THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Of interest to other judges
Case : C 983/2015

In the matter between:

THE MINISTER OF PUBLIC WORKS	**Applicant**
and	
PUBLIC SERVICE COORDINATING BARGAINING COUNCIL	**First Respondent**
I DE VILLAGER-SEYNHAEVE N.O.	**Second Respondent**
PSA obo N B POSWA	**Third Respondent**

Date of Hearing: 17 November 2021

Date of Judgment: 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 10h00 on 27 June 2022

Summary: (Application to reinstate review application – inordinate delay – no mala fides – long delay not properly explained – issue arising for determination the subject of conflicting awards – some prospect of success – Review application reinstated – adverse cost award as a mark of court's disapproval of the applicant's tardiness)

JUDGMENT

LAGRANGE J

Background

[1] This matter began as an application to review an arbitration award issued on 25 September 2015, in terms of which the arbitrator decided that the post of Deputy Director: Movable Assets in the Department of Public Works ('the department') to which the third respondent Ms N Poswa ('Poswa') represented by the PSA, was appointed on salary level 11, should have been on salary 12 since 1 August 2012 because the job weighting attached to the post showed that the post was graded at that level. An internal memorandum of the department of 19 November 2014 confirmed that the post was a level 12 post.

[2] The department received the award on 29 September 2015 and the review was filed on 25 of November 2015, a fortnight late. The department applied for condonation for the late filing of the review application, albeit that had understated the number of days it was late. In any event, this application was not opposed, and there is no obvious prejudice which resulted from the two week delay. In the circumstances, I believe it ought to be condoned, irrespective of the merits of the application.

[3] By the end of January 2016, a record was transcribed which consisted only of the record of a postponement application. The state attorney wrote to the bargaining Council on 12 and 23 February 2016 requesting the missing compact disc containing the digital record. On 4 March 2016, the state attorney realised that the letters had been addressed to the wrong person in the bargaining Council. However, three more months elapsed before this request was repeated on 13 June 2016, this time with a warning that if it was not provided by 30 September 2016, the department would bring an application to compel the filing of the record. The warning was reiterated on 22 September 2016.

[4] However, it was only on 13 June 2017, over eight months after the departments deadline to the bargaining Council expired, that the department launched an application under rule 11 to compel the bargaining Council to file the digital record of the arbitration proceedings, on an urgent basis. The application was unopposed.

[5] From 19 September 2017, the department began pressing the registrar for the application to be enrolled. On 30 January and 13 February 2018, the department followed up in writing with the registrar for the enrolment of the matter on the unopposed roll.

[6] On 16 February 2018, the PSA launched an application to dismiss the review application. The application to compel and the dismissal application were enrolled for hearing on 7 August 2018, but there was no appearance for Poswa. Attorneys of record for the PSA had withdrawn on 27 June 2017 and, unbeknownst to the court, the new attorneys of record had already withdrawn the dismissal application, which explains the absence of legal representatives of the PSA on that date.

[7] On 7 August 2018, this court granted the application of the department to compel the bargaining Council to file the digital record of the proceedings and also to file an application to revive the review application as the review application was deemed withdrawn under the provisions of the practice manual. The court directed that the application to revive the review application and the application to dismiss it should be enrolled at the same hearing. According to the founding affidavit in the reinstatement application, the state attorney realised in December 2018 that the record would have to be reconstructed as the digital record finally received from the bargaining Council did not contain a record of the evidence.

[8] Between the end of January and the end of October 2019, a protracted process took place, mostly internally within the department, to reconstruct the record. By the end of that period, an agreement was finally reached with the respondents on the reconstructed record.

[9] The application to revive the review application was only launched on 19 February 2020, nearly one and a half years after the court had ordered the department to launch it, and about three and half months after the reconstructed record was agreed to.

[10] The dismissal and revival applications were enrolled for hearing on 17 November 2021 and argument was heard using Zoom owing to the prevailing Covid 19 pandemic. Prior to the hearing the PSA withdrew the dismissal application, it having become moot in view of the circumstances which necessitated the revival application being brought.

The revival application

[11] Since the review application was launched on 25 November 2015, the department did not take another step in the proceedings until it filed the application to compel production of the record on 17 June 2017, nearly 18 months later. In terms of clause 16.1 of the labour court practice manual if an applicant in a review application has taken no further steps in the matter for a period of six months the file must be archived and is treated as having been dismissed. Similarly, clause 11.2.7 provides that if all the necessary papers in a review application had not been filed within 12 months of the application been launched the application will be archived and regarded as lapsed. In both instances an application to revive the review is necessary if the applicant wishes to pursue it. In this case, the review file had to be archived on either ground.

[12] It is now trite law that an application to revive a review application which has been archived and deemed dismissed or lapsed, is similar to a condonation application[1].

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[1] *Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC), viz:

> "[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default;

The delays and the explanation therefor

[13] Assuming in the department's favour that the initial record was uplifted late in January 2016, the 60 day period for filing the record would have expired sometime towards the end of May 2016. The department was aware of the incompleteness of the record in early February 2016 and then started to engage with the bargaining Council. In March, the state attorney knew that the inquiries about the record had been directed to the wrong person, but no further steps was taken until mid -June when the request for the missing portion of the record was repeated. Why it was felt the bargaining council should be given an additional three months before any step was taken by the department to compel the production of the record is not explained. In the meantime, the six-month period in clause 16.1 of the practice manual taking of further step had already expired by the end of May 2016. The first time the state attorney took a step that might actually advance the review application was only the following year on 13 June when it launched the application to compel production of the record approximately a year after it threatened it would do so. Taken together, the unexplained period of delay at that point extended from early March 2016 to mid-June 2017.

[14] It took another three months before the state attorney began attempting to have the matter set down, whereafter the delays were mainly due to the clogged motion court roll and the application to compel was only heard on 7 August 2018.

[15] The court order did not stipulate when the reinstatement application ought to have been launched and it appears that the department, represented by the state attorney, took the view that it would be unwise to bring that application until it had attempted to reconstruct the record. From the account given it appears that this was a very slow process taking nearly 10 months once it was known that the bargaining

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> and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised."

Council could not produce the record required. What was finally produced as a reconstructed record, which consists of one and a half pages, is so paltry it is difficult to understand why it took so long. Only one witness, Ms M Sebole, the Assistant Director: Organizational Design and Job Evaluation gave evidence. Nonetheless, the delays from the end of May 2019 onwards appeared to be largely owing to an unresponsive approach by Poswa's attorneys to the reconstruction efforts of the department, which accounts for half the period before the reconstructed record was agreed upon. That said, it should not have taken the department more than two months to present a reconstructed record given the limited evidence led. Accordingly, it is fair to say it took at least three months longer than it should have.

[16] All in all, the unexplained delay attributable to the department, most of which arose in the state attorney's office, even if the time taken to get the application to compel set down is excluded altogether, was about 18 months. This is an excessive delay. *Ms N Mbangeni*, counsel for the department, disputed the respondents' characterisation of the delay as 'lackadaisical', but rightly conceded that the delays were inordinate. Nonetheless she argued the delays were not attributable to bad faith on the part of the department. I agree it would be unfair to characterise the department's conduct as acting in bad faith for the sake of delay, the department cannot wish away the absence of any kind of explanation for the long lags in steps taken by the state attorney. It was only in November 2019, very late in the saga, that the department asked for the matter to be handled by another state attorney. It was remiss of the department not to ask for regular updates on the progress of the litigation and cannot just absolve itself of blame, more especially as it claims the case is of some importance to it, owing to conflicting arbitration awards dealing with the same grading issue.

[17] In the upshot, the explanation for the delays is quite insufficient.

Merits

[18] The LAC in *Samuel* seems to say that the standard of evaluation of the merits in a reinstatement application should be the same as that which is applied in

rescission applications[2], rather than applying the 'reasonable prospects of success test' normally used in condonation applications.

[19] The nub of the department's claim on the merits is twofold. Firstly, it argues that another arbitration award adopted a different interpretation of the same resolution and ministerial directive in issue in this case. Secondly, the arbitrator made a fundamental factual error in determining that Poswa's post as deputy director had been graded as a level 12 post, whereas it was graded as a level 11 post, and it was not competent for the arbitrator to determine a different grading.

[20] The other award the department refers to was case number PSCB -15/16 handed down on 22 September 2015 by the arbitrator, Mr T Nsibanyoni. The employee in that matter, Ms E Mtiyane, was appointed in the identical post to Poswa with the same job weighting of 664. Ms Mtiyane also sought to be remunerated on the basis her post should have been graded at level 12. In that matter, the arbitrator found that the post was always graded at level 11 and clause 3.6.3.2 of Resolution 3 of 2009 as amended by clause 18.1 of Resolution 1 of 2012, did not apply to her because it only dealt with employees appointed to posts graded at 10 or 12, but at salary levels 9 or 11. The significance to be attached to the job weighting of the post did not seem to feature in the other arbitrator's reasoning, by contrast with the award under consideration in this matter, in which it was central to the arbitrator's reasoning.

[21] The department contends that the job weighting of 664 which appears to place Poswa's post on the lowest job weight score for a grade 12 post, was not determinative of the post's job grade which had been confirmed in October 2010 as a grade 11 post, and had never been regraded, which would have been necessary for Poswa to have been paid on a grade 12 scale.

[22] Without going in depth into the merits, I can see that the department has a reasonable prospect of success. Obviously, it would also assist both parties to know if the arbitrator's interpretation of the effect of the resolutions and directives was a

[2] See extract in fn 1.

reasonable one[3], as the ramifications of conflicting awards go beyond the case of Poswa's own dispute.

Conclusion

[23] Were it not for the wider implications of the uncertainty arising from the two awards, I would be strongly inclined not to resuscitate the review application as the delays are really inexcusable. I am also mindful of the fact that the respondents will not be unduly prejudiced by the matter being finalised at this late stage as Poswa will receive backpay if the award is upheld and she remains employed by the department. In the circumstances, I believe it would be in the interests of justice to allow the review to be reinstated.

[24] Nonetheless, the court must express its great displeasure with the limping intermittent prosecution of the review and an award of costs is in order as a mark of the court's disapproval, notwithstanding the ongoing employment relationship.

[25] Another issue must be mentioned. Only the reinstatement application was enrolled. However, on examination of the correspondence between the parties' attorneys it appears that they had agreed between themselves that if the review application should have been argued on a provisional basis at the same hearing, to avoid a second hearing of the review if the application was reinstated. This agreement does not seem to have been conveyed to the registrar, and *Mr Bosch*, counsel for the respondents, was clearly unaware of it. To try and speed up the resolution of the application, provision is made for the parties to approach the registrar for an expedited set down of the review application.

Order

[26] The review application is reinstated.

[27] The Applicant's late filing of the review is condoned.

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[3] *SA Municipal Workers Union v SA Local Government Bargaining Council & others* (2012) 33 *ILJ* 353 (LAC) at 360-361 laid down this standard for reviewing interpretation and application of collective agreement awards.

[28] The Applicant must pay the Third Respondent's costs of opposing the reinstatement application and the costs of launching the dismissal application, which was subsequently withdrawn.

[29] The Registrar is directed to attempt to arrange an expedited hearing of the review application in consultation with the parties' legal representatives.

Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant	**N Mbangeni**
Instructed by	**The State Attorney**
For the Third Respondent	**C Bosch**
Instructed by	**Thashen Subrayen & Associates**