

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR245/2023

In the matter between:

MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE
Applicant

and

GENERAL PUBLIC SERVICE SECTORAL
Respondent
BARGAINING COUNCIL (“GPSSBC”) **First**

MARTIN SAMBO N.O.
Respondent **Second**

PSA obo LM NEMAVHIDI
Respondent **Third**

Heard: 08 December 2023

Delivered: 12 February 2024

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The Applicant approached this Court seeking an order to review and set aside the arbitration award issued by the Second Respondent dated 19 October

2022. The review application was filed on 1 March 2023 outside the prescribed period of six weeks.

- [2] The applicant further seeks an order condoning the late filing of its review application. If condonation application is not granted, this Court lacks the necessary jurisdiction to consider the merits of the review application and the application stands to be dismissed. If the condonation is granted, then I will consider the merits of the review application.

Condonation

- [3] Although the award is dated 19 October 2022, the applicant was only served on 24 November 2022 electronically via email. The applicant ought to have filed the review application on or before 5 January 2023 and it was only filed on 1 March 2023.
- [4] In respect of the degree of lateness, the review was filed seven weeks outside the prescribed timeframe. The Applicant submitted that the reasons for lateness is due to the delays in obtaining the relevant authorization for the review application to be filed. The Applicant received the authority to review the award on or about 1 February 2023 and the papers were served on the Third Respondent on 23 February and on the First and Second Respondent on 28 February 2023. The Applicant stated that it has strong prospects of success because its failure to shortlist the Third Respondent was a result of her failure to meet the minimum educational requirements for the position of Chief Director: Marketing and Communication. It was further submitted that the Third Respondent will not suffer any prejudice if the late filing of the review application is condoned. The Third Respondent did not file any opposing papers despite being properly served with the review application.

- [5] In applying the ratio in *Melane v Santam Insurance Co Ltd*¹, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*² summarized the principles for consideration as follows:

‘The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.’

- [6] In *Foster v Stewart Scott Inc*³, his Lordship Mr Justice Froneman (as he then was) held as follows:

“It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive.

¹ 1962 (4) SA 531 (A) at 532C – F.

² (2008) 29 ILJ 318 (LC) at paras 17–18.

³ (1997) 18 ILJ 367 (LAC) at para 369.

These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-366A.”⁴

- [7] In applying the above principles to this present application, I am satisfied that the period of delay is not too excessive and the Applicant has provided some explanation for the delay. The application is not opposed; therefore, I have decided to grant the condonation application for the purposes of properly considering the prospects of success. I will now proceed to consider the review application on the merits.

Relevant background

- [8] The crux of the Third Respondent’s complaint relates to her non-shortlisting for the position of Chief Director: Communication and Marketing which was advertised with a requirement for a minimum qualification of an undergraduate degree (NQF level 7) in communication and marketing and related field plus a minimum of five (5) years’ experience as a senior manager in the related field. She then lodged a grievance on or about 18 October 2021 and the outcome of her grievance was that she was not shortlisted because she possessed a BA Degree in Social Sciences, BA Honours in Development Communication and not the relevant NQF level 7 qualification as per the advertisement.
- [9] On or about 20 January 2022, the Third Respondent referred an unfair labour practice dispute relating to promotion and the Second Respondent was the appointed arbitrator. The Second Respondent concluded that the Applicant

⁴ See also: *Melane v Santam* 1962 (4) SA 531 (A) at 532C - F; *Mansoor v CCMA and others* 2000 (1) BLLR 79 (LC) at 83, at para 18; *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211D - 2; *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC); *SA Broadcasting Corporation v CCMA and Others* (2003) 24 ILJ 999 (LC); *Achilles v HE Auto Import and Export (Pty) Ltd* (2000) 5 LLD 18 (LC); *Fortuin v CCMA and Others* (2005) 26 ILJ 96 (LC).

committed an unfair labour practice by failing to shortlist the Third Respondent and awarded compensation equal to one month salary in the amount of R91 311.00.

- [10] Not satisfied with the arbitration award, the Applicant seeks to review and set aside the arbitration award on the basis that it is not one which a reasonable decision maker could make based on the grounds of review stated below.

Grounds for review

- [11] The Applicant filed a review application and stated that the Arbitrator committed misconduct in relation to the duties of the Commissioner by failing to take into account the new regulations relating to minimum educational requirements for appointment into SMS positions in the Public Service.
- [12] The Applicant further submitted that the Commissioner committed an irregularity by interfering with the minimum requirements prescribed set by the employer by seeking to impose his own criteria to favour the Third Respondent and he erred by taking into account a criterion that was not applied by the selection panel to all candidates.
- [13] The Applicant does not dispute that the Third Respondent had the requisite experience in that he had been the Director: Marketing and Public Relations for 16 years but what was in dispute is whether the Third Respondent met the minimum educational requirements as advertised. The Commissioner found that the failure to shortlist the Third Respondent was not done in good faith and found that the Applicant committed an unfair labour practice.

Analysis

- [14] Section 186(2)(a) of the Labour Relations Act⁵ (the LRA) provides that unfair labour practice means an unfair act or omission that arises between an

⁵ No. 66 of 1995, as amended.

employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

- [15] The arbitrator's award which is the subject of these review proceedings concluded that the Applicant committed an unfair labour practice by failing to shortlist the Third Respondent because she had 16 years' experience as a Director and the Applicant emphasized the educational qualification despite the Applicant's experience and the provisions of the SMS Handbook.
- [16] The Applicant contends that the recruitment, selection and filling of vacancies in the public service is governed by the Public Service Act⁶ (the PSA) as well as the Public Service Regulations (the PSR) which were applicable during the advertising of the position of Chief Director: Communications and Marketing. Part C.1.1 of the PSR deals with recruitment and provides that "*an executive authority shall determine composite requirements for employment*".
- [17] The selection panel had excluded the Third Respondent from shortlisting because her qualifications (BA Degree in Social Sciences, BA Honours in Development Communication) did not meet the relevant NQF level 7 qualification as per the advertisement. The Arbitrator was alive to the fact that the Third Respondent did not have an NQF level 7 qualification as prescribed in the SMS Handbook but emphasized that clause 8.2 (2)(b) of the Handbook states that educational qualifications should not be the sole determinant of suitability. The Applicant conceded that the Third Respondent had the requisite experience but she was not shortlisted because she did not meet the academic requirements as prescribed in the advertisement.
- [18] In *Herholdt v Nedbank Ltd*,⁷ the Labour Appeal Court emphasized there is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconstruing the whole nature of the enquiry. The threshold for

⁶ No. 103 of 1994.

⁷ (2012) 23 ILJ 1789 (LAC) at para 39.

interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different’.

[19] In *PSA obo Thorne v Department of Community Safety (Western Cape) and Others*⁸, the LAC stated that in the setting of appointment criteria in relation to the requirements of a post, the Department is allowed to set an educational standard which it believes is reasonable for the requirements of the post.

[20] In *KwaDukuza Municipality v Rajamoney and Others*⁹ the Labour Court held that:

‘for the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria. The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements.

[21] Having regard to the conclusions reached by the arbitrator in this matter, I am of the view that he failed to appreciate that the selection panel could not *mero motu* amend the requirements for the advertised position in order to shortlist the Third Respondent who did not meet the prescribed academic

⁸ [2018] 12 BLLR 1173 (LAC) at para 24.

⁹ (D880/10) [2013] ZALCD 17 (13 June 2013) at para 15.

requirements. The requirements as set out in the advertisement were set out by the relevant executive authority as envisaged in clause C1.1 of the Public Sector Regulations and the Panel did not have the authority to disregard them.

[22] In the premises, the following order is made:

Order

1. The condonation application is granted.
2. The arbitration award of the second respondent issued under case number GPBC80/2022 is reviewed and set aside.
3. There is no order as to costs.

G. C. Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : KF Magano
Instructed by : State Attorneys, Pretoria

For the Respondent: No appearance