



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR481/08

In the matter between:

MABIRIMISA NKHANEDZENI EWERT **APPLICANT**

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

1ST RESPONDENT

DENGA MULIMA

2ND RESPONDENT

MEC FOR PUBLIC WORKS

3RD RESPONDENT

GOVERNMENT EMPLOYEES' PENSION

FUND

4TH RESPONDENT

Heard: 20 December 2011

Delivered: 20 December 2011

Summary: Applicant disputing pensionable period as certified by 4th Respondent, thereby detrimentally affecting his pension emoluments payable by the 4th Respondent. Challenges this in the 1st Respondent some 34 months after he had been discharged arising from his application for ill- health in terms of section 17(2)(a) of the Public Service Act 103 of 1994 on the basis of it being a dispute of mutual interest/ severance.

Condonation refused by 2nd Respondent on basis of the length of delay and incomplete explanation for it. Applicant seeks to review condonation ruling. Held that not reviewable and even if the prospects of success were to have been weighed in the conspectus of factors in exercising the discretion whether or not to grant condonation, there were none, as the Applicant was in the wrong forum. The 1st Respondent had no jurisdiction to resolve such a pension dispute. Application dismissed, each party to bear its own costs.

JUDGMENT

HARDIE AJ

- [1] This is an opposed application to review the ruling of the 2nd Respondent made on 12 February 2008, not to grant the Applicant condonation for the late referral of his alleged dispute to the 1st Respondent under case number PSGA1088-07/08.
- [2] It is common cause that the Applicant's services with the 3rd Respondent were terminated on 31 March 2005 due to ill- health in terms of section 17(2)(a) of the Public Service Act 103 of 1994, and arising from an application by the Applicant to be discharged on this basis. This is commonly known as boarding on the basis of ill- health.
- [3] Subsequent thereto, and on 19 May 2007 (more than two years after the Applicant's discharge), the 3rd Respondent received correspondence from the Applicant in the form of a facsimile from Adv Sekhwari alleging that as the Applicant had been contributing to the 4th Respondent with effect from 1 March 1992, which is for more than 10 years prior to the termination of his employment on 31 March 2005, he qualified for a monthly pension annuity. Adv Sekhwari called on the 3rd Respondent to correct the date of commencement and recalculate Applicant's pension benefits, failing which an appropriate High Court would be approached to enforce the Applicant's rights.
- [4] On 5 July 2007, the 3rd Respondent responded to Adv Sekhwari's facsimile, alleging that according to 3rd Respondent's records and those of

the National Treasury (Pension Administration), the Applicant's pension contributions commenced on 1 June 2005, and that as he had only contributed for 9 years and 9 months, his pensionable service disqualified him from receiving a pension annuity. He thus received only a gratuity and forfeited his annuity. In addition, that the Applicant had been informed by officials in both the benefits section and those at the pension office on several occasions about the forfeiture of his annuity benefits should he terminate his services before the completion of the ten years pensionable period.

- [5] No response was received to the 3rd Respondent's letter dated 5 July 2007 from the Applicant. Instead, the Applicant with the assistance of Adv Sekhwari, made a referral to the 1st Respondent on 21 January 2008. In the referral form, the nature of the dispute is characterised both as a matter of mutual interest and severance. The date upon which the dispute is alleged to have arisen is indicated as July 2007. Together with the referral, the Applicant deposed to a founding affidavit in support of his application for condonation. He states under oath that the dispute arose on 10 July 2007 and that it is about six months late, he having sought legal advice on 19 May 2007. He alleges that he previously took the matter up with the 3rd Respondent as well as the Labour Department, but that there was no progress; hence he sought legal advice from Adv Sekwari in May 2007.
- [6] On 6 February 2008, the 3rd Respondent served and filed an opposing affidavit, in which it set out the history of the matter. It alleged *inter alia* that prior to the termination of his employment, the Applicant had not raised any formal grievance with either the 3rd or 4th Respondents. He had also been issued with a certificate of membership of the 4th Respondent as at 4 November 2002 and did not object to the date of admission to the 4th Respondent on the certificate, namely 1 June 2005. Also, prior to being discharged on 31 March 2005, the Applicant had been advised by 3rd Respondent's officials that he was going to be disadvantaged if he left the 3rd Respondent's employ before the elapse of ten years and that he should stay another four months so as to complete ten years pensionable service.

- [7] In his replying affidavit, the Applicant alleged *inter alia* that the delay was occasioned by the conduct of the 3rd Respondent's officers who kept on promising him that they were attending to his complaints whereas they were doing nothing, without specifying who the officials were and when the promises were made. Further, that he had been to the Labour Department on two occasions, as well as attended upon the offices of the 3rd Respondent's finance department's Ms Mampwe Malema who had undertaken to locate his file and revert to him. This never happened. He also denied that any advice was given to him by any of the 3rd Respondent's officials that he should wait to complete ten years of pensionable service. He however, admitted that the degree of delay is two years.
- [8] The 2nd Respondent in declining to grant the Applicant applicant's application for condonation, held that the Applicant had failed to provide a comprehensive explanation for the lengthy delay, and thus it was not necessary for him to consider Applicant's prospects of success. He found also that the Applicant had attempted to fudge the length of delay by concocting the date of dispute as being July 2007.
- [9] Whilst 2nd Respondent's reasoning may not show a full appreciation for the principles enunciated in *Melane v Santam Insurance Co Ltd* 1962 (4) SA531 (A) at 532C-F, in that excellent prospects of success may perhaps compensate for a lengthy delay and lack of a comprehensive explanation for the lengthy delay when exercising a discretion whether or not grant condonation, the ruling under review is not so unreasonable that no reasonable decision maker could come to it. In fact, the Applicant did not seek the indulgence of condonation with clean hands, attempting to roll back the clock only to July 2007, yet admitting in her replying affidavit that the length of delay was two years.
- [10] The fact is that the referral to the 1st Respondent was ill- conceived, and therefore has no prospects of success. The Applicant's alleged dispute is not one regarding severance nor of mutual interest, and should therefore never have been pursued in the 1st Respondent in the first place. This is a dispute concerning his pension emoluments. As the Applicant is

precluded from approaching the Pension Fund Adjudicator in terms of section 30A of the Pensions Fund Act No 24 of 1956 for resolution of his pension dispute for reason that the 3rd Respondent as an organ of state is a contributor to the 4th Respondent, his remedy was as threatened in Adv Sekhwari's facsimile dated 19 May 2007, to have approached the High Court for a declaratory order that the date of commencement of his pensionable service was 1 March 1995 and not 1 June 1995.

[11] As regards the costs in this matter, I am disinclined to order that the Applicant pay the 3rd Respondent's costs. It is apparent from the 3rd Respondent's affidavit opposing condonation before the 1st Respondent, that it had obtained legal advice at that time, by the case law quoted therein. Also that it has been advised by the state attorney in this review application. Had the 3rd Respondent have raised the issue that the Applicant was pursuing its pension dispute in the incorrect forum, it would have in all likelihood nipped this review application in the bud.

I therefore make the following order:

1. The Applicant's review application is dismissed.
2. Each party is to bear its own costs.

S B Hardie
Acting Judge

APPEARANCES

APPLICANT:	Adv MS Sikhwari Instructed by AR Maidia Attorneys, Thohoyandou
THIRD RESPONDENT:	Adv BM Lecoge Instructed by the State Attorney, Johannesburg.

LABOUR COURT