IN THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not reportable

Case No: JS 657/18

In the matter between:

NATIONAL EDUCATION HEALTH AND

ALLIED WORKERS UNION obo RENDANI

NEMAHUNGANI & 4 OTHERS **Applicants**

and

LIMPOPO LEGISLATURE **Respondent**

Heard: **5 September 2019**

Delivered: **20 November 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] With this application, the applicant (NEHAWU), acting on behalf its members (the individual applicants), seeks an order condoning the late filing of their statement of claim.

[2] In opposing the application, the respondent (the Limpopo Legislature) raised preliminary points and challenged the authority of the deponent to the founding affidavit to institute any proceedings on behalf of NEHAWU. It further contends that the founding affidavit did not comply with the formal requirements contemplated in the Regulations pertaining to the administration of oaths and affirmation.

[3] In regards to these preliminary points, the founding affidavit is deposed to by Rendani Nemahungani, one of the individual applicants, whose authority to

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depose to that affidavit is challenged. The respondent's further contention is that the other individual applicants are not cited as parties to these proceedings, and that they had merely annexed their confirmatory affidavits to the founding affidavit. It was further pointed out that Nemahungani did not aver to be acting on behalf of the other individual applicants.

[4] At the hearing of this application, it was submitted on behalf of the applicants that only three of the individual applicants were before the Court instead of four as initially cited. It was contended that the incorrect citation of the number of individual applicants was a mere error which was not material. I agree that such an error is not material, even though it would have been proper for the applicants to have sought an amendment to the pleadings.

[5] The second preliminary point is however more serious. The founding affidavit in support of the application for condonation is clearly defective. This is so in that even though someone purporting to be a Commissioner of Oaths signed the affidavit, this was not in compliance with Regulation 4 of the Regulations,[1] as the names, address and designation of the purported Commissioner of Oaths are not clearly set out in the document, and further since there was no evidence that the Commissioner of Oaths was authorised to hold office in that capacity.

[6] Despite this glaring defect having been pointed out in the answering affidavit, no attempts were made by the applicants to rectify same, as no replying affidavit was served. It is appreciated as argued on behalf of the applicants that central to the enquiry as to whether an affidavit was properly before a court is whether it can be said that it substantially complied with the Regulations. In this case however, in the absence of compliance with the core requirements specified in Regulation 4, it is not far-fetched to conclude that the 'affidavit' before the Court could have been signed by any person

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4 (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The commissioner of oaths shall-

(a) sign the declaration and print his full name and business address below his signature; and

(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.

purporting to be a Commissioner of Oaths. I am therefore in agreement with the submissions made on behalf of the respondent that clearly there is no proper affidavit before the Court, and that the matter ought to be dismissed on that ground. For these reasons, I do not deem it necessary to deal with the respondent's contentions in regards to Nemahungani's authority to bring this application on behalf of the other individuals, or the dispute surrounding the status of their confirmatory affidavits.

[7] It is however my view that even if the preliminary point as determined above is dispositive of the matter, the application in any event ought to be dismissed on its merits, which for the sake of completeness, I propose to deal with.

[8] The individual applicants are all female employees employed by the respondent in different capacities. The respondent has a policy in terms of which employees are paid an annual performance bonus upon a satisfactory performance assessment. It is common cause that the individual applicants were paid *pro rata* in respect of their performance bonus for the financial year 2015/2016 instead of full payment.

[9] Flowing from complaints that the individual applicants had lodged, the respondent's response in a letter dated 8 September 2016 was that the *pro rata* payment was made on the basis that they (individual applicants) were on maternity leave during the relevant period of performance assessment.

[10] A dispute was then referred to the Commission Conciliation Mediation and Arbitration (CCMA) on 1 February 2017 wherein the individual applicants alleged that they had been unfairly discriminated against on the grounds of their pregnancy, and in direct contravention of the provisions of section 6 of the Employment Equity Act (EEA).[2] They sought relief in terms of the provisions of section 10 of the EEA. The dispute was referred some six months out of time, and the CCMA had granted condonation in that regard.

[11] After several procedural matters were dealt with at the CCMA, a certificate of non-resolution was issued on 6 July 2017. The dispute was then referred for

[2] Act 55 of 1998 (as amended)

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arbitration. It came before Commissioner P Shai, who had on 23 October 2017, issued a jurisdictional ruling to the effect that the CCMA lacked the requisite jurisdiction to arbitrate the matter. The Commissioner's reasoning was that the individual applicants' remuneration exceeded the minimum threshold prescribed in terms of the provisions of the Basic Conditions of Employment Act (BCEA)[3] by the Minister of Labour.[4]

[12] The respondent correctly pointed out that the individual applicants were throughout this dispute, represented by NEHAWU, which ought to have known that the option to arbitrate such disputes was only open to employees earning below the threshold. In my view such elementary errors of law on the part of NEHAWU related to the provisions of the EEA, are indeed inexcusable. The fact that a certificate of outcome indicated that the matter should be referred for arbitration was not an excuse for NEHAWU to fail to appreciate the peremptory provisions of section 10(6)(aA) of the EEA.

[13] The statement of claim was ultimately served on 31 August 2018. A copy of the statement of claim delivered to the Court is stamped and dated 16 July 2019. One can only assume that a copy served on the respondent was not delivered on the same date. Be that as it may, the statement of claim was accompanied by an application for condonation. The respondent contends that the statement of claim was 7 months and some seven days out of time when regard is had to the date when the certificate of outcome was issued, being 6 July 2017. The applicants on the other hand contend that the

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[3] Act 75 of 1997 (as amended). Section 10(6) (aA) provides:

'(6) If the dispute remains unresolved after conciliation-

(a) any party to the dispute may refer it to the Labour Court for adjudication;

(aA) an employee may refer the dispute to the CCMA for arbitration if-

(i) the employee alleges unfair discrimination on the grounds of sexual harassment; or

(ii) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act; or

(b) any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute consent to arbitration of the dispute.

[4] Section 6(3) of the BCEA provides:

The Minister must, on the advice of the Commission, make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination.

delay is only about 108 days, taking into account the date upon which the jurisdictional ruling was issued.

[14] In *NEHAWU obo Mofokeng & Others v Charlotte Theron Children's' Home*[5], the Labour Appeal Court held that the provisions of subsection 10(6) and 10(7) must be read together when determining the prescribed time periods applicable for the referral of a dispute contemplated in Chapter II of the EEA.[6] The provisions of subsection 10(7) stipulate that the relevant provisions in part C and D of the Labour Relations Act (LRA) shall find application in disputes referred to in Chapter II of the EEA. The Labour Appeal Court further held that a reading of the provisions of subsection 10(7) of the EEA was such that the 90 days' time period contemplated in section 136(1)(b)[7] of the LRA was equally applicable (within context) to proceedings contemplated in subsection 10(6) of the EEA, and further that the 90 days' time period contemplated within the provisions of section 136(1)(b) of the LRA (within context) must be computed from the date the dispute was declared as unresolved. Any doubt as to when the 90 days period is triggered was put to rest in *F & J Electrical CC v MEWUSA obo E Mashatola and Other* [8], where the Constitutional Court held that;

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[5] [2004] ZALAC 9; [2004] 10 BLLR 979 (LAC)

[6] *Ibid* at para 19 where it was held:

> …Reading section 10(6) and 10(7) of the Equity Act together, it would appear that the Equity Act must be read together with the applicable provisions of the Act. By reference to the words 'with the changes required by the context' in section 10(7) the ninety-day time period as provided for in section 136(1) of the Act, which itself appears in part C of Chapter VII of the Act, becomes applicable to the dispute. In other words, although the present dispute involves adjudication after an unresolved conciliation and section 136(1) refers expressly to arbitration, the savings provision in section 10(7) of the Equity Act then becomes operative; hence the ninety-day requirement is of equal application in the new context to the adjudication as envisaged in section 10(6) of the Equity Act.

[7] Section 136 of the LRA. **Appointment of commissioner to resolve dispute through arbitration**

(1) If this Act requires a dispute to be resolved through arbitration, the commission must appoint a commissioner to arbitrate that dispute, if -

(a) a commissioner has issued a certificate stating that the dispute remains unresolved; and

(b) within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the Commission, on *good cause* shown, may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period.

[8] [2015] ZACC 3; 2015 (4) BCLR 377 (CC); (2015) 36 ILJ 1189 (CC); [2015] 5 BLLR 453 (CC) at para 30

"The union contended that the referral of the dispute to the Labour Court was within the prescribed period. It seems that this contention was based on a misconception that the 90-day period was to be reckoned from the date of the ruling of the CCMA. That is not so. In this case, the period had to be reckoned from the date when the certificate was issued."

[15] In line with the above principles, the delay in referring this matter for adjudication is about ten months, upon a proper calculation of the 90-day period from 6 July 2017 when the certificate of outcome was issued, and 31 August 2018 when the statement was ultimately filed.

[16] It is trite that in determining whether *good cause* has been shown, the Court must exercise its discretion judicially. The Court must further take into account the facts and circumstances of each case, in determining whether the interests of justice permit that condonation be granted[9]. In this regard, factors to be considered in determining whether the interests of justice dictate that condonation be granted include, but are not limited to the degree of lateness,

[9] See *Steenkamp and Others v Edcon Limited* 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC), where it was held that

"[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

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."

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation."

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the explanation thereof, the prospects of success, the prejudice to the parties, and the importance of the case[10].

[17] Insofar as the degree of the delay is concerned in this case, there can be no doubt that a delay of about ten months is excessive in the extreme. This creates an even more onerous burden on NEHAWU and the individual applicants, to give a full and detailed account for each period of the delay.

[18] In attempting to proffer an explanation, Nemahungani on behalf of the individual applicants stated that;

18.1 *Immediately* after the jurisdiction ruling was issued on 23 October 2017, NEHAWU had instructed a firm of attorneys for the purposes of filing a statement of claim. On 14 February 2018, arrangements were made for a consultations to be held between NEHAWU, the individual applicants and the appointed attorneys on 19 February 2018;

18.2 On 12 March 2018 and subsequent to the first consultation meeting, the attorneys wrote to NEHAWU indicating that the documents which ought to have been received by 23 February 2018, were only received on 1 March 2018 and as such, the attorneys required further instructions on the matter;

18.3 On 14 June 2018, the individual applicants wrote to NEHAWU registering their dissatisfaction with the services of the appointed attorneys and the lack of progress in the matter. They further sought to have the attorneys substituted on basis that they had failed to schedule further consultation meetings, and also had failed to file papers with this Court. The statement of claim was subsequently filed on 16 July 2018 after the appointment of the applicants' current attorneys of record.

[19] The explanation as proffered by Nemahungani is clearly lacking in detail and is thin on substance. Even if the applicants were under the misapprehension

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[10] See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A)

that the 90 days was triggered from the date of the jurisdictional ruling, once they had appointed attorneys to prosecute the claim on their behalf, it does not assist their case for them to complain about the attorneys' incompetence or lack of diligence, when it is not clear as to what steps they had taken to ensure that the matter was timeously prosecuted. The individual applicants do not explain what they did between February 2018 after the attorneys were appointed and June 2018 when they realised that they were not satisfied with their service, other than to refer to consultations they had with the attorneys in February and March 2018.

[20] The individual applicants further appear to have washed their hands off the matter and sought to blame NEHAWU and the erstwhile attorneys for the delay. Furthermore, it is not correct that the erstwhile attorneys were appointed *immediately* after the jurisdictional ruling was issued. The ruling was issued on 23 October 2017, and on the applicants' own version, the erstwhile attorneys were consulted at most, in February 2018, some four months since the ruling was issued. Surely that period cannot be equated to '*immediately'.*

[21] As correctly pointed out by the respondent, the applicants made no attempt to explain the period after 14 June 2018 when the mandate of the erstwhile attorneys was purportedly terminated. Furthermore, there is no explanation on what steps were taken thereafter and why it took a further full month to eventually file their statement of claim on 16 July 2018. On the whole, the delay between October 2017 and February 2018 remains unexplained. Equally so, the delay after the applicants had appointed their erstwhile attorneys whose mandate was allegedly terminated, and again after the appointment of new attorneys, is not fully explained. In effect, any explanation in that regard is wholly inadequate and unsatisfactory.

[22] It is further trite that in an instance such as this, where the delay is excessive in the extreme, and the explanation is found to be inadequate, the Court may decline to consider the other relevant factors such as the prospects of

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success and prejudice.[11] Even if the applicants can be given the benefit of the doubt and it is accepted that any matter involving alleged unfair discrimination is important, this however is not the end of their problems, as they still need to demonstrate that they have prospects of success in the main claim. This is hardly so in this case as demonstrated below.

[23] The individual applicant's claim is premised on the provisions of section 6 of the EEA, being discrimination on the basis of pregnancy. The inquiry on whether there is unfair discrimination involves three stages, *viz* whether there is differentiation which amounts to discrimination; and if the discrimination is established, whether the discrimination is unfair.[12] Once discrimination is shown, the employer must in terms of the provisions of section 11(1) of the EEA prove on balance of probabilities that such discrimination did not take place; or that the discrimination is rational, or not unfair and/or is justifiable.

[24] Central to the determination of the individual applicants' claim is whether the conduct of paying them *pro rata* performance bonuses on account of their absence from service after taking maternity leave amounts to discrimination on the basis of their pregnancy. It was common cause that other than the *pro rata* payments made based on the 8 months that they had rendered their services, the individual applicants were also paid four months' salary whilst on maternity leave. They however contended that the conduct in question amounted to discrimination on the grounds that clause 5.4[13] of the Limpopo Legislature Performance Management Policy and Procedure 2010, did not provide for their exclusion from the payment of a full performance bonus in circumstances where they were on maternity leave during parts of the period

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[11] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H: where in was held:

> There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused

[12] See *Mbana v Shepstone and Wylie* 2015 (6) BCLR 693 (CC); (2015) 36 ILJ 1805 (CC)

[13] 5. **Performance cycle, assessment and Appraisal**

> …
>
> 5.4 Quarterly performance assessments and annual performance appraisals not conducted within prescribed time frames shall not be considered, except in the event of unforeseen circumstances or employee taking leave, and alternative arrangement in writing for assessment made are with Human Resource before the due date of performance assessments.

of assessment. They further relied on the memorandum issued by the Manager in the Office of the Secretary dated 8 June 2016, for the assertion that female employees like them remained entitled to the payment of a full performance bonus notwithstanding their absence from work for an extended period.

[25] A substantial part of the individual applicants' main claim rests on their interpretation of clause 5.4 of the policy. Clause 1 of the policy defines 'appraisal' as an annual formal assessment of an employee based on agreed set performance standards. A 'formal assessment' is further defined as a formal meeting between an employee and a supervisor for the purpose of discussing the employee's rating and areas that require improvement in order to determine the employee's overall performance. The policy further at clause 1 defines a '*pro rata* payment' as a payment awarded to an employee based on a number of months that *an employee* has worked in a post [in a particular financial year].

[26] The applicants' contentions are without merit for the reasons correctly pointed out on behalf of the respondent. In this regard, I am in agreement that payment of a performance bonus is not intended to reward employees who cannot demonstrate that they had performed during the period of assessment. In plain terms, there can be no entitlement to a performance bonus in circumstances where an employee did not render services or had their performance assessed in the particular year financial. The contention that there should be a blanket payment of the performance bonus where the requirements for such a payment were not met cannot be sustainable, as it would defeat the purpose of the policy, which is to reward employees who had rendered their services to a satisfactory level, and to remedy any unsatisfactory performance that might be identified during the formal assessment or appraisal.

[27] On a plain reading of clause 5 and the definition clauses, the policy excludes the payment of rewards to employees who may have completed their "formal" *assessment* outside the timeframes set-down in terms of the policy. The policy in clause 5.2 provides that performance reviews must be done on

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quarterly basis and further that annual appraisals must be completed at the end of each financial year. The general scheme of clause 5 of the policy is therefore that a quarterly and annual assessment or appraisal of an employee's performance must be completed within certain specific timeframes in each financial year. There is nothing in clause 5.4 and in the policy in general that supports the version of the applicants that they remain entitled to a performance reward notwithstanding the fact that they were absent from duty during the period of performance assessment.

[28] As it was correctly pointed out on behalf of the respondent, the applicants' claim has not got out of the starting blocks. There is no basis, even *prima facie*, for any conclusion to be reached that the individual applicants would be able to demonstrate that the conduct complained of amounts to any discrimination, let alone an unfair one. The respondent has on the other hand, demonstrated that there was a rational basis for excluding the individual applicants from the full payment taking into account the provisions of the policy. In the end, the applicants have not shown that their claim enjoys any prospects of success should it proceed to trial.

[29] In circumstances where the delay in filing of the statement of claim was excessive in the extreme, and where the explanation tendered for that delay was wholly unsatisfactory and inadequate, and further where the applicants' claim have no prospects of success, it can clearly not be in the interests of justice to grant condonation. The prejudice to the respondent should condonation be granted is clear, as it would be required to defend a claim which has no merit, and which claim the applicants leisurely prosecuted.

[30] The respondent sought a costs order against the applicants should the application fail. This Court enjoys a wide discretion under the provisions of section 162 of the LRA in regards to an award of costs, having taken into account the requirements of law and fairness. It is my view that this case, which goes back to 2016 ought not to have come this far, given the nonchalant manner with which it was prosecuted from the beginning, and its glaring lack of merit. In the circumstances, and given the reasons in this

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judgment as to why the application should fail, I see no reason in law and fairness, why NEHAWU in particular should not be burdened with its costs.

[31] Accordingly, the following order is made;

Order:

1. The application to condone the late filing of the Applicants' statement of claim is dismissed.

2. NEHAWU is ordered to pay the costs of this application.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: S.S Makoasha Instructed by S. Rangoanasha Incorporated

For the Respondent: M.H Marcus instructed by Lebea & Associates

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