IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1398/18

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

LINDIWE KHUMALO *N.O.* **Second Respondent**

IMATU obo PETER MABONE **Third Respondent**

Heard: **Considered on the papers**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 30 May 2023**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this application, the applicant seeks an order reinstating the review application which was deemed withdrawn by virtue of the provisions of paragraph 11.2.3 of the Practice Manual of this Court. The applicant further

seeks leave to file the record of arbitration proceedings. The application is opposed by the third respondent.

Background:

[2] In the main review application, the applicant seeks an order reviewing and setting aside the arbitration award under case number GPD 041703 dated 15 May 2018 issued by the second respondent (Arbitrator) acting under the auspices of the first respondent, the South African Local Government Bargaining Council (SALGBC).

[3] In the award, the Arbitrator concluded that the dismissal of Mr Peter Mabone (Mabone), a member of IMATU, on allegations of sexual harassment, was procedurally and substantively unfair. The Arbitrator further ordered retrospective reinstatement of Mabone, together with back-pay equivalent to 13 months' remuneration.

The application to reinstate the review and evaluation;

[4] Under the provisions of paragraph 11.2.2 of the Practice Manual of this Court read with 7A(6) of the Rules of this Court, an applicant is obliged to file the record of arbitration proceedings within 60 days from the date that the Registrar of the Court issues a Rule 7A (5) Notice. In the event that the applicant is unable to comply with the 60-day period, paragraph 11.2.3 of the Practice Manual provides that the review application shall be deemed to have been withdrawn, unless the applicant had sought consent from the opponent for an extension of the timeframes, and where consent is refused, the applicant has approached the Judge President of this Court on application for the extension of the timeframes. Even more apposite to the facts of this case is paragraph 11.2.4 of the Practice Manual, which obliges a party in circumstances where the record is of poor quality for whatever reason that makes it unusable, to approach the Judge President for directives in respect of the further conduct of the review proceedings.

[5] In an application to reinstate a review deemed withdrawn, the applicant must demonstrate *good cause*[1]. This is so in that such applications are akin to seeking condonation for the failure to comply with stipulated time-lines. When considering whether *good cause* has been demonstrated, the court exercises a discretion having taken account of *inter alia* the degree of lateness, the explanation therefor, the prospects of success and the importance of the case[2].

[6] The arbitration award having been issued on 15 May 2018, the applicant served and filed its review application on 16 July 2018. On 13 August 2018, the Registrar of this Court issued a notice in terms of rule 7A(5) of the Rules of this Court. This implies that the transcribed record ought to have been filed and served on 13 November 2018.

[7] The applicant contends that the delay in filing and serving the transcribed record is about 220 days. This is in circumstances where the record was only served on the third respondent, and not yet filed with the Registrar of the Court. Clearly in the absence of such filing on the Registrar, one cannot identify the date of delivery for the purposes of compliance with the provisions of Rule 7A(6) of the Rules of this Court. The mere fact that the applicant in its Notice of Motion still seeks leave to file the record fortifies the difficulties pointed out in determining the extent of the delay.

[8] The applicant however attributes the continued delays in the yet to be filed record on difficulties in securing a complete copy since it was uplifted on 17 August 2018. It contends that upon uplifting the record, it was discovered that it did not include the digital recordings of the proceedings and that the SALGBC was informed of the defects on the same date.

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[1] *South African Police Services v Coericius and others* [2023] 1 BLLR 28 (LAC) at para 10.
[2] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10; Clause 11.2.7 of the Practice Manual also provides;

> 'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation of hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should be archived or be removed from the archive.'

[9] The applicant contends that it followed up on the matter on 21 August 2018, and between 6 and 13 September 2018. On 13 September 2018, the SALGBC confirmed that it would make available two further compact discs. On 28 September 2018, the Registrar of the Court issued a further rule 7A(5) notice, which was uplifted on 17 October 2018, which the applicant took to transcribers.

[10] On 1 November 2018, the applicant received certain portions of the transcribed record and was informed by the transcribers that certain files in the CDs were corrupted, which meant that the evidence of certain witnesses could not be transcribed, and also that certain portions were inaudible. On the same date, the applicant had advised the SALGBC of the difficulties with the digital recordings. On 7 and 21 November 2018, the applicant made further enquiries with the SALGBC regarding the missing portions of the record.

[11] On 21 November 2018, the applicant's attorneys of record attended at the SALGBC to advise of the defects with the record, and requested a hearing for the reconstruction of the record. On 27 November 2018, the applicant made further enquiries regarding the scheduling of the reconstruction hearing.

[12] On 5 December 2018, the SALGBC enrolled the matter for a reconstruction hearing for 26 February 2019. On the hearing date, despite the parties being in attendance, the Arbitrator failed to make an appearance. It was at that hearing that a union official representing the third respondent had indicated that he was in possession of an alternative digital copy of the record of proceedings, which could be filed for the purposes of compliance with rule 7A(6) of the Rules of this Court.

[13] On 27 February 2019, the third respondent made a written undertaking that the digital record would be filed with the Registrar of the Court and further the applicant was placed on terms to have the record transcribed by no later than 13 March 2019. On the same date, the Registrar of the Court issued a further notice in terms of rule 7A(5), which the applicant uplifted on 15 March 2019. The transcribed record became available on 23 April 2019.

[14] The applicant further attributes delays to the fact that it had on 13 May 2019, addressed correspondence to the third respondent, seeking confirmation that the transcribed record was a true reflection of the arbitration proceedings. It was further contended that the parties had between 21 May and 3 June 2019 held telephonic discussions regarding the status of the transcribed record; and that it was only on 3 June 2019 that the third respondent had confirmed the correctness of the record. It is alleged that the third respondent had further made an undertaking that it would not oppose the applicant's application to reinstate the review application. This latter contention is nonetheless odd in that it is not for the parties to agree on whether a review ought to be reinstated or not. That is a matter that goes to the heart of the jurisdiction of the Court and it is thus of no consequence whether the third respondent had agreed or not to oppose the application.

[15] The applicant further contends that on 6 June 2019, it was discovered that the record was still incomplete, and the third respondent on 10 June 2019 undertook to provide the identified outstanding evidence. On 13 June 2019, the applicant sought the consent of the third respondent for the remittal of the dispute to the SALGBC. On 1 July 2019, the third respondent made a further undertaking that it would provide certain outstanding evidence.

[16] Between 17 to 26 July 2019, there were further discussions between the parties regarding the remittal of the dispute to the SALGBC and further in regards to the missing portions of the record. On 16 August 2019, the parties agreed that the third respondent would make available the outstanding portions of the record. On 19 August 2019, the outstanding portions of the record were collected from the third respondent's attorneys of record and was accordingly dispatched to be transcribed.

[17] The basis of opposing the application to reinstate the review by the third respondent is that the applicant failed to invoke the pre-emptive procedures provided for in terms of paragraph 11.2.3 and 11.2.4 of the Practice Manual. It was submitted that once the applicant had become aware that the time frames in filing the record stipulated in terms of paragraph 11.2.2 would not be met, it omitted to approach the third respondent to obtain an extension or to

approach the Judge President of this Court on application to seek the said extension. The third respondent further contended that significant aspects of the delay remain unexplained and by implication, the applicant has failed to demonstrate good cause for the delay.

[18] As already indicated, to the extent that the record is yet to be filed with the Registrar of this Court, one cannot speak of the extent of the delay, other than pointing out that such a delay is indeed on-going. This is in circumstances where even on the applicant's own version, it had been in possession of at least the reconstructed record as agreed to between the parties, since 3 June 2019.

[19] Other than the fact that the record is yet to be filed with the Registrar, amidst all the problems that may have been encountered in securing a complete record, the applicant has not, as correctly pointed out, made any attempts to invoke the provisions of paragraph 11.2.3 or 11.2.4 of the Practice Manual by requesting an extension from either the third respondent or the Judge President of this Court. This is significant in view of what was stated in *Samuels v Old Mutual Bank*[3] that the provisions of the Practice Manual are binding on the parties. These provisions are specifically meant to assist parties that are unable to secure a record on time for the purposes of compliance with the 60 day time frames, and if these are purposely not utilised, I see no reason why at a belated stage, the Court must come to their assistance.

[20] It is trite principle that a party seeking condonation must do so immediately after the need to do so arise. In this case, the 60-day period lapsed as far back as 13 November 2018, after the Registrar of this Court issued a notice in terms of rule 7A(5) of the Rules of this Court. The application to reinstate was only filed and served in October 2019, almost a year after the review application was deemed withdrawn. All that the applicant had done in explaining the continuous delays, is to merely recite events from 13 November 2018, without saying much about why the pre-emptive provisions were not utilised, and further the reason why the record has yet to

[3] [2017] 7 BLLR 681 (LAC) at para 15.

be filed with the Registrar despite it being available since June 2019. In the end, the applicant has not provided a full, detailed and accurate account for the extremely excessive continuous delays, and one cannot therefore speak of this application having been made *bona fide*.

[21] The basis of questioning the applicant's *bona fides* arises from the continuous delays in that even if the application were to be granted, it still needed to comply with Rules 7A(6) and 7A(8) of the Rules of this Court. This means that an answering affidavit still need to be filed before a Rule 7A(10) can be filed. These unnecessary delays and legal approach of the applicant of seeking leave to file the record without having done so in the first place, hardly contributes to any expeditious resolution of disputes, and cannot be countenanced.

[22] The filing of a transcribed record in compliance with the Rules is the basis upon which condonation can be sought for the purposes of reinstating a review application. To reiterate, a party cannot bring an application for condonation in respect of a matter which is not before the Court. A Notice of Motion together with an affidavit as in this case, is not a complete application for the purposes of a review. It follows that in the absence of the record before the Court, there is nothing to reinstate before it. It further follows that there is no basis upon which other factors demonstrating good cause must be determined.

[23] The third respondents seek a costs order and I agree that the applicant should be mulcted with such an order. This is so on the basis that as already indicated, this application lacks *bona fides* since there does not seem to have been any inclination its part to ensure that the review application is timeously and properly before the Court for final determination, let alone seek the assistance of this Court when it was apparent as far back as 17 August 2017 that there were difficulties with the record. Mabone was dismissed in April 2017 and the review application is nowhere near ripe for a hearing, and the blame lies squarely at the door of the applicant in the light of the delays pointed out in this judgment. It is against these factors that the applicant should be burdened with the costs of this application, which in any event was

doomed in the absence of compliance with Rule 7A(6) of the Rules despite a reconstructed record being available.

[24] Accordingly, the following order is made:

Order:

1. The applicant's application to reinstate the review application is dismissed with costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:	Salijee Govender van Der Merwe Incorporated, (Heads of argument prepared by Adv. E. Nwedo).
For the Third Respondent:	Mathopo, Moshimane, Mulangaphuma Incorporated Trading as DM5 Incorporated (Heads of argument prepared by Mr L. Ntlantsana)