



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

**JUDGMENT**

Not reportable

Case No: JR2401/09

In the matter between:-

**THE DIHLABENG LOCAL MUNICIPALITY**

**Applicant**

and

**INDEPENDENT MUNICIPAL AND ALLIED TRADE**

**UNION obo B J MOTLOUN**

**First Respondent**

**A V LEKOTA**

**Second Respondent**

**Heard: 12 APRIL 2013**

**Delivered: 28 March 2014**

**Summary: The arbitrator's failure to deal with the main issue renders his or her arbitration award reviewable.**

**JUDGMENT**

LALLIE J:  
Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent in which he ordered the applicant to pay the individual first respondent an amount of R44,179.68, the difference in remuneration between job levels 6 and 7 from 16 November 2005. That the application was filed outside the 6 weeks period envisaged in section 145(1) of the Labour Relations Act<sup>1</sup> and the applicant applied for condonation of the lateness. Both applications are opposed by the first respondent.

Condonation

- [2] This application was filed outside the statutory six weeks period envisaged in section 145 of the LRA. The explanation proffered by the applicant for the delay is that shortly after receiving the arbitration award it enlisted the services of Advocate Pretorius SC to settle the founding papers. He was not readily available owing to work commitments and the High Court recess. These reasons are not denied in the first respondent's answering affidavit. A further reason is that the docex took an unreasonably long period to deliver the founding papers to the correspondent of its attorneys for purposes of serving the founding papers. The applicant's submissions that the delay was not caused by its inaction and that the respondents will not suffer prejudice as a result of the delay were denied by the first respondent.
- [3] It is accepted principle that condonation is not granted for the asking. Applicants are required to make out a case for the court to exercise its discretion in their favour. The test for condonation requires the applicant to provide a reasonable explanation for the delay and prove that it has reasonable prospect of success. Prejudice and fairness to both parties are part of the factors which need to be considered.<sup>2</sup> The interests of justice is the overriding consideration.<sup>3</sup>

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<sup>1</sup> Act 66 of 1995 ("the Act")

<sup>2</sup> See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

<sup>3</sup> See: *Van Wyk v Unitas Hospital and Others* 2008 4 BCLR 442 (CC) at para [22]

- [4] It is common cause that the applicant failed to explain the entire 34 days of the lateness and left a substantial period unexplained. A decision on condonation is not based on a single factor. While failure to explain the full period of lateness is serious, it has to be considered with other factors. The test for prejudice is the extent of prejudice on the respondent balanced against the interests of the applicant. The prejudice the first respondent stands to suffer is the inability to receive and enjoy the money due to him in terms of the award, pending the outcome of the review application. The applicant will lose its right to be heard. When prejudice on both parties is considered the unavoidable conclusion is that the applicant will be non-suited and therefore suffer more prejudice should this application be denied.
- [5] The applicant submitted that it has good prospects of success in the review application, but the first respondent did not agree. The test for prospects of success is not whether the applicant will, but could succeed. The assessment of the merits of the applicant's case is preliminary and not final.<sup>4</sup> The applicant is required to show that its prospects of success are at the very least, reasonable.<sup>5</sup> A preliminary assessment of the applicant's case reflects that it could be successful in the review application. The applicant's version and concessions made by the first respondent's witness on the interim placement policy, its purpose and the applicant's promotion policy point to the direction of the applicant's success.
- [6] The applicant submitted that the effect of the award has significant consequences for it and expressed the need to have the principle dealt with in the award determined by this court. The award is based on a collective agreement which is binding on municipalities. Its proper application is important for uniformity in labour relations in local government. When all the relevant factors are considered it is in the interests of justice to grant this application so that a determination can be made on the reasonableness of an award which has an effect not only on the parties, but also on a number of municipalities to which the collective agreement is binding.

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<sup>4</sup>See: *Mould v Roopa NO and Others* [2003] 1 BLLR 38 (LC)

<sup>5</sup>See: *SABC v CCMA and Others* [2002] 9 BLLR 824 (LAC).

### The arbitration award

- [7] The individual first respondent was employed by the applicant. Before November 2005 he was a payroll clerk. He was placed as the officer, risk and asset management, from 17 September 2003 and again on 16 November 2005. He referred an unfair labour practice dispute in terms of section 186(2) of the LRA to the South African Local Government Bargaining Council ("the SALGBC"). The dispute was arbitrated by the; second respondent (the "arbitrator") who had to determine whether the individual first respondent had been promoted to the position of officer risk and asset management (the impugned position) or he occupied it in terms of the placement policy.
- [8] The arbitrator found that when the individual first respondent was placed in the impugned position, he was elevated from post level 7 to level 6 with no change in his remuneration. He rejected as irrelevant the applicant's version that the salary levels were subject to salary negotiations at national level and a decision of the Labour Court. He found that the dispute before him was about the individual first respondent being remunerated at the level and position he occupied. His award was that the first respondent had successfully proved that the individual first respondent was entitled to the remuneration and benefits which accompanied his job level. He ordered the applicant to pay the individual first respondent an amount of R44,179.68 which is equivalent to the retrospective payment of the difference in remuneration between job level 6 and 7 from 16 November 2005.

### Grounds for review

- [9] The applicant sought to rely on a number of grounds. Some were admitted and others were denied by the first respondent. A further category of grounds consisted of those which the first respondent only noted. The denied grounds include the submission that the award was unreasonable, and contrary to evidence. Further grounds included the allegation that the individual first respondent was placed in the impugned position as a result of the placement policy in terms of which the correct salary would only be finalized as and when the job evaluation process and categorization of municipalities had done at national level. So is the submission that the award subverts the negotiation process and pose a risk of contradicting an award

of the SALGBC on the dispute regarding the placement policy.

- [10] This award will survive being reviewed and set aside if it is one a reasonable decision-maker could reach on the, evidence before the second respondent.<sup>6</sup> The following *dictum* in *Herholdt V Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* is opposite;<sup>7</sup>

‘...For a defect in the conduct of proceeding to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result...’.

- [11] In the award the commissioner stated that the issue he had to decide was whether individual first respondent was placed in the impugned position according to the placement policy or he was promoted internally. In analyzing was elevated from post level 7 to 6. He did not disclose the manner in which he elevated

- [12] *In Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*<sup>8</sup> *the court enunciated the review test in para 16 as follows:*

‘In short: A review court must ascertain whether the arbitrator considered the principal issue before him / her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at’.

- [13] The arbitrator evaded the principal issue before him. Identifying it correctly was not enough. It was just the foundation for all the other factors including considering all the facts before him and culminating in a reasonable decision based on such facts. The arbitrator failed to make a finding on whether the individual respondent’s elevation resulted from the operation of the placement policy or promotion. Evidence was led on behalf of both parties on promotion procedures and the placement policy but the second respondent rejected as irrelevant submissions on the placement

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<sup>6</sup> See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 110

<sup>7</sup> [2013] 11 BLLR 1074 (SCA) at para 25

<sup>8</sup> An unreported judgment under case number JA 2/2012 [2013] ZALAC dated 4 November 2013

policy. He found that negotiations at national level were about determining appropriate remuneration for various post levels. The arbitrator gave no reason for finding that the impugned post fell outside the realm of the posts which were the subject of the negotiations at national level. By finding that the individual first respondent's dispute was about him being remunerated according to the level and position that he is currently occupying the arbitrator made a finding which fell outside the scope of the dispute he said he was required to determine.

- [14] The arbitrator committed a gross irregularity by evading the principal issue before him, finding relevant evidence to be irrelevant and reaching a decision which is incongruous with the issue he had to decide. All these irregularities led him to reach a decision a reasonable decision-maker could not have reached on the evidence before him. His award therefore falls outside the bounds of reasonableness and has to be reviewed and set aside.

Conclusion.

- [15] In the premises the following order is made:

[15.1] The arbitration award issued by the second respondent under case number ESD 100702 and dated 10 June 2009 is reviewed and set aside;

[15.2] The matter is remitted to the South African Local Government Bargaining Council to be arbitrated *de novo* by an arbitrator other than the second respondent.

**Lallie J**

**Judge of the Labour Court of South Africa**

APPEARANCES:

For the Applicant:

Advocate. C E Yeo

Instructed by:

Fairbridges Inc.

For the Respondents:

Riaan Schmidt (Union Official)