Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: **C495/2023**

In the matter between:

DEPARTMENT OF EDUCATION:
FREE STATE PROVINCE Applicant

and

SUID-AFRIKAANSE ONDERWYSERS UNIE (SAOU)
OBO B GREYVENSTEIN First Respondent

D H SMITH *N.O.* Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL Third Respondent

Date of Set Down: 24 June 2024
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment on 6 March 2025.

JUDGMENT

VAN VOORE AJ

1. The applicant is the Department of Education: Free State Province. The applicant launched an application to reinstate a review application deemed to have been withdrawn by virtue of the applicant failing to file a record within sixty (60) days of being notified by the registrar that the record has been received.

2. The reinstatement application was launched on 8 March 2024. The reinstatement application is opposed by the Suid-Afrikaanse Onderwysers Unie, the first respondent.

3. In terms of the Practice Manual the applicant in a review application is required to file a record of proceedings within 60 (sixty) days of the date on which the applicant is advised by the registrar that the record has been received.

4. The applicant launched a review application on 10 October 2023. The applicant contends that the reinstalment application was launched as a matter of caution. Notwithstanding this contention, the reinstatement application is premised on the basis that a record of proceedings in the review application ought to have been filed by 23 January 2024. A full record of proceedings was ultimately filed by 29 February 2024. In the circumstances, the matter falls to be dealt with on that basis that the review application is deemed to have been withdrawn.

5. On 24 October 2023 the representatives for the second and third respondents sent an electronic mail to the applicant's attorney and the first respondent providing them with a notice of compliance, notice to abide and record of proceedings. The electronic mail of 24 October 2023 also informed the applicant that the third respondent would make available the audio recordings of the arbitration proceedings. Prior to 24 October 2023 the applicant itself was not notified by the office of the registrar to uplift the record of proceedings.

6. The applicant's attorney became aware of the electronic mail correspondence of 24 October 2023 on 6 November 2023 and upon her return from leave. On that day, 6 November 2023, the applicant's attorney sought the assistance of the applicant's offices in Cape Town to uplift certain documents, including the record of proceedings.

7. The applicant's attorney took various steps between 7 November 2023 up to and including 29 February 2024 to file a complete record of the arbitration proceedings. Those steps included the appointment of a transcription service to transcribe audio recordings.

8. The applicant delivered the first part of the record consisting of the referral form, the respondent's heads of argument, the applicant's bundle and the commissioner's handwritten notes to the first respondent on 15 November 2023. At that stage, 15 November 2023, the complete record was not yet filed.

9. On 24 January 2024 the applicant served the transcribed record on the first respondent. On 29 February 2024 the applicant served part 2 of the record and filed it with the office of the registrar on 12 March 2024.

10. The parts of the record were made available to the applicant in 'piecemeal fashion' and at different times. The applicant took steps to serve parts of the record as they became available to it.

11. It is not seriously disputed that there was some delay in the filing of a complete record of proceedings. The applicant, on the basis that it filed a transcribed record on 24 January 2024, contends that the extent of the delay is 1 day. The first respondent, on the basis that part 2 of the record, consisting of pre-arbitration minutes, was served on 29 February 2024, contends that the extent of the delay is some 40 days. Even on the basis that the extent of the delay is some 40 days, the applicant did indeed take certain steps to deliver such parts of the record as became available to it. This is not a matter in which the applicant

took no steps or inadequate steps in in pursuit of the review application. On the contrary, the applicant has recorded the various steps taken by it.

12. In ***Zono v Minister of Justice & Correctional Services*** 2020 (11) BLLR 1160 (LC) at paragraph 17 the court held:

> *"An application for reinstatement of a review application deemed to have been withdrawn is, in essence, an application for condonation. It is incumbent on the Applicant to show good course, why, in this case, the record of proceedings under review was not filed within the prescribed time limit. Condonation is not there nearly for the asking, nor are applications for condonation merely a formality (see NUMSA v Hillside Aluminum [2005] 6 BLLR 601(LC); Grootboom v National Prosecuting Authority & Another [2014] 1 BLLR (CC)). A party seeking condonation must make out a case for the indulgence sort and bears the onus to satisfy the Court that condonation should be granted".*

13. In ***South African Police Services v Coericius & Others*** [2023] 1 BLLR 28 (LAC) at paragraph 10 the Court held:

> **"***The Practice Manual, in clause 11.2.3 itself, does not address a mechanism to revive an application that has been 'deemed to be withdrawn'. However, in clause 11.2.7, where the failure to comply with those provisions results in the application being "… regarded as lapsed" that paragraph goes on to provide that the lapsing can be reversed if "good course is shown why the application should not be archived". No good reason exists to suppose the consequences of "deemed to be withdrawn" and "regarded as lapsed" should bear substantively different meanings. Both these provisions are contained in clause 11.2, both address related aspects of delay in the prosecution of a review application. Both forms of default must be capable of remediation by an application to reinstate."*

14. The applicant has provided a detailed and reasonable explanation for the delay in failing to comply with the provisions of the Practice Manual relevant to

the delivery of a record of proceedings. In part that delay is not due to any fault on the part of the applicant. The delay, though considerable, is not unduly long.

15. As contemplated in the ***MEC: Department of Health Eastern Cape Province v PHSDC & Others*** (PR 187/16) [ZALEPE 4 (7 February 2020)] an applicant in a reinstatement application is not required to demonstrate that it has '*excellent*' prospects of success.

16. In the review application the applicant seeks, *inter alia*, to review and set aside an arbitration award of the second respondent. That arbitration award relates, *inter alia*, to whether the Riebeeckstad Secondary School qualified to be regraded and the impact of such a regrading on the salary of the principal of the Riebeeckstad Secondary School. One of the central issues in the review application is the proper interpretation and application of the relevant collective agreement of the third respondent.

17. In the review application the applicant contends, *inter alia*, that in interpreting the relevant collective agreement, the second respondent deviated substantially from the evidence before him. The applicant's grounds of review include that the award of the second respondent does not reflect that the second respondent dealt with the evidence of either of the parties before him and that this discloses misconduct or a gross irregularity in the arbitration proceedings.

18. As noted above, it is not necessary at this stage for the applicant to establish that it has '*excellent*' prospects of success. On balance, at this stage it cannot be said that the applicant's review application is unmeritorious.

19. The issues to be determined in the review application are of significant importance to the applicant and the first respondent. Those issues include the proper grading or regrading of a public school. The applicant will suffer severe and irreparable prejudice if the review application is not reinstated.

20. Such prejudice as the first respondent will suffer if the review application is reinstated is outweighed by the prejudice that the applicant will suffer if the review application is not reinstated.

21. The first respondent contends that in the review application and the reinstatement application the Head of the Department of Education, Free State Province, should have been joined as a party. The first respondent further contends that the review application and the reinstatement application are defective on the basis of the non-joinder of the Head of the Department of Education, Free State Province.

22. It is not necessary for present purposes to consider and determine the alleged non-joinder as raised by the first respondent The issue as to the alleged non-joinder can properly be ventilated and determined in the review application.

Order

23. The application to reinstate the review application is granted.

24. There is no order as to costs.

VAN VOORE AJ
ACTING JUDGE OF THE LABOUR COURT
(In chambers)

Appearances:

For the Applicant	Adv Phakama State Attorney, Free State Province
For the Second and Third Respondents	Adv van der Westhuizen Instructed by Erasmus Inc.