IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 797/17

In the matter between:

GOVERNMENT PENSIONS ADMINISTRATION AGENCY **Applicant**

And

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **First Respondent**

JOHN SIAVHE *N. O* **Second Respondent**

RONALD OPPELT *N.O* **Third Respondent**

PUBLIC SERVANTS ASSOCIATION

obo RACHEL KEKANA **Fourth Respondent**

Heard: **7 November 2018**

Delivered: **15 May 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] With this application, the Applicant seeks various orders including condonation for the late filing of the review application; the review and setting aside of the condonation ruling issued by the Second Respondent (Commissioner Siavhe), dated 4 March 2016; the substitution of the condonation ruling with an order that the Fourth Respondent's referral of a dispute is not condoned; alternatively reviewing and setting aside the whole arbitration award of the Third Respondent (Commissioner Oppelt), and substituting it with an order that the dismissal of Ms Rachel Kekana as represented by the PSA was substantively fair, or in the alternative, remitting the matter to the third respondent (GPSSBC) for a hearing *de novo*. Kekana as assisted by the PSA opposed the review application.

Condonation:

[2] The Applicant sought condonation for the late delivery of the review application in respect of the condonation ruling issued by Commissioner Siavhe on 4 March 2016.

[3] The applicant correctly pointed out that a review of the condonation ruling in the light of the provisions of section 158(1B)[1] of the Labour Relations Act

[1] Which states:

> 'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

(LRA)[2] was impermissible, as the dispute between the parties was immediately referred to conciliation and arbitration, which processes had to be finalised before the Court could be approached with a review application.

[4] The application to review both the condonation ruling and the arbitration award was in any event brought within the time periods stipulated in section 145(1)(a) of the LRA. In the end, an application for condonation was not necessary.

Background:

[5] Kekana was employed by the Applicant since January 1999 and at the time of the dispute, she occupied the position of Senior Administration Clerk. She was dismissed from the applicant's employ on 27 January 2013 on allegations of misconduct pertaining to fraudulent payments in respect of a fictitious pension benefit claim. The dismissal followed an internal disciplinary enquiry held against Kekana and some of her colleagues. She had lodged an appeal against the dismissal with the Minister of Finance, who had confirmed the dismissal on 28 June 2013.

[6] In September 2013, the PSA referred an unfair dismissal dispute to the General Public Service Sector Bargaining Council (GPSSBC) citing *'PSA obo Rudman and two others'*. A condonation was also sought for the late referral of the dispute. The referral was some 83 days out of time. Commissioner Martin Sambo of the GPSSBC considered the application for condonation and dismissed it in terms of a ruling issued on 25 April 2014. No further steps were taken in respect of that ruling by the PSA.

[7] The applicant's contention is that the referral and the condonation ruling dealt with Kekana's dispute. The PSA nonetheless referred a second unfair dismissal dispute on behalf of Kekana on 10 November 2015. The referral was accompanied by an application for condonation as it was 837 days out of time. The application was opposed. It was considered and granted by Commissioner Siavhe on 4 March 2016.

[2] Act 66 of 1995 (as amended)

[8] At a conciliation meeting held on 27 September 2016, the matter could not be resolved and was then referred for arbitration. The matter came before Commissioner Oppelt, who had delivered his award on 13 March 2017, and found that the dismissal of Kekana was substantively unfair. The Commissioner had ordered that Kekana be retrospectively reinstated with an amount of back-pay equal to R542 885.15.

The grounds of review and evaluation:

[9] Central to this dispute is whether there was a live dispute capable of conciliation or arbitration at the time that the second dispute that resulted in the condonation ruling of Commissioner Siavhe was referred.

[10] The Applicant relies on the condonation ruling of Commissioner Sambo for the contention that in the absence of that ruling having been reviewed or set aside, there was no live dispute between the parties, as the dispute and condonation application before Commissioner Sambo involved Kekana and two of her colleagues, and consequently, Commissioner Siavhe lacked jurisdiction to consider the condonation application.

[11] In the founding affidavit, the applicant further contends that at the conciliation proceedings held on 28 February 2014 after the initial referral, it had raised various preliminary issues about the identities of the parties. It was then agreed between the parties that the various disputes should be separated, as the individual employees were not charged and dismissed for the same misconduct. It was however submitted that Commissioner Sambo still proceeded to determine the condonation application, which was subsequently refused.

[12] In the answering affidavit, Kekana denied that her dispute formed part of the initial referral and condonation application leading to the ruling by Commissioner Sambo. She contended that her dispute was separated from the others at the directive of the GPSSBC, She contended that any points of law in that regard ought to have been raised at the conciliation in respect of the second referral, or that the issue of jurisdiction that the matter was *res judicata* could have been raised at arbitration, which the applicant did not.

[13] Kekana's submissions that objections were not raised in respect of the second referral cannot be correct. The applicant had opposed the second referral, contending that it was out of time by 835 days, and further that the matter was initially dealt with under another referral. The matter was initially dealt with in a 'Jurisdictional Ruling' issued by GPSSBC's 'Junior Resident Panellist', SM Skweyiya, on 12 October 2015. It appears that the purpose of that ruling was to determine whether condonation for the second referral was necessary or not, leading to a finding that indeed the second referral was out of time necessitating an application for condonation.

[14] To the extent that there may have been an agreement to separate Kekana's dispute from the others as initially referred, Commissioner Siavhe in his ruling appears to have accepted that this was indeed the case. Further to the extent that the Applicant conceded that it had raised various preliminary points, and in particular, in relation to the joint referral of the dispute when the circumstances of the dismissal of the individual employees were different, I am prepared to accept that indeed there was at least a common understanding that the matters were to be separated. This however meant that Kekana had to immediately refer her own dispute, together with an application for condonation.

[15] It was common cause that the dismissal of Kekana effectively took place on 28 June 2013. She had then referred a dispute on her own on 9 November 2015, together with an application for condonation. It was therefore common cause that her referral was some 837 days out of time.

[16] The principles applicable to applications for condonation are trite as enunciated in *Melane v Santam Insurance Co. Ltd*[3]. The Supreme Court of

[3]1962 (4) SA 531 (A) at 532B-E, where it was held that;

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to

Appeal in *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*[4] reiterated the applicable principles as follows;

> 'A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

[17] In the end, the interests of justice would determine whether condonation ought to be granted[5]. In this case, there is no doubt that the delay by Kekana in referring her dispute to the GPSSBC was excessive in the extreme. She therefore had a greater burden to set out all the facts and circumstances relating to the delay, and most importantly, to provide a satisfactory explanation for each period of the delay. Any period of delay that was unaccounted for would ordinarily result in condonation being refused[6].

[18] In the condonation application before Commissioner Siavhe. Her explanation was as follows;

> *"During the conciliation on 28/2/2014, the GPAA objected to her inclusion to Rudman's case, they then requested that, this applicant must be separated from Rudman but there is no need to start the process of condonation, what matters then was that she must be issued with a separate case number. It is surprising to learn that on 3/9/2015 during the conciliation between the parties objected to the conciliation citing the fact that we must apply for condonation*
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> *On the 3/9/2015, GPAA promised to make submissions to PSA whereby PSA was given 14 days to respond to, PSA unfortunately did not receive*

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compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[4] 2017 (6) SA 90 (SCA) at para [26]

[5] See *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* (2000 (2) SA 837 (CC)

[6] See *NUMSA and Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

anything from GPAA until we received the attached jurisdictional Ruling from GPSSBC.

Based on the above truth, we appeal to the Commissioner to consider our application"(Sic*)*

[19] Under prospects of success, Kekana averred that;

*'Applicant believes that he/she has good cause because (**explain with good reasons why the employer's conduct was unfair**): As we have stated under procedural fairness that during the disciplinary hearing, GPAA did not provide the employee with supporting documents on time. We therefore expect to be provided with neutral commissioner who will not be biased like the Chairperson who conducted the disciplinary hearing.*

Employer added his unfairness by objecting to the conciliation of the 3/9/2015, which is a deviation from the consensus the parties agreed to on 28 /2/2014' (Sic)

[20] Commissioner Siavhe in the condonation ruling considered Rule 9 of the GPSSBC Rules, and the relevant factors to be considered in such applications, and found that the referral was *not* 'substantively late' and the reasons for the delay were acceptable. The Commissioner was further persuaded that Kekana had demonstrated prospects of success in the main matter, and that she would be 'highly prejudiced' if condonation was not granted.

[21] It is accepted that when considering applications for condonation, arbitrators enjoy a wide discretion, and the Courts should be slow in interfering with their decisions on review, unless it can be demonstrated that the discretion enjoyed by the arbitrator was exercised capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons. Thus, the test is whether the Arbitrator committed a misdirection, an irregularity, or failed to exercise his or her discretion, or exercised it improperly or unfairly. In any event, it has been held that a simple misdirection is insufficient, and that such misdirection must

be of such a nature, degree or seriousness that shows that the discretion was not exercised at all or was exercised improperly or unreasonably[7].

[22] There are obvious difficulties with the condonation ruling issued by Commissioner Siavhe, which in my view calls for an interference. My conclusions in this regard are based on the following;

22.1 It needs to be stated that Kekana in seeking condonation was assisted by the PSA. The condonation application however is clearly structured in an incoherent manner, without any attempt at making it more detailed in the light of the inordinate delay. It clearly lacks substance, and it appears that it was hurriedly stitched together on the *pro forma* template with no regard to substance and content. Surely members of the PSA in good standing deserve better in their moments of need.

22.2 The first obvious incorrect assertion by Commissioner Siavhe was that the application for condonation was unopposed. This however was not so. The application for condonation was filed on or about 9 November 2015, and the Applicant had indeed filed its opposition on or about 23 November 2015. Even if an application such as this was unopposed, it did not imply that it should be granted, as the Commissioner had to be satisfied that good cause was shown. On that irregularity alone, the ruling ought to be set aside.

22.3 The delay being inordinate, there are inherent difficulties with the explanation proffered by Kekana in that regard. The first is that to the extent that she seeks to rely on the separation of the disputes, she cannot in the same token rely on any suggestion that *'there was no need to start the process of condonation'*. The initial referral was in any

[7] See *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC) para [16]; *NUMSA v Fibre Flair cc t/a Kango Canopies* (2000) 21 ILJ 1079 [LAC] 1081 at G-1082A; *Cowley v Anglo Platinum & others* JR 2219/2007; [2016] JOL 35884 (LC) at para 21; *Coates Brothers Limited v Shanker and Others* [2003] ZALAC 12 at para 5, where it was held that;

> 'I have referred in para [3] above to the case of National Union of Metalworkers of SA & Others v Fibre Flair CC in which were summarised the relevant principles with regard to the interference with a discretion which is to be judicially exercised. An appellant must show, in an appeal from a decision in a lower court, that the court *a quo* "acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly."'

event late, leading to a refusal to grant condonation by Commissioner Sambo. If Kekana sought to rely on that referral for not seeking condonation in respect of the second referral, it follows that the GPSSBC would not have had jurisdiction to consider the second referral as the matter was *res judicata*.

22.4 Even if Kekana was promised that a new case number would be allocated by the GPSSBC that new case number would still have been meaningless in the absence of condonation in any event.

22.5 The explanation for the delay proffered by Kekana amounts to no explanation at all.[8] No attempt was made whatsoever to give a full account for the delay between 26 June 2013 when she was dismissed, or 28 February 2014 when the Applicant objected to the joint referral, and 9 November 2015 when she ultimately filed her application for condonation together with the referral. The explanation says nothing, other than to state what happened at the conciliation proceedings of 28 February 2014 when the Applicant objected to the joint referral.[9] It is therefore extraordinary that Commissioner Siavhe would find that the delay was not 'substantive' or that a reasonable explanation was proffered in that regard.

[8] *Moila v Shai N.O and Others* [2007] 5 BLLR 432 (LAC); 2007 (28) ILJ 1028 LAC at para 34 where it was held that:

> "I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success."

[9] See *Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at para 13, where it was stated that*;*

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

22.6 To the extent that Commissioner Siavhe felt compelled to deal with the prospects of success in the light of the conclusions regarding the extent of the delay and the explanation in that regard, it has been was held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused[10]. This approach is even more apposite in circumstances such as in this case, where the referral was inordinately out of time and where no attempt was made whatsoever to explain that delay.

22.7 In the ruling, nothing is said about what Kekana's prospects of success were, and this is unsurprising because she made no discernible averments in that regard in her application. On the other hand, the Applicant in opposing the condonation (which the Commissioner had no regard to), was that Kekana was charged with gross dishonesty in that she allegedly fraudulently allocated/created/authorised or facilitated payment of pension benefits amounting to R138 203, 28 into various fraudulent bank accounts. Those charges *prima facie* appears to be serious, and at the most, they required some response in the condonation application. However, Kekana said nothing about those charges, other than to refer to procedural unfairness. In those circumstances, the question that arises is, on what basis really, could Commissioner Siavhe have concluded that he was persuaded that Kekana had demonstrated prospects of success with the main claim?

22.8 It has been restated that on the whole, the issue is whether it would be in the interests of justice to grant condonation. In my view, it cannot be in the interests of justice to condone a late referral where the delay is excessive in the extreme, and where no attempt was made to explain that delay. It can also not be so in circumstances where an employee who was dismissed on account of serious allegations pertaining to

[10] *NUM v Council for Mineral Technology* 1999 3 BLLR 209 (LAC) at para *10.*

dishonesty, says nothing in seeking condonation, about why the dismissal was unfair.

22.9 The applicant like any other party to any proceedings is entitled to finality in a dispute, and a failure to take steps for about 837 days in respect of a dispute is clearly prejudicial to the Applicant, and cannot be in the interests of administration of justice or expeditious resolution of disputes as envisaged in the LRA.

22.10 In this case, the Commissioner only stated that Kekana would be 'highly prejudiced', but is not stated what the basis of the prejudice is. The fact of the matter however is that any prejudice that Kekana would suffer is as a direct consequence of her or the PSA for that matter, sleeping on her dispute for 835 days. Parties seeking condonation cannot complain of prejudice when it is self-inflicted. Ultimately, an application for condonation is a request for an indulgence, and a party seeking that indulgence must demonstrate that it deserves it by showing good cause. In this case, Kekana had clearly not shown good cause.

[23] In the light of the above, it follows that the Commissioner's decision in granting condonation in circumstances where good cause was not shown, cannot be said to have exercised his discretion fairly, rationally or reasonably. At the opposite end, the invariable conclusion to be reached is that in exercising his discretion, the Commissioner did so for insubstantial reasons, and committed a misdirection and an irregularity. It follows from these conclusions that first, the condonation ruling cannot stand, and second, the arbitration award issued by the third respondent equally ought to be set aside on the basis that Commissioner Oppelt lacked jurisdiction.

[24] Further in the light of the material placed before the Court, no purpose would be served by remitting the matter back to the GPSSBC, and the Court is in a position to substitute the Commissioner Siavhe's ruling. I have had regard to the requirements of law and fairness, and in the light of the circumstances of the case, I am of the view that no order as to costs should be made.

[25] In the premises, the following order is made;

Order:

1. The Condonation Ruling issued by the Second Respondent dated 4 March 2016 under case number GPBC 2760/2015 is reviewed, set aside and substituted with an order that;

   'The application for condonation for the late referral of an alleged unfair dismissal dispute by the PSA on behalf of Ms Rachel Kekana to the GPSSBC is dismissed'

2. The arbitration award issued by the Third Respondent under case number GPBC 2760/2015 dated 13 March 2017 is set aside.

3. There is no order as to costs

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Edwin Tlhotlhalemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: W.P Bekker, instructed by Gildenhuys Malatji INC

For the First Respondent: Makgamatha, instructed by MM Mitti INC Attorneys