



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1309/12

**TLOHOHELO JUNIOR PRIMARY
SCHOOL**

Applicant

AND

MATSIE RATSELA

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER J.S.C NKOSI N.O

Third Respondent

Heard: 11 July 2017

Delivered: 10 August 2017

JUDGMENT

DEALE AJ

Background

- [1] In 2002, the First Respondent was engaged by the Applicant as a grade R teacher. Her engagement was terminated in 2011. She then referred an unfair dismissal dispute to the Second Respondent. She claimed she was an employee and was dismissed unfairly.
- [2] The Applicant's version was that there was no dismissal because there was no employment relationship between the Applicant and the First Respondent. It asserted that the First Respondent, together with others was attending a training programme at the Applicant's school in terms of a fixed term contract. The contract was not with the Applicant, but with the School Governing Body (the SGB) of the Applicant. The SGB is a separate entity. Her engagement terminated when her fixed term contract expired.
- [3] On 11 April 2012, the Third Respondent (Commissioner) found that the First Respondent was an employee of the Applicant and that she had been unfairly dismissed, both procedurally and substantively. The Commissioner made an award under case number GAJB 28276-11(the "Award") in the following terms

"6. AWARD

- 6.1 That the dismissal is substantively unfair.
- 6.2 That the Respondent Tlholohelo JP School re-instates the applicant Matsie Ratsela on the same terms and conditions as those that obtained prior to her dismissal with back –pay in the sum of R46 900.00 calculated at the rate of R6 700.00pm equivalent to the applicant's seven month's salary.
- 6.3 That the applicant resumes duties no later than the 2nd of May 2012 and is allowed to do so by the respondent.
- 6.4 That payment is made no later than fourteen days from date of receipt of this award.
- 6.5 No order as to costs."
- [4] On 30 May 2012 the Applicant served its Notice of Motion and Founding Affidavit to review and set the Award aside.

- [5] On 8 June 2012, the First Respondent filed and served its Notice to Oppose.
- [6] On 26 September 2012, the First Respondent served a Notice in terms of Rule 11. It called on the Applicant to file the record in terms of Rule 7A(6) of the Rules of the Labour Court within 10 days.
- [7] On 19 November 2013, the Rule 11 application came before this Court on an unopposed basis. The matter became opposed and Prinsloo AJ (as she then was) made a Ruling (the “Ruling”) in the following terms –
- “1.
2. The Applicant (Tlholohelo Junior Primary School) is to file opposing papers by no later than 3 December 2013, failing which the matter must be enrolled on the unopposed roll.
3. Costs are reserved”.
- [8] On 29 April 2014 the First Respondent's Rule 11 application came before this Court. Molahlehi J ordered that the Applicant's Review application be dismissed with costs.
- [9] On 12 June 2014 the matter again came before this Court at the First Respondent's instance to have the Award made an order of Court. There was no appearance for the Applicant. Van Niekerk J granted the application and the Award was made an order of Court.
- [10] The Applicant now applies to rescind the Order made by van Niekerk J on 12 June 2014 (the “Order”). The Applicant further applies to review and set the Award aside. The Applicant also filed an application for condonation for the late filing of its application to rescind.
- [11] The Applicant must first overcome the two preliminary hurdles to acquire the right to challenge the Award by way of an application for review in terms of section 145 of the LRA. It must first succeed in its application to condone the late filing of its opposing papers. If it succeeds, it must then succeed in its application to rescind the Order.

- [12] The First Respondent opposes the applications for condonation, to rescind and to review.

Condonation

- [13] I will first deal with the application for condonation. If it succeeds, it will then be necessary to deal with the application to rescind. If the application to rescind succeeds, it will only then be necessary to deal with the application for review. If either of the applications to condone or to rescind were to fail, there would be no basis to hear the application for review. In that event, the Applicant's application for review would be dismissed.
- [14] Rule 12 requires an applicant to show that there is good cause for a court to grant condonation. The factors to consider if there is good cause are the degree of lateness, the reason for the delay, the prospects of success in the main application, in this case for review, and the potential prejudice to the other parties¹.
- [15] The Ruling clearly put the duty squarely on the Applicant and its representatives to comply strictly with the 3 December 2013 deadline specified in the Ruling. If it failed to do so for no good reason, it would effectively forfeit its right to proceed with the application for review.
- [16] It is common cause that the Applicant failed to comply with the Ruling. It filed its opposing answering papers late on 11 December 2013. There was no application for condonation for the late filing - nor was there an adequate explanation for the failure to comply with the Ruling by the due date.

Degree of Lateness

- [17] The Applicant filed its opposing papers 7 days late. At first glance, this may not seem an inordinately long delay. However, in the context of the long history of this case, it was a significant delay. By its own admission, the Applicant conceded in its Founding Affidavit that -

¹See *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A)

“18. The answering affidavit was extremely late and there was no request for condonation.”

- [18] It will also be evident from the Background described earlier that all the prior interlocutory applications and counter-applications had been necessitated by the consistent tardiness of the Applicant's several sets of attorneys to take pro-active steps to comply with the Rules and time periods prescribed by this Court. The delay in filing the opposing papers on or before 3 December 2013 as stipulated by the Order was yet another example of the tardiness.

Reasons for the Delay

- [19] The Applicant's current attorneys essentially attribute the blame for the procession of delays on the Applicant's previous attorneys (Founding Affidavit paras 39 – 47). In particular, it attributes the reason for their non-appearance at the hearing in court before van Niekerk J on 12 June 2014 to a “miscommunication” between attorneys and counsel.
- [20] The Applicant's counsel who appeared at the hearing of this application confirmed this was the main reason for the delays and he had nothing further of substance to add to provide a plausible reason.
- [21] It has been well established in numerous judgements of this Court that delays caused by the tardiness of legal representatives is not an acceptable reason for granting condonation. This case should be no exception.
- [22] It follows, that the applicant has failed to provide a satisfactory explanation for the delay.

Prospects of Success

- [23] The Applicant must show for both the applications for condonation and for rescission that there are reasonable prospects of success in the main application for review. If it fails to do so, the preliminary applications must necessarily fail and, as a consequence, the application for review must be dismissed.

- [24] The circumstances leading to the termination of the First Respondent's employment are recorded in the Award and appear to have been common cause between the parties in the arbitration.
- [25] On 30 September 2011, the First Respondent's employment with the Applicant terminated. The Applicant's version was that there was no permanent employment because the First Respondent had been engaged on a fixed term contract which had expired. For this reason, there was no dismissal.
- [26] The Founding Affidavit in support of the application for condonation and rescission of the Order is made by Legotlho Makgale. He is the former Deputy Chairperson of the Tlholohelo Junior Primary School Governing Body (SGB).
- [27] He asserts in his affidavit² that there was no employment relationship between the First Respondent and the Applicant school. This was because the true employer was in fact the SGB, not the Department. There was only a fixed-term contractual relationship between the First Respondent and the SGB to provide a teacher training programme for the First Respondent. She and several others like her were not qualified teachers but aspired to qualify before the deadline of 2014.
- [28] On this basis the Applicant asserted as its primary ground for review of the Award that the Commissioner failed to make the distinction between the Department and the SGB. This is expressed in the Founding affidavit in paragraph 31 page 18 of the bundle as follows –
- “Perhaps the commissioner failed to appreciate the glaring distinction between the Department and the SGB and this resulted in him arriving at a fundamentally flawed conclusion.”
- [29] This assertion is different from the evidence which the Applicant's Principal, Ms Raisetja Mavusa appeared to have given in the arbitration. In her testimony she said when she arrived at the school she noted that there were no contracts for some of the GB teachers. She approached the Department of

² (paragraph 26 page 31)

Education for specimen contracts and the First Respondent signed one. As the Commissioner noted in the Award, she further testified that –

4.2. “The Department appointed them on the basis that they were required to pass their exams by no later than 2014.” (Award page 2)

[30] It is curious that there is no reference made in this excerpt of the Award or elsewhere in the Award which refers to the distinction between the SBG and the Department as claimed in the Founding Affidavit. Neither is there any cross-reference to the record where the Applicant’s witness may have given evidence in the arbitration on the point which the Commissioner may have failed to identify as central to the Applicant’s case.

[31] The First Respondent’s version was that she had first been employed by the Applicant in 2002 without a written contract as a Grade R teacher. Then in 2005, she was given a contract which was renewed annually. The Applicant told her without prior notice or consultation that they had decided to terminate her last contract which was due to expire at the end of September 2011.

[32] The Commissioner dismissed this claim. He analysed several characteristics of the working relationship and observed as follows -

“5.1 The facts of this case reveal all the hallmarks of an employer employee relationship. The applicant reported daily. She had no other source of income. She was subject to payee (sic). She offered a service she did not present a finished product. She was subject to direction and control of the GB and its functionaries. The employee could not have contracted out of the LRA anchored by the constitution of the RSA to give the effect to the fundamental right not to be unfairly treated. The applicant is therefore an employee”.
(Award at page 3.)

[33] The Commissioner further found that –

“[7.1] the First Respondent had a legitimate expectation to be employed at least until 2014 on the same terms and conditions. (Award para 5.2); and

[7.2] The First Respondent was dismissed without being given a reason for the termination.”

- [34] It was for these reasons that the Commissioner concluded that there was a dismissal and that it had been substantively and procedurally unfair.
- [35] To succeed in a review application, the applicant must show that the Commissioner made findings and an award which a reasonable decision-maker would not have made on consideration of the evidence and relevant legal issues in the arbitration³.
- [36] It is clearly evident from the Award that the Commissioner indeed considered the undisputed evidence of repeated annual renewals of the First Respondent's fixed term contracts which gave rise to the legitimate expectation of permanent employment.
- [37] He also applied his mind to whether one or more of the factors referred to in section 200A of the Labour Relations Act⁴ (LRA) applied to the First Respondent's working relationship with the Applicant. This section deals with the presumptions as to who is an employee. It provides a set of guidelines to assist a decision-maker to assess whether a person is an independent contractor or an employee. A person is deemed to be an employee if one or more of the factors is found to exist in the particular working relationship.
- [38] The Commissioner noted that not just one, but several factors relating to the Applicant's control over the First respondent applied to the First Respondent's working relationship. It was on this basis that he came to the conclusion as recorded in paragraph 5.1 of the Award that an employment relationship did in fact exist between the Applicant and the First Respondent. For these reasons, there is no basis to conclude that the Commissioner's conclusion was unreasonable or irregular.
- [39] The Commissioner's reasoning and conclusions must prevail over the Applicant's version that there was no employment relationship with the Applicant and that the "true employer was the SGB" who had engaged the First Respondent on a fixed term contract which had expired.

³ See *Sidumo and Another v Rustenburg Platinum Mines* [2007] 12 BLLR 1097 (CC)

⁵ [2017] 6 BLLR 539 (CC),

[40] The very purpose of section 200A of the LRA is to provide a set of objective guidelines to assess the existence or otherwise of an employment relationship. The guidelines evolved because the legal nature of a working relationship may either be unclear and or be an employment relationship by another name. The Commissioner applied the guidelines and correctly concluded on the evidence presented that an employment relationship existed between the Applicant and the First Respondent.

[41] I conclude from these considerations, that there are no reasonable prospects of success for the Applicant's intended review of the Award.

[42] It follows that the application for condonation must fail and be dismissed. This is because the Applicant has failed to show good cause to grant the application.

Rescission and Review

[43] It also follows from the decision to deny the condonation that the applications for rescission and review must also be dismissed as a necessary consequence.

Implementation of the Award

[44] The effect of dismissing the applications for the rescission of the Order and the review is that the Award must now be implemented.

[45] Mr Crous has made submissions on the manner in which the Award should be implemented. He referred in particular to the recent Constitutional Court judgment on the issue of back-pay in circumstances such as this case in which the implementation of an award has been considerably delayed pending the outcome of a review application. In *National Union of Mineworkers of South Africa OBO M Fohlisa and 41 Others vs Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd*⁵ the Court confirmed that "reinstatement" means that the court orders that –

⁵ [2017] 6 BLLR 539 (CC),

“[48] the employee must be “put back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. This means that the court is ordering that the employee not only be taken back to his or her job, but that he or she be afforded her or his benefits under the contract. The benefits include payment of remuneration. Surely that covers the date of the reinstatement and the date on which the reinstatement actually takes place.”

[46] In this case, the First Respondent was dismissed on 30 September 2011. It is regrettable to note that the First Respondent died on 21 April 2017 and thus will not benefit from reinstatement into her job as a result of this judgment. However, during her post dismissal life it is evident that she demonstrated a consistent and determined intention to seek justice in this Court. Her son has continued to pursue the case for her estate in his capacity as appointed Trustee. The benefits will accordingly accrue to the First Respondent's deceased estate.

Calculation of back pay

[47] The First Respondent was and her estate is now entitled to payment by the Applicant as follows -

- 47.1. Seven (7) months back-pay of R46 900.00 specified in the Award; plus
- 47.2. The remuneration calculated at R6 700.0 per month;
- 47.3. For the period from the date of reinstatement on 2 May 2012 as specified in the Award and her date of death on 21 April 2017; plus
- 47.4. Annual increases; less
- 47.5. Statutory deductions.

Costs

[48] The First Respondent's attorneys have applied for a punitive costs order against the Applicant. There is some merit in the submissions given the

dilatory conduct of the Applicant which has delayed the finalisation of this case for some 5 years.

[49] As indicated, there were never any reasonable prospects of success in the review yet the Applicant persisted regardless to pursue the matter. This came at great cost and hardship for the First Respondent who went without an income without good reason.

[50] The difficulty in considering a punitive costs order is that it may serve to punish the wrong party. There is reason to believe the Applicant was advised and relied on its various attorneys to persist with the case against the odds. For this reason, it is not appropriate to order a punitive cost order on the attorney and client scale against the Applicant. Nor would it be practical to shift let alone apportion degrees of the blame onto the current and past attorneys.

[51] However this is a case in which it is most certainly appropriate to make an order of costs against the Applicant on the party and party scale.

Interest

[52] The Applicant applied for interest on the arrear salaries for the period. However, the capital must a liquidated judgement debt to attract interest in terms of the Prescribed Rate of Interest Act. The calculation of the arrear salaries for the purpose of this case was not capable of accurate calculation taking account of annual increases, statutory deductions and other factors to qualify as a liquidated amount. For this reason, it is not competent for this court to make an order for the payment of interest.

Order

[53] In the premise, I make the following order:

1. The applications for condonation, rescission and review are dismissed.
2. The Order of Van Niekerk J dated 12 June 2014 is confirmed.

3. The Applicant is ordered to make payment to the First Respondent's estate as calculated in paragraph 47 of this judgement.
4. The Applicant is ordered to pay the First Respondent's taxed costs.

P. Deale

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

K Molemoeng

Instructed by:

Msikinya Attorneys & Associates

For the Respondent:

M Crous of Du Randt Du Toit Pelsers
Attorneys

LABOUR COURT