IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D13/2021
Not Reportable

In the matter between:

SUPERCARE SERVICES GROUP (PTY) LTD	Applicant
and	
BHEKANI NXUMALO	First Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
COMMISSIONER SCELO VICTUS MKHIZE	Third Respondent

Heard: 12 June 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 27 March 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicant initiated an application in which it sought to review and set aside a ruling by the third respondent in terms of which he refused to rescind an award previously granted by default in favour of the first respondent. It failed, however, to deliver the record within the time period permitted in terms of clause 11.2.3 of the Practice Manual with the result that it was deemed to have withdrawn its application. Additionally, a period in excess of twelve months elapsed without all the papers in the review application having been filed, with the result that clause 11.2.7 also became operative.

[2] This led to the applicant having initiated the present application in which it sought orders reviving its review application and condoning the late delivery of the record, the granting of which relief was opposed by the first respondent.

Background

[3] On 16 February 2018 a default award was granted in favour of the first respondent pursuant to the arbitration of his dispute which had taken place on 12 February 2018. The award provided,

> *'8. The dismissal of the Applicant constitutes a substantively unfair dismissal.*
> *9. The Respondent, Supercare Services Group (Pty) Ltd, is ordered to reinstate the Applicant, Bhekani John Nxulamo, in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal, and to pay his arrear salary in the amount of R14 000.00 (fourteen thousand rand), less any deductions authorized by law, calculated in paragraph 7 above, within fourteen days of having been advised of this award.*
> *10. The reinstatement in paragraph 9 is to operate with retrospective effect from 1 November 2017.*

11. The applicant is to tender his services to the employer within 7 days of being notified of this award.'

[4] Having alleged that it became aware of the default award on 5 April 2018, the applicant applied for the rescission thereof on 20 April 2018. The first respondent opposed such application, dealt with by the third respondent on the basis of the parties' respective affidavits together with the first respondent's oral submissions, the applicant not having attended the hearing. On 16 May 2018 he issued a ruling in terms of which the applicant's application for the rescission of the default award was refused.

[5] Approximately two and a half years later, on 20 January 2021, the applicant initiated its review application. In view of the delay in question, its application was accompanied by a condonation application in which it explained that it had only become aware of the rescission ruling on 13 August 2020.

[6] On 17 March 2021 the second respondent delivered one compact disc containing a mechanical recording and a bundle of documents to this court under cover of a Notice in terms of R7A(3). Although the court file contains a Notice in terms of R7A(5) issued on 18 March 2021 nothing in the court file evinced the transmission of such notice to the applicant. On the applicant's own version it nonetheless became aware of the availability of the record which had been made available by the second respondent on 19 March 2021. Upon its subsequent consideration of the mechanical recording which had been provided, it became apparent to the applicant's attorney that that which had been furnished was wholly unrelated to the arbitration proceedings between the applicant and the first respondent.

[7] This led the applicant to having made a number of enquiries with the second respondent concerning the provision of the correct recording. The first of such enquiries was an email transmitted to the second respondent on 6 April 2021. After an exchange of correspondence which concluded on 4 May 2021, a recording relating to the correct arbitration proceedings was obtained and delivered to this court. A Notice in terms of R7A(5) was duly issued on 11 May 2021 in terms of which

the applicant was advised that one compact disc containing a mechanical recording had been received from the second respondent in terms of R7A(3).

[8] The applicant made arrangements for the transcription of such recording which transcription was completed on 21 June 2021. It subsequently transpired that the recording was that of the default arbitration proceedings itself, rather than the recording of the rescission application hearing. The applicant did not deem the transcription of those proceedings relevant for the purposes of its review application.

[9] Approximately one year later on 19 May 2022, not then having delivered any record at all, the applicant delivered its Notice in terms of R7A(8)(b) in which it evinced its intention to stand by its Notice of Motion and founding affidavit. Notwithstanding that the applicant had not delivered the record prior to having delivered its Notice in terms of R7A(8)(b), the first respondent delivered his answering affidavit. The applicant subsequently delivered its replying affidavit.

[10] When the applicant's review application came before this court on 8 February 2023 this court drew the parties' attention to the fact that no record had ever been delivered. In the circumstances of the application then having been deemed to have been withdrawn and to have lapsed in terms of clauses 11.2.3 and 11.2.7 of the Practice Manual respectively, the application was struck from the roll.

[11] Some five months later, on 4 July 2023, the applicant initiated its revival application. Albeit that the applicant indicated in its application that the record would be delivered contemporaneously with its application for the reinstatment of its review application, it took the applicant a further six weeks to do so when, on 24 August 2023 it delivered its Notice in terms of R7A(6) under cover of which both the documentary portion of the record which had been made available to it in March 2021, as well as the transcript of the arbitration proceedings which had been completed in June 2021 were delivered.

Analysis

[12] As a point of departure the applicant suggested that the time period for the delivery of the record had not yet commenced, given that no Notice in terms of R7A(5) had been issued by this court. This proposition was unsustainable.

[13] Although it was not evident that the first of such notices dated 18 March 2021 had been transmitted to the applicant, this was not true of the second, dated 11 May 2021. On the applicant's own version, the second respondent's *'notice of further filing'* was *'followed by a Rule 7A(5) Notice on 11 May 2021'*. Moreover, the copy of such notice contained in the court file evinced proof of complete transmission thereof to the applicant's attorney's telefax number on 13 May 2021.

[14] This being the case, the applicant was notified by this court that the record which was subsequently relied upon by it was available by 13 May 2021 and the time period prescribed for the delivery thereof commenced, at the latest, on that date. Concomitantly the latest date on which the applicant had timeously to deliver the record was on 6 August 2021. As this was not done, the provisions of clause 11.2.3 of the Practice Manual became operative.

[15] Additionally, having instituted the review application on 20 January 2021, all the documents necessary for the prosecution of its review were not delivered within a period of twelve months. Distinct from the issues relating to the record in the review proceedings, the applicant's replying affidavit was only delivered on 22 June 2022. The provisions of clause 11.2.7 of the Practice Manual accordingly took effect on 19 January 2021.

[16] In the circumstances, it is clear that there was indeed a need on the part of the applicant to have initiated its reinstatement application. It is trite that such an application is akin to an application for condonation, and that the usual factors relevant to such an application are apposite.

[17] The delivery of the record has been determined to have been required to have been effected by not later than 6 August 2021. Although the applicant did not itself calculate the extent of the delay in the delivery thereof, in view of this having ultimately taken place on 24 August 2023, the extent of the delay was a little more than two years. Undoubtedly, the period of delay is excessive.

[18] It is difficult to discern from the reasons provided by the applicant the actual cause for the delay, save that it may be inferred that the applicant appears to have formed the view that the delivery of any record was wholly unnecessary.

[19] Having experienced the difficulties explained above in relation to obtaining a transcript of the hearing of the rescission application, and having been furnished with the mechanical recording of only the arbitration proceedings, it determined that such transcript was unnecessary for the purposes of its review. As that transcript was made available to it on 21 June 2021, the failure on its part then to have delivered the documentary portion of the record was wholly unexplained.

[20] The only mention made by the applicant in its founding affidavit of the documentary portion of the record was with reference to that portion of the record which the second respondent had made available at the outset,

> *'A proper consideration of the Applicant's Application for Review against the aforementioned Notice will reveal that from the aforementioned list, the Rescission Ruling dated 16 May 2018; Default Award dated 16 February 2018; and Rescission Application dated 10 April 2018 had already been included as annexures to it.'*

[21] Although not expressly articulated, this court presumes that the applicant intended to infer that by virtue of it having already annexed certain of the documents which formed part of the record to its founding affidavit in its review application, it was of the view that to deliver the self-same documents as a part of the record would have constituted unnecessary repetition. Had the documents which were annexed to its founding affidavit in the review application constituted an exact duplication of the documentary portion of the record its presumed belief, however erroneous, may have constituted an understandable reason for its failure. This was not, however, the case.

[22] The documents annexed to the applicant's founding affidavit included two documents which were not part of the record: a statement which was attributed to

the first respondent, and the record of the disciplinary enquiry. The arbitration award was one issued in default of any appearance on behalf of the applicant and consequently in the absence of any evidence having been introduced on its behalf. The founding affidavit in the rescission application included neither document as an annexure thereto. Accordingly, not only were documents included as annexures to the founding affidavit in the applicant's review application which were not part of the record, but a document furnished by the second respondent as a part of the record which was crucial to the determination of the applicant's review application was not annexed thereto. This was the affidavit delivered by the first respondent in opposition to the applicant's rescission application, termed his *'replication affidavit'*. Noteworthy is the fact that the applicant in its application for condonation for the late delivery of its review application had alleged that it had been the sourcing of the outstanding documentation relating to the rescission application, in particular *'the opposing affidavit to the rescission application'* which had contributed to the delay in having initiated its review application.

[23] In the circumstances, if the applicant was of the view that the documents annexed to its founding affidavit sufficed to have constituted the record, and there had accordingly been no need to deliver the record provided to it by the second respondent, this view would have been both unreasonable and misplaced.

[24] The issue of the failure on the part of the applicant to have delivered the record was drawn to the applicant's attention 8 February 2023 on which date the review application was struck from the roll, the order having expressly dealt with the reasons therefor. Notwithstanding, it took the applicant a further six and a half months to do so, the delay in respect of which was wholly unexplained.

[25] The inadequacy of the applicant's explanation concerning its failure to have delivered the record timeously is relevant also to its failure to have ensured that all the necessary papers were filed within a period of twelve months from the date on which the application had been launched, on 20 January 2021, in terms of clause 11.2.7 of the Practice Manual.

[26] That portion of the record which the applicant eventually delivered was available to it by 19 March 2021. Whatever issues arose concerning the mechanical recordings, the applicant ultimately resolved that this was unnecessary for the prosecution of its review application, evinced by the delivery of its Notice in terms of R7A(8)(b) on 20 May 2022. A period of more than one year had by then elapsed from the date on which it initiated its review application to the delivery of that notice. Save for the explanation provided concerning the attempts made by it to obtain the relevant mechanical recordings at the outset, which attempts terminated on 21 June 2021, wholly unexplained was the cause of the further delay in the delivery of its Notice in terms of R7A(8)(b), effected almost a year after the transcript which the applicant ultimately deemed to have been unnecessary had been provided to it.

[27] In its reinstatement application, the applicant was required to set forth facts which, if established in due course, would demonstrate that it had some prospects of success in its review application. In amplification of its assertion that it had excellent prospects of success, the applicant dealt only with the acts of misconduct which the first respondent was alleged to have committed and which had resulted in his dismissal, which was not the issue which had been required to be addressed. As the applicant's review application concerned the third respondent's ruling refusing rescission of the default award and was accompanied by an application for condonation, the applicant was required to deal with its prospects of success in its condonation application together with the basis upon which it asserted the rescission ruling fell to be reviewed and set aside. Neither of these issues were addressed at all.

[28] It was the applicant's further assertion that,

> *'… it would be grossly unjust in these circumstances to have to reinstate and compensate a former employee who on his own version conceded that he had misappropriated client's property and received remuneration, therefore.'*

[29] Its allegation that the first respondent had, by his own admission, been guilty of misconduct was predicated on the statement attributed to the first respondent annexed to its founding affidavit in the review application. Its subsequent denial of

the first respondent's assertion that no such evidence had been tendered at the arbitration was self-evidently incorrect, given that a default award had been issued. The first respondent, on the other hand, asserted that the delay was prejudicial to him, having been wholly inimical to the expeditious resolution of labour disputes.

[30] The applicant's expressed concerns relating to the prejudice it alleged it would suffer in the event of the refusal of the relief ought, as a matter of direct correlation, to have been demonstrable by reference to evidence of the applicant having treated the dispute as having been of some importance. This was not, however, objectively borne out by the manner in which it dealt with the first respondent's dispute and subsequently prosecuted its review application:

- Having applied for the rescission of the default award on 20 April 2018, it alleged in its application for condonation for the late delivery of its review application that it became aware of the rescission ruling on 13 August 2020. If this is correct, then wholly unexplained in that application were the steps, if any, which had been taken by it in the intervening period in which the outcome of its rescission application was awaited; a period in excess of two years.
- Having become aware of the outcome of its rescission application, a further period of some five months elapsed before it initiated its review application.
- The record upon which it ultimately relied was made available to it on 19 March 2021, but in the absence of delivery thereof, it took the applicant until 20 May 2022 to deliver its Notice in terms of R7A(8)(b).
- The particularity of the applicant's various omissions, as well as the need on its part to deliver a record and to initiate a reinstatement application was made known to it on 8 February 2023, yet such an application was not initiated until 4 July 2023, and the record was not delivered until 24 August 2023.

[31] It was incumbent upon the applicant to demonstrate that the interests of justice would be served by the exercise of this court's discretion in favour of reinstating its review application and granting it condonation for the late delivery of

the record. Not only did it fail to do so, but it is evident that its actions, both historically and in the prosecution of its review, were not those of a diligent litigant. The delay in the delivery of the record was excessive and largely inexplicable, whilst the review application as a whole was beset with long periods of unexplained inactivity. The applicant failed to address its prospects of success in either its condonation or its review applications. Whatever prejudice may be sustained by the applicant as a result of the refusal on the part of this court to reinstate the review application is, in the circumstances of the matter, insufficient a reason to grant the applicant the relief sought by it. The application will accordingly be dismissed.

Costs

[32] The first respondent requested that the applicant be ordered to pay his costs. As he, as an unemployed individual, was obliged to incur legal costs in opposing the application, this court can conceive of no reason why he ought not to be entitled to recover such expenditure.

Order

1. The application to revive the review application under D13/2021 is dismissed.

2. The applicant is ordered to pay the first respondent's costs of opposition, the scale, where applicable, to be Scale B.

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

Appearances

Applicant:
Mr J Schabort, MacGregor Erasmus Attorneys Inc

First Respondent:

Mr M Nonyongo, M P Nonyongo Attorneys