IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C 463/14

In the matter between:

HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION NORTHERN CAPE PROVINCE **First Applicant**

MEMBER OF THE EXECUTIVE COMMITTEE: DEPARTMENT OF EDUCATION, NORTHERN CAPE PROVINCE **Second Applicant**

and

PUBLIC SERVANTS ASSOCIATION obo LUXTON **Respondent**

Heard: **1 August 2018**

Delivered: **9 May 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicants seek an order rescinding and setting aside the order of this Court (per Steenkamp J) dated on 20 November 2014, in which the Court had reviewed and set aside the refusal of the first applicant (the HOD for Education: Northern Cape) to reinstate the individual respondent (Ms Luxton) subsequent to her dismissal (for alleged abscondment) in terms of the provisions of section 17(3)(a)(i) of the of the Public Service Act.[1] In terms of the Court order[2], the termination of Luxton's services was declared unlawful, and she was reinstated with retrospective effect from the date of termination of her services.

[2] This application, which is opposed by the respondents, was brought in terms of the provisions of rule 16A(1)(b) of the Rules of this Court. The application ought to have been filed and served within 15 days of the applicants becoming aware of the Order issued by default. The rescission application was filed on 17 December 2017 and it is therefore some three days outside the timeframes provided for in terms of the Rules.

[3] The application for condonation is not opposed and in the light of the delay being obviously insignificant, and further in the light of the explanation proffered in that regard, I am satisfied that the interests of justice dictate that condonation be granted.

Background:

[4] Luxton was employed by the applicants as Head; Records and Security Management at the Department of Education in Kimberley since October 2008. She was suspended on 17 January 2013. She had then through her Union, the PSA, referred an unfair labour practice dispute to the GPSSBC. In an arbitration award issued on 13 December 2013, Commissioner Martinus van Aarde of the GPSSBC found that the suspension of Luxton was an unfair

[1] Act 103 of 1994 (as amended)

[2] The order reads: **IT IS ORDERED THAT**:

1. The decision of the first respondent [HOD], taken on 4 March 2014, to terminate the services of the applicant's member, AP Luxton, is reviewed and set aside.
2. The decision of the Second Respondent, taken on 25 March 2014, not to reinstate the Applicant's member, AP Luxton is reviewed and set aside.
3. The termination of the Applicant's member's services was unlawful.
4. The Respondents are ordered to reinstate the Applicant's member retrospectively from the date of termination of employment.

labour practice. An order was made for her reinstatement together with payment of an amount of two months' salary as compensation. It is common cause that the applicants did not challenge the arbitration award.

[5] The services of Luxton were terminated on 4 March 2014 in terms of the deeming provisions of section 17(3)(a) of the Public Service Act on the grounds of absconsion, following her alleged failure to report for duty in compliance with the arbitration award. Luxton had made representations on 7 March 2014 and it is common cause that the second respondent (MEC) had refused to reinstate her upon considering her representations.

[6] Luxton as assisted by the PSA approached this Court in June 2014 to seek an order reviewing and setting aside the decisions of the applicants to terminate her services and the refusal to reinstate her subsequent to her representations. It is common cause that the review application was unopposed, and was thereafter enrolled for hearing on the unopposed roll, resulting with the Order of Steenkamp J on 20 November 2014.

The rescission application and submissions:

[7] Founding and supporting affidavits were filed and served on behalf of the applicants in support of the rescission application. In the founding affidavit, Mr Onewang Mogatle(Mogatle), the Director: Legal Services for the Department of Education: Northern Cape averred the following;

7.1 The applicants were not aware of the review application until the Office of the State Attorney, and in particular, its Ms A Gxogxa, received a notice of enrolment in respect of that application. According to Mogatle, at no stage did the applicants give instructions or indicated that they were not opposing the matter.

7.2 As at the date of deposing to the founding affidavit, the applicants had not received any pleadings from the respondents.

[8] Gxogxa from the Office of the State Attorney in Kimberly deposed to the supporting affidavit and averred that;

8.1. The State Attorney received the notice of enrolment on 19 September 2014 from the Registrar of this Court. It was the first time on that date that the applicants became aware of the review application.

8.2. Upon receipt of the notice of enrolment, Gxogxa communicated with Ms Bailey, an attorney in the Office of the State Attorney in Cape Town for the purposes of uplifting the documents in the court file for copies to be produced.

8.3. On 22 October 2014, Bailey unsuccessfully made attempts to uplift the court file. On 3 November 2014, Gxogxa instructed her office to communicate with an official of this Court with the intention of obtaining a copy of the review application and the details of the respondents attorneys in Cape Town.

8.4. On 3 November 2014, the applicants served their notice of intention to oppose the review application on the respondents' attorneys of record, who are based in Bloemfontein.

8.5. She averred that on 11 November 2014, the Court official reverted with the incorrect contact details of the respondents. On 15 November 2014, counsel on brief on behalf of PSA (Adv Pieter Venter) indicated to Gxogxa via email that the application would proceed on the hearing date on unopposed basis in view of the fact that the applicants had failed to file an answering affidavit, notwithstanding the fact that the notice of intention to oppose was filed belatedly.

8.6. On 17 November 2014, Gxogxa informed Adv Venter that the applicants were not served with the review application, or in the alternative, that the State Attorney be provided with the proof of service of the review application. On the same date, Adv Venter inquired from Gxogxa whether the applicants would be seeking a postponement of the review proceedings and further whether there was a tender for costs in respect of the postponement. That was an indication to her

that the respondents was amenable to a postponement subject to a tender of costs.

8.7. Later in the day on 17 November 2014, Adv Venter informed Gxogxa that Ms Esme Tobias, an official at the State Attorney's office in Kimberly had confirmed receipt of the review application papers. He further sent through proof of the facsimile for the service of the review application. Further emails were exchanged in respect of the costs implications of the postponement.

8.8. Gxogxa contends that on 19 November 2014, and a day before the Court date, Adv Venter asked her to contact him and she did so without success. She then communicated a tender of costs to Adv Venter and sought an undertaking that the matter would be postponed for purposes of preparing and filing an answering affidavit.

8.9. She further averred that on 19 November 2014, she arranged with Ms Bailey of the Cape Town office to attend to the postponement of the matter, further advising her that the matter would be postponed by agreement. It transpired that Ms Bailey failed to make an appearance at the Court proceedings.

8.10. Gxogxa averred that the applicants' default should be condoned as it was based on a *bona fide* belief that there was an agreement to postpone the matter. She contends that Adv Venter was aware of her instructions to oppose the matter. She further alluded to the difficulties she had experienced in having to rely on correspondents since her office is in Kimberly.

[9] The Counsel for the respondents, Adv Petrus Venter deposed to the opposing affidavit and averred the following;

9.1 On 15 November 2014, his instructing attorney advised him that the State Attorney had filed a notice of intention to oppose the review application without accompanying affidavit. He immediately contacted the Office of the State Attorney to enquire what the intention was. On

17 November 2014, the Office of the State Attorney informed him that attempts were being made to uplift the file and that their instruction was to oppose the application. At that stage, a notice of set-down had long been sent to the parties and the applicants had not taken any steps.

9.2 On 17 November 2014, he again enquired from the State Attorney whether a postponement would be sought and whether costs were to be tendered if that was the case. A response was received from the State Attorney on 19 November 2014 at about 09h55 enquiring whether matter would be postponed.

9.3 Adv Venter denied that there was any agreement on a postponement. He averred that he made unsuccessful attempts to contact the office of the State Attorney to advise that there was no agreement on a postponement. Later in the day he had received an email requesting him to submit a draft postponement agreement. He advised that there was no agreement on a postponement. He further denied that he or his instructing attorney had any telephonic discussions with the State Attorney in the morning of 20 November 2014. He denied that there was any written agreement to postpone and that all that he did was to enquire from the State Attorney whether a postponement would be sought as the notice of intention to oppose was filed late.

9.4 The applicants according to Adv Venter were properly served with the review application and a Ms Tobias of the applicants had acknowledged receipt thereof. The State Attorney did not file any formal application for a postponement, had failed to appear in Court, and had acted negligently and with tardiness.

Mootness:

[10] It was submitted on behalf of the respondents that following Steenkamp J's Order, the applicants had complied thereafter as Luxton was reinstated. It had been for over a period in excess of three years since the reinstatement. It was further submitted that the matter has been deprived of practical significance or rendered academic, and that to have it decided now would not be in the public

interest. It was submitted that there is no live controversy between the parties, and that to have Luxton's services terminated again pending another determination would not serve any purpose in the light of the reason for termination and the period of her reinstatement.

[11] The principles surrounding mootness are trite. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law[3]. Thus, where there was no live controversy between the parties, and, in the absence of any suggestion that any order might have an impact on the parties, the disputes between the parties were moot, especially since future cases inevitably presented different factual matrixes and hence no purpose would be served in resolving the dispute[4]. In *Ruta v Minister of Home Affairs*[5], it was reaffirmed that that mootness is no absolute bar to determining an issue, and that the question is whether the interests of justice require that it be decided.

[12] In the light of the common cause facts that Luxton as at the hearing of this application had been reinstated for over a period of three years in accordance with the Steenkamp J's Order of 20 November 2014, the issue is whether it is in the interests of justice to consider and determine the application under these circumstances.

[13] It is apparent that the practical effect of an order rescinding the Order of Steenkamp J would effectively be to remove Luxton from her position after more than a period of four years, in circumstances where the applicants have

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[3] See *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at 18, fn18

[4] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11, where it was held that;

> 'This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.'

[5] [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) at para 9

not only failed to timeously opposed the review application, but also where as shall be illustrated later in this judgment, the applicants have clearly displayed nonchalance and negligence in attending to the review application before 20 November 2014. To grant such an order in my view would clearly not be in the interests of justice.

[14] Of course it remains important for Luxton to remain in her position in circumstances where the applicants have reinstated her when they should have immediately sought rescission and diligently acted in that regard. To the extent that the applicants have reinstated Luxton after the 20 November 2014 Court order, I fail to appreciate how it is of importance to them to have Luxton removed from her position. In the circumstances, I agree that the application ought to be dismissed on account of mootness.

Good cause shown?

[15] Even if I may be wrong in regards to the issue of whether the matter is moot or not, it is my view that the applicants have not shown good cause under the provisions Rule 16A(1)(b) of the Rules of this Court[6] for the application to succeed.

[16] The explanation proffered by the applicants for their default is hardly satisfactory. The starting point is that the review application despite it being served on them, remained unopposed as at 20 November 2014. Even if the application was not received by the responsible persons at the Office of the State Attorney or the office of the applicants, the application was properly served on the Office of the State Attorney on 27 June 2014 as evident from the affidavit of proof of service deposed to by Carolina Johanna Venter of the respondents' attorneys of record. From that affidavit, the review application was received by one Esme Tobias of the Office of the State Attorney, and it is not for the respondents to guess who in that office the application ought to

[6] Rule16A(1) (b) provides:

> The court may, in addition to any other powers it may have-
> (a)….
> (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.

have been served on. There can therefore be no doubt that the application was timeously and properly served.

[17] A second consideration is that a notice of set-down was sent to both parties on 18 September 2018, some two months prior to the hearing date. This was after a notice of enrolment was filed and served by PSA's attorneys of record on 13 August 2014. Notwithstanding the notices of enrolment and set-down, it was common cause that the notice of intention to oppose the review application was only filed and served a few days prior to 20 November 2014.

[18] The constraints pertaining to the Office of the State Attorney in Kimberley having to use correspondents in Cape Town is hardly a reasonable excuse. In the light of the timeline of events upon receipt of the notices as indicated above, all the excuses pertaining to attempts to uplift the file or to obtain the contact details of the respondents are equally not reasonable, as all that was required was for someone on behalf of the applicants to act with the necessary urgency to either file a notice of opposition, or to directly contact the respondents' attorneys whose details were clearly available from the notices already mentioned, and to ensure that the matter either gets properly opposed with the necessary application for condonation, or at most to ensure that a proper application for a postponement was filed.

[19] The events from 15 November 2014 when Adv Venter on behalf of the respondents contacted the Office of the State Attorney and until 20 November 2014 when the matter was heard further demonstrate the tardiness on the part of the Office of the State attorney and the applicants in this matter.

[20] The first issue is that as at 19 November 2014, it was apparent to the Office of the State Attorney, or at least to Gxogxa, that a postponement had not been secured. No effort was made to file and serve a formal application for a postponement.

[21] Even if Gxogxa had reason to believe that Adv Venter had agreed to a postponement, it appeared that she had washed her hands off the matter, and left it to Ms Baily of the Cape Town Office to attend to the matter to 'confirm' a

postponement that in essence had not been agreed upon. Bailey however did not attend to the matter, and all that is before the Court is Gxogxa's averment that Bailey informed her after the Court order was granted that she did not manage to obtain someone to attend the proceedings in her absence.

[22] No attempt was made by Bailey to file a confirmatory affidavit to explain the circumstances that led to her non-appearance in Court before Steenkamp J. Again, this in my view, points not only to sheer tardiness but also negligence on the part of the Office of the State Attorney. The applicants' counsel's contention that there was a misunderstanding between the Offices of the State Attorney in Kimberley and Cape Town can hardly be a reasonable excuse in the light of the other surrounding factors. The principle that a litigant cannot be absolved from the negligence, ineptness and tardiness of his or her chosen legal representative is also applicable to this case[7].

[23] In the circumstances, there is no basis for a finding to be made that the explanation proffered by the applicants for their default is reasonable, or that they were not in wilful default. On the other hand, an assessment of the conduct of the Office of the State Attorney as a whole, demonstrates that there was less diligence and attentiveness to this dispute, which bordered on recklessness.

[24] The issue of prospects of success in the light of the conclusions reached in regards to mootness, and in particular, the fact that Luxton has since been reinstated in my view is equally academic. Luxton's services were terminated on the basis of alleged absconsion. The termination followed upon her reinstatement in terms of the arbitration award issued on 13 December 2013. The applicants' view is that Luxton failed to report for duty in compliance with the arbitration award, hence the deemed discharge from duty was invoked in accordance with the provisions of section 17(3)(a)(i) of the Act. It is common cause that Luxton had made representations as to why her services should not be terminated hence the review application. However, upon the default order having been obtained, the applicants do not say much about the

[7] See *Saloojee v Minister of Community Development* 1964(2) SA 135 (AD) at 141 B-H; *Superb Meat Supplies cc v Maritz* (2004) 25 ILJ 96 (LAC)

circumstances that led to Luxton's reinstatement. In fact, that issue is not even addressed at all in the pleadings.

[25] If the applicants felt so strongly about that termination, there would have been no reason to reinstate her. As already indicated, the effect of granting the order that the applicant seeks would be severely prejudicial to Luxton , as she would have to be removed from her position. This can neither be fair nor in the interests of justice.

[26] In the circumstances, the applicants' application for a rescission of Steenkamp J's Order of 11 November 2014 ought to fail. In regards to the issue of costs, it is trite that this Court may make an award of costs upon a consideration of the requirements of law and fairness. In the light of the conclusions reached in regards to mootness, and the conduct of the Office of the State Attorney in this matter, fairness dictates that the applicants, and in particular, the second applicant, be burdened with the costs of this application.

[27] Accordingly, the following order is made;

Order:

1. The late filing of the application for rescission is condoned.

2. The application for rescission of the Order of this Court issued on 11 November 2014 is dismissed with costs.

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Edwin Tlhotlhalemaje
Judge of the Labour Court of South Africa

Appearances:

For the applicants: Adv. M Ngumbela, instructed by the State Attorney: Cape Town

For the Respondent: A Hechter of Andrie Hechter Attorneys