



REPUBLIC OF SOUTH AFRICA

Not reportable

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

Case no: JR 3108/04

In the matter between:

FRANCOIS C OOSTHUIZEN

Applicant

and

THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE
SERVICE

First Respondent

SAFETY AND SECURITY SECTOR
BARGAINING COUNCIL

Second Respondent

F J VAN DER MERWE (N.O.)

Third Respondent

R GROBLER

Fourth Respondent

Heard: 08 February 2011

Delivered: 23 October 2012

Summary: (Review – condonation of ostensibly late filing of grievance refused – internal procedures completed when employer refused to consider

grievance further – no need to set aside employer's refusal to grant condonation for late filing of a grievance before a referral of unfair labour practice to bargaining council).

JUDGMENT

LAGRANGE, J

Introduction

- [1] The applicant joined the Police Service in December 1990. By June 1996 he was promoted to the rank of inspector on the basis of his qualifications. In 1997 he obtained a National Diploma: Purchasing Management from Technicon S. A. That qualified him to be promoted to the rank of captain provided that a vacant position existed. Until January 2001 there were no vacant positions. In 1997 and 1998 a process of restructuring took place in the SAPS, which was known as the "En Masse" process. This provided opportunities for promotion for certain ranks in the service.
- [2] The applicant claims that he made enquiries to have his designation changed to Provisioning Administration Occupational Class, which would have made him eligible for promotion to the rank of Captain. However, on making enquiries in December 1997 he was told by a human resource management official that only officers with the rank of Captain to Superintendent could benefit from the En Masse process. He did not take the matter further at that time because he accepted that the information was correct.
- [3] When vacant positions became available for non-commissioned officers and P. S. A. personnel to apply for vacant positions he did so but was unsuccessful. He also applied for vacant positions in 2002 similarly without success. It was in September 2003 that his hopes for promotion were revived when he read an article in a trade union paper concerning three members who obtained retrospective promotion after an arbitration award in their favour. All three of them had the same qualifications as the applicant and similar experience in Provision Administration according to the applicant. The applicant believed that the three persons mentioned

had obtained an advantage in relation to promotion that he and others in similar positions had not been given.

- [4] On 28 October 2003 the applicant lodged an official grievance. According to his grievance the three members were appointed as non-commissioned officers under the Police Act on 1 December 1997. At that time they had the same experience as he did in provisioning administration and had obtained their National diploma on the same date as himself. When they were translated naturally to the police service they retained their civil ranking in the clerical division of PAS Provisioning Administration. As a result of the arbitration award they were promoted to the rank of officer. In the light of this he felt that the advice he had been given at the time was at odds with what he was entitled to be therefore sought relief in the form of retrospective promotion to December 1998 with the same financial benefits which the three members obtained.
- [5] The personnel division commenting on the grievance took the view that the applicant's complaint was distinguishable from the three members he sought to compare himself with. Firstly, they pointed out that no written application for transfer to the PAS: Provisioning Administration Officials could be found in his file. Secondly, they stated that in terms of the interim promotion policy which applied at the time, that is before 1 June 2001, a member seeking promotion from Provisioning Administration official to Senior Provisioning Administration official in terms of the applicable pay PAS a member had to serve two and a half years, or three years, depending on the promotion report, before they could be promoted to the next rank level. The applicant was also horizontally translated to the occupational category: Provisioning Administration Officials without any disadvantage on 1 July 2002 when all non-commissioned officers were translated to the correct occupational category, which might not have happened if he had been translated on one December 1997.
- [6] The grievance was unresolved at the conclusion of step three of the grievance procedure and accordingly on 15 January 2004 was referred for a meeting in terms of step 4. It was at this stage that the employer took issue with the date when the grievance was lodged. From a letter written

by the Section Head: Promotions and Awards it appears that he was of the view that the grievance should have been filed within 180 days from the time when the applicant first qualified for translation to assistant Provisioning Administration official (level VI) from 1 December 1997. The relevant paragraph of the grievance procedure annexed to collective agreement 5/99 read:

"The grievance procedure may be invoked by any grievant within 180 days after the date upon which the grievance became aware of the grievance or might reasonably have been expected to become aware of the grievance. Provided the National Commissioner or his or her delegate may in his or her discretion and in exceptional circumstances where the interest of the service so require, permits a grievant to invoke the grievance procedure after such period."

- [7] Accordingly, the Section Head was of the view that the applicant should have applied for condonation for the late filing of the grievance. The initial response of the applicant's union on his behalf was that no application for condonation was necessary because he only became aware in August 2003 of what he perceived to be his disadvantageous treatment when the magazine article was brought to his attention. The Promotions Subsection Head, Kemp, strenuously objected to the contention that the applicant could only have become aware of the alleged bad advice he had received when he read the article mentioned. He points out that in the union's own letter it made reference to a circular dated 24 February 1998 in which it was said that any logistical work experience would apply on translation between occupational groups. This he said, was at odds with the advice he said he had received. Accordingly, the applicant could reasonably have been expected to have been aware of this in February 1998.
- [8] Moreover, Kemp pointed out that another head office directive dated 28 August 1998, made it clear that various personnel, who did not qualify to participate in the En Masse process, had qualified in the meantime under the general and horizontal mobility rules to be translated to occupational categories where vacant posts existed. In the absence of any evidence

that the applicant made any enquiries about these arrangements, he was of the view that the applicant could not blame the employer for his own failure to obtain clarity about these arrangements. He also added that the arbitrations which the applicant referred to concerned the promotion and not the translation of the affected members.

- [9] In reply, SAPU claimed that the applicant only became aware of the head office circular of 28 August 1998 when he received Kemp's letter. It further contended that it was the employer's responsibility to see that the content of circulars was communicated to employees and the applicant was unaware of the contents of the circulars referred to. Nonetheless, and under protest, the applicant filed a condonation application for the ostensible five and a half year delay. He reiterated his explanation for this delay as being due to his ignorance of his rights regarding promotion until he learnt of the arbitration award, after which he took action to launch his grievance.
- [10] The condonation application was dismissed on 30 May 2004. Having failed to advance his complaint to the final step of the grievance procedure, the applicant referred an unfair labour practice claim to the Safety and Security Sectoral Bargaining Council ('the SSSBC'), by 22 June 2004, less than thirty days after this decision. However, the applicant's attempt to advance his dispute by means of this referral ground to a halt, when the respondent raised an *in limine* objection to the matter proceeding.
- [11] The employer's objection was that step four of the grievance procedure had not been exhausted and therefore the SSSBC had no jurisdiction to hear the matter. The objection was based on clauses 3.2 and 3.5.1(b) of the bargaining council dispute procedure. According to the arbitrator, clause 3.2 stated that prior to any dispute of right being referred to the council, the aggrieved employee must have exhausted all internal procedures. Clause 3.5.1(b) stated that a dispute sent to conciliation-arbitration must have been referred to the council within 30 days of all internal procedures having been exhausted.

[12] Thus, having prevented the applicant from advancing his grievance further by refusing to condone what it contended was the late lodging of the grievance, the respondent now sought to rely on its own refusal to admit his grievance to the final stage of the internal grievance procedure, as a bar to the applicant's access to external remedies provided for by the LRA. Added to this, the respondent further contended that if the applicant was dissatisfied with the condonation decision he ought to have applied to review that decision instead of pursuing an unfair labour practice dispute.

[13] The applicant sought a variety of forms of relief, namely an order:

13.1 Declaring that he had lodged his grievance within 180 days of the date he became aware of it;

13.2 Reviewing and setting aside the National Commissioner's decision to refuse his application for condonation for the late filing of the grievance (on the assumption that the first prayer for relief was not granted);

13.3 Reviewing and setting aside the jurisdictional ruling of the third respondent;

13.4 Directing the National Commissioner to convene a step 4 meeting in terms of the dispute procedure.

Evaluation

[14] The third respondent accepted both in limine arguments advanced by SAPS and ruled that he did not have jurisdiction to hear the unfair labour practice dispute because in his view to exhaust all the steps in the grievance procedure required that the procedure must have commenced and must have been completed 'within the confines of the procedure/policy itself'. He also found that even if he disagreed with the National Commissioner's decision refusing condonation, he could not set it aside because he had no jurisdiction over an administrative decision which would have to be taken on review if the applicant wanted to set it aside.

[15] Rather than consider the applicant's claim for relief in respect of the National Commissioner's decision, it makes more sense to first consider if

the arbitrator was correct in his jurisdictional finding and then to consider the other claims if necessary. The pivotal question is whether or not all the steps in the grievance procedure had been exhausted when the applicant was barred from proceeding to step 4 by the employer's refusal to condone what was perceived to be his late filing of the grievance. When the National Commissioner decided not to grant the applicant's conditional condonation application, he effectively put an end to the applicant's ability to complete all steps in the grievance procedure, and thereby his attempts to resolve the grievance with his employer.

- [16] It is true the applicant might have that decision set aside on review, but the fact remains that as long as the commissioner's decision on condonation stands, the last step in the grievance procedure cannot be completed. The commissioner's decision effectively disposed of the applicant's grievance at the internal level. As such it was as final in effect as if no resolution to the grievance could be found at a step 4 meeting.
- [17] From the applicant's perspective, there was nothing more he could do to trigger the last step in the grievance procedure. He had requested a step 4 meeting, as the grievance procedure required him to, after he had followed all the previous steps, but he was refused the meeting on the basis of not obtaining condonation for the late filing of the grievance. That decision halted the advancement of the grievance and made it impossible for the applicant to access the final step in the process.
- [18] To all intents and purposes the grievance procedure was exhausted when the respondent refused to allowed the matter to proceed to the final stage, by closing the door to the step 4 process in the procedure. It was disingenuous of the employer to say on the one hand to the applicant he could not refer his grievance to the bargaining council because it had not held a step 4 meeting with him despite his request for one, and in same breath refuse to hold such a meeting, because in its view the applicant was inexcusably late in filing his grievance.
- [19] The bargaining council acquires jurisdiction to entertain the dispute if it is referred within 30 days of all internal procedures being exhausted. If the employee has done all that is required of him or her to invoke all the steps

in the procedure but the employer refuses to entertain it beyond a certain stage, then the grievance cannot be resolved under the procedure, and the procedure is exhausted as an internal dispute resolution mechanism.

[20] The arbitrator was correct in finding that he did not have the power to set aside the National Commissioner's decision not to condone the late filing of the grievance, but that is a distinct issue from whether or not all the steps in the grievance procedure were effectively exhausted before the applicant referred his unfair labour practice dispute.

[21] In the circumstances, I am satisfied that the arbitrator erred in finding that he had no jurisdiction to entertain the applicant's unfair labour practice, and that ruling must be set aside. Given that the bargaining council does have jurisdiction, there is no reason why the matter cannot be referred to conciliation-arbitration before another arbitrator.

[22] It is not necessary for the purposes of this outcome to make any finding or comment on the substantive merits of the applicant's unfair labour practice claim and therefore I refrain from doing so. In the light of this decision it is also not necessary to consider the other relief the applicant sought in respect of the National Commissioner's decision on condonation or the convening of a step 4 meeting.

Order

[23] The decision of the third respondent that he had no jurisdiction to conciliate and arbitrate the applicant's unfair labour practice claim under case number PSSS 161-04/05 is set aside.

[24] The applicant's unfair labour practice claim under case number PSSS 161-04/05 must be set down by the second respondent for conciliation-arbitration before an arbitrator other than the third respondent, within 45 days of the date of this judgment.

[25] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R Venter instructed by Vierbergen Attorneys

FIRST RESPONDENT: T Makhubele instructed by the State Attorney,
Pretoria