



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 993/10

In the matter between:

MINISTER OF CORRECTIONAL SERVICES

Applicant

and

POPCRU obo K.M MATHIBEDI & 4 OTHERS

First Respondent

P.M NGAKO N. O

Second Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Third Respondent

Considered:

In Chambers

Delivered:

11 December 2018

JUDGMENT: LEAVE TO APPEAL

TLHOTLHALEMAJE, J:

- [1] This application for leave to appeal against the whole judgment and order of Sello AJ delivered on 20 February 2018 is before me by agreement between the parties and by direction of the Acting Deputy Judge President of this Court.
- [2] In terms of the Court order, the applicant's (Department) application to review and set aside the arbitration award dated 16 February 2011 issued under the auspices of the third respondent (GPSSBC) by the second respondent (the Commissioner) was dismissed with costs. The award was further made an order of court in accordance with the provisions of section 158 (1)(c) of the

Labour Relations Act (LRA).¹ In the award, the Department was ordered to promote the individual employees (members of POPCRU) to the posts of Correctional Officer Grade 1, with effect from 1 April 2008.

[3] On 15 June 2018, the Department filed and served an application for leave to appeal together with an application for condonation. Both applications were opposed by POPCRU representing the individual employees. The background facts of this dispute are to a large extent common cause and may be summarised as follows:

3.1. In a memorandum dated 12 November 2007, the Department invited Correctional Services Officers who occupied positions on salary level 6 and/or below to apply for positions on a higher salary level (*i.e.* salary level 6 and/or 7). This recruitment process was intended to constitute a promotion for those officers on salary level 6 and below.

3.2. The minimum requirements for the positions were:

- i. in respect of a promotion to *salary level 6 [Correctional Officer Grade (II)]*, a grade 12 certificate; at least four years applicable experience; or at least 3 years in the position of Correctional Officer Grade (III); and a performance rating of at least an average of 65% in the 2006/2007 year.
- ii. in respect of *Correctional Officer Grade I* positions; seven years working experience, three of which must be in the position of Correctional Officer Grade (II), and a performance rating of at least an average of 65% in the year 2006/2007.
- iii. Officers who did not possess a grade 12 certificate but had the relevant experience that exceeded the minimum requirement per grade were also encouraged to submit their applications for promotion.

3.3. In a further memorandum dated 16 November 2007, the Department indicated the criteria for the determination of the necessary experience

¹ Act 66 of 1995 (as amended)

to mitigate against the lack of a formal grade 12 qualification. For example, the memorandum in respect of salary level 6 positions required grade 11 qualification with at least five years working experience and a minimum of three years' experience as a Correctional Officer Grade (III) as opposed to four years working experience required from one who had a grade 12 qualification, *etc.*

- 3.4. The individual employees and other employees applied for the 19 advertised promotional positions. When the 19 positions were filled by other candidates, the aggrieved individual employees referred an unfair labour practice dispute to the GPSSBC. Their dispute related to the filling of the position of Correctional Officer Grade 1 and 15 other individuals were cited as co-respondents in the referral.
- 3.5. At the arbitration proceedings, POPCRU on behalf of the employees had challenged the Department's Regional Commissioner's decision to consider the performance of the financial year 2006/2007 higher in hierarchy in determining the suitable candidates for promotion.
- 3.6. POPCRU's contention was that in an event that there were more suitable candidates than the available positions, the Department was required in terms of paragraph 7.3 of the memorandum dated 16 November 2007, to take into account, additional factors such as, area of locality, seniority, the officer's performance rating in 2006/2007 and the completion of a prescribed promotional examination (in that order). To that end, POPCRU's contention was that the decision of the Regional Commissioner to elevate the standing of the performance rating above the others constituted a breach of the Department's recruitment policy and by implication, constituted unfair labour practice.
- 3.7. In an arbitration award dated 16 February 2010, the Commissioner accepted that the employees met the minimum requirements for the post, and that they were shortlisted. The Commissioner however observed that the employees' names were somehow excluded from the final list issued by the Regional Office.

3.8. The Commissioner held that the Department had accordingly committed an unfair labour practice by failing to promote the employees on the basis that their names had been removed from the list recommended by the selection panel. According to the Commissioner, since the selection panel had complied with the Department's policies, the Regional Office should not have interfered with the final list.

Condonation for the late launching of the application for leave to appeal and evaluation:

- [4] Sello AJ's judgment having been delivered on 20 February 2018, the notice of leave to appeal was only delivered on 14 June 2018, some 68 days outside the timeframes provided for by the Rules of this Court².
- [5] The principles applicable to applications for condonation are well-established. The Court in the exercise of its discretion may or may not grant condonation upon a consideration of a variety of factors including the degree of lateness, the explanation therefor, the prospects of success, the prejudice to the parties and the importance of the case. These factors are to be assessed as a whole as they are interrelated. In the end, and upon a consideration of these factors, the Court, in the exercise of its discretion, will be persuaded by what the interests of justice dictates³.

² Rule 30 of the Rules of this Court provide;

Application for leave to appeal to the Labour Appeal Court

- (1) An application for leave to appeal to the Labour Appeal Court may be made, by way of a statement of the grounds for leave, at the time of the judgment or order.
- (2) If leave to appeal has not been made at the time of judgment or order, an application for leave must be made and the grounds for appeal furnished within 15 days of the date of the judgment or order against which leave to appeal is sought, except that the court may, on good cause shown, extend that period.

³ *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC), where it was held that;

"[3] ...It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature

- [6] The delay in bringing the leave to appeal is about 68 days and not 90 days as averred on behalf of the Department. That delay in my view ought to be considered within the context of other delays that have plagued this matter. It is accepted that it took six years for the judgment to be delivered, arguments in the review application having been heard on 26 July 2011.
- [7] The founding affidavit was deposed to by Matsobane Jimmy Mahlatse (Regional Coordinator: Legal Services, Gauteng) on behalf of the applicant. The averments pertinent to the determination of the condonation application are as follows;
- 7.1 The judgment was received on 4 April 2018, and a copy was forwarded to the office of the State Attorney on the same day. On 26 April 2018 the State Attorney's office had sent an email to counsel who had handled the matter on behalf of the Department, informing her that the file went missing and could not be traced as it was initially handled by two other attorneys who had since left the office of the state attorney.
- 7.2 On 15 May 2018, the matter was allocated to another practitioner within the State Attorney's Office. On 17 May 2018, the State Attorney inspected the Court file and made the necessary copies. A consultation with Counsel was scheduled and only held on 6 June 2018 as it was the only date when all individuals involved in the matter were available.
- [8] It is trite that a party seeking condonation must give an account of each period of delay⁴. POPCRU in opposing the application correctly pointed out that no explanation was proffered in respect of various periods of the delay including;
- a) the delay between 20 February 2018 when judgment was delivered and 4 April 2018 when it was allegedly received by the applicant;

and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

⁴ See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

- b) the period between 26 April 2018 to 16 May 2016, when the matter was forwarded to Counsel and the appointment of the new practitioner;
- c) from 17 May 2018 to 6 June 2018, when the documents were copied from the Court file;
- d) and from 6 June 2018 to 14 June 2018, when the state attorney consulted with counsel.

[9] A period of 68 days' delay in launching the application for leave to appeal is excessive. Clearly as pointed out on behalf of POPCRU, the Department has not covered all the periods of the delay, and all that it had done was to list events which took place during the period of the delay without giving much of an explanation. No attempt was made to explain what the reason could be for only receiving a copy of the judgment on 4 April 2018, when it was delivered on 20 February 2018.

[10] Even if it was correct that the judgment was only received on 4 April 2018, at least an attempt should have been made to demonstrate that a minimum of enquiries were made with the office of the Registrar of this Court to establish the reason the judgment was only made known to the Department on the date it alleges. It appears that the Department simply expected the Court to accept that notwithstanding the fact that judgment was delivered on an earlier date, it was only received on the date that the Department alleged to have received it.

[11] Even more concerning is that on the averments made, the file was only uplifted on 17 May 2018 when judgment was allegedly received on 4 April 2018. No attempt was made to explain the delay during that period, and the excuses related to the Department's internal workings or that of the office of the state attorney's appear to be lame in the extreme.

[12] In the end, the explanation proffered on behalf of the Department for the delay in launching the application for leave to appeal is lacking in detail, is wholly inadequate and unsatisfactory, and worst still, fails to take the Court in its confidence.

- [13] Mahlatse further averred that in the event that condonation was not granted, the applicant would be severely prejudiced in that it will not have the opportunity to present its case and arguments before the Court as to the reasons for the leave to appeal. He further averred that the employees would on the other hand, suffer little if any prejudice should condonation be granted.
- [14] The issue of prejudice needs to be examined within the context of delays in this matter. The dispute between the parties arose sometime in August/September 2009. It was heard before the Commissioner between October and November 2009, and finalised in February 2010. The Award was issued on 16 February 2010.
- [15] The Department launched its review application out of time by some five weeks. Even though the Department had not filed a substantive founding application in respect of condonation and no cogent explanation for the delay was proffered as can be gleaned in the judgement⁵, Sello AJ nonetheless exercised his discretion and condoned the non-compliance with the time periods.
- [16] It is appreciated that the six years' delay in handing judgment cannot be passed on to the Department. Notwithstanding the extensive delays however as mentioned above, it would in my view be remiss to appreciate the prejudice on the employees as a result of the unexplained delays caused by the Department. A party within the context of an application for condonation cannot complain of prejudice should condonation not be granted, where that prejudice ultimately is as a result of its own doing.
- [17] Mahlatse makes no submissions at all in regards to prospects of success, other than to state that there were overwhelming prospects of success in the application for leave to appeal. No effort was made to indicate to the court that the averments made in the application for leave to appeal should be deemed to be incorporated in the application for condonation.

⁵ Paras 12 -20 of the Judgment

[18] Notwithstanding the above, the principles applicable in applications for leave to appeal are trite as further codified in terms of the provisions of section 17(1)(a)(i) and (ii) of the Superior Courts Act.⁶ In essence, an application for leave to appeal will succeed where there are reasonable prospects of success on appeal or where there are other compelling reasons why the appeal must be constituted, including but not limited to conflicting judgments on the subject issue.

[19] The test for reasonable prospect of success was explained in *S v Smith* as follows:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of succeed on appeal and that those prospects are not remote but have realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success an appeal’.

[20] In its application for leave to appeal, the Department essentially contends that this Court misdirected itself in various ways which I do not deem necessary to repeat, other than to state that the same or similar issues that are raised in this application were equally raised and dealt with in the judgment. In my view, having had regard to the arbitration award, the judgment of Sello AJ, the grounds upon which leave to appeal is sought and the opposition thereto, I hold the view that the Department has not advanced sound, rational or compelling grounds for a conclusion to be reached that it has any prospects of success on appeal.

[21] On the whole therefore, and further having had regard to the excessive nature of the delay in filing the application for leave to appeal, the lack of an adequate or satisfactory explanation for the delay, the prejudice to the

⁶ Act 10 of 2013

employees which far-outweighs that to be suffered by the Department should condonation be granted, the lack of prospects of success in the main application for leave to appeal, the interests of expeditious resolution of disputes and administration of justice, it is my view that the interests of justice dictate that condonation ought to be refused. Accordingly, it follows that the application for leave to appeal ought to be refused.

[22] I have further had regard to the requirements of law and fairness in regards to the issue of costs, and hold the view that a costs order is not warranted in this case. Accordingly, the following order is made;

Order:

1. The application for condonation for the late filing of the applicant's notice of application for leave to appeal is dismissed.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

E Tlhotlhemaje

Judge of the Labour Court of South Africa