



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA1/19

In the matter between:

HILDA MOLOSIOA

Appellant

and

ESKOM HOLDINGS LIMITED (KOMATI POWER STATION)

Respondent

Heard (via TEAMS): 3 November 2020

Delivered: By email to the parties

CORAM: WAGLAY JP, COPPIN JA et SAVAGE AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Kent AJ) dismissing a condonation application for the late bringing of an application to review, in terms of s 145 of the Labour Relations Act ¹(LRA), an award of a Commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA), effectively, dismissing a claim of an alleged unfair labour practice perpetrated by the respondent.

[2] During about January 2008 the appellant, having applied for an advertised post, accepted a written offer made to her by the respondent of the position off "Business Process Advisor (T12)". While working in the position, and

¹ Act 66 of 1995.

during about June 2012, she became aware of an organogram that had been produced by the respondent which indicated that the position of “Business Process Advisor (P12)” was vacant.

- [3] The appellant perceived this to be a reference to the position that she had been appointed to and sought an explanation from the Human Resources Manager of the respondent. She was, essentially, advised that the P12 position was indeed vacant; that it was a different position from the one she occupied and that it had existed all along; that it required registration with a professional body; that the position she held at grade T12 was actually reflected on the respondent’s system as “office of business and administration”; that she had been appointed to the position that she had applied for, which was at the T12 level; and that the remuneration and benefits were in the line with that grade. She was then given a letter stating that she occupied the position of “Senior Technician Quality Assurance (P12)” and that the conditions of service and salary remained unchanged.
- [4] In response, the appellant lodged a grievance, alleging that there had been a unilateral change in her terms and conditions of employment. A meeting where the grievance was dealt with was held on 23 January 2013. The chairperson of the meeting issued a recommendation to the effect that the designation of “Senior Technician Quality Assurance (D12)” was “the best fit” for the position occupied by the appellant in terms of job output, task grade and qualifications.
- [5] Still not satisfied, the appellant launched a stage 2 grievance. The meeting where this grievance was dealt with was held on 2 September 2013 and it was chaired by a different person. In summary, the chairperson of this meeting concluded that there had only been an error in the naming of the appellant’s position; that the appellant had been appointed to the T12 level as per the offer letter in which the applicable remuneration and benefits were clearly stated; that the appellant received the remuneration and benefits commensurate with the T12 position; and that the process the Human Resources Department followed, after being made aware by the appellant of

the problem, was fair and did not impact negatively on any of the appellant's benefits.

- [6] Still not assuaged, the appellant referred an unfair labour practice dispute to the CCMA in terms of section 186 (2)(a) of the LRA. In terms of this section, an "unfair labour practice" means any unfair act or omission that arises between and an employee involving unfair conduct by the employer relating, *inter alia*, to the demotion of the employee.
- [7] The appellant complained that she was appointed as business process advisor, but had been misled and had been appointed to a position lower than that which she had applied for. It was alleged by her, or on her behalf, essentially, that she had applied for a position on the PAO grade level (this refers to the previous grading system of the respondent), but had been appointed to the T12 level on the new grading system, which, according to her, was lower than the PAO grade. The appellant alleged that on the PAO level she would have been entitled to more benefits, including a higher salary and car allowance. Essentially, the further contention was that since the appellant had been appointed to the position, designated in the offer as "Business Process Advisor", she was actually appointed on the POA level, or its equivalent, and that she was thus entitled to the salary and benefits commensurate with that level.
- [7] The Commissioner had to consider whether there had been an unfair labour practice as contemplated in section 186(2)(a) of the LRA, and more particularly, whether the appellant had been "demoted" as contemplated in that section. Having heard the evidence of the parties, the Commissioner concluded in his award that the appellant had failed to prove an unfair labour practice; that it was not a matter within the CCMA's jurisdiction and that the written particulars of employment do not constitute a benefit within the definition of section 186(2) of the LRA. The Commissioner also stated that the dispute was one in terms of section 29 of the Basic Conditions of Employment Act² which was for the Department of Labour to resolve.

² Act 75 of 1997.

- [8] The appellant brought an application in the Labour Court to review the Commissioner's award, contending, in essence, that the Commissioner's award did not fall within the bounds of reasonableness; that the CCMA had jurisdiction and that an unfair labour practice (in this case a demotion) had been proved. Since that application was brought late, the appellant sought condonation. She dealt somewhat cursorily with that aspect in her founding papers that were initially filed in the review application and attempted to elaborate on that aspect in a supplementary founding affidavit which was subsequently filed, ostensibly, in terms of Rule 7 of the rules of the Labour Court.
- [9] The court a quo considered and dismissed the application for condonation on the basis, firstly, that the appellant did not give a satisfactory explanation for the delay in her founding affidavit and secondly, because the application for review had no prospects of success. The court a quo did, however, grant the appellant leave to appeal to this Court.
- [10] In this Court counsel for the appellant, instructed by attorneys that replaced the appellant's former attorneys, made submissions foreshadowed in supplementary heads of argument that had been submitted. The submissions were, in essence, that the court a quo had erred in refusing the appellant condonation; that it ought to have dealt with the merits of the review application and ought to have reviewed and set aside the Commissioner's award.
- [11] In respect of the condonation aspect, counsel argued that the court a quo erred, not only concerning the extent of the delay, but adopted an inappropriate rigid and formal approach regarding compliance with rule 7A (8) of the Labour Court's rules; that, in the interest of justice, it ought to have taken into consideration the appellant's explanation for the delay furnished in the supplementary affidavit deposed by the appellant. Concerning the admissibility of that affidavit, counsel, essentially, submitted that since the respondent had responded to the review application by delivering an answering affidavit without first invoking the High Court Rule for setting aside the filing of the supplementary affidavit as an irregular proceeding, the court a

quo ought to have found that the respondent had condoned any noncompliance by the appellant with Rule 7(8). Secondly, counsel submitted that the court a quo erred in not finding that the respondent's answering affidavit had been delivered late and that the respondent required condonation in that regard. In respect of the merits, counsel submitted, in essence, that the appellant had established a "demotion" as contemplated in section 186(2)(a) of the LRA and that the contrary finding of the Commissioner was not reasonable.

[12] Counsel for the appellant was adamant that this Court should finalise the matter and not refer it back to the court a quo to deal with the merits.

[13] In light of my view of this matter, it is not necessary to deal in detail with the technical issues raised by the appellant, save to state in that regard that there is merit in the point that, notwithstanding the wording of Rule 7(8), a party need not necessarily have to amend a notice of application in a review in order to be able to file the supplementary affidavit contemplated in that Rule. As a matter of practice, the grounds of review are not stated in the notice of application, but are dealt with in the founding affidavit. The notice relates to the relief or order that is being sought, while a case for that relief is to be made out in the founding affidavit. The rules clearly anticipate, that once the record of the proceedings being reviewed, is made available, it may be necessary to add to, or further refine the grounds, or basis on which the relief, stated in the notice of application, is being sought, albeit without having to amend the notice of application or notice of motion, because the relief sought remains the same. Having said that, in determining whether the filing of a supplementary affidavit was justified, every case has to be decided on its own facts.

[14] An applicant for condonation must make out a proper case for the grant of that relief.³ This includes, not only giving a satisfactory explanation for the delay, but showing that the applicant has good prospects of succeeding in the principal application. It is now trite that a strong explanation may make up for

³ See, inter alia, *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F; *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) para 10.

weak prospects and vice versa, but also that where there are no prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.⁴ I accept that the court a quo erred concerning the extent of the delay and that there was an explanation for the short delay. However, there would have been no point in granting condonation if the review itself had no prospect of success at all.

- [15] The appellant's claim that she was demoted is misconceived. She did indeed apply for the position of "Business Process Advisor PAO; Komati Power Station". That is what appears on the advertisement. The only requirement for the job, according to the advertisement, was indeed, "grade 12 +3 (to) 5 years related experience". However, on 11 January 2008 she was, in writing, offered the position of "Business Process Advisor (T12) in the Risk Assurance Group (Business Processors) at Komati Power Station" and she accepted that offer. The offer gave details of the salary and benefits that applied to that position. She could have refused that offer on the basis that it was not the position she applied for, but she did not. She was accordingly appointed to the position that she had been offered, at grade T12 level with the salary and benefits commensurate with that level. She in writing accepted that offer on 15 January 2008.
- [16] The appellant was never appointed to the position at POA level, or for that matter on the P12 level. She never occupied such a position at any stage and was not "demoted" from such a level to the T12 level, assuming that the T12 level is lower than the POA or P12 level. The appellant always got the salary and benefits that she was entitled to on the T12 level, and which she had accepted out of her own free will. Nothing was taken away from her that she might otherwise have been entitled to.
- [17] The conclusion of the Commissioner to the effect that the appellant did not make out the case of unfair labour practice, as contemplated in section 186 (2) (a) of the LRA, clearly falls within the limits of reasonableness. The further conclusion by the Commissioner that the CCMA did not have jurisdiction in

⁴ *National Union of Mineworkers v Council for Mineral Technology* (see previous footnote) para 10; *Colett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC).

those circumstances was perhaps an unnecessary one, but that did not detract from the reasonableness of the main conclusion, namely, that an unfair labour practice, as aforesaid, was not proved.

[18] There was clearly no prospect of the applicant showing that the award of the Commissioner did not fall within the bounds of reasonableness and one cannot conclude that the court a quo erred in those circumstances in refusing the appellant the condonation that she sought.

[19] In the circumstances, the appeal stands to be dismissed. The respondent did not seek any costs from the appellant. Taking the law and fairness into account this is not a matter where appellant should be mulcted with costs.

[23] The appeal is dismissed.

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Adv Rito Mathevula

Instructed by Mogale Inc. Attorneys

FOR THE RESPONDENT:

Mr D Masher

of Edward Nathan Sonnenberg Attorneys