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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1074/13

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES	**Applicant**
and	
PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA	**First Respondent**
COMMISSIONER KERRY DRISCOLL N.O.	**Second Respondent**

Heard: **29 April 2015**

Delivered: **13 May 2015**

Summary: Application for condonation and review of jurisdictional ruling. Lengthy delay, poor explanation, no prospects of success. Application dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, the Minister of Correctional Services, seeks to have a jurisdictional ruling of the second respondent, an arbitrator acting under the auspices of the Public Service Co-ordinating Bargaining Council (PSCBC), reviewed and set aside. But first, it seeks condonation for the late filing of the review application.

Background facts

[2] The first respondent, a trade union, referred a dispute to the PSCBC concerning the interpretation and application of a collective agreement entered into between the parties to that bargaining council and styled "Resolution 1 of 2007". Conciliation was unsuccessful. The parties held a pre-arbitration meeting. After that meeting, for the first time, the Department raised a jurisdictional point. It argued that the General Public Service Sectoral Bargaining Council (GPSSBC), and not the PSCBC, had jurisdiction. The arbitrator ruled that the PSCBC did have jurisdiction. She directed that the matter be set down for arbitration. The Department now seeks to review that jurisdictional ruling.

Condonation

[3] I shall deal with the application for condonation with reference to the well-known principles set out in *Melane v Santam Insurance Co Ltd.*[1] That will include a discussion of the merits of the review application under the heading of prospects of success.

Extent of the delay

[4] The applicant was particularly coy about the extent of the delay. The deponent to the founding affidavit, Mr Madimetja Frans Chaba, does not address it. And Mr *Masuku*, who appeared for the applicant, insisted on dealing with the condonation application only after addressing the Court on the merits of the review application itself. But to his credit, he readily conceded in oral argument that the application was two months late and

[1] 1962 (4) SA 531 (A).

that it is an excessive delay. I have to consider that coupled with the explanation therefor.

Explanation for the delay

[5] Mr *Masuku* also conceded that the explanation for the delay is inadequate. I will nevertheless consider the explanation, such as it is.

[6] The ruling was handed down on 24 February 2013. In terms of s 145 of the Labour Relations Act[2] the applicant had to deliver its review application within six weeks, i.e. by 1 April 2013. It only did so on 7 June 2013, more than two months later.

[7] Mr Chaba says that, "on receipt of the ruling" – presumably in February – the Department's legal department "examined it for purposes of advising the Department on the matter". One advocate Cronjé -- presumably employed in the legal department – then wrote a letter to the Head of Legal Services "for guidance". He only did so some three weeks later, on 13 March 2013. And all that he says, is: "It would be appreciated if the consultation in respect of this matter could be scheduled for 8, 9 or 10 April 2013 please". By that time, the legislated and prescribed period of six weeks would already have lapsed; yet the Department exhibits no urgency. And what is more, the email from Cronjé attached to Chaba's affidavit is in response to an email from Chaba to one Reuben Mbuli dated 6 March 2013 that reads as follows:

> "**Subject:** REQUEST FOR THE SERVICE OF COUNCIL [*sic*] MASUKU THABANI" [*sic*].
>
> Good day Dr Mbuli,
>
> As per our standing arrangements, we would like to request that you request the Office of the state attorney to appoint Council [*sic*] Masuku to represent us during an arbitration [*my underlining*]. The matter in dispute is payment of backdated overtime as per GPSSBC Resolution 2 of 2009, but the matter will be heard at PSCBC. We are still awaiting the Council (GPSSBC) to inform us about the date. I will appreciate your assistance and progress report."

[2] Act 66 of 1995 (the LRA).

[8] It is immediately apparent that this email has nothing to do with the current review application. In fact, it is a request to appoint counsel to represent the Department in the arbitration that was to commence after the jurisdictional ruling.

[9] Officials of the Department consulted counsel on 23 April 2013 – well after the time for delivering the review application had already expired. Yet they did not act with any sense of urgency.

[10] Chaba says that "counsel had not received a brief from the State Attorney although the latter was instructed on 12 March 2013 to brief counsel". He purports to back up that statement with reference to a letter to the state attorney of that date; but once again, that letter has nothing to do with a review application. Instead, it is an instruction to brief the Department's current counsel, Adv Thabani Masuku, "to handle the arbitration in this matter".

[11] Chaba then goes on to say that "a dispute en suite [*sic* – presumably 'ensued'] between Counsel and the State Attorney relating fees that Counsel was entitled to charge in the matter". But the accompanying correspondence that he attaches relates to Adv M Khoza SC and is headed "**NON-JOINDER: BACKDATED BACKPAY**". There is no reference to this review application. And Adv Khoza's emailed response does not refer to this application at all. It reads:

> "Dear Sir, I take extreme umbrage when an impression is created that I agreed to a fee when no discussion was entered into with me.
>
> I've been on [redacted] for the past two years and did matters also from your office. I don't expect that you wull st [*sic*] this stage feign ignorance when your records are there to show. To me this is down right [*sic*] silly and meant to undermine me. I will not accept that. My rate, for the time being, is [redacted]. I have done work for thus [*sic*] client at this rate before about two years ago I will not accept anything less. Currently for your information my commercial rate is [redacted]."

[12] Eventually, on 10 May, the Department agreed to a fee with Adv Khoza SC. Chaba does not explain why the state attorney or its current counsel – who, according to Chaba, had consulted with the Department on 23 April –

had done nothing to expedite the review application, already out of time, in the interim. And to make matters worse, Chaba says that "at the time that the letter [i.e. the email] was dispatched to counsel [i.e. Adv Khoza SC], he was involved in an arbitration and out of town. [It] thus only came to his attention on 20 May 2013 when he returned to chambers". Chaba does not explain why the email didn't come to counsel's attention while he was away, given the ease of communication by email in this electronic era, and Adv Khoza did not depose to an affidavit. (It is noteworthy that the email from Adv Khoza dated 30 April 2013 was "sent from Samsung Mobile").

[13] Chaba further says that "our Deputy Commissioner, Lucky Lempiditse Thekisho tried on a number of occasions to contact the State Attorney and/or Counsel to find out about progress in the matter. That was all in vain." He does not say whether "counsel" refers to Adv Masuku, who had consulted with him as long ago as 23 April and who appeared in this application, or Adv Khoza SC. Neither Thekisho nor either counsel deposed to a confirmatory affidavit.

[14] Chaba then blithely says that "the delay has been adequately explained", without any explanation at all for the further delay of a month from the time senior counsel's fee had ostensibly been agreed and the review application was eventually delivered on 7 June 2013.

[15] The "explanation" amounts to no explanation at all. At best for the Department, it exposes dilatoriness, tardiness and negligence on its side and on the side of its legal representatives. And, to add insult to injury, the Department's replying affidavit was also delivered late.

[16] Despite the lengthy delay and the poor explanation therefor, I will deal with the Department's prospects of success in the review application.

Prospects of success

[17] The ruling under review goes to the question of jurisdiction. The test on review is therefore whether the ruling was right or wrong.[3]

[3] *SARPA v SA Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC).

[18] The ruling sets out the reasons for the arbitrator's finding, the relevant legal principles and the reasoning process leading to her conclusion succinctly and clearly. It is, as Mr *Orr* submitted, a model award.

[19] The arbitrator starts off by correctly identifying the dispute she needs to resolve, as Mr *Masuku* conceded. She makes it clear that she needs to determine whether the PSCBC has the necessary jurisdiction to deal with the dispute: "It is important to bear in mind that the dispute before me is whether the PSCBC or the GPSSBC has the necessary jurisdiction to deal with the dispute and not what the correct interpretation of the Resolutions are."

[20] Framing the dispute in this way, the arbitrator correctly followed the guidance of the Constitutional Court and the Supreme Court of Appeal. As Nugent JA stated in *Makhanya*[4], cited by the arbitrator:

> "[T]he power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*[5], expressed it as follows:
>
> 'It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.'"

[21] The same holds true for arbitrations, as the arbitrator correctly decided. She also correctly followed the *dictum* of the Constutional Court in *Gcaba*[6] that:

> "Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case".

[22] That is exactly what the arbitrator proceeded to do. She considered the referral by the union. The dispute that it referred was a dispute relating to the interpretation and application of PSCBC Resolution 1 of 2007. That is a dispute over which that Bargaining Council has jurisdiction. It may be a good claim or it may be a bad claim. That is irrelevant.

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[4] *Makhanya v University of Zululand* [2009] 4 All SA 146 (SCA); 2010 (1) SA 62 (SA) para 54.

[5] *Chirwa v Tr*ansnet Ltd 2008 (4) SA 367 (CC) para 155.

[6] *Gcaba v Minister for Safety & Security* (2010) 31 *ILJ* (CC) para 75.

[23] Despite this clear and correct exposition of binding legal precedent, the Department persisted with this application. It is only when pressed in oralk argument that Mr *Masuku* offered what he called a "guarded concession" that the PSCBC does have jurisdiction to arbitrate the dispute that the union referred to it, i.e. a dispute about the interpretation and application of PSCBC Resolution 1 of 2007.

[24] Given this concession, and the concessions with regard to the lengthy delay and the poor explanation in the condonation application, it is difficult to fathom why the Department has persisted with this application. The applicant had no prospects of success and it was evident that the condonation application would fail. That brings me to the question of costs.

Costs

[25] The Department's counsel has conceded on essentially every point argued that its application was doomed to fail. Yet the Department persisted with every step of this application, including the late filing of a review application and a replying affidavit; the application for condonation; and briefing (initially) both senior and junior counsel. At the hearing, only junior counsel appeared, although the Department's heads of argument were drafted by senior and junior counsel. And to this must be added the cost of flying counsel from Cape Town to argue a matter originating and enrolled in Johannesburg. In law and fairness, taking into account that the Department has been unsuccessful and its conduct in pursuing the application, it must pay the union's costs. The only concern is that, as is so often the case, it will be the taxpayer that has to foot the bill.

Order

The application for condonation – and thus the application for review -- is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	Thabani Masuku Instructed by the State Attorney.
FIRST RESPONDENT:	Chris Orr Instructed by Bowman Gilfillan Inc.