REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/~~Not Reportable~~

Case No JR 2496/08

In the matter between:

POPCRU obo E KALIPA	**Applicant**
and	
J ROBERTSON N.O.	**First Respondent**
THE MINISTER FOR SAFETY AND SECURITY	**Second Respondent**
THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**Third Respondent**
A VAN GROENEUN	**Fourth Respondent**

Heard: **13 December 2011**

Delivered: **19 January 2012**

Summary: Refusal to condone the late referral of an unfair labour practice concerning a promotion dispute to the bargaining council. Dispute referred late because the employee wanted to join the arbitration hearing of Mr Kloppers. Employee represented by a union who is signatory to the Dispute Procedure in the bargaining council. Union should have been alert to the need to refer the dispute timeously. On the prospects of success the employee does not aver facts to show that the promotional appointment was unfair. Condonation refused.

JUDGMENT

SEEDAT AJ

Background

[1] The applicant seeks to review and set aside a ruling made by a commissioner of the Safety and Security Sectoral Bargaining Council (SSSBC) refusing to condone the late referral of an unfair labour practice dispute by the employee.

[2] The employee, a member of the South African Police Service (SAPS), had applied for a promotional post, was short listed, interviewed and was one of five candidates whose names were submitted to the National Commissioner of SAPS. The fourth respondent was appointed.

[3] A formal grievance was lodged by the employee in terms of the internal grievance procedures of SAPS but no consensus was reached and a mediation certificate was issued.

[4] It is common cause that the internal process was finalised on 27 June 2008 and that is the date on which the dispute arose.

[5] Pursuant to the Dispute Procedure for SSSBC to which POPCRU, the trade union representing the employee, is a signatory, all disputes must be referred to the SSSBC within 30 days of the internal grievance procedure being exhausted. The SSSBC will then set the matter down for a 'joint conciliation and arbitration'.[1]

[6] The employee's union did not lodge the dispute immediately because the employee wanted to join in the arbitration of a Mr Kloppers.

[7] When the union did refer the dispute on behalf of the employee, it was beyond the prescribed 30 days and a formal application for condonation for the late referral had to be made.

The condonation ruling

[8] On 28 October 2008, the commissioner refused the application for condonation. He based his ruling on the grounds of degree of lateness, the reason for the delay, prospects of success and the balance of convenience, including any

[1] clause 3.1(c) read with clause 3.5.1(b)

prejudice to the other party as categorised in clause 7.2 of the Dispute Procedure for SSSBC. I will deal with his reasons briefly.

[9] In his application for condonation, the employee had stated that his referral was 55 days outside the 30-day period. The employer had accepted this calculation and so did the commissioner who regarded it as excessive.

[10] As for the explanation for the late referral, the commissioner emphasised that the employee was assisted by his union which should have been aware of the time constraints and waiting for a fellow employee to join in the same matter was not an acceptable reason for the delay in referring the dispute.

[11] In considering the prospects of success, the commissioner was initially hesitant to make a finding but then impliedly accepted the employer's submission that proper procedures were followed by the employer in appointing the fourth respondent and that he was the better candidate. The commissioner added that even if the employee had any prospects of success, this would be 'outweighed by the delay in the referral of the dispute and the lack of reasons for such delay'.

[12] The commissioner then concluded that the employer will be prejudiced if condonation is granted.

Ground for Review

[13] The award was first challenged on the ground that the delay in referring the dispute, in the circumstances of the case, was not excessive.

[14] Secondly, the applicant asserts that the commissioner discarded the reasons for the delay on the basis that they were not acceptable without considering their reasonableness. And the 'fact that the employee waited to be joined [in another arbitration] provides a reasonable and acceptable reason why he failed to refer the dispute within the prescribed time limits'.

[15] Thirdly, 'the employee was not required to prove on a balance of probabilities that he had good prospects of success, but merely had to allege facts which, if proven during the subsequent arbitration proceedings, would have entitled him to the relief sought'.

[16] Fourthly, the applicant takes issue with the commissioner making reference to discrimination and the test of balance of convenience.

[17] Lastly, says the applicant, the commissioner did not consider the importance of the case to the employee.

[18] Subsequently, the applicant amended its notice of motion to read that the requirement in the Dispute Procedure for the SSSBC to refer all unfair labour practice disputes to the SSSBC within 30 days was in conflict with section 191(1)(b)(ii) of the LRA which prescribes a period of 90 days for the referral of an unfair labour practice dispute. However, at the commencement of the hearing, Mr Basson, representing the applicant, abandoned this argument.

An evaluation of the condonation application

[19] At the hearing, the parties agreed that the calculation of 55 days was from the date the dispute arose and that the referral was, in fact, 22 days out of time.

[20] While there was a reference to 'unfair discrimination' in the referral form, the gravamen of the employee's complaint was the promotion of 'a person who does not meet required requirements as per external advert'. The issue of discrimination was not even alluded to in the application for condonation.

[21] The test of balance of convenience including prejudice is a factor together with the degree of lateness, the reasons for lateness and the prospects of success which parties in the SSSBC must elaborate on when making an application for the condonation of a late referral of a dispute.[2] Indeed, the standard affidavit in support of application for condonation issued by the SSSBC has a section labelled 'prejudice' for the deponent to complete. There is no section headed 'Importance of the Matter'.

[22] The commissioner can therefore not be faulted for not making a finding on the claim of discrimination and weighing the application on a balance of convenience in the context of prejudice.

[2] clause 7.2

[23] In considering an application for condonation, one has to be mindful of the advice of Holmes JA in *Melane v Santam Insurance Co Ltd*[3] that there has to be 'an objective *conspectus* of all the facts'.

[24] The only explanation proffered by the employee for the delay is that he 'was waiting for the date of Mr Kloppers arbitration date so that he can join in the process' [sic]. No explanation is given as to who is Mr Kloppers, what was his dispute about, why was there a need for the employee to wait for the arbitration date for Mr Kloppers, why would he want to join the arbitration and, most importantly, why did the employee not join Mr Kloppers but instead elected to refer the dispute himself.

[25] Conradie AJ in *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & others*[4] averred:

'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one'

[26] The applicant union was at all times representing the employee and therefore ought to have been aware of the time frames. More tellingly, because it is a signatory to the Dispute Procedure for the SSSBC, the union should have been vigilant and fastidious in lodging the dispute timeously.[5]

[27] This explanation for the delay is vague and unsatisfactory[6] and certainly not acceptable or for that matter, reasonable.

[28] Condonation will generally not be granted in the absence of an acceptable explanation for the delay,[7] regardless of the good prospects of success on the merits.[8]

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[3] 1962 (4) SA 531 (A) at 532C-F.
[4] (2010) 31 ILJ 1413 (LC) para 13
[5] See *Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council* (2010) 31 ILJ 1413 (LC) para 25
[6] See *SA Broadcasting corporation Ltd v Commission for conciliation, mediation & Arbitration & others* (2010) 31 ILJ 592 (LAC)
[7] *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC); *Mziya v Putco Ltd* [1999] 2 BLLR 103 (LAC); *Waverley Blankets Ltd v Ndima and Others* (1999) 20 ILJ 2564 (LAC)
[8] *NEHAWU obo Mofekeng and Others v Charlotte Theron Children's Home* (2003) 24 ILJ 1572 (LC); *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

[29] In *Moila v Shai NO,*[9] Zondo JP (as he then was) confirmed the principle that where 'no explanation has been given for the delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success'.

[30] LaGrange AJ (as he then was) in *Carter v Commission for Conciliation Mediation & Arbitration and Others,*[10] wrote:

'[I]n the light of current jurisprudence, it seems that in condonation applications where the explanation for one or more significant periods of delay is absent or completely inadequate this may constitute a sufficient reason for refusing condonation, but even in such instances, adjudicators in exercising their discretion are not precluded from still considering the prospects of success.'

[31] I would be inclined to dismiss the application for review without even deliberating the prospects of success. However, it may be educative to look at the prospects of success to establish whether the commissioner's reasoning is reviewable on that basis.

[32] The employee makes a bald allegation that the fourth respondent 'did not meet the requirements' of the employer. On Mr Basson's own argument, the employee 'had to allege facts which, if proven during the subsequent arbitration proceedings, would have entitled him to the relief sought'. The employee sets out his compliance with the requirements for the post but does not allege any facts showing the deficiency, either procedurally or on the merits, of the promotion of the fourth respondent. Of course, it is axiomatic that an unfair labour practice must be unfair. This may be stating the obvious but the employee fails to set out any *prima facie* grounds of unfairness.

[33] While the reasons given by the commissioner for discounting the prospects of success may not be a model of clarity, they are, nonetheless, supportive of his finding.

[9] (2007) 28 ILJ 1028 (LAC) at para 34.
[10] (2010) 31 ILJ 2876 (LC) at para 29.

[34] In the premises the application to review and set aside the arbitration award issued by the first respondent under case number PSSS 236-08/09 is dismissed with costs.

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SEEDAT AJ

APPEARANCES:

FOR THE APPLICANT: Advocate JL Basson

Instructed By: Grosskopt Attorneys (Pretoria)

FOR THE RESPONDENT: Attorney M Kgatla

For The State Attorneys (Pretoria)