THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D382/22

In the matter between:

NOBUHLE MADIKIZELA **Applicant**

and

CCMA **First Respondent**

RAJENDRA SHANKER N. O **Second Respondent**

PEP-A DIVISION OF PEPKOR TRADING (PTY) LTD **Third Respondent**

Heard: **6 November 2024**

Delivered: **7 November 2024**

Summary: An application to reinstate a review application that has been deemed to have been withdrawn. A prognosis of items 11.2.1, 11.2.2, and 11.2.3 of the Practice Manual, where a record had been filed late. Law and fairness govern the awarding of costs —Labour Court wields a wide discretion on the issue of costs under section 162 of the LRA- nothing in the present case merits the award of costs (1): The review application is reinstated. Held (2): No order as to costs.

JUDGMENT

Kadungure T, A.J.

Introduction

[1] The Third Respondent dismissed the Applicant and thereafter lodged her unfair dismissal dispute under the auspices of the Conciliation, Mediation and Arbitration (''the CCMA'') for conciliation, which, however, did not achieve the desired results. So, she then proceeded to arbitration, where the CCMA found the dismissal to be fair.

[2] This judgment relates to an application by the Applicant to reinstate the review application, which is deemed to have been withdrawn by virtue of non-compliance with clauses 11.2.2 and clauses 11.2.3 of the Practice Manual. The Third Respondent opposes the Application.

Material facts

[3] The facts set out below do not purport to be a comprehensive rendition of the facts. Where necessary, the facts set out below are drawn from the pleadings filed, the transcriptions of the disciplinary hearing, and the parties' submission during the hearing of this matter.

[4] The Applicant was employed by the 19th of July 2017 as a cashier or sales assistant at the third respondent's ''bluff'' store.in 2011, she was trained as a 2ic, and as such, she occasionally performed the duties of a store manager when required. On 01 August 2015, she applied and was promoted to store manager at 6157, Isipingo. In 2021, she applied for and was promoted to manage a store with a considerable turnover in Isipingo-store 925.

[5] As a store manager, she reported to the area manager, Yongama Tenza(''Tenza''). Tenza was arrested for his involvement in a burglary at one of the Pep stores, and this prompted the Third Respondent to do an investigation on all branches in his area, including the one managed by the Applicant. Tenza was dismissed for his misdemeanors.

[6] after an intense investigation, the Applicant was charged with gross misconduct in that she failed to report fictitious company-related transactions, which resulted in a financial loss to the company.in addition to this, she was also charged with gross negligence with respect to violating the company's petty cash procedures in that from March 2020-February 2021, she failed to verify invoices authorised by her, which caused financial loss to the company, in the amounts of R23 086.00 for store 6157 and R2000.00 for store 925 respectively

[7] the Applicant was found guilty of the charges above at the disciplinary hearing and was consequently dismissed. She lodged a dispute under the auspices of the CCMA; her application was, however, dismissed.

[8] On 30th August 2022, the Applicant launched a review application in terms of section 145 of the LRA. The said review application was launched within the prescribed period. On 30th September 2022, the Registrar of this Court advised that a record of the proceedings sought to be reviewed and set aside was dispatched. The record was, however, rendered incomplete as digital recordings of all proceedings were not filed with the Registrar.

[9] The aforesaid digital recording was made available to the Applications on 03rd October 2022. On 4th October 2022, the Applicant's attorneys attempted to uplift the record. Still, it was incomplete, so they contacted the first respondent's employee, Nkosinathi Nene, who acknowledged that the recordings were with the first respondent.

[10] On 05th October 2022, The Applicant's attorneys after that, uplifted the recordings from the First Respondent's offices. On 21st October 2022, the Applicant's attorneys were notified that there were outstanding recordings, which they later uplifted on 24th October 2022. On 25th October 2022, the Applicant's attorneys delivered the recordings to Sneller recordings and were given a quotation the following day, the 26th of October 2022.

[11] The Applicant alleges that there were a plethora of calls between the Applicant's attorneys and Sneller, which led to back-and-forth communication and resulted in Sneller amending their invoice. On 02 February 2023, the Applicant's attorneys prepared and sent an invoice together with an amended quotation.

[12] On 26th February 2023, Legalwise paid the claim for the money for transcription and on 27th February 2023, Sneller was paid for the record to be transcribed. On or about 31 March 2023, after the transcription of the record, the Applicant filed the transcribed record and simultaneously, the Applicant launched the present application. The record ought to have been delivered on or before 19th January 2023.

The applicable principles and provisions

[13] The purpose of the Labour Relations Act 66 of 1995 (''LRA'') is inter alia the effective resolution of Labour disputes, and the processes introduced by the LRA are intended to bring about the expeditious resolution of Labour disputes. The detrimental implications of delays are obvious.[1]

[14] This Court has accepted that a review application is by its nature an urgent application and that it requires prosecution with diligence and urgency.[2] This is supported by the Practice Manual.[3] Wherein an Applicant in a review application is required to ensure that all the necessary papers in the application are 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 be regarded as lapsed unless good cause is shown as to why it should not be archived.

[1] Rules Labour Court Rules, 2024: Commencement Government Notice 5038 of 2024

[2] Commercial Workers Union of SA v Tao Ying Metal Industries and others (2008) 29 ILJ 2461 (CC), where the Constitutional Court held at para 63 that: "These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years".

[3] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

[15] The amendments to section 145 of the LRA, which took effect on 1 January 2015, are specifically aimed at expediting the prosecution of review applications and inter alia require that an Applicant in a review must apply for a hearing date within six months of launching the review application. A review application requires urgent prosecution without undue delay.

Filing of the record

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

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

> *''11.2.1 Once the registrar has notified an Applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the Applicant must collect the record within seven days.*
>
> *11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the Applicant is advised by the registrar that the record has been received.*
>
> *11.2.3 If the Applicant fails to file a record within the prescribed period, the Applicant will be deemed to have withdrawn the application unless the Applicant has, during that period, requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the Applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service to all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any*

extension of time that the respondent should be afforded to file the record.''

[18] This Court and the Labour Appeal Court (LAC) have considered the status of the Practice Manual[4] and held that, in essence, the manual promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practice and litigate in the Labour Court, and it promotes the statutory imperative of expeditious dispute resolution. The provisions of the Practice Manual are binding and should be adhered to, but they are not to be adhered to or ignored by parties at their convenience.

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

[20] A proper interpretation of clause 11.2.3 shows that there are three possibilities if the record is not filed within 60 days of the date on which the Applicant is advised by the registrar that the record has been received. The first possibility is the easy and obvious one, namely, for the Applicant to request the respondent's consent for an extension of time, and consent has been given.

[21] The second possible scenario arises only in the event that consent was sought from the respondent but is refused. In such event, the Applicant may, on notice of motion supported by affidavit, apply to the Judge President for an extension of time.

[22] The third possible scenario arises when the Applicant in a review application fails to file the record within the prescribed 60-day period and fails to obtain the respondent's or Court's consent for the extension of time. In such a case, the review application is deemed to have been withdrawn.

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[4] Ralo v Transnet Port Terminals and Others [2015] 12 BLLR 1239 (LC) (Ralo); Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and others (2014) 35 ILJ 1672 (LC); Samuels v Old Mutual Bank [2017] 7 BLLR 681 (LAC) (Samuels).

[23] In the event that a review application is deemed withdrawn, it has specific legal consequences. In *Ralo v Transnet Port Terminals and others*[5] *(Ralo)*, the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of Municipal Council of *the Municipality of Windhoek v Marianna Esau*[6]*,* Where the Court held that the word 'deemed' is considered to have a conclusive effect. This Court concluded by stating the following**:**

> *"…The plain and unambiguous wording of the practice manual is to the effect that the Applicant must be regarded as having withdrawn the review application."*

Evaluation

[24] In this case, the Applicant seeks a reinstatement of the review proceedings, which are deemed to have been withdrawn for want of compliance with clause 11.2.2 of the Practice Manual. The provisions of the Practice Manual are binding.

[25] In dealing with compliance with the Practice Manual, the SCA in *Mtshali & others v Buffalo Conservation 97 (Pty) Ltd*[7] held as follows:

> [37] The approach of this court to condonation in circumstances such as present is well-known. I *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others*[8] Ponnan JA held that factors relevant to the discretion to grant or refuse condonation include the 'degree of non-compliance, the explanation thereof, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

[5] [2015] 12 BLLR 1239 (LC)

[6] LCA 25/2009, 2 March 2010.

[7] (250/2017) [2017] ZASCA 127 (SCA)

[8] [2013] 2 All SA 251 (SCA)

[26] The position as posited on in *Darries v Sheriff Magistrate's Court Wynberg & another*[9] applied in a situation of non-observance of the rules. With regard to prospects of success, it was said, '*it is advisable (not obligatory, it seems to me.*[10]*) that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success.*' My brother Van Niekerk J, in the matter of *Robor Tube (Pty) Ltd v MEIBC and others,*[11] took the view that a withdrawn application could be reinstated. He further took the view that a fresh notice of motion and an affidavit are not required for a withdrawn review. He also held that such applications to reinstate should be considered on the strength of the inherent powers that this Court has. I am in agreement. I may add, in my view, since a right to review is automatic, refusing applications to reinstate is as good as denying an Applicant an automatic right of review.

[27] 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 application may still be dismissed and or upheld by a Court of review. With that possibility, it is an unnecessary burden to require an Applicant to demonstrate excellent prospects of success at this stage. I agree that reinstating a hopeless review application would be nothing but clogging the roll and effectively troubling a judge with non-meritorious reviews. Unfortunately, there is no mechanism to gate-keep in reviews. Unlike in appeals, a mechanism to gate-keep is provided through the need to apply for leave to appeal.

[28] Refusing to reinstate a review application simply because it lacks excellent prospects of success is at odds with section 34 of the Constitution.

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[9] 1998 (3) SA 34 (SCA)

[10] My own addition.

[11] [2018] 39 ILJ 2332 (LC)

[29] 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 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.

[30] This practical approach, which augurs well with the approach by *Robor Tube,* is that the Court must exercise its inherent discretion to encourage practitioners to first seek consent to reinstate the withdrawn/lapsed review, failing which an application must be brought. Such applications may even be entertained in chambers.

[31] I do not understand *Macsteel Trading Wadeville v Francois van der Merwe N. O*[12] to be suggesting that "the substantive application" to reinstate must be heard in an open Court. On the contrary, with regard to the imperatives of expeditious resolution of Labour disputes, there are no policy reasons why such applications may not be considered in chambers.

[32] I have taken into account the difficulties encountered with regard to the record. It is common cause that insurmountable quandaries have been suffered by the Applicant in obtaining a correct record. The initial delay in the proceedings took place from 03 October 2022 to 24 October 2022, when the Applicant's attorneys received an incomplete record. The consequence of the filing of an incomplete record by the First Respondent was not of the Applicant's own making. This was the sole fault of the First Respondent, who bore the responsibility of delivering the record to the other parties herein.

[12] [2019] 40 ILJ 798 (LAC)

[33] The second phase of delay ensued from 25th October 2022 to 27th February 2023, when the payment for the transcript was made. The issues during the second phase are contained in paragraphs 19 to 30 of the Applicant's founding affidavit when the Applicant's attorneys made several attempts to ensure that Legalwise makes payment for transcriptions. Despite the efforts of the Applicant's attorneys, it appears that Legalwise, payment was slow, and this delayed the payment for the transcription of the recordings.

[34] The delay from 26th October 2022 to 27th October 2022 was caused by the Applicant's legal insurance, Legalwise, which failed to make payment on time. This fact cannot be overlooked, and even if one were to blame the attorneys of the Applicant, the sentiments expressed in the constitutional court case of *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo, and Others*[13] cannot be ignored.

[35] In the Baloyi case, Masoneke DCJ, then he was, stated that:

> *''31] The application was about 13 months late. The delay appears excessive. But there are mitigating circumstances. These are that the Applicant and his Pretoria attorneys were not aware that the Supreme Court of Appeal had already issued its order and became aware of it only in about November 2014.*
>
> *[32] This was not the first time that the Applicant was let down by an attorney. There was a delay of about 19 months in the lodging of his application for leave to appeal against the Labour Court judgment. That Court accepted the Applicant's explanation that he had been misled by his then attorney of record about whether the review judgment had been handed down and later about the procedure to be followed in an application for leave to appeal.*

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> *[33] Although the full truth of the matter is difficult to piece together without the complete record and without evidence or submissions from the respondents, the Applicant deserves better than the treatment he has received thus far. On his version, uncontradicted and unopposed before us, almost everybody has failed him in some way or another."*

[36] The Applicant, in this matter, cannot be faulted for claiming money from his legal insurer for the purpose of continuing with a review application. The claim itself shows an intention to pursue her review Application. The further payments that were made on the 26th and 27th of February 2023 are clear proof that you indeed wanted the transcription to be done.

[37] The Third Respondent submitted an answering affidavit stating that the Applicant could have obtained a quote from an alternative transcription service provider and then claimed repayment of the funds. The difficulty with this assertion is that the court is not in possession of Legalwise's policy on claims. Furthermore, there is no evidence that the Third Respondent has shown that the ''other'' transcription services offered a better service than Sneller.

[38] The Third Respondent further states that the Applicant failed to explain why no funds could be diverted or borrowed and applied to the payment of a transcription service provider lending repayment by Legalwise. This court does not have the benefit of the Applicant's credit record and does not know whether she could have been able to borrow money. Considering the different economic circumstances that each person and family has in this country, blaming the Applicant for not borrowing cash so that she can be in debt will be a step too much in litigation. She clearly had faith that Legalwise would deliver timeously. Unfortunately, she was made to wait for reasons described in paragraph 38 of the Applicant's affidavit, such as delays being caused due to the need for Legalwise to comply with their internal policies.

[39] I am mindful of the fact that ''those'' that in its answering affidavit, the Third Respondent proposes that the Applicant ought to have borrowed and repaid money also have internal policies of their own, and Who knows,

there might have been more delays as such entities or persons had to ensure that the money being borrowed from the Applicant was processed and compliance with internal policies was met.

[40] The issue of ‘’a plethora of telephonic calls’’ was raised by this court as the founding affidavit contains no names of the attorney who made calls to Legalwise. I am, however, comforted by the fact that there is a confirmatory affidavit by Stembile Anele Mahaye, an attorney and Sbonga Dlamini, who both confirm the contents of the Applicant’s main affidavit. I am of the view that they made calls, and such calls resulted in Legalwise making the payment for transcription.

[41] The third phase of delay concerns the period from 27th February 2023 to 31st March 2023; during that period, the records were uplifted from the Applicants, and they were transcribed by Sneller. Furthermore, the record was thereafter indexed and filed, and an application for reinstatement was brought before this court. Given the volume of the pages to be transcribed and such difficulties abound, it serves the interest of finality convenience of the court. It avoids unnecessary delay in reinstating the review application.

[42] It is indeed so that the review application is important for the Applicant. Had it not been for the launching of this application, which I consider unnecessary, the record having been filed in time, albeit with incorrect portions, the review application may have been finalized by now.

[43] For all the above reasons, the application for reinstatement ought to be granted.

Costs

[44] When it comes to costs, this Court wields a wide discretion under section 162 of the LRA. This allows us to issue cost orders in line with legal requirements and fairness.

[45] Ms Foot, for the Third Respondent, submitted that there is no reason why an order in favour of the Third Respondent should not be made. Counsel for the Applicant submitted that the Applicant was a breadwinner, unemployed and in no position to afford to pay a cost order against her.

[46] In *Zungu v Premier of the province of KwaZulu-Natal and others, the Constitutional Court*[14] confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[47] This is a case where a cost order must be considered and the Third Respondent's submissions in respect of the issue of cost are not without merit. However, I am alive to the fact that the Applicant is an unemployed individual who will, in all probability, not have the means to pay a cost order. A cost order against the Applicant will not only be one that will be difficult to execute but will also cause harm to the Applicant, which is a factor that has to be considered in fairness.

[48] In my view, the interest of justice and fairness would be best served by making no order as to costs.

[49] In the results, I make the following order:

Order

1. The review application is reinstated.

2. There is no order as to costs.

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Tendayi Kadungure

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv Makiwane

Instructed by: M Dlamini Attorneys

[14] (CCT136/17) [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC) (22 January 2018)

For the third Respondent:	Lynsey Foot of Cliffe Dekker Hofmeyer Inc, Johannesburg.