive.

Costs

[33] The last issue to be decided is the issue of costs. In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result.

[34] In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[35] In *Zungu v Premier of Kwa Zulu-Natal and Others*[6] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court

[6] (2018) 39 ILJ 523 (CC) at para 24.

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(or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[36] Mr Moolla submitted that the Applicant's legal representatives should be ordered to pay the costs *de bonis propriis* and in support of his argument, he referred to the correspondence addressed to the said representatives. On 21 May 2021 the Respondent's attorneys addressed a letter to the Applicant's representatives, M S Mnisi Attorneys, wherein it was stated that they were surprised to learn that the matter was set down for hearing, as they had not received any papers from the Applicant, other than the review application.

[37] In the letter Mnisi Attorneys were requested to remove the matter from the roll for a number of reasons, *inter alia* because a defective application was received via email on 27 July 2018, which application was not deposed to or commissioned, the review application was filed late, there was no proof of service, no record was filed and no Rule 7A(6) or (8) notice was served on the Respondent.

[38] Mnisi Attorneys were requested to remove the matter from the roll and were informed that should they fail or refuse to do so, the Respondent's attorneys would attend Court, would raise the issues and would seek the dismissal of the application, with a punitive cost order, *de bonis propriis.*

[39] Mnisi Attorneys responded on 28 May 2021 that they are amenable to the proposal that the matter be removed from the roll, however subject to a proposed settlement to the effect that the jurisdictional ruling is by agreement, set aside and the matter remitted to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the provisions of Rule 17, alternatively that the parties enter into a settlement in terms of which the Applicant could apply for available positions. Should the Respondent not be amenable to the proposal, Mnisi Attorneys made it clear that the issues would be addressed in Court, when the matter is set down for hearing.

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[40] As the Respondent did not agree with the settlement proposals, the matter proceeded to hearing. Mr Moolla argued that the Applicant's attorneys persisted to proceed with the matter, notwithstanding the issues that were raised with them on 21 May 2021 and they dragged the Respondent to Court, in circumstances where the matter should have been removed from the roll.

[41] In view of the facts of this case, I am satisfied that the Respondent is entitled to costs. The question is who should be ordered to pay the costs.

[42] Mr Moolla on the one hand submitted that the Applicant's legal representatives should be ordered to pay the costs *de bonis propriis.*

[43] I canvassed the issue of costs with Mr Mapila, for the Applicant, who conceded that as the Applicant was a layperson, who sought legal assistance from his attorneys and who was not responsible for the filing or drafting of the papers, he could not be burdened with a cost order against him.

[44] I invited Mr Mapila to make submissions as to why Mnisi Attorneys should not be ordered to pay the Respondent's costs, but he was unable to say why a cost order *de bonis propriis* should not be made.

[45] In *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others* [7] the Constitutional Court ordered costs *de bonis propriis* on a scale as between attorney and client and held that:

> "An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."

[7] 2009 (1) SA 565 (CC) at paragraph 54.

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[46] In *Indwe Risk Services (Pty) Ltd v Van Zyl*[8] the Court considered circumstances where a *de bonis propriis* cost order was warranted and held that:

> "I am also mindful of the fact that an order for costs *de bonis propriis* is only awarded in exceptional cases and usually where the court is of the view that the representative of a litigant has acted in a manner which constitutes a material departure from the responsibilities of his office. Such an order shall not be made where the legal representative has acted *bona fide* or where the representative merely made an error of judgment. However, where the court is of the view that there is a want of *bona fides* or where the representative had acted negligently or even unreasonably, the court will consider awarding costs against the representative. Because the representative acted in a manner which constitutes a departure from his office, the court will grant the order against the representative to indemnify the party against an account for costs from his own representative. (See in general Erasmus *Superior Court Practice* at E12-27.)"

[47] *In casu* it is evident that the Applicant's attorneys filed a review application without any reflection as to the provisions of the LRA, the Rules or the Practice Manual. One could reasonably accept that a practising attorney assisting a paying client, should at least consider the law, the applicable rules and practice directives when an application for review is filed and other parties are dragged to Court. In this instance, there was no regard for the Rules insofar as service on all the Respondents is required, an application for condonation was filed without a notice of motion and without a supporting affidavit, the record was not filed timeously or properly – all issues an attorney representing a client should attend to and be aware of. The non-compliance with the Rules is flagrant and not expected from a legal practitioner.

[48] It is further aggravating that a letter was addressed to the Applicant's attorneys on 21 May 2021 wherein they were advised of the issues and the shortcomings in the application and they were requested to remove the matter from the roll. Instead of reconsidering the case and the issues raised by the Respondent,

[8] (2010) 31 ILJ 956 (LC).

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Mnisi Attorneys responded with a settlement proposal. When the proposed settlement was not accepted, they pursued the matter and it proceeded on an opposed basis.

[49] To persist with this application in the face of the defects as indicated by the Respondent, and of which Mnisi attorneys should have been aware of had they acted diligently, is not merely an error of judgment and does not indicate *bona fides*. M S Mnisi Attorneys acted in a manner that constitutes a departure from their office by drafting papers that did not comply with the bare minimum legal requirements, by litigating in a fashion that displayed a blatant disregard for all the applicable Rules and prescripts, by persisting with a defective and flawed application and by burdening this Court, with limited resources and a substantial backlog, in circumstances where they should have taken a step back and considered the obvious defects and flaws, of which the Respondent also made them aware. This Court's displeasure should be known to the attorneys.

[50] This is an exceptional case where the Applicant's representatives acted in a reprehensible manner, not only towards their client, but also towards this Court, with no regard to their duty as officers of the Court, and that justifies an order for costs *de bonis propriis*

[51] I am of the view that M S Mnisi Attorneys should be ordered to pay the Respondent's costs *de bonis propriis.* I am guided by the principles set out by the Courts in making such an order, mindful that it is awarded only in exceptional cases.

[52] The Applicant has not placed any reason before this Court as to why costs should not be ordered as aforesaid. I invited Mr Mapila to make submissions on this issue, but he failed to make any submissions, let alone convincing ones.

[53] Since M S Mnisi Attorneys were not given notice of my intention to make such an order, I intend to afford them seven days within which to make submissions as to why an order in those terms should not be confirmed. If no submissions are received within the prescribed time, the cost order will have final effect.

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[54] In the premises I make the following order:

Order

1. The application is dismissed;
2. The Third Respondent's costs are to be paid *de bonis propriis* by M S Mnisi Attorneys, on the scale as between attorney and client;
3. The order for costs in paragraph 2 *supra* is provisional and M S Mnisi Attorneys are afforded seven days to make written submissions as to why the order should not be confirmed, failing which the cost order will be final;
4. The Registrar of the Labour Court is directed to forward a copy of this judgment to the Legal Practice Council.

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Connie Prinsloo

Judge of the Labour Court of South Africa

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Appearances:

On behalf of the Applicant:	Advocate M Mapila
Instructed by:	M S Mnisi Attorneys
On behalf of the Third Respondent:	Mr M Moolla of Salijee Govender van der Merwe Inc Attorneys

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