Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 1598/16

In the matter between:

NZALISEKO HOLE	**Applicant**
and	
Y LE ROUX (*N.O.*)	**First Respondent**
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL	**Second Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Third Respondent**
SETHUPI LEDWABA	**Fourth Respondent**

Heard: 25 April 2018

Delivered: 2 May 2018

Summary: (Review – condonation ruling – extensive delay – inadequate explanation of significant delays – affidavits in condonation application providing insufficient basis for condonation – prospects of success also impaired by probable jurisdictional difficulty relating to the real nature of the dispute - refusal of condonation not unreasonable)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review of condonation ruling in respect of an unfair labour practice dispute. The applicant referred an unfair labour practice dispute to the second respondent on 14 April 2016. Initially, he referred it on 16 October 2014.

The nature of the dispute

[2] He claims that the dispute arose on 13 October 2014 and not on 1 December 2011, which is when he failed to obtain an appointment to a particular post he had applied for. The basis for arguing that the dispute arose on the later date is that, he claims that his complaint relates not to a single incident of his unsuccessful application in 2011 but to an ongoing and continuous wrong perpetrated against him in the sense that the third respondent was "allowing and actively applying an unfair labour practice during its various recruitment processes". According to him, the dispute came to a head in October 2014. In his referral form he notes that the dispute arose on "13 October 2004 and ongoing".

[3] In setting out the facts of his dispute in the referral form states:

> "Whenever I make an application to the post for promotion it is unfairly rejected.
>
> The department has "blacklisted" me because of a grievance I had against the department in 2009.
>
> The PSC resolved the grievance in my favour. The department then advised that anyone lodges a grievance will not receive promotion with the Department. All grievances were going to be tracked for this purpose
>
> No one at senior level or higher has assisted in resolving this matter despite my numerous requests.
>
> I was advised to lodge a dispute because the matter would not be resolved."
>
> (emphasis added)

[4] He repeated these statements word for word when setting out his prospects of success in his founding affidavit in support of his condonation application. In his affidavit, he averred that his prospects of success were good because "(i)t is clear that the policy of the department has hindered the applicant for the better part of the last four years. The applicant has suffered dearly at the hands of the department and has not been able to progress his career or his income whilst being so hindered."

[5] In the arbitration proceedings, he successfully applied to join the fourth respondent, a deputy director of the Labour relations employed by Department of Justice and Constitutional development who was the successful candidate for the post of deputy director of the Labour relations. The arbitrator joined fourth respondent in the proceedings on the basis that the applicant was not merely seeking compensation but to be appointed to the post of the fourth respondent and accordingly, the fourth respondent's rights were affected. The fourth respondent was the person who was successful in being appointed to the post the applicant had applied for in 2011.

[6] Although the applicant claims the dispute arose 'in October 2014 and ongoing', he seeks as relief, promotion with back-pay from 1 November 2011, which is the date on which the successful candidate was appointed to the post the applicant had applied for at the time. During the course of his argument, he insisted that the dispute was simply an unfair labour practice dispute of an ongoing nature, but it is clear from his factual description of the dispute that a recurrent thread in his complaint is that he was prejudiced in all promotion applications since 2011. In particular, he claims that at a meeting in 2014, one Mr D Mpholo stated that no employee in the department who lodged grievance would be promoted. This he took to be evidence of a blacklisting policy in the department which he was a victim of because he had complained about his non-appointment to positions. It must be mentioned that this was not dealt with in any detail in his founding affidavit in the condonation application, but clearly the alleged existence of such a policy underlies his complaint that the unfair labour practice is an ongoing one. On the face of it, this type of dispute seems more appropriately dealt with as an infringement of rights

under section 5 (1) and (2) of the Labour Relations Act 66 of 1995, as it concerns supposed victimisation for the exercise of rights rather than simply a complaint about unfairness in applications for promotion.

[7] However, insofar as his claim only concerns an unfair labour practice relating to promotion, this court has held that such disputes are of a discontinuous nature and arise at the time the appointment is made. See for example ***Eskom Holdings SOC Ltd v NUM***,[1] where employees had referred an unfair labour practice dispute relating to promotion, their argument was that the 90-day limit did not apply as from the date of the alleged unfair act by the employers because the dispute was likewise of a continuous nature. The court decided that disputes even where non-promotion amounts to an unfair labour practice, it cannot be said that the employer continues to commit it on a month to month basis until the dispute is referred to the CCMA, because that "…would render the 90-day time limit under section 191(1)(b)(ii) completely valueless."

Grounds of review

[8] The applicant, in summary, raises the following grounds of review:

8.1 The arbitrator misdirected herself in determining that the dispute arose on one December 2011.

8.2 She failed to consider properly the explanation for the delay from 18 September 2015 to 1 February 2016 and from 18 February 2016 to 14 April 2016.

8.3 The arbitrator failed to consider the prospects of success and prejudice in evaluating whether condonation should be granted.

The arbitrator's ruling and evaluation

[9] The arbitrator wrote a very detailed condonation ruling, far more detailed than the founding affidavit filed by the applicant himself, which read more like pleadings than an affidavit. The arbitrator's findings and my evaluation of them are set out below.

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[1] [2017] 8 BLLR 797 (LC)

The delay and the explanation for the delay

[10] The arbitrator found that the degree of lateness was not 143, or 113 days as the applicant contended, to the extent that he conceded any lateness at all. The arbitrator noted that the dispute was identified as an ongoing one which started four years ago. The arbitrator decided that the date the dispute arose was when the post of deputy director which the applicant had applied for was filled on 1 December 2011 which made the referral 4 years 4 months late (1591 days)

[11] The arbitrator held that he should have referred the matter in 2012 and that he had not even referred the dispute to the grievance procedure as required. He did not even file a grievance in 2014 in respect of the dispute he claims arose in October 2014. The arbitrator also noted that the relief sought by the applicant, namely promotion backdated to 1 November 2011 supported the contention that the dispute arose then and not in 2014.

[12] The applicant only offered an explanation for the delay for the period after the jurisdictional ruling by arbitrator Dube on 18 August 2015 in respect of the dispute which he referred on 16 October 2014. That ruling found that the bargaining council lacked jurisdiction to determine the dispute because the applicant had never lodged an internal grievance with the Department. The applicant then did so about a month after the ruling, but the department advised him that it was too late to lodge a grievance as the 90 days in which to do so had expired as per the collective agreement governing the grievance procedure. It was only on 1 February 2016 at least four months (a period of 137 days) after the department rejected his grievance on 18 September 2015 that he enrolled the matter for arbitration. He was then informed by the bargaining council that in view of the jurisdictional ruling on 18 August 2015, the dispute would have to be referred afresh. However, from the time of being informed that a fresh referral would be necessary, he took a further 57 days (from 18 February 2016 to 14 April 2016) to do so. The arbitrator was prepared to overlook periods when the prosecution of his claim was out of his hands, but noted that was only accounted for 353 days of the delay.

[13] In my view, the arbitrator correctly held that such an excessive delay required a very good explanation. In this regard, the arbitrator noted that he failed to explain why he failed to lodge even a grievance for over two and a half years before making the initial referral in October 2014. Secondly, for the applicant to attribute the entire delay from 18 September 2015 until 1 February 2016 to the complexity of the issues surrounding the previous matter and the need for council's advice was an insufficient explanation for that delay. Further, there was no explanation for the additional delay of nearly two months in making a fresh referral.

[14] I am inclined to agree with the arbitrator that this is a case where the application for condonation was devoid of detail or a reasonable explanation in circumstances where the delay was excessive even if it was accepted that he was entitled to treat the dispute as an ongoing one, that only came to a head in October 2014. His lapses in activity from that date, quite apart from not lodging a grievance until he had no choice, entailed delay is of 184 days or six months and a full explanation for those delays is lacking. On that ground alone, the arbitrator would have been justified in refusing condonation.

Prospects of success

[15] Regarding the prospects of success, the applicant pleaded those in the broadest terms as mentioned above. In so far as the dispute relates to the appointments he applied for other than the one in 2011, there was no evidence before the arbitrator that he lodged any grievance in respect of those appointments when he was unsuccessful. The arbitrator pertinently noted that the referral was of an unfair labour practice dispute pertaining to promotion and accordingly the applicant's claim that the dispute arose when he failed to resolve his complaint about discrimination against him in relation to discrimination in promotion applications on account of lodging a grievance could not refer to the unfair labour practice dispute but to a discrimination dispute over which the arbitrator had no jurisdiction. I have already discussed above the nature of the applicant's complaint as set out in his affidavit. Obviously, the real nature of the dispute also would have a material impact on the applicant's prospects of success in arbitration

proceedings where his complaint of being blacklisted on account of invoking procedures to pursue his rights is not something that could be entertained under an arbitrator's unfair labour practice jurisdiction.

[16] Moreover, the absence of any evidence of grievances filed in respect of other appointments he was unsuccessful in obtaining and his persistent attachment to the initial appointment he failed to obtain in 2011, together with the retrospective relief he seeks, strongly suggests that the bedrock of his dispute still relates to that unsuccessful application. Further, insofar as he confines his dispute to a pure unfair labour practice claim relating to promotion, the applicant's contention that his dispute was an ongoing one since 2011, is unsustainable in law. I agree with the judgement in *Eskom Holdings* regarding the discrete and non-continuous nature of unfair labour practices related to promotion.

Prejudice

[17] In the context of a case where the prospects of success are so problematic and where the applicant did not follow available procedures timeously even when advised in November 2011 to lodge a grievance, the prejudice he suffered is regrettably for the most part self-inflicted and the arbitrator did not commit a reviewable irregularity in failing to attach any weights to this factor in the circumstances.

[18] For all the reasons above, I do not believe that this is a case where it can be said that the arbitrator's material findings were in any sense irrational or that she misdirected herself in some way that amounted to a reviewable irregularity.

Costs

[19] As it appears that the applicant has simply been misguided in the way that he has conducted his dispute, and that there might well be merit in his underlying complaint, I am disinclined to make a cost order against him.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person

THIRD RESPONDENT:	S B Nhlapho instructed by the State Attorney