IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 450/16

In the matter between:

KGAOGELO MOKOTEDI	**Applicant**
and	
ESKOM HOLDINGS SOC LIMITED	**First Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
JOYCE NKOPANE *N. O*	**Third Respondent**
BONGANI KHUMALO *N.O*	**Fourth Respondent**

Heard: 17 October 2018

Delivered: 29 March 2019

Summary: Condonation applications granted. Review application is granted.

JUDGMENT

MABASO, AJ

Introduction:

[1] The applicant seeks an order in the following terms:

> "Declaring that, the applicant's referral of this review application to this Honourable Court is not late, alternatively, condoning its late referral.

Reviewing and setting aside the ruling by the third respondent, to the effect that the referral of the dispute to the CCMA is late,

Declaring that the applicant's referral of the dispute to the CCMA is not late, alternatively, condoning its late referral,

Referring the dispute back to the second respondent, for determination by the Commissioner other than the fourth respondent,

Alternative to the above two orders,

Setting aside the ruling of the fourth respondent dismissing the application for condonation of the late referral of this dispute to the second respondent (the CCMA),

Reviewing and setting aside the ruling of the fourth respondent, made under case number GAJB 12698/2015, and dated t 18 January 2016, in terms of which the arbitrator dismissed the applicant's condonation application,

Substituting therefor, an order condoning the applicants late referral of this dispute to the CCMA,

Referring the dispute back to the second respondent, for determination by the Commissioner other than the fourth respondent".

Condonation for the late delivery of both the review application and answering affidavit

[2] The review application was delivered on 11 March 2016. The applicant avers that she received the condonation ruling on 28 January 2016, whereas the ruling by Commissioner Nkopane (the first ruling) was made orally on 28 October 2015. The delivery of the review application of the condonation ruling is one day out of the normal six-weeks' period. The delay is not inordinate and I grant condonation for the late delivery of the review application against the condonation ruling. However, the review application of the first ruling is out of time as it was filed beyond the prescribed six-week period. Considering the explanation provided and that the first ruling is interrelated to the condonation ruling, it is my view that it was going to cause a further delay if the applicant had approached this court before the condonation ruling, at the CCMA, could

be issued. Under those circumstances, I am satisfied with the explanation given; therefore I am also inclined to grant the condonation for the late delivery of the review of the first ruling.

[3] The first respondent delivered a separate condonation application for the late delivery of its answering affidavit. On 8 December 2016, the applicant in the review application delivered the notice in terms of rule 7A (8) of the rules of this Court. Any party herein that intended to oppose the review application was expected to deliver their opposing papers by no later than 22 December 2016. Before this date, both the applicant and the first respondent had agreed that the answering affidavit was to be delivered by no later than 9 January 2017. However, the first respondent only delivered it on 29 January 2017. The reason proffered is that there was an oversight on the part of its attorneys' offices. The applicant is opposing this condonation application.

[4] Considering that the delay is less than twelve days from the date when the answering affidavit was due, and that the reason proffered is that it was an administrative oversight, I am inclined to grant condonation for the late delivery of the answering affidavit. Oversight happens daily and dismissing the application based on this oversight would not be in the interests of justice.

Brief background:

[5] The applicant declared an unfair labour practice dispute against the first respondent, based on disparities in payment of benefits. The Commission for Conciliation, Mediation and Arbitration (CCMA) set the matter down for Con/Arb on 14 July 2015. On 7 July 2015, the first respondent delivered a notice objecting to the arbitration commencing immediately after conciliation. Conciliation took place as scheduled, but remained unresolved, and the conciliating Commissioner issued a certificate of outcome.

[6] On 28 August 2015, the applicant referred the dispute to arbitration which the CCMA proceeded to set it down for 12 October 2015. On or about 9 October 2015, the first respondent delivered an application, titled 'jurisdictional point' wherein it complained that the true nature of the dispute is one of equal pay for equal work, therefore, the CCMA has no automatic jurisdiction to arbitrate

it. The second point is that the dispute had been referred to conciliation outside the reasonable period or 90 days from the date of the dispute, therefore as the applicant had not applied for condonation *"the CCMA has not determined whether or not it has jurisdiction from the onset of this proceedings.*" The applicant delivered an answering affidavit incorporating therein a condonation application wherein she, *inter alia,* averred, that since a conciliation certificate has been issued "it is not open to the [first respondent] to challenge the referral". Whether or not the CCMA had jurisdiction to entertain this point after the conciliation process is not one of the points raised by the applicant before this Court.

[7] Commissioner Nkopane was appointed to determine whether the dispute was referred to the CCMA out of time or not. On 28 October 2015, Commissioner Nkopane concluded that the dispute by the applicant was referred to the CCMA out of time, referring to the provision of section 191 (1) of the Labour Relations Act[1] (LRA), which provides that if there is a dispute about an unfair labour practice, the employee alleging such conduct may refer such dispute to the CCMA within 90 days of the act (either commission or omission).

[9] As Commissioner Nkopane had deferred the issue of condonation, which the applicant had incorporated as an alternative, the CCMA appointed Commissioner Khumalo to decide on this point. The applicant and her attorneys did not attend the sitting of 11 January 2016, but the first respondent was represented.

[10] Commissioner Khumalo, in the condonation ruling, found that on or about 29 October 2013, the applicant's manager submitted an application that her allowance be increased after establishing that her other colleagues were earning more than her. This application was declined on or about 7 November 2013. According to him, this is the date that the dispute arose. Therefore, he concluded that the referral to the CCMA was about 450 days' late and that the applicant had failed to provide a fully detailed and accurate account of the causes of the delay. According to Commissioner Khumalo, the explanation

[1] Act 66 of 1995 as amended.

given was unreasonable. He concluded that the applicant's claim is one of equal work for equal pay. He then proceeded to dismiss the dispute.

[11] In the founding papers, the applicant contends that her attorneys were not notified of the set down of 11 January 2016. In paragraph 46 of the same affidavit, she contends that the dispute before the CCMA was about an unfair labour practice as it involves the payment of car allowance permitted to her.

Grounds for Review

[12] The grounds of review are summed up as follows. Commissioner Khumalo committed a reviewable irregularity when he proceeded to hear the matter without the applicant present as the CCMA had failed to notify her attorneys of record of the set down date, and committed a reviewable irregularity in concluding that the date on which the unfair labour practice arose is 7 November 2013, when the third respondent had already ruled on this point.

[13] The findings by Commissioner Khumalo that the dispute arose in 2013 was factually wrong, as the first respondent did not notify the applicant of its decision on the grievance, as it did not give reasons for not paying the applicant the same amount of allowance as her colleagues, the reasons were only provided in March 2015.

[14] The applicant further contends that the alleged unfair labour practice is a continuous act. The first respondent was continuously paying her less allowance than her colleagues.

[15] The applicant contends that both Commissioners misunderstood the issue before them, as the issue was about the reason for being paid lesser allowance which constitutes an unfair labour practice.

[16] In my view, whether the issue before the CCMA was about an unfair labour practice or equal work for equal pay is not important, but what is important is the date that the alleged dispute arose. The issue before the Commissioners that had to be decided was the date of the alleged conduct. Therefore,

questions are, whether the dispute was referred out of time? If so, can this Court interfere with the discretion of Commissioner Khumalo?

Was the dispute referred out of time?

[17] Before answering this question, it is necessary to reiterate that among other things, the purpose of the LRA is to promote effective resolution of labour disputes.

[18] What is of paramount importance is section 191 of the LRA. In the case of an unfair dismissal, an employee would have 30 days from the date of dismissal to refer the dispute to the relevant forum. However, in respect of an unfair labour practice, an employee has 90 days from the date of the act (either commission or omission), to refer a dispute and if it is a later date, such dispute should be declared within 90 days on which the employee became aware of the "act or occurrence".

[19] In terms of the referral form, the applicant wrote the date of dispute as being 31 March 2015. In the application for condonation before the CCMA, the applicant affidavit reads thus:

> "on **29 October 2013**, my manager, Siyanda Radebe, requested me to apply for increase of my car allowance, to bring it in line with my core project finance officers, as there was no reason why my car allowance should be lower than theirs, when I was no less qualified for it than them."[2]

[20] The applicant contends that there was no reason given as to why she was treated differently. I am of the view that the reason behind the differentiation cannot interrupt the 90 days as envisaged by the LRA.

[21] I need to pause here and mention that the applicant's emphasis on the point that the alleged unfair labour practice dispute based on benefits herein is a

[2] Own emphasis.

continuous act, she relies on the LAC's instructive case of the *SABC Ltd v CCMA and Others*[3] where it was held that,

> "The ruling of the Commissioner would, therefore, be open to be reviewed and set aside if the dispute constituting the unfair labour practice was said to occur in 1998 as alleged by the appellant. The problem, however, is that the argument presented by the appellant is premised upon the belief that the unfair labour practice/unfair discrimination consisted of a single act. There is, however, no basis to justify such belief. While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example, where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination, in the latter case, has no end and is, therefore, ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.

And

> **Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/ unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly**. In the circumstances the dispute being labelled as ongoing was an accurate description of the "dispute date" and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct.

[22] The latter paragraph does not suggest that there is a new principle in our law that each unfair labour practice would amount to a continuous act and that

[3] [2010] 3 BLLR 251 (LAC), para 27

each court faced with unfair labour practice dispute must conclude that it is a continuous conduct. One has to take into account the facts of each case, and considering that this is a reviewing Court which is confined to the dispute that is before it.

[23] In *casu*, in paragraph 33 of the founding affidavit before the CCMA, which was before the Commissioners when they decided that the referral was out of time, the applicant avers that,

> "my contention is that the applicant is committed, and **is still committing**, and unfair labour practice against me as I explained above…"

Considering this submission and what the LAC in *SABC* above said, I am of the view that the commissioners should have investigated this, because the LAC's judgment is salutary.

[24] Before deciding as to whether condonation application should be granted or not, the first question that has to be asked by a commissioner is whether or not condonation was necessary. If it is found that there was no need for condonation then that should be the end of the enquiry.

[25] The LAC in *Kungwini Residential Estate and Adventure Sport Centre Limited v Mhlongo NO and Others*[4] held that where the commissioner hears and determines an application for condonation without notice to one of the parties involved in such dispute, it will amount to ignorance of the *audi alteram partem* rule, and if there is prejudice, meaning there must have been something that the party who was absent wanted to raise or might have brought to the attention of the commissioner, the Court held:[5]

> 'However, I do not think that this provision can possibly be relied upon to dispense with the giving of notice to the parties, or at least to the applicant if the respondent is in default, of the commissioner's intention to hear a matter. For a commissioner to hear and determine an application for condonation without notice to the parties would be to ignore the *audi alterem partem* rule. There is no indication in the papers that any such notice was given to either

[2006] 5 BLLR 423 (LAC) at Para 13.

> the third respondent, who had applied for condonation or the appellant. Although it may be argued that it was not necessary to give notice to the appellant, since, although it was a party as contemplated by Rule 31, it had not given notice of intention to oppose the application (leaving aside Annexure A), the same cannot be said about notice to the third respondent. Had notice of the intention to hear the condonation application been given to the third respondent legal representative, Hawyes, **he would surely have had an obligation to call Annexure A to the attention of the CCMA** or at least to advise the appellants attorneys of the set down of the application. Had that occurred it is unlikely that the CONDONATION RULING would have been made in the absence of both parties and the huge wastage of time and effort which has occurred in this matter would have been avoided.'

[26] The applicant, as stated above, contended that her attorneys were not served with a notice of set down for the hearing of the condonation application, therefore, they were not in attendance at the CCMA because of this reason. The third respondent submits that under those circumstances, the applicant should have brought a rescission application in terms of section 144 of the LRA, and not a review application. The first respondent correctly referred this Court to the decision in *Bloem Water Board v Nthako NO and Others*[6] where the LAC held that a review application, where a matter should have been dealt with by way of section 144, is permissible under exceptional circumstances. The starting point in deciding this issue is that an applicant has the onus to show exceptional circumstances to persuade this Court to intervene in *media res*.

[27] Landman JA,writing for the Court, in *Bloem Water Board*[7] *others*, in respect of powers of the LC held that:

> '…the purpose of review is to consider the material irregularity whether they appear on the record or not and at any time before, or during arbitration

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6 (2017) 38 ILJ 2470 (LAC); [2017] 11 BLLR 1073 (LAC).

7 Ibid. at para 16.

proceedings ***and also, if they surface only after arbitration proceedings are terminated***.'[8]

[28] The issue of whether the notice of set down was sent to the applicant's attorneys (which was a chosen address) or not came after the applicant became aware of the outcome of the condonation application. Therefore taking into account the principle in *Bloem Water Board*, where the LAC said the purpose of the review is consider *inter alia* irregularity that "surfaced only after arbitration proceedings are terminated". I conclude that it is in the interest of justice that this Court hears the review application.

[29] The remaining question is how the applicant is being prejudiced by the condonation ruling or hearing of the condonation without her and her attorneys being physically present. Before Commissioner Khumalo, according to the condonation ruling, there were affidavits, and his findings are based on what the affidavits contained. As I have mentioned above, Commissioner Khumalo should have considered the point mentioned in paragraph 22 above, but clearly did not deal with it and the applicant's attorneys presumably would have brought this point to the attention of Commissioner Khumalo. I, therefore, conclude that the applicant was prejudiced as she did not get a fair trial of issues. Therefore the review application should be granted. I conclude that this court is not in the position to substitute the condonation ruling because the application for condonation that was before the CCMA requires further investigation by a CCMA commissioner, as a result of the way it is drafted , e.g the excerpt in paragraph 23 of this judgment.

[30] In the result, I make the following order:

Order

1. Condonation for the late delivery of the review application is granted.
2. Condonation for the late delivery of the first respondent's answering affidavit is granted.
3. The ruling by the third respondent issued on 28 October 2015 is reviewed and set aside.

4. The condonation ruling issued by the fourth respondent under CCMA case number GAJB 12698-15 is reviewed and set aside.
5. The determination as to whether the applicant's referral to the CCMA was out of time or not is referred back to the CCMA for hearing *de novo*, before any other commissioner other than the third and /or fourth respondents.
6. There is no order as to costs.

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S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Makita

Instructed by: Makita Attorneys

For the Respondent: Mr Rapulang

Instructed by: Cliffe Dekker Hofmeyr Inc