IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Not reportable

Of interest to other judges

CASE NO: C121/2010

THE MINISTER OF CORRECTIONAL SERVICES Applicant

and

PUBLIC HEALTH & SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL First Respondent

C MBILENI *N.O.* Second Respondent

DENOSA obo M M VOSLOO Third Respondent

Heard: 21 September 2011

Delivered: 27 September 2011

JUDGMENT

STEENKAMP J:

1. The applicant applies to review and set aside an arbitration award ("the award") issued by the second respondent ("the arbitrator") under the auspices of the first respondent ("the bargaining council"). The applicant also seeks condonation for the late delivery of the review application.

2. The arbitrator found that the Department was in breach of paragraph 3.2.5.3 (iii) of the applicable collective agreement, Resolution 3 of 2007; and ordered it to "translate" the third respondent, Ms Vosloo, to "the appropriate salary scale" attached to Operational Manager Nursing (Primary Health Care) managerial level, ie PN-B3, retrospectively.

THE APPLICANT'S CONDONATION APPLICATION

3. The application for review was filed about a month after the statutory six-week time limit had expired.

4. An applicant for condonation seeks an indulgence from the court, which entails the exercise of the court's discretion upon a consideration of a number of factors. These factors include: the length of the delay, the explanation for the delay, the applicant's prospects of success in the main action and the importance of the case. Ordinarily these factors are interrelated.[1]

[1] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532C-F.

5. Where, however, the applicant does not advance a reasonable and acceptable explanation for its delay, the other factors are immaterial and condonation should be refused without more.[2]

6. The minimum requirements of an explanation were set out in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 353 where it was said that:

> **"… the defendant must at least furnish an explanation of his own default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."**

7. There are compelling considerations in the labour relations context as to why a court should be slow to condone non-compliance with the dispute resolution time periods laid down in the Labour Relations Act 66 of 1995 ("the LRA") and the rules.[3] The Constitutional Court and the Supreme Court of Appeal have recently called for a reform of what has been referred to as "systemic delays" in resolving labour disputes.[4] Requiring strict compliance with the dispute resolution time periods forms part of this much-needed reform.

8. It is well-established that this is not sufficient to merely blame one's legal representatives for a delay. The relevant principles were set out in *Saloojee & Another v Minister of Community Development* 1965 (2) SA 135 (A) 141B-E:

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[2] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 765C-D; *Mziya v Putco Ltd* [1999] 2 BLLR 103 (LC) 107A-B; *Darries v Sheriff, Magistrate's Court* 1988 (3) SA 34 (SCA) 41C-D. These principles were confirmed in *National Entitled Workers Union v Sithole & Others* (2004) 25 ILJ 2201 (LAC) paras 23-27, albeit that on the exceptional facts of that matter, less weight was given to the unexplained delay than would usually be the case.
[3] See for example, *National Union of Mineworkers v CCMA & Others* (1999) 20 ILJ 2092 (LC) paras 22-24.
[4] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & Others* (2010) 31 ILJ 273 (CC) paras 46-47; *Equity Aviation Services (Pty) Ltd v CCMA & Others* 2009 (1) SA 390 (CC) para 52; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others* [2009] 6 BLLR 517 (CC) paras 1 and 12; *Strategic Liquor Services v Mvumbi NO & Others* (2009) 30 ILJ 1526 (CC) paras 12-13.

> **"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. … The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."**[5]

9. In *NEHAWU v Vanderbijlpark Society for the Aged* [2011] 7 BLLR 690 (LC), a trade union blamed the delay in filing a statement of case on its lengthy internal processes. The court noted that the thrust of the explanation was that *"a large multi-layer organisation cannot easily comply with the time limits of the LRA"*. In rejecting this explanation, the court, per Lagrange J, held that (para 9):

> **"The LRA has been in existence for more than fifteen years, and the time limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of its members and would adapt their internal procedures to accommodate those time limits, not vice versa. <u>The scale of an organisation cannot serve as a justification for delays.</u> On the contrary, it is reasonable to expect that larger organisations, be they trade unions or businesses ought to be able to see to it that they are organised to deal with disputes of this nature in a systematic [manner] to ensure that they do not fall foul of the time limits in the LRA. Where handling such disputes is a core function of the organisation, this should go without saying."** (emphasis added)

[5] This principle has been routinely applied by the Labour Court. See, for example: *Waverley Blankets Ltd v Ndima & Others* (1999) 20 ILJ 2564 (LAC) para 10; *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC) paras 19-20; *Mkhize v FNB* [1998] 11 BLLR 1141 (LC) paras 20-23; *Rustenburg Transitional Local Council v Siele NO* (1999) 20 ILJ 2935 (LC) para 19; *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC) para 17; *Mokoena v Naik* [1997] 12 BLLR 1543 (LAC) 1544I; *Khan v Cadbury South Africa (Pty) Ltd* [2010] ZALC 175 (C965/2008, 17 November 2010).

10. As will be elaborated upon below, these principles are equally apposite in the present matter.

The extent of delay

11. The award was issued on 17 December 2009. The 6-week time limit for bringing a review application elapsed on 28 January 2010. The review application was delivered on 25 February 2010, approximately one month out of time. In the context of the 6-week time limit contained in the LRA, a one month delay is substantial.

The explanation for the delay

12. The explanation for the delay that was placed before the court may be summarised as follows:

12.1. The deponent to the founding affidavit is Annelize Malan, the Department's Regional Co-ordinator, Legal Services. She says that "there is often a time delay" at the applicant's corporate services department. This is why it took 5 weeks (until 21 January 2010) for her superior to authorise the launching the review application. Ms Malan ascribes this delay to the *"sheer volume of [the corporate services department's] workload"*. There is no confirmatory affidavit from her superior, nor any official in the corporate services department.

12.2. Ms Malan instructed the state attorney to prepare the review application on 21 January 2010. It would have been apparent to Ms Malan – who says that her duties entail representing the Department in labour disputes, as well as matters of a litigious nature -- and the state attorney that the 6 week time period was due to elapse on 28 January 2010. (There is certainly nothing to indicate the contrary in the papers). Despite this, consultations with counsel only took place on 1 February 2010. Neither Malan nor the state attorney explained why it was necessary to brief counsel.

12.3. There is no explanation tendered whatsoever for the further 25 day delay until the launching of the application. The founding affidavit itself consists of 5 pages of substantive content, most of which is devoted to the condonation application.

13. The "explanation" tendered really amounts to no explanation at all. The applicant in essence seeks to be treated differently from ordinary litigants on account of its size and alleged above-average volume of workload. In keeping with the above-cited dictum in *Vanderbijlpark Society for the Aged*, the scale of an organisation cannot serve as a justification for delays. On the contrary, the departments responsible for labour litigation within the applicant's structures are under an obligation to see to it that disputes of this nature are dealt with in a systematic manner to ensure that they do not fall foul of the time limits in the LRA.

14. With regard to the 25 day delay in launching the application following the receipt of the instruction to proceed, this delay is entirely unexplained. The deponent appears

to be of the view that condonation is merely a formality which is there for the taking, a notion of which she should be strongly disabused. And neither Malan, who purports to have legal expertise in labour matters, nor the state attorney explained why it was necessary to brief counsel to prepare a simple review and condonation application.

15. In light of the patent insufficiency of the explanation tendered, I would refuse condonation on this ground alone, and, in line with the authorities referred to above, it is not strictly necessary to consider the merits of the application. But in any event, the applicant does not enjoy realistic prospects of succeeding in the review application, for the reasons that follow.

THE REVIEW APPLICATION: PROSPECTS OF SUCCESS

The test on review

16. The applicant seeks to attack the merits of the arbitrator's findings. It is therefore necessary to consider whether the award satisfies the threshold of reasonableness posited in *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC), namely: is the award one which a reasonable decision maker could not reach?[6]

17. The stringency of the *Sidumo* test was highlighted by Willis J in *Thebe Healthcare v NBC, Road Freight Industry* 2009 (3) SA 187 (W) 201D-E:

[6] (2439F).

> **"As the famous saying goes, 'Quot homines, tot sententiae'. Opinions, even among reasonable men and women, may differ and, at times, quite markedly. If the test in a challenge to an administrative decision is whether the decision was one that no reasonable decision maker could reach, it will, in practice, be very difficult to succeed."** (footnote omitted)

Background

18. On 10 September 2007, a collective agreement was concluded under the auspices of the council between the state as employer and various trade unions, including DENOSA, the third respondent. The agreement was headed "Resolution 3 of 2007: Agreement on Implementation of an Occupational Specific Dispensation (OSD) for Nurses" ("the OSD agreement").

19. The OSD agreement marked a substantial restructuring of the terms and conditions of employment of professional nurses who fell within the council's registered scope. The OSD agreement provided for *inter alia*:

19.1. Career pathing;

19.2. Pay progression;

19.3. Grade progression;

19.4. Recognition of appropriate experience;

19.5. Increased competencies; and

19.6. Performance,

with a view to attracting and retaining nursing professionals in all the identified occupations to the public health sector.

20. The agreement included various "translation measures" in terms of which employees would be "translated" from the existing dispensation to appropriate salary scales under the OSD agreement. One of the principles underpinning the translation process was the following:[7]

> *"A Professional Nurse (Registered Nurse) who is managing a nursing speciality unit, and who is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212, as amended, but who has been performing these duties of managing the speciality unit satisfactorily on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the corresponding management level."*

21. In terms of annexure A to the OSD agreement, which set out *inter alia* career streams and salary scales, there was a substantial difference in salary applicable to the job titles of Operational Manager Nursing (General Unit) (PN-A5)[8] and Operational Manager Nursing (Primary Health Care) (PN-B3).[9]

22. As at the relevant date, 30 June 2007, the third respondent's member, Vosloo, managed the nurses at the Buffeljagsrivier correctional services institution.

23. As a result of the OSD process, Vosloo was translated to the position of Operational Manager Nursing (General Unit). However, the Buffeljagsrivier facility was a primary health care unit, not a general unit. On a correct application of the OSD, Vosloo ought to have been translated to the Primary Health Care (PN-B) salary

[7] Item 3.2.5.3(iii).
[8] Item 1.5.
[9] Item 3.3.

scale, not the General Unit (PN-A) salary scale. This was the crux of the dispute that formed the subject matter of the arbitration proceedings under review.

24. It is significant that, prior to the arbitration proceedings, the applicant recognised that Vosloo managed the Buffeljagsrivier facility. That is why she was translated to the post of Operational Manager. The error made by the department was that it incorrectly appointed Vosloo on the "general" stream, whereas in fact she should have been appointed on the "primary health care" stream. Vosloo merely sought her translation to be corrected to reflect the true nature of the facility which she managed.

25. At the arbitration, for the first time, the department appeared to take issue with the fact that Vosloo was an Operational Manager at all. This stance was irreconcilable with the fact that Vosloo had been appointed as the Operational Manger (General) by the department on its application of the OSD process.

26. After hearing evidence from both sides, the arbitrator found in Vosloo's favour and concluded that on a correct application of item 3.2.5.3(iii) of the OSD agreement, Vosloo should have been translated to the appropriate salary scale attached to the Operational Manager Nursing (Primary Health Care), i.e. PN-B3.

Was the outcome of the award one at which no reasonable decision maker could have arrived?

27. As set out above, the department at all material times acknowledged that Vosloo was employed at Operational Manager level. The only question was whether the Buffeljagsrivier facility was a General or Primary Health Care institution.

28. Vosloo testified that the department had confirmed in February 2008 in writing that DCS (the Department of Correctional Service) was a primary health care institution. This was not challenged in cross-examination. On the contrary, the department's witness and its area commissioner, Ms VV Maputuma, confirmed that Vosloo performed supervisory duties in a primary healthcare centre.

29. In light of the fact that Vosloo was actually translated by the department to an Operational Manager post (albeit mistakenly on the "General" stream as opposed to the "Primary Health Care" stream) it is difficult to pay any credence to the department's proposition that Vosloo did not manage the Buffeljagsrivier facility as at the relevant date. In any event, Vosloo gave clear evidence to this effect. Her version was corroborated by Maputuma.

30. In light of the evidence before him, the arbitrator reasonably concluded that Vosloo had been satisfactorily managing a nursing speciality unit as at 30 June 2007 and that the other requirements of item 3.2.5.3(iii) were met. He accordingly ordered the department to translate Vosloo to the post of Operational Manager Nursing (Primary Health Care) at level PN-B3.

31. Mr *Van der Schyff*, for the applicant, argued that a managerial post in which Ms Vosloo could have acted, did not exist on the establishment at the Buffeljagsrivier

facility, and that, therefore, the relevant prescript did not apply. But the evidence at arbitration was clear – Vosloo did fulfil managerial functions. And paragraph 3.2.5.3(iii) of the collective agreement only requires that the person "who is managing a nursing specialty unit" and "who has been performing these duties" must be translated. That is a question of fact, and on the evidence before him, the arbitrator reasonalbly found that, as an objective fact, Ms Vosloo was managing the unit.

32. For the reasons set out above, the outcome of the award was eminently reasonable. It certainly cannot be described as an outcome at which no reasonable decision maker could have arrived.

Applicable salary scale

33. The applicant takes issue with the award on an additional, narrow point, namely that the arbitrator failed to specify precisely which salary scale should be applied to Vosloo.

34. The arbitrator ordered the department to translate Vosloo to the post of Operational Manager Nursing (Primary Health Care) at salary level PN-B3. It is correct that there are 5 different salary scales applicable to a PN-B3 post, ranging from R235 659 to R265 236 per annum.

35. It is common cause that Vosloo has applied to the arbitrator for quantification of the award based on the lowest of the five salary scales (i.e. R235 659). In argument, the department could offer no *bona fide* objection to the lowest PN-B3 salary scale

being applied. In the premises, the third respondent submitted that it would be appropriate to order that the applicable salary scale is R235 659. I agree. In the interests of expeditious dispute resolution, it would serve little purpose to remit this issue to the arbitrator for clarification.

CONCLUSION

36. In the premises:

36.1. The applicant's application for condonation is refused.

36.2. The review application is dismissed.

36.3. The applicant is ordered to adjust the salary scale applicable to the third respondent, Ms Vosloo, to the lowest PN-B3 salary scale with effect from 1 July 2007, together with interest thereon from 1 July 2007 to date, and all other increases and allowances applicable to post level PN-B3.

36.4. The applicant is ordered to pay the third respondent's costs.

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AJ STEENKAMP

Judge

APPEARANCES

Applicant:	J van der Schyff, instructed by the State Attorney.
Third respondent:	GA Leslie, instructed by Chennels Albertyn.