



**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not Reportable

Case no: PR 04/2015

In the matter between:

**XOLISWA MBEMA**

**Applicant**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First respondent**

**ANTHONY MARE N.O**

**Second Respondent**

**SA POST OFFICE**

**Third Respondent**

**Heard: 30 November 2017**

**Delivered: 23 August 2018**

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**JUDGMENT:**

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**TLHOTLHALEMAJE, J.**

- [1] The applicant, a member of Communications Workers Union (CWU), seeks an order reinstating her review application, which was deemed to have been withdrawn following the late filing of the transcribed record of arbitration proceedings.
- [2] The common cause facts are that the applicant was dismissed on 18 December 2013. Having referred an alleged unfair dismissal dispute, the matter came before the second respondent (Commissioner) for arbitration, and an award in terms of which her claim of unfair dismissal was dismissed was issued on 16 October 2014. A review application was launched on 25 January 2015. On 3 February 2015, the CCMA served a copy of Notice of

Compliance in terms of Rule 7A(3) of the Court's Rules on CWU, and was accordingly advised by the office of the Registrar of this Court that the record was available.

- [3] CWU conceded that that it failed to comply with the provisions of clause 11.2.2 of the Practice Manual of this Court in that it did not obtain the consent of the third respondent upon having failed to file the transcribed record within 60 days.
- [4] CWU explanation for the failure to file the transcribed record timeously is averred to have been attributable to the CCMA having filed an incomplete record. Urgent correspondence was then sent to the CCMA on 14 and 25 May 2015, and also on 9 July 2015, in which the CCMA was reminded of the incomplete record. It was only on 13 August 2015 that the full record was ultimately made available.
- [5] The third respondent in opposing the application averred the following (as per the answering affidavit of Setimela Jerry Selala);

5.1 The record having been made available on 1 March 2015, its attorneys of record had on 13 April 2015, enquired from the Court whether it had been filed and was informed that it had still not been collected for transcribing. On 15 April 2015, correspondence was addressed to CWU confirming that the record was available and that in terms of the provisions of the Practice Manual, the record should have been collected within 7 days of its receipt by the Court. CWU was reminded that failure to comply with the provisions of the Practice Manual could result in the review application being deemed to have been withdrawn. No response was received from CWU.

5.2 On 14 May 2015, CWU advised the third respondent's attorneys of record that the record was incomplete and a request had been made to the CCMA to furnish the completed record. Similar correspondence was received on 9 July 2015. On 13 August 2015, the Registrar of the Court had sent correspondence to the parties advising that a further

disc of the proceedings was made available, and CWU was directed to make copies of the transcription and to provide proof of service.

5.3 Between 14 May 2015 and 1 March 2017, no further correspondence was received from CWU in regard to the matter. It was only on 1 March 2017 that CWU had sent correspondence to the third respondent's attorneys of record in which it was stated that even though the record was received, it was unhelpful as it was inaudible, and that the evidence of one of the witnesses had not been interpreted from isiXhosa to English.

5.4 It was only on 25 April 2017 that CWU had sent correspondence to the Judge President of the Court seeking a directive concerning the poor quality of the record.

[6] The application to reinstate the review application was launched on 31 May 2017 which was promptly opposed. CWU did not file a replying affidavit.

Evaluation:

[7] Rule 7A(6) of the Rules of this Court provides that applicants in a review application must furnish the Registrar and each of the other parties with a copy of the record or portion of the record. Applicants are required to make available copies of such portions of the record as may be necessary for the purposes of the review. The service and filing of the record in review applications is provided for in clause 11.2 of the Court's 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 on 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."

- [8] In this case, it is common cause that the transcribed record of arbitration proceeding was filed way out of the prescribed 60 day period, if it is accepted that the full record was made available as from August 2015. The 60 days period expired on 6 November 2015, and it took CWU until 25 April 2017 to seek a directive from the Judge President of this Court. It was further common cause that no request was made for an extension from the third respondent. Even then, it is not disputed that such the request to the Judge President was by way of an application, which the third respondent had objected to as being ill-conceived. Upon that objection, the request was subsequently abandoned, and this application was launched on 31 May 2017. In essence, there was never a request made to the Judge President at any stage.
- [9] Other than correspondence sent to the CCMA by CWU between May and July 2015, it does not appear that any further steps were taken by the Union until April 2017 when the aborted directive was sought from the Judge President. Despite Mr Mashego's averments in the founding affidavit that attempts were made to reconstruct the record, and which attempts were frustrated by the first and second respondents, it is not indicated in the affidavit as to when those attempts were made and how these were frustrated by the first and second respondents.
- [10] The submissions made on behalf of the applicant that the necessary steps were taken at all times to diligently pursue the review application cannot

therefore be correct. Once a review application is deemed withdrawn by virtue of the provisions of clause 11.2.3 of the Practice Manual has a binding effect<sup>1</sup>, there is an onerous burden on the applicant to convince the Court why that application ought to be reinstated.

- [11] In this case, and as correctly pointed out on behalf of the third respondent, there was a delay of about 22 months before any steps were taken by CWU. That delay is hardly explained in the founding affidavit, and ordinarily, this should be the end of the enquiry. For the sake of completeness however, I will proceed to deal with other considerations in this application.
- [12] Mr Mashego's averments in regards to the applicant's prospects on the merits of her review application are equally less than convincing, as all that is indicated is that there are good grounds in law to 'substantiate' the review application. Such a bare averment hardly takes this matter any further. On the other hand, the third respondent's contentions were that the applicant's prospects were exceedingly poor based on the fact that she was dismissed after being found guilty of charges related to fraud in respect of her wilful and unlawful misrepresentation of facts when performing a card issue transaction on a client's account without his knowledge or authority. The applicant was also charged with theft in that she had wilfully and unlawfully performed a withdrawal transaction and removed an amount of R3 200.00 belonging to a client without authorisation. Other than these allegations, which the Commissioner had found to have been proven, reference was also made to

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<sup>1</sup> *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC); (2017) 38 ILJ 1790 (LAC) at paras 14-15, where it was held that;

"The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, inter alia, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standard of conduct expected of those who practice and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution.

The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore are binding. The Labour Court's discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the court."

the fact that the applicant had in her testimony, conceded that she had indeed made the transaction.

[13] Significantly, there was no replying affidavit filed by either Mr Mashego or the applicant. Equally so, the applicant did not even bother to file a confirmatory affidavit to Mr Mashego's founding affidavit. Nowhere in the founding affidavit was it indicated to the court that the review application ought to be incorporated into this application, and nor was any reference made to the review application in support of any averments. In these circumstances, I fail to appreciate how this Court can come to any conclusion that the applicant has established some prospects of success, even on a *prima facie* basis.

[14] It was further submitted on behalf of the applicant that she would suffer substantial prejudice should the review application not be reinstated. However, it is my view that the alleged prejudice to the applicant is of her own or the Union's making. In my view, in circumstances where the applicant or CWU had not acted diligently in the prosecution of the review application, and/or where no explanation was proffered for the failure to act with any haste, and/or where the applicant has not demonstrated any prospects of success on the merits of the review application, it is more the third respondent that stands to suffer substantial prejudice if the review application was to be reinstated.

[15] In conclusion, no case has been made out as to why the review application deemed to have been withdrawn as a consequence of the applicant's lack of diligence should be reinstated. I have further had regard to the requirements of law and fairness and conclude that a cost order is not warranted in this case.

[16] In the circumstances, the following order is deemed appropriate;

Order:

1. The application to reinstate the review application deemed to have been withdrawn by virtue of the provisions of Clause 11.2.3 of this Court's Practice Manual is dismissed.

2. There is no order as to costs

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E. Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

**APPEARANCES:**

For the Applicant:

Mr. B Mashego of  
Communications Workers  
Union

For the Third Respondent:

F Le Roux

Instructed by:

Goldberg & De Villiers  
Incorporated

LABOUR COURT