THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PR 192/15

In the matter between:

SOL PLAATJIE LOCAL MUNICIPALITY **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **First Respondent**

T L MABUSELA N.O **Second Respondent**

SAMWU obo M D MORWE **Third Respondent**

Heard: **18 May 2017**

Delivered: **13 June 2017**

Summary: Application to condone late filing of record in a review application. Applicant has to file an application for reinstatement of the review. Interpretation of clause 11.2 of the Practice Manual. Steps to be followed when record is missing or inaudible. Guidelines for practitioners and parties in general.

JUDGMENT

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Background facts

[1] On 19 August 2015 the Second Respondent (arbitrator) issued an arbitration award reinstating Mr Morwe (Morwe). On 13 November 2015 the Applicant filed a review application under case number PR 192/15, seeking the review and setting aside of the said arbitration award as well as condonation for the late filing of the review application.

[2] The First Respondent filed the record with this Court on 8 December 2015 and a Rule 7A(5) notice was issued by the Registrar on 18 December 2015.

[3] The Applicant explained that between December 2015 and January 2016 it attempted to obtain a formal quotation for the transcript of the record and on 27 January 2017 the Applicant's attorneys confirmed that they would pay for the transcription of the record.

[4] On 4 March 2016 the Third Respondent's attorneys, Cheadle Thompson and Haysom Inc (CTH), addressed a letter to the Applicant's attorneys, referring to the Rule 7A(5) notice of 18 December 2015 and stating that:

> "In terms of Rule 7A(5) read with clause 11.2.2 of the Practice Manual of the Labour Court, April 2013, your client is required to file the record of arbitration proceedings within 60 days of being notified that the record is available with the registrar.
>
> We confirm that 60 days from 18 December 2015 expires on 16 March 2016. If you fail to deliver the record by 16 March 2016, your client's review application will be deemed to be withdrawn. We trust that the record will be delivered within the time period in order to expedite the resolution of this long outstanding matter."

[5] On 18 March 2016 the Applicant's attorneys responded to CTH's letter of 4 March and recorded that the transcribed record was still awaited. The

Applicant's attorneys did not agree with CTH's view in respect of the filing of the record and responded that: *"The record was timelessly (sic) applied for an we still await for the feedback in this regard. We therefore cannot concur with the contents of your stated letter and revert back to you as soon as we receive the document."*

[6] On 22 March 2016 CTH responded to the Applicant's attorneys and reiterated that the review application was deemed to be withdrawn.

[7] The transcribed record was served on CTH on 5 May 2016 and on 17 May 2016 CTH indicated that the transcript was incomplete in that Morwe's evidence in chief, cross-examination and re-examination was not part of the transcript. The Applicant's attorneys were requested to urgently provide the transcript of Morwe's evidence as well as their Rule 7A(6) and (8) notices.

[8] On 31 May 2016 the Applicant's attorneys requested the missing portion of the record from the transcribers, Ikamva Veritas Transcription Services Consortium (Veritas).

[9] On 1 June 2016 Veritas responded to the Applicant's attorneys and informed them that they will have to enquire from the bargaining council in respect of the days of the arbitration for which there appear to be no record. Veritas advised that the bargaining council would send a new CD to the Labour Court whereupon the Labour Court will notify the Applicant's attorneys that the record was filed and the new disc should be collected and Veritas would prepare a quotation for the transcription thereof.

[10] On 6 June 2016 the Applicant's attorneys contacted the bargaining council regarding the missing portion of the record and one Thabiso informed them that he would look for the recording and revert. On 7 June 2016 Thabiso was still listening to the available recordings to locate the missing portion. On 14 June 2016 Thabiso informed the Applicant's attorneys that they could not locate the missing portion of the record and that the arbitrator advised that his laptop crashed and there is no available recording. Thabiso furthermore advised that the arbitrator was willing to assist with the reconstruction of the record if the parties were amenable.

[11] The Applicant's attorneys informed CTH on 22 June 2016 that the complete record of proceedings was not available and that a portion of the recordings was lost. They further informed CTH that the bargaining council indicated that the arbitrator will arrange for a date to reconstruct the missing portion of the record. CTH was requested to hold the matter in abeyance, in view of Morwe's persistent tender of his services.

[12] On 22 June 2016 CTH responded that as the application for review is deemed to be withdrawn, there is no pending application before the Labour Court and the Applicant was requested to comply with the arbitration award. As there was no longer a review application pending, the matter could not be placed in abeyance.

[13] The Applicant subsequently arranged a consultation with counsel for 30 June 2016 and this application was filed on 17 July 2016.

[14] The matter was enrolled for hearing on 18 May 2017.

The relief sought

[15] The Applicant seeks an order condoning non-compliance with the Rules of this Court in respect of the late filing of the complete record, an order directing the parties to hold a meeting to reconstruct the record and alternatively for the matter to be remitted to the First Respondent for a hearing *de novo* as the record is incomplete.

[16] The relief sought will be considered in detail.

Analysis

Filing of the record

[17] Rule 7A(6) of the Labour Court Rules provides that the applicant 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, as the case may be. The applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.

[18] The serving and filing of the record in a review application is provided for in clause 11.2 of the 2013 Practice Manual of the Labour Court (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.
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> 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."

[19] This Court and the Labour Appeal Court have considered the status of the Practice Manual[1] and held that in essence, the manual promotes uniformity and consistency in practice and procedure and sets guidelines on standards of conduct expected of those who practise and litigate in the Labour Court and it promotes the statutory imperative of expeditious dispute resolution. The

[1] *Ralo v Transnet Port Terminals and Others* [2015] ZAECPEHC 68 (17 June 2015), *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others [2014] 5 BLLR 516 (LC), (2014) 35 ILJ 1672 (LC), Rumba Samuels v Old Mutual Bank* Case no DA30/15 handed down on 25 January 2017.

provisions of the Practice Manual are binding and should be adhered to and it is not to be adhered to or ignored by parties at their convenience.

[20] Clauses 11.2.1 and 11.2.2 provide for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the consequences should an applicant fail to file the transcribed record within the prescribed period.

[21] A proper interpretation of clause 11.2.3 shows that there are three possibilities if the record is not filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received. The first possibility is the easy and obvious one namely for the applicant to request the respondent's consent for an extension of time and consent has been given.

[22] The second possible scenario arises only in the event that consent was sought from the respondent but is refused. In such event the applicant may, on notice of motion supported by affidavit, apply to the Judge President for an extension of time. The application must comply with Rule 7 and affidavits are be filed within the time limits prescribed by Rule 7.

[23] The third possible scenario arises when the applicant in a review application failed to file the record within the prescribed 60 days period and failed to obtain the respondent's or Court's consent for the extension of time. In such a case the review application is deemed to be withdrawn.

[24] *In casu* the Applicant has not filed the record within the prescribed 60 day period and has not approached the Third Respondent for consent for an extension of time this. It follows that the review application is deemed to be withdrawn.

[25] In *Ralo v Transnet Port Terminals and others*[2] *(Ralo)* the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of *Municipal Council of the Municipality of Windhoek v Marianna Esau (LCA 25/2009, 2*

[2] *Ralo v Transnet Port Terminals and Others* [2015] ZAECPEHC 68 (17 June 2015), [2015] 12 BLLR 1239 (LC), (2015) 36 ILJ 2653 (LC).

March 2010) where the Court held that the word 'deemed' is considered to have a conclusive effect[3]. This Court concluded by stating the following:

> "…The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application"

[26] *In casu* the same fate meets the Applicant and the status of the review application is 'withdrawn'. In view of the fact that the review application is withdrawn, the alternative relief sought by the Applicant cannot be granted.

[27] There is however no bar, either in the Rule of this Court or the Practice Manual to the Applicant filing an application in which it seeks to have the review application reinstated. Logic dictates that the review should be reinstated and be alive before the late filing of the record could be condoned. An application to have the review application reinstated could be filed together with an application in which condonation for the late filing of the record is sought.

[28] I accept that this application was an attempt to get the review application back on track. The Applicant however should have filed an application wherein the order sought is for the review application to be reinstated.

[29] *In casu* the Applicant sought condonation for the late filing of a record without an application to reinstate the review application. Condonation for the late filing of a record cannot be granted in respect of a withdrawn application.

Reconstruct

[30] The Applicant also seeks an order directing the parties to hold a meeting to reconstruct the record.

[31] Clause 11.2.4 of the Practice Manual provides as follows:

> "If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge

[3] Ralo at para 10.

> President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed."

[32] In my view clause 11.2.4 of the Practice Manual is abused by some parties and practitioners in this Court and their abuse contributes significantly to an unnecessary increase of the workload of Judges in this Court. Some of the practitioners and parties abuse clause 11.2.4 to the extent that they write letters or file applications seeking 'direction on the further conduct of the review application' long before such direction is needed. This clause is abused and used as a backdoor to get advice and guidance from this Court.

[33] Clause 11.2.4 allows an applicant to approach the Judge President for a direction on the further conduct of the review application in very limited circumstances. Firstly, where the record of the proceedings under review has been lost. This may happen for instance when the arbitrator's recording has been stolen or destroyed and there is no recording that could be transcribed. Secondly where the recording is of such poor quality that it is inaudible.

[34] In instances where the record is lost or inaudible the first step for the applicant is to assess whether the entire recording or only a portion of it is lost or inaudible. This is necessary and of relevance because Rule 7A(5) requires of an applicant to make available copies of such portions of the record as may be necessary for the purposes of the review. Where the issue on review is limited or on a point of law only, the entire transcript of the proceedings may not be necessary for purposes of the review. The applicant should assess its grounds for review and consider whether the available portion of the record is sufficient to proceed with the review and whether this Court would be in a position to consider the review on such limited portion of the record.

[35] The Constitutional Court and the Labour Appeal Court confirmed that the Court is not precluded from determining a matter on less than a complete record in appropriate cases where the matter can be decided on the material

before Court. Where the interests of justice demand it, a pragmatic approach is appropriate despite the inadequacies of the record[4].

[36] Where the entire recording is lost and it has been established that the record is necessary for the Court to decide the review application, the parties should attempt to reconstruct the record. I will deal with the principles relating to reconstruction *infra.*

[37] Where the entire recording is lost and reconstruction proved to be impossible or a futile exercise, the applicant should first approach the respondent and attempt to obtain consent to remit the matter back to the CCMA or bargaining council for a hearing *de novo* because of the absence of a transcribed record and the impossibility of adjudicating the review without a record. The applicant may, in the event consent is given, approach the Registrar for an order to be made by a Judge in chambers in terms of the provisions of Rule 17(3) of the Rules of the Labour Court. This step will promote the expeditious resolution of the dispute.

[38] In the event that the entire recording is lost and the respondent refuses to consent to remit the dispute for a hearing *de novo,* the applicant may approach the Judge President for a direction on the further conduct of the review application.

[39] Where the entire recording is inaudible, the parties should attempt to reconstruct the record. The principles of reconstruction also apply where the recording is lost. It is the duty of the applicant in a review application to initiate the steps and to drive the process of reconstruction to finality.

[40] The process of reconstruction had been explained by the Labour Appeal Court as far back as 2003 in *Lifecare Special Health Services (Pty) Ltd t/a*

[4] *Papane v Van Aarde NO and others* (2007) 28 ILJ 2561 (LAC), [2007] 11 BLLR 1043 (LAC), *Toyota Motors (Pty) Ltd v CCMA and others* [2016] BLLR 217 (CC), *Baloyi v MEC for Health and Social Development, Limpopo and others* (2016) 37 ILJ 549 (CC), Unreported judgment of the Labour Appeal Court JA 19/2015 *IDWO obo Cyril Linda and 4 others v Super Group and others* (28 February 2017)

Ekuhlengeni Care Centre v Commission for Conciliation, Mediation and Arbitration and others[5] *(Lifecare)* as follows:

> "A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness.
>
> I appreciate that reconstructing parts of the record some two years after the event will be time consuming and may prove frustrating. However, the situation is not all bleakness. In addition to the commissioner's handwritten notes, Mr Mbelengwa filed a full closing argument of nine typewritten pages which should prompt his recollection. Those concerned are expected to cooperate. With the requisite cooperation, there is reason to hope that a fair reproduction will be feasible."

[41] The steps set out in *Lifecare* should be followed to reconstruct an inaudible or incomplete record. Only if the process of reconstruction proved to be fruitless or impossible or if the outcome of the process is inadequate to proceed with the review application, may the applicant approach the Judge President for direction on the further conduct of the review application.

[42] An applicant seeking such direction from the Judge President should set out in detail what steps were taken to ensure that a record, necessary for the review application, was placed before Court, why the available record is

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[5] (2003) 24 ILJ 931 (LAC).

inadequate to proceed with the review and that the parties have done what they could to place a proper record before Court but are unable to do so.

[43] The Judge President and Judges in this Court are not to advise parties to file an application to compel in terms of Rule 7A(4) or to order them to reconstruct a record where the bargaining council already indicated a willingness to facilitate such a process. Parties should explore and exhaust the remedies available to them before approaching this Court for direction on the further conduct of the review application.

[44] *In casu* the order sought by the Applicant to direct the parties to hold a meeting to reconstruct the record is an abuse of process. The bargaining council has identified the need to reconstruct and indicated a willingness to assist with the process as far back as June 2016. Instead of expediting the reconstruction process, the Applicant approached this Court to order the parties to reconstruct the record. One year after the need to reconstruct was identified, the parties have not moved one step closer to attempt the reconstruction of the record. The delay and this application could have and should have been avoided.

Costs

[45] Costs should be considered against the requirements of the law and fairness.

[46] The requirement of law has been interpreted to mean that the costs would follow the result.

[47] In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[48] Mr Cronje for the Applicant submitted that this is a *bona fide* application, this is not a case where the Applicant did nothing and there is still a relationship between the parties.

[49] Mr Makhura for the Third Respondent argued that the Applicant should have filed an application to reinstate the review application and that the current application is incompetent. He further submitted that the Applicant is not

serious to obtain the record as from August 2016 there was no further movement or any steps taken to secure the record. Mr Makhura also took issue with the fact that the matter could have been filed in Johannesburg but was brought in Port Elizabeth.

[50] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and* others[6] it was emphasized that:

> "……unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings."

[51] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

[52] The relief sought by the Applicant was not competent and I see no reason to deviate from the ordinary rule that costs should follow the result.

[53] In the premises I make the following order:

Order

1. The application is dismissed with costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

[6] 2012 33 ILJ 2117 (LC).

Appearances

For the Applicant:	Advocate P R Cronje
Instructed by:	Van de Wall Incorporated Attorneys
For the Third Respondent:	Mr M Makhura of Cheadle Thompson & Haysom Attorneys