



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: J 1769/16

In the matter between:

POLICE AND PRISON CIVIL RIGHTS UNION

obo MARGARET MOKOTONG

Applicants

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

MARLEZE BLIGNAUT (SWANEPOEL) N. O

Second Respondent

THE NATIONAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE SERVICE

Third Respondent

Heard: 17-18 May 2018

Delivered: 28 August 2018

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant, the Police and Prison Civil Rights Union (POPCRU), acting on behalf of its member, Ms Margaret Mokotong (Mokotong) seeks an order in terms of the provisions of section 145(1) of the Labour Relations Act (LRA)¹, to review and set aside the arbitration award issued by the second respondent

¹ Act 66 of 1995 (as amended)

(the Commissioner) on 6 February 2016. In the award, the Commissioner dismissed Mokotong's claim of an alleged unfair discrimination related to pay disparities (equal work for equal value). Mokotong essentially was of the view that she was entitled to a scarce skills allowance offered to her colleagues.

- [2] The applicant further seeks condonation for the non-compliance with the time limits provided for in terms of the provisions of section 145(1) of the LRA. The third respondent opposes both the condonation and review application.

Background:

- [3] Mokotong is employed by the third respondent as a senior accounts clerk. In 2004, the Public Service Coordinating Bargaining Council agreed on a framework for special allowances as per its Resolution 2 of 2004. The agreement defined a scarce skills position as an occupation within the state security agency and which the agency found difficulties in recruiting and retaining prospective employees. The position also require the employee to possess an advanced knowledge in a particular field, which knowledge must have been acquired through a prolonged course of study and/or specialised instruction.
- [4] In 2006, the third respondent took a decision to designate and implement the scarce skills policy in respect of certain departments or occupation. In a Circular dated 24 January 2007², the Divisional Commissioner: Career Management sought to clarify the requirement that an employee of the SAPS

² IMPLEMENTATION OF AN ALLOWANCE FOR EMPLOYEE CATEGORIES WHICH POSSESS SCARCE SKILLS IN THE SOUTH AFRICAN POLICE SERVICE (SAPS)

...

2. The following years of service will be applicable in order for members to qualify for the payment of the allowance:

2.1 if the member has the relevant qualification, he/she must have at least three (3) years' service, after receiving the qualification, in the employee category which possess scarce skills, before the allowance is payable to him/her...

2.2 if a member does not have a relevant qualification, he/she must have at least five (5) years' service within the employee category which possess scarce skills in order for the member to acquire the necessary competencies:

Example: if a member was appointed in a scarce skills environment on the 1st April 2002 and the member does not have a qualification then the member will qualify to receive the payment of the Scarce Skills in respect of that employee category from the 1st April 2007 (date on which the employee completed 5 years' service) if the member still continues to perform the scarce skill function.

...

must satisfy in order to be eligible for the scarce skills allowance. The internal audit department in which Mokotong was employed within the third respondent was not categorised as a scarce skills department until 27 June 2008 when the Minister of Safety and Security took a decision to designate it as such³, with certain conditions attached to the payment of scarce skills allowance, including that the employee must possess a postgraduate academic qualification.

- [5] For reasons not clear, the minimum requirements prescribed by the Minister were not strictly applied by the third respondent until it received a complaint from the financial department. The non-compliance with the Minister's directive had resulted in all the employees in the internal audit department, including Mokotong, receiving the scarce skills allowance when it was not due to them. Those payments continued until 2011 when put on hold. The employees were then required to re-apply for the allowance.
- [6] Following a variety of disputes lodged by employees in the unit related to the requirement of a postgraduate academic qualification, the Minister agreed in September 2012, to relax that requirement.⁴ The Minister then required that an applicant for the allowance must possess a National Diploma in Internal Audit and/ Bachelor of Commerce with majors in Accounting, Auditing or

³ IDENTIFICATION OF SCARCE SKILLS IN THE SOUTH AFRICAN POLICE SERVICE (SAPS): INTERNAL AUDIT

1. The Minister of Safety and Security, on 27th of June 2008, approved the following:
 - 1.1. Internal Audit be declared an employee category which possesses scarce skills in the SAPS; and
 - 1.2. A monthly Scarce Skills Allowance of R1 500 be paid to Internal Auditors who have passed the CIA, CCSA, CGAP or CFSA examinations and who meet the requirements for the payment of the Scarce Skills Allowance as stipulated in Circular 4/2/1 dated the 13th of November 2006...
2. The Scarce Skills Allowance will come into effect from the 1st of July 2008.

...

⁴ REQUEST FOR THE RELAXATION OF THE POST GRADUATE CERTIFICATION REQUIRED BEFORE MEMBERS IN THE INTERNAL AUDIT ENVIRONMENT MAY BE ELIGIBLE FOR THE PAYMENT OF THE SCARCE SKILLS ALLOWANCE

...

4. RECOMMENDATION

- 4.1 It is recommended that the Minister of Police, in terms of the powers vested upon him, approve that:
 - 4.1.1 A National Diploma in Internal Audit and/ or Bachelor of Commerce with majors in accounting and auditing or higher be the relevant qualification on the payment of the Scarce Skills Allowance to the internal auditors with three years' relevant experience in the environment with effect from 1 September 2012

higher subject. The new scheme was to commence on 1 September 2012. Mokotong was excluded from the new scheme on the basis that she did not possess the required minimum academic qualifications. This led to the referral of an alleged unfair discrimination dispute based on the provisions of section 6⁵ of the Employment Equity Act (EEA)⁶. It is not clear from the papers as to whether the dispute found its way before the Commissioner by virtue of the provisions of section 10(6)(b) of the EEA or not. Since this was not an issue raised in the course of these proceedings, I will assume that this was the case.

- [7] As already indicated, the Commissioner dismissed Mokotong's claim of alleged unfair discrimination and gave extensive reasons in that regard, which will not be dealt with for now in the light of the preliminary issues to be determined.

Condonation:

- [8] The arbitration award having been issued on 6 February 2016, the applicants only approached the Court with a review application on 19 August 2016. The third respondent took issue with the late filing of the review application. Similarly, the applicants contended that the third respondent filed its answering affidavit some five months late, and without filing an application for condonation.
- [9] Further preliminary points raised by the applicants related to the *locus standi* of the deponent to the answering affidavit and typographical errors in the answering affidavit. These last two preliminary points were nonetheless not taken any further as it was apparent that the deponent to the answering affidavit was the same person who had appeared on behalf of the third respondent throughout the arbitration proceedings. The typographical errors pointed out were in any event not material or fatal. The contention that the

⁵ Section 6: **Prohibition of unfair discrimination.** —

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

⁶ Act 55 of 1998 (as amended)

answering affidavit was filed late without an application for condonation is equally meritless in the light of the applicant's failure to raise an objection as contemplated in Clause 11.4.2 of the Practice Manual of this Court⁷.

- [10] An application for a review of an award brought under section 145 of the LRA ought to have been brought within six weeks of the date that the award was served on the applicants. Under section 145 (b) of the LRA, the Court may however on good cause shown, condone the non-compliance with the time frames stipulated under section 145 (a) of the LRA.
- [11] The principles applicable in the consideration of applications for condonation are fairly trite. This Court in the exercise of its discretion in determining whether good cause has been shown, will take into account various relevant factors including but not limited to the extent of the delay, the explanation for that delay, the prospects of success on the merits, and whether the third respondent stands to suffer prejudice if condonation is granted⁸. Ultimately, the considerations of the interests of justice (which involve an assessment of all the relevant factors) will determine whether condonation should be granted or not⁹.
- [12] There are a number of worrying factors in this case insofar as condonation is sought. The applicants do not state the date when the award was received. It is further not clear from the Rule 7A(3) compliance notice as to when the award was despatched to the parties. Be that as it may, the third respondent's contention was that the review application was some six months out of time, and the applicant do not dispute the period of the delay save to mention that it

⁷ Clause 11.4.2 which provides;

Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.

⁸ *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) At 532b-E

⁹ *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3; See also *F & J Electrical CC v Metal and Electrical Workers Union of South Africa obo Mashatola and others* [2015] 5 BLLR 453 (CC) at 461, para [30]; *Ndlovu v S* 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B.

was only five rather than six months. I would nonetheless accept that the delay in launching this review application is excessive in the extreme.

[13] It has been stated repeatedly in this Court that condonation cannot be had for the mere asking, and that there is an obligation on the defaulting party to proffer a reasonable, adequate and satisfactory explanation for the delay, which explanation must also cover each period of the delay¹⁰.

[14] In this case, the applicants merely seek an indulgence on the basis that Mokotong was not aware of the fact that she could review the award, until she was informed that she had reasonable prospects of success by the applicants' attorneys of record during consultations held with POPCRU on 20 May 2016. It was averred that the attorneys of record were immediately instructed to proceed with the launching of the review application.

[15] There are important lessons to be learnt from the principles applicable to applications for condonation as reiterated in *Colett v Commission for Conciliation, Mediation And Arbitration and Others*¹¹, and which for the purposes of this case, are worth summarising;

- a) When assessing the reasonableness or unreasonableness of a delay sight must not be lost of the fact that labour disputes must be resolved without delay¹²
- b) Where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success¹³.

¹⁰ See *Grootboom v National Prosecuting Authority and Another* (2014) 1 BLLR 1 (CC) at para 22

¹¹ [2014] 6 BLLR 523 (LAC); (2014) 35 ILJ 1948 (LAC)

¹² At para 34

¹³ At para 38. See also *Grootboom* at para 51, where it was held that;

"The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

- c) There is no merit in the contention that the court must consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules¹⁴.

[16] In my view, the facts of this case are a classic example of where the principle that without a reasonable explanation for a delay which is excessive, there would be no need for a consideration of other factors pertaining to such applications. This is so especially where the purported explanation proffered by the applicants as in this case amount to no explanation at all¹⁵.

[17] The starting point is that Mokotong is a member of POPCRU, one of the largest public sector unions, whose officials are surely well aware of, or ought to be aware of the time frames applicable in this court. POPCRU as evident from the record of arbitration proceedings, had represented Mokotong in those proceedings. Her contention therefore that she was not aware that she could approach the court with a review application is fallacious, in that had she bothered to timeously enquire from her union (to the extent that she alleged that she was not aware of that right or time periods), she would have been accordingly advised, as POPCRU was her representative throughout.

[18] The award sought to be reviewed having been issued in February 2016, not an *iota* of explanation is proffered in regards to the delay between that date and 20 May 2016 when the applicants allegedly consulted with their attorneys of record. No attempt was made whatsoever as to the reason the attorneys of record were consulted some three months since the award was issued. Furthermore, despite the alleged instructions to the attorneys to immediately

¹⁴ At para 39

¹⁵ See *Moila v Shai N.O and Others* (2007) 28 ILJ 1028 (LAC); [2007] 5 BLLR 432 (LAC) at para 34, where it was held that:

"I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success."

launch the review application, there is still no explanation proffered for the three months' delay between when the instructions were issued and 19 August 2016, when the application was finally launched. Effectively, there is no explanation for the excessive delay, and it is at this point that the enquiry should end.

[19] Mokotong further averred that the application was brought on a *bona fide* basis and that it was in the interests of justice that the condonation be granted. It was correctly pointed out on behalf of the third respondent that the applicants had failed to demonstrate through facts that it is in the interest of justice that the condonation be granted.

[20] It is appreciated that in the end, it is the interests of justice that dictate whether condonation should be granted or not. Unfortunately the concept 'interests of justice', despite its elasticity as pointed out in *Grootboom*, is not a self-standing consideration meant to be flashed before the Court and/or abused by defaulting parties. The concept cannot be a free pass to an indulgence by this Court in circumstances where there is an excessive delay and where no attempt was made to explain that delay. In such circumstances, because the delay negatively impacts upon the expeditious resolution of disputes and thus the effective administration of justice, and because in the absence of an explanation it should invariably be concluded that on the whole, the non-compliance with the time frames was flagrant, it cannot be in the interests of justice to grant an indulgence.

[21] I have further had regard to the requirements of law and fairness in regards to an award of costs. It is apparent flowing from the above conclusions that the review application was an afterthought, and it is not sufficient for the applicants to simply aver that it was made *bona fide*. This is one of those cases where the review application was filed way out of time and without any explanation, and where the applicants essentially hoped that by some miracle, an indulgence would be granted. Unfortunately, such practices continue unabated in this Court, further clogging its already overburdened roll to the detriment of legitimate and timeously referred matters. This Court has always warned parties that non-compliance with its rules will not be countenanced,

and it is apparent that this is one of those cases where this warning has gone unheeded. In the circumstances, and having had regard to the requirements of law and fairness, and further despite any continuing relationship between POPCRU and the third respondent, I see no reason why the applicants, particularly POPCRU should not be burdened with the costs of this application.

Order:

[22] In the premises, the following order is made;

1. The applicants' preliminary points are dismissed.
2. The application to condone the late filing of the review application is dismissed.
3. The applicants' review application is dismissed
4. POPCRU is ordered to pay the costs of this application.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

K.A Wilson

Instructed by:

Weavind & Weavind Incorporated

For the Third Respondent:

L.J Zikalala

Instructed by:

The State Attorney: Pretoria

LABOUR COURT