IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D1369/17

In the matter between:

S.S. SEHOANE Applicant

And

DEPARTMENT OF CORRECTIONAL SERVICES First Respondent

GENERAL PUBLIC SERVICE SECTORIAL BARGAINING COUNCIL Second Respondent

SANJAY BALKARAN N.O. Third Respondent

Heard: **29 June 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 04 August 2021.**

Summary: **Opposed Review**

JUDGMENT

GOVENDER, AJ

[1] The Applicant instituted the following two applications:-

i. to reinstate his application to review the arbitration awarded handed down, under case no: GPBC2395/2014, by the Third Respondent, dated the 26th of May 2017; and

ii. for condonation for the late filing of the Transcribed Record.

[2] The First Respondent opposed the re-instatement and filed an opposing affidavit therein.

[3] The Applicant had elected not to file a replying affidavit, claiming that the opposing affidavit contained largely hearsay evidence which did not necessitate a reply.

[4] I will first deal with the application for condonation of the late filing of the record, as the status of the review is that it is deemed withdrawn. In the event that I grant condonation for the late filing of the record, I will then deal with the application to reinstate the review.

Background

[5] The Applicant was dismissed by the First Respondent, after he pleaded guilty at his internal disciplinary hearing, for being in the possession of dagga on the 28th of March 2012 whilst on duty. The dismissal was upheld in terms of the Appeals Authorities decision of the First Respondent. The Applicant referred an unfair dismissal dispute to the Second Respondent which was heard on the 6th and 7th of April 2017 at the Westville Prison.

[6] The Applicant maintained that his dismissal was both substantively and procedurally unfair. The Applicant, in particular, challenged the validity of the charge sheet and argued selective application of discipline, by the

First Respondent, in dealing with cases of a similar nature where employees were found in possession of dagga/contraband and were either not disciplined and/or not dismissed.

[7] The Applicant contends further that the Award handed down by the Third Respondent is reviewable on the basis that the Third Respondent committed gross irregularities, had misconceived the nature of the enquiry and failed to make a determination of the two conflicting versions of both parties.

Chronology of events

[8] A brief summary of the chronology of events that transpired after the review application was instituted follows below and have been extrapolated from the affidavits filed by the parties as well as other documents forming part of the record.

[9] The review application was launched on the 5th of October 2017.

[10] A bundle of documents and one recorded cassette tape was uplifted by the Applicant's attorney on the 9th of February 2018.

[11] On the 17th of February 2018, a quotation was received by the Applicant from Sneller Recordings to transcribe the Record.

[12] The estimate quote received from Sneller Recordings was in the sum of R6, 091.20 (Six Thousand and Ninety One Rand and Twenty Cents). The Applicant avers that, due to financial constraints, he was unable to pay Sneller Recordings for release of the transcribed Record. The Applicant made a final payment of R775.00 (Seven Hundred and Seventy Five Rand), on the 21st of August 2018 to Sneller Recordings, and only then was the transcribed Record released to the Applicant.

[13] The supplementary affidavit and transcribed Record was filed on the 14th of September 2018. The transcribed Record ought to have been filed once received by the Applicant given the delay , however, for reasons not explained, the Record was only filed with the supplementary affidavit.

[14] The First Respondent filed its opposing affidavit on the 4th of February 2019.

[15] The application for reinstatement of the review was served on the 1st of October 2019.

[16] The First Respondent alleges that they were not aware of the application to reinstate the review despite service at the Office of the State Attorney on the 01st of October 2019. They contend that they only became aware of the application to reinstate the review when they were served with the indexed bundles in June 2019.

[17] I pause to mention that the state attorney tasked to handle this matter, has provided no explanation to this court, by way of affidavit, as to why he was not aware of the application despite service on his offices.

Application for condonation

[18] The principles applicable in applications for condonation are trite.

[19] In the case of ***SA Post Office Ltd v CCMA***[3], Waglay DJP (as he was then) stated that:-

> *'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation*

[3] [2012] 1 BLLR 30 (LAC) at para 23.

thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'

[20] In accordance with the provisions of section 191(11)(b) of the LRA, the Court may on good cause shown, condone the non-observance of the time frames. 'Good cause' was explained in ***Melane v Santam Insurance Co. Ltd***[4] in the following terms;

'In deciding whether sufficient cause has been shown, the basic principle 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 therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[21] Another factor to be considered is the interest of justice. ***In Brummer v Gorfil Brothers Investments (Pty) Ltd***[5], the Constitution court held that an application for condonation should be granted if it is in the interests of justice and refused if it is not. It was further held that the interests of justice must be determined by reference to all relevant factors, including:-

i. the nature of the relief sought,
ii. the extent and cause of the delay,

[4] 1962 (4) SA 531 (A) At 532b-E.

iii. the nature and cause of any other defect in respect of which condonation is sought,
iv. the effect on the administration of justice,
v. prejudice and
vi. the reasonableness of the applicant's explanation for the delay or defect.[6]

[22] In ***Colett v CCMA & Others,***[7] the LAC further held that 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***[8], 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***[9]:

> "*There is a further principle which is applied and that is 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*."

[23] And further at paragraph 9 it was held:

> "*The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross in flagrant disregard of the rules was without merit*."

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[5] Brummer v Gorfil Brothers Investments (Pty) Ltd and Others (CCT45/99) [2000] ZACC 3; 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC).
[6] 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) at para 3.
[7] (2014) 18 ILJ 367 (LAC).
[8] (1999) 3 BLLR 209 (LAC) at paragraph 10.
[9] (1962) 4 SA 531 (A) at 532 C - D.

[24] In ***Robotube (Pty) Ltd v MEIBC & Others***[10] it was held that a withdrawn application can be reinstated and that such applications should be considered on the strength of the inherent powers that this court has. A right to review is automatic, refusing applications to reinstate is as good as denying an Applicant a diplomatic right of review.

Evaluation

[25] The Applicant failed to comply with the provisions of Clause 11.2.2[11] of the Labour Court Practice Manual effective April 2013, by failing to file the transcribed Record of the proceedings within 60 days and the Applicant was thus, in terms of Clause 11.2.3[12], deemed to have withdrawn the application.

[26] According to the Applicant, the 60 days would have expired on the 04th of May 2018, however on my count the 60 days would have expired on the 11th of May 2018 excluding weekends and public holidays. The Applicant was therefore approximately 3 months late in the filing of the transcribed Record.

[27] The Practice Manual however does provide litigants with some relief, as it provides that if Clause 11.2.2 is not complied with, then at least good cause must be shown in order to resuscitate the review application i.e. *a proper condonation application must be brought explaining the reason for the delay*. Clause 11.2.3 shows that there are three possible options available to the party 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.

[28] The first option is for the Applicant to request consent for the extension of time from the Respondent and if the consent has been granted then the

[10] [2018] 39 ILJ 2332 (LAC).

[11] For the purposes of Rule 7A(6), Records must be filed within 60 days of the date in which the Applicant is advised by the Registrar that the Record has been received.

matter remains alive. In the event that the consent sought is refused, the Applicant has the option to, on Notice of Motion, supported by an affidavit, apply to the Judge President for the extension of time. The third option is when the Applicant has failed to file the Record within the prescribed 60 day period and failed, to obtain the Respondent's or Court's consent for the extension of time, is to then apply for condonation as is the case herein.

Explanation for the delay

[29] The Applicant's reasons for the delay are as follows:

i. The Applicant was unemployed. The unemployment had commenced on the date on which he had been dismissed and his difficulties in having the Record transcribed was as a result of financial hardship.

ii. The Applicant explains that a further delay was occasioned by the non-availability of his attorney, which resulted in his supplementary affidavit only being filed on 13th of September 2018.

iii. Once the review was filed the Applicant had to wait for the Registrar to make the Record available to him and this was only done on the 9th of February 2018. The Applicant had no control over any delays before this date.

iv. A week later after receiving the Record from the Registrar, the Applicant had requested and received a quote from Sneller Recordings indicating the costs of transcribing the Record. The quote from Sneller Recordings is dated the 17th of February 2018.

[12] If the Applicant failed to file a Record within the prescribed period, the Applicant will be deemed to have

v. The Applicant further attaches the invoice of 21st of August 2018 for a payment of R775-00 towards Sneller Recordings and it is common cause that the quote from Sneller Recordings was in the sum of R6,091.20 (Six Thousand and Ninety One Rand and Twenty Cents). Therefore, it is reasonable to surmise from the facts that some payment/s had been made to Sneller Recordings, prior to the 21st August 2018 when the balance of R 775-00 was paid to obviously settle Sneller Recordings in full so that the Record could be transcribed.

[30] Once the Record was received the Applicant consulted with his attorney and filed his supplementary affidavit approximately 17 days later. A further two weeks later, on the 1st of October 2019, the Applicant filed an application to reinstate his review application.

[31] I pause to mention that the Applicant's attorney of record had also sent a letter to the Registrar of the Labour Court, date stamped the 17th of August 2018, advising him that the Records are still incomplete and the transcribed Record is still outstanding. He therein further advised him to unarchive the review application as the Applicant was still pursuing the review.

[32] The First Respondent contends that the Record was only filed in January 2019, however, in my view it is highly improbably that the supplementary affidavit would have been filed without filing the Record. In any event, the Respondent's contention that the Record was only filed on the 11th of January 2019 amounts to hearsay, as no confirmatory affidavit was attached to their answering affidavit confirming their averment, as was correctly pointed out by the attorney for the Applicant.

[33] In light of the above, it appears, in my view, the Applicant had never abandoned his review application. The Applicant did take satisfactory

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withdrawn the application, unless …

steps to prosecute the review. Further, it is reasonable to accept that a lack of funds delayed the finalisation of the transcribed Record.

[34] The delay of approximately three months is therefore, in my view, not inordinately long in the circumstances.

Prospects of success

[35] It is not a requirement that an Applicant must demonstrate excellent prospects of success to gain reinstatement. Refusing to reinstate a review application simply because it lacks excellent prospects of success is at odds with Section 34 of the Constitution. However, that said it must be borne in mind that a hopeless review application would achieve nothing more except to unnecessarily clog the court rolls and effectively burden a Judge with a non-meritorious review.

[36] In respect of the prospects of success, it was held in ***Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd***[13], that this meant that all what needs to be determined is the likelihood or chance of success when the main case is heard.[14] A similar approach was followed in ***Seatlholo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd),***[15] where it was held that the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial. Equally so, the prospects of success

[13] [2008] ZALC 96; (2009) 30 ILJ 347 (LC).
[14] 2009 30 ILJ 347 (LC) at para 27.
[15] (2011) 32 ILJ 2206 (LC) para 24.

do not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard.[16]

[37] In ***SA Democratic Teachers Union v Commission for Conciliation, Mediation & Arbitration & others (2007) 28 ILJ 1124 (LC)*** at para 38, it was held that;

> "*A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a prima facie case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case*"

[38] In ***Mulaudzi***[17] however, the Supreme Court of Appeal has since held that it is advisable in such applications, to set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.

[39] The Applicant contends that he has great prospects of success on the main review application, *inter alia*, on the following grounds:-

i. The Arbitrator had failed to provide brief reasons for his decision as envisioned by Section 138(7)(a) of the LRA;

[16] Production Institute of South Africa (PTY) Ltd v CCMA & others (Case No: JR1974/2009) at para 12.

[17] Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited 2017 (6) SA 90 (SCA) at para [34].

ii. The Arbitrator had failed and/or neglected to explain why he preferred the employers version;

iii. The Arbitrator had misconceived the nature of the enquiry;

iv. The Arbitrator had committed gross irregularity in that he failed to determine the key factual controversy sheet;

v. The Arbitrator committed a misconduct in that he failed to arrive at a decision based on the evidence properly before him in that the Applicant had pleaded guilty in the charge of being is possession of dagga but was also dismissed for another two charges and/or actions where no evidence was led during the Arbitration proceedings.

[40] The main contention appears to be the issue of consistency. The Applicant did lead the evidence of BT Phakathi at his Arbitration, who according to the Award, testified that he too had been guilty of similar transgressions as the Applicant but was only given a written warning which was valid for six months and was not dismissed.

[41] I am satisfied that the Applicant has established demonstrable prospects of success, in particular, his ground for review in respect of the issue of constituency of discipline and sanction imposed in the workplace. This is apparent from the founding affidavit of the review application coupled with a reading of the Award. It would be in the interests of justice to have a proper ventilation of these issues before the reviewing court.

Prejudice

[42] The Applicant claims that he would be greatly prejudiced if the review application was not reinstated as he would not be given the opportunity to fairly and fully present his case. He further alleges that he paid a lot of money for the Records to be transcribed in order to proceed with the matter so that justice can be done and that there will be no prejudice to the Respondents as it is still in possession of the documents to be used in this matter.

[43] The Respondents do not submit that any prejudice would be suffered in the event that relief sought is granted.

[44] However, it is trite law that labour disputes ought to be resolved expeditiously and this is factor that the Practice Manual seeks to reinforce. However that being said, I am not persuaded herein that there will be any significant prejudice suffered by the Respondent should this matter be allowed to proceed.

Conclusion

[45] Taking into account all the circumstances set out above, it is my considered view that the Applicant never abandoned his application to review the Award, nor was he dilatory in prosecuting the review. The difficulties encountered in transcribing the Record were satisfactorily explained. I find that the delay of approximately 03 months was inordinately long in the circumstances. Therefore, condonation for the late filing of the Record is granted.

[46] Accordingly, I also find for the above reasons that the Applicant ought to be afforded an opportunity to reinstate the review application.

Order

1. The late filing of the Transcribed Record is hereby condoned.

2. The Applicant is granted leave to reinstate the application for review.

3. The Registrar is instructed to enrol the review application for hearing on the opposed motion roll.

4. There is no order as to costs.

N Govender

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: M Nonyongo

Instructed by Nonyongo Attorneys

For the First Respondent: Advocate Z Rasool

Instructed by State Attorney, Durban