

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

CASE NO: JR1287/04

In the matter between

JUSTICE MOGOTSI

Applicant

and

**COMMISSIONER PORTIA NKUTHA
GENERAL PUBLIC SERVICE**

1st Respondent

SECTORAL BARGAINING COUNCIL

2nd Respondent

NATIONAL PROSECUTING AUTHORITY

3rd Respondent

J U D G M E N T

REVELAS J:

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act, 66 of 1995 as amended.

[2] The applicant, Mr Justice Mogotsi, seeks to set aside a ruling made by the first respondent in favour of the third respondent, in terms whereof the condonation sought by the applicant for the late referral of this dispute by the third respondent was dismissed. The applicant has put forward several grounds for the review of the ruling and *inter alia* has submitted that the commissioner who heard the matter, (the second respondent), committed a gross irregularity and also did not come to a conclusion which was justifiable in relation to the facts and evidence placed before her.

[3] A complaint was also raised that the arbitrator committed an irregularity by accepting the third respondent's answering affidavit which was not served on the applicant. What was before the arbitrator, was an application for condonation supported by a founding affidavit deposed to by the applicant. Then there was the respondent's answering affidavit in response to the application for condonation before the commissioner. According to the applicant, his referral was five months out of time. According to the third respondent the referral was seven months out of time. Counsel on behalf of the third respondent, Mr Mokgare, has however pointed out to me, quite correctly so, that the delay was six months and two days.

[4] The explanation given by the applicant for the delay was that he was appointed as a public prosecutor and stationed at the Odi Magistrate's Court with effect from February 1993 and he had been promoted to higher levels within the department. He then made reference to August 2001 when he was transferred to Justice College as a lecturer and whilst being there the chief director orally notified him that he had been promoted. He was later notified that the promotion had been reversed. As a result he said he lodged a grievance.

[5] During May 2002 he received a report that he should have been promoted to the rank of prosecutor (level 4) with effect from August 2000 whilst still at the Odi Magistrate's Court. He stated that he had to however be re-evaluated by the Director of Public Prosecutions in the North West. He thereafter compiled a report and submitted it to the North Western Province and was told that the original as well as the duplicate copy thereof got lost in their offices. On or about January 2000 he was transferred to the Director of Public Prosecutions

in Pretoria but still pursued the outstanding issue. As a considerable time had lapsed he had appreciated, but between the said period in issue he said he was requested to compile a further report, which he did on the basis of what he could remember, and then forwarded it to the chief prosecutor.

[6] During June 2003 he was informed that the North Western Province evaluation committee decided that he could not be promoted. He then took the matter up with Ms Lamola of the Department of Justice in terms of the prescribed procedures procedures. He alleged that she had failed to attend to his matter. He contended that:

"Holistically taking the actions of the employer towards me I tendered my resignation due to the manner in which continued employment was made intolerable."

[7] Despite the resignation, he said he was notified that the National Office of the Department of Justice took a decision that his pension benefits could not be paid out until the said issue of his promotion had been dealt with. He stated that his failure to refer the matter to the Council timeously, was not due to a deliberate disregard of the rules of the Council. He reiterated that he was "pursued by the decision of national office of the department of Justice" who would not pay his pension benefits until the issue of his promotion had been dealt with.

[8] The third respondent contended that the matter was seven months late and contended that if the applicant was serious about addressing the matter and resolving it, he would not have waited for more than seven months to have the dispute referred and resolved. The submission was made that the applicant had knowledge of the

procedures because during April 2003 he had engaged the Department of Justice in the same proceedings, as he was currently doing with the third respondent.

[9] In so far as the applicant alleged that the reason for referring the matter was that he did not get his pension in time, the third respondent made the following statement:

"It is however amazing that after seven months without the same pension that he says delayed him, he managed to refer the matter to the Council."

[10] In so far as the reasonableness of the explanation of the applicant is concerned, the third respondent alleged that the applicant referred the matter to the CCMA when it was only 20 days late. The CCMA notified him that the referral was out of time. The applicant subsequently applied for condonation, saying he had been unaware of the 30 day time limit. The applicant said he had been engaged in looking for alternative employment.

[11] In so far as the prospects of success are concerned the third respondent stated that it should be taken into consideration that the applicant is a legally qualified person who knows the rules and he was represented by a union when filing his application. With regard to his defence of not getting his pension in time, the respondent found that explanation unacceptable and tried to persuade the commissioner to hold the same view.

[12] In her analysis, the commissioner referred to several cases in support of her finding when she ultimately dismissed the application for condonation. She first set out all the arguments presented by the

applicant as I have referred to them in this judgment. She subsequently set out all the arguments which were raised before her by the second respondent and then analysed the various arguments with reference to case law.

[13] The commissioner held that the degree of lateness was excessive and she found the explanation for the delay unacceptable. She stated categorically that she accepted the third respondent's submission that the applicant and his union should have known better about the dispute resolution procedures and the relevant statutory time frames.

[14] In so far as the applicant's prospects of success in the main case are concerned, she held that they were not very strong. She mentioned that the applicant failed to afford the third respondent an opportunity to deal with his grievances which were against his previous employer, namely the Department of Justice, whereas in actual fact on the applicant's own admission the Department of Justice refused to pay his pension until his promotion issue had been resolved. Therefore she found that even after his resignation the Department of Justice remained willing to deal with his grievances.

[15] Consequently she held that the applicant failed to make out a *prima facie* case of constructive dismissal. The attitude of the applicant after his resignation, the commissioner held, did not support the submission that the matter is important to the applicant. The fact that there was no expeditious action on his side was held to be indicative of the fact that the applicant did not take the matter seriously.

[16] In so far as prejudice to the applicant is concerned, the

commissioner held that the prejudice to be suffered by the respondent, should condonation be granted, far outweighed the prejudice to be suffered by the applicant should condonation not be granted. In this regard the commissioner specifically mentioned that the third respondent was denied an opportunity to deal with the matter internally.

[17] The commissioner also made reference to a technical issue as to the institution at which the "intolerability" must have taken place. According to the commissioner it was abundantly clear from the applicant's submissions that the alleged grievances related to the Department of Justice and not to the third respondent. She did however see that at the time of his resignation the applicant was employed by the third respondent. With regard to this aspect the commissioner held:

"The least the applicant could have done was to inform the respondent of his outstanding issues with the Department of Justice and/or request the respondent to facilitate the resolution of such grievances. At this stage the respondent is unfairly prejudiced by the fact that it is now dragged into these proceedings whilst it is not directly involved in the substantive claim of the matter."

Subsequently the commissioner found that the applicant failed to show good cause in terms of section 192 of the Labour Relations Act and dismissed the application for condonation.

[18] In my view, the commissioner carefully considered the arguments before her. I have to consider that commissioners have a wide discretion regarding condonation and that they are enjoined by the Labour Relations Act to deal with matters judiciously. Seven

months, I cannot disagree, is an excessive delay. Even six months and two days is an excessive delay.

[19] In so far as the prospects of success are concerned, the commissioner held a *prima facie* view with which I cannot interfere either. I must emphasise that decisions and rulings and awards of commissioners of the CCMA are meant to be final. They should not be lightly set aside or referred back to the CCMA to be reconsidered. In the circumstances, and according to the tests that have been laid down by this Court and the Labour Appeal Court for the review of such rulings, I am not satisfied or persuaded that I should interfere in the ruling.

[20] Accordingly the application for review is dismissed. This is not a matter where I deem it appropriate to make a costs order.

Elna Revelas
Judge of the Labour Court