THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No: JR 590/2018

In the matter between:

ALINAH HLUBI **Applicant**

and

B S MTHETHWA **First Respondent**

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL **Second Respondent**

DEPARTMENT OF ENVIROMENTAL AFFAIRS **Third Respondent**

Heard: **26 August 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 August 2021.**

Summary: Application to revive the review application and condone the late filing of the record – application dismissed

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JUDGMENT

COETZEE AJ

[1] The applicant approaches this Court for an order reviving the review application, condoning the late filing of the transcribed record, and ordering the Registrar to set the review application down for a hearing.

[2] The applicant filed her review application in good time on 5 April 2018.

[3] The registrar informed the applicant on 25 May 2018 that the recordings were ready for collection and the applicant's attorney collected the recordings on 29 May 2018.

[4] The applicant delivered the transcript of the record with a supplementary affidavit on 30 November 2018.

[5] As the transcripts were filed outside the 60-day period, this Court on 29 January 2020 archived the review application in terms of the Practice Manual paragraph 11.2.3 which means that the review application was deemed to have been withdrawn.

[6] This application seeks to retrieve the review application and to condone the late filing of the record.

The delay

[7] The transcriptions were filed approximately 3 months late. The delay is inordinate.

The explanation

[8] The Registrar on 25 May 2018 informed the applicant's attorney that the records of the proceedings were ready for collection.

[9] The attorney sent the records to the transcribers on 29 May 2018.

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[10] The third respondent on 18 June 2018 enquired from the applicant's attorneys as to the status of the record and the applicant's attorneys replied that the transcribers were busy with the record.

[11] The applicant's attorney explains that the transcribers quoted on providing the transcriptions and sent an invoice on 3 July 2018.

[12] The applicant settled the invoice on 31 July 2018 as the invoice was for a substantial amount of money. According to the applicant's attorney payment of the invoice did not delay the preparation of the record

[13] The last day for service of the record was 15 August 2018.

[14] The third respondent's attorney again acquired as to the filing of the record and the applicant's attorney on 6 September 2018 replied that he was waiting for the transcribers.

[15] The arbitration protracted for a period of 12 days and the transcript is over 1000 pages.

[16] The transcribers completed the transcript on 19 October 2018 and delivered the record to the applicant's attorney on the same day.

[17] The applicant's attorney then studied the transcripts and prepared a supplementary affidavit.

[18] The applicant's attorney served the transcript with a supplementary affidavit on 30 November 2018.

[19] The applicant's attorney attributed the delay to the voluminous nature of the record.

[20] The third respondent also challenged the applicant in respect of the explanation for the period from 19 October 2018 to 30 November 2018.

[21] On 4 February 2019 the third respondent's attorney wrote to the applicant's attorney and recorded that in its view the review application was deemed withdrawn as the record had not been filed within 60 days. In the letter clause 11.2 is quoted in full. The third respondent's attorney also recorded that

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notwithstanding it intended to file an answering affidavit to protect its client's rights.

[22] The third respondent's attorney in the answering affidavit filed in the review application on 18 February 2019, raised as a point in limine the provisions of paragraph 11.2.3 of the Practice Manual and that the review was deemed to have been withdrawn.

[23] The applicant's attorneys in the reply stated as follows:

> "6.10 We view this point in limine as being an opportunistic one by the third respondent in that it failed to even raise this issue during or before it was served with the Supplementary Affidavit by way of correspondence.
>
> 6.11 Its ambush tactic is regrettable and a cheap shot at trying to avoid this matter from being fully ventilated and resolved by this Honourable Court.
>
> 6.12 The Third Respondent's own condonation application (for the late filing of the answering affidavit) shows that the record is voluminous. It is hypocritical of the Third Respondent to want this Court to hold the Applicant to the 60 days for filing the record and at the same time, condone its excessive late filing of its answering affidavit on the ground that the record was voluminous.
>
> 6.13 It is for this reason that the applicant will not make an application for condonation as it is necessary (sic) in this instance given that it had been open and frank with the Third Respondent about the delay in the transcription of the records."

Prejudice

[24] The applicant submits that she will suffer prejudice if her case is not heard and the third respondent claims prejudice in the long delay and unnecessary costs in opposing this application.

Prospects of success

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[25] Both parties claim good prospects of success for themselves and no prospects for the other. Both failed in this application to deal in summary with the prospects. The applicant relied heavily on the allegation that the deponent to the answering affidavit allegedly did not have the authority to depose to the affidavit or to oppose the revival application, and for that matter oppose the review application.

[26] The applicant alleges numerous reasons why the award should be set aside but do not list them. The Court is referred to the founding affidavit.

Analysis

[27] The delay of three months is inordinate and requires a reasonable explanation for all the periods of delay.

[28] The third respondent challenges the explanation in that it is incomplete. And lacks sufficient detail.

[29] The applicant's attorney did not say when and if he made follow ups with the transcribers. When the third respondent made enquiries during June and September 2018, the response was that the applicant's attorney was waiting for the transcribers.

[30] The explanation for the period from 19 October 2018 to 30 November 2018 is that the applicant's attorney perused the record and prepared the supplementary affidavit. The supplementary affidavit is 14 pages long and contains numerous references to the transcribed record.

[31] Neither the Labour Court Rules nor the Practice Manual requires that the supplementary affidavit and the transcript of the record must be delivered simultaneously[1].

[32] The applicant's attorney has not explained why he failed to deliver the record when he received it on 19 October 2018 but waited until 30 November 2018. The explanation is inadequate in this respect.

[1] Rule 7A(6) and Rule 7A(8)

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[33] As to the prospects of success, I with respect follow the approach of Moshoana J in *MEC Department of Health Eastern Cape v PHSBC*[2] where the Court held as follows with regard to the prospects of success:

> "In my view, it is not a requirement that an applicant must demonstrate excellent prospects of success to gain reinstatement. Such is not required since all that an applicant would obtain is a regain of the automatic right of review. Such a review may still be dismissed or upheld by a Court of review."

[34] That, however, does not assist the applicant where the explanation is inadequate.

[35] It is trite law that the same considerations apply in revival applications as in condonation applications[3]. In respect of condonation applications, the Labour Appeal Court in *NUM v Council for Mineral Technology*[4] said the following:

> " The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. <u>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 the delay, an application for condonation should be refused.</u>"(own emphasis)

[36] The applicant has not persuaded the Court of a reasonable explanation so as to have regard to the prospects of success. The applicant has also not shown strong prospects of success, in any event.

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[2] Case PR 187-16 at para 15
[3] Samuels v Old Mutual Bank [2017] 38 ILJ 1790 (LAC)
[4] [1999] 3 BLLR 209 (LAC) at para 10

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[37] In showing good cause the applicant did not proffer any clear and convincing explanation as to why the provisions of the Practice Manual were deliberately ignored. In the application all that is said about it is:

> "63. It is I as an attorney who did not file an application for condonation due to my understanding of the Rules that point in limine's (sic) will be addressed at the hearing of this Review Application.
>
> 64. This is based on the understanding provided by Justice Moshoane in an unreported case of *MEC Department of Health Eastern Cape v The PHSDSBC and Others Case PR187-16* (unreported) that once (sic) replying affidavit has been filed in terms of Rule, the Registrar ought to allocate a date especially if the record has been filed. The right to review is automatic and a refusal to reinstate a review because it lacks excellent prospects of success is in contravention of Section 34 of the Constitution."

[38] The applicant's attorney does not explain why he did not abide by the provisions of the Practice Manual. He seems to rather attempt to explain why he did not file a condonation application.

[39] As to the reference to the *MEC*-case in this regard, what the Court said was:

> "17. In my view when an application for reinstatement is considered by this Court, in the circumstances where the record has not been filed timeously, regard must also be heard to the provision that allows for an extension of the time period either by consent and or through an application to be considered in chambers. Thus, if a party takes advantage of the opportunity to seek a consent and or apply within the stated period chances are that the extension may be granted, in which event a deemed withdrawal may not take place. Similarly, where an application is made for reinstatement, it ought to be treated the same way as an application for an extension should consent be refused."

[40] The applicant's attorney's attention was drawn to the provisions of the Practice Manual during January 2019 in a letter. Thereafter again in the answering affidavit. Instead of acting, the applicant's attorney took issue with the point *in limine* with an attack on the third respondent's *bona fides*.

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[41] It was only when the third respondent provided the applicant's attorney with a copy of the Court Order that the review had been deemed withdrawn that he acted. The Court would have expected that the applicant's attorney would have explained, in the revival application, his interpretation, or lack thereof, of the provisions of the Practice Manual when his attention was drawn to it, or the reason why he disregarded it.

[42] The lack of an explanation smacks of a deliberate disregard of the Practice Manual.

[43] That in turn delayed this matter at least from February 2019, alternatively April 2019 to October 2020 when the applicant applied for the revival.

[44] Having regard to all the above considerations, it is not in the interest of justice to revive this matter that relates to a dismissal five years ago.

Costs

[45] The third respondent asked for a cost order. The Court has regard to the result of the application. In addition, the deliberate disregard of the provisions of the Practice Manual and a lack of a proper explanation why it occurred demand a cost order. The unwanted attack on the third respondent for raising the point in limine is not the conduct expected in litigation of this nature.

Order

[46] I make the following order:

1. The application is dismissed with costs.

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F. Coetzee

Acting Judge of the Labour Court of South Africa

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Appearances

For the applicant:	B Luthuli of Bongani Khanyile Ka Luthuli Attorneys Inc
For the Third Respondent:	Adv Paul Schumann
Instructed by:	J Philip Attorneys

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