Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Case no: P 79/13

In the matter between:

TRAYISHILE BUTANA	**Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
NALEDI BURWANA-BISIWE (*N.O.*)	**Second Respondent**
AMATHOLE DISRICT MUNCIPALITY	**Third Respondent**

Heard: 24 February 2016

Delivered: 26 February 2016

Summary: (Dismissal of review-non-compliance with practice manual-belated application for condonation – no grounds of review revealed on pleadings – on holistic consideration of relevant factors review application dismissed)

JUDGMENT

LAGRANGE J

Introduction

[1] In this matter, the applicant was a plumber working for the respondent municipality. On 17 June 2013 the second respondent, an arbitrator of the SALGBC found his dismissal was substantively and procedurally fair. She confirmed his dismissal effectively for not taking appropriate measures to safeguard vehicles under his control on two occasions.

[2] His original attorneys of record timeously launched a review application by 6 August 2013. A record of the proceedings was lodged by the bargaining Council and his attorneys of record were notified that the record could be uplifted for transcription on 14 August 2013. Although the applicant himself claims he was not aware of this notice, there is good reason to believe that his attorneys did receive it as the evidence shows that arrangements were made to have the record transcribed in September 2013. He was represented by those attorneys until the end of November 2013.

[3] For reasons which are not entirely clear his original attorney of record could no longer represent him at that stage and the matter was referred to another firm of attorneys, but they also declined to pursue the matter and the matter was then sent to his current attorney of record with Hendry first consulted on 27 February 2014. It appears that he did not have funds to pursue the matter at that point and his attorney undertook to approach the applicant's former union to see if they would finance the matter.

[4] However this was only done in June 2014 after his attorney had left the employment of the firm he was working with and had started to work for his own account in May. There is a delay of some four months between the time that his attorney took over his matter and before he acted upon it. The explanation provided was that in the course of leaving his former firm he was extremely busy winding up matters that were to remain with his former employer and starting his new practice. His attorney also contacted the applicant's legal insurance scheme but did not receive any response from them at that time.

[5] What appears to have jolted his attorney into action was the filing of the employer's application to dismiss the review application on 14 August 2014. On 28 August 2014 his attorney notified the third respondent's attorneys that the applicant wished to pursue his review application and asked them to consent to the withdrawal of the dismissal application for which the applicant tendered the wasted costs. The municipality was not willing to withdraw the application but was prepared to grant the applicant a short indulgence to file his opposing affidavit in the dismissal application.

[6] On 29 August 2014, the day after requesting the municipality to withdraw the dismissal application, the applicant's attorney contacted the transcription service and discovered for the first time that in fact the record had already been transcribed and paid for by the applicant's original attorneys. The applicant had never been billed for the transcription and it would appear that possibly this cost had been borne by his legal insurer. The applicant's attorney then followed up his previous correspondence with the municipality's attorneys on 2 September 2014 and conveyed the fact that the transcript was now ready to be filed and repeated the request to the municipality to withdraw the dismissal application. He also undertook to shortly file a supplementary affidavit. The municipality nevertheless confirmed that it would pursue the dismissal application.

[7] On 23 October 2014, the municipality filed its replying affidavit. In the replying affidavit, it was pointed out that the documentary exhibits still had to be filed and pertinently drew the applicant's attention to the provisions of the practice manual and his failure to file a supplementary affidavit in terms of rule 7A(8). The municipality also drew his attorney's attention to the requirements of the practice manual in terms of which a matter is deemed to have lapse if the record has not been filed within 12 months of review proceedings commencing.

[8] Although the applicant undertook to file his supplementary affidavit in 2014, for reasons which are unclear, this was only done barely a fortnight before this hearing in February 2016, without seeking any condonation for his inordinate delay in doing so. However, on 28 October 2014 he did file an application to condone the late filing of the transcribed record and

sought to reinstate the review application. As far as the court was aware this matter had not been enrolled for the hearing before me. However, it emerged that even though neither of the parties appeared to have received notices of set down, that the review application and the applicant's condonation application for the late filing of the record on 24 November 2015 and 2 December 2015 respectively had also in fact been set down for hearing on 24 February 2016.

[9] Clearly, the applicant failed to seek any indulgence from the court or from the respondents to extend the time period for filing a record and the time for taking such a step in terms of paragraph 11.2.3 of the practice manual has long passed. In terms of that provision, the application was deemed withdrawn in the absence of such indulgence. In terms of paragraph 16.1 of the practice manual, a matter is also archived if no further steps have been taken to prosecute a review application for a period of six months. A party that wishes to revive the matter must make an application on notice of motion in terms of paragraph 16.3 of the manual for the file to be retrieved.

[10] This the applicant only did after receiving the replying affidavit in the dismissal application. By that stage the transcript of the review application had been filed but not the bundle of documents, so the record was still not complete when the respondents filed their answering affidavit in the condonation application. The condonation application provides no new details to explain why the practice manual was not complied with, although *Mr Grobler* appearing for the applicant gamely suggested that in the past the court might have allowed the review application to proceed and that it took a while for parties to absorb the changes in practice. However, no explanation appears on the papers from the applicant's attorney why he was ignorant of the practice manual, or why no steps had been taken by him to acquaint himself with the rules and directives applicable in the Labour Court, which would be expected of a professional who is litigating in an unfamiliar forum, if indeed that was the case. At this juncture, it is perhaps appropriate to mention that to date, the reported judgements of this court show that the practice manual is considered a directive, which

parties are expected to comply with, and is not regarded a mere guideline.[1]

[11] It was correctly submitted by *Mr Grogan*, who appeared for the third respondent, that this would effectively dispose of the need to consider the applicant's condonation application to revive the review, especially in the light of the fact that the condonation application contained no new information which was not already canvassed in the dismissal application.

[12] I should mention that in so far as the review application had been set down before today's hearing, because the applicant left the filing of the 7A(8) notice so late that the last day for filing an answering affidavit is the day after today's hearing and pleadings in the review application could have been not timeously close before today's hearing. To date, no condonation application explaining why it took over a year to file this notice, which also did not advance any additional grounds of review, has been filed.

[13] Obviously, because I am effectively considering whether there are good grounds for reviving the review application and not dismissing it, regard must be had to the applicant's prospects of success if he proceeds with his new application. He was found guilty of two incidents in which a Council vehicle was exposed to risk. The arbitrator's concluding observations in this regard read:

> "24. The applicant acknowledges that for both he incidents of 14 February and zero 2 March 2012 he had an ADM vehicle which he had parked on private premises. On both incidents vehicles were not parked under lock and key facilities, neither were they parked on ADM or government property. On both incidents the vehicles were parked in the open, private property was no person in attendance.

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[1] See **Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others (2014) 35 ILJ 1672 (LC)** and **Ralo v Transnet Port Terminals & Others (2015) 36 ILJ 2653 (LC)**

> 25. By the applicant's own admission, in one of the vehicles the windows and doors are not locked due to the closing and locking mechanisms not working. He claims to have reported that matter but did not produce any proof to that effect. In both incidents the vehicles were accessed with years with no the preventing such access, to an extent that on 02 March the vehicle was even towed away by the police was not even an alarm been raised by the applicant or anybody he might have trusted the vehicle to.
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> 26. This sufficiently proves the fact that the applicant had violated the management policy of the ADM on the safekeeping of the vehicles he was entrusted with an even endangered the safety and exposed them to threat."

[14] Having read the record, it is apparent that much of the applicant's defence focused on attempting to demonstrate that more serious conduct involving vehicles went unpunished or that fleet management policy should have been invoked instead of or before any disciplinary action was taken. Very little of his own version about what transpired on each of the occasions in question was clearly put to the employer's witnesses.

[15] In any event, the applicant's supposed grounds of review which are set out in his founding affidavit simply dispute the correctness of some of the findings that the arbitrator reached and contend that she failed to take into account certain mitigating evidence. The grounds of review are essentially grounds of appeal. As stated, the factual allegations he makes, do not even reveal any *prima facie* basis for a review based on irregularity, unreasonableness or acting in excess of powers. As such, they do not reveal that on his own version the applicant has made out a case on review. In this regard, it can be mentioned that in the belated supplementary affidavits for which condonation is still sought, these inadequate grounds were not augmented or amended in any way. As such, it appears to me that it would be an exercise in futility for this matter to proceed further with both parties incurring additional costs only to confront the fact that the founding papers do not reveal grounds of review at some later date.

[16] On the question of costs, simply because I believe that the applicant himself would not have been aware of the inadequacy of his application or

the steps necessary to redeem it, I do not believe it would be equitable to burden him with the costs of the matter.

Order

[17] In light of the above,

17.1 the applicant's review application is dismissed, and

17.2 the parties must bear their own costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M Grobler instructed by Sharp Attorneys
THIRD RESPONDENT:	J Grogan SC, instructed by Wesley Pretorius & Associates.