IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Not Reportable

Case no: D 1287-17

In the matter between:

C JIJANA AND 12 OTHERS	**Applicant**
and	
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**First Respondent**
COMMISSIONER P JAIRAJH	**Second Respondent**
GOSSBC	**Third Respondent**
Heard: **3 May 2018**	
Delivered: **3 October 2018**	

JUDGMENT

WHITCHER J

[1] This is an application to review and set aside the second respondent's ruling that the third respondent did not have jurisdiction to determine the dispute

referred by the applicants to the first respondent on 27 July 2016 under case number GPBC 1488/2016.

[2] The terms and conditions of employment of the employees who are subject to the GPSSBC are encapsulated in resolutions of the bargaining council which record collective agreements. Among other collective agreements are several which deal with “occupational specific dispensations” (OSDs).

[3] The parties to PSCBC Resolution 1 of 2007 resolved to implement OSDs for the different categories of employees in the Public Service and that the OSDs must include unique salary structures per occupation; centrally determined grading structures; career pathing opportunities based on competence, experience and performance and pay progression within the salary levels.

[4] To this end a collective agreement, GPSSBC Resolution 1 of 2008, styled *Implementation of an Occupational Specific Dispensation (OSD) for legally qualified employees* was concluded in 2008.

[5] The applicants referred a dispute to the Bargaining Council on 27 July 2016.

[6] They ticked the box in the referral form which describes the nature of the dispute as an *interpretation and/or application of a collective agreement* and described the facts of the dispute as follows:

> *The Applicants are employed as Estate Controllers and/or Assistant Masters in the Masters Office in Durban. The employer has failed to implement the Occupation Specific Dispensation (OSD) for Legally Qualified Personnel: GPSSBC Resolution 1 of 2007. This resulted in the Applicants being paid far less salary compared to their colleagues who perform the same work as them.*

[7] Further, in answering the question what relief they wanted, they stated:

> *The employer corrects the Applicants’ salaries retrospectively, and to pay Applicants’ monies due to them as per the retrospective correction.*

[8] They recorded that the dispute had arisen in 2008.

[9] A document with their names, job titles and dates of employment was annexed to the referral form. According to the document, their respective dates of employment were in 2008, 2011, 2013, 2014 and 2015.

[10] At the commencement of the arbitration, the first respondent raised questions regarding the nature of the dispute and the long delay in referring the dispute.

[11] The first respondent complained that they had been unable to ascertain from the referral form the real nature and specifics of the dispute. They pointed out that PSCBC Resolution 1 of 2007 [on which the dispute appears to be premised] was merely a general conceptual resolution in terms of which the parties to the resolution had agreed to negotiate different OSDs (collective agreements) for the different categories of employees in the Public Service. Pursuant thereto a collective agreement (GPSSSBC Resolution 1 of 2008) styled *Implementation of an Occupational Specific Dispensation (OSD) for legally qualified categories of employees* was concluded in 2008. The OSD, *inter alia,* provided for a new system of differentiated salary scales for legally qualified employees and for the employees to be translated to appropriate posts and salary grades. And, as far as the first respondent was concerned it had implemented Resolution 1 of 2008. What then, can possibly be the dispute *about the application of the collective agreement*?

[12] The arbitrator was referred to the case of *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal*[1] in which the Labour Appeal Court noted as follows in para [17]:

> What is a "dispute" *per se,* and how one is to recognise it, demands scrutiny. Logically, a *dispute* requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. What is signally absent from the record is any clue that the respondent disputes that the collective agreement provides that an employee on

[1] [2016] 7 BLLR 649 (LAC)

suspension is entitled to full pay. Indeed, on the basis of the allusions in the ruling, that fact seems to be common cause. Similarly, there is no clue that the respondent disputes that the collective agreement binds itself and the appellant. What then, can possibly be the dispute *about the application of the collective agreement*?

[13] The first respondent further argued that whatever the nature of the dispute it had not been referred within a reasonable time, namely within 90 days of the alleged misconduct by the first respondent. In this regard, they again referred to the case of *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* in which the Labour Appeal Court stated as follows in para [32]:

> "…what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA not from civil litigation. A true money claim belongs to civil litigation and insofar as such a claim is covered by section 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and Prescription Act would prevail in such a context. The use of analogy must be tempered by an appreciation of the context and functionality of the procedures and remedies provided in the LRA. In true labour disputes, the provisions of section 191(1) of the LRA are a more obvious general yardstick to test what is a reasonable time for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. The appropriate enquiry is into the history of the engagement between the parties about the controversy, and the elapse of time since engagement to resolve the controversy ceased. Self-evidently, the ultimate decision on reasonableness has to be fact-specific. A lapse of 692 days in respect of a failure to pay a salary is a remarkably long time. On this record, nothing said provides a convincing rationale why the delay was unavoidable.

[14] Counsel for the first respondent contended that in all these circumstances, there was no competent dispute before the arbitrator, alternatively the bargaining council lacked jurisdiction to determine the dispute.

[15] The applicants' attorney addressed the arbitrator and explained the nature of the dispute as follows:

> *The issue in dispute is that "the estate controllers and the assistant masters … are unfairly paid as a consequence of the respondent's failure to apply the OSD policy correctly. The consequence of that failure is that they end up paid less than what their counterparts are paid when they are actually doing the same job. That is the dispute.*

[16] And later in his address:

> *The way the department is applying the OSD results in the applicants being paid far less than their counterparts for performing the same work, the same amount of work, who have the same amount of experience, who have the same amount of service".*

[17] On which collective agreement the dispute was premised, he gave an extremely muddled response. From what I could gather after *repeated* readings of the record his argument went something like this: Resolution 1 of 2008 was supposed to give effect to Resolution 1 of 2007. The applicants' complaint is that Resolution 1 of 2008 does not give effect to Resolution 1 of 2007 and the manner in which the first respondent has implemented Resolution 1 of 2008 does not give effect to the objectives of an OSD set out in Resolution 1 of 2007.

[18] He contended that the referral was not out of time because the LRA does not set a time frame for referring a dispute that concerns an interpretation and/or application of a collective agreement.

[19] Moreover, he contended, the applicants' dispute on the interpretation and application of a collective agreement is "entwined with an unfair labour practice because the result of the misinterpretation of the collective

agreement is an unfair labour practice" and an unfair labour practice is committed every month the first respondent unfairly implements the OSDs.

[20] In regard to the latter, he cited the case of *SABC Ltd v CCMA and Others*[2] in which the Labour Appeal Court held as follows in paras [27] and [28]:

> … The problem however is that the argument presented by the appellant is premised upon the belief that the unfair labour practice/unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.
>
> Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/ unfair discrimination commenced because it is not a single act of discrimination but one which is repeated monthly. In the circumstances the dispute being labelled as ongoing was an accurate description of the *"dispute date"* and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct.

[21] The first respondent countered that the council does not have jurisdiction over a complaint that a collective agreement had resulted in an unfair labour practice.

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[2] (2010) BLLR 251 (LAC)

[22] The arbitrator found as follows:

> *I accept the respondent's argument that the Council does not have jurisdiction to deal with the alternative claim of an unfair labour practice. I accept the respondent's assertion that as the Court held in* Hospersa, *the provisions of section 191(1) of the LRA is the yardstick to test what is a reasonable time. Having regard for what triggered a referral to be made in terms of section 191 and failing which an application for condonation should be made, I find that a lapse of 8 years to refer a dispute is an unreasonably long time. As a consequence of the above the GPSSBC does not have jurisdiction to determine the matter.*

Analysis

[23] The applicants' explanation of the nature of their dispute was muddled and confusing.

[24] At times it appeared that they took issue with the *content* and *fairness* of Resolution 1 of 2008, to wit that it does not give effect to Resolution 1 of 2007 and impacts unfairly on the applicants. The bargaining council clearly has no jurisdiction to deal with such a dispute.[3]

[25] At other times, they seemed to assert that the first respondent had *incorrectly interpreted and applied both collective agreements.* Clearly only Resolution 1 of 2008 is open to an interpretation and/or application dispute.

[26] The judgment in *Department of the Premier, Western Cape v Sam Plaatjies NO and others*[4] is instructive here. In the matter the respondents, all state or senior state legal advisors employed by the applicant, were "translated" to higher grades pursuant to an "occupation specific dispensation" collective agreement. They referred a dispute to the respondent bargaining council, claiming that the applicant had committed an unfair labour practice by not *applying the agreement properly.* The Court noted that the employees had not

[3] See *IMATU v SALGBC & others* (2010) 31 ILJ 1407 (LC) para [13]; *Public Servants Association obo Strauss and others v Minister of Public Works N0 and others* [2013] 7 BLLR 710 (LC); *Department of the Premier, Western Cape v Sam Plaatjies NO and others* [2013] 7 BLLR 668 (LC)

[4] [2013] 7 BLLR 668 (LC)

taken issue with the *content* of the agreement. Their complaint was that the employer had *incorrectly interpreted or applied it* when effecting their translation. Although the referral was rather imprecisely formulated, the employees' main claim concerned the interpretation of the collective agreement. If that was the true nature of the dispute, the bargaining council had jurisdiction. *But if the effect of the application of the agreement was unfair* to the employees that was a consequence of a bargain their union had struck with the employer, and its members had to live with the consequences. A collective agreement is binding on all members of the union parties. *Even when a party has referred an interpretation or application dispute, the arbitrator is bound to determine the true issue.* In this case, the main dispute was about the application of the collective agreement. The council had jurisdiction to determine that dispute, *but not over the alternative unfair labour practice claim.* All the council could do was to determine whether the agreement had been applied correctly. If the agreement was found to have been correctly applied, that would have been the end of the matter. *The council could not determine whether the agreement had been fairly applied.* The arbitrator's award was set aside and replaced with an order declaring that the council had jurisdiction to entertain the interpretation/application dispute, but lacked jurisdiction to entertain the alternative unfair labour practice claim.

[27] As stated, the applicants in their opening address did not demonstrate a dispute the terms of which were clear, understandable and fell within the jurisdiction of the bargaining council.

[28] However, the following observation by the Constitutional Court in *CUSA v Tao Ying Industries and Others (2008) 29 ILJ 2461 (CC)* at para 66 should have been instructive to the arbitrator:

> A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change

> its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration……The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.[5]

[29] The case before the arbitrator did not deal with a simple subject matter. An arbitrator acting reasonably would have adjourned the matter and instructed the applicants to file a written statement of case or permitted the applicants to lead the evidence of their main witness. If at the end of his or her evidence-in-chief, an adjournment was necessary for the first respondent to take instructions and prepare its cross examination, that could have been done. I note from the record that the applicants' representative made a similar request.

[30] However, this is not the end of the matter. The question is whether the way the arbitrator ultimately disposed of the case is reviewable.

[31] The arbitrator essentially disposed of the case on the basis that the dispute was not referred within a reasonable time.

[32] In my view, the arbitrator committed a material irregularity in summarily disposing the matter in this manner. In *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal,* the Labour Appeal Court stated as follows:

> "…what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA not from civil litigation. A true money claim belongs to civil litigation and insofar as such a claim is covered by section 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and Prescription Act would prevail in such a context. The use of analogy must be tempered by an

[5] Emphasis added.

> appreciation of the context and functionality of the procedures and remedies provided in the LRA. In true labour disputes, the provisions of section 191(1) of the LRA are a more obvious general yardstick to test what is a reasonable time for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. *The appropriate enquiry is into the history of the engagement between* the parties about the controversy, and the elapse of time since engagement to resolve the controversy ceased. *Self-evidently, the ultimate decision on reasonableness has to be fact-specific.* A lapse of 692 days in respect of a failure to pay a salary is a remarkably long time. *On this record, nothing said provides a convincing rationale why the delay was unavoidable.*[6]

[33] On the face of the matter, the dispute appears to have been referred about 6 years after the translation process began and, although the parties did not deal with this point on record, my understanding from various judgments on the matter is that the translation of an employee comprises a single event at a specific point in time. However, the annexure to the referral form records that there are various applicants with different dates of employment and the applicants recorded in their referral that there was a history of engagement with the first respondent on the matter. The first respondent also indicated to the arbitrator that the translation process comprises of at least two phases.

[34] In these circumstances an arbitrator acting reasonably would have struck the matter from the roll and advised the applicants to file an explanatory affidavit (a condonation application) to explain the time factor and if relevant the delay in referring the dispute to get the matter reinstated.

[35] To sum up, in the circumstances of this case, the arbitrator should have given the applicants an opportunity to file an explanatory/condonation affidavit, and

[6] Emphasis added

in the event of a successful application, an opportunity to lead evidence on the matter to ascertain the real dispute between the parties.

[36] The arbitrator would have been entitled to award costs against the applicants for the adjournment. The record reveals that prior to the arbitration the first respondent asked the applicants to attend a pre-trial conference to clarify the nature of the dispute, but the applicants' attorney, with no rational explanation, refused to attend same or offer a statement of claim.

Order

[37] In the premises, the following order is made:

(1) The second respondent's ruling is reviewed and set aside.
(2) The applicants may apply to have the matter re-enrolled together with a condonation application and statement of case.
(3) I make no order as to costs.

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B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	S Mhlanga from Mhlanga Incorporated
For the First Respondent:	RPA Ramawele, SC instructed by the State Attorney, KwaZulu-Natal