

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. JR 1253/2007

NOT REPORTABLE

In the matter between:

MUZIKAYISE CECIL NDLOVU

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1st Respondent

COMMISSIONER THEMBEKILE NSIBANYONI

2nd Respondent

INTERNATIONAL MARKETING COUNCIL

OF SOUTH AFRICA

3rd Respondent

GOVERNMENT COMMUNICATION

AND INFORMATION SYSTEMS

4th Respondent

THE GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

5th Respondent

JUDGMENT BY:

C.J. MUSI, AJ

REASONS ON:

21 October 2008

- [1] On 22 May 2008 I dismissed this application and ordered the applicant to pay the third and fourth respondent's costs. On 4 June 2008 the applicant requested my full reasons for doing so. These are those.
- [2] I want to mention at the outset that this application is ill conceived, misplaced and totally flawed. The mere restatement of the relief sought is a clear manifestation of the very dim prospects of success this application has.
- [3] The applicant sought the following relief.

“BE PLEASED TO TAKE NOTICE that the abovementioned Applicant, Ndlovu Muzikaise Cecil intends to apply to the honourable Court mentioned above on a date to be arranged with the honourable Registrar for an order in the following terms:

1. An Ordering condoning non-compliance on the part of the Applicant with the procedure provisioned:
 - 1.1. in the rules of practice, is condoned and
 - 1.2. LRA in particular sub-section 145(1)(a) and/or Schedule 7 Part B sub-Item 3(4)(a) of LRA.
2. Ordering, in terms of Rule 22:

- 2.1. That the fourth Respondent be joined as a party to these proceedings.
 - 2.2. That the fifth Respondent be joined as a party to these proceedings.
 - 2.3. That the Applicant shall serve the pleadings that has hitherto been delivered (by the Applicant and third Respondent in these proceeding) to the fourth and the fifth Respondents.
3. Authorizing the Applicant to amend the notice of motion dated 25 May 2007 within 10 day of this order, by deleting the whole contents of paragraph 1 thereof and substituting such with the following prayers:
 1.
 - 1.1. Ordering that the award made by the first Respondent, which is dated 12 April 2007, be set aside.
 - 1.2. Ordering that the award made by the first Respondent, which is dated 29 May 2006 be set aside.
 - 1.3. Ordering that the award made by the fifth Respondent which is dated 20 September 2005 be set aside.
 - 1.4. Ordering that the decision made on the 19 June 2007 by the first Respondent dismissing

application for rescission of the award dated 29 May 2006 be set aside.

- 1.5. Hearing and determining the dispute of alleged unfair dismissal and/or unfair labour practice on the grounds contemplated Schedule 7 part B sub-Item 3(4)(a) read with sub-Item 4(1) of the said schedule of LRA, and Ordering that awards and/or rulings that are set aside by sub-paragraph 1.1. to 1.4. hereabove are to be substituted with the following Order:

- 1.5.1. Declaring that the Applicant was dismissed by the third Respondent.

- 1.5.2. Declaring that the aforesaid dismissal of the Applicant is procedurally unfair, (in that the third Respondent failed to comply the provisions of item 9 of Schedule 8 of the code of good practice of LRA).

- 1.5.3. Declaring that the aforesaid dismissal of the Applicant is substantively unfair, (in that the third Respondent had not established any act of misconduct).

- 1.6. Alternatively to paragraph 1.5.1. to 1.5.3. hereof and in the event of the honourable Court finding and/or concluding that the Applicant has at all time

relevant hereto, has been the employee of the fourth Respondent then, in that event:

- 1.6.1. Declaring that the removal of the Applicant from the post of Corporate Communications Manager to the post of Assistant Director with consequent reduction in his remunerations constitutes unfair labour practice (unfair demotion) as contemplated in Schedule 7 Part B sub-Item 2(1)(b) of LRA.
- 1.6.2. Declaring that the actions on the part of the third and/or fourth Respondent to change the terms of contract of employment of the Applicant without the consent of the Applicant constitutes automatically unfair dismissal as contemplated in subsection 187(1)(c) and (d) of LRA.
- 1.6.3. Declaring that the actions on the part of the fourth Respondent to demote the Applicant without first giving the Applicant an opportunity to respond to the allegations of misconduct (against him) constitutes unfair labour practice.
- 1.6.4. Ordering the third Respondent and/or fourth Respondent to reinstate the Applicant in his

then occupation as Corporate Communications Manager.

1.6.5. Ordering that the reinstatement of the Applicant referred to in the preceding paragraph shall be deemed to be operating with retrospective effect from 01 July 2004.

1.6.6. Ordering the third and fourth Respondent to pay unpaid amount of remunerations within 15 days of this order.

1.6.7. Alternatively to prayer 1.6.4. to 1.6.6. hereof, and in the event the honourable Court not being inclined to grant prayer 1.6.4 hereof, then, in that event ordering the third and/or fourth Respondent to jointly and severally pay compensation to the Applicant in the sum of money the honourable Court deem reasonable.

4. Order authorizing the amendment of the grounds of review (set out in paragraph 41 of the founding affidavit 25 May 2007,) by deleting the contents thereof and substituting such with the grounds of review set out in paragraph 6 of the supporting affidavit that is dated **30 November 2007**, which supporting affidavit is attached hereto.

5. In terms of Rule 11(4) of the Labour Court, Ordering the first and/or Respondents to deliver the records of the the proceedings that were held on the 23 February 2007 before the first Respondent.
6. An Ordering that:
 - 6.1. the dispute between is referred to trial before this honourable Court.
 - 6.2. the founding affidavit and the answering affidavit delivered by parties shall be treated as statement of case and opposing statement respectively.
 - 6.3. the Respondents are authorized to amend or deliver additional pleadings within 10 days.
7. Alternatively to prayer 4 hereof and in the event the honourable Court finding and/or concluding that the Applicant erred in bringing review application in that he ought to have instituted the referral to this honourable Court in terms of Schedule 7 Part B sub-Item 4(1) of LRA and not in terms of rule 7A, then in that event condoning the error on the part of the Applicant and directing the procedure to be followed in determining the dispute as the honourable Court deems it reasonable.

8. In the event of opposition of any of the relief herewith sought by one or more of the Respondent(s) hereto, then, in that event an Order directing such Respondent(s) opposing to pay the costs of this application.
9. Granting the Applicant further and/or alternative relief the honourable deems fit.”

[4] During September 1999 the applicant was employed by the Government Communication and Information Systems Department (GCIS), fourth respondent, headed by the Minister in the Presidency.

[5] In mid 2000 the applicant was assigned by the GCIS as the secretary of the Project Manager of the International Marketing Mobilisation (IMM). The project Manager of the IMM was tasked by Cabinet to establish the International Marketing Council of South Africa (IMC), the third respondent. The third respondent was formed during 2001.

[6] In October 2001 the applicant was appointed as the Corporate Communications Manager of the third respondent. The third respondent avers that the applicant was seconded

by the fourth respondent to it whereas the applicant alleges that he was appointed by the third respondent independently from the fourth respondent. I do not deem it necessary to decide this issue. I must however mention that on 18 January 2002 the Director Human Resources of the fourth respondent wrote to the applicant to inform him about a salary increase and added that:

“This package is offered to you by the IMC as per their attached appointment letter and when you return to GCIS you will revert to your current salary position and rank”

(my underlining).

- [7] The applicant negotiated a salary increase with the Chief Executive Officer of the third respondent which culminated in an agreement being reached on 30 April 2004. The CEO wrote to the applicant and informed him that she is pleased to increase his salary to R324 000 per annum.
- [8] The CEO of the third respondent requested the CEO of the fourth respondent to terminate the applicant's secondment. On 1 July 2004 the applicant's secondment was withdrawn.

The applicant was requested to report at the fourth respondent. This heralded the start of the protracted dispute between the applicant and the third and fourth respondents.

[9] On 10 April 2004 the applicant, represented by Webber Wentzel, referred the dispute between himself and both the third and fourth respondents to the CCMA (the first respondent) alleging that he was unfairly dismissed on 1 July 2004 by the third and or the fourth respondent. The first respondent informed the applicant that the dispute must be referred to the General Public Services Sectoral Bargaining Council (GPSSBC), the fifth respondent.

[10] On 9 January 2005 the applicant, represented by Mr Jiyane of NEHAWU, referred the dispute to the fifth respondent but cited the fourth respondent only. During the arbitration proceedings the applicant insisted that the fourth respondent was not his employer and that he was employed by the third respondent. On 20 September 2005 the Commissioner, Denga Mulima, ruled that the GPSSBC had no jurisdiction to adjudicate a dispute between the applicant and the third

respondent because the third respondent is a parastatal and not a government department.

[11] On November 2005 the applicant then referred the dispute to the GPSSBC citing only the third respondent. On 16 November 2005 he was advised that the GPSSBC does not have jurisdiction to adjudicate the dispute because the third respondent is a parastatal.

[12] The applicant represented by Mr Jiyane of NEHAWU, again, referred the dispute to the first respondent, but this time citing the third respondent only. On 29 May 2006 Commissioner Raffee ruled that the first respondent has no jurisdiction to adjudicate the dispute between the applicant and the third respondent in essence because the applicant was at all times before 1 July 2001 employed by the fourth respondent. The applicant unsuccessfully applied for the rescission of Raffee's award.

[13] The applicant then referred an unfair labour practice dispute against the third respondent to the first respondent, alleging that he has been unfairly demoted by the third respondent.

During the arbitration hearing before Thembekile Nsibanyoni (2nd respondent) the third respondent argued that the first respondent lacked jurisdiction because the matter ought to be dealt with by the GPSSBC and further that the first respondent was *functus officio* in view of Raffee's ruling that the first respondent lacked jurisdiction. The second respondent found that the first respondent is *functus officio* and may not deal with the matter until the ruling of Raffee has been set aside by this court. The matter was dismissed and the applicant was advised to approach the GPSSBC or this court.

[14] The applicant then lodged a review application to set aside the second respondent's order. It is this application that the applicant now seeks to amend.

[15] I will for the purposes of this part of the judgment disregard the unacceptable manner in which the application for amendment has been brought. As has correctly been pointed out by the third and fourth respondents, the notice of an intention to amend serves in this case both as a notice to

amend and an amended version of the original review application.

[16] The application for amendment *inter alia* seeks an order that the awards of Mulima (dated 20 September 2005), Raffee (dated 29 May 2006) and the award of 19 June 2007 (dismissal of the rescission application?) be reviewed and set aside.

[17] Accepting that I may deal with all three reviews in this application, it is clear that the review applications are lodged way out of time. The applicant also seeks an order condoning his non-compliance with the rules.

[18] The test for granting condonation was enunciated in **Melane v Santam Insurance Co. Ltd** 1962 (4) SA 531 9A) at 532 B – D where Holmes JA stated:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually

relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.”

On the other hand it must be remembered that “*an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits*” per **Miller JA in Chetty v Law Society, Transvaal** 1985 (2) SA 756 at 768 B – C. Condonation is not a mere formality. Where there has been non-observance of the Rules of Court the applicant should give a satisfactory explanation for the delay in filing the review application as well as a satisfactory explanation for the delay in seeking condonation. See **Darries v Sheriff; Magistrate Court, Wynberg and Another** 1998 (3) SA 34 at 40H to 41 D.

- [19] The nearest that the applicant, in this matter, comes to giving an explanation is at paragraphs 3.8.8 to 3.8.9 of the supporting affidavit in the interlocutory application. In the

aforementioned paragraphs, the applicant states the following:

“3.8.8 At all proceedings that were held in respect of the aforesaid dispute, I was acting in person. The reason why I have been acting in person is that I had financial difficulties. I have made arrangement (sic) in respect of payment of legal fees.

3.8.9 I submit that I being a lay person, and having personally framed the papers delivered, my case require to be placed in proper light by my legal representative, accordingly it is essential that I seek authorisation from the honourable Court to have the provisions of the notice of motion and the grounds of review amended in the terms set out in the notice of motion read with paragraph 6 hereof.”

[20] The applicant is economical with the truth. The proceedings which he now seeks to set aside where dealt with on 20 September 2006, 29 May 2006 and 19 June 2007 respectively.

[21] It goes without saying that the lateness is by any stretch of the imagination inordinately long.

- [22] The applicant does not even come near to stating any grounds upon which the award of Mulima (20 September 2005) should be set aside. He therefore shows no prospects of success.
- [23] The applicant has given no details in his affidavit in respect of the award of 19 June 2007 although he requests that it be set aside.
- [24] The applicant was initially represented by Webber Wentzel. During the proceedings before Mulima on 20 September 2005 he was represented by Mr Jiyane of NEHAWU. During the proceedings before Raffee he was represented by the same Jiyane. Because he gave no explanation or details in respect of the award of 19 June 2007 it is not clear whether he was represented then. His bold and sweeping statement that he was acting in person is therefore only applicable to the proceedings before the second respondent. Ironically, his review application in respect of those proceedings was lodged timeously. The applicant has in my view not given any explanation, let alone a satisfactory one, in relation to the delay in filing the review applications. There are in my view

also no prospects of success in those matters. The applications for condonation ought to be dismissed.

[25] The applicant also seeks an order that the fourth and fifth respondents be joined as parties to these proceedings.

[26] The relevant parts of **Rule 22 of this Court's Rules** reads as follows:

“22 (1) The court may join any number of persons, whether jointly or severally, separately, or if the right to relief depends on the determination of substantially the same question of law or facts.

(2) (a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings...”

[27] The applicant has to show that there are inter alia grounds of equity, convenience, the saving of costs and the avoidance of multiplicity of actions in order to succeed in an application

for joinder. See **Gemeenskapsontwikkelingsraad v Williams and Others** (2) 1977 (3) SA 955 (W) at 971 H. The applicant must also show that the right to relief depends on the determination of substantially the same question of law or facts.

[28] My conclusion in relation to condonation would ordinarily put paid to this application for joinder. I propose however to deal shortly, for the benefit of the applicant, with the joinder issue.

[29] The applicant's case has always been that he seeks no relief against the fourth respondent. During the proceedings before Mulima under the auspices of the fifth respondent, the applicant stated that the fourth respondent is not his employer and that there is no employment relationship between him and the fourth respondent. The applicant sought relief against the third respondent only, before the fifth respondent. The applicant did not apply to have Mulima – whose award he now seeks to set aside – joined.

[30] The third respondent is an independent entity. It is not the fourth respondent. The fourth respondent was not a party at

the arbitration proceedings before Raffee and Nsibanyoni. It was also not a party to the rescission application of 19 June 2007. The fourth respondent has no interest in the orders sought by the applicant against the third respondent. The granting of any order against the third respondent does not in anyway affect the interest of the fourth respondent. I can see no considerations of equity, convenience, cost saving or avoidance of multiplicity of actions militating in favour of joinder in this matter. This application is misguided and ill conceived. It ought to be dismissed.

- [31] Likewise the joinder of the fifth respondent is totally misplaced. The fifth respondent was approached by the applicant to adjudicate a dispute between the applicant and the fourth respondent. Mulima under the auspices of the fifth respondent was the Commissioner. During those proceedings – as pointed out above – the applicant in essence agreed that the fifth respondent does not have jurisdiction to adjudicate the dispute because he is employed by the third respondent. The fifth respondent has no interest in the orders sought by the applicant against the third respondent. My finding in relation to condonation also

reinforces the point that the fifth respondent has no interest in these proceedings. The applicant failed to set out any grounds on which Mulima's award should be reviewed and set aside. The application to join the fifth respondent should also be refused.

[32] The applicant also requests that the first respondent be ordered to deliver the records of the proceedings that were held on 23 February 2007 before the first respondent. The applicant does not allege, in his affidavit, that evidence was adduced during the arbitration proceedings before Commissioner Nsibanyoni. In paragraph 6 of his affidavit, the applicant states that:

"The learned Commissioner who presided on the 23 February 2007 committed gross misconduct in relation to the duties of the Commission in that the learned Commissioner:

6.1.1 violated the peremptory provisions of subrule 36 (1) and (2) of the CCMA in that the learned Commissioner failed to keep records of the proceedings in any form whatsoever as she ought to have done. In particular the Commissioner erred in failing to record the testimony that

I canvassed and/or submissions that I made during argument on the relevant date.”

[33] It is clear from the Commissioners ruling that no evidence was adduced during the arbitration proceedings. The Commissioner states that:

“At the onset; the respondent raised a *point in limine* stating that the CCMA did not have jurisdiction to hear the matter, since the matter should be referred to the CPSSBC.”

The ruling then deals with this issue only. Clearly no evidence was led. The contention of the applicant that the “Commissioner erred in failing to record the testimony that I canvassed” is clearly false.

[34] The applicant also requested me to refer the dispute between the parties to trial. This prayer is also totally misplaced and ill conceived. It exhibits a gross misunderstanding of what review proceedings are and the scope and powers of this court in review proceedings. In **Northern Province Local Government Association v**

CCMA & 4 Others (2001) BLLR 539 (LC) at paragraph 12 it was correctly stated that:

“In my view, the ambit of section 145 is confined to the particular proceedings and award handed down by a commissioner who has presided over arbitration proceedings.”

[35] In exercising its review powers this court must have regard to what was before the Commissioner during the proceedings. The Court cannot in my view during review proceedings refer the matter for trial in this Court and then sit as a Court of first instance. This would be totally incompetent. The Labour Court is a creature of stature. Its powers are inter alia contained in the Act. The Act also ousts its jurisdiction in certain instances. For instance, the question whether the failure to promote or the demotion of the applicant is an unfair labour practice falls outside the jurisdiction of the Labour Court. It is an issue that has to be settled at CCMA level. If the matter is before this Court by way of review, the Court will be guided by the proceedings before the Commissioner. This application should also be dismissed.

[36] The whole application to amend ought therefore to be dismissed.

[37] I have deliberately closed my eyes to the glaring inadequacies of this application and decided to deal with the substantive issues so that form should not trump substance.

[38] The applicant was reprimanded by Mr Howard Freese of the fourth respondent that this protracted litigation is straining the employer – employee relationship. Freese was at pains to point out that it is the applicants' right to proceed with any legal proceedings that he may want to pursue. The applicant however continued with his vexatious litigation. I considered making a punitive costs order but decided against it. It is clear that the applicant does not know who his employer is or he deliberately does not want to recognise his employer. The course for the applicant would then be to bring a substantive application, wherein he cites both third and fourth respondent, requesting an order declaring the one or the other as his employer. Armed with that order he can then decide which course to take. It is my view that a cost order in favour of the third and fourth respondents would be just

and equitable under the circumstances. They opposed the application. The other respondents did not.

[39] It is for the above reasons that I made the order as set out in paragraph one of this judgment.

CAGNEY J. MUSI, AJ

On behalf of the Applicant:
Instructed by:

Adv. RPA Ramaweli
Mabuela Inc.

On behalf of the Respondent:
Instructed by:

Adv. TJ Magano
Nishlan Moodley & Associates