



Not reportable

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)**

CASE NO.: C523/2019

In the matter between:

THANDEKA GANA

Applicant

and

**PUBLIC HEALTH & SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

First Respondent

GAIL McEWAN NO

Second Respondent

**THE DEPARTMENT OF SOCIAL DEVELOPMENT
WESTERN CAPE**

Third Respondent

Heard: 7 July 2021

Judgment date: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 15 October 2021

Summary: Application for the review of a condonation ruling. Ruling reviewed and set aside as it is unreasonable for several reasons.

JUDGMENT

GANDIDZE AJ

Introduction

- [1] The applicant seeks an order reviewing and setting aside a condonation ruling refusing condonation for the late referral of her dispute to the first respondent, the Council. The condonation ruling further records that '*The challenge about administrative decision should be referred to the Labour Court*'. The applicant challenges both these findings and the third respondent opposed the review application
- [2] Before dealing with the grounds for review, I deem it necessary to first set out the events preceding the issue of the condonation ruling.

The proceedings at the first respondent

- [3] The dispute concerns the non-appointment of the applicant to a promotional post of Manager: Community Development and Sustainable Livelihood. There was no dispute that the selection panel recommended the appointment of the applicant but that the Head of Department (the HoD), the ultimate decision maker, rejected the recommendation and directed that the position be re-advertised. The applicant lodged a grievance relating to her non-appointment after she was informed that her application was unsuccessful. Whilst the recruitment process was underway after the post was re-advertised, a decision was taken to cancel the recruitment process altogether. This position subsisted at the time that the dispute was referred to the Council.
- [4] The transcript reflects that the proceedings commenced on 23 October 2018. The applicant was represented by an attorney, Ms. Mooreland from Guy and

Associates and the third respondent was represented by Mr. Sebapu, a Labour Relations Officer in the employment of the third respondent.

- [5] At that sitting, the third respondent raised a point *in limine* that the Council lacked jurisdiction to determine a matter that related to the rationality of a decision of the HOD not to appoint the applicant as recommended by the selection panel, hence an administrative action matter. After hearing submissions from both parties, the commissioner ruled, with reference to case authority, that properly construed, the applicant had declared an unfair labour practice relating to promotion and therefore the Council had jurisdiction to hear the matter.
- [6] After the ruling had been issued and based on a discussion that took place between the commissioner and the parties' representatives, Ms. Mooreland suggested that the HOD testifies first on whether the post still existed, as in her view, the answer to that question might be dispositive of the matter. This was agreed to by all and the HOD, Mr. Robert McDonald was called to the stand.
- [7] After swearing in McDonald, the commissioner reminded the parties that she had ruled that the dispute was an unfair labour practice relating to a promotion and that as agreed between the parties, it was crucial to establish from McDonald what had happened to the post that the applicant unsuccessfully applied for.
- [8] Thereafter McDonald testified that:
- 8.1 the applicant's cognitive functioning on problem solving was at Standard 8 to 10 level whereas the post required someone in possession of a degree, tertiary, or equivalent qualification. He added that this requirement this was not the main reason he did not approve the applicant's appointment.
 - 8.2 the selection panel mistakenly attributed behavioral competencies that were unfavourable to the top scoring candidate, Mr. Msomi whereas Msomi's behavioral competencies were better matched for the post than

the applicant's. For this reason, he could not understand why the selection panel did not recommend Msomi, the highest scoring candidate for the position. He had specifically requested the people who conducted the competency tests to explain this to him.

- [9] At that point the commissioner requested the competency reports for the applicant and Msomi to be discovered and Mr. Sebapu undertook to make the reports available, with the consent of the concerned parties. Ms. Mooreland added that in the absence of these reports, she was unable to cross examine the witness and further raised the concern that the contents of the documents in the applicant's possession were markedly different from those in the third respondent's bundle. The commissioner ruled that McDonald would finish giving his evidence on what happened to the post after which the parties would sort out the bundles.
- [10] McDonald continued and testified that he took the decision not to fill the position on 9 November 2017 and that thereafter, he was informed of significant budget cuts from R15 million to R1.5 million. For this reason, he decided that the social work community development manager should manage all the public works projects instead of appointing someone to the advertised post, to save money. If funds were to be received in the future, they could re-advertise the position. That was the end of McDonald's testimony.
- [11] The commissioner invited Ms. Mooreland to cross examine McDonald and the only question posed to McDonald was whether anyone was acting in the position in the question. McDonald responded that another employee, Sonya Kingsley, was performing the duties of her post and as well as those of the post that the applicant had applied for. Mooreland stated that she could not take the cross examination any further. McDonald was excused on the basis that he would return either later that day or on a future date.
- [12] After McDonald had been excused, there was a discussion about the exchange of bundles and conducting a pre-arbitration conference. The commissioner also raised the issue whether the dispute had been referred to the Council on time.

There was no resolution or finding on this issue at the time. Pursuant to that discussion, the commissioner issued an adjournment ruling on the same day to this effect:

- 12.1 a ruling had been issued that the dispute related to an unfair labour practice;
- 12.2 it was agreed that McDonald would testify on whether the post that applicant applied for is still available and McDonald testified;
- 12.3 the matter was postponed at the applicant's instance after Mooreland pointed out that the documents in the respective bundles had different contents;
- 12.4 the issue of condonation may need to be dealt with;
- 12.5 the matter was adjourned to allow the parties to exchange bundles and for the parties to decide and inform the Council by 31 October 2018 whether the arbitration would continue.

[13] The arbitration proceedings resumed on 11 February 2019. The applicant was not in attendance, due to being sick, but had new legal representation in the form of Mr. Lennox Jele of Jele Incorporated and counsel, Mr. Mbobo. The third respondent's representative remained unchanged. At the commencement of those proceedings, the commissioner raised these issues:

- 13.1 that the parties had not complied with the ruling of 23 October 2018 and that she could hold them in contempt;
- 13.2 condonation for the late filing of the referral was required as McDonald testified that he made the decision being challenged on 9 November 2017 and that this version was not challenged but that even if the applicant became aware of the decision in April 2018, condonation was still required. An exchange ensued between the commissioner and Mr. Mbobo until the commissioner ruled that a formal application for condonation was indispensable;
- 13.3 the applicant's claim was an unfair labour practice that her non-appointment to the post was unfair and unreasonable;

- 13.4 if the post in question no longer exists, it was pointless proceeding with the matter.
- 13.5 after some debate about whether the ruling of 23 October had been properly served on the applicant, the commissioner stated as follows:

Alright. I'm going to close this case right now for want of jurisdiction. You guys want to fool around with me and no listen to my instructions in the letter, in my ruling. I raised the question of when the dispute was referred as McDonald testified he had concluded (indistinct) on 9 November, no one had raised the questions of condonation previously and this may have been dealt with before arbitration continues, so I expected an answer to that today and in the lack of an answer I closing this case and it can only be re-opened once we know whether or not condonation is granted and I am going to recuse myself from being the commissioner who decides whether or not to grant condonation in this regard. So this case is now closed....

- [14] After what seemed like a rant by the commissioner, Mr. Mbobo sought clarity on whether the applicant must file a condonation application. The commissioner answered in the affirmative but added that '*I will not be dealing with the matter of condonation*', that she would recuse herself from the condonation application, that the Council will appoint a commissioner to hear the condonation application, that she was not going to handle the condonation application, that she would keep an eye on whether condonation is granted '*But in the event that condonation is granted then I would request that I be given because I already part heard this case*'. Despite having recused herself from deciding the condonation issue, the commissioner considered that application and refused condonation.
- [15] It is against this background that the applicant seeks to review the condonation ruling. Each ground for review will be dealt with in turn.

Was the referral late and could the Commissioner raise this issue mero motu?

- [16] The applicant complains that since the third respondent did not raise the issue of condonation, it was not open to the commissioner to raise this issue. This

submission is not in line with our law. A commissioner or a court can and in fact must raise the issue of jurisdiction mero motu, as per *Cusa v Tao Ying Metal Industries and Others*.¹

- [17] The applicant insists that the referral to the first respondent was made timeously, and this issue needs to be determined.
- [18] The sequence of events was not in dispute. The HOD rejected the recommendation to appoint the applicant to the post on 9 November 2017, but this decision was not communicated to the applicant at that point. It was only on 12 December 2017 that the applicant was informed that the recruitment process for the post had been finalized but even then, no information was shared on the outcome of the process.
- [19] On 13 February 2018, 20 February 2018, and 9 April 2018 the applicant wrote to the third respondent requesting information on the outcome of the process.
- [20] It was only on 18 April 2018 that the applicant was informed that her application was unsuccessful, but the reasons thereof were not divulged.
- [21] On 3 May 2018, the applicant requested reasons why her application was unsuccessful and there was no response.
- [22] The following day, 4 May 2018, the applicant lodged a formal grievance.
- [23] The third respondent acknowledged receipt of the grievance on 7 June 2019, more than a month later.
- [24] Subsequently, in a letter dated 2 August 2018 sent on 16 August 2018, the applicant was informed that her grievance was found to be 'unsubstantiated.'
- [25] The applicant referred the dispute to the Council on 22 August 2018. The matter was unsuccessfully conciliated, hence the referral for arbitration.
- [26] Returning to the question whether that referral was made within the prescribed time limits, section 191(1)(b)(ii) of the Labour Relations Act 66 of 1995 requires

unfair labour practices to be referred for conciliation within 90 days of the act or omission which allegedly constitutes the unfair labour practice, or if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

- [27] The applicant submitted that the referral was not late but that even if it was late, she had given an acceptable and reasonable explanation for the delay. The third respondent's answer thereto was that the referral was 110 days late. The condonation ruling has a heading 'Degree of lateness' and records that this issue will be addressed in the analysis but nowhere in the ruling is this issue returned to and dealt with by the commissioner.
- [28] In my finding, the act complained of was the non-appointment of the applicant to the post that she was recommended for. Even though that decision was made on 9 November 2017, it was only on 18 April 2018 that the applicant was made aware that her application was unsuccessful. Therefore, in my finding, the 90 days should be calculated from this date, taking us to 17 July 2018. In other words, the referral for conciliation ought to have been made on or before 17 July 2018. It was made on 22 August 2018 and therefore it was made 35 days late.
- [29] This delay, though not negligible, was not excessive. This was a factor that the commissioner ought to have taken into account in assessing whether the applicant had shown good cause for the late referral but was not considered at all by the commissioner. The sole reason the commissioner refused condonation was the alleged lack of prospects of success. I return to this issue below.

Explanation for the delay

- [30] The explanation tendered by the applicant was not disputed. In short, she awaited the outcome of the grievance process before referring the matter to the first respondent. She submits that it was reasonable to do this, and I agree.

[31] In answer, the third respondent argues that the Grievance Rules require an employee to refer the matter externally if a grievance is not resolved within 30 days, unless there is agreement to extend this period. There are two problems with this submission. The first is that the Labour Relations Act prescribes the period within which a referral ought to be made to the first respondent and the Grievance Rules cannot trump the LRA. The second is that the third respondent acknowledged receipt of the grievance more than 30 days after it had been filed. But more importantly, Mr. Sebapu who represented the third respondent wrote to the applicant on 1 August 2018 requesting her consent to the extension of the period for processing her grievance. The applicant received the outcome of her grievance on 16 August 2018, and she made the referral to the first respondent 6 days later. On those facts, the applicant cannot be blamed for awaiting the outcome of the grievance process before escalating the matter to the Council. The explanation for the delay was reasonable and acceptable and this was another factor in favour of granting condonation which was never considered by the commissioner.

Applicant's prospects of success

- [32] It will be recalled that the sole basis on which condonation was refused was the commissioner's reasoning that the applicant lacked prospects of success.
- [33] The applicant's case was that the HoD did not approve the recommendation of the Selection Committee without any rational and/or reasonable explanation. In an affidavit deposed to by Mr. Sebapu, he submitted that even though the applicant had been recommended for appointment given her level of expertise, maturity, and strong behavioral preference, the HOD declined to approve the recommendation due to the applicant's competency assessment results which showed that she performs at the equivalent of a Grade 10-12 level. Sebapu also refers to the post being unfunded due to cost containment measures and budget cuts, that the recruitment for the post had been discontinued and that the functions of the post had been amalgamated with the post of Poverty Manager.

[34] The findings of the commissioner on the issue are:

- 15) *I checked a number of time with Gana-Mbekeni and she confirmed me the real issue in dispute is the decision taken by the head of the Department to divide work up and not to appoint anyone in the position ofIt was the administrative decision taken to put sustainable development under the same unit as poverty. Gana-Mbekeni testified that he constitutional right to fair labour practice had been infringed by the decision not to fill the vacancy... as she had been the recommended candidate.*
- 16) *In terms of the application for condonation as the post... now fell under the same unit as poverty due to budget constraints there was no need to fill the post for which Gana-Mbekeni had applied as it was no longer a funded post and is not regarded as being vacant. On the basis that the position which Gana Mbekeni had applied does not exist there is no point in granting condonation in circumstances where the outcome sought is not possible to achieve. That is to confirm that the post of sustainable development now falls under the same unit as poverty. In the circumstances there was no need to now fill this post, it was no longer a funded post and is not regarded as being vacant. In circumstances such as exist in this case the prospects of success are non-existent and condonation should be denied.*

[35] The first problem with this reasoning, based on the record as it currently stands is that Gana-Mbekeni never testified. It is therefore unclear when Gana-Mbekeni is said to have informed the commissioner when she checked 'a number of times' as found. From the transcript, the applicant always spoke through her legal representatives, and she did not testify.

[36] Secondly, the findings about what became of the post were based on McDonald's evidence, which was repeated in Sebapu's affidavit. The challenge with this version is that McDonald did not complete his evidence and it was agreed that he would be recalled on another day to finish giving his evidence. McDonald was never recalled to complete his evidence and so that he could be cross examined on what he had testified to after the applicant's legal representative had had a chance to peruse the relevant documents. Therefore,

a decision on prospects of success could not be based on McDonald's untested evidence. That evidence was untested and not that it was undisputed.

- [37] In any event, I agree with the submission made on behalf of the applicant that the dispute related to the HOD's decision not to appoint the applicant notwithstanding the recommendation of the Selection Committee. The third respondent also agreed that this was the issue in dispute. The pre-arbitration minute filed by the parties recorded the issue in dispute as the HOD's decision not to approve the recommendation to appoint the applicant. The dispute turned on the fairness of that decision, which is the test in such cases.² Conspicuously absent from the condonation ruling is an evaluation of the third respondent's version, deposed to by Sebapu, on the reasons the HOD refused to approve the recommendation of the Selection Committee. Even if the HOD had a discretion on whether to make an appointment, such a discretion is not unfettered. Whether the HOD acted fairly in exercising that discretion is the issue to be determined at arbitration. There was nothing before the Commissioner to indicate whether that discretion had been exercised fairly. Instead, the Commissioner concluded that the applicant lacked prospects of success based on events that occurred in July 2018, more than 8 months after the HOD took the decision not to approve the recommendation to appoint the applicant to the post.
- [38] What transpired after 9 November 2017 was of secondary relevance to the question whether the HOD had acted fairly. That the post no longer exists might have impacted the relief to be granted. If it turned out that the post no longer existed, the applicant could not seek appointment to the post, but she could certainly seek other relief permissible in unfair labour practice disputes as set out in section 193(4) of the LRA. It did not mean that her unfair labour practice claim lacked prospects of success as found by the commissioner.
- [39] I also make the observation that the commissioner held this erroneous belief that if the post no longer existed, then the matter cannot proceed. She expressed this view on 11 February 2019. On that day she directed the parties to discuss whether the matter would proceed to arbitration after getting clarity

on whether the post still existed. I have already found that this was an erroneous approach.

[40] There is another concerning aspect about the commissioner's finding on prospects of success. Paragraph 11 of the condonation ruling records that the applicant deposed that she was doing the work of the manager business development that she was not remunerated for and that the employer had unfairly stopped paying her the acting allowance of R6 000 per month since December 2014. What is recorded is shocking as nowhere in her affidavit did the applicant make such a case. Either this alleged evidence by the applicant influenced the commissioner's ultimate decision or the commissioner worked from a ruling that she had drafted previously in a different matter and failed to make the changes required taking into account the facts of the case that was before her. Both scenarios are probable. It is unfortunate that a commissioner tasked with such an important function can treat the case with such little regard for the litigants who had to incur huge legal costs litigating over a condonation ruling that contains irrelevant material.

[41] The ruling also contains irrelevant matter about the postponement of the matter on two previous occasions at the instance of the applicant, which suggests that in deciding the matter, the commissioner took into account this further irrelevant factor. The conclusion on prospects of success is not only unreasonable but also wrong in law.

The finding that the Council had no jurisdiction

[42] This finding is another instance of what the court is lamenting as the little regard the commissioner had for the parties and how this matter should have continued to arbitration in 2019 already. She found as follows:

- 17) *As the challenge by Gana-Mbekeni is to the administrative action taken by the Head of Department, the Council had no jurisdiction in this new matter raised.... Not only is condonation denied but the Council has no jurisdiction in the points made under (15) above.*

- [43] The reference to (15) must be erroneous and can only be a reference to (17). It will be recalled that at the first sitting on 23 October 2019 the third respondent raised the issue of jurisdiction. The ruling by the commissioner was that the dispute was about an alleged unfair dismissal dispute. That ruling finally disposed of the issue and it was never raised by any party again and it could not be raised again. Despite this and without any warning to the parties, the commissioner revisited this issue and gave a ruling which was contrary to the one she made on 23 October 2019. This is inexplicable and renders the ruling one that no reasonable decision maker could have arrived at. The third respondent's submissions to the contrary are rejected.
- [44] That ruling would in any event be reviewable because the apex court in *Gcaba v Minister of Safety and Security*³ ruled that promotion in the public sector does not constitute administrative action.

Deciding the matter after recusal

- [45] This is yet another ground for review raised by the applicant and there is merit to it. Out of her own accord and presumably because she could appreciate that her impartiality to decide the condonation application was in question, the commissioner volunteered to recuse herself from determining the condonation application. She repeatedly informed the parties that a different commissioner would decide that application and that once a decision had been made, she would request to be allocated the file to continue with arbitration as the matter was part heard.
- [46] Contrary to this undertaking, the commissioner determined the condonation application. On being furnished with the condonation papers, the commissioner wrote to the Council as follows:

This is a very problematic case....

.....

It is practice to set the matter down for condonation. In this case it might be easier. I tried to do it on the papers but she has no prospects of success and perhaps I should tell her that face to face.

Please set it down for an In Limine /arbitration. In my ruling dated 23 October 2018 it was agreed by both parties that they would revert to the Council by no later than 31 October 2018 as to whether or not this case should proceed to arbitration given that the post for which the employee applied no longer exists.

[47] What is concerning about the contents of this communication by the commissioner is that she does not inform the Council that she had recused herself from hearing the condonation application. Secondly, the commissioner expresses the view that the applicant lacked prospects of success and proposed that this be communicated to her face to face. This is a clear indication that the commissioner predetermined the outcome of the condonation application because she was of the view that if the post no longer exists, the matter could not proceed. I have already found that this view was erroneous.

[48] When the applicant learnt from the set down notice that the commissioner who had recused herself from hearing the condonation application would in fact determine it, she wrote to the Council objecting. Unfortunately, the objection fell on deaf ears and the matter served before the commissioner on 12 June 2019. The commissioner should not have determined the condonation application and this irregularity also renders the ruling reviewable.

Conclusion

[49] In all the circumstances, the condonation ruling cannot stand. It is one that no reasonable decision maker could arrive at for all the reasons set out above.

[50] Even though both parties asked for costs, I will not award costs. The parties have already incurred huge legal fees thus far and will continue to incur costs in light of the order below.

[51] I intend to substitute the ruling in respect of condonation as all the material was placed before court which was in as good a position to decide the matter.

[52] The following order is issued:

Order:

1. The condonation ruling is reviewed and set aside and is substituted with an order that condonation is granted.
2. The Council is directed to re-enroll the matter for a de novo hearing of the Applicant's unfair labour practice dispute before a commissioner other than second respondent.
3. There is no order as to costs.



Tapiwa Gandidze
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: J Van Der Schyff
instructed by KM Ramodike & Associates

For the third respondent: Nabeelah Gallant
instructed by the State Attorney

¹ 2009 (2) SA 204 CC at para 68.

² *Noonan v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 2597 (LAC).

³ [2009] 12 BLLR 1145 (CC)