

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C679/17

In the matter between:

THE NATIONAL DEPARTMENT OF LABOUR**Applicant**

And

**THE PUBLIC SERVANTS ASSOCIATION OF
SOUTH AFRICA OBO ABEGAIL BOBANI****First Respondent****GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL****Second Respondent****CM BENNET N.O.****Third Respondent****Date heard: 1 August 2019****Delivered: 12 November 2019**

JUDGMENT

RABKIN-NAICKER, J

- [1] On the 24 August 2018, I ordered that the review application under the above case number was deemed to have been withdrawn and gave leave to the applicant to apply to resuscitate the review. The notice of application in the matter before me seeks the following relief:
- “1. That the Applicant’s review application under case number 679/17 is and be hereby reinstated and/or revived from the date of this order.
 2. Condoning the Applicant’s failure to file the balance of the record in accordance with the Labour Court Rules and the Labour Court Practice Manual.
 3. Directing that the Applicant file and served the balance of the record in accordance with the Rules of this Court and the Practice Manual.”
- [2] The first respondent opposes the application on the basis that the Department has failed to provide any reasonable explanation for the delay in prosecuting the review application.
- [3] The explanation for the delay in filing the record in this matter is a rather tortuous one to travail. For the purposes of this judgment, I need only deal in detail with the said explanation or lack thereof, for the period January 25 2018 to June 7 2018. In order to do so it is necessary to record the averments made in the founding papers as follows:
- “36.9 On or about 25 January 2018, the attorneys on behalf of Bobani enquired from the Applicant’s attorneys about the balance of the record and the transcript.
- 36.10 The Applicant accepts that at the time when the enquiry referred to *supra*, was made, it still awaits the balance of the record.
- 36.11 The Applicant also acknowledge that, ideally, it should have continued with the written correspondence wherein it should have informed Bobani that it still awaits the balance of the record. This was, however, not done.
- 36.12 However, in attempts to fully comply with the obligations to file the record, I understand that the Applicant’s sought to procure the balance of the record from the transcribers.

36.13 To the above end, the attorneys on behalf of the Applicant telephonically and otherwise in or during January to April 2018 (including May 2018) contacted the transcribers about the balance of the record. Despite the enquiries about the balance, the transcribers did not produce the balance, until June 2018.

36.14 The Applicant accepts that in retrospect the attorneys should have communicated more regularly with Bobani's attorneys about their attempts to obtain the balance of the record. This was not done.

36.15 The Applicant also accepts that when the balance was not delivered by mid-January 2018, this might have (erroneously) created an impression that the balance would not be produced.

36.16 I confirm that the balance of the record was only filed on the 7th of June 2018 (almost four to five months after the other portion of the record was filed on or about 20 December 2017)."

- [4] It must be borne in mind that the applicant received a notice in terms of Rule 7A(5) from the Labour Court with a CD to be transcribed for the purposes of the review on the 27 November 2017. It was sent to the transcribers on the next day. The complete record thus took some seven months to be delivered.
- [5] The applicant has provided no supporting evidence in relation to the averments above i.e. copies of case notes as to when the transcribers were contacted. There is no confirmatory affidavit from the transcribers in relation to calls made to them. There are no specific dates given as to when the matter was followed up. There is a standard confirmatory affidavit by the state attorney responsible for the matter which takes its case no further.
- [6] In addition to my observations above, there are further no averments as to any initiatives by the applicant department to follow up on the progress of its review application. Yet the founding affidavit claims that: "This matter is of great importance to the Applicant and as such, would to see it to its conclusion." (sic)
- [7] The award sought to be set aside in the main application was made after a referral to arbitration of an unfair labour practice dispute. It reads as follows:

“The first respondent committed unfair labour practices by suspending applicant without pay and further by demoting her. In addition, it acted in breach of its own procedures in the way it administered the hearing and/or implemented the resultant sanctions.

Applicant is seeking reinstatement to her appointed position with retrospective payment. That is so ordered.

Applicant is to return to her position as Deputy Director, Human Resource Management, with effect from 1 October 2017.

The first respondent is ordered to pay applicant, by no later than 31 October 2017, the difference in salary between that which she has been paid and that which she would have been paid had she not been demoted, which sanction is hereby overturned. This calculation to an amount of R594 697,00 (Five Hundred and Ninety Four Thousand, Six Hundred and Ninety Seven Rand); and

The above figure is calculated thus: Grade 12 salary of R806 061,00 less Grade 9 salary of R311 784,00 from 1 August 2016 to 31 March 2017, a period of 8 (eight) months plus Grade 12 salary of R864 903,00 less Grade 9 salary of R334 545,00 from 1 April 2017 to 30 September 2017, a period of 6 (six) months.

In addition, first respondent is ordered to pay applicant by no later than 31 October 2017, a monthly salary at level 12, an amount of R67 171, 75 (Sixty Seven thousand, One hundred and Seventy One Rand and Seventy Five Cents), in respect of the period of unpaid suspension, which sanction is overturned. This is calculated on the Grade 12 salary of R806 061 – divided by 12.

With these factors in mind, in addition, the back-pay awarded above, first respondent is ordered to pay applicant by no later than 31 October 2017, a solatium equivalent to two months salary at Grade 12, an amount of R144, 150,50 (One hundred and Forty Four Thousand, One Hundred and Fifty Rand and fifty Cents), (864 903,00 divided by 12 x 2)”

- [8] When I considered the application brought by the first respondent on August 24 2018, I indicated my displeasure with the Applicant's conduct of the matter by means of a punitive costs order. The first respondent has emphasized in its answering papers that the explanation for the excessive delay in delivering the record in this application, differs from that offered on behalf of the Department in the first application. Counsel for the applicant submitted that I should not deal with these contradictions as the matter was *res judicata*. I note that this cannot be correct given that I was concerned with an

application to deem the matter withdrawn in the first hearing, a different cause of action, and with a different remedy. However, it is not necessary for me to determine this application with regard to the alleged contradictions.

- [9] It is evident from all of the above that no reasonable explanation has been given for the excessive delay from the 25 January to the 7 June 2018 for the purposes of the granting of condonation in this matter. It is trite therefore that it is not necessary for me to consider the prospects of success on review in such a case.¹ Both the Department and the State Attorney were content to remain supine once the review was launched, despite attempts made on behalf of the first respondent to obtain the necessary record. Not only does this fly in the face of the principle of speedy resolution of disputes, the said conduct has manifestly prejudiced the first respondent. In these circumstances, the application must fail. This is a matter in which it is equitable to award costs to the successful party despite the ongoing relationship between the parties, given the conduct by the State. I therefore make the following order:

Order

1. The application for the revival of the review application under case number C67/2017 is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: C Tsegarie instructed by the State Attorney

First Respondent: Malcom Lyons & Brivik Inc

¹ See for example National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte H Theron Children's Home (2004) 25 ILJ 2195 (LAC) at para 23.