

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case number: JR747/08

In the matter between:

DEPARTMENT OF HEALTH AND SOCIAL

DEVELOPMENT (LIMPOPO PROVINCE)

Applicant

And

DR MWANABUT JOHN NZADI

1st Respondent

DR KINZONZIBIEMO

2ⁿ Respondent

EXECUTOR OF DECEASED ESATATE

OF DR MALANDU

3rd Respondent

PHSDSBC

4th Respondent

SAMUEL NEGOTA N.O.

5th Respondent

Judgement

Molahlehi J

Introduction

- 1] The applicant in this matter seeks to review both the certificate of outcome of the conciliation proceedings and the arbitration award which were issued under cases number *PHSHS 197-01/08* and *PHSHS 179-07/08* respectively.

The applicant has also applied for condonation for the late filing of the review application. The applicant further claims that the respondent waived their rights to be promoted in terms of circular 72 of 2003 because they participated in interviews under circular 176 of 2004.

2]The review application arose mainly from the arbitration award which was issued by the sixth respondent (the arbitrator) in terms of which she found the applicant to have committed an unfair labour practice in not promoting the first to the third respondents (the respondents). The arbitrator further ordered that the respondents be translated to the senior positions of senior medical officers with effect from the 1st November 2007.

Background facts

3]The first and the second respondents are employed as medical practitioners by the applicant. The third respondent has since the issuance of the arbitration award passed away. He is in these proceedings represented by the executor of the deceased estate of Dr Malundu.

4]The issue that gave rise to the dispute between the parties concerned the promotion of medical officers to a higher salary levels. The promotion process was initially regulated by circular 72 of 2003 (resolution 72) which had been issued by the head of the department during 2003. In terms of that resolution one of the criteria for promotion to a higher salary position was prior experience.

5]The one challenge of the process set out by circular 72 was that the skills and the actual experience was not taken into account in evaluating whether or not a medical officer qualified for promotion. In order to address the issue of experience in the assessment of whether or not a medical officer should be upgraded to a higher salary level the head of the department issued circular 176 of 2004. The two main things that this circular did, was to withdraw the

provisions of circular 72 and introduce interviews in the assessment of whether or not a medical officer should be promoted.

6]The respondents were during October 2004 recommended by their manager for promotion to the positions of chief medical officers. The recommendation was then sent to the head office of the applicant by the chief executive officer (the CEO). The applicant declined to upgrade the respondents.

7]The respondents were unhappy with the decision not to upgrade them and accordingly addressed a memo to the applicant during August 2006, complaining that despite the decision not to promote them some of their colleagues had been promoted. The applicant says that the respondents were not promoted because they were not suitably qualified for promotion despite their years of service.

The grounds for review

8]The applicant contends that at the time the respondents addressed their memorandum of grievances regarding refusal to promote them, circular 72 of 2003 was no longer in operation it having been withdrawn and replaced by circular 176 of 2004. The applicant further contends that the arbitrator lacked jurisdiction because the alleged unfair labour practice was declared after the prescribed 90 days as required by the law.

9]The other issue raised by the applicant is waiver. In this respect the applicant contends that the respondents waived their rights to claim the right to be promoted under circular 72 because they applied and participated in interviews for promotions under circular 176 during 2006.

10]As concerning the arbitration award the applicant contends that it is clear from the summary of the evidence by the arbitrator that respondents became

aware of what had happened regarding the decision not to promote them during 2004 but did nothing about it until when resolution 72 was withdrawn and rendered inoperative. It is on the basis of this that the applicant contends that the arbitrator exceeded his powers. In other words the arbitrator is alleged to have made an award based on a non existing circular. The applicant further contends that the arbitrator committed an error of law in translating the respondents to the positions of PMO when they had in fact been unsuccessful in their interviews for those positions. The arbitrator is also accused of having committed a gross irregularity by failing to appreciate that the respondents did not discharge their burden of showing that an unfair labour practice had been committed.

The arbitrator's award

11]The arbitrator concluded that the applicant had committed an unfair labour practice on the basis of the following findings:

- i. That despite saying that the translation of the other two doctors were erroneously made, it was not disputed that their translation was made on the basis of circular 72.
- ii. That the applicant failed to show that the respondents' promotion was not covered by the period of circular 72 and that they were competent and satisfied that the required period of experience for them to be promoted.
- iii. That resolution 176 which was intended to withdraw resolution 72 only came into effect on the 1st January 2005.
- iv. That the applicant violated the rights of the respondents' Constitutional right and that violation was not mitigated by the invitation for them to attend the interviews for the vacant posts

during 2007.

Evaluation

12]The first issue for consideration in this matter is whether or not the applicant has made out a case for the condonation for the late filing of its review application. If unsuccessful in the condonation application that would be the end of the applicant's case. If successful then the issue for determination would be whether the award of the arbitrator is reviewable for unreasonableness or gross irregularity.

13]In order to succeed the applicant had to satisfy certain interrelated factors which have been firmly established by our courts. Those are the factors which the court has to take into account in exercising its judicial discretion weighing whether or not condonation should be granted. In exercising its discretion whether or not to grant condonation for the late filing of the review application the factors which the court takes into account 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 frames; (c) bona fide defence or prospects of success 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 (see *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) and *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (AD). However the two factors that tilt the scale significantly in weighing the above factors are the reasonableness of the explanation and the prospects of success.

14]The applicant in its review application is seeking to review and set aside both the certificate of outcome of the conciliation and the arbitration award. It therefore means that the explanation for the delay has to deal with the

period from the time the certificate of outcome was issued and that of the arbitration award.

The certificate of outcome

15]As indicated the applicant is seeking to review and set aside the certificate of outcome of the conciliation proceedings. This review is patently and excessively late. The only explanation that the applicant seems to proffer for the delay in reviewing the certificate of outcome is that although its representative, Mr Ngoasheng attended the conciliation meeting, he did not “*handle it*” (the conciliation). In this respect Mr Ngoasheng says the following:

*“I did not handle the conciliation process. I attended the conciliation meeting. I did not raise the issue of jurisdiction or condonation. This was a serious omission on my part. The applicant did not waive its right to object to jurisdiction. It never came to my mind that the referral was out of time. I also refer the Court to the grievance rules for the public service which deals with the procedure to lodge a grievance . . . According to annexure "H" the grievance must be dealt with within 30 days. This means that if it is not, the employee must refer the dispute to the bargaining council. According to the doctors, they lodged internal grievance in 2004. They were supposed to have referred the dispute to the bargaining council after 30 days from the date they lodged the grievance and no response forthcoming from the employer. They did **not**.”*

16]Mr Ngoasheng goes further to say:

“I was in fact alerted by the legal representatives of the applicant during consultation for purposes of the review that the dispute that

was arbitrated lapsed in 2004 when the doctors failed to refer it to conciliation then. The doctors' internal grievance was finalised in 2004 when they were told that they will not be promoted. The doctors could not have had the dispute conciliated without an application for condonation. Otherwise the bargaining council lacked jurisdiction to conciliate. The conciliation certificate must be set aside.”

17]In my view, the above does not provide an explanation as why the applicant did not file its review application of the certificate of outcome timeously. In a sense Mr Ngoesheng statement amounts to admission of gross negligent and dereliction of duty. If for any reason the statement of Mr Ngoesheng was to be regarded as an explanation it is extremely poor and should for that reason be regarded as being weak and unacceptable for the following reasons: In the first instance Mr Ngoasheng does not take the court in his confidence by explaining who is the person who represented the applicant at the conciliation proceedings and why did that person not raise the issue of jurisdiction. In the heads of argument the applicant says that the respondents were one and half year late but does not explain why it seeks to review the certificate of outcome only now. It is further stated in the applicant's heads of argument that the dispute could be arbitrated only if dispute had been referred to conciliation on time. This argument is unsustainable in the light of the authority set out by the Labour Appeal Court in the case of, *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others* [2000] 12 BLLR 1389 (LAC). In that case the Court in considering a situation similar to the present case had the following to say:

“In my view the language employed by the legislature in [section 191](#) is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and,

the council or commissioner has issued a certificate in terms of [section 191\(5\)](#) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate.”

The Labour Appeal Court then quoted with approval what was said by the Court a quo in that case when it said:

“If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, public policy as expressed in the maxim omnia praesumuntur rite esse acta, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision...”

18]Essentially the decision in *Fidelity Guards Holdings (supra)* is based on the general principle of our law that a decision or an administrative decision is valid until set aside. In other words on the facts of this case the certificate of outcome was valid until set aside on review. On the basis of this principle and the decision in *Fidelity Guards Holdings* the arbitrating commissioner in this matter was entitled to assume that the certificate outcome was valid and more particularly because its validity was not even raised. Whilst these

considerations are important, the critical issue in this matter is the fact that the review of the certificate of the outcome of the conciliation is extremely late and no satisfactory explanation has been tendered as to its lateness. The condonation application whose details are considered later deals only with the reasons for the delay in filing the review application of the arbitration award. For these reasons the application that seeks to review and have the certificate of outcome of the conciliation set aside stands to fail.

19]I now turn to deal with the reasons proffered by the applicant for the late filing of the review application. The reasons for the delay in filing the review application according to the applicant was because of the following reasons:

- *The arbitration award was received on 13 December, which was the beginning of the festive season.*
- *The procedure that needs to be followed in deciding whether or not to review an arbitration award. At the time the arbitration award was served on the applicant it was not brought to the attention of the Labour Relation Department, which is also attributed to the festive season.*
- *Adv Rawutlu needed to be notified and be briefed about the arbitration award.*

20]In my view the two main factors upon which this matter turns on are; the reasonableness of the explanation and the prospects of success. It is common cause that the delay was two and half months. The first reason given for the delay is that the arbitration award was received during December when most employees had already left for the festive season holidays. The other reason is that the arbitration award had to be referred to the senior legal manager of the applicant.

21]The applicant does not tender any explanation as why it took a month for both the senior legal manager and the general manager to finalise on the decision to review the arbitration award. In my view the delay of two months is excessive if regard is had to the unsatisfactory explanation tendered by the applicant. The weakness in the explanation is not compensated for by the prospects of success.

22]It is common cause that the case of the respondents concerned an unfair labour practice in terms of s186 of the Labour Relations Act 66 of 1995 (the LRA). Section 186 of the LRA reads as follows:

“Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving -

- a) 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;*
- b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;*
- c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act”.*

23]It is also common cause that the arbitrator considered the respondents' case

on the basis of the circular 72 of 2003. The relevant provisions of circular 72 reads as follows:

"1.1.1 On appointment and subject to furnishing of proof of previous experience appropriate recommendation should be submitted to the provincial office for appointment at a level other than the entry level depending on the number of years of previous appropriate experience, e.g. 3 years appropriate experience could serve as recommendation for appointment at the next level or senior and 6 years at the principal level where the previous framework provided for this rank level. "

A note under clause 1.1.1 reads as follows:

"NB: Recommendation for consideration of experience on appointment should be done in such a manner that serving personnel with the same number of years of experience are not disadvantaged"

At clause 1.2.1 the circular provides that:

"Since the facing out of the ranks/leg promotion provision movement to the next level/grade is by open competition, i.e. through adverts of positions in that grade."

And at clause 1.2.2 the circular reads as follows:

"Within the framework provided for in public service regulation, 2001 (Chapter 1 Part V/C3) and in an effort to both attract and retain critical skills, it is directed that serving personnel who had performed satisfactorily and who have served for continuous 3 years be recommended for

translation to senior level, and to principal level in respect of 6 years where the previous framework provided for rank levels up to this level."

24]The essence of the respondents' complaint at the arbitration hearing was that they were unfairly treated as concerning their promotion because they satisfied the requirements set out circular 72 and that in addition the applicant was inconsistent in applying its policy in that two of their colleagues were promoted in terms of that circular.

25]The applicant does not dispute the inconsistent application of its policy but states that the promotion of the other two doctors was in error. It is apparent that that error was not corrected at the time this matter came before the arbitrator. It is also apparent that the arbitrator in assessing the fairness of the treatment of the respondents by the applicant took into account both the unfair treatment arising from the inconsistent application of the policy concerning promotion and compliance with the requirements of circular 72. It should be recalled that whilst the applicant had discretion in terms of whether or not to promote a medical officer, it can never be that the fairness would permit that such discretion be exercised unfairly. The discretion had to be exercised by having regard to the provisions of the requirements of circular 72 and it be exercised in an objective and fair manner. In this respect the arbitrator in finding that the applicant committed unfair labour practice took into account the requirements of circular 72 and the fact that there was no evidence of complaints against the respondents more particularly regarding their work performance.

26]The essence of the arbitrator's finding is that the applicant did not provide any justification or reasonable explanation for its decision not to promote the respondents in the face of the requirements of circular 72 having been

satisfied. It is also clear that the arbitrator did not accept as justification or as an acceptable explanation by the applicant that it made an error in promoting the other two doctors. It is undisputed that qualification for promotion of medical officers was based on years of experience in terms of circular 72 unlike in the case of circular 176 where promotion was based on having to be interviewed before being promoted. In dealing with the differentiated treatment between the respondents and the other two doctors, the arbitrator says the following:

“It must be noted that the posts that the respondents contested for were the same posts of Chief Medical Officers. It must be noted that the appointment of the two doctors being Dr Nara and Dr Tshiani were done by mistake. Apart from that those appointments were done before Circular No 72 of 2003 was withdrawn. Their appointments were done in 2004. . . .”

27]In my view there exist no prospects of success in as far as the applicant was required to show that the arbitrator was unreasonable in arriving at the conclusion that the applicant committed an unfair labour practice. The decision of the arbitrator is in line with what circular 72 envisaged. The case which was before the arbitrator was based on the cause of action that arose when circular 72 was still in place. In other words the cause of action upon which the respondents' case was based had already arisen at the time circular 176 was introduced.

28]I am also of the view that it cannot be said that the arbitrator committed gross irregularity in the approach he adopted. The applicant has not, in my view, satisfied the requirements of proving gross irregularity as set out in *Telcodia Technologies v Telkom SA Ltd 2007 (3) SA 266 (SCA)*. In the first instance it cannot be said that the arbitrator did not appreciate the task he had

to deal with in resolving the issues that the parties had presented to him. He clearly understood that the issues concerned the dispute that arose during the period when circular 72 was still in place. The effective withdrawal of that resolution only took effect during January 2005 and not during 2004, the time when the dispute arose. It can thus not be said that the arbitrator misconceived his mandate to the extent that it can be said that applicant was denied a fair hearing. *See Goldfields Investment Ltd and another v City Council of Johannesburg and another 1938 TPD 551*. Similarly it cannot be said that the arbitrator exceeded his powers because on the evidence before him he performed his duties within confines of the mandate as defined by the cause of action.

Waiver

29]The other basis upon which the applicant challenged the arbitration award is based on the contention that the respondents had waived their rights to assert their claim under circular 72 by participating in the interviews of their promotion as envisaged in circular 76.

30]In my view the applicant has not made out a case that the respondent by participating in the interviews under circular 176 did so with the full knowledge and with the view to waiving their rights under circular 72.

31]In the light of the above discussion it is my view that the applicant's application for condonation stands to fail. I see no reason in law and fairness why the costs should not follow the results.

32]In the premises the following order is made:

1. The applicant's application for both condonation and the review applications are dismissed with costs.

Molahlehi J

Date of Hearing: : 23 September 2010

Date of Judgment : 2 February 2011

Appearances

For the Applicant: W R Mokhare instructed by the State Attorney

For the Respondent: N B Sibeko for the union