IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR2640/2013

In the matter between:

SAMWU obo TN NOBHUZANA Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT First Respondent

BARGAINING COUNCIL (SALGBC)

NASIMA RAFFEE N.O. Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY Third Respondent

Heard: **29 September 2016**

Delivered: **15 December 2016**

JUDGMENT

BERKOWITZ, AJ

Introduction

[1] This is an application, brought by SAMWU on behalf of TN Nobhuzana to review and set aside an arbitration award issued by the second respondent, who upheld the dismissal of Nobhuzana, a metro police traffic officer, who was found to have solicited a bribe from a member of the public.

[2] The applicant launched a review application in terms of s 145 of the Labour Relations Act,[1] (LRA), but did so out of time and now seeks condonation.

[3] This matter was first set down for hearing on 7 July 2016 and was finalized on 29 September 2016.

The practice manual.

[4] Clause 11.2.2.read together with clause 11.2.3, as well as clause 11.2.7 of the Practice Manual of the Labour Court of South Africa (the Practice Manual), which manual came into effect on 2 April 2013, are relevant.

[1] Act 55 of 1995.

[5] The import of clause 11.2.2 & 11.2.3 is that if the applicant fails to file the record within the prescribed period, the applicant will be deemed to have withdrawn the application, but that steps can be taken for an extension of time to file the record; whilst what clause 11.2.7 provides, is that all the necessary papers in the application must be filed within twelve months of the date of the launch of the application, and where this time limit is not complied with, the application will be archived and regarded as lapsed.

[6] The Court in *Ralo v Transnet Port Terminals & Others*[2] held that the plain and unambiguous wording of clause 11.2.3 of the Practice Manual is to the effect that the applicant must be regarded as having withdrawn the review application, but that the applicant could apply to reinstate the review application, together with an application for condonation for the late filing of the record. The Court then in *Ralo* proceeded to strike the matter from the roll.

[7] Whilst taking cognizance of what the court stated in *Ralo* in regard to striking the matter from the roll, clause 2.2 of the Practice Manual also provides that "It must be emphasised that no judge is bound by practice directives; this manual is not intended to limit judicial discretion."

[8] As four years had already lapsed since the dismissal of the employee; having regard to criticisms emanating from both the Supreme Court of Appeal and the Constitutional Court in regard to delays in finalising matters in the Labour Court, as well as bearing in mind the primary objective of the expeditious resolution of disputes articulated in the LRA; and as striking the matter from the roll to enable the applicant to deliver yet a further condonation application to explain why the matter should not be regarded as having been withdrawn, or why it should not be archived, would again delay finalisation of this matter, I exercised my discretion and afforded the applicant an opportunity to seek condonation and to simultaneously explain why the record had not been filed within the prescribed period.

[2] (2015) 36 ILJ 2653 (LC)

Issues raised *mero motu.*

[9] As the applicant was seeking the indulgence of the Court by way of the grant of condonation, and considering that the LAC in Queenstown *Fuel Distributors CC v Labuschagne NO & others* [3] held that a policy of strict scrutiny of condonation applications in individual dismissal cases must be adopted, even though neither of the parties had raised certain issues which need to be considered in a condonation application, in keeping with what was stated by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries & others*[4] that :

> …'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law'…[5]

[10] The following issues were raised *mero motu* :

1) the founding affidavit in support of the review application in the court file was not dated by the deponent nor by the commissioner of oaths;

2) the original founding affidavit was not placed in the court file in accordance with Rule 5(3) of the Rules of this court ;

3) the date that the confirmatory affidavits were signed and commissioned by the commissioner of oaths pre-dated their founding affidavit filed in support of the review application;

[3] (2000) 21 ILJ 166 (LAC)
[4] (2008) 29 ILJ 2461 (CC)
[5] At para 68.

4) the original confirmatory affidavits were not placed in the court file in accordance with Rule 5(3) of the Rules of this court;

5) the confirmatory affidavit by the applicant's attorney attached to the founding affidavit (which related to the explanation for the delay in filing the review application), did not confirm the contents of the founding affidavit but instead stated that it confirmed the contents of the applicant's replying affidavit;

6) the review application was dated and served on 17 December 2013 but was only filed with this Court on 14 January 2014, which meant that the review application was not 1 week out of time as contended by the applicant in its condonation application, but rather 5 weeks out of time;

7) the supplementary affidavit was filed on 23 December 2014 i.e. some 4 months after the re-constructed record was received by the applicant's attorneys on 22 August 2014 ;

8) the 10 day delay between the time that the supplementary affidavit had been deposed to on 10 December 2014 and filing of same with this court on 23 December 2014;

9) the original supplementary affidavit was not in the court file in accordance with Rule 5(3) of the Rules of this court;

10) the delay of some 7 months between 22 August 2014 (when the re-constructed record was received by the applicant's attorneys) and 26 March 2015 when the transcribed record was filed with this court; and the delay of thirteen months from 17 January 2014 - 17 February 2015 for the documentary portion of the record furnished by the first

respondent in terms of rule 7A(2), to be filed with this court by the applicant.

[11] The applicant sought a postponement of the matter in order to file supplementary papers dealing with the issues that had been raised *mero motu*, which postponement was granted, and the matter was then finalised on 29 September 2016. Both the applicant and the 3rd respondent filed further papers.

[12] Only argument pertaining to the lengths of the various delays and the explanations in relation thereto were dealt with, although counsel for the applicant, Mr van der Westhuizen, submitted that I was enjoined to simultaneously also consider the prospects of success.

[13] In this regard, the Labour Appeal Court in *Colett v Commission for Conciliation, Mediation & Arbitration & others* [6]held:

> '[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In NUM v Council for Mineral Technology [[1999] 3 BLLR 209 (LAC) at para 10], it was pointed out that in considering whether good cause has been shown the well-known approach adopted in Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C–D should be followed, but —
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> "[t]here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused".

[6] (2014) 35 ILJ 1948 (LAC); [2014] 6 BLLR 523 (LAC)

> [39] The submission that the court a quo had to consider theprospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.

[14] In light of the above authority, I did not deem it necessary to consider the prospects of success if I were dissatisfied with the explanations offered for the delays, and judgment was reserved in order to first consider the delays and explanations offered for same.

The approach to condonation application.

[15] Delays in the launching of s 145 review applications, especially in the context of individual dismissals, must be subject to 'strict scrutiny', and the principles of condonation should be applied on a 'much stricter' basis. The LAC in *Queenstown Fuel Distributors CC v Labuschagne NO & others* [7]had this to say:

> '[24] ... In principle, therefore, it is possible to condone non-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.
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> [25] By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.'

[7] (2000) 21 ILJ 166 (LAC).

[16] In addition to what has already been stated above in regard to considering the merits, this court in *NUMSA & another v Hillside Alluminium*[8] held :

> [12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. The intention is that disputes alleging unfair dismissal should be referred to conciliation within 30 days of the dismissal (section 191(1)(b)(i) (Act 66 of 1995)); that the conciliation process be completed within 30 days (section 191(5) (Act 66 of 1995)) and that disputes for adjudication by the Labour Court should then be referred within 90 days of the end of the conciliation process. For a variety of reasons, these time periods are often not complied with in practice. Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits. The latter principle was stated by Myburgh, JP in NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC) at 211G-H:
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> "There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused."

[8] [2005] 6 BLLR 601 (LC)

The condonation application.

The delay in filing the review application.

[17] The arbitration award dated 9 October 2013 was received by the applicant on 29 October 2013. The review application was due to be filed by no later than 10 December 2013. Same was dated and served on the respondents on 17 December 2013, but it emerged that the review application had only been filed with this Court on 14 January 2014, and accordingly the review application was five weeks out of time and not seven days as was submitted by the applicant.

[18] The explanation offered for the delay in not filing the review application by the due date of 10 December 2013 was that the applicant's attorney of record had a busy schedule and that consultation only took place on 9 December 2013 (i.e. one day before the review application was due to be filed on 10 December 2013).

[19] It was further explained that Mr Maenetje, the applicant's attorney, was out of office from 10 December-17 December 2013 attending to another matter, and that the application was then finalised on his return on 17 December 2013.

[20] In explaining the delay between 17 December 2013, when the application was finalized, and 14 January 2014, when the review application was filed with the court, Mr Kaizer Bathusang Modibe (Modibe), an admitted attorney in the employ of the applicant's attorneys, explained in the supplementary affidavit dealing with this delay that :

> "Mr Marakalala does not visit the Labour Court every day and it is explained to me that he will usually, unless the matter is urgent, visit the Labour Court when papers in different matters are required to be

filed with the court and that he sometimes only visit the court once a week".

The delay in filing the transcript of the arbitration and documentary portion of the record.

[21] The 2nd respondent had filed a Rule 7A(5) notice on 17 January 2014. The first communication by the applicant to the 2nd respondent was on 25 March 2014 when the applicant advised that the incorrect recording had been made available to the applicant.

[22] Ultimately a reconstruction meeting had to be held on 22 August 2014 because the recording of the arbitration was not available. The applicant only filed the documentary portion of the record on 17 February 2015, thirteen months after the record had been made available by the 2nd respondent on 17 January 2014, whilst the applicant filed the transcript of the arbitration hearing on 26 March 2015, that is 7 months after the reconstruction meeting held on 22 August 2014.

[23] The explanation offered by Modibe in regard to the thirteen month delay in filing the documentary portion was that "it was attributable to an oversight".

[24] The explanation offered for the 7 month delay between 22 August 2014 and 26 March 2015 in filing the transcript of the arbitration hearing was that a Mr Ntuli, a member of the South African Municipal Workers Union (SAMWU) who represented Nobhuzana in the arbitration, was sent the transcribed notes after they had been received on 22 August 2014 for his approval and confirmation, and that Ntuli was only able to confirm the correctness of the transcription on 3 December 2014 because Ntuli had forwarded his file with his notes to SAMWU head office where it was "not possible to immediately trace the file". No explanation was offered as to why it took 3 months for the file with his notes to be located at SAMWU head office. Similarly, no explanation was

offered as to what steps were taken by the applicant's attorneys to follow up the matter with Ntuli during this 10 week period between, 22 August 2014 - 3 December 2014.

[25] In explaining the five-week delay between the filing of the documentary portion of the record on 17 February 2015, and the filing of the transcript of the arbitration on 26 March 2015, counsel for the applicant submitted that the transcript for the arbitration ought to have been included as part of the supplementary affidavit filed in December 2014.

The delay in filing supplementary affidavit.

[26] The supplementary affidavit was signed on 10 December 2014, but only filed with the court on 23 December 2014. The explanation offered by Modibe for the delay in the filing of the supplementary affidavit was that:

> "Mr Marakalala advises me that he cannot recall exactly why he only filed the supplementary affidavit on the 23rd of December 2014 and he can only assume, in accordance with his usual way of doing it, filed the supplementary affidavit simultaneously with other matters which were required to be filed with the registrar of the Honourable Court".

[27] Having filed the supplementary affidavit on 23 December 2014, the applicant went on to explain that the 3rd respondent's attorneys would be "granted the normal time for the filing of answering papers" in the event it was considered necessary considering that an answering affidavit had already been filed in January 2014, and that when no further answering affidavit was filed, the applicant filed a replying affidavit.

[28] The replying affidavit ought to have been filed by the 2nd week of January 2015, but yet same was only filed on 17 March 2015, and no explanation was

offered for this two-month delay. Although there was no notice of objection by the 3rd respondent to such late filing of the replying affidavit, it was yet another unexplained delay.

Analysis.

[29] Ultimately the reason that the review application was filed outside of the six week time period was that Maenetje Attorneys had been instructed by SAMWU to assist in bringing the review application but due to Maenetje Attorneys' busy schedule, they only consulted on 9 December 2013 in circumstances where the six week period for the delivering of a review application was due to expire the next day, on 10 December 2013. In addition, Mr Maenetje was scheduled to be out of office from 10 December 2013, and would only be able to attend to the review application on his return to office on 17 December 2013.

[30] In *Allround Tooling (Pty) Ltd v NUMSA & others*[9] the LAC held:

> …'It is not an acceptable explanation for delay that a practitioner is too busy. If the nature or size of a practitioner's practice renders it impossible for him to render a professional service and to comply with the provisions of the Labour Appeal Court Rules, he must not take on the work.'[10]…

[31] Based on what has been stated by the LAC, as Maenetje Attorneys did not have the capacity to take on the review application, they should not have done so, and accordingly the explanation that they were too busy is not an adequate explanation.

[32] Furthermore, as it turned out, the application was served on 17 December 2013, but only filed with this Court on 14 January 2014.

[9] [1998] 8 BLLR 847 (LAC)
[10] At para 10.

[33] In explaining the delay in filing of the review application, the applicant's attorneys, depose to the fact that, "unless a matter is urgent", they would not necessarily file documents with the Court as and when they are due, but rather when papers in different matters are ready to be filed.

[34] It was put to Mr van der Westhuizen, that this indicated that the review application was not regarded as urgent by the applicant's attorneys.

[35] It was submitted by Mr van der Westhuizen that these words should not be construed as the practice manual being disregarded by the applicant, but rather that what was being explained is that a matter would be regarded as urgent when it is a matter that is to be set down on the urgent roll or to be heard on an urgent basis. Whilst a review application is not an urgent application that is heard on the urgent roll or on an urgent basis, Clause 11.2.7 of the Practice manual provides inter-alia, "A review application is by its nature an urgent application" in other words, from the stage of launching of the review application up to the point of informing the registrar in writing that the application is ready for allocation for hearing, the appropriate urgency, immediacy, punctuality, priority and promptitude should be present throughout the process of formulating and finalising a review application. Whichever way one looks at it, the applicant's attorneys did not regard the review application as urgent.

[36] It was further submitted that but for the delays occasioned by the recording not being readily available, that the review application would have been finalised within the 12 month period contemplated by clause 11.2.7 of the practice manual. Whilst it may well be that this submission would be correct, not only were the necessary papers in *casu* in fact not filed within 12 months of the date of the launch of the review application, but I am of the view that by providing in the practice manual that a review application is by its nature an urgent application is not to be confined only to the filing of the necessary papers within a 12 month period, but is to be seen as over-arching principle

and a general approach to review applications such that there is a strict compliance with all the prescribed time periods, and that any non-compliance with such time periods must be fully and adequately explained.

[37] In regard to the status of practice directives, this Court in *Ralo*[11] had regard to what was discussed in *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others*[12]. The court in Tadyn said the following, at para 11 The correct approach in my view, as to the force and effect of practice directives similar the one in issue is the one adopted in In re Several Matters on the Urgent Roll, 3 in which the court had to consider the force and effect of the provisions of the practice manual chapter 9.24 of the South Gauteng High Court regarding the failure by the applicant to set out the explicit circumstances which rendered the matter urgent. A The court held that in law the Judge President was entitled to issue practice directives relating to the procedure of setting down matters on the roll.

[38] In light of the unsatisfactory and/or absence of explanations in regard to the delay in the launching of the review application; the delays in filing the documentary portion of the record and the transcript of the arbitration, it is unnecessary to deal with the other issues that were raised *mero motu*, as listed above.

[39] In regard to the explanation offered by Modibe for the thirteen month delay in filing the documentary portion that is, . that"it was attributable to an oversight", is not only an unacceptable explanation, but it is devoid of any particularity.

[40] The explanation offered for the 7 month delay between 22 August 2014 and 26 March 2015 in filing the transcript of the arbitration ,. namely that the file

[11] (2015) 36 ILJ 2653 (LC)
[12] (2014) 35 ILJ 1672 (LC). Also see Edcon (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others: In re Thulare & others v Edcon (Pty) Ltd (2016) 37 ILJ 434 (LC), where the court confirmed that the directives contained in the Practice Manual were not merely guidelines and that they had to be adhered to.

could not be located, and that it took 3 months to find this file, without offering any explanation at all as to why it took 3 months, is equally unacceptable.

[41] The applicant's attorneys were seemingly completely inactive in expediting matters during this period.

[42] The explanation that the transcript for the arbitration ought to have been included as part of the supplementary affidavit filed in December 2014, is not an adequate explanation to explain why there was a five week delay between the filing of the documentary portion of the record on 17 February 2015, and the filing of the transcript of the arbitration on 26 March 2015.

[43] Not only does the Labour Appeal Court make it clear that being too busy is no explanation, but the time within which documents were filed with this court by the applicant's attorneys were apparently not dictated by the rules of the court, as it should be, but rather by the demands of the attorney's practice. This too can also never be an acceptable explanation.

[44] Finally, condonation can never be granted when the explanation tendered not only disregards this court's Practice Manual, but is actually in defiance of it.

[45] Given the poor explanations for certain of the delays, coupled with the absence of any explanations for other delays, the application for condonation must fail. In the absence of the applicant having succeeded in obtaining condonation, the review application also falls to be dismissed.

[46] As the applicant has not provided a reasonable and acceptable explanation for the delay and is guilty of a flagrant and gross failure to comply with the prescribed time-periods and the rules of this Court as well as the Practice Manual, the prospects of success need not be considered.

Prejudice.

[47] It was submitted that there was no prejudice to the respondent if condonation were granted. I need add nothing further than align myself with what the LAC stated in *Superb Meat Supplies CC v Maritz*[13]

> [16] In this court and the Supreme Court of Appeal 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 & A 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.

[48] If there is any prejudice to the applicant, then it is not the respondent who should be saddled with the consequences of any such prejudice when the blame for such prejudice lies with the applicant's nominated attorneys.

[49] I now turn to the issue of costs.

[50] Although there is already a penalty in place in the refusal of condonation due to attorney's lack of diligence, cognizance also needs to be taken of the views

[13] (2004) 25 ILJ 96 (LAC)

expressed by the Constitutional Court in relation to the conduct of legal practitioners.

[51] In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others*,[14] the Constitutional Court held that:

> [47] ... The Labour Court and Labour Appeal Court rules provide for a court-managed process to ensure that matters are heard in proper form, and expeditiously so. If practitioners cause delays, the rules provide the means for the labour courts' judiciary to exercise discipline and control over them.'…

[52] The Constitutional Court in *Grootboom v National Prosecuting Authority & another*[15] also held as follows :

> [32] I need to remind practitioners and litigants that the rules and courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive.
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> [33] Recently this court has been inundated with cases where there has been disregard for its directions. In its efforts to arrest this unhealthy trend, the court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this court once again expressed its displeasure in eThekwini [eThekwini Municipality v Ingonyama Trust [2013] ZACC 7; 2013 (5) BCLR 497 (CC)] as follows:
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> '[26] The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, in eight of

[14] (2010) 31 ILJ 273 (CC)
[15] (2014) 35 ILJ 121 (CC)

the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past. In [Van Wyk], this Court warned litigants to stop the trend. The Court said:

> "There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks."

[27] The statistics referred to above illustrate that the caution was not heeded. The Court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation.'

[34] The language used in both Van Wyk and eThekwini is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the court is self-evident. A message must be sent to litigants that the rules and the court's directions cannot be disregarded with impunity.

[53] The practice manual of this Court itself sets guidelines on the standards of conduct expected of those who practise in the Labour Court, and addresses the need to maintain respect for the court as an institution; and cautions that a failure to comply with the directives contained in the manual will be viewed in a serious light and will be addressed by an appropriate sanction which may include an order for costs *de bonis propriis* against the representatives who fail to comply.

[54] A brief summary in relation to the conduct of the applicant's attorneys is as follows:

> The South African Municipal Workers Union (SAMWU) instructed Maenetje Attorneys to assist in bringing the review application. Due to the busy schedule of the said attorneys, consultation only took place on 9 December 2013 (one day before the expiry of the six week period provided for in s145). Mr Maenetje was then out of the office from the 10th December 2013 attending to another matter in Polokwane, and returned on the 17th December 2013,;
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> As stated earlier, the review application was dated and served on 17 December 2013 but was only filed with this Court on 14 January 2014 which meant that the review application was not 1 week out of time as contended by the applicant in its condonation application, but rather 5 weeks out of time, and the explanation by the applicant's attorneys for this, was that the review application was not seen as urgent;
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> The founding affidavit in the court file was not dated by the deponent nor by the commissioner of oaths; the date that the confirmatory affidavits were signed and commissioned by the commissioner of oaths pre-dated the founding affidavit filed in support of the review application; the confirmatory affidavit by the applicant's attorney attached to the founding affidavit did not confirm the contents of the

founding affidavit but rather confirmed the contents of the applicant's replying affidavit;

the original founding affidavit, the original confirmatory affidavits and the original supplementary affidavit were not placed in the court file in accordance with Rule 5(3) of the Rules of this court ;

the supplementary affidavit was filed on 23 December 2014 i.e. some 4 months after the re-constructed record was received by the applicant's attorneys on 22 August 2014;

there was a 10 day delay between the time that the supplementary affidavit had been deposed to on 10 December 2014 and filing of same with this court on 23 December 2014;

it took from 22 August 2014 (when the re-constructed record was received by the applicant's attorneys) until 26 March 2015, i.e. some seven months, for the transcribed record to be filed with this court;

it took from 17 January 2014 - 17 February 2015 (i.e. some 13 months) for the documentary portion of the record furnished by the first respondent in terms of rule 7A(2), to be filed with this court by the applicant;

[55] The review application was ill-conceived from the very outset in that the application was launched outside of the 6 week period in circumstances where the explanation offered of the applicant's attorneys for the non-compliance with the 6 week period of being too busy was found by the LAC in *Allround Tooling*[16] to not be an acceptable explanation for a delay.

[16] [1998] 8 BLLR 847 (LAC)

[56] The explanation offered by the applicant's attorneys for the further delay in the actual filing of the review application is one that is in defiance of what is contained in the practice manual; against this background, one would, at the very least, have expected the remaining course of the review application to have been pursued with the appropriate vigilance and diligence, and to also have been handled in accordance with the Rules of this court rather than in accordance with the demands of the applicant's attorneys' practice, but this was not the case.

[57] In *Indwe Risk Services (Pty) Ltd v Van Zyl: In re Van Zyl v Indwe Risk Services (Pty) Ltd* [17]the court considered circumstances where a *de bonis propriis* costs 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.)'[18]

[58] To my mind, the applicant's attorneys acted in a manner which constitutes a material departure from the responsibilities of his office, and such conduct cannot be seen as *bona fide* nor merely an error of judgment.

[17] (2010) 31 ILJ 956 (LC)
[18] At para 39.

[59] In *SA Liquor Traders' Association & others v Chairperson, Gauteng Liquor Board & others*[19],the Constitutional court held:

> '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.'[20]

[60] I do not believe that the applicant's attorneys have shown the requisite level of professionalism and courtesy, and practitioners in this Court cannot be permitted to conduct matters in this manner and then expect that there are to be no consequences.

[61] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness also become applicable. Mr Laka, on behalf of the third respondent, submitted that costs on the attorney and client scale should be ordered.

[62] In *Gois t/a Shakespeare's Pub v Van Zyl & others* [21](it was held that:

> 'Furthermore, this court may make a punitive costs order such as costs on an attorney and client scale where it believes it appropriate to do so. Factors to consider whether or not to grant such punitive costs orders include where the conduct of the party —
>
> (a) is vexatious and amounts to an abuse of the legal process, even though there is no intention to be vexatious;

[19]2009 (1) SA 565 (CC)
[20] At para 54.
[21] 2003) 24 ILJ 2302 (LC).

(b) evinces a lack of bona fides;

(c) is reckless, malicious and unreasonable.'[22]

[63] As long ago as 1998, the LAC in *Sennet & Wessels (Pietersburg) BK v Prins*[23] found that:

> 'it is the duty of a legal representative to ascertain what rules and procedures are applicable to a matter handled on behalf of his or her client; and in regard to the excuse of pressures of work, the court commented that it was time to remind legal representatives of certain basic duties, and that if a practitioner cannot devote reasonable attention to a client's matter, he or she should notify the client of that so that someone else can then attend to the matter.'

[64] In *casu*, the applicant's attorneys were reckless, inter alia, in not heeding what the LAC had said in *Prins* and their conduct was also vexatious and amounts to an abuse of the legal process, even though there was not necessarily an intention to be vexatious.

[65] In regard to not burdening others with the financial implications of the attorneys conduct, I have further considered what was said in *Mantshiyane v Kopanong Local Municipality & others: In re Kopanong Local Municipality v Mantshiyane & others*[24] (that:

> "The taxpayers should not be burdened to pay costs and to fund litigation where there is a reckless disregard for the provisions of the LRA and the rules of this court. "

[22] At para 43.
[23](1998) 19 ILJ 1134 (LAC)
[24] 2016) 37 ILJ 1695 (LC) at para 42.

[66] I also had regard to the fact that there is no ongoing relationship between the parties.

[67] In the result, I make the following order:

1. The condonation application for the late filing of the review application is dismissed.
2. The review application is dismissed.
3. The applicant's attorneys are to pay the costs on an attorney and client scale *de bonis propriis* (which includes the costs of both 7 July 2016 & 29 September 2016).

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Berkowitz AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES.

For the Applicant: Adv G van der Westhuizen

Instructed by : Maenetje Attorneys

For the Respondent: S Laka