REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: C 1034/02

In the matter between:

SIVUYILE HANGANA Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL First Respondent

BRIAN CURRIN N.O. Second Respondent

DEPARTMENT OF EDUCATION, WESTERN CAPE Third Respondent

JUDGMENT

NTSEBEZA, AJ:

[1] The Applicant (Sivuyile Hangana) was an employee of the Third Respondent (the Department) at Imizamo Yethu Secondary School, George, firstly as a temporary educator in 1993 and as a permanent educator in 1996. During April 2000 he attended a disciplinary tribunal hearing in George on 30 May 2000 to answer charges that he had been absent from school for a period of 76 days. Consequent upon this hearing, he received a telefax from his principal in July 2000 advising him that his services would be terminated with effect from 1 August 2000. His appeal to the MEC for Education was unsuccessful.

[2] Despite his failure to reverse his position, he continued to work on full pay until he was verbally informed by his principal in November 2000 that his "*salary was to be stopped*".

[3] It is common cause that since the Applicant's last day of employment, namely, the 30th November 2000, the first date on which the matter was referred to the First Respondent, the Education Labour Relations Council ("the Council") was on 29 April 2002 when the Second Respondent, acting under the auspices of the Council as its arbitrator refused to condone Hangana's late referral of his matter to the Council.

[4] In considering whether the matter was one which he could condone for its late referral, the arbitrator considered that the period of delay was from 13 November 2000 to the date of referral in April 2002. It is clear from his award that the arbitrator did not take into consideration an explanation which Hangana gives for the period of delay. Summarised, Hangana's explanation for the delay between 13 November 2000 and November 2001 is that the Department was dilatory in sending a copy of the Minutes of the disciplinary enquiry and the presiding officer's report. These were only sent to Hangana's attorney, one Mr Francois Van Zyl, in November 2001. Mr Van Zyl, according to Hangana, could not prepare for conciliation until he had perused the presiding officer's report and the Minutes of the disciplinary enquiry.

[5] To the extent that it is important that there should be an explanation for a period of delay, I am satisfied that Hangana has given an explanation for the period of delay between November 2000 and November 2001. I am also satisfied that even though his attorneys could have been more purposeful in demanding the expeditious filing of the requisite documents to them, the delay occasioned in this instance was due solely to the dilatoriness of the Third Respondent.

[6] I must mention at this stage that my difficulty in this application, in which Hangana seeks to review the decision of the arbitrator to dismiss his application for condonation of the late referral of his dispute to the Council concerning his dismissal, is the fact that it is unopposed. The only sworn facts are those of the Applicant, and even though he raises very contentious issues, there has been no endeavour whatsoever by any of the respondents to either oppose the application or to indicate their attitude thereto. I am therefore not in a position to gainsay the sworn evidence of the only deponent in these proceedings, namely, Hangana. I must therefore accept his un-contradicted averments, to the extent that they are justifiable and make legal sense.

[7] It is for this reason that again I have to consider whether or not the period of delay between November 2001 to April 2002, a period of some five months, has either been explained to me for me to be able to properly consider it, or whether the explanation is reasonable in all of the circumstances that are placed before me by way of evidence. Once again I

have got only the evidence of Applicant, and the record, without any contrary affidavits even from the attorneys whom he blames for the delay in this leg of the period of delay.

[8] Summarised, Hangana's reason for the delay is that this was occasioned by the dilatoriness or the negligence of his legal representatives. He also states that he had initially incorrectly been advised that the proper forum was the Labour Court. As Mr Grogan, Hangana's Counsel who appeared before me on 17 April 2003 in this review application submitted, and as is apparent from his Heads of Argument which, at my instance and request, he subsequently filed, Hangana was required, despite his straitened circumstances, to raise a sizable deposit for purposes of approaching the Labour Court.

[9] He had also been advised, according to what Hangana claims, that his union, South African Democratic Teachers Union ("SADTU"), in January 2002, had already filed an application for condonation on his behalf. He also denies, in his Founding Affidavit, that he has ever, at any stage, been unavailable for purposes of giving instructions to his attorneys. This denial is uncontradicted either by the attorneys, nor is it challenged by any of the respondents in whose interest it would be to oppose the granting of the relief that Hangana is seeking from me.

[10] Even if I disagree with Mr Grogan – and I leave that open – that for purposes of a review application I need not myself consider the adequacy

of the reasons that Hangana gives, I do agree with him that the mere fact that it appears from the arbitrator's award, which is the subject matter of review in these proceedings, that he did not give adequate or any consideration to the explanation for the period, should be sufficient for me to find that his decision is reviewable. I therefore find that on that basis alone, his decision ought to be reviewed and set aside. I am also satisfied that I am competent to review a decision of the Bargaining Council even though it is interlocutory. I therefore agree with the attitude adopted in the authority for that proposition submitted by Mr Grogan.

[See: ***Metz Transport (Pty) Ltd v Furniture, Bedding & Upholstery Industry Bargaining Council, Greater Northern Regions & others*** (2001) 22 ILJ 2460 (LC).]

[11] I also agree with Mr Grogan that even though this Court, and the one above it, have been very clear in indicating that there are limits to the extent to which a litigant can rely on the negligence of the dilatoriness of his lawyers, that rule is not absolute, and I think this is one of the cases in which it must find exception, due regard being paid to the circumstances of this case.

[See: ***Van Dyk v Autonet (a division of Transnet Ltd)*** (2001) 21 ILJ 2484 (LC); ***Swanepoel v Albertyn*** (2000) 21 ILJ 2701 (LC).]

[12] For me, therefore, it does not become necessary to consider whether the

prospects of success are good and whether there is any prejudice to the respondents if I were to review and set aside the arbitrator's award. As far as prejudice is concerned, none has been alleged, nor is there any that is apparent from the facts. The mere fact that the respondents, more particularly the Department, has not bothered to file any opposing papers, although that by itself is no reason to necessarily conclude that there has been no prejudice suffered by it, is nonetheless a strong basis on which I can rely for deciding whether a delay is so unreasonable as, in its effect, to have caused prejudice to one of the affected parties.

[See: ***Dyali v Fort Cox College of Agriculture & Forestry and another*** [1998] 6 BLLR 641 (Tk) at 644F-645C].

[13] This is a case in which my sympathies go to Hangana, the Applicant. Even though, in a superficial sense, this case may well appear to be similar to the case in which the Constitutional Court made a decision recently, I distinguish it from that case, (unreported case CCT 36/03 in ***The Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and 3 Others***, decided on 2 October 2003). In that case, the Constitutional Court refused an application for condonation, and in doing so, cited with approval its own decision in ***Bramer v Gorfield Brothers Investments (Pty) Ltd & Others*** 2000 (2) SA 837 (CC), where it had stated that the main consideration whether to grant condonation of the very late filing of an application is whether it is in the interest of justice to do so.

[14] I hold that the circumstances of this present case differ from those in the ***Settlers Agricultural High School*** case (***supra***) because in that case, after an inordinate period of delay, the Applicant was seeking the removal of the school principal from a post in which he had been appointed, and nine months since the Supreme Court of Appeal had dismissed an application for leave to appeal from the High Court that had reinstated the school principal.

[15] The Court felt that it would not have been in the interest of justice that after such an inordinate delay, the particular dispute should be reopened in circumstances in which the reinstated school principal would be placed in jeopardy of losing his position, and in circumstances also where the school would be subjected to the uncertainty and dislocation which would be the inevitable consequence of such proceedings.

[16] In this case, I have no evidence that the order which I am about to give will lead to those grave consequences. This is so because the Department has not sought to place evidence before me on the basis of which I can make that judgment. In any event, as Mr Grogan submitted, the only one who has suffered prejudice in this case is the Applicant. If the dispute were to be referred to arbitration, an arbitrator could well give the Department the opportunity to reinstate the Applicant at another school. For that reason, even though I considered the decision of the Constitutional Court for the striking resemblance which it has with the

present matter, I find that it is distinguishable, and I so distinguish it on the facts.

[17] The Applicant has also made some explanation for the late filing of the present application. He seeks condonation with regard thereto. In the view that I take of this matter, I will not spend more time on that application save to state that in my considered opinion, the period of delay for bringing this particular application is seven weeks, and in my view, it is not an excessive period. I therefore condone it.

[18] Having taken the view that I have, I now wish to consider the other reliefs sought by the Applicant. I believe that the reliefs sought by him in paragraphs 5 and 6 of his Notice of Motion, are totally incompetent. He seeks that I should declare the deductions from his salary of the amount of R4 500,00 for the period December 1999 to February 2000 as having been unlawful and, that I should order the Department to pay him the said amount, with interest. Those prayers can be dealt with adequately by the forum which, as a consequence of my order, is going to be the appropriate body to deal with all outstanding issues which flow from the nature of the order that I will give.

[19] In the circumstances, I give the following order:

(a) The award of the Second Respondent, dated 18 June 2002, in terms of which the Second Respondent decided not to condone

the late referral to the First Respondent of the dispute concerning his dismissal by the Third Respondent, is hereby reviewed and set aside.

(b) The First Respondent is hereby ordered to process the said dispute in accordance with the provisions of its Constitution and/ or rules and the provisions of the Labour Relations Act No. 66 of 1995.

(c) There will be no order as to costs.

D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: **17 APRIL 2003**

Date of Judgment: 17 October 2OO3

For the Applicant: **J G GROGAN**

Instructed by: **L MTIYA & COMPANY**

For the Respondents: No appearance.