THE REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no.: D460/13

In the matter between:

DEPARTMENT OF HEALTH – KZN **Applicant**

and

PUBLIC SERVICE CO-ORDINATING

BARGAINING COUNCIL **First Respondent**

COMMISSIONER V REDDY **Second Respondent**

HOSPERSA obo MR MS SHAMBI **Third Respondent**

HEARD: **22 July 2014**

Delivered: **28 November 2014**

Summary: - Condonation and Application to Review and set aside a Jurisdictional Ruling

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JUDGMENT

MAESO AJ

[1] The Applicant has made application to review and set aside the Second Respondent's ruling that the First Respondent had jurisdiction to determine the dispute referred to it by the Third Respondent.

[2] Before dealing with the merits of the review, it is necessary to deal with the fact that the review application is "about 17 days" outside of the 6 week time limit imposed by Section 145 of the Labour Relations Act. The Applicant alleges that the ruling was telefaxed to the incorrect fax number which caused part of the delay. Once it was aware of the ruling, it had difficulty in arranging a consultation with its attorney of record.

[3] A decision to grant or refuse condonation requires this Court to exercise its discretion when deciding whether the Applicant has shown good cause why the late referral should be condoned. Any application seeking condonation must set out the grounds established in *Melane v Santam Insurance Company Limited*[1] . This in turn must deal with the degree of lateness, the reasons for lateness, the prospects of success and any prejudice to the other party.

[4] The delay in this matter is not excessive and in any event, the Respondents have not opposed the application for condonation. The late filing of the review application is therefore granted.

[5] The Applicant takes issue with the Third Respondent filing its answering affidavit on the 18th December 2013 which was some time after the Applicant had served its Rule 7A(8)(b) notice on the parties on the 23rd July 2013. The rules of this Court required the Third Respondent to have filed its Answering Affidavit within 10 days of the receipt of the aforesaid notice.

[6] Rule 12 of the Labour Court Rules allows this Court, on good cause shown, to condone noncompliance with any period prescribed by the rules.

[7] Paragraph 11.4.2 of the Practice Manual of this Court states that where a Respondent has filed its replying affidavit outside of the time period set out in the rules, there is no need to apply for condonation of the late filing of such affidavit unless the party upon whom the affidavit is served, files a Notice of Objection to the late filing of the affidavit. The Notice of Objection must be

[1] 1962 (4) SA 531(A**)**

served and filed within 10 days of the receipt of the affidavit after which time the right to object shall lapse.

[8] The Third Respondent did not make application for condonation for the late filing of its Answering Affidavit. However, the Applicant did not file a Notice of Objection as required by the Practice Manual. Instead it raised a point *in limine* in its Replying Affidavit dealing with the late filing of the Answering Affidavit.

[9] The notices filed by the parties indicate that the Third Respondent filed a notice indicating its appointment of different attorneys of record on the 19th August 2013. The Third Respondent has not explained the delay in serving and filing its Answering Affidavit which it only did on the 18th December 2013.

[10] By not filing the required Notice of Objection, clause 11.4.2 of the Practice Manual indicates that the Applicant's right to object to the late filing lapses if a Notice of Objection is not filed within 10 days of receipt of the affidavit. The Applicant raised the issue of the late filing in its replying affidavit. This is not in accordance with the Practice Manual and on that basis the Applicant's right to object to the late filing of the Third Respondent's answering affidavit has lapsed.

[11] Even if I am wrong and the matter is to be heard without taking into account the answering affidavit, this Court would still be obliged to consider the facts submitted by the Applicant and then decide whether the application satisfied the review test set by the courts. Given the facts of this case, it is my view that the decision in this matter would be the same.

Background

[12] The Third Respondent was dismissed at a disciplinary enquiry that had established that the matric certificate which the Third Respondent had used was forged.

[13] The Third Respondent's dismissal was upheld on appeal on the 21st October 2010.

[14] The Third Respondent referred an unfair dismissal dispute for conciliation in terms of section 135 of the Labour Relations Act. The referral was 31 days late and an application for condonation was only filed on the 10th May 2011.

[15] The application for condonation was dismissed on the 17th September 2011and the ruling was not challenged.

[16] The Third Respondent referred the matter afresh and the panellist, correctly, ruled that the dispute had already been dealt with in light of the condonation ruling dated 17 September 2011.

[17] On 15 August 2012, the Third Respondent referred another dispute described as the interpretation and application of the collective agreement described as PSCBC Resolution 1 of 2003. The Third Respondent alleged that during his precautionary suspension prior to his dismissal, he had not been paid. The Third Respondent alleged that this was in breach of the collective agreement.

[18] In the referral form the Third Respondent confirmed that the dispute arose on the 13th October 2010 approximately 2 years after the referral was made.

[19] The matter came before the Second Respondent for conciliation on the 14th September 2012. The Applicant argued that the dispute could not be conciliated because there had been an unreasonable delay in referring the dispute.

[20] The Second Respondent ruled that the Third Respondent's claim was in fact a claim for the payment of remuneration which was "essentially a claim for a debt". The Second Respondent concluded that the claim was therefore subject to the Prescription Act of 68 of 1969 and that this Act ‘stipulates that a debt is extinguished by prescription 3 [three] years after same becomes due’.

[21] Although the referral was 692 days late, the Second Respondent ruled that it was referred within ‘the 3 year period as stipulated in the aforegoing Prescription Act and has therefore not prescribed. When a period is prescribed for referral of a dispute, as is in the case in this dispute, the unreasonable delay rule does not apply’.

[22] For this reason the Second Respondent ruled that the dispute was properly before the First Respondent. It is this ruling that the Applicant asks the court to review and set aside.

The issue

[23] Section 24 of the Labour Relations Act ("LRA") requires disputes about the interpretation or application of a collective agreement to be resolved by conciliation and if not successful, the dispute must be resolved by arbitration. However, section 24 of the LRA, unlike in other disputes, does not prescribe a time limit within which to bring such a dispute to the CCMA or Bargaining Council.

[24] The Courts have held that in the circumstances where a time period is not prescribed, the time period must be a reasonable one. In *Setsokosane Busdiens EDMS Bpk v Voorsitter Nasionale Vervoerskommissie en Ander* [2], the Court held that:

> 'The test which a court has to apply to ascertain whether a common law application for review in the absence of a specific time limit was brought within a reasonable time is of a dual nature. The Court has to ascertain (a) whether the proceedings were instituted after expiration of a reasonable time and (b) if so, whether the unreasonable delay should be condoned. As regards (b) the Court exercises discretion but the enquiry as far as (a) is concerned does involve the exercise of the Court's discretion, it involves a mere examination of the facts in order to determine whether the period that has elapsed was, in the light of all the circumstances, reasonable or unreasonable…'.

[25] When deciding what a reasonable time period should be within which a dispute of this nature should be referred, the Court must consider all the circumstances. Section 1(d) (iv) of the LRA specifically requires disputes to be resolved effectively. It is accepted that labour disputes ought to be resolved expeditiously.

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[2] 1986 (2) SA 57(A) at 59 H-J

[26] In the matter of *Moolman Brothers v Gaylard NO and Others*[3], the court dealt with a review application under Section 158(1) (g) of the Labour Relations Act where no time limits were prescribed within which to bring a review. The court found that a period of 6 weeks was reasonable in the circumstances as it was in keeping with the time periods prescribed for bringing review applications in terms of Sections 145 of the Act.

[27] In *Librapac CC v Moletsane NO and Others*[4] the court was asked to consider an application for condonation for the late filing of a review brought in terms of Section 158(1)(c) of the LRA. The court confirmed that the determination of a reasonable time is not a matter of *"mere arithmetic"*. The court's view was that an assessment of a reasonable time will depend on whether the passage of time was likely to result in prejudice.

[28] It is only once the delay is considered to be reasonable, that this Court moves to the second phase of its enquiry which is to consider the explanation for the delay.

[29] It is common cause that in this matter, the referral in question was 692 days late. The court must take into account the events that occurred since the employee's dismissal which was confirmed on appeal on 21st October 2010.

[30] As has been set out earlier, the employee attempted to refer a number of disputes in relation to his dismissal and on each occasion the disputes were defective. None of the rulings associated with these referrals have been challenged.

[31] The current dispute under examination is one relating to the interpretation and/or application of the collective agreement, namely the PSCBC Resolution 1 of 2003.

[32] The Second Respondent entertained the dispute and found that the dispute was *"essentially a claim for a debt"*. He went onto find that as the debt was subject to the provisions of the Prescription Act 68 of 1989, and that a debt is

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[3] (1998)19 *ILJ* 150 (LC)
[4] (1998) 19 *ILJ* 1159 (LC)

only extinguished by prescription 3 years after it has become due, the delay of 692 days was reasonable. As a result the Second Respondent found that there was no need to make application for condonation before the dispute was to be determined.

[33] In the Labour Appeal Court's decision of *Minister and Safety and Security v Safety and Security Sectoral Bargaining Council and Others*[5] **,** the court drew the distinction between a dispute on the one hand and an issue in dispute on the other. The Labour Appeal Court referred to *Johannesburg City Parks v Mphahlani NO and Others*[6] **– ,** that set out the following example illustrating the distinction between a dispute and an issue within a dispute:-

> '…One may have a situation where an employee is dismissed for operational requirements and that dismissal is challenged as unfair because it is said that in terms of a certain collective agreement the employer was supposed to follow a certain procedure before dismissing the employee but did not follow such procedure. In such a case, in determining whether dismissal was fair or unfair, the Labour Court would have to determine whether the relevant provisions of the collective agreement were applicable to that particular dismissal. The employer may argue that, although the collective agreement is binding on the parties, the particular clause did not apply to a particular dismissal. This means that the Labour Court has to interpret and apply the collective agreement in order to resolve the dispute concerning the fairness or otherwise of the dismissal for operational requirements. So, the real dispute is about the fairness or otherwise of the dismissal and the issue of whether certain clauses of the collective agreement are applicable and/or were complied with before the employee was dismissed is an issue necessary to be decided in order to resolve the real dispute'.
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> '...it cannot be said, for example, that the Labour Court has no jurisdiction to adjudicate the dispute concerning the dismissal for operational requirements and it must be referred to arbitration just because, prior to or in the course of, resolving the dismissal dispute, the issue concerning the interpretation or application of certain clauses of the collective agreement must be decided. It

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[5] (2010) 31 *ILJ* 1813 (LAC) (case no PA2/09)

[6] (2010) 31 *ILJ* 1804 (LAC) at paras 14 and 15**.**

> would be different, however, where the main dispute, as opposed to an issue in a dispute, is the interpretation or application of a collective agreement. In the latter case the Labour Court would ordinarily not have jurisdiction in respect of the dispute and the dispute would be required to be resolved through arbitration in terms of the LRA'.

[34] The dispute that was before the Second Respondent was that of an unfair labour practice in accordance with section 186(2) (b) of the LRA. The right to be paid in these circumstances may be found in the collective agreement referred to and this may be an issue which may have to be dealt with in order to resolve the real dispute. The dispute itself however, does not relate to the application or interpretation of the collective agreement. The dispute is quite simply one relating to the unfair suspension of the employee.

[35] As a result, I do not agree that the Prescription Act is an appropriate comparator when deciding whether the dispute was brought within a reasonable period of time. Normally section 191(1) (b) (ii) of the LRA requires an unfair labour practice dispute to be referred within 90 days of the date or act that constitutes an unfair labour practice or within 90 days within which the employee becomes aware of the unfair labour practice. The unfair labour practice in this matter ought to have been by December 2011.

[36] The employee's previous attempt to refer a dispute outside of the prescribed time limits failed as a consequence of the employee not having good reason for the delay. The current delay is significant and the employee cannot in these circumstances, conveniently describe his dispute as one that falls into a category that does not contain a prescribed time limit. To allow this would give parties referring disputes an opportunity to bypass the time limits set out in the LRA. The time limits contained in the LRA are in place to ensure speedy and efficient resolution of disputes which should form the basis of dispute resolution in this country.

[37] Given the nature of the ruling there is no need for the ruling to be reasonable. It must be correct in law and if not it must be reviewed and set aside.

[38] Given the extent of delay and for the reasons set out above the Second Respondent's ruling cannot be correct.

[39] For these reasons, the Second Respondent's decision is reviewed and set aside with costs.

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Maeso, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant:	Ms Cele
Instructed by:	AP Shangase & Associates
Third Respondent:	Advocate P J Blomkamp
Instructed by:	Llewellyn Cain Attorneys