THE LABOUR COURT OF SOUTH AFRICA

AT CAPE TOWN

Of interest to other judges

Case no: C313/2018

In the matter between:

NEHAWU obo JACQUES CUPIDO	**First Applicant**
and	
DEPARTMENT OF SOCIAL DEVELOPMENT, NORTHERN CAPE	**First Respondent**
A.N. MAFA (*N.O.*)	**Second Respondent**
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL	**Third Respondent**
ANNA WITBOOI	**Fourth Respondent**

Heard: 6 November 2024

Delivered: 11 November 2024

Summary: (Application for reinstatement of review application – jurisdictional ruling – very excessive delay - inadequate explanation for the delay – reinstatement of application dismissed - Costs)

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JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application brough by the union NEHAWU, together with its member, to reinstate a review application and, if reinstated, to condone the original late referral and, if that is also successful, to set aside the jurisdictional ruling of the second respondent ('the arbitrator') dated 5 December 2017.

[2] The individual applicant, Mr J Cupido ('Cupido'), had applied for a Director's post in the Namakwa Municipal district. Although he was shortlisted, the selection panel ranked him third among the final candidates. It was common cause he had the necessary qualifications and ten years' experience, whereas the successful candidate, Ms A Witbooi ('Witbooi'), did not have the necessary NQF 6 qualifications. He referred an unfair labour practice concerning promotion to the third respondent ('the bargaining council') seeking relief in the form of an award that the first respondent ('the department') should convene a new selection panel because Witbooi had been 'incorrectly' appointed.

[3] Witbooi's appointment was approved on 8 December 2016 to commence on 1 January 2017. Cupido referred his unfair labour practice dispute to the bargaining council on 5 April 2017. Witbooi's appointment had been made subject to a resolutive condition that the appointment would be terminated if her qualifications could not be verified. As it happened, the department learned she did not have the qualifications claimed, which was the primary basis for Cupido's complaint.

[4] On 7 June 2017, Witbooi's provisional appointment was then terminated, and she then reverted to her previous position. By the time the arbitration hearing convened on 16 November 2017, the department had informed

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NEHAWU, Cupido's union, that the post would be re-advertised. Notwithstanding this, Cupido persisted with his dispute on the basis that he was still entitled to the promotion because the unfair labour practice had already been committed when Witbooi had been appointed, without having the necessary qualifications, and he had been denied promotion as a result. In essence he claims the unfair labour practise claim he referred concerning the appointment of Witbooi, in the absence of having the necessary qualifications, remained unaffected by her appointment subsequently being withdrawn.

The arbitrator's ruling

[5] The department raised an *in limine* issue arising from this sequence of events. It argued that because the appointment had been withdrawn and no one had ultimately been appointed a final decision on the appointment to the vacant post had not been made. In the circumstances, Cupido could not complain that he had unfairly been denied promotion.

[6] The arbitrator accepted this argument drawing support from the Labour Appeal Court judgment in *Department of Justice v CCMA & others* [1] on the basis that in that case the court had held a promotion dispute could not be entertained where a final decision on promotion had not been taken.

[7] Based on the heads of argument presented by both parties he decided that, in this case too, no final decision had been taken on the director's vacant position following the withdrawal of the appointment. Accordingly the referral was premature as the dispute could only be entertained once a permanent appointment was made. Consequently, he concluded he had no jurisdiction to hear the matter.

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[1][2004] 4 BLLR 297 (LAC)

The reinstatement application

Summary chronology of the delays in the prosecution of the review application and the explanation therefor

[8] The jurisdictional ruling was issued on 5 December 2017, though Cupido claims he only received it on 23 January 2018.

[9] Accordingly, the review application should have been filed no later than 6 March 2018, but was only served on the department on 18 April 2018, so it was just over six weeks late, or twice the time within which it should have been filed. If the review application is reinstated, this delay would also have to be condoned, before the merits of the review itself could be considered.

[10] On 7 May 2018, the Registrar of this court issued a Rule 7A(5) notice. The notice indicated that there was no digital record filed in the form of a compact disc. Although it was contended there was no proof it had been served on the union's erstwhile attorneys of record, L M Mokhele Inc ('Mokhele Inc'), there is a fax transmission in the court file showing it was successful transmitted to their fax number. Thereafter, the union had 60 court days to file the record in terms of clause 11.2.2 of the Labour Court Practice Manual ('the Practice Manual'), which applied at the time.[2] This gave the union until on or about 31 July 2018 to file the record. Because the hearing dealt with a jurisdictional question only argument was presented. Accordingly, the only record that needed to be filed would have consisted of the documents submitted by the parties at the arbitration hearing.

[11] Even though it was not strictly necessary, the department filed a notice of opposition on 14 May 2018.

[12] The record and supplementary affidavit were filed on 20 March 2020. Clause 11.2.2 of practice manual required it to be filed in 60 court days or it would be deemed withdrawn under Clause11.2.3. The deadline for filing the record was around 31 July 2018, so it was nearly eight months

[2] The clause is now replaced by Rule 37(14) of the new Labour Court Rules

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overdue when it was filed in March 2020. It follows it had already been deemed by the end of July 2018.

[13] On 4 May 2021, the applicant applied for condonation for non-compliance with clause 11.2.2 of the practice manual. Cupido deposed to the affidavit in support of this application and there was no confirmatory affidavit issued by either the current attorneys or a union official concerning the events related by Cupido, much of which concern the conduct of the attorneys or the union rather than Cupido himself, who was unlikely to have had firsthand knowledge thereof.

[14] The explanation offered for the major portion of the delay was that in May 2018 a bill was received from the union's former attorneys which the union disputed and the relationship between the union and the lawyers broke down. Beyond attaching the disputed bill, very minimal details are provided for the long period of delay between then and instructing the current attorneys. Cupido states that the union took issue with the invoice from Mokheli Inc resulting in "*various correspondence*" requesting it be reduced, none of which was attached, nor were any details provided about when this correspondence took place. We are then told that the working relationship between Mokheli Inc and the union broke down because the union refused to pay the invoice and the firm refused to perform any further work for the union, including Cupido's review application, until the account had been paid. After this very attenuated elucidation, Cupido states that it was during August 2019 no resolution had been reached and he realised no action had been taken in his matter since the original application had been filed, so he instructed the union to find alternative representation so the matter could proceed.

[15] It was only 26 September 2020 that the union appointed its current attorneys of record to attend to the matter. Cupido consulted with the attorney on 9 October and the next day correspondent attorneys were instructed to uplift the file, only to report that the only documents in the file were the Rule 7A(5) notice and the respondent's notice of intention to defend. The union then supposedly attempted to find out if it had been copied in with correspondence from the bargaining council, but we are told

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by Cupido that this "*proved to be a burdensome task*" and nothing could be obtained to assist the attorneys. Who undertook the 'burdensome task' in the union and what they actually did is left to the court's imagination.

[16] Cupido was contacted by the union's attorneys on 24 October 2019 and informed that review application might have been archived by the registrar in light of the Rule 7A(5) notice being issued on 2 May 2019. The attorneys requested a deposit to brief counsel to obtain an opinion on the merits the review application. It is unclear if Cupido or the union paid this. It is also not mentioned when this happened. In any event, the next time another step was taken was the following year on 14 January 2020, when the attorney's correspondents were again instructed to uplift the court file, only to hear it had been removed by Mokhele Inc. On 22 January 2020 counsel was nevertheless requested to proceed with drafting an opinion on the prospects of success "*with the available information and documentation which was mainly the documents which had been dispatched by the bargaining council"* (emphasis added). When or how the documents had been obtained from the council is not revealed.

[17] A favourable opinion was forthcoming and Cupido claimed that, on 3 March 2020, he instructed his attorneys to proceed with the application.

[18] Reviewing the narrative provided by Cupido, apart from instances where there is the odd letter to confirm his account, the account of a period of delay between sometime in May 2019 and March 2020 it amounts to a sketch in feint outline. This is hardly surprising, as Cupido could only have had second-hand knowledge of most of what transpired. The court must deprecate what has become a common practice in condonation applications, namely for a party to rely on an affidavit of a person who has little direct knowledge of the steps taken by the legal representatives or a union or employer's organisation to prosecute the review application. As in this case, the largely second-hand version of the deponent is often not even authenticated by a confirmatory affidavit of someone with the first-hand knowledge of events.

[19] We are also not even told of what Cupido personally did to try to accelerate his review between May 2018 until he decided to tell the union

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to brief other attorneys in August 2019, at least 15 months later. Why was it only then he felt it was necessary to take that step? We are not told if he had been pestering the union before that to speed matters up or to provide answers how it intended to go forward with the case. Cupido has a honours degree and was applying for a senior post with a salary just under R 1 million per annum at the time. It appears he had enough sway in the union to instruct it to change attorneys of record. It was incumbent on him to set out his own reasons for his apparent inactivity for a long time, or to show that he was very active in trying to get the union to act, but the union was not unresponsive or obstructive. It is not enough for him to say that his hands were tied because of the obstructive attitude of the union's former attorneys. It is evident that the union was able to finalise the filing of the record without their assistance.

[20] Similarly, the union is silent about why it only decided to brief other attorneys in August 2019 and what steps it was taking to circumvent the impasse with Mokhele Inc. For instance, we are not told why it did not attempt to reconstruct the record in 2018 given that the award was only a jurisdictional ruling made on the papers after hearing submissions. It appears it did have the bundle by the time it briefed counsel in 2020, but how and when the union had acquired it is not revealed. That detail is important, because it would demonstrate how soon the union started to make any meaningful effort to take the matter further by attempting to obtain the bundle, after it had reached an impasse with the former attorneys. On the slender version provided there is no reason to suppose it did so until early 2020 around the same time it asked its correspondents to uplift the record.

[21] The vague outline of an explanation of what happened between May 2018 and early 2020 raises more questions than answers. It is plainly inadequate considering the extraordinary length of the delay from sometime in May 2018 until March 2020. What is also striking is that the union never approached the department for assistance in reconstructing the very limited record, nor did it ask it for an extension of time to file the record.

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[22] An application to reinstate a review application is essentially an application to obtain condonation for non-compliance, previously with the provisions of the Practice Manual, and now with the Labour Court Rules[3].

[23] Considering the length of delay and the wholly inadequate explanation, this is a situation in which the merits do not even fall to be considered in my view. In *Colett v Commission for Conciliation, Mediation & Arbitration & others*[4], the Labour Appeal Court reaffirmed this principle:

> *"[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition I that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In NUM v Council for Mineral Technology it was pointed out that in considering whether good cause has been shown the well-known approach adopted in Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-D should be followed, but —*
>
> *'[t]here 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 good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused'.*
>
> *[39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit."*

(footnotes omitted)

Other considerations

[24] Are there any other considerations in the broader interests of justice which might nonetheless warrant condoning the review, if it is assumed the

[3] *Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC) at paragraph 17.

[4] (2014) 35 *ILJ* 1948 (LAC)

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arbitrator did misconceive the jurisdictional issue ? The prejudice to the department of resuscitating the review of an appointment process dating back more than seven years is significant given the primary relief Cupido sought of convening a fresh interview process before a new selection panel. I note in passing that it appears Cupido did not re-apply for the position when it was advertised, which would have been an opportunity to participate in a selection exercise afresh, albeit that it would not guarantee he would be shortlisted for an interview.

[25] Leaving the remedy of reconvening a selection panel aside and considering alternative relief in the form of an award of compensation, is the prejudice to Cupido of possibly being denied that relief sufficient to allow the review to run its course? In this regard, it must be remembered that the department decided to re-advertise the post once the successful candidate's appointment had to be revoked. Part of Cupido's complaint is that the very fact that Witbooi was appointed in the first place, without having essential qualifications for the job, was unfair to him, because he ought to have been appointed. However, at the time there was no reason to suppose he would have been the obvious replacement, because he was only the third choice of the selection panel.

[26] It is so that when the matter was before court Cupido raised the point that the second-in-line candidate had resigned, the implication being that he would have been the natural successor to the post. However, no date when the alleged resignation had taken place was provided. Even by the time Cupido deposed to his replying affidavit in the reinstatement application on 9 July 2021, this allegation had never been made in any form in any of his affidavits.

[27] Cupido did argue that it did not necessarily follow that just because he was the third choice did not mean he ought not to have been the successful appointee, but no evidence was provided to show that it was probable he would have been preferred over the next highest scoring candidate. There is no evidence to show even a prospect that he would have been appointed if the department had not appointed Witbooi in the first place and, accordingly, no prospect of establishing an unfair labour practice

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relating to promotion. The learned author, J Grogan *SC*, succinctly summarises the legal position in this regard:

> *"It is not enough for an employee who complains of unfair conduct in relation to promotion simply to allege and prove that he or she was better qualified or more 'suitable' than the successful candidate. The courts have warned that arbitrators are not permitted to impose their own decisions on employers with regard to whom to promote. They may interfere only if the employer has acted in a procedurally unfair manner or in bad faith, and may order 'instatement' only where it is manifestly obvious that, but for the unfair labour practice, the employee would have been promoted."*[5]

(Case references omitted).

[28] In light of the above, I am not persuaded it would be in the interest of justice to revive the review application even if the extreme delay and inadequate justification therefor are ignored and I assume the grounds of review of the ruling itself are sound.

Costs

[29] Given the perfunctory approach to justifying a reinstatement application involving an excessive delay and the absence of any demonstrable ultimate prospect of success in the unfair labour practice claim even on a *prima facie* basis, this is a case where the respondent has been put to unnecessary expense opposing the application. Some award of costs is appropriate in law and fairness to discourage this speculative type of litigation, even if the parties are in an ongoing relationship.

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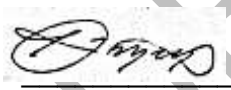
[5] J Grogan, Workplace Law, (17th edition), page 63.

Order

1. The Applicant's application to reinstate the review application of the Second Respondent's ruling dated 5 December 2017 under case number PSHS19-17/18 is dismissed.
2. The Applicant must pay one-third of the First Respondent's costs of opposing the application.



R Lagrange
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: --- AIB Lechwano
Instructed by: --- PH Attorneys
For the Respondent: --- NC Panduva, State Attorney

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