



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D130/2022

Not Reportable

In the matter between:

MEC: DEPARTMENT OF HEALTH KZN

First Applicant

HOD: DEPARTMENT OF HEALTH KZN

Second Applicant

and

SIZWE CLEMENT KHANYILE

Respondent

Heard: 22 March 2024

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 8 November 2024.

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] An order was issued by this court on 17 February 2023 in terms of which the review application herein was declared to have been deemed withdrawn. The applicants, referred to collectively as the Department of Health ('the DOH'), thereafter made application for orders in the following terms,

'1. That the ex parte Order granted on 17 February 2023, deeming the review application under D130/2022 withdrawn, be rescinded in terms of section 165 of the Labour Relations Act, 66 of 1995.

2. That the review application be reinstated and the first applicant be granted leave to proceed with the review application under case number D130/2022.'

[2] The respondent,¹ referred to as Mr Khanyile, opposed the application.

Background

[3] The DOH dismissed Mr Khanyile in consequence of his having been found to have stolen certain of its property, and to have disregarded certain of its safety and security rules. Mr Khanyile challenged the fairness of its decision to the Public Health and Social Sectoral Bargaining Council and, on 31 January 2022, the commissioner arbitrated to arbitrate the dispute issued an award under PSHS482-21/22 in terms of which he found that Mr Khanyile's dismissal by the DOH had been substantively unfair.

[4] Dissatisfied with the award, the DOH initiated a review application on 25 March 2022. As its review was required to have been initiated by not later than 14 March 2022, it sought condonation for the delay.

[5] Upon the PHSSBC having delivered the record of proceedings to this court, the Registrar issued a Notice in terms of R7A(5) in which the DOH was advised that the record, comprising both a mechanical recording and a bundle of documents, was available. Although the DOH denied that the Notice in terms of R7A(5) had been

¹ Whilst three respondents were cited in the review application, only Mr Khanyile as the third respondent was cited as a respondent in the present application. He, however, took no issue with the omission.

served on it, it acknowledged that it had been notified telephonically that the record had been made available for collection. The record was uplifted on 22 April 2022.

[6] Relying on the date of 13 April 2022, the DOH was required to deliver the record on or before 8 July 2022. This was not done until 25 August 2023.

[7] In the absence of the record's delivery, Mr Khanyile took steps to enforce the award at the beginning of 2023 by initiating what was referred to in the heading of its Notice of Motion as an application for contempt of court. In compliance with clause 13 of the Practice Manual which operated at the time, the application was brought *ex parte*. Deviation from the Practice Manual occurred, however, by the inclusion of the prayer in the Notice of Motion, *'that the review application under this case number is deemed withdrawn.'*

[8] The court hearing his application on 17 February 2023 issued two separate orders. The first related to the contempt application, and called upon representatives of the DOH to show cause why they ought not be held in contempt. The second read,

'IT IS ORDERED THAT

1. The review application under D130/2022 is deemed withdrawn.'

[9] DOH launched the present application after having become aware of the orders granted on 17 February 2023, then having sought orders in the following terms,

'1. That the ex parte Order granted on 17 February 2023, deeming the review application under D130/2022 withdrawn, be rescinded in terms of section 165 of the Labour Relations Act, 66 of 1995.

2. That the review application be reinstated and the first applicant be granted leave to proceed with the review application under case number D130/2022.'

Analysis

[10] In seeking rescission of the order granted *ex parte* in which the review application was declared to have been deemed to have been withdrawn, the DOH relied on s165 of the LRA read with Rule 16A, both of which provide for the rescission of judgments granted erroneously in the absence of a party affected thereby. In his answering affidavit Mr Khanyile argued that regardless of the manner in which the order had been obtained, and irrespective of the order itself, factually, as a consequence of the DOH's failure to have delivered the record timeously, the review application had been deemed to have been withdrawn by operation of the Practice Manual.

[11] Whilst this court's procedures require contempt applications to be initiated *ex parte*, insofar as all other applications are concerned the usual legal principles concerning notice apply. These principles were summarised by the High Court in Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others [2023] (6) SA 578 (GJ).

'In our law, there is a fundamental norm that no decision adverse to a person ought to be made without giving that person an opportunity to be heard. In a court of law, this norm is scrupulously observed. However, in the real world, prudence dictates that sometimes pragmatism must be applied and in exceptional circumstances that sacred right of audi alteram partem may be relaxed, but when it is appropriate to do so, such a decision is hedged with safeguards. The principle which governs whether to grant an order against a person without their prior knowledge is straightforward: only when the giving of notice that a particular order sought would defeat the legitimate object of the order. This procedure is rare and is called an ex parte application.'

[12] Inasmuch as Mr Khanyile may well be correct that the order in question did no more than record the factual position which then prevailed, this does not answer the question why he had found it necessary to ask for the order in the first place, let alone to have done so by way of an *ex parte* application where no justification was established for his departure from the ordinary requirements of notice. In all events, at the hearing of the matter his representative, Mr Suleman, consented to rescission

of the order. As this court is satisfied that grounds exist for rescission such relief will be granted.

[13] Mr Khanyile was correct that despite rescission of the order the effect of the Practice Manual in light of the DOH's failure to have complied with the time periods prescribed for the delivery of the record was that the review application was deemed to have been withdrawn, and its reinstatement must be ordered before the DOH may continue to prosecute its review application. On this court's assessment of the applicable time period it was obliged to have delivered the record by not later than 9 July 2022.

[14] It is trite that an application for reinstatement is akin to a condonation application, suffice that the threshold to be met in relation to a litigant's prospects of success is set at a lower bar. In seeking to reinstate its review application, the DOH provided an explanation for the delay, asserted that its prospects of success were good, and argued that the interests of justice required the granting of the relief sought.

[15] As regards its explanation, although the DOH's attorney denied that the R7A(5) Notice had been served she nevertheless accepted that she became timeously aware that the record was available. A handwritten note marked on the envelope in which the record was contained reflected that it was uplifted on 22 April 2022.

[16] The DOH alleged that a decision on the part of the State to change the service provider which provided transcription services to it caused the initial part of the delay. The record was originally delivered to Sneller Recordings, however by 10 May 2022 the DOH's attorney established that she was then required to utilise the services of Gauteng Transcribers and the record was uplifted from Sneller Recordings to be delivered to it. The quotation which had been requested from Gauteng Transcribers was provided on 20 May 2022 with the instruction to proceed with the transcription having been given to it later that same day.

[17] Not having received the transcription of the record in the present matter, nor others which were then awaited, the DOH's attorney transmitted an email which related to the records in each matter on 12 July 2022.

[18] Although unsupported by objective evidence of the fact, the DOH alleged that the record was eventually was provided to it in November 2022.

[19] After an unsuccessful attempt to utilise the services of the advocate who had previously dealt with the matter, the DOH's attorney was required to comply with its Supply Chain Management Policy and the Treasury Regulations in order to obtain the services of another advocate. That process was concluded in January 2023 and a consultation was arranged on 9 February 2023, from which it became apparent that further consultations with other individuals who had not been present at the first was required.

[20] At the time when the DOH was in a position to launch its reinstatement application, it received Mr Khanyile's contempt application, which included the separate order granted in relation to the deemed withdrawal of the review application. This necessitated that a further affidavit be drafted, being the answering affidavit opposing the contempt application. The separate order granted also necessitated that it revisit its reinstatement application.

[21] The DOH was then of the view that the order relating to the deemed withdrawal precluded it from taking any further steps in the prosecution of its review application until such time as it succeeded in having such order rescinded. Notwithstanding this view, it subsequently delivered the record in August 2023.

[22] Mr Khanyile argued that the explanation provided by the DOH was deficient in a number of respects:

- The DOH had failed to provide proof of initial delivery of the record to Sneller Recordings;
- The DOH had not requested expedited transcription;
- There was no indication that the DOH's attorney made any effort to obtain the record after the transcription had been requested;

- At no point did the DOH seek Mr Khanyile's consent to the late delivery of the record which it could have done in terms of clause 11.2.3 of the Practice Manual;
- There was no particularity provided concerning when the brief was sent to the original counsel, nor when it was returned;
- There was no particularity provided concerning the steps taken to procure the new service provider;
- No particularity was provided in relation to the dates of such further consultations which were alleged to have taken place;
- No indication was given of the date on which the original reinstatement application was alleged to have been ready for delivery.

[23] In reply, the DOH disputed the correctness of the conclusions and observations arrived at by Mr Khanyile.

[24] As regards its prospects of success, the DOH referred to its founding affidavit in its review application which it alleged demonstrated that its prospects were good. If reference is to be had to the review application, the DOH's case was that the arbitrator had disregarded the uncontroverted evidence before him, misconstrued the evidence of its witnesses, and considered irrelevant issues which had not been before him. In amplification thereof, the DOH alleged that the arbitrator had failed to consider, amongst other things, the evidence established by the inspection *in loco* which had been conducted as well as the video surveillance footage which had captured Mr Khanyile's misconduct. In addition to this, it asserted that it had introduced evidence of Mr Khanyile's admission that he had committed the misconduct in question, which was disregarded by the arbitrator. It was accordingly the DOH's case that the evidence before the arbitrator had established the commission of both the removal of its property, and the failure on Mr Khanyile's part to have complied with its rules regarding safety standards.

[25] In its present application, the DOH set forth a summation of the evidence relied on by it which it alleged established both the perpetration of the misconduct by Mr Khanyile as well as the justification for his dismissal. This being the case, the

DOH alleged that it enjoys good prospects of success in seeking to review and set aside the award.

[26] Mr Khanyile elected not to respond directly to the DOH's allegations, having asserted only that the particularity of the evidence provided by the DOH ought to be dealt with in the course of the review application.

[27] In consideration of the DOH's case for the reinstatement of its review application, it is evident that the delay in question was in excess of one year. In circumstances in which the record was required to have been delivered on or before 8 July 2022, this was ultimately attended to only on 24 August 2023, post fact the delivery of its reinstatement application. The delay, in the context of labour dispute resolution, is not an insignificant period of time.

[28] Insofar as its explanation for the delay was concerned it is evident that the DOH was intent upon challenging the award upon receipt thereof. Having received the DOH's instructions to initiate the review application, and having done so, the DOH's attorney thereafter took the steps required of her when she first became aware that the record had become available, by having caused it to be uplifted from this court and delivered to the transcription service. Her further conduct, however, does not evince the exercise by her of the appropriate degree of diligence which may have been expected of an admitted attorney entrusted with a client's litigation.

[29] Seemingly the first and only enquiry directed by her to the transcription service concerning the transcribed record took place after the 60 day period had passed. If regard is to be had to the email transmitted on 12 July 2022 it is clear that she had by then overlooked that which had previously been done by her. In her email, directed to Sneller Recordings, she reiterated her previous request for a quotation. This request was made in circumstances in which she had previously uplifted the record from that entity, delivered it to Gauteng Transcribers, and had thereafter both sought and been provided a quotation from it. On 12 July 2022 no quotation was awaited from Sneller Recordings, a transcription of the record was awaited from Gauteng Transcribers.

[30] In response to the issue raised by Mr Khanyile concerning the intended recipient of the email, the DOH stated,

'I cannot speculate as to why Gauteng Transcribers only produced the transcript in November 2022, however during July 2022, which should have been at the expiry of the 8 weeks as per the quotation, the applicants' attorney made a follow up with both Sneller and Gauteng Transcribers, since all the recordings were originally sent to Sneller before the existence of Gauteng Transcribers.

Applicants' attorneys were advised to enquire with Sneller for the transcribing that was delivered at Sneller, since Sneller had an obligation of finalising all transcripts received by them before the award of the tender to Gauteng Transcribers.'

[31] The DOH's explanation is incompatible with its original explanation that (1) Sneller Recordings was no longer contracted to do work for the State; (2) the record had been physically delivered to Gauteng Transcribers for transcription; and (3) Gauteng Transcribers' quotation to perform the work had been accepted by the DOH's attorney. It is also apparent from the transcription itself that the work was performed by Gauteng Transcribers.

[32] For whatever purpose that particular email was intended, there was no evidence of any further actions taken by her in relation to the record thereafter. By simply allowing the transcription service to do the work required of it at its own pace, she thereby allowed the transcription of what ultimately amounted to 84 pages of evidence to take some six months to be attended to. It must be accepted that in the circumstances of her original request having been for the urgent transcription of the record, and the quotation furnished to her had anticipated that the transcription would take no more than 8 weeks to complete, the subsequent delay in the provision thereof ought to have caused her to have reminded those responsible that the work in question remained outstanding.

[33] If it is accepted that the transcript was made available in November 2022, there was no impediment to the delivery thereof at that time. This court is left to infer, although not expressly stated, that this was not done as a result of her having then been aware of the need on the part of the DOH to initiate a reinstatement application. This was then delayed by a further three months as a result of the need to secure the services of new counsel, as the advocate who had previously been involved in the matter was, for reasons which were not explained, no longer available.

[34] Whilst new counsel was appointed in January 2023, and notwithstanding that the DOH's attorney must then have been aware of the need to act with some alacrity, it took a further two months to finalise the present application, it being evident that the present application was not initiated prior to Mr Khanyile's contempt application and orders of 17 February 2024 having then been served on the DOH.

[35] It is clear that neither the paucity of the explanation provided nor the circumstances which gave rise to the delay can be attributed to the DOH itself. The cause of the delay related, firstly, to the length of time taken for the delivery of the record. Whilst it is notionally possible that this period of time would have been curtailed by the expenditure of any effort on the part of the DOH's attorney, it is certain that the DOH itself played no part in the time which was ultimately taken.

[36] The second period related to the need on the part of its attorney to comply with the State Attorney's processes to procure the services of counsel. Again, the DOH had no involvement in this process and could have done nothing to expedite its conclusion.

[37] It is evident that the DOH took the initial step to initiate its review application upon it having become aware of the need to do so. In doing so, it entrusted the matter to the offices of the State Attorney, the only attorney it was permitted to appoint. Nothing indicates that the DOH itself was either responsible for or contributed to the delay in the delivery of the record which subsequently ensued. Given these factors coupled with the absence of any discernible conduct on its part indicative of its loss of interest in the proceedings, although the delay was significant

and poorly explained this court is unable to find that the apparent negligence of its attorney ought to be imputed to it.

[38] As regards the DOH's prospects of success two aspects require consideration. The first is that of condonation, the second concerns the potential reviewability of the award.

[39] Insofar as its condonation application is concerned, the delay in the launching of the review application was a period of approximately one week. There is no reason to believe that the such condonation for such period, four days of which were not business days, would not be granted in due course.

[40] As regards the review application itself, whilst Mr Khanyile was correct that the final determination of the reviewability of the award would be a matter for the court of review in due course, the issue is not wholly irrelevant for in the present proceedings. An applicant seeking the reinstatement of its review application is required to place facts before the court which, if established in its review application in due course, would entitle it to succeed in that application.

[41] Neither the DOH's allegations concerning the failures on the part of the arbitrator nor the evidence presented by it during the course of the arbitration were challenged by Mr Khanyile and this court must accordingly accept the correctness thereof. This being so, this court must also find that the DOH has, in its present application, met the threshold required of it to establish facts which if sustained in the course of its review, would entitle it to succeed in such application. This suffices to warrant ventilation of the issues upon which it relies in seeking to challenge the award.

[42] This court is aware that labour disputes are required to be dealt with expeditiously, and that the benefit of the award in Mr Khanyile's favour has been held in abeyance by the delay. This is not, however, the only relevant consideration. If Mr Khanyile was indeed guilty of the misconduct in question, that misconduct was serious; having constituted dishonesty in the form of the misappropriation of the DOH's assets. The interests of justice would not be served by the reinstatement of a

dishonest employee to employment in the public service. On the other hand, if no interference with the award is warranted, and it is not set aside in review proceedings in due course, Mr Khanyile will be entitled to its enforcement, which will include both his reinstatement and his arrear remuneration.

[43] Accordingly, in consideration of the totality of the circumstances of the matter, this court finds that the DOH has established that the interests of justice would best be served by granting the order of reinstatement, and will exercise its discretion accordingly.

Costs

[44] Mr Khanyile asked for the dismissal of the application, with costs. The DOH sought the granting of an indulgence. Albeit that it has been successful, Mr Khanyile's opposition to its application cannot be said to have been frivolous, unreasonable, or unjustified. In the circumstances, this court is of the view that fairness requires that Mr Khanyile be awarded his costs.

Order

1. The order granted on 17 February 2023 in terms of which the review application under D130/2022 was deemed to have been withdrawn is hereby rescinded.
2. The review application under D130/2022 is hereby reinstated.
3. The first applicant is given leave to take such further steps in the prosecution of its review application as it is required to do.
4. The applicants are ordered to pay the respondent's costs of opposing the reinstatement application.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicants:

Mr CM Kulati, instructed by the State Attorney, KwaZulu-Natal

Respondent:

Mr MZF Suleman, Raoof & Associates