IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2014/2008

In the matter between:

POPCRU obo SM MOROKA AND 8 OTHERS **Applicant**

and

COMMISSIONER MNS DAWSON N.O. **1st Respondent**

THE MINISTER OF SAFETY AND SECURITY **2nd Respondent**

THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **3rd Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. The Minister of Safety and Security, the applicant in this matter, seeks to rescind a default order handed down by Van Niekerk, AJ (as he then was) on 20 December 2008, in which an arbitration award handed down under the auspices of the Safety and Security Sectoral Bargaining Council dated 18 August 2007 was made an order

of the Labour court in accordance with section 158(1)(c) of the Labour Relations act 66 of 1995 ('the LRA').

2. Although the citation of this matter reflects the parties in their respective capacities in the original default application, the applicant in these proceedings ('the Minister' or 'the employer') was the second respondent in the original application and the third respondent in these proceedings ('the union') was the applicant in the default application proceedings. I shall refer to the eight individual employees whose joint grievance resulted in the referral of the matter as an unfair labour practice dispute as 'the individual grievants'.

Condonation

The length of delay

3. The default order is dated 20 December 2008, which was a Saturday. Some allowance can be made for the fact that it only reached the state attorney's offices on 23 December. In terms of rule 16A(2)(b) of the Labour Court rules, the rescission application should have been launched by 19 January 2009. However it was only launched over two months later on 25 March 2009. Consequently the application is 47 court days overdue, and the employer seeks condonation for the late filing of the application. The length of the delay, given the nature of the application, is considerable.

The explanation for the delay

4. At the time of the default order being granted, an application for review of the original arbitration award was pending. This was pertinently brought to the attention of the court at the time by the union's legal representative. It should be mentioned that the review application had been launched in October 2007, but by the time the

s 158 application was heard more than a year later, no further steps had been taken in that matter. It was only when preparation for this application was under way, that the employer sought to breathe new life into the review application.

5. The employer's explanation for the delay in bringing the rescission application was essentially that:

5.1. the order was faxed to the state attorney's office on 23 December 2008, but was not brought to his attention even though he only went on leave on 2 January 2009. The reason for him not becoming aware of the section 158(1)(c) application was that it was misplaced in the mailroom and was only located on the state attorney's return from leave on 26 January 2009;

5.2. the relevant state attorney only learnt of the order on 12 January 22009 after receiving a call from the union's attorney enquiring if the South African Police Services ('SAPS') would comply with the order.

5.3. the rescission application was not attended to immediately on account of the state attorney's "very busy schedule" on his return from leave resulting in him only briefing counsel for an opinion on the prospects of success on rescission on 16 February 2009. This four week period of delay between 19 January and 16 February is the first significant delay in the matter, after the period for launching the application expired.

5.4. Counsel provide an opinion on 19 February 2009, but the state attorney did not act on it promptly because he was engaged in handling matters in two different courts on 19 and 20 February 2009. However, the state attorney only consulted with counsel on 16 March 2009 about the steps to be taken in terms of counsel's opinion. The period between 20 February and 16 March is the second major delay in attending to the matter.

6. Although the relevant state attorney was on leave when he learnt of the order, no steps were taken to get anyone else in the state attorney's office to refer the matter to counsel before his return. On his return this should have been a priority, especially once he realized that the section 158(1)(c) application had in fact been received by his office.

7. The delays in seeking counsel's advice and consulting again with counsel three week's later are not properly explained even if allowance is made for the matters the state attorney had to attend to in February. Notwithstanding his "busy schedule" the state attorney does not explain why other matters took priority on his return and why this matter had to wait three weeks before it was even referred to counsel for an opinion. To simply cite a 'busy schedule' is not a satisfactory explanation and is wholly lacking in the kind of detail that should be provided in a condonation application.

8. If he was engaged in other matters on 19 and 20 February, but got the opinion on 19 February, there is no explanation at all why it took another three weeks to set up a consultation with counsel. Thus, the explanation provided still fails to account for approximately seven weeks or nearly two-thirds of the actual delay.

9. Given the existence of a default court order and the time limit for filing rescission applications, the state attorney should have proceeded with a much greater sense of urgency, even if further allowance is made for the late receipt of the copy of the order because his office was operating on a skeleton staff complement during the December period.

10. The explanation for most of the delay is accordingly unsatisfactory and might well be construed as providing sufficient reason for refusing the condonation application.

Merits of the matter

11. The Labour Appeal Court decided in ***Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*** **(2007) 28 ILJ 2246 (LAC)** that rescission can be granted if the applicant can show good cause for the default, even if it does not qualify for rescission under the more limited grounds set out in section 144 of the LRA. The LAC approved the following statement in ***Northern Province Local Government Association v CCMA & other*** **(2001) 22 ILJ 1173 (LC): "**An applicant for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defence to the plaintiff's claims.'[1]

12. In this instance, the employer's justification for failing to oppose the application is rather weak. This is not a case where the respondent did not receive notice of the application. The court is told the application did not come to the state attorney's attention because it had been "misplaced" in the registry section. Quite how it got misplaced and the circumstances under which it was eventually found remain a mystery, despite a supporting affidavit from a registry clerk. Nevertheless, limited though the details are, they do tend to show that the person responsible for dealing with the matter was unaware of the application and I accept therefore, albeit with some reservation because it appears to have been a result of administrative neglect, that there was a plausible explanation for the second respondent's failure to oppose the application.

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[1] ***Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*** **(2007) 28 ILJ 2246 (LAC)**, at 2257 par [35].

13. The applicant's prospects of ultimately succeeding with the rescission application, if condonation is granted must also be considered. The applicant's prospects of success on rescission are linked to the merits of the case, in the sense that in order to rescind the default judgment the employer must be able to demonstrate it has a *bona fide* defense to the application to have the award made an order of court. The existence of a *bona fide* defense, in turn, relates partly to the employer's prospects of success in reviewing the arbitration award. At the time of the original application being heard, no record of the arbitration award had been filed, though the employer had belatedly taken steps to compel production of the record from the bargaining council.

14. To evaluate if the employer's prospects of success in the review application are reasonable, the arbitration award and the main grounds of review must be considered. The facts of the dispute before the arbitrator are mainly common cause. The parties differ more over the legal interpretation to be placed on those facts, and in particular over the legal characterization of the dispute.

15. The arbitrator held that by employing the individual grievants as administrative clerks but requiring them to perform the duties of trainers without promoting them to trainers' positions, SAPS had committed an unfair labour practice.

16. The arbitrator therefore ordered SAPS to "promote the applicants... to the rank of trainer with effect from the 7 December 2004." The employer was further ordered to adjust the salaries of each one of the individual grievants from the level of administrative clerks, at level 3, to that of trainers, at level 6.

17. The arbitrator states that when he asked SAPS's representative to address him on the fairness of appointing someone as an administrative clerk while requiring them to perform the duties of a trainer, he refused to do so. Instead the representative argued

that the individual grievants were employed as administrative clerks and were being paid as such.

18. On the material available, the dispute giving rise to the award may be summarised as follows, though it is quite possible that more may come to light about the real nature of the dispute once the full record of the review application is available:

    18.1. The individual grievants were first employed at the SAPS Benoni Institute as contract workers. Although they were performing duties for SAPS, they were being remunerated by the European Union ('the EU').

    18.2. It was common cause that they were performing the duties of driving trainers.

    18.3. When the EU withdrew its assistance, the individual grievants were earning salaries of R 60,000 - 00 per annum.

    18.4. According to the arbitrator, they were then engaged by SAPS at a salary of R 39,498 per annum, which was the salary of a level 3 Administrative clerk. On the written offers of employment made to the driving trainers they were designated as administrative clerks. They reluctantly accepted this though they continued to work as driving trainers.

    18.5. In terms of a letter from the commander of the driver training at Benoni, dated 15 December 2005, the individual grievants were wrongly appointed and after a year in employment were still on the wrong rank structure. The commander recommended that they be appointed as training officials, noting also that they had the same qualifications as other training officials stationed at the Driver section.

    18.6. In July 2006, the individual grievants lodged their grievance with SAPS. In their grievance they claimed they had been wrongly appointed to the incorrect

rank and demanded rectification of this. According to the arbitrator, their case was that because they had been performing duties as trainers and not administrative clerks, the respondent was obliged to promote them to the rank of trainers, namely level 6 of the remuneration scale.

19. The essence of SAPS' complaint about the merits of the award is that the dispute before the arbitrator was nothing more than a wage dispute as the employees were seeking to be paid salaries at level 6 because they were entrusted with the responsibilities of trainers.

20. The employer argues that the arbitrator's characterization of the dispute as a dispute over promotion is a contrivance by him to overcome the fact that the dispute concerned a 'wrong appointment', which is something not provided for by the unfair labour practice provisions of section 186(2) of the LRA.

21. In the alternative, the employer claims that because the individual grievants were clearly unhappy with the terms on which they were appointed, it might be argued that the dispute is essentially a contractual one over which the arbitrator also had no jurisdiction. Certainly the terms of the contracts which designated them as administrative clerks appear to bear no relationship to their actual job, but quite what the contractual remedy would be in the circumstances is somewhat obscure.

22. The employer argues that the dispute is analogous to the situation which confronted this court in the case of ***Northern Cape Provincial Administration v Hambridge NO and Others*** **(1999) 20 ILJ 1910 (LC)**, except that in this matter the appointments of the individual grievants were made by mutual agreement. In the *Hambridge* case, the court was dealing with an unfair labour practice claim in which the employee claimed to be entitled to a 'benefit' of an allowance for carrying extra responsibilities while acting in a higher position. The court held that was a salary or wage issue concerning

a matter of mutual interest and not about a benefit within the meaning of the term as it is used in the unfair labour practice definition.[2]

23. On the face of it, this dispute is not simply a question of employees wanting more pay because they are temporarily performing the functions of a higher graded job, or because they have assumed responsibilities in addition to those they perform in relation to their job designation. On the face of the available evidence, the individual grievants never were administrative clerks in anything but name. According to the letter from their commander, their only functions are those of training officers.

24. The individual grievants have not asked for a grading and evaluation exercise to be conducted, nor have they demanded that they should simply get more pay for what they do. What they are seeking is to be placed at the post and level which corresponds to the job they have always performed, namely that of a training officer. Changing the their current job designation as administrative clerks to that of training officers, with a commensurate adjustment of their remuneration might be construed as a promotion, and in this sense, the dispute could be characterized as one relating to promotion.

25. On the other hand, it is also not a typical dispute in which trainers' posts were advertised after the engagement of the complainants by SAPS, and where they were rejected as suitable candidates, thereby giving rise to an unfair labour practice dispute premised on a refusal to promote staff.[3] This is also not a case in which the grievants' existing posts were upgraded whilst they occupied them.[4] I cannot say therefore that SAPS has no prospect of succeeding with its argument that this is not a promotion dispute in the true sense of the word.

26. In response to the employer's attack, Mr Basson, who appeared for the union, suggested in the alternative that the arbitrator enjoyed jurisdiction over the dispute

[2] at 1914, paras [16] – [17] of the judgment.
[3] See ***Jele v Premier of the Province of Kwazulu-Natal & others*** **(2003) 24 ILJ 1392 (LC)** where the court discussed promotions in the context of distinguishing them from appointments.
[4] See ***National Commissioner of the South African Police Service v Potterill NO and others*** **(2003) 24 ILJ 1984 (LC)**.

even if it was a mutual interest matter (in the narrow sense of a dispute of interest) because the dispute arose in the context of an essential service. It is possible the case could have been dealt with in this manner, but it seems clear from the award that the matter had been referred as an unfair labour practice rather than a dispute of interest and that the arbitrator determined the matter on that basis. It might also be argued by the union that the unfair labour practice jurisdiction is not so inflexible it cannot remedy the alleged inequities in the employer's treatment of the respondents.

27. However, for the purposes of this analysis, it is sufficient that it is possible SAPS could succeed in a jurisdictional challenge on the basis outlined above.

28. For the purposes of condonation, a party must demonstrate a reasonable prospect of success, but for the purposes of rescission the applicant must merely establish some prospects of success. The evaluation of this lesser degree of prospective success has been expressed as follows:

> *"(I)t suffices if an applicant shows a prima facie case in the sense of setting out averments which, if established at the proceedings, would entitle that party to the relief asked for. An applicant need not necessarily deal fully with the merits of the case."* [5]

29. As I believe the second respondent has demonstrated some prospect of successfully challenging the arbitrator's jurisdiction, based on its narrow interpretation of what a dispute relating to promotion entails, the second respondent has some prospect of succeeding with its review application. For the purposes of a rescission application, this means it is able to lay a basis for arguing that the arbitration award should not be made an order of court, at least pending the outcome of the review application.

[5] See ***SA Democratic Teachers Union v Commission for Conciliation, Mediation & Arbitration & others* (2007) 28 ILJ 1124 (LC) at 1132-1133**, paras [36] – [37] and the judgments cited there.

30. Has the second respondent demonstrated a serious intention of proceeding with the review application? Initially the review application proceeded in good time, though the second respondent only followed up on the apparent failure of the bargaining council to file a record of proceedings eight months later, in June 2008. It appears the reason for this is that the 7A notice issued by the bargaining council on 8 November 2007 had not come to the state attorney's knowledge, a common occurrence in the employer's conduct of this matter. It was only in August 2008, after the uplifted record had been transcribed and sent to counsel, that the second respondent became aware the record was seriously incomplete.

31. At this point, the state attorney simply misplaced the file and forgot about this matter. He claims he would have been attending to six other files of other clients of the state attorney at any one time, and not having sight of the file he forgot about it. While the state attorney's candour about his neglect is commendable, the result was that the matter lay unattended until five months later when he received counsel's opinion in January 2009 which urged SAPS to take steps to compel the filing of the record. Only the prospect of not obtaining rescission galvanized the second respondent to revive the review process at this point.

32. However, this is not a case in which the review application was only initiated when an application under section 158 was launched to make the award an order of court, and even though it has done so falteringly, the second respondent has demonstrated an intention to pursue the review application and does not appear to have been willfully in default.

33. In conclusion, the second respondent has demonstrated a reasonable prospect it ought to succeed in rescinding the default order, if condonation for the late referral were granted.

Prejudice

34. It is true that if the condonation application is refused, the second respondent will have to comply with the court order and it might have some difficulty recovering payments already made pursuant to the order, if it is vindicated on review. It must be said that as the individual complainants remain employed by the second respondent this risk is not as great as the risk of non-recovery in the case of reviews in unfair dismissal cases where the former employees might still not be gainfully employed. Against this I must consider that the earnings differential which might be payable appears to be in the region of 50 % of the individual grievants' salaries. This would amount to a significant sum to recover if the employer ultimately succeeded with its review application.

Conclusions

35. The second respondent has demonstrated that it was not willfully in default, and that it probably has a *bona fide* defence. Even though I am not satisfied that significant delays in bringing the rescission application are properly explained, I am inclined to condone the late referral of the rescission application on an overall consideration of all the factors informing the grant of condonation.

36. In view of my assessment of the second respondent's prospects of rescinding the order of this court, in my consideration of the condonation application, it follows that the second respondent's rescission application should also succeed.

37. However, on the face of the matter, the conduct of the state attorney's office in dealing with this application which necessitated the rescission application and the condonation application, makes this a matter in which costs should not follow the result. My *prima facie* view is that the general neglect displayed in the handling of court process by the state attorney's registry office and the casual approach of the state attorney in pursuing the matter once it came to his attention, is conduct

deserving of a mark of this court's disapproval in the form of an adverse cost award on an appropriate scale of costs.

38. As the matter of such an award of costs was not raised when the matter was argued, the parties are given an opportunity in terms of the order below to make submissions in this regard.

Order

39. Accordingly, it is ordered that:

    39.1. the second respondent's late referral of its rescission application in respect of the default order issued by this court on 17 December 2009 is condoned;

    39.2. the default order of this court issued on 17 December 2009 making the arbitration award of the first respondent an order of court is rescinded, and

    39.3. the determination of an order of costs is reserved pending consideration of any further submissions made by the parties in terms of the direction below.

40. It is directed that:

    40.1. the parties must file and serve further written submissions they might wish to make on the issue of an appropriate order of costs in the matter within 10 days of this judgment being handed down, and may file and serve any response they wish to make to the other party's submissions within 5 days of receipt thereof, and

40.2. in any submissions made in terms of this direction, the parties should also address the question whether or not this is a case in which it would be appropriate for this court to make an adverse award of costs against the second respondent and what an appropriate scale of costs would be in the event that it does.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 26 January 2010
Date of judgment: 15 April 2010

Appearances:

For the applicant: Mr JL Basson
Instructed by Grosskopf Attorneys

For the second respondent: Mr P C Pio
Instructed by the State Attorney