

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2661/17

In the matter between:

**NATIONAL EDUCATION HEALTH AND ALLIED
WORKERS UNION (NEHAWU) obo DANIEL NAIDOO**

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION (CCMA)**

First Respondent

MOHAMED RAFEE N.O

Second Respondent

ENERGY AND WATER SETA

Third Respondent

Heard: 25 February 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 May 2020.

Summary: Condonation application for the late delivery of the review application – without prospects of success, explanation for the delay is inconsequential.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this application, the applicant, NEHAWU, seeks an order to review and set aside the arbitration award issued by the second respondent (commissioner) under case number GAJB18485-16, dated 16 October 2017. The commissioner

dismissed the claim by NEHAWU that the second respondent committed an unfair labour practice by not promoting its member Mr David Naidoo (Mr Naidoo).

- [2] NEHAWU's main impugn is that the commissioner rendered an unreasonable award. The third respondent is defending the impugned award and also opposes NEHAWU's condonation application for the late delivery of the review application.

Condonation application

- [3] The degree of lateness is about five weeks. The explanation for the delay is that the NEHAWU official was snowed under in his duties and as result could not keep tabs of the internal processes that had to be undertaken in order to secure instructions to launch these proceedings. However, it would seem that Mr Naidoo constantly kept following up on progress made in his matter.
- [4] The crux of the third respondent's opposition is that NEHAWU has no prospects of success. The third respondent submitted that even if the degree of lateness was negligible and the explanation reasonable, condonation should not be granted because there are no prospects of success.
- [5] This Court has on several instances rejected the explanation that seeks to blame the union officials or the structures of the union for the delay, as is the case in the matter at hand. However, given the third respondent's line of attack, I propose not to belabour this point but to proceed to deal with the prospects of success.

Pertinent facts

- [6] The facts in this matter are predominantly common cause. Mr Naidoo commenced his employment with the third respondent on 17 February 2011 and held a position of an Administration Clerk. On 10 April 2014, he was promoted to the position of Records and Facilities Administrator. There were 11 other Records and Facilities Administrators whose appointments preceded that of Mr Naidoo.

- [7] On 1 April 2015, a year later, the third respondent promoted the 11 Records and Facilities Administrator to the positions of Practitioners. Mr Naidoo was not considered for this promotion. Discontented by his exclusion, Mr Naidoo referred an unfair labour practice dispute. A conciliation was unsuccessful. The matter proceeded to arbitration. The commissioner found that Mr Naidoo did not qualify for a promotion and that the third respondent did not commit an unfair labour practice, hence the impugned award.

Legal principles and application

- [8] In *National Union of Mineworkers v Council for Mineral Technology*,¹ the Labour Appeal Court (LAC) reaffirmed the principles set in *Melane v Santam Insurance Co Ltd*² and stated that:

‘The approach 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 therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is 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 ...’ (Emphasis added)

- [9] Turning to the matter at hand, it is common cause that the promotion of Mr Naidoo as well as that of the 11 Records and Facilities Administrators was consequent to the third respondent’s organisational restructuring which resulted in a new organogram being adopted. The employees of the third respondent were placed into the new organogram in terms of a matching and placing exercise that commenced at the beginning of 2014. The effect of the matching

¹ [1999] 3 BLLR 209 at 211-213; see also *Queenstown Fuel Distributors CC v Labuschagne NO and Others* [2000] 1 BLLR 45 (LAC) at para 24; *Steenkamp and Others v Edcon Limited* 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC) at paras 27 and 37;

² 1962 (4) SA 531 (A).

and placing exercise was that some employees were appointed to positions that were senior.

- [10] Mr Naidoo was one of the employees who were the first to benefit by being promoted. His previous position was graded at B4; whilst the current position is graded at C2. The whole matching and placing process was not undertaken in terms of the normal recruitment process. No interviews were conducted with the employees before their placement into senior positions.
- [11] The 11 Records and Facilities Administrators were senior to Mr Naidoo in terms of number of years and level of experience. None of the 11 Records and Facilities Administrators were promoted in April 2014 when Mr Naidoo was promoted to his current position. They were merely placed in their administrator positions within the new organogram.
- [12] Mr Naidoo conceded during the arbitration proceedings that his promotion on 1 April 2014 was the fruit of the matching and placing exercise. On the other hand, Mr Errol Gradwell (Mr Gradwell), the third respondent's Chief Executive Officer, testified that there were no grounds to promote Mr Naidoo together with the 11 Records and Facilities Administrators as he was one of the first employees to be promoted in April 2014. Conversely, the 11 Records and Facilities Administrators were only promoted a year later. As a result, Mr Naidoo could not benefit twice from the same matching and placing exercise or organisational review.
- [13] Counsel for Mr Naidoo was constrained to concede that Mr Naidoo had already benefited from the same process that promoted the 11 Records and Facilities Administrators. However, he was adamant that there was nothing unbecoming with benefiting twice from the same process within a period less than a year. That is so because, as he submitted, the third respondent's promotion policy permits it. However, this submission is untenable in the light of Mr Naidoo's concession that his promotion to the position of an Administrator and that of the 11 Records and Facilities Administrators to positions of Practitioners came about due to the restructuring process and not the promotion policy. In essence, the restructuring process was an exception to the rule.

[14] In my view, proverbially, Mr Naidoo wants to have his cake and eat it. His claim met its demise when he conceded that his promotion to be an Administrator and the promotion of the 11 Records and Facilities Administrators to be Practitioners was birthed by the same restructuring process. As such, the finding by the commissioner that he was not eligible for a further promotion in terms of the same process is beyond reproach.

[15] It stands to reason, therefore, that the application for condonation is stillborn without prospects of success. The degree of lateness and the reasonable explanation for the delay are of no consequence.

Conclusion

[16] In the circumstances, the application for condonation stands to be dismissed. It is purposeless to traverse the other issues that arose in this matter given the dispositive nature of the finding on condonation.

Cost

[17] Taking into account the persisting collective bargaining relationship between the parties, it would offend the principle of law and equity to grant costs against NEHAWU.

[18] In the circumstances, I make the following order:

Order

1. The condonation application for the late delivery of the review application is dismissed.
2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate T Moretlwe

Instructed by:

Mdhluli Pearce & Mdzikwa Incorporated

For the third respondent:

Sandile Tom of Werksmans Attorneys

LABOUR COURT