



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case No: D264/20

In the matter between:

SIBUSISO JUSTICE KUNENE

Applicant

and

EZEMVELO KZN WILDLIFE

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

SIZWE M. NGUBANE (cited in his capacity as Commissioner
of the Commission for Conciliation, Mediation and Arbitration)

Third Respondent

Heard: 21 October 2020

Delivered: This judgment was handed down electronically by circulation to the parties and /or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 22 October 2020.

Summary: Review

JUDGMENT

SCHUMANN, AJ

- [1] The Applicant in this matter seeks an order reviewing and setting aside a ruling by the Third Respondent refusing condonation for a late referral of an unfair labour practice dispute against the First Respondent to the Second Respondent. The grounds on which the review is based are that the Third Respondent paid insufficient attention to the Applicant's prospects of success, alternatively, that because the unfair labour practice alleged was "*ongoing*" no application for condonation was necessary.
- [2] The referral to the Second Respondent was made on 18 February 2020, nearly seven years after the unfair labour practice alleged by the Applicant first arose in June 2013. The Third Respondent provided brief reasons for the refusal of condonation on a standard form. He stated simply that the delay of seven years was excessive and the explanation inadequate. Whether the prospects of success were good or not, in the absence of a suitable explanation for a very lengthy delay he was not inclined to grant condonation.
- [3] Although it is so that the Applicant annexed several documents to the standard form application for condonation which he contended demonstrated his excellent prospects, I cannot seriously fault the reasoning of the Third Respondent or find that no reasonable Commissioner would have refused condonation on the material before him. The Applicant alleged only that his union had been attempting to resolve the matter with the First Respondent during the seven year period and a letter to the MEC: Economic Development and Environmental Affairs, dated November 2016, outlining his dispute and requesting intervention is one of the annexures to his affidavit. He further mentions in his affidavit that the dispute had come before the Labour Court in March 2017 and he had been advised to refer the matter to the Second Respondent. The explanation is scant and there are very lengthy periods for which no proper explanation is provided at all. While the Applicant's prospects of success may appear positive (in the absence of a version from the employer),

they can be pitched no higher than that and the Third Respondent's refusal of condonation must, therefore, stand.

It is on the second leg of the Applicant's argument that I am satisfied a case is made out for review of the Third Respondent's ruling although only in a more limited sense than contended for by the Applicant. It is apparent from the documents put up before the Third Respondent by the Applicant that the unfairness alleged is ongoing. His claim is that he was promoted to the position of "Wildlife Investigator" but never paid the correct salary and benefits. Paragraph 3 of his letter to the MEC states as follows: *"I am prejudiced by this action because since 01 June 2013 I have been performing duties in terms of my realigned but have not been compensated for it"* (sic)

An unfair failure to grant promotion to an employee is a single act of unfairness even though there may be financial consequences stretching beyond that single unfair act. Where, however, it is alleged that a promotion was granted but aspects of the promotion, such as the salary and/ or benefits subsequently provided or the responsibilities of the position, do not accord with the dictates of fairness (for example, where the employee is not given what was promised or is paid less than others in the same post) the unfairness is ongoing for as long as the conduct complained of persists. (See **SABC v CCMA and Others** 2010 31 ILJ 592 LAC) The Applicant's case as outlined in his condonation affidavit and the documents annexed to it clearly alleges such ongoing unfairness and is congruent with the facts in the **SABC** matter.

- [4] Thus, while the refusal of condonation for the period up to 90 days prior to the referral is not reviewable (the time period within which the dispute must be referred in terms of section 191(1)(b)(ii)), the Second Respondent has jurisdiction to deal with the alleged ongoing unfairness from that time forward without condonation being granted. The effect of the Third Respondent's ruling is that the Second Respondent is deprived of jurisdiction to deal with the period for which the Applicant does not require condonation. It is trite that a ruling which incorrectly either grants or denies jurisdiction is reviewable and the Third Respondent's ruling should thus be corrected.

- [5] When this matter was called on 13 October 2020 I was satisfied that service of the Notice of Set Down had been properly effected on the First Respondent by the Registrar at its email address as the matter was unopposed. After being addressed by Mr Luthuli for the Applicant I indicated the nature of the relief I intended to grant but that I would draft a short judgment setting out my reasons which would be delivered electronically in due course. I later discovered a notice of opposition in the court file which gave the details of a firm of attorneys at whose address the First Respondent would accept service of all notices and documents. I therefore requested my registrar to contact Mr Luthuli and inform him that the matter was adjourned to 21 October 2020. In light of the fact that the notice was not served on the attorneys he was requested to contact them and inform them of the date.
- [6] When the matter was called on 21 October 2020 he informed me that he had tried to contact one of the partners of the First Respondent's attorneys who had subsequently returned his call on or around 15 October. He had given him full details regarding the matter, the reasons why it had been adjourned to 21 October and the relief I had previously indicated I was inclined to grant. The First Respondent's attorney indicated that he would peruse their file in the matter and revert but did not do so.
- [7] In the circumstances, I am satisfied that to the extent that service of the notice of set down on the First Respondent and not its attorneys may have been irregular, this has now been cured. As more than 30 days have lapsed since the Applicant's original referral, the matter should proceed to arbitration. I accordingly grant the following order:
- [7.1] The ruling of the Third Respondent is reviewed and corrected to read as follows:
- (a) Condonation for the late filing of the Applicant's referral from the inception of the alleged unfair labour practice until 90 days prior to the date of the referral is refused.

- (b) In respect of the ongoing unfairness allegedly occasioned by the conduct of the Respondent, Ezemvelo KZN Wildlife, from 90 days prior to the referral forward, the matter must proceed to arbitration.

[7.2] The arbitration referred to in paragraph (b) above must be set down before a Commissioner other than the Third Respondent.



P Schumann

Acting Judge of the Labour Court of South Africa