



REPUBLIC OF SOUTH AFRICA

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

**Of interest to other
Judges**

Case no: JR 3307/09

In the matter between:

BENNET SHIBOGDE

Applicant

and

MINISTER OF SAFETY AND
SECURITY

First Respondent

NATIONAL COMMISSIONER, SOUTH
AFRICAN POLICE SERVICES

Second Respondent

L NABO (N.O.)

Third Respondent

SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL

Fourth Respondent

Heard: 26 August 2010

Delivered: 11 July 2012

Summary: (Review – condonation- effect of withdrawal equivalent to absolution from the instance – general statement of financial hardship not sufficient to explain 3 month delay in making a fresh referral and condonation application)

JUDGMENT

LAGRANGE, J

Introduction

- 1] This is an application to review and set aside a condonation ruling of the third respondent ('the arbitrator') on 8 October 2009, in which he found that the applicant had not shown good cause for the late referral of his unfair labour practice dispute to the bargaining Council. The review application was also filed late and the applicant has applied for condonation in that respect also. The first and second respondents, were the Minister of Safety and Security and the National Commissioner of the South African Police Service ('the respondent' or 'the employer'). The third and fourth respondents are the arbitrator and the Safety and Security Sectoral Bargaining Council ('the SSSBC' or 'the council'), respectively.

The application for the late referral to the bargaining Council and the arbitrator's reasons for refusing condonation

Length of the delay

- 2] The history of this matter is slightly unusual. The applicant had applied for promotion to the rank of Captain at the crime combating unit based in Soweto. The successful applicant for post number 281 was a female police official, Captain M Mohlale. The applicant lodged a grievance against the outcome, which was finalised 9 May 2005. He referred an unfair labour practice dispute in terms of section 186(2)(a) of the labour

relations act 66 of 1995 ('the LRA') to the bargaining Council on 20 May 2005. The arbitration in the matter was finalised in August 2005 and it was found that the employer had committed an unfair labour practice and the applicant should be promoted to the rank of Captain. The employer took this matter on review and the Labour Court referred the matter back to the bargaining Council to be heard before another arbitrator because the successful candidate was never cited as a party in the initial arbitration.

- 3] The second arbitration was set down for 23 April 2009. At these proceedings the employer's representatives produced an employment equity plan and advised that it had followed this plan when appointing a female officer to the post. The applicant, who was represented at the hearing by his attorney, then withdrew his dispute, but the following day sought to retract this withdrawal decision by sending a letter to the bargaining Council to that effect. His representative was advised to submit his request in writing. After hearing nothing a further letter was sent to the bargaining Council on 28 May 2009 asking for the matter to be re-enrolled. The same day the bargaining Council advised that since the applicant had withdrawn the matter the applicant should file a new referral form.
- 4] The applicant only referred the dispute afresh some three months later on 2 September 2009.
- 5] The applicant was clearly unsure whether the delay for which he sought condonation was to be calculated from the date when the original dispute arose in 2005 or later. The respondent accepted that the degree of lateness should be calculated from a date 30 days after the date the matter was set down for arbitration, on the basis that normally a referral would have to be made within 30 days of the mediation process being finalised. On the same ground, the arbitrator accepted that the referral was 100 days late and that such a degree of lateness was substantial.

The reasons for the lateness

- 6] The applicant said the reason for failing to file the dispute afresh in good time was because he had financial difficulties and could not instruct his

attorney properly. The arbitrator rejected this explanation because he reasoned that the applicant himself could have referred it or could have done so through the trade union he was affiliated to and, in any event, a lawyer was not required to make a dispute referral.

- 7] At the end of his ruling that the arbitrator concluded that if the applicant and his attorneys had the intention to re-enroll the dispute as early as 24 April 2009, there were no convincing reasons provided by them to explain why the referral was only made on 1 September 2009. The arbitrator was of the view that nothing indicated that the delay was not wilful.

The applicant's prospects of success

- 8] The arbitrator found it difficult to assess which party had reasonable prospects because he said he had not been informed of the merits of the dispute, though he noted the previous arbitration award in favour of the applicant as well as the fact that the applicant withdrew the matter after being presented with the employer's employment equity plan. From his reasoning one may surmise that the arbitrator was not persuaded that the applicant had demonstrated that his prospects of success were most probably better than those of the respondent.
- 9] In his affidavit in support of his condonation application the applicant relied on the fact that the previous award was in his favour and that the matter was only referred back to the bargaining Council on account of non-joinder of the successful applicant. By way of trying to explain why he decided to pursue the matter, despite withdrawing it when the respondent presented the employment equity plan, the applicant said that on closer scrutiny of the plan it appeared to him that the document was of questionable validity and should be tested under cross-examination. No basis was provided for this contention. He argued further that, on the evidence presented in the original arbitration hearing, employment equity was held not to have played a role in the promotion.
- 10] The following features of the original award in this matter are worth highlighting. The arbitrator in that matter found that the appointment of the

successful candidate had been made purely on points allocated, and that certain points had been allocated to her which should not have been. He also found that other points were not allocated to the applicant which ought to have been. As a result, the arbitrator concluded that if the misallocation of points was corrected the applicant would have received an overall score of between 20 and 22 whereas the successful candidate would have only received a score of 16. Thus the applicant ought to have succeeded.

- 11] The arbitrator acknowledged that the points of the second highest candidate might also have required adjustment, but was of the view that the onus of producing that evidence lay with the respondent if it wished to dispute that the correct result would have led to the applicant being appointed. The arbitrator discounted evidence from the respondent's witnesses that greater representivity had played a role in the selection process. In this regard, he mentioned that notes on the documents completed by the panel showed that the applicant's promotion would have enhanced representivity, yet no similar observations were recorded in respect of the successful candidate.

Prejudice to the parties

- 12] The arbitrator accepted that both parties would suffer prejudice if the late referral of the dispute was not condoned. The applicant's prejudice would lie in the delay in the matter since 2005 and the possible unavailability of witnesses who conducted the interviews. On the other hand, the prejudice to Captain Mohlale who had already occupied the post for four years would be considerable. On balance, the arbitrator concluded that the SAPS and the successful candidate would suffer greater prejudice than the applicant if the matter proceeded.

The review application

Condonation for the late filing of the review

- 13] The applicant's attorney received the condonation ruling on 21 October 2009 and the review application was filed on 8 December 2009. Accordingly the degree of lateness was only six days. The delay is not completely insignificant in the context of the six-week period permitted for the filing of review applications. However, it cannot be said to have resulted in any serious prejudice to the respondents, even though the explanation for the delay is weak, namely that the applicant only consulted with his attorneys on 18 November 2009 and took more than a week to instruct them to proceed with the review. In the circumstances, I am inclined to condone the late filing of the review application and deal with the merits of the application fully.

Grounds of review of the arbitrator's condonation ruling

Condonation was not necessary

- 14] The first ground of review raised by the applicant is that the arbitrator should not have made a ruling at all because the referral was not late. It appears that the applicant is of the view that it was necessary for the arbitrator to make a ruling on the withdrawal of the dispute and in the absence of a ruling the matter could simply have been re-enrolled.
- 15] The respondent points out that it was the applicant's decision to withdraw the matter, with the assistance of his legal representative, whereas he could simply have asked for the hearing to be stood down in order to examine the employment equity document presented to him. The respondent argues further that, because the withdrawal of the dispute was his own decision there was nothing on which the arbitrator was required to make a finding, and accordingly there was no need to wait for a ruling before trying to have the matter re-enrolled as a fresh referral.
- 16] Secondly, the respondent points out that the court merely ordered that the matter should be re-enrolled by the Council within 30 days of the

judgement, and once this had been done, the rules of the bargaining Council applied and any further referral to conciliation – arbitration outside of the 30 day period had to be accompanied by a condonation application in terms of those rules.

The justification for the delay

- 17] The applicant contended that the arbitrator's finding that the delay was unjustified because the applicant did not have the funds to instruct his legal representative was irrational because the arbitrator was well aware that his legal representative had been acting previously in the matter and that it was unrealistic in the circumstances to expect him to have instructed another person.
- 18] The respondent equally asks why the applicant's attorney could not have taken on the matter on the basis that he would be paid once the applicant had the necessary funds in view of the long-standing relationship the applicant relied on. The respondent also alludes to the fact that the applicant's attorney did perform work for the applicant after the matter was withdrawn, yet no explanation was provided why this work was done but he could not assist the applicant in completing the referral form. More importantly, the respondent points out that the applicant does not explain why he could not complete the referral form himself or why he could not have sought the assistance of a union.

The findings on prospects of success

- 19] According to the applicant, the arbitrator ought to have made a determination on the prospects of success and should have enrolled the matter to determine this issue which is an important factor in determining the application. Furthermore, he failed to consider that the matter was only referred back to arbitration on the previous occasion because of the failure to join the successful candidate as a party to the proceedings.

- 20] The respondent disputes that the arbitrator was under any obligation to convene an enquiry into the merits, and he was entitled to consider the matter on what was presented to him by the parties.

The arbitrator's finding on prejudice

- 21] On the arbitrator's findings regarding the prejudice to the parties of the matter proceeding, the applicant contends that these were also irrational because the same witness who testified on behalf of the second respondent at the initial arbitration proceedings and who chaired the interviews was present on 23 April 2009, yet the arbitrator concluded that the witnesses who conducted the interviews might not be readily available. Moreover, the applicant had indicated in his condonation application that all the witnesses and documentary evidence were available and this was not contested by the respondents. The applicant dismissed as nonsensical the arbitrator's finding that Captain Mohlale would be prejudiced, because she would still retain her appointment and he would merely be promoted in rank if he was successful.
- 22] The employer does not make much effort to defend the reasonableness of the arbitrator's finding on this issue but emphasises that the delay was nonetheless unreasonable and therefore the arbitrator's findings were justifiable.

Evaluation

The need for a condonation application

- 23] There is no dispute that on the day the matter was enrolled, the applicant withdrew the case and then had second thoughts overnight. Once a matter is withdrawn, any further attempt to revive it is to be treated as a fresh referral of the dispute. On his own version, the applicant withdrew on the legal advice of his attorney, but changed his mind and advised his attorney to re-enroll it.
- 24] The respondent argues that once the matter was withdrawn without objection from it and without objection from the arbitrator, the matter was

finalised. However, I agree with the applicant that the arbitrator's assent was required for the withdrawal of the matter, for the reasons mentioned below. Nevertheless, since the arbitrator did not proceed with the matter, it must mean he implicitly assented to the withdrawal even if no formal ruling was recorded by him, so the applicant's argument that no condonation application was necessary is not well grounded on the facts.

25] On the question of whether the withdrawal required the arbitrator's assent, I see no reason in principle why an arbitrator should not have the same discretion which is afforded a judge on whether or not to allow a matter to be withdrawn.¹

26] Yet the fact that a matter is withdrawn is not necessarily a bar to reinstituting proceedings. It seems that the prevailing view is that a claim is not determined by the withdrawal of the claim, but the withdrawal is equivalent to a grant of absolution from the instance.² It therefore remains open for the applicant to reinstitute proceedings as the merits of the claim have not been adjudged.³

1 In high court proceedings it has been held that withdrawal of an action is not simply within the discretion of an applicant once *litis contestatio* has been reached: the court has a discretion whether to allow the matter to be withdrawn. See **Karoo Meat Exchange Ltd v Mtwazi 1967 (3) SA 356 (C)**, per Diemont, J and Watermeyer, J at 359F-360AH. See also **Vena v Vena & another 2010 (2) SA 248 (ECP)** at 632I-633D.

2 **Kaplan v Dunell Ebdon and Co 1924 EDL 91** at 93 where Van der Riet J stated that the effect of a withdrawal of a case by a plaintiff was that:

"the case disappears from the roll as though absolution from the instance had been given. In my view a plaintiff is not at any time debarred from withdrawing a case and if this is done by him even after set-down the Court no longer has the action before it."

Also see **Irish & Co (now Irish & Menell Rosenberg Inc) v Kritzas 1992 (2) SA 623 (W)**, per Levy AJ, at 633B-D:

"There can be no doubt that, in the words of Lord Erskine LC in Woode v Leake (1806) 2 Ves 412, respondent's withdrawal was 'with a view to prevent justice and defeat the object of the reference', but it certainly cannot be said that respondent abandoned his claims or that, in the absence of evidence, applicant was entitled to anything more than an award of absolution from the instance which would of itself then permit the re-opening by respondent of the disputes between applicant and respondent. Cf Kruger v Die Sekretaris van Binnelandse Inkomste 1970 (4) SA 687 (A). The consequence of the award of absolution from the instance is that respondent would be entitled to raise the same issues again in whatever forum might be open to him in order to achieve the effect that this arbitration was intended to achieve."

3 See in this regard **Sparks v Sparks 1998 (4) SA 714 (W)**, an appeal judgment by a full bench of the Witwatersrand Division of the High Court, at 721:

- 27] The bargaining Council had enrolled the matter for conciliation-arbitration proceedings on 23 April 2009. That enrolment was not a result of a referral made by the applicant but was a result of the council giving effect to the court order. The withdrawal of the matter by the applicant, did not bar him from referring the matter afresh, but the timing of any subsequent referral and the need for condonation cannot be measured simply against the dispute resolution rules of the bargaining council, which were designed for initial referrals that are made by an employee party, not for referrals made after an applicant has abandoned the rehearing ordered by the court.
- 28] The enrolment of the matter on 23 May 2009 occurred solely in consequence of a court order and was not determined by the ordinary process of referral leading to a set down for con-arb proceedings. Ordinarily, the requirement for condonation of a late referral would be measured against the date on which the dispute had arisen, which in this case would have been in 2005. But if an enrolment is ordered by the court and then the applicant withdraws from the matter, is the applicant free to approach the council at any time thereafter to re-enrol it?
- 29] There is no express statutory time limit, nor is there one in the dispute resolution procedure or rules of the bargaining council which directly regulates a fresh referral in the factual circumstances of this case. Where no time limit is stipulated, it is normally assumed that a reasonable time limit should apply. For example, in ***Radebe v Government of the Republic of SA & others* 1995 (3) SA 787 (N)** at 798A-I it was held:

“In the absence of a statutory limit the Courts have, however, in terms of their inherent powers to regulate procedure, laid down

*“As pointed out in *Purchase v Purchase* 1960 (3) SA 383 (D) at 385 dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent. The equivalent of absolution from the instance would be that no order is made or that leave is granted to apply again on the same papers. That was certainly not the case in this judgment. There was a decision against the respondent, an order was indeed made and the reasons given therefor. In *Cordiglia v Watson* 1987 (3) SA 685 (C) the Court of appeal found that the magistrate who had stated ‘. . . the court cannot come to the conclusion either that the scales weigh in favour of the complainant nor that the scales weigh in favour of the defendant in this matter’ and who then invited further investigation by the maintenance officer had ‘. . . clearly intended (the order) to be the equivalent of an order for absolution . . .’ (at 688A). An order of absolution is ordinarily not decisive of the issue raised, it decides nothing for or against either party”*

(footnotes omitted)

that review proceedings have to be instituted within a reasonable time. There are two principal reasons for the rule that the Court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that unreasonable delay may cause prejudice to other parties. Harnaker v Minister of the Interior 1956 (1) SA 372 (C) at 380D; Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41. The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions. Sampson v SA Railways and Harbours 1933 CPD 335 at 338; the Wolgroeiers ' case at 41D-E; cf Kingborough Town Council v Thirwell and Another 1957 (4) SA 533 (N) at 538. Other parties might be prejudiced by unreasonable delay where the delay is of such a nature that other parties or the person whose decision is being reviewed have either forgotten relevant facts, or the recollection of all concerned of the facts is not as clear as it would have been if the matter had been brought within a reasonable time (Francis v Dutch Reformed Church, George and Another 1917 CPD 179 at 182; Maseto and Others v Pleskus and Others) 1917 TPD 366 at 368; the Kingsborough case at 538; Sampson v SA Railways and Harbours 1933 CPD 152 at 154) or where the delay is such that those persons who have to depose to affidavits or give evidence in support of the respondents' case are no longer available to give testimony (Sampson v SA Railways and Harbours 1933 CPD 152 at 154; Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander 1983 (4) SA 689 (C) at 698) and, in my view, where documentary and other forms of evidence are no longer available to support the respondent's case....

When the question arises, either because it is raised by an opposing party or mero motu by the Court, the Court has first to determine whether a reasonable time has elapsed prior to the

institution of the proceedings or, to put it differently, whether there has been an unreasonable delay on the part of the applicant. (The Wolgroeiers case at 42A; Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommisje, en 'n Ander 1986 (2) SA 57 (A) at 86B-D). In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The enquiry is a factual one; that is, whether the period which has elapsed was, in the light of the relevant circumstances, reasonable or unreasonable. (Wolgroeiers Afslaers case supra at 42C-D; Setsokosane's case supra at 86E). If the Court were to arrive at the conclusion that there has been an unreasonable delay, the Court should exercise a discretion as to whether the unreasonable delay should be condoned.'

- 30] Although the arbitrator does not have the inherent powers of a court, when faced with an application like the present one, an arbitrator is compelled to decide if condonation is necessary and if so what period needs to be considered. I think this must be a power that is reasonably ancillary to the performance of the arbitrator's functions, otherwise, the arbitrator would be unable to deal with the referral. Provision for the condonation of late referrals to the bargaining council is set out in clause 6 of the council's dispute procedure, and the procedure for making an application for condonation is dealt with in terms of rule 15 of the dispute resolution rules. In the case of unfair labour practice disputes referred to the SSSBC, the dispute resolution procedure of the council regulates time periods for referrals. This will be dealt with in more detail below.
- 31] The applicant himself originally believed the period of delay he had to explain was the period since the original completion of internal dispute procedures and his fresh referral of his dispute to conciliation-arbitration in September 2009. Later, he adopted the view that no condonation was necessary because the arbitrator had not made a formal ruling on the withdrawal of the matter, therefore he was free simply to request its re-enrolment. By contrast, the respondent accepted that 30 days from the date the matter was set down on 23 April 2009 would have constituted a

reasonable period for making a fresh referral. The apparent basis for the respondent adopting a 30 day period was clause 16 of the bargaining council's dispute resolution rules dealing with conciliation-arbitration, which the respondent cited, thus:

"Part 3 CON-ARB 16 how to request con-arb or arbitration:

1)

2) The referring party must

(a)....

(b)....

(c) if the referral document is served out of time or⁴ 30 days period the referring party must attach an application for condonation in accordance with rule 9."

(sic)

32] In fact, it appears that the operative version of the rules in 2009 was the version adopted in resolution 2 of 2008 on 1 April 2008 by the bargaining council. The equivalent provision in the 2008 rules to clause 16(2)(c) of the previous rules, cited above, is clause 10(2)(c), which reads:

"(2) The referring party must –

(a)...

(b)...

(c) If the referral document is served out of time, the referring party must attach an application for condonation in accordance with rule 15."

33] The relevant rule for referral of an unfair labour practice dispute is rule 3.5

⁴ "or" might be a typographical error and should have been "of" even though it would still not be very grammatical.

of the Dispute Procedure⁵ of the bargaining Council Constitution, which reads:

“3.5 If the dispute is one that is contemplated in terms of clause 3(1)(c), that is a dispute that in terms of the Act the Council must conciliate and arbitrate, it must be referred to the Council for joint conciliation and arbitration. Such disputes include disputes over dismissals for misconduct and incapacity, unfair labour practice disputes (excluding disputes concerning alleged discrimination). In respect of these disputes the following procedure applies:

(a) A party to a dispute may refer the dispute in writing to the Secretary for a joint process of joint conciliation and arbitration. In the referral the referring party must state the facts giving rise to the dispute.

(b) The dispute must be referred to the Council within 30 days after all internal procedures have been exhausted.”

(emphasis added)

- 34] Thus, in so far as there is any time limit which might be relevant to a referral in this matter, the 30 day period since the conclusion of internal procedures would appear to be most pertinent, but clearly it does not deal with the specific factual circumstances which have arisen in this matter. However, I am prepared to accept that the 30 day period is a reasonable time period in this instance because the respondent was willing to concede it and there was some rationale that it accorded with the period for a normal referral save that the starting date was determined by the failure of the matter to settle on the first occasion it was set down for conciliation-arbitration. I cannot say the arbitrator acted unreasonably in deciding that this was a reasonable time for the referral to be made or that condonation was required. It should also be mentioned that the applicant did not suggest to the arbitrator that condonation was not required, so the arbitrator can hardly be blamed for not addressing this..

⁵ SSSBC resolution 02/2001 dated 13 February 2001, amending Schedule 2 of the bargaining council's constitution.

- 35] Having said that, I do not want to suggest that a 30 day time period would necessarily be considered appropriate in all cases. Thus, the respondent might have argued that the only valid basis for setting the matter down afresh was the existence of the court order and once the matter had been set down within the period stipulated in the order then the order had been complied with and could not be the foundation for a later referral. In that case, it might have argued that the period of delay would not start 30 days from the days from the date on which the matter was set down in compliance with the order, but would be the whole period from the expiry of the original referral period after the dispute arose. Doubtless, the history of litigation would explain much of such a period of delay, but further delays after the applicant had been afforded a fresh opportunity to have his matter heard in consequence of the court order might be viewed even more seriously.
- 36] Nevertheless, on the basis that a thirty day period was a reasonable period for making a fresh referral, is arbitrator's conclusion that the applicant's explanation for the delay was unconvincing, unreasonable or flawed in some other way? The fact that he had been represented by the same attorney up to the point of the withdrawal of the matter, was supposedly ignored by the arbitrator. However, the arbitrator reasoned that legal expertise was not required to make a fresh referral. Implicitly, he was saying that the primary reason given by the applicant for failing to make the referral, namely that he could not pay his attorney, was simply not a good enough reason to delay for three months, because an attorney's expertise was not required. Thus, the fact that his previous attorney would not help him was not of any relevance to this issue.
- 37] It is true that the applicant was initially quick to try and reverse his withdrawal of the matter on 24 April 2009. On his instruction, his attorney wrote the letter seeking to re-enrol the matter the day after he withdrew it. When the council did not respond, there was a gap of nearly a month before the next letter was written, again by applicant's attorney. Eventually a reply was received on 28 May 2009. In it the council made it clear what it expected of the applicant, yet despite having written three letters on behalf

of the applicant, it was at that very point that the applicant's attorney was no longer prepared to do further work on the matter. At least that is the applicant's version, as his attorney never filed a corroborating affidavit either in the review application or in the condonation application, which in itself a significant concern given the nature of the applicant's explanation for the delay.

38] Thus, the applicant took no steps from the end of May to the end of August 2009 to advance his case, even though it only involved completing a referral form and filing the condonation application.

39] There is no evidence that he asked the bargaining council for guidance in this regard, nor did he even write a letter to the respondent and the council explaining that he still intended to pursue his case, but was hampered by lack of funds. There was also no explanation advanced why the applicant's lack of funds only became a problem on 28 May 2009 apart from a statement that he received a cost account, in an unspecified amount, from his attorney, and that he was willing to give the matter up owing to the exhaustion of his finances. How he happened to overcome this handicap at the end of August, other than stating that he managed to obtain a portion (also unspecified) of the funds required, is not explained. In this regard, it must also be borne in mind that the applicant was not unemployed during this period. After nothing further happened in June and July, it would not have been unreasonable of the respondent to have believed the applicant had decided to abandon the matter.

40] In the circumstances, I do not think the arbitrator can be said to have acted irrationally in finding that the explanation for the delay between 23 May and 2 September 2009 was not convincing on the evidence available to him. Similarly, his finding that the failure to pursue the matter for three months was wilful, is not one that no reasonable arbitrator could have arrived at.

41] On the question of the arbitrator's failure to make a finding on the

prospects of success, the applicant is on stronger ground. It seems to me that the arbitrator reached the conclusion that the prospects of success and failure were evenly balanced, but he did not have to find that the applicant was more likely to succeed than fail. All he was required to determine was that he had some prospects of success: he did not have to show on a balance of probabilities that he ought to succeed.⁶ However, he was not required to conduct a hearing to determine this and was entitled to make a finding on the material before him.

42] The two key factors to consider in the applicant's favour were that the applicant had succeeded in the first arbitration and the arbitrator had found that employment equity had not been a significant consideration in determining the successful candidate. Against that was the employer's introduction of new evidence of a policy of employment equity which was not presented to the first arbitrator. That might well have changed the picture in the second hearing and clearly was the reason why the applicant initially withdrew when it was tabled. Had the arbitrator applied the correct test in evaluating the prospects of success, he might well have concluded that this aspect favoured the applicant.

43] On the question of prejudice, the applicant's points are also well made, and it appears the arbitrator did not apply his mind properly to the issue in reaching his conclusions. Given the relief sought, there was no prejudice the successful candidate would have suffered because she would not have been removed from her post if the applicant was ultimately successful. The real prejudice to the respondent would have been having to pay two salaries at the higher rank instead of one. Secondly, it appears that the arbitrator might have ignored the presence of the first respondent's key witness. But even if he had not been aware of this, it seems his remarks on the availability of witnesses were speculative rather

⁶ See, for example, *Gaoshubelwe & others v Pie Man's Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC) at 353,[27].

than based on evidence.

Conclusion

- 44] In summary, I do not think the arbitrator's findings on the matter of the applicant's delay were ones a reasonable arbitrator could not have reached, and I do not think he ignored relevant evidence when deciding that issue. However, he clearly ignored relevant factors when considering the question of prejudice and the prospects of success, either because he misunderstood the issues he had to consider or how those questions are to be evaluated. Accordingly, the findings of the arbitrator on these issues must be set aside and depending on an overall re-evaluation of the condonation application his ruling to dismiss the condonation application could also be set aside. However, for the reasons which follow, on a re-consideration of the condonation application, his overall finding must be upheld. As the court has all the same evidence before it as the arbitrator did, there is no reason why, in the circumstances, the court cannot reconsider the merits of the issues of prospects of success and prejudice and consequentially whether this should alter the arbitrator's decision to refuse condonation..
- 45] It is clear that because he did not make a finding on the prospects of success, the arbitrator did not give any weight to this issue when deciding to dismiss the condonation application. Had he done so, it is more likely he would have been compelled to conclude that the applicant did have some prospect of success. So too on the issue of prejudice, he would only have had to weigh up the prejudice to the applicant if he was denied condonation against the prejudice to the respondent of having to go through another arbitration a long time after the initial hearing. On the respondent's own version it will have a stronger case to make because of the fresh evidence it wishes to raise about its employment equity policy which was not canvassed in the initial arbitration. If that is so, it cannot be said it would obviously be prejudiced by a further hearing, whereas

refusing condonation would end the applicant's claim.

- 46] In making an overall assessment of the case for condonation, the central issue is whether the merits of the questions of prejudice and the prospects of success outweigh the long delay of three months and the unconvincing explanation for it. On the applicant's own account he was willing to give up the matter at the end of May 2009 owing to his lack of finances, and it appears that he only decided to renew his pursuit of his claim when he inexplicably came into funds in August some three months later.
- 47] Effectively, the applicant is asking that his inaction over a significant period due to a rather sketchy account of financial hardship should not deprive him of his claim, despite having deliberately chosen, with legal advice to hand, to abandon the opportunity afforded by the review judgment to have his case re-heard on 23 April 2010. It was his own decision to withdraw, when no obstacle stood in the way of the re-hearing proceeding that precipitated the situation he now wants to extricate himself from. Yet, from 28 May 2009 onwards he made no mention of the reason he was not making a fresh referral, either to the bargaining Council or to the first respondent, until he filed his condonation application on 2 September 2009.
- 48] Notwithstanding that he has some prospect of success and that the question of prejudice may favour him, I do not think that his alleged inability to fund further litigation, which was not properly substantiated, justified him simply biding his time on the re-referral until such time as his finances improved. This is particularly so where he was the author of the need for a fresh referral and where he made no alternative effort to obtain other assistance with the referral and condonation application, for which legal representation was not a pre-requisite.
- 49] In the circumstances, despite setting aside the arbitrator's findings on the issues of prejudice and prospects of success, the length of delay and the failure to adequately justify it are not outweighed by those factors and I am persuaded no condonation should be granted even on a fresh consideration of all the relevant factors, taking into account the substituted

findings above.

- 50] On the question of costs, the applicant was partially successful and it would be just and equitable for both parties to bear their own costs in the matter.

Order

- 51] The findings of the arbitrator on 8 October 2009 on the issues of the prejudice suffered by the parties in the event of the condonation being granted and the applicant's prospects of success are reviewed and set aside, and are substituted with findings that the applicant had some prospect of success and the relative prejudice to the parties of the matter being reheard or not, on balance, favoured the applicant.

- 52] The application to review and set aside the condonation ruling in respect of the late re-referral of the applicant's unfair labour practice dispute is dismissed.

- 53] Each party must bear their own costs.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: J M Gouws of Johan Gouws Attorneys

FOR THE FIRST RESPONDENT: T F Mathibedi instructed by the State
Attorney

[Handwritten signature]