REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 698/2013

Case no: J 271/2015

In the matter between:

EDCON (PTY) LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

WILLEM KOEKEMOER N.O. **Second Respondent**

JAMES THULARE AND 14 OTHERS **Third Respondent**

In re:

JAMES THULARE AND 14 OTHERS **Applicant**

and

EDCON (PTY) LIMITED **Respondent**

Heard: **7 and 16 July 2015**

Delivered: **13 November 2015**

Summary: **Revival Application in terms of clause 16.2 of Practice Manual read with Rule 11 to reverse deemed archiving of review court file. Enforceability of provisions of Practice Manual restated. Effect of deemed archiving of review application –what must be proven in order to reverse this. "Good cause" to be shown –same principles as utilised in rescission applications. Thin explanation and weak prospects of success. Application dismissed.**

Application to dismiss review – Rule 11. No general principle that a respondent must place an applicant on terms before seeking dismissal of review, especially where Rule 16.2 is of application which allows such applicant to enrol its review for default judgment. Application granted.

JUDGMENT

Bank; AJ

[1] This matter comprises four related applications traversing two case numbers:

1.1 A review application under case number JR698/2013 in which the applicant ("Edcon") seeks to review and set aside an arbitration award dated 30 March 2013 ("the arbitration award") handed down by Commissioner Willem Koekemoer ("the Commissioner") under CCMA

Case No GATW12372-12 in which the respondent employees, comprising some 15 employees of Edcon, were reinstated with back pay after their dismissal was found to be substantively unfair ("the review application"). The review application was launched on 16 April 2013;

1.2 an application launched by the respondent employees under Case No J271/2015 in terms of section 158(1)(a) of the LRA seeking that the arbitration award be made an order of this court. This application was launched on 13 February 2015 ("the section 158 application");

1.3 an application under case number JR698/2013 launched by the respondent employees to dismiss the review application. This too was launched on 13 February 2015 together with the section 158 application and will be referred to as "the application to dismiss"; and

1.4 an application launched by Edcon in terms of Rule 11 of the Rules of this Court as read with clause 16.2 of the Practice Manual in which an order is sought that the court file be retrieved from the archives of the Registrar's office pursuant to the deemed archiving of the review application. This was launched on 22 April 2015 ("the revival application"). This judgment is chiefly concerned with the revival application as the fate of all others depends on it.

Adjournment proceedings

[2] When the matter came before me on 7 July 2015, it was apparent that the combined court files in this matter were not in a satisfactory condition and Edcon requested an opportunity to file heads of argument in respect of the revival application. Mr Van Graan SC, who appeared on behalf of the employees, opposed the application for the one-week adjournment and I heard both him and counsel for Edcon, Mr Manchu, in this regard and was persuaded to grant a one-week adjournment, ordering that Edcon was to pay the wasted

costs occasioned by the adjournment. Although I handed down an *ex tempore* judgment setting out reasons for awarding costs against Edcon, I will again state the reasons for doing so:

2.1 the parties went to arbitration in 2012 regarding an alleged unfair dismissal which resulted in an arbitration award handed down in favour of the employees;

2.2 but for the fact that a review application was instituted by Edcon, it stands to reason that the award would have been complied with or, at the very least, the employee parties would have taken steps to enforce the award granted in their favour;

2.3 the main application is one for review and, although there are three other ancillary applications, it is beyond dispute that Edcon is the ultimate *dominus litis* in these proceedings;

2.4 in any event, Edcon's review application is now deemed to be archived and it has an onus to discharge in order to succeed in its revival application;

2.5 more than three years have elapsed and there is still no finality in the matter;

2.6 any prejudice suffered by Edcon cannot be compared with that suffered by the employee parties who remain dismissed with their fate hanging in the balance.

[3] It is for these reasons that I ordered that Edcon pay the wasted costs occasioned by the adjournment of the matter.

[4] The parties duly reconvened for further argument on the matter on 16 July 2015 (although 17 July 2015 had originally been ordered, this was not convenient to all parties and an earlier date agreed upon).

Background

[5] Before considering the four applications before me, it is appropriate to set out a brief background to the events in question and I am grateful to both counsel for assisting me with summaries and chronologies of the salient facts.

[6] The 15 employees were all employed by Edcon at its Woodlands Boulevard store near Pretoria in various positions ranging from customer assistants to managers. All employees are permitted to purchase merchandise on staff accounts which are subject to credit limits. It came to light in March 2012 and in the ensuing months that several of Edcon's employees, including the 15 respondents in this matter, had purchased merchandise beyond the permitted credit limits or had in fact done so under circumstances where they did not in fact qualify for any credit. It appears that they had also done so when the electronic systems were operative (such as during times of load-shedding). They were subsequently suspended and notified of internal disciplinary enquiries and accused of a failure of their duty to act honestly and with integrity in having abused the Edgars offline facility at that store. It was further alleged that these actions had resulted in a breach of the trust relationship between the company and each employee. Each of the 15 employees were found guilty and dismissed on different dates.

[7] The first 11 of the respondent employees referred a dispute to the CCMA on 8 October 2012 and the remaining four employees referred their dispute on 30 October 2012. All disputes were thereafter consolidated.

[8] Arbitration proceedings took place under the auspices of the CCMA and chaired by the Commissioner. The final arbitration session took place on 13 March 2013 and the Commissioner handed down his award on 30 March 2013, reinstating 12 of the 15 and awarding financial compensation to the remaining three.

[9] The Commissioner allowed legal representation after Edcon opposed this. From the arbitration award it appears that only one witness testified on behalf of Edcon, namely, Mr Makhado Tshihadu, a forensic investigator. He explained in detail how the individual employees had intentionally misused their Edgars staff accounts to obtain credit for which they did not qualify. They did so by specifically purchasing goods at offline pay points and that this had been done in an intentionally dishonest manner to the extent that the trust relationship had broken down. He also confirmed that, at the initial stages of the investigation, some of the employees had been advised that they could receive final warnings provided that their staff accounts were fully paid up and that they disclosed exactly what had happened. He, however, cautioned that no promises of any sort were made to these employees.

[10] Three of the dismissed employees testified at the arbitration. Several of the dismissed employees had been employed by Edcon for many years. They were adamant that Edcon had not suffered any loss and denied that they had been dishonest in any way. They explained that the payroll department would deal with any oversold accounts (that is, where they had purchased merchandise in excess of their stipulated credit limits) by automatically deducting monthly instalments from their salaries, which would be reflected on their individual payslips. This would continue until the entire amount of purchases was paid off. It appears that this operated as a form of revolving credit facility which enables Edcon staff to purchase merchandise at discounted prices. It also appears that purchases were generally made on an "online" basis, meaning that the system would be able to immediately determine whether a staff member had overshot their credit limit and therefore refuse a particular purchase. It seems, however, that "offline" purchases were also possible, in which case the system would not be able to detect whether a staff member's purchase would cause them to overshoot their credit limit.

[11] The employees further stressed that at no stage over a period of several years were the offline staff purchases or alleged oversold accounts ever questioned by Edcon. They stated that no training had been given or any clear policy

implemented by Edcon. It was also alleged that Makhado himself had directed the employees as to the contents of their written statements during the investigation and had informed them that if they immediately paid all outstanding amounts they would each receive final written warnings. Most of the employees had obtained loans in order to pay off these accounts. The employees all denied that they had been dishonest in any way but insisted that any amounts purchased would invariably be repaid through payroll deductions.

The arbitration award

[12] The Commissioner clearly took great pains to consider and analyse the arguments advanced by both parties. The Commissioner found that Edcon had failed to demonstrate that the rule upon which it relied had even been applied, not to mention applied consistently. He did not regard Makhado's testimony as authoritative, by reason of the fact that no other employee of Edcon, having knowledge of the rule as well as how and when it was implemented and applied, had bothered to testify. For these reasons, he found that there was no evidence to support Edcon's contention that the employees were aware of the applicable workplace rule or that they could reasonably be expected to have been aware of this rule. He even found that it was questionable whether any rule had in fact been contravened.

[13] Turning his attention to the appropriateness of the sanction of dismissal, he found that Makhado simply could not substantiate such sanction, as he had not taken the decision to dismiss. The Commissioner could only speculate as to how Edcon had arrived at its decision to dismiss, stating that there was no evidence before him to demonstrate that Edcon had ever considered any disciplinary sanction short of dismissal. He rejected Edcon's claim that there was no trust left in the employment relationship. This was a mere unsubstantiated claim.

[14] The Commissioner found that it was common cause that all employees were first offenders with clean disciplinary records and that quite a number of them

had many years of employment with Edcon. Moreover, Edcon had not suffered any losses due to their conduct and the only possible harm was a possible contravention of the provisions of the National Credit Act 34 of 2005. At most, all the employees had been guilty of was utilisation of a greater credit limit than that for which they qualified, or they utilised credit to which they were not entitled. He found that Edcon ought, at the very least, to have placed the employees on terms regarding their use or alleged misuse of these accounts. He found that although the employees had been "*opportunistic*" in the way they managed their accounts, their explanations had been plausible and there had clearly been no intention to defraud. Ultimately, he stated, the employees remained responsible to repay any debts which they had incurred. For these reasons, the dismissal of the 15 employees was found to be unfair.

The review application

[15] Edcon launched its review application against the arbitration award on 16 April 2013 and this was followed by a notice of opposition filed on behalf of the dismissed employees by their former attorney-of-record. It appears clear that the CCMA filed the record of arbitration proceedings less than one month later, on 10 May 2013. The employees take issue with Edcon in that, to this day, it has still never disclosed the date on which the Registrar advised it that the record had been received from the CCMA for upliftment, or that the record had in fact been uplifted within seven days as required by clause 11.2.1 of the Practice Manual (which, I point out, came into effect on 1 April 2013).

[16] Thereafter, it appears that much correspondence between the respective attorneys passed regarding the transcribed record of proceedings until it appears that Edcon received the transcribed record on or about 19 July 2013 and subsequently filed this record and transcript on 6 August 2013, along with a notice in terms of Rule 7A (8) stating that it stood by its notice of motion.

[17] It is common cause that no answering affidavit in this review application has ever been filed on behalf of the respondent employees. Counsel for the

employees, Mr Van Graan, conceded that none of the copious papers filed of record in this matter disclosed any reason for this. He however, argued that Edcon had always been at liberty to instruct the Registrar to have the review application enrolled for default judgment after the last day for the filing of the opposing affidavit had passed, in terms of Rule 16(2) of the Rules. It appears that this filing date was 15 August 2013. He pointed out that it was common cause that at no time after 15 August 2013 did Edcon ever attempt to have its review application enrolled on the unopposed roll for default judgment. This, he argued, was a crucial factor which militated against the prospects of success of Edcon's revival application.

The revival application

[18] Thereafter, the matter appears to have lain dormant. Neither party appears to have been aware that a significant date was looming: 16 April 2014 - the 12-month anniversary of the launching of the review application. The significance of this date is that clause 11.2.7 of the Practice Manual of this Court requires that all necessary papers in a review application must have been filed within 12 months '… of the date of the launch of the application (excluding Heads of Argument) and the registrar [must be] informed in writing that the application is ready for allocation for hearing'.

[19] What is more important, and, indeed, what has led to the present situation, is the sentence which follows directly thereafter:

> 'Where this [12 month] 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 [sic] be archived or be removed from the archive' (my emphasis).

[20] As mentioned above, none of this appears to have entered the minds of either party's representatives until the representatives of the respondent employees launched an application to dismiss Edcon's review in terms of Rule 11(3) of the

Labour Court Rules in February 2015. This was accompanied by the section 158 application. It appears that approximately two months later, Edcon thereupon launched its revival application. I now turn to consider the revival application in detail.

[21] Clause 16.2 of the Practice Manual states:

> 'A party to the dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision'.

[22] Clause 16.3 of the Practice Manual provides that the legal consequences of a file being placed in archives (or, preferably, a file which is deemed to have been archived) is the same as if the matter had been dismissed.

[23] The question naturally arises as to the status and enforceability of the provisions of the Practice Manual.

[24] This has been confirmed by Molahlehi J in *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others*[1] from which it is clear that all practice directives are competent and should be adhered to and are not merely guidelines. I respectfully agree with this interpretation, which is fortified by the peremptory language used in clause 16 of the Practice Manual with regard to the legal effect of a court file having been archived. In my view it seems clear that the deemed archiving of a review court file is to consign the unfortunate file to a form of limbo without ever being formally dismissed and from which the file may never emerge unless a properly-motivated revival application demonstrating "good cause" enters to rescue it from a shadowy netherworld akin to the Asphodel Meadows of Greek Mythology.

[1] (2014) 35 *ILJ* 1672 (LC) at para [11], approving the approach of the South Gauteng High Court in *In re several matters on the urgent roll* 2013 (1) SA 549 (GSJ) per Wepener J at paras [10] and [13]

[25] Edcon seeks an order that the court file be retrieved from the Registrar's archives in accordance with clause 16.2 of the Practice Manual, together with the costs of opposition. Presumably, if it obtains this relief then the respondent employees are to be placed on terms to file their answering affidavit in the review application and the main matter will thus proceed in the ordinary course to be ventilated at another time. It is thus necessary to scrutinise this application to see whether in fact Edcon has shown that "*good cause*" exists for such retrieval.

[26] In *Superb Meat Supplies CC v Maritz*[2] the Labour Appeal Court adopted the same test used in the determination of applications for the rescission of default judgments when determining whether "*good cause*" has been shown. I am of the view that these wide-ranging principles are most certainly of application to a revival application such as the present. These principles are:

26.1 the applicant must give a reasonable explanation of its default;

26.2 the application must be made *bona fide*;

26.3 the applicant must show that it has a *bona fide* defence to the respondent's claim (and must set out sufficient facts which, if established at trial, would constitute a good defence).

[27] In determining whether or not good cause has been shown, a court is given a wide and flexible discretion which ought not to be fettered or abridged by an exhaustive definition to the meaning of these words. What is clear is that the court's discretion must be exercised after a proper consideration of all relevant circumstances. The Labour Appeal Court also held that where the default has been wilful or due to gross negligence, a court may well decline to grant relief. However, the absence of such wilfulness or gross negligence in relation to the default is not an absolute prerequisite for the granting of such relief.

[2] (2004) 25 *ILJ* 96 (LAC) at paras [19] - [23]

[28] With these principles in mind I now turn to the case for revival made out by Edcon, as set out in its founding affidavit deposed to by one Bonelela Mgudlwa ("Mgudlwa"), a labour relations specialist in its employ. Mgudlwa states that its human resources legal specialist who was dealing with the matter left its employ on 16 September 2013 (which is approximately one month after the last day for the filing of an answering affidavit by the employees in the review application) and then, approximately 11 days later, its senior legal specialist also left its employ. No handover of pending legal matters ever took place.

[29] With regard to the length of the default, Mgudlwa immediately concedes that when the time for filing of the answering affidavit to the review had elapsed by 15 August 2013, it failed to enrol the review application for hearing in terms of clause 11.4.1 of the Practice Manual, and also concedes that the delay has lasted from 16 August 2013 until 20 April 2015 when it launched the present revival application, a period of approximately 20 months. Mgudlwa states further that he was contacted by the respondent's erstwhile attorney, Anton Rudman with a request for the transcribed record of proceedings and that an opposing affidavit would then be drafted. He then states:[3]

> 'They were in contact with me. I had no knowledge of the matter prior to their approach. I was able to establish however that [Edcon] had complied with its obligations up to that point including filing the record. I communicated as much to the Individual Respondents' attorneys by telephone after receipt of the letter at 'MB4'';

[30] No further explanation is provided and it is not clear what happened subsequently during discussions between the parties.

[31] With regard to its prospects of success on review, Mgudlwa's affidavit devotes a scant one paragraph to this and simply incorporates by reference the grounds of review in the review application. I shall return to this aspect shortly.

[3] At para 10.4 of the founding affidavit

[32] With regard to prejudice, Mgudlwa states that the respondent employees will not be prejudiced by the retrieval of the file from the archives as they already have an arbitration award in their favour and will still have an opportunity to oppose the review and make further representations to the court. Should they be successful with their opposition, they may receive an award of costs, back pay and interest. On the other hand (it is argued), should the file remain archived, Edcon will be unable to continue with its review application and will be denied an opportunity to be heard. It insists that both parties are responsible for the delay.

[33] I pause to note that a supplementary affidavit dated 10 July 2015 was filed during the one week adjournment of the matter and deposed to by one Isiah Kaizer Moyane, Edcon's Executive Manager: Employee Relations. This was filed in response to a further argument advanced on behalf of the employees that the review application was deemed to have been withdrawn because Edcon had failed to seek consent for an extension of time for the filing of the arbitration record from the respondents and from the Judge President. Moyane attaches letters dating back to May and June 2013 relating to the status of the arbitration record in support of an argument that the attorneys had tacitly consented to this. For reasons which will become apparent later, I do not deem it necessary to deal with this argument.

Has Edcon shown "good cause"?

[34] Applying the abovementioned three principles applying to rescission applications, I can immediately dispose of the second as I have no doubt that Edcon's application for revival is indeed made *bona fide* and it has never been suggested otherwise. That leaves me to consider whether Edcon has met the requirements of a reasonable explanation for its default and whether it has a *bona fide* defence, or, in other words, whether it has prospects of success on review.

[35] The Rules of Court, when read with the Practice Manual, place a heavy onus on an applicant for review to ensure that such an application is prosecuted with both diligence and alacrity. When considering the explanation of default, I note that Mgudlwa, on behalf of Edcon, does not explain why it failed to utilise the procedural advantage of simply setting the matter down for hearing on as an unopposed review application as it was entitled to do in the absence of an answering affidavit. He merely states that this failure was "*regrettable*".

[36] Although Edcon clearly seeks to shift the blame for the delays after August 2013 to the individual employees for their failure to file answering affidavits in the review application, there can be no doubt that by no later than February 2014, Edcon's HR representative, Mgudlwa, was well aware of the review application which he had inherited. It is also apparent that the 12-month period referred to in clause 11.2.7 of the Practice Manual had not yet elapsed and the court file was not yet deemed to be archived.

[37] I find Edcon's explanation for the delay to be thin. Although Edcon cannot without anything more be blamed for the departure of two of its important HR officials during the month of September 2013, there is no explanation for the extraordinarily long period of some fourteen months between February 2014 (when Rudman contacted Mgudlwa) and late April 2015 when the revival application was launched. It must of course be mentioned that this revival application was only launched after the individual employees had launched their own section 158 application and an application to dismiss the review.

[38] Turning to analyse Edcon's prospects of success, it is necessary to have regard to the content of its review application and, more specifically, to the grounds of review set out therein. In brief, these grounds are:

38.1 the Commissioner misdirected himself in concluding that the clarity of the rule of purchasing offline had not been properly established, whereas one of the employees, Julia Makololo, had conceded that although offline purchasing was allowed over-selling was disallowed.

It is submitted that the Commissioner placed very little or no weight on this evidence and thereby arrived at "*an illogical conclusion*";

38.2 the fact that the individual respondents took advantage of using the system when it was offline in order to purchase indicates an awareness of the wrongfulness of their actions and that they took advantage of a flaw in the system. This, it is argued, renders their actions dishonest;

38.3 the Commissioner misdirected himself in finding that Edcon's witness, Makhado, was in no position to state whether the trust relationship had indeed broken down between the parties;

38.4 the Commissioner placed undue emphasis on the issue of consistent application of the Rule, where neither party presented any evidence on this issue;

38.5 the fact that the respondent employees had made "*exorbitant purchases while the system is offline*" that could not be detected at the time rendered their conduct "*fraught with ill-will and intention to be dishonest*". This had, in turn, been a clear breach of their fiduciary position *vis-à-vis* the company and justified their dismissal;

38.6 the Commissioner misdirected himself in concluding that monthly deductions from the individual respondents' salaries constituted a tacit acceptance of the over-selling transgression;

38.7 the award handed down was a "*blanket award*" that included three employees who had abandoned the proceedings midway. These employees had been awarded salary backpay along with the others and the attorney acting for all the employees had no mandate to do so in respect of these three employees.

[39] Having considered these grounds of review (and noting that I am not hearing the review application itself) I am of the view that Edcon's prospects of success are not very good. I say so for the following reasons:

39.1 the factual version of the individual employees who testified at the arbitration was never controverted, especially with regard to the deduction of instalments from the staff's monthly salaries in order to pay for all purchases, no matter the amount thereof;

39.2 the Commissioner properly and correctly analysed the evidence in relation to the question of whether there was a rule or standard in place, as required by item 7 of Schedule 8 to the LRA;

39.3 the Commissioner correctly pointed out the weaknesses in Edcon's case regarding the appropriateness of the sanction of dismissal. His analysis of the evidence and conclusion on a balance of probabilities that there was no intention to defraud and therefore no dishonesty cannot be credibly challenged as reviewable. Moreover, his finding that Edcon had failed to consider any sanction short of dismissal cannot be faulted;

[40] This is therefore a case in which the applicant for revival has provided a poor explanation for its default accompanied by a case having little prospect of success on the merits. I am not persuaded that Edcon can be said to have shown good cause for the file in the review application to be retrieved from the archives. Accordingly, the revival application must fail. I now turn to consider the remaining applications before me.

Application to dismiss review

[41] The individual applicants have launched an application to dismiss the review application in terms of Rule 11.3 of the Labour Court Rules. This application was launched on 13 February 2015. Although the notice of motion is somewhat

curiously worded in that it seeks that the review application itself be set aside and reviewed, I do not consider this to be of any moment as it is clear that a dismissal of the review application is sought. As expected, this application is based on Edcon's failure to prosecute its review after August 2013 when the answering affidavit was due. This application reveals that, despite the aforementioned transcription of the record having taken place, it was not to be found in the court file at all. I also noted that it was not present in the court file. What is, however, present is merely the CCMA file which was obviously despatched by the CCMA in compliance with Rule 7A (3) of the Rules in May 2013.

[42] It was also submitted by Mr Manchu on behalf of Edcon that, because the individual respondents had failed to file an answering affidavit in the main review application, it was not open to them to seek a dismissal of the review application. No authority for this submission was provided, nor do the provisions of Rule 11 support such a tortuous and limited reading. There can be no doubt that the individual respondents are still very much before the court as litigants and, even had Edcon set the review application down for default judgment, this would have had to be on the opposed role, in accordance with the Practice Manual.

[43] Mr Manchu also argued that there is a mutual obligation on both parties to ensure that a review application progresses expeditiously towards finalisation. In this regard he referred me to *Meintjies v New Tyre Manufacturers Bargaining Council and Others*[4] in which Molahlehi J expressed this view, citing, as authority, *Sishuba v National Commissioner of the SA Police Service*.[5] It is therefore necessary for me to digress to discuss that case. In *Sishuba*'s case, Molahlehi J stated that there was no reason why an employee faced with a delay on the part of the applicant cannot file heads of argument prior to those of the employer, '*thereby activating the process of the registrar setting the*

[4] (2012) 33 *ILJ* 1725 (LC) at para 31.
[5] (2007) 28 *ILJ* 2073 (LC).

matter down'.[6] He also saw no reason why the employee did not in the circumstances place the employer on terms and call upon it to file its heads of argument prior to bringing an application to dismiss. It must, however, be noted that Molahlehi J took into account the prospects of success on review as appeared from the papers filed in the matter. It must however, be noted that Sishuba's case was decided in 2007, long before the advent of the Practice Manual.

[44] Mr Manchu also referred me to several other decisions where it has been held that an application to dismiss is a drastic remedy and not to be granted lightly. However, in many of these decisions (such as *Karan t/a Karan Beef Feedlots and Another v Randall*[7]) the court was concerned with action proceedings initiated by a statement of claim and a delay on the part of the applicant in bringing the matter to trial. In my view, a review application is somewhat different as it is somewhat easier for an applicant to simply set down the matter for hearing in terms of clause 11.4.1 of the Practice Manual, which states that, where a notice of intention to oppose has been delivered but no answering affidavit has been delivered within the prescribed time limit, the Registrar must, at the request of the applicant, enrol the application on the opposed motion roll and serve a notice of set down on all parties. This is a far cry from the situation where the defendant in action proceedings is faced with a recalcitrant plaintiff: there is no convenient rule in place which provides specific relief. Instead such a defendant has no choice but to bring a substantive application to dismiss the action. It is in the latter type of situation that it is appropriate that the respondent party be placed on terms. I do not view the respondent in review proceedings such as the present being in an analogous position.

[45] It is clear that none of the decisions to which I was referred concern review applications that have been determined subsequent to the commencement of operation of the Practice Manual. As such, those decisions must be considered distinguishable and treated with a certain degree of circumspection insofar as

[6] *Sishuba (supra*) at para 18.
[7] (2009) 30 *ILJ* 2937 (LC).

it might be contended that they have the effect of laying down a general principle that a respondent, who seeks to have a review application dismissed for want of prosecution, must in all circumstances place the applicant on terms before bringing such application.

[46] In fact, having regard to more recent case law, I must align myself with the remarks of Lagrange J in the case of *Moraka v National Bargaining Council for the Chemical Industry and Others*[8] where the court, considering a long unexplained delay of almost two years between the incorrect filing of a transcript and the filing of the supplementary affidavit, said:

> '…A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.'

[47] Although the facts in the present matter are obviously different, there can be no doubt that Edcon has, over the several years since the inception of its review application, adopted a casual approach to this litigation. It has also failed to display a consistent interest in pursuing its review application and taken the necessary steps to do so without undue delay.

[48] From all the above, it is clear that, despite Mr Manchu's vehement arguments, it cannot be said that Edcon has treated its application for review with the necessary degree of diligence, care and urgency as required by the Rules of this Court as read with the Practice Manual. As mentioned above it has already failed to show good cause why the file should be retrieved from the archives and has very little prospects of success on review. For these reasons, I do not consider it necessary to have regard to the submission made by Mr Van Graan

[8] (2011) 32 *ILJ* 667 (E) at para 20.

on behalf of the individual respondents that the review application lapsed by reason of its failure to obtain an extension of time.

[49] I am therefore not persuaded by the argument that the individual respondents bear an equal amount of responsibility for the long delay in the prosecution of the main review application. Edcon must ultimately bear ultimate responsibility for this delay. The dilatoriness of the individual respondents (and their representatives especially) may conveniently be dealt with when I come to consider the question of costs.

[50] In the event, I am satisfied that Edcon has failed to prosecute its review application to the extent that the interests of justice require that it effectively be barred from pursuing its review. In light of its weak prospects of success, I do not consider that that the interests of justice would be served by allowing the review application to proceed only to have another judge of this Court have to consider the very same merits as are already before me. In any event, it is highly unlikely that the ill-fated transcript of proceedings will ever see the light of day. This would probably make the task of any court having to assess the review application on its merits that much more difficult. In light of my findings, however, this is now academic, and no other court will be given the unhappy task of having to determine the review on the merits without the aid of a transcript of proceedings.

[51] In the circumstances, I therefore find that the application by the individual employees to dismiss the review is well-founded and grant the application.

Section 158 application

[52] In light of the dismissal of the revival application and the dismissal of the review application in favour of the individual employees there is no reason why they should not be entitled to the relief they seek in the Section 158 application making the arbitration award an order of court. I accordingly grant such an order.

Costs

[53] In this matter, the question of costs arises as both parties are legally represented and the individual employees have employed the services of Senior Counsel. Indeed, the costs of employing Senior Counsel were sought in argument on behalf of the individual respondents, as well as costs on the attorney client scale.

[54] I am mindful that Section 162 of the LRA affords the Court a broad discretion relating to the award of costs based on considerations of both law and fairness, and that the Court may take into account the conduct of the parties in proceeding with or defending the matter.

[55] Although I would ordinarily have had no hesitation in granting the individual respondents the costs relating to all applications before me as they have been substantially successful on all counts, and would even consider granting attorney client costs against Edcon on the basis of its failure to provide a reasonable explanation for its default or to demonstrate good prospects of success on review, I am also mindful of the fact that their legal representatives failed to file an answering affidavit in the main review application when they could and should have done so. This would most certainly have given rise to a course of events quite different from those that took place and would most certainly have entailed a resolution of the matter to the advantage of both parties at least more than a year ago.

[56] In the circumstances I am prepared to grant the individual respondents their costs, but I decline to grant them such costs on a punitive scale, neither do I deem it appropriate to order that such costs include the costs of employing Senior Counsel.

Order

[57] I therefore grant the following order:

1. Edcon's application to retrieve the file under case number JR698/2013 from archives is dismissed.

2. The application by the individual respondents under case number JR698/2013 to dismiss the review application is granted.

3. The application by the individual respondents under case number J271/2015 in terms of section 158(1) (c) of the LRA is granted and the arbitration award is made an order of court.

4. Edcon is ordered to pay the costs of all the above applications on the party and party scale.

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Bank; AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant (individual respondents,	
James Thulare and 14 others):	Adv ESJ van Graan SC
Instructed by:	Keith Whittaker Attorneys
For the Respondent:	Advocate T Manchu
Instructed by:	Norton Rose Inc