

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable/reportable

LAC Case No: JA106/22

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES

Appellant

and

SOLIDARITY obo HJ TALJAARD

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Second Respondent

Third Respondent

MSIZA BHEKI N.O.

Heard: 23 May 2024

Delivered: 24 June 2024

Coram: Sutherland, Musi JJA and Davis AJA.

JUDGMENT

DAVIS, AJA

Introduction

[1] This appeal seeks to set aside the order of Mabaso AJ in the court *a quo* in which an arbitration award granted by the third respondent on 22 March 2018 was made an order of the court on 13 September 2019.

[2] Regrettably this matter has a long history caused by numerous delays. As a result of these delays, the appellant has been constrained to make an application for the condonation of the late delivery of a notice of appeal and record of appeal. It further seeks condonation for the late delivery of a review application of the arbitration award of third respondent, in terms of which it seeks an order that the matter should be remitted to the second respondent for consideration by another Commissioner.

[3] These various delays and consequent applications for condonation thus necessitates recourse to the chronology leading up to this appeal.

The chronology

[4] Mr HJ Taljaard (represented by first respondent) commenced employment with appellant in 1989 and has been employed continuously thereafter.

[5] On 24 June 2009 the appellant signed off on Resolution 2 of 2009 containing an agreement in respect of the implementation of an Occupation Specific Dispensation (OSD) regarding officials employed by the appellant. The agreement was signed by the appellant as well as by the relevant trade unions and thereafter constituted a binding collective agreement. Insofar as Mr Taljaard was concerned, he had performed the function of a case management supervisor but was remunerated on the lesser scale of a case officer. Pursuant to Resolution 2 of 2009 he contended that, as the effect of the OSD had been backdated to 1 January 2008, he was entitled to be paid in the amount of R 423 447.00 per annum as opposed to his current remuneration of R 307 293. 00 per annum.

[6] His complaint, which gave rise to arbitration proceedings, was that some eight years after the Resolution implementing the OSD had been signed, the appellant, on its own admission, had not yet complied with the terms of this collective agreement.

[7] In his arbitration award, the third respondent found that the non-translation of Mr Taljaard on the OSD pay progression to a salary level of R 423 447.00 constituted an unfair labour practice in terms of s 185 (b) of the Labour Relations Act¹ (LRA). Accordingly, third respondent ordered the appellant to backdate Mr Taljaard's salary to an amount of R 423 447.00 per annum as from 1 January 2008 together with interest calculated from 31 March 2018.

[8] On 12 December 2018 the appellant sought an order condoning its late filing of a review application of this award by third respondent which was opposed by the first respondent on 18 February 2019.

[9] On 20 March 2019 the first respondent notified the appellant that it would no longer oppose the condonation application and requested that it be served with the relevant review application.

[10] On 9 April 2019 the first respondent wrote to the appellant notifying it that no review application had yet been delivered and requested an update in respect of the progress thereof. Further correspondence was generated on 15 April 2019 to the same effect.

[11] By 9 May 2019, as the first respondent had received no communication from the appellant, it notified the appellant that it was in the process of bringing an application in terms of Rule 11 of the Rules for the Conduct of Proceedings in the Labour Court as it appeared that the appellant had no intention pursuing its review application. On 21 May 2019 Professor Nkowane, on behalf of the appellant, advised Ms Nicolette Ras of first respondent that the review application had been sent on 15 February 2019. However this transpired to be an incorrect reflection of the facts. By 25 June 2019 no review application had been delivered. This triggered the application by the first respondent to the court *a quo* for, *inter alia*, an order to make the arbitration award of the third respondent an order of court in terms of s 158 (1) (c) of the LRA.

¹ 66 of 1995.

[12] The Registrar of the Labour Court issued a notice of set down on 17 July 2019 advising the parties that this application was to be heard on 27 August 2019. On 23 August 2019 the appellant delivered a review application. However this application was not accompanied by an application to stay the enforcement of the arbitration award nor a notice that there had been compliance with the provisions of s 145 (7) and (8) of the LRA.

The judgment of the court *a quo*

[13] Mabaso AJ noted that there had been a consistent failure by the appellant to bring a review application which had triggered the application brought by the first respondent before the court *a quo*. The learned judge observed that the award of the third respondent had been issued in March 2018. While appellant alleged that it received this award in May 2018, however by 25 June 2019 no review application had been delivered: that is by the time that the first respondent brought its application before the court *a quo*.

[14] On this basis the learned judge concluded:

‘The respondent’s explanation in the answering affidavit as to why the review application was delivered on 28 August 2019 amounts to no explanation at all and it boils down to negligence on the part of the State in prosecuting the review application... I conclude that it will be in the interests of justice that the arbitration award should be made an order of court to allow the employee its rights to enforce the terms of the arbitration award.’

[15] Although leave to appeal was dismissed by the court *a quo*, this Court, on petition, granted the appellant the right to appeal the judgment of the court *a quo*. In keeping with the conduct of appellant in respect of this dispute, the litany of unexplained

delays on the part of the appellant regrettably did not cease upon the granting of the order in respect of leave to appeal to this Court on 1 December 2022.

[16] It is clear that at the very least by 14 December 2022 the appellant knew that they had to file a record of appeal within 60 days. On 12 April 2023 the first respondent addressed a letter to the appellant indicating that the application for leave to appeal should be withdrawn as no record had been filed. By 7 August 2023 there was no communication from the appellant to first respondent. Indeed there was a continued failure to file the appeal record that should have been filed on 2 March 2023.

[17] Significantly, throughout this period, as was noted by first respondent's counsel, the appellant never filed an application to review the arbitration award of third respondent. Only a notice of motion in respect of the condonation application was filed. A review application has never been produced.

Evaluation

[18] In *Khumalo and another v Member of the Executive Counsel of Education Kwazulu Natal*², the Court was required to deal with the legality of applicant's promotion. An issue before the Court was the importance of the consequences of delay and, in particular, the manner in which '*the MEC delayed reprehensibly in bringing the application to the labour court.*³' In particular, the question was raised as to whether the MEC should be non-suited as a result of an unreasonable delay in bring the review.

[19] The Court per Skweyiya J held:

'[t]he delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. In the context

² 2014 (5) SA at 579 (CC).

³ See: *Khumalo* (Ibid) at para 39.

of public-sector employment, the value of security for employees and mitigating the arguably inherent inequality of the workplace must be kept in mind.’⁴

[20] In the context of the facts before the Court, it ultimately held that, ‘*the nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained and the nature of the claim does not warrant condoning the delay.*’⁵ The dispute in *Khumalo* was different from the present case. However the principles laid down by the Constitutional Court are applicable to the present dispute. In the present case, save for references to the internal deficiencies within appellant’s organisation that caused the delay in prosecuting a review application and difficulties located in the office of the State Attorney, no satisfactory explanation was given for any of the delays which characterised appellant’s conduct in respect of this litigation.

[21] In addition no review application which set out the case for granting a review was placed before the Court, even after all of the delays which had taken place. Indeed it is difficult to see how the court *a quo* could have dealt with this issue in any other manner as there is no review application that had been properly brought before it.

[22] In short, were this appeal to be granted, it would grant a licence to the appellant to finally “*get its house in order*” and bring a proper review application. Given the consistent failures and the lack, particularly of a proper review application there is no justifiable basis to “*grant such a licence*”.

[23] It is not disputed that Mr Taljaard has performed the functions of a case management supervisor since July 2009. To the extent that there was some suggestion raised by appellant’s counsel with regard to a possible prescription of Mr Taljaard’s claim, the fact remains that this was never mentioned in any papers in that no proper application had been placed before the court *a quo* to set aside the award of third

⁴ See: *Khumalo* (Id fn 2) at para 52

⁵ See: *Khumalo* (Id fn 2) at para 68.

respondent. That for eight years after the signature of the OSD Resolution, appellant, on its own admission has not complied with this Resolution, which redounds to the considerable detriment of Mr Taljaard, only compounds its difficulty.

Conclusion

[24] In summary given that to date appellant has never complied adequately with the requirements for bringing a proper review application and that all of the delays can be located in its own conduct or that of persons who were mandated by it to launch these proceedings, this inexorably leads to one conclusion, namely that the unconscionable delay in this particular case justifies a dismissal of the appeal.

[25] For these reasons therefore the appeal is dismissed with costs.

Davis AJA

Sutherland, Musi JJA concurring

APPEARANCES:

FOR THE APPELLANT: M.S. Mphahlele SC with R. Munzhlele, instructed by
State Attorney: MMabatho

FOR THE FIRST RESPONDENT: N. Ras, of Solidarity