THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C 485/2020 NOT REPORTABLE

In the matter between:

MARVIN BARNARD	**First Applicant**
and	
CITY OF CAPE TOWN	**First Respondent**
COMMISSIONER JANINE CARELSE	**Second Respondent**
COMMISSIONER ORLANDO MOSES	**Third Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Fourth Respondent**

Date of Set Down: 22 March 2023

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 28 March 2023.

Summary: (Review – condonation and jurisdictional rulings – condonation of late filing of review application – dismissed on a conspectus of factors)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant wishes to review two rulings by panellists of the fourth respondent (the SALGBC or 'the bargaining council'). The first ruling was handed down by the third respondent (Ms J Carelse) on 5 August 2019, and the second on 21 August 2020 by the second respondent (Mr O Moses), hereinafter referred to as the first and second arbitrators respectively. The first ruling dismissed the applicant's application for condonation for the late referral of his dispute to the bargaining council. The second ruling held that the arbitrator had no jurisdiction to consider another condonation in respect of a later referral of a dispute.

[2] The applicant also requests the court to condone the late filing of his review application of the two rulings on 19 November 2020.

[3] When the review and condonation application was first enrolled on 7 February 2023, it became apparent that service of court process by the applicant had been effected by email. This was done before the Judge President of the Labour Court had issued general directive LC 02/2022 on 5 January 2022 permitting service by email. Accordingly, to ensure that the first respondent had an opportunity to still oppose the application, service by email was permitted but further time was granted to the first respondent to file opposing papers and the application was re-enrolled on notice to both parties on 22 March 2023. No opposing papers were filed and the first respondent did not appear at the postponed hearing. Accordingly, the matter proceeded by default. The applicant, Mr M Barnard ('Barnard'), represented himself.

Chronology of events

[4] Barnard is employed in the Library and Information Services department of the City of Cape Town, the first respondent. He has pursued a dispute arising from his unhappiness with the outcome a job evaluation exercise in 2018 via a very circuitous route.

[5] Before addressing his application for condonation of the late filing of his review application it is necessary to set out a brief summary of the history of the dispute.

[6] Barnard initially claimed that the City committed an unfair labour practice on 1 November 2018 when it failed to re-grade him at salary level 14 following a job evaluation. It should be mentioned he had not been entirely unsuccessful in getting his job grade re-evaluated as he was raised to a higher salary level as a result of the exercise.

[7] In any event, he referred the dispute to the bargaining council ('the SALGBC') as an unfair labour practice claim under s186(2) of the Labour Relations Act, 66 of 1995 ('the LRA'). The referral form was not part of the record nor attached to the pleadings, but it appears it was referred timeously to the bargaining council.

[8] However, when the matter was enrolled at the SALGBC on 19 January 2019, he and his union withdrew his dispute 'to pursue the matter as an equal pay for equal work dispute in the CCMA'. This latter dispute was later referred to the CCMA and on 15 April 2019, was unsuccessfully conciliated in that forum. The certificate of outcome issued by the presiding commissioner characterised the dispute as an unfair discrimination claim relating to equal pay for work of equal value and indicated that it could be referred to the Labour Court. This was in accordance with the way Barnard characterised his dispute in the CCMA at that stage.

[9] However, on 25 June 2019, instead of referring an unfair discrimination dispute to the Labour Court under the s 6(4) of the Employment Equity Act 55 of 1998, he referred his dispute to the SALGBC for a second time. On this occasion, the dispute referral form again characterised the dispute as an unfair labour practice dispute under s 186(2) relating to promotion. However, in his description of the dispute on the referral form he also claimed that the employer did not comply with its Job Evaluation policy principles which required it to ensure equal grading for work of equal value.

The first arbitrator's ruling on condonation

[10] The second referral to the SALGBC was made about five months later than it should have been. Accordingly, he brought a condonation application to have the late referral permitted. The first arbitrator dismissed the condonation application with detailed reasons. In the course of her reasoning, she set out the chain of events leading to the late referral. She noted it was the applicant and his union which had decided to re-refer the dispute. They had not been compelled to do so by any adverse ruling.

[11] The arbitrator correctly held that she had to deal with the second referral as a fresh one because the first one had been withdrawn. Unsurprisingly, she found that the delay of 146 days was excessive. The reason for the delay was solely due to the applicant changing dispute forums of his own accord. In addition, there was a delay of two months since the referral to the CCMA was withdrawn. The arbitrator found that there was no explanation for this latter delay which Barnard should have provided.

[12] Turning to Barnard's prospects of success, the arbitrator concluded that his case concerned a complaint that he was not receiving the same salary as others performing the same work. The SALGBC could only determine a dispute relating to benefits under its unfair labour practice jurisdiction. She considered whether there was any prospect of success in the light of this being the issue. The arbitrator noted that Barnard had already been upgraded to the highest level in the Administrative stream when he was upgraded from Administrative Officer 2 at salary level 11 to the position of Administrative Officer 3 at salary level 12/13. She accepted the City's contention that, in order to advance his cause further, Barnard would have to be appointed to a post outside the administrative stream he was in. That would have entailed advertisement of a new post and he would have had to participate in a competitive recruitment and selection process. In light of this, she found his unfair labour practice claim had poor prospects of success.

[13] The arbitrator concluded that, in the absence of a proper explanation for a substantive portion of the delay, and the poor prospects of success, his

condonation application should fail. The arbitrator's ruling on condonation was issued on 25 July 2019 and was received by Barnard on 8 August 2019. Accordingly, if he wished to review that ruling, the application should have been filed by 19 September 2019. However, the application was only filed well over a year later on 30 November 2020, as one component of a single application which also included an application to review the ruling of the second arbitrator (handed down on 21 August 2020). I note that the review of the second ruling should have been filed by 2 October 2020, so the combined review application was also filed nearly eight weeks' late in respect of that ruling.

[14] In his supplementary affidavit in the review application, Barnard outlined events between August 2019 and November 2020. He stated that by 26 September 2019 he learned that IMATU, which he belonged to at the time, was not prepared to take his case to the labour court. He eventually took advice from a labour lawyer who suggested that it would be more cost effective to attempt to get his job re-evaluated again than referring a case to the labour court. In the email containing this advice, which Barnard included as an annexure to his papers, the attorney stressed that it was unlikely he would be permitted to review the original condonation ruling because of the elapse of time since it was handed down. Barnard stated another reason he was advised that he should follow the re-evaluation route as he had already prepared a re-evaluation document and submitted it to his line manager.

[15] Barnard maintains that he requested feedback for three months without receiving any response from the City following the requested the re-evaluation of his job description. Consequently, he launched a grievance on 20 February 2020. He alleges that, on 9 March 2020, it was confirmed that his job description was for a higher grade than the one he was on. However, the City relied on a new provision in its job evaluation policy which stated that if a job evaluation result would entail placing the employee in a different career stream (e.g management rather than administrative) or a job more than two grades higher than the current one they occupied, then such a change was deemed to be a 'major change' and would require consideration of the creation of a new post. It appears on the second occasion, that it was again acknowledged

Barnard's job description would require the creation of new post and management declined to take the process further. I note that this policy was already in place at the time of the first job evaluation dispute in November 2018.

[16] Barnard's grievance came to a halt at the end of May 2020 after there was no response to the grievance he lodged at Step 3 of the grievance procedure. This led to his third referral of an unfair labour practice claim to the SALGBC on 26 June 2020. The City argued this was essentially the same dispute relating to the job evaluation outcome on 1 November 2018 and the dispute had already been disposed of by the first arbitrator's ruling.

The second arbitrator's jurisdictional ruling

[17] The second arbitrator agreed that the real issue in dispute still concerned the November 2018 job evaluation result and found that, instead of reviewing the ruling of the first arbitrator, the applicant had tried to circumvent that ruling by making a fresh referral on 20 June 2020. The arbitrator held that the matter was still subject to the ruling of the first arbitrator and accordingly he could not deal with the matter again. He declined jurisdiction on the basis that the dispute was *res judicata*.

[18] The second arbitrator was quite correct that he did not have the power to entertain a referral of what was essentially the same dispute in respect of which the first arbitrator had declined to grant condonation. Unless and until the first ruling was set aside the applicant could not proceed further with his claim and he could not refashion it in a different form to try and bypass the effect that ruling.

[19] Therefore, the primary issue on review is whether the first ruling should be set aside. But even before the merits of that can be considered, Barnard must first obtain condonation for the late filing of this review application.

The condonation application for the late filing of the review application

[20] At the initial court hearing in February this year, Barnard's service of court process by email was provisionally condoned, subject to the respondent being given a further opportunity to oppose the matter. However, by the time the matter was re-enrolled on notice to both parties for hearing on 22 March 2023, the City had neither opposed the condonation application nor the review application.

The extent of the delays

[21] Notwithstanding the City's apparent decision not to oppose the application, Barnard must still satisfy the court his belated review application of both rulings should be condoned. He should should have applied to review both of the rulings within 6 weeks of them being issued. Accordingly, the review application of the first ruling should have been filed no later than 16 September 2019, but was over fourteen months' late. The second ruling should have been taken on review by 2 October 2020 and was therefore about 6 weeks' late, or double the maximum time it should have taken. The first delay is exceptionally late and a very good explanation is required to explain it. The second delay is significant, though not as extreme as the first, and also requires proper justification.

The explanation for the delays

[22] I have already alluded to Barnard's account of the period following the condonation ruling by the first arbitrator until the second referral to the SALGBC on 26 June 2020. He claims that after receiving the second ruling he 'was engaged with SAMWU' from the time he received the ruling until 20 October 2020. Somewhat cryptically he states "I had at the same time been trying to locate alternative assistance as the same pattern had occurred as had been with IMATU". This appears to be an oblique way of saying SAMWU was also not prepared to take the matter further on his behalf. At that stage he obtained advice from another entity, LAWU. It is not clear from his affidavit if this entity is a trade union, as he kept referring to the person representing that body as an attorney, Mr Harun Abdul.

[23] In any event, in April 2021, LAWU advised him he needed to get the record of the first ruling transcribed. Between then and August 2021, a period of about three to four months, Barnard claims he continued to request progress on the submission of papers. On 21 August he claims he received 'submission papers' for the record. The supplementary affidavit was only filed on 5 November 2021, nearly a year after proceedings were instituted.

Evaluation

[24] The delay in applying to review the first ruling is exceptionally long. However, much Barnard professes ignorance about time periods he was well aware during the first half of 2019 that he had a choice about how to advance his case. He expressly withdrew a claim based on unfair discrimination relating to equal pay for equal work and decided to reinstitute an unfair labour practice claim. He knew that he had been refused condonation by August 2019 for this referral. Accordingly, he was aware that time limits could present a problem for his pursuit of his claim. On advice of his lawyer, he also knew by September or October 2019 that he was already at risk of being refused condonation to review the condonation ruling because he should have acted earlier. Knowing that time was already running out to institute such a review, he decided nonetheless to restart the same dispute he had just been prevented from pursuing owing to the condonation ruling. In May 2020, he predictably arrived at the same sticking point in the job re-evaluation process he had previously encountered in November 2018. Barnard kept mentioning in court that he is a layperson. He might not be a lawyer, but his papers and presentation in court show that he is adept enough in addressing the issues at hand. He is clearly perfectly literate and his affidavits and submissions though somewhat prolix at times do grapple with the issues he is required to address. His ability to grapple with the issue of condonation is clearly not beyond his grasp, even if he might have had assistance from time to time.

[25] The first arbitrator's decision cannot be faulted on the merits. It is one that any reasonable arbitrator could have made on the same facts in the exercise of their discretion on whether or not to grant condonation. The prospects of setting that ruling aside on review are minimal in my view.

[26] As regards the second ruling, the question is whether the arbitrator was being asked to deal with a fundamentally different dispute. If the second arbitrator had found in Barnards' favour he would effectively have negated the first arbitrator's previous ruling. A party cannot simply recycle a dispute by repeating the same internal steps he previously followed and thereby breathe fresh life into it, so that his dispute can rise again like the figure of Lazarus in the bible. The second arbitrator cannot be faulted for his finding that the dispute was *res judicata* at least in the sense that the same dispute had previously been referred to the bargaining council and the referral had been found to be unacceptably late.

[27] It was not set out in Barnard's grounds of review as such, but when he presented argument at court Barnard raised an additional argument that condonation had never been necessary because he was suffering a continuous wrong because of the incorrect evaluation of his job. It is so in cases of unfair discrimination that, for example, an act of unfair discrimination is repeated as long as an employer is paying employees differently on grounds that amount to unfair discrimination, because the act of unfair differentiation is repeated every month they are paid[1]. However, the LAC has distinguished such cases from cases of unfair labour practice disputes in which the complaint stems from a once off act such as a failure to promote someone, even though the remunerative consequences of the act are ongoing[2]. In this instance, the dispute originated with the job evaluation decision in November 2018, which might have had ongoing consequences for Barnard's grading and therefor his remuneration flowing from that decision. However, the unfair labour practice itself was the regrading decision and was not of an ongoing nature. It is true that if Barnard had persisted with a claim of unfair discrimination under the Employment Equity Act based on his treatment relative to white comparators, it

[1] See *SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 *ILJ* 592 (LAC) at para 27.
[2] See Amalungelo Workers Union on behalf of Mayisela & others v Commission for Conciliation, Mediation & Arbitration & others (2022) 43 ILJ 600 (LAC) at paras [22] and [24]. See also *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and others* [2017] 8 BLLR 797 (LC) at paras [57] to [9], and *City of Johannesburg v South African Local Govt Bargaining Council and Others* (JR3204/10) [2014] ZALCJHB 85 (10 February 2014) at para [11].

is possible condonation would not have been required, but even though he could have pursued such a claim, he abandoned that dispute at the CCMA. In conclusion, this is not a case where condonation was not required.

[28] In the circumstances, I am not persuaded that Barnard's delay in reviewing the initial condonation ruling can be justifiably excused taking into account the extent of the delay, his attempt to justify the delay (caused largely by his tactical choice of how best to pursue his dispute) and his prospects of success on the merits of both review applications. His simultaneous application to review the second ruling, which could only be set aside if the first ruling is, has correspondingly poor prospects of success. Even though the delay is less extreme than in respect of the first ruling, the explanation for the delay of some month's is lacking in the kind of detail an adequate explanation demands.

[29] I accept that the employer has not come to court to argue it will be prejudiced if the review is allowed to go ahead, but that is only one consideration in deciding whether or not to condone dilatoriness of this order. There are also policy considerations such as the need for the expeditious handling of labour disputes[3] and the need for finality which must be taken account . To permit these review applications to proceed would only lend encouragement to parties to reformulate disputes as a way of escaping the consequences of not failing to act timeously in the first place.

[30] In conclusion, the late filing of the joint review application should not be condoned.

Order

[1] The application to condone the late filing of the Applicant's review application of the rulings of the Third and Second Respondent's under case number WCM 061907 dated 5 August 2019 and 19 August 2020 respectively is dismissed.

[2] No order is made as to costs.

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[3] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2016) 37 ILJ 313 (CC).*

Lagrange J

Judge of the Labour Court of South Africa

Representatives

For the Applicant	In person
For the First Respondent	No appearance