



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no: D1245/16

In the matter between:

NATIONAL HEALTH LABORATORY SERVICE

Applicant

and

MAGDELENA TURZYNIECKA

Respondent

Heard: 26 April 2017

Delivered: 15 September 2017

Summary: [Doctrine of res judicata-Application to strike out-(Rule 6(15) of the Uniform Rules-Power of attorney signed outside the Republic of South Africa (Rule 63 of the Uniform Rules-Condonation application (inordinate delay and poor explanation may lead to condonation not being granted)-Section 158(1)(h) of the LRA-Principle of legality-Reasonable time].

JUDGMENT

MABASO AJ

Introduction

[1] The applicant and the respondent entered into an employment contract in July 2013 wherein the latter was employed as a medical practitioner. The respondent is a foreign national and based on her nationality, on 28 September 2016, the applicant brought this application, and its notice of motion is couched in the following:

- “1. Condoning the late filing of this application.
2. Declaring that no valid and enforceable contract of employment came into existence between the applicant and the respondent in July 2013.
3. In the event that it is found that a valid and enforceable contract of employment came into existence between the applicant and the respondent in July 2013 declaring the contract of employment concluded between the applicant and the respondent on 22 July 2013 is invalid, unlawful and enforceable.
4. Setting aside the aforesaid contract of employment.
- ...”

[2] In its heads of argument, the applicant submitted that this application is in terms of section 158(1)(a)(iv)¹ of the Labour Relations Act² (the LRA).³ The

¹ this section provides that “Labour Court may make any appropriate order, including a declaratory order”.

² Act 66 of 1995 as amended.

³ I have taken note that the manner in which prayers 2 and 3 are framed, they are similar to the matter which the Constitutional Court had to deal with, *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 2014 (3) BCLR 333 (CC)*, (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (*Khumalo*) where it said even if an applicant may submit that its application is in terms of section 158(1)(a)(iv) of the LRA, taking into account the nature of the application before a court, it can be concluded that the application was in terms of section 158(1)(h) of the LRA, which is a *principle of legality*. It concluded that:

“[32] In this matter, the constitutional and legislative framework must inform an approach which does not undermine the hard-won protections afforded to public sector employees whilst understanding the uniqueness of public-sector employment. Of importance is the demand that decisions are made and executed lawfully, **fairly and expeditiously**. We are confronted with the rather unusual situation of a state functionary seeking to establish the unlawfulness of its own institution's actions. The MEC's standing to bring the challenge is established in a number of previous decisions of the Supreme Court of Appeal. It is nevertheless of relevance here to outline and particularise this principle.

Counsel for the Applicant, confirmed during argument that indeed this application, prayer 3, is similar to the one of *Khumalo* (Constitutional Court matter). It is apparent to me that the applicant is challenging the legality of the contract entered into between the parties. Therefore, it requires that such application must be made within a reasonable time. This application is accompanied by a condonation application, as per prayer 1. I deal with the issue of condonation below.

- [3] The applicant is the National Health Laboratory Services (NHLS) which is established in terms of the National Health Laboratory Service Act⁴. (Hereinafter referred to as the applicant) The respondent is Ms Magdalena Turzyniecka (hereinafter referred to as the respondent). The respondent is opposing this application.

Issues

- [4] The following points *in limine* are raised by the parties against each other, in this application:
- (a) the applicant submitted that a power of attorney and the confirmatory affidavit delivered by the respondent are defective therefore the answering affidavit be struck out;
 - (b) whereas the respondent submitted that the matter is *res judicata* because it was finalised in terms of the provisions of section 138(7) of the LRA; and
 - (c) the respondent raised the point of prescription.

[42] There is no prescribed time limit for launching a review under section 158(1)(h) of the LRA. The Labour Court Rules further prescribe no time limits for bringing review applications. Under other provisions of the LRA, the time limits in which litigants or complainants are required to bring their disputes are strictly circumscribed. The importance of resolving labour disputes in good time is thus central to the LRA framework. It is generally understood that proceedings under section 158(1)(h) **must be launched within a reasonable time. In some instances, in the context of the LRA, the courts have held a reasonable time to be about six weeks** (Own emphasis)

⁴ Act 37 of 2000.

- [5] If point (a) succeeds, the matter will proceed unopposed, on the other hand, if point (b) or (c) succeeds the entire application will have to be dismissed. In respect of point (c), I am of the view that there is no proper case that has been presented before me, as the respondent's assertion is a vague one which reads thus "...The applicant seeks to pursue this Honourable Court pronounce upon the validity of a contract concluded in July 2013, the applicant's right to do so has become prescribed..."

Factual background

- [6] The respondent is a foreign national who holds dual citizenship of Poland and the United Kingdom. At the beginning of 2011, the applicant and the Nelson R Mandela School of Medicine at the University KwaZulu-Natal jointly appointed the respondent in the capacity of lecturer. Taking into account the nationality of the respondent, her appointment to this position was based on "the basis that she had a valid work permit which foreign nationals are required to possess to enable them to lawfully work within the Republic of South Africa . The type of visa which the respondent produced was one in terms of which she was entitled to reside within the Republic of South Africa with a spouse and to work for the applicant on the basis that she was residing with a spouse in the Republic of South Africa."⁵
- [7] In 2013 the respondent was successfully interviewed for the position of head of Department of Chemical Pathology at the Inkosi Albert Luthuli Complex Hospital in Kwa-Zulu Natal. Subsequently, she was offered the position on the basis that she was entitled to stay and work in this country as she had a South African spouse with whom she was living with. The offer of employment (the offer) was transmitted to the respondent by way of an email dated 5 July 2013, wherein it is stated that the interviews were successful, and therefore she was offered a position with effect from "01 July 2013", and it indicates that the contract of employment and "offer letter of employment" were attached therein.

⁵ Founding affidavit, at para 3.3.

This email further states *that “Please read and initial each page and sign on the last page, if and when you concede with the terms and July(sic) conditions of the appointment, then send it back to me”.*

- [8] According to the letter of appointment, at the tail of it the respondent was advised that *“Kindly confirm your acceptance of the offer of employment and the attached contract , by signing and returning to the Human resources department within 7 days of receipt of this offer.”*⁶The applicant’s basis for prayer 2 is that the respondent failed to accept the offer within seven days thereafter.
- [9] On 10 July 2013, two days before the expiry of the 7 day period, the respondent sent an email to the applicant stating *inter alia* that she found some discrepancies regarding working hours between the letter dated 24 June 2013 and the employment contract: In that the letter provides that *“[she] required to work minimum 56 hours per week (40 hours basic and 16 hours committed over time)... with regards to a periods of notice –see point .5 of the contract – am I treated as a new employee or an old employee who changes the position , that is would my period of notice be one month or a one week for the next six months(sic)?* The Respondent requested the applicant to “address and clarify” these points.⁷
- [10] In the papers it is not indicated as to whether the aforestated questions by the respondent were addressed or not, and if indeed when? However, that on 22 July 2013 the respondent “purported to accept the offer of employment”, and according to the applicant, this offer had already lapsed and was no longer capable of being accepted as the period of 7 days had passed from the date of receipt of the offer of a letter of employment. It further avers that the acceptance was supposed to be accepted by no later than 14 July 2013. Based on this, the applicant says:

⁶ (own emphasis). The “attached contract” is not part of the papers before me.

⁷ The email from the respondent is part of the founding affidavit.

“Unbeknown to the applicant and the respondent that the offer of employment in the contract was no longer acceptable on 22 July 2013, the parties conducted themselves as if there was a valid acceptance of the offer of employment and contract when in fact there was not. Similarly, the applicant and the respondent conducted themselves as if a valid and enforceable contract of employment came into existence when in fact and in law that was not so.”⁸

And

“The fact that the applicant and the respondent conducted themselves as if a valid and enforceable contract of employment came into existence does not mean that the contract of employment did in fact and in law come into existence. Their conduct is in fact irrelevant in that determination”⁹

[11] The applicant further states that, should this Court dismiss this prayer(prayer 2) , it should at least make an order that the contract that was entered into by the parties is unlawful as it was invalid and unenforceable, as it is against clause 9.3 of the recruitment policy of the applicant, made in contravention of the Department of Health policy dealing with employment of foreign health professionals which requires that a foreign national should be employed on a fixed term contract of not more than 5 years. The condonation application (prayer 1) relates to prayer 3 of the notice of motion.¹⁰ Therefore, no explanation is given for the bringing of prayer 2 after a period of more than 3 years following the conclusion of the contract.

[12] The third ground is that when the applicant appointed the respondent, it relied on the visitor’s visa and that she was to reside with the South African spouse. Therefore, according to it, the respondent was not a party to the marriage, which would have qualified her to be a spouse. Therefore, if this information

⁸ Founding affidavit, at para 4.3

⁹ Founding affidavit, at para 4.4.

¹⁰ Founding affidavit, at para 4.11.

was at the applicant's attention, the respondent would not have been appointed to this position.

- [13] The deponent to the founding affidavit is one Mr Bheki Templton Hlatshwayo (Mr Hlatshwayo) who has not stated his position, save to say he is employed by the applicant and authorised to bring this application on its behalf. On behalf of the respondent, the deponent to the answering affidavit is Mr Dean Macbeth Caro (Mr Caro) who avers that he is the current attorney of record for the respondent and he is "duly authorised by the respondent to depose to this affidavit on her behalf". It needs to be mentioned from the beginning that one does not need the authorization to depose to an affidavit, however, but to bring and/or oppose an application on behalf of another.¹¹

The power of attorney and confirmatory affidavit

- [14] Following the delivery of Mr Caro's affidavit, on 21 February 2017 the applicant delivered a notice challenging the authority of Mr Caro in acting on behalf of the respondent, and calling upon Dean Caro & Associates to deliver a power of attorney confirming their instruction. On 3 March 2017, the attorneys complied with this request by delivering such document. The applicant delivered the replying affidavit wherein it avers that the answering affidavit should be struck out as the attorneys for the respondent have failed to submit a power of attorney despite being asked to do so, alternatively that there was no condonation application for the late delivery of the answering affidavit. The condonation point was not pursued further during argument.
- [15] Therefore, the only point that remained was the one on failure to deliver a power of attorney and confirmatory affidavit, Counsel for the applicant acknowledged that both were delivered, however, according to him they were defective because they had no seal of office taking into account that were

¹¹ *Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)* at para 19. The respondent in the confirmatory affidavit says "...Dean Caro, my attorney duly appointed in these proceedings to act on my behalf. In respect of Caro's affidavit I confirm the correctness thereof."

signed outside the Republic of South Africa, meaning the answering affidavit should be struck out.

- [16] The court may strike out any part of an affidavit, whereby it is called upon to do so, if such affidavit or its part is scandalous, vexatious or irrelevant and this cannot be done when the opponent is not being prejudiced. The applicable rule is Rule 6(15) of the Uniform Rules which provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. **The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.**”(Own emphasis)

- [17] As the argument for the applicant is that the answering affidavit should be struck out because despite a power of attorney and confirmatory affidavit being submitted they do not comply with the provisions of Rule 63 of uniform rules.

- [18] It is important to quote part of the applicable Rule 63, which reads thus:

“In this rule, unless inconsistent with the context—

‘document’ means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before an officer prescribed by section eight of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963);

‘authentication’ means, when applied to a document, the verification of any signature thereon.

(2)Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office—

(a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or

(2A) Notwithstanding anything in this rule contained, any document authenticated in accordance with the provisions of the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents shall be deemed to be sufficiently authenticated for the purpose of use in the Republic where such document emanates from a country that is a party to the Convention.

[Sub-r. (2A) inserted by r. 2 of GNR. 89 of 12 February 2010.]

(3) If any person authenticating a document in terms of sub-rule (2) has no seal of office, he shall certify thereon under his signature to that effect."

- [19] In observing the Rules, this court has to remind itself that the rules exist for the court not that the court exists for the rules. Therefore, in interpreting the rules some flexibility has to be taken into account and look at the circumstances under which such document had to be delivered, and most importantly the interests of justice. For example, in *Brown's*¹² case, the court held that:

*"It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. **That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.***

¹² *James Brown and Hamer (Pty) v Simmons* NO 1963 (4) SA 656 (A) at 660D-H. See also *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA), at para 32.

Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to... It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.”

- [20] Taking into account that the applicant and the respondent are involved in another litigation represented by the same sets of attorneys and that the respondent attorneys have delivered the answering affidavit on behalf of the respondent and deals with an arbitration award which is a public document and the existence of such arbitration award is not disputed by the applicant. I have also taken into account, what the then Cape Division said in respect of authentication of documents executed outside the Republic of South Africa, where van Reeve J emphasised that:

*“The rules relating to the authentication of a document executed in foreign countries have been designed to ensure that such documents are genuine before use can be made thereof in the Republic of South Africa. **The prescribed formalities are not mandatory**, and the genuineness of such documents may be proved on Page 458 of [2003] 1 All SA 453 (C) a balance of probabilities by means of direct or circumstantial evidence or both. (See: *Chopra v Sparks Cinemas (Pty) Ltd* and another 1973 (2) SA 352 (D) at 358B–D; see also *Ex parte Holmes and Co (Pty) Ltd* 1939 NPD 301; *Friend v Friend* 1962 (4) SA 115 (E)).”*¹³

¹³ *Maschinen Frommer GmbH and Co KG v Trisave Engineering and Machinery Supplies (Pty) Ltd*

[21] Mr Caro as an officer of Court, who represented the respondent during the arbitration and his affidavit deals principally with the issues relating to the point *in limine* that was raised on behalf of the respondent-the arbitration award, in respect of further averments by the applicant in the founding affidavit Mr Caro's affidavit are just bald averments. Therefore, I am not convinced that there would be any prejudice on the part of the applicant if both the confirmatory affidavit and power of attorney by the respondent are accepted, as they are, in confirming what is contained in Mr Caro's affidavit. And there is no averments of scandalous, vexatious or irrelevant that has been made. Based on all of the above, I cannot disregard the answering affidavit. I need to mention that the application to strike out is misplaced in this application.

Doctrine of *res judicata*

[22] In the answering affidavit the respondent raises the *res judicata* point *in limine* in that the same parties before the CCMA were involved in the same cause of action whereby the same relief which is being sought was dealt with at that forum. The respondent did not submit the same arbitration award however both parties confirm that the same arbitration award is the subject of the review before this Court under case number D 737/16. As an arbitration award is an administrative act and the review documents are also public documents, therefore this Court had to retrieve the file to look at what is contained in such arbitration award, to determine as to whether this point of *res judicata* is valid or not.

[23] The SCA in *Prinsloo NO and others v Goldex 15 (Pty) Ltd and another*¹⁴ summarised this principle as follows:

[2003] 1 All SA 453 (C). [Own underlining and bolding].

¹⁴ [2012] JOL 28866 (SCA).

“The expression “res iudicata” literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the exceptio was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause.” ¹⁵

Arbitration award:

- [24] The arbitration award under the CCMA’s case number KNDB 8399/15, was about an unfair dismissal dispute which had been referred to the CCMA in terms of the provisions of the LRA, where the respondent claimed that she was unfairly dismissed. During the arbitration, the applicant did not tender any *viva voca* evidence and relied on documentary evidence. It was presented before the commissioner that the respondent was issued with a letter terminating her employment advising her that failure to provide the applicant with a “new” work permit their employment relationship was terminated with effect from 12 June 2015. [This application, before me, sought to challenge the legality of the same contract of employment which was terminated in June 2015]
- [25] The applicant, during the arbitration, submitted that it was disputing that there was a dismissal instead their employment relationship terminated by the affluxion of time. However, the Commissioner rejected this explanation.
- [26] In deciding this application I need to remember that the Constitutional Court in the case of *Molaudzi v S*¹⁶, in expanding on the *res judicata* doctrine said that each case has to be decided on its facts before one can conclude that indeed

¹⁵ Ibid, at para 10 .[Footnotes omitted].

¹⁶ 2015 (8) BCLR 904 (CC) at para 18.

the matter is *res judicata*¹⁷. Moreover, such facts have to be scrutinised, as the court held as follows:

*"In the context of a criminal appeal there is, strictly speaking, no "cause of action" but rather grounds of appeal against a particular conviction or sentence. It is arguable that this may be akin to a "cause of action" for the purposes of res judicata. It could be reasoned that in the first application this Court was not called upon to adjudicate the substantive merits of the constitutional challenges now raised. By analogy this is a different "cause of action", and therefore this Court is not precluded from hearing the second application under the res judicata rule."*¹⁸

- [27] Taking into account that the applicant wants the contract between the parties that was entered into in July 2013 be declared "no valid and enforceable contract of employment came into existence between the applicant and the respondent in July 2013", clearly this was not the case before the commissioner at the CCMA which the commissioner was called upon to decide on the termination of contract on 11 June 2015. I am of the view that before me there is a "new cause of action" which I have been called to decide upon. Under those circumstances, I agree with the Applicant that the validity of the contract of employment was not adjudicated at the CCMA. Therefore, the *res judicata* point *in limine* fails.

Prayer 1, 2,3 and 4: Is there a convincing case? (Two reasons why this application cannot succeed)

A. The award

- [28] It is prudent to mention that Mr Hlatshwayo, the deponent to the founding and replying affidavits, does not state his position within the applicant and further does not indicate as to when did the applicant become aware of this alleged

¹⁷ Ibid, para 23.

¹⁸ Ibid, para 18.

invalidity. Be that as it may, the basis for the applicant's contention that the contract entered in July 2013 is invalid is because it was accepted on 22 July 2013, instead of 14 July 2013.

- [29] Every matter has to be decided based on its circumstances and applicable principles. The applicant's basis for this application is one of the validity of the contract-which the applicant terminated in June 2015. In my view, it cannot be decided in isolation taking into account that the relationship between the parties herein is the employment relationship which in this country is governed by its legislations (such as the LRA and Basic Conditions of Employment Act), and these legislations are the supreme law in employment matters as compared to the general common law principles. For example, section 210 of the LRA provides that,

“ Application of Act when in conflict with other laws-If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail”.

- [30] The applicant did not put this Court in its confidence, in that in its founding papers it did not mention that there is an arbitration award issued against it in terms of section 138 of the LRA, and if the respondent did not mention this, it means that this Court was not going to be aware of the arbitration award, as not all arbitration awards issued by CCMA are published. The applicant in its replying affidavit where it answers what has been raised by the respondent in respect of what the commissioner decided, the relevant excerpt from it reads thus:

“Insofar as the arbitrating commissioner has concluded that the respondent was a permanent employee of the applicant, **it is for this reason that the applicant now seeks an order declaring that such**

employment is invalid for the reasons set out in the applicant's founding affidavit¹⁹

[31] This shows that the arbitration award, in this matter, is a crucial document. Hence I have to look at it. It is common cause between the parties that the arbitration award is the subject of the review application before this Court under case number D737/2016.

[32] The arbitration award is an administrative action²⁰, and this arbitration award has not been reviewed and set aside, meaning it is binding, as the Supreme Court of Appeal put it, in the matter of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*²¹ in that:

*"... Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."*²²

[33] The same contract of employment which I have been asked to declare invalid and unenforceable as, according to the arbitration award, was terminated by the applicant when it issued a letter to the respondent on 11 June 2015 which partly reads as follows *"we regrettable inform you that your employment agreement with [the applicant] is now terminated from the 12th June 2015"*.

¹⁹ Replying affidavit at page 94. (Own emphasis)

²⁰ *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) BCLR 158 (CC).

²¹ [2004] 3 All SA 1 (SCA)

²² *Ibid*, para 26.

Evidently, the commissioner decided on the fairness of dismissal following the termination of the same contract of employment. Moreover, he concluded that the dismissal was substantively unfair. It is common cause between the parties that the arbitration award is the subject of the review as mentioned above.

[34] If I were to decide as to the validity of the contract that was entered into between the parties, the question would be what would be the status of the arbitration award. The answer to this question is that indirectly I would be saying the arbitration award is not enforceable. I, therefore, conclude that the review application, under case number D 737/16 and this application cannot run parallel. Instead, the arbitration award supersedes this process whereby the applicant is relying on the legality. Based on the aforementioned reasons, I conclude that I lack jurisdiction to make a pronouncement on the validity of the contract between the parties which was terminated by the applicant in June 2015.

[35] Consequently, in respect of prayer 2 this Court cannot decide on something that was terminated by the applicant.

B. The condonation

[36] But even if my conclusion above, paragraph 28 to 35, is wrong, I still believe that this application cannot succeed based on the following.

[37] The applicant is reviewing its decision in respect of appointing the respondent on a permanent basis, according to it, instead of a fixed term contract as per paragraph 7 of its policy. The applicant is challenging the lawfulness of its own decision and is expected to act expeditiously so.²³ The applicant has brought condonation application, which I have to use judicial discretion as to whether I grant it or not.

²³ *Khumalo's matter*, note 3 above.

- [38] In explaining the reason for the delay in the delivery of this application, the applicant asserts that it became aware of the non-compliance of its policy of employment of foreign nationals in August 2013. It then took steps to unilaterally amend the contract of employment in a letter dated 30 August 2013 and acknowledged that it was legally incorrect in taking such approach. It is stated that the respondent resisted the nature of the amendment of the contract. Subsequently, there was a misunderstanding between the senior officials and junior staff members of the applicant in respect to the approach to be taken. It is not explained as to how long this confusion took place.
- [39] This application was delivered in September 2016, and there is no explanation as to what happened between August 2013 and 9 June 2015, a period of 21 months. Moreover, between 9 June 2015 and September 2016 a period of a further 15 months. In essence, there is no complete explanation for the period of 3 years as to what steps were taken by the applicant to correct the alleged unlawful act. There is an excessive delay in bringing this application. In the matter of *Khumalo* above, Skweyiya J, for the majority, in respect of reasonable time in the context of LRA held that,

*“the importance of resolving labour dispute in time is thus central to the LRA framework. It is generally understood that proceedings under section 158(1)(h) must be lodged within a reasonable time. In some instances, in the contents of the LRA, the courts have held a reasonable time to be about six weeks”*²⁴

- [40] It is a requirement that a delay, especially if it is an unreasonable delay, an applicant in a condonation application has to explain the entire period. The Constitutional Court in the matter of *Van Wyk v Unitrans Hospital and others*²⁵ in rejecting a condonation based on an unreasonable delay had the following to say:

²⁴ Footnote 3 above, at para 42.

²⁵ 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC)

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing. It amounts to this. During the entire period of approximately eleven months she was considering whether or not to appeal the decision of the Supreme Court of Appeal. During this period she sought advice from a number of individuals whom she has not disclosed. In addition she alleges that she does not have unlimited funds although she admits that this is not a compelling reason for the delay. She has not furnished any explanation as to why it took approximately eleven months for her to decide whether or not to appeal. Nor has she furnished any explanation how she overcame her funding difficulty.”²⁶

- [41] Based on the above, I am not satisfied that the delays should be overlooked. Even if one were to look at the prejudice that will be suffered by the respondent, clearly the respondent will suffer prejudice and that for the mere fact that she is waiting for the outcome of this case and the other case is still pending before this Court, delay itself can be a prejudice and “*weaken the ability of a court to consider the merits of a [case]*”.²⁷ I am of the view that this is a matter which requires the prospects of success not to be looked at taking into account the length of delay and that no plausible explanation for the delay has been proffered. I have further taken into account that there is no explanation as to when did the applicant realise that it entered into a contract of employment with the respondent after the expiry of the seven-day period, as per its assertion, therefore without such explanation I am of the view that this application was delivered far beyond a reasonable time.

- [42] In the circumstances, the following order is made:

²⁶ Ibid, at para 22.

²⁷ *Department of Transport v Tasima (Pty) Ltd* 2017(1) BCLR 1 (CC), at para 160.

Order

1. The Application is dismissed.
2. There is no order as to costs.

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv KT Tsatsawane
Instructed by: Gildenhuys Malatji Inc,

For the Respondent: Adv P Schumann
Instructed by: Dean Caro Attorneys