



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR991/12

In the matter between:

MOQHAKA LOCAL MUNICIPALITY

Applicant

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER P M VENTER N.O.

Second Respondent

K I SELEBOGO

Third Respondent

IMATU

Fourth Respondent

Heard: 10 July 2013

Delivered: 28 August 2013

JUDGMENT

MASIPA, AJ

Introduction

- [1] On 10 July 2013, I reserved judgment in this matter after hearing arguments and submissions by the Applicant's representative and those representing the Third Respondent. This is the judgment.
- [2] In its notice of motion, the Applicant set out its case as being a review, correction or setting aside of the Second Respondent's arbitration award under case number FSD111117 dated 16 March 2012; the review, correction or setting aside of the certificate of outcome issued by the Second Respondent dated the 27 December 2011 under case number FSD111117; the condonation of the late filing of the review application in relation to both the sections 145 and 158(1)(g). As part of the order sought by the Applicant, it asked for costs against the party opposing its application.
- [3] The review applications are brought in terms of sections 145 and 158(1)(g) of the Labour Relations Act 66 of 1995, as amended; the LRA.

Background

- [4] The Third Respondent has been employed as the Applicant's Assistant Human Resources Manager since 1 June 2009. She reported directly to the Corporate services Manager. In terms of the Applicant's approved structure, she was the head of the human resources department. On or about 13 September 2010, the Applicant appointed Samuel Kula as a human resources manager for five years.
- [5] The Third Respondent challenged the Appointment of Kula as she believed her job functions were diluted. She referred an unfair labour practice dispute relating to demotion to the Bargaining Council, the fourth Respondent, on or about 24 November 2011. The date of dispute was stated as 24 October 2011.
- [6] The Applicant contends that there Third Respondent ought to have applied for condonation for the late referral of the unfair labour practice dispute and that in the absence of this, the Second Respondent lacked jurisdiction to conciliate

the dispute. This issue was never raised before the Second Respondent and on or about 27 December 2011, a certificate of outcome was issued by the Second Respondent declaring the dispute unresolved.

- [7] The matter was scheduled for arbitration on 1 March 2012. The Second Respondent issued an arbitration award dated 16 March 2012 wherein he found that the Applicant committed an unfair labour practice and ordered that it pays the Third Respondent compensation in the amount of R112 574.70. The Applicant avers that the arbitration award was served on the parties on or about 18 March 2012 while the Third and Fourth Respondent avers that it was served on 19 March 2012. There is a condonation application in respect of the arbitration award. There is also a purported condonation in respect on the review of the certificate of outcome.

Condonation Application

- [8] In respect of the condonation application for the section 145 review application, he submitted that the application was 4 days late and that the explanation for the delay was that the Applicant's attorney erroneously calculated the time period by allowing for 30 court days (the equivalent of six week) and as a result of the public holiday believed that the review was timeously delivered.
- [9] He submitted that the explanation for the minimal delay was reasonable. Further that the Applicant had good prospects of success and no prejudice had been occasioned to the Third and Fourth Respondent's.
- [10] Schmidt submitted that the condonation application was three days late. He asked that the condonation application not be granted due to the lackadaisical manner in which the Applicant approached the review application.
- [11] The general rule for a condonation as enunciated in *Melane v Santam Insurance Co Ltd*¹ and more recently referred to by Boda AJ in *SAMWU and Another v South African Local Government Bargaining Council and Others*² is

¹ 1962 (4) SA 531 (A) at 532C-F.

² (JR 1517/12) [2013] ZALCJHB 190 (1 August 2013) at para 20.

that a party seeking condonation must set out the degree of lateness, the explanation for the lateness, prospects of success and the importance of the case which has on recent days been categorised as prejudice.

[12] It is trite law that in deciding whether sufficient cause has been shown, the court has a discretion to be exercised judicially upon consideration of all the facts and that there must be fairness on both sides.

[13] In this matter, the degree of lateness is three days which is negligible. There is a reasonable explanation tendered for the delay. As appears from the papers and extensive heads of argument submitted by the parties, the Applicant had fairly reasonable prospects of success. On the issue of prejudice which has to be determined fairly between the parties, it would have been prejudicial to the Applicant not to condone the late filing of the matter. The Third Respondent's prejudice, if any, was minimal since the condonation application was heard on the same day as the review application. The matter was ripe to be heard on the merits and finalised.

The Grounds for review

[14] The Applicant's grounds for review were that the Second Respondent in conflict with the behest of the LRA and/or the Constitution, failed to apply his mind, misconducted himself, committed a gross irregularity, exceeded his powers or acted unreasonably by:

- (a) failing to consider the submissions made by the Applicant properly or at all, particularly relating to the job descriptions of Kula and the Third Respondent and by finding that the Applicant had demoted the Third Respondent.
- (b) finding that the Applicant committed an unfair labour practice by appointing Kula on 13 September 2012, when the dispute that was referred to the first Respondent related to an alleged unfair labour practice committed on or about 24 October 2011.

- [15] A further ground of review in relation to the section 158(1)(g) application was that the Second Respondent, in conflict with the behest of the LRA and/or the Constitution, failed to apply his mind, misconducted himself, committed a gross irregularity, exceeded his powers or acted unreasonably by issuing a certificate of outcome without the late referral of a dispute being condoned.
- [16] Dealing firstly with the Section 158(1)(g) review, it was contended by the Applicant that when the Third and Fourth Respondents referred the dispute to the First Respondent, they incorrectly reflected the date of the dispute as 24 October 2011 which he argued was incorrect. He submitted that the correct date was 13 September 2010 when Kula was appointed as Human Resources Manager.
- [17] Hutchinson submitted that the Second Respondent failed to apply his mind to the fact that the Third Respondent was obliged to seek condonation for the late referral of her dispute. As a result, the Second Respondent committed gross irregularity in the conduct of the proceedings by issuing a certificate of outcome.
- [18] Schmidt submitted that the Third Respondent lodged a grievance on 24 October 2011 and when it was unresolved, referred a dispute to the First Applicant when the grievance was not resolved. And the certificate issued on 27 December 2013.
- [19] He submitted that since the Applicant did not seek to have the certificate reviewed at the time, it demonstrated that it abided the outcome. He submitted further that the review in terms of Section 158(1)(g) was four months and seven days late.
- [20] The contention that the Second Respondent committed a gross irregularity was wrong and that he was under no obligation to require the Third and/or Fourth Respondent(s) to submit a substantial condonation application. In support of this submission, he referred to the decision of *SABC v CCMA and Others*³ where Waglay ADJP, as he then was, confirmed that:

³ [2010] 3 BLLR 251 (LAC) at para 27.

‘...The problem however is that the argument presented by the appellant is premised upon the belief that the unfair labour practice/unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.’

- [21] Schmidt argued that the date of dispute did not have to coincide with the date on which the unfairness complained about commenced as it is not a single act but one which was repeated monthly. He argued, therefore, that there was no need for the Third and/or Fourth Respondents to seek condonation and, consequently, that the decision arrived at by the Second Respondent that there was no need for a condonation application was correct.
- [22] He argued that there was no need for the Applicant to have the certificate of outcome set aside on review as the dispute only arose on 24 October 2011 when the Third Respondent filed her grievance. The dispute was referred within the 90 day period prescribed by the provisions of Section 191(1)(a) and (b) and 191(2) of the Labour Relations Act,⁴ (the LRA). He argued further that the Applicant's conduct in demoting the Third Respondent was indeed continuous and ongoing.

⁴ Act 66 of 1995, as amended.

- [23] In *Mhlongo and Others and Robertsons Ltd*,⁵ it was held that it was unnecessary for the respondent to first to bring an application to set aside the certificate of outcome before it can raise the jurisdictional point at arbitration. My view is that this is not necessary.
- [24] Reference was made to *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others*⁶ where the employer had seized upon the CCMA's failure to condone a referral that was late only because the employee had waited for the outcome of his internal appeal. The court observed that in such circumstances condonation would (or should) be granted as a matter of course, this did not detract from the legal validity of the employer's point. The fact remained that a certificate had been issued in the absence of what had been held to be a necessary jurisdictional pre-condition - namely, formal condonation of the employee's failure to comply with the statutory time-limit, as required by s 191(2) of the LRA. Pillemer AJ dealt with that point by ruling that, even if the 'certificate of non-resolution' was defective at the time it was issued, the employer's failure to attack it timeously meant that it had acquired validity with the passage of time.
- [25] In *Mhlongo's* matter, reference was also made to Grogan J, Employment Law⁷ commenting on whether arbitrators can proceed with their task if the conciliating commissioner has certified that the dispute remains unresolved but has not condoned a later referral or has committed some other irregularity before issuing the certificate. The court or arbitrators appear to have jurisdiction whatever the conciliating commissioner's error might have been.
- [26] In the *SABC* judgment, the LAC correctly analysed the continuous nature of unfair labour practice and unfair discrimination disputes i.e. that some arise from single acts while others continue to occur. The Third Respondent's case arose as a result of the diminution of her status and responsibilities. Clearly, the diminution of her status would have occurred when Kula was appointed, being 13 September 2010 or shortly thereafter, since she would have been

⁵ (2002) 23 ILJ 433 (CCMA).

⁶ (2000) 21 ILJ 2009 (LC).

⁷ Vol 17 February 2001.

aware that he was employed as the Human Resources Manager and was instructed to report to him. In this regard, the appointment of Kula can be said to have created a single act of demotion which would have necessitated a condonation application. However, from that single act if unfairness arose continuous acts of unfairness i.e. his conduct of continuously depleting the Third Respondent's duties/responsibilities.

- [27] In view of this, I find that the Third Respondent's dispute was referred timeously and that there was no need for a condonation application.

The arbitration award

- [28] There was no oral evidence led before the Second Respondent. The award was, therefore, based on written submissions from the Applicant and the Third and Fourth Respondents and the bundles of documents. It was common cause that the Applicant had only one approved organogram and that the Applicant took certain duties and responsibilities away from her when Kula was appointed. Further that the Third Respondent's salary was not affected.
- [29] In analysing the award, the Second Respondent stated that the onus rested with the Third Respondent i.e. the employee. He stated that section 186(2)(b) of the LRA provides that the employer may commit an unfair labour practice by demoting an employee. He stated that the Third Respondent's case was that Kula was appointed in an irregular manner and contrary to the Applicant's policy. Further, that by taking away the certain duties of the Third Respondent's her status was demoted.
- [30] The Applicant's case was that Kula, the new HR Manager was appointed on a more senior level than that of the Third Respondent and that the appointment was a managerial prerogative. Further, that Kula was performing on a higher level and had only taken over some of the member's duties. There was therefore no unfair labour practice committed and the Third Respondent was still performing her duties on the level of Assistant Manager.

- [31] The Second Respondent referred to the decision of *Solidarity obo Kern v Mudau and Others*⁸ where a Senior Personnel was placed in the post of Committee Officer in a merged municipality constituted an unfair labour practice. It was held that financial loss was not the only criterion as demotion can consist of diminution of status even where the employee's salary was not reduced. The second Respondent also referred to *Du Toit et al; Labour Relations Law*⁹ and to *Grogan; Dismissal, Discrimination and Unfair Labour Practices*¹⁰ where the notion was dealt with together with the decision of *NUMSA obo Classen and Others v Andrag Machinery (Pty) Ltd.*¹¹
- [32] The Second Respondent was not convinced that the Applicant complied with its own policy as the change to its organisational structure was not referred to the Local Labour Forum and there was no job evaluation. He mentioned that the position that Kula was appointed to was not approved.
- [33] Having considered the matter, the Second Respondent found that after considering Kula's job description to that of the Third Respondent that the Applicant removed virtually all the responsibilities of the Applicant and left her with only two tasks. Further, the line of reporting was changed and the Third Respondent no longer reported to the Manager Corporate Services. He stated that there was no consultation with the Applicant prior to appointing Kula.
- [34] The Second Respondent found that the Applicant acted unfairly and that such conduct constituted an unfair labour practice. In respect of the relief, the Second Respondent was not convinced that re-assigning Kala's duties would have a fair result to all parties involved and awarded compensation.

The review and the legal framework

- [35] The Applicant's grounds of review were that the Second Respondent failed to apply his mind, misconducted himself, committed a gross irregularity, exceeded his powers or acted unreasonably by failing to consider its submissions properly or at all. This was particularly in respect of the job

⁸ [2007] 6 BLLR 566 (LC).

⁹ 4th Edition.

¹⁰ 2nd Edition.

¹¹ [2003] 8 BALR 861 (MEIBC).

descriptions of Kula and that of the Third Respondent which led to a finding that the Third Respondent had been demoted and a further finding that the Applicant committed an unfair labour practice in appointing Kula on 13 September 2012, when the Third Respondent's dispute referred to the First Respondent related to an alleged unfair labour practice committed on or about 24 October 2011.

- [36] In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,¹² the court held that when all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, improperly rejected or where there was a full opportunity for an examination of all aspects of the case, then there is no gross irregularity. In *CUSA v Tao Ying Metal Industries and Others*,¹³ the court held that it was clear that a commissioner is obliged to apply his or her mind to the issues in a case.
- [37] In the *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴ decision referred to above, Van Niekerk J stated that in summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.
- [38] In order for the Applicant's application to succeed, the question is whether the decision reached by the commissioner (the Second Respondent) was one

¹² (2008) 29 ILJ 2899 (LAC) at para 13.

¹³ (2008) 29 ILJ 2461 (CC) at para 134.

¹⁴ (2010) 31 ILJ 452 (LC) at para 17.

that a reasonable decision-maker could reach in accordance with *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.¹⁵ After considering the evidence presented before the Second Respondent, the answer to that question is yes, the decision of the Second Respondent was that of a reasonable decision maker. In *Herholdt v Nedbank Limited*,¹⁶ the Labour Appeal Court held that it is gross irregularity or misconduct if the Commissioner fails to take into account material evidence or has regard to irrelevant evidence.

- [39] The evidence before the Second Respondent was that the Applicant breached the provisions of the Municipal Systems Act by failing to ensure that appointments made were in accordance with the staff establishment of the municipality. This was, however, not the issue before him as the issue related to demotion and not appointment.
- [40] It was common cause that the Third Respondent retained her position of Assistant Manager Human Resources and that her salary was not affected by Kula's appointment. He correctly found that a reduction in salary was not a pre-requisition for demotion. He found further that demotion occurs where there is diminution in the employee's status and responsibilities.
- [41] The evidence before the Second respondent including the adverts for the positions and the actual duties for the two had similar duties. The Applicant argued that the Third Respondent did not perform most of the duties on the advert and that Kula performed them at a higher level. It argued further that as a Human Resources Manager, he had authority to decide which duties were performed by the Third Respondent. The evidence before the Second Respondent proved that the duties were similar and that by taking away duties, it amounted to taking away her responsibilities which resulted in the diminution of her status. This conduct occurred over a period of time until she lodged a grievance which was finalised on 22 November 2011.

¹⁵ (2007) 28 ILJ 2405 (CC) at para 110.

¹⁶ [2012] 9 BLLR 857 (LAC) at para 33.

- [42] The issue before the Second Respondent did not relate to demotion as a result of Kula's appointment but due to the diminution of status. This appears throughout the Second Respondent's award. His decision was therefore based on this issue and not on Kula's appointment. The date when Kula was appointed was therefore secondary to the issue.
- [43] While the Third Respondent stated in her referral papers that she sought to be placed in the position of Human Resources Manager, the relief was not granted by the Second Respondent. The Second Respondent awarded compensation instead. Even if he was displeased with Kula's appointment which was not the issue before him, I find that the decision he arrived at in respect of the actual issue which was before him was reasonable in the circumstances.
- [44] The Second Respondent's award falls within the band of reasonableness and that it must stand. Both counsel for the Applicant and the Third Respondent submitted that the costs should follow the results.
- [45] In the premises, I make the following order:
1. The Applicant's late filing of the review application in terms of Section 145 is condoned;
 2. The Applicant's review application in terms of Section 158(1)(g) is dismissed;
 3. The Applicant's review Application in terms of Section 145 is dismissed.
 4. The Applicant is to pay the Third and Fourth Respondent's costs.

Masipa, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate W J Hutchinson

Instructed by: Kirchman INC

For the Third Respondent: Advocate R M Schmidt, IMATU Official

LABOUR COURT