



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P197/12

P67/13

In the matter between

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE

DEPARTMENT OF HEALTH

Applicant

and

THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

First Respondent

FA BATWINI

Second Respondent

NM GXOLO

Third Respondent

MR PADAYACHY

Fourth Respondent

MD MANUEL

Fifth Respondent

Heard: 6 February 2014

Delivered: 19 March 2015

Summary: A commissioner's omission to give reasons for being satisfied that a party has discharged the onus of proof renders his or her award reviewable as commissioners are enjoined by the LRA to give reasons for their decisions.

JUDGMENT

LALLIE J

Introduction

- [1] Four applications served before court. An application to review and set aside an arbitration award issued by the second respondent ("the arbitrator") under case number PSHS 88-10/11 ("the award"), in favour of the fifth respondent, an application to make the arbitration award an order of court, an application to dismiss the review application mainly for the applicant's tardiness in its prosecution and an application for joinder.

Factual background

- [2] On 25 October 2009, the Department of Health of the Eastern Cape Province ("the Department"), advertised the post of Deputy Director: Clinical Support Services ("the impugned position"). One of the requirements was current registration with the Health Professionals Council of South Africa ("HPCSA"). The Department appointed the fifth respondent who was registered with the South African Nursing Council ("SANC") and not the HPCSA in breach of the requirements for the position. Aggrieved by the fifth respondent's appointment, the third and fourth respondents ("the respondents") referred an unfair labour practice dispute to the first respondent where the arbitrator found that the Department committed an unfair labour practice. She ordered the Department to re-advertise the position. The arbitration award forms the subject matter of the applications which served before court.
- [3] The review application was filed late and the Department applied for condonation of its late filing. The respondent filed an application for joinder. Counsel for the applicant, Mr Booï, and counsel for the respondents, Mr Christison, reached an agreement that the Department would not oppose the

joinder application. They further agreed that the application to dismiss the review application be heard first and for the outcome of the application to make the award an order of court to follow the result. The review application would be heard last. Both the review and condonation applications are not opposed. The application to dismiss the review application was filed, according to the respondents, as a counter application to the condonation application. It is opposed by the applicant.

- [4] The chronology of the events in this matter started with the issuing of the arbitration award on 12 December 2011. On 24 May 2012, the applicant filed the review application. The respondents filed their notice of opposition on 14 June 2012. On 25 June 2012, the applicant filed an application for condonation of the late filing of the review application. On 23 July 2012, the state attorney requested the first respondent to file the record. On 24 July 2012, the state attorney, on behalf of the applicant, reminded the first respondent to file the record and requested the registrar to ask the first respondent to accede to the request. A further request was made on 2 September 2012. On 2 August 2012, the state attorney addressed a letter to the arbitrator requesting her to file the record and the mechanical recording of the arbitration proceedings. On 1 October 2012, the state attorney filed an application, compelling the first respondent to file the record. On 5 December 2012, the first respondent informed the state attorney that it had not received the review application. On 5 December 2012, the state attorney delivered the review application to the first respondent for the second time. On 12 December 2012, the state attorney addressed a letter to the register seeking assistance to have the first respondent deliver the record. On 31 January 2013, while the state attorney's official responsible for this matter was on leave, the registrar advised the office of the state attorney of the availability of the record. On 17 January 2013, the state attorney instructed Veritas to transcribe the record which it filed on 5 and 20 February 2013.
- [5] The respondents' attorneys filed their notice of opposition to the review application on the state attorney in which they indicated that notices and correspondence intended for the respondents should be served on their

address. The state attorney submitted that owing to an error on its part, it served the notices on their trade which represented them before they were legally present. The respondents' attorneys therefore were unaware of some of the notices which were filed by the applicant including the application for condonation of the late filing of the review application. The applicant submitted that it has good prospects of success in the review application. It denied having prosecuted the review application tardily and submitted that the progress in executing the review application was retarded by the first respondent's failure to file the record of the arbitration proceedings.

- [6] In *Sishuba v National Commissioner of SAPS*¹ the court referred with approval to *Mothibeli v Western Vaal Metropolitan Substructure*² in concluding that depending on the circumstances of a case, administration of justice may dictate that an applicant's claim may be dismissed for the applicant's undue delay in prosecuting the claim. The relevant principles in deciding whether to debar an applicant for the delay in prosecuting its case include the enquiry whether it is in the interests of justice to allow the applicant to pursue its case and potential prejudice on the respondents and third parties.
- [7] The respondents did not deal with the issue of prejudice. It elected not to oppose the review application. The applicant's failure to serve the condonation application on the respondent's attorneys resulted in their inability to oppose it on time, however, when they got to know that it had been filed, they took a conscious decision not to oppose it. The chronology of the events of this matter does not support the conclusion that the applicant delayed without justification in filing the review application. It reflects the applicant's unabated efforts of bringing the review application before court. A number of letters were written, the registrar was asked to assist in persuading the first respondent to file the record of the arbitration proceedings and an application to compel the filing of the record was filed. The applicant did not sit on its laurels but took active steps to prosecute its review application. The delay resulted from the failure of the first respondent to perform its statutory

¹ [2007] 10 BLLR 988 (LC).

² [2000] 1 BLLR 85 (LC).

duties. It will therefore not be equitable to visit that failure on the applicant. In the circumstances, the application to dismiss the review application cannot succeed.

- [8] I have considered the unopposed condonation application and I am convinced that the applicant has shown good cause for the lateness to be condoned. Although the extent of the delay is substantial its explanation is reasonable and acceptable. The applicant has good prospects of success in the review application in that its application could be successful if the allegations it seeks to rely on are proved. It will further suffer more prejudice than the respondent if the condonation application is denied in that it will lose the right to have the review application heard.
- [9] The applicant submitted that the arbitrator reached a decision which no reasonable decision-maker could have reached in finding that the respondents had discharged the onus of proof that the applicant had committed an unfair labour practice. No evidence was led to support the arbitrator's finding. The applicant further submitted that the arbitrator exceeded her powers, and failed to give due consideration to the matter before her leading her to reach findings which lack both a legal and factual basis.
- [10] The facts of this matter are mainly common cause. The applicant advertised the impugned position. One of the requirements was registration with HPCSA. It appointed the fifth respondent who was not registered with HPCSA but with the SANC. The respondents alleged that the applicant committed an unfair labour practice by appointing a candidate who did not fulfil one of the requirements. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*³ it was held that in determining review applications, this court needs to consider whether the arbitrator considered the principal issue, dealt with the evidence and reached a reasonable decision. A reading of the arbitration award reflects that the arbitrator stated the versions of both parties before her and concluded that she was satisfied that the respondents had discharged the onus of proving that the applicant had committed an unfair

³ [2014] 1 BLLR 20 (LAC).

labour practice. She did not deal with the evidence before her and gave no reasons for being satisfied that the onus of proof had been discharged. She was enjoined by section 138 (7) of the Labour Relations Act 66 of 1995 ("the LRA") to give brief reasons for her decision. She gave none thus rendering her award reviewable.

[10] In the premises the following order is made:

- 10.1 The application for joiner is granted.
- 10.2 The application to dismiss the review application is dismissed.
- 10.3 The late filing of the review application is condoned.
- 10.4 The arbitration award issued by the second respondent under case number PSHS 88-10/11 and dated 12 December 2011 is reviewed and set aside.
- 10.5 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Advocate Booi

Instructed by: State Attorney

For the Third Respondent: Advocate Christison

Instructed by: Brown Braude & Vlok Inc Attorneys

LABOUR COURT