THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C61/2017

In the matter between:

NEHAWU obo ABRAHAM SMITH **Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL **First Respondent**

J N MATSHEKGA **Second Respondent**

DEPARTMENT OF SOCIAL DEVELOPMENT **Third Respondent**

Heard: 24 May 2018

Delivered: 01 August 2018

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks the review and setting aside of the Second Respondent's (the arbitrator) condonation ruling (the "ruling") dated 21 December 2016 wherein he refused to grant condonation for the late filing of the Applicant's unfair labour practice dispute.

[2] The application is opposed.

Factual background

[3] The Applicant, Mr Abraham Smith (the employee) is employed by the Third Respondent (the Department) as a customer care officer at Vredenburg District. He was appointed in the said position in 2007 at salary level 7.

[4] In 2010 the Western Cape Provincial Government introduced a modernization policy and the Department's modernization process entailed a redesign of the organisational structure. In terms of the proposed organisation and establishment of the Department, which was approved by the Minister, the post of customer care officer in the West Coast region was graded on salary level 8.

[5] The employee was matched and placed in the position of customer care officer in the West Coast region with effect from 1 November 2010. However, the employee was only absorbed into the said position on salary level 8 with effect from 1 March 2014 and he became entitled to remuneration on salary level 8 as from this date. The Department placed reliance on the provisions of the Public Service Regulations of 2001 which provide that the absorption of an incumbent employee in a higher graded post takes effect on the first day of the month following the month during which the executing authority approved the absorption. The executive authority approved the upgrade of the post of customer care officer from salary level 7 to 8 on 8 February 2014, which upgrade was with effect from 1 March 2014.

[6] The employee addressed correspondence to the Department relating to what he perceived as a discrepancy in his remuneration. The employee sought retrospective remuneration of the difference between salary levels 7 and 8,

commencing from November 2010 when the Department adopted the job evaluation outcome.

[7] The employee was advised to lodge a grievance after the Department was unwilling to pay him the difference in remuneration retrospectively. The grievance was lodged on 14 April 2014 and was referred to the Public Service Commission on 5 November 2014, as provided for in the public service grievance procedure.

[8] On 28 May 2015 the Public Service Commission indicated that it has found the employee's grievance to be substantiated and recommended that the Department remedies the situation. On 21 July 2015 the Department informed the employee about the outcome of the Public Service Commission's investigation and that notwithstanding its recommendation, the Department maintained its view that the employee's grievance was unsubstantiated and the matter was regarded as finalised.

[9] The employee subsequently referred an unfair labour practice dispute relating to benefits to the First Respondent on 14 November 2016.

[10] The dispute had to be referred within 90 days from the date it arose. The date the dispute arose is contentious and according to the Applicant, it arose on the date the Department rejected the Public Service Commission's recommendation and informed the employee that the matter was closed. On this scenario, the dispute had to be referred to the bargaining council by no later than 19 October 2015, but was only referred on 14 November 2016. The Applicant applied for condonation for the late filing of the dispute.

[11] The Department opposed the condonation application on the basis that the employee did not provide good cause for the lateness.

[12] The arbitrator dismissed the application for condonation after he calculated the degree of lateness from 1 March 2014, when the employee lodged a grievance. The arbitrator found that the dispute was referred 899 days outside the 90-day timeframe and he found the degree of lateness to be 'extremely excessive' with no explanation as to why the dispute was only referred to the First Respondent

in November 2016, when the outcome of the grievance was given in July 2015. The arbitrator held that where there was no reasonable and acceptable explanation for the delay, the prospects of success are immaterial.

[13] The Applicant seeks the review and setting aside of the condonation ruling and the gist of the Applicant's review is that the arbitrator failed in his duties when he refused to grant condonation after he failed to deal with the employee's prospects of success, in view of the employee's failure to provide an adequate explanation for the delay.

The arguments

[14] The employee has been remunerated on salary level 8 as from 1 March 2014 and he is aggrieved by the fact that his adjusted remuneration was not made retrospectively since 2010. The Department finally dismissed his grievance in July 2015 and he only referred his dispute to the First Respondent on 14 November 2016.

[15] In his application for condonation, the employee stated that the matter arose on 14 April 2014 when his appointment to salary level 8 was confirmed, thus the referral was 28 months late. Counting from the outcome of the grievance in July 2015, the period is reduced to just over a year.

[16] In argument before Court, the Applicant submitted that neither the arbitrator nor the parties considered the fact that the date of the dispute does not have to coincide with the date on which the unfair labour practice commenced because the unfairness complained of did not constitute a single act.

[17] The Applicant's argument is that where an employer pays its employees who occupy the same post differently based on arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the unfair treatment is continual and repetitive and therefore there was no need to apply for condonation.

[18] This issue was not raised before the arbitrator and was not included in the Applicant's grounds for review. Can this issue be raised at this point?

[19] In *Commercial Workers Union of SA v Tao Ying Metal Industries and others*[1] the Constitutional Court has held that:

> 'Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible
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> These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'

[20] The question whether the Applicant had to apply for condonation at all is indeed a point of law and I am inclined to consider the Applicant's submissions in this regard.

[21] The Applicant's case is that the unfair labour practice commenced when the employee was matched and placed as a customer care officer on salary level

[1] 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC).

8 on 1 November 2010, but was still remunerated at salary level 7. The unfair labour practice continued subsequent to the adjustment of the employee's salary on 1 March 2014, since the adjustment regulated the employee's future position, but did not eradicate the past unfair labour practice.

[22] The Applicant argued that the withholding of remuneration the employee has earned on salary level 8 prior to 1 March 2014, amounts to a continued unfair labour practice being committed by the Department. On this basis the unfair labour practice was of a continuing nature and there was no need for the employee to ask for condonation in the first place.

[23] The question is whether the unfair labour practice is indeed ongoing. This question is to be considered with specific reference to two distinct aspects namely 'unfair labour practice' and 'ongoing'. In my view there are two difficulties with the Applicant's submissions.

Unfair labour practice

[24] The employee seeks retrospective remuneration of the difference between salary levels 7 and 8, commencing from the date in 2010 when the Department adopted the job evaluation outcome. In his referral to the First Respondent it is evident that he seeks the correction of his salary and of what he believes to be an underpayment for the period between November 2010 and March 2014, when his salary level was indeed adjusted to level 8.

[25] In short, the employee claims retrospective remuneration.

[26] In *Apollo Tyres SA (Pty) Ltd v CCMA and others*[2] the Labour Appeal Court dealt with the meaning of 'benefit' as provided for in section 186(2)(a) of the Labour Relations Act[3] (LRA) and held that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an

[2] (2013) 34 ILJ 1120 (LAC).
[3] Act 66 of 1995, as amended.

employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit. It was said that:

> 'In my view, the better approach would be to interpret the term 'benefit' to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment 'benefit' in s 186(2)*(a)* of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.'

[27] In my view, the better approach would be to interpret the term 'benefit' to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment 'benefit' in s 186(2)*(a)* of the LRA means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.

[28] I am not convinced that the employee's claim for retrospective remuneration of the difference between salary levels 7 and 8 and the correction of what he believes to be an underpayment of his salary, constitutes an unfair labour practice and would be justiciable by the First Respondent in terms of the provisions of section 186(2)(a) of the LRA.

[29] This is a material difficulty for the Applicant in the sense that even if the arbitrator had considered the prospects of success, the Applicant's prospect to succeed with a claim for retrospective remuneration under an unfair labour practice benefits dispute, is unlikely.

Ongoing unfair labour practice

[30] If I were to accept that the employee's claim indeed constitutes and unfair labour practice, the question is whether it is ongoing.

[31] The Applicant's case is that the unfair labour practice commenced on 1 November 2010 when the employee was matched and placed as a customer care officer on salary level 8, but was remunerated at salary level 7. The employee has been remunerated on salary level 8 as from 1 March 2014. The unfair labour practice continued subsequent to the adjustment of the employee's salary as the adjustment only regulated the employee's future position, but did not eradicate the past unfair labour practice.

[32] In *SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration and others*[4] the Labour Appeal Court considered the question and held that:

> 'While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. **The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages.** Each time the employer pays one of its employees more than the other he is evincing continued discrimination.
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> Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/unfair discrimination commenced because it is not a single act of discrimination but one which is

[4] (2010) 31 ILJ 592 (LAC).

repeated monthly. In the circumstances the dispute being labelled as ongoing was an accurate description of the 'dispute date' and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct.' (My emphasis)

[33] The Applicant's argument is flawed. Even if an unfair labour practice was committed in respect of the employee's remuneration from November 2010 and such was repetitive and continual, it ended and the conduct terminated on 1 March 2014, when his salary level was adjusted to level 8. The unfair labour practice, if any, did not continue beyond this date and it cannot be said that it is continuing because it did not eradicate the past.

[34] The Applicant had to refer an unfair labour practice dispute within 90 days from 1 March 2014, when the employee's remuneration was adjusted and when the unfair labour practice ceased. The dispute had to be referred to the bargaining council by 30 May 2014.

[35] There is no merit in the Applicant's submission that there was no need to apply for condonation when the unfair labour practice dispute was only referred to the First Respondent in November 2016.

[36] The need to apply for condonation was obvious and the Applicant indeed applied for condonation.

[37] The arbitrator refused to grant condonation for the late referral and it is this ruling the Applicant seeks to have reviewed and set aside.

<u>The condonation application and ruling:</u>

[38] In the condonation application that served before the arbitrator, the Applicant's explanation for the lateness was as follows:

38.1 When his appointment on salary level 8 was confirmed without retrospective effect from 1 November 2010, the Applicant lodged a dispute or grievance on 14 April 2014, which was subsequently referred to the

Public Service Commission on 5 November 2014, as provided for in the public service grievance procedure.

38.2 On 28 May 2015 the Public Service Commission indicated that it has found the employee's grievance to be substantiated and recommended that the Department remedies the situation. On 21 July 2015 the Department informed the employee about the outcome of the Public Service Commission's investigation and that notwithstanding their recommendation, the Department maintained its view that the employee's grievance was unsubstantiated and the matter was regarded as finalised.

38.3 The application was also delayed by the sudden disappearance of the union official, who was said to be on sick leave and who was later dismissed. The employee learnt about this when she made a query on the progress of her case.

[39] The arbitrator considered the application for condonation and recorded that the degree of lateness was excessive. The referral was made 29 months late, which delay is no doubt excessive.

[40] In his survey of the relevant factors, the arbitrator recorded the submissions made and more specifically the reasons for the lateness, namely that the matter was referred to the Public Service Commission on 5 November 2014, the notice of the outcome was received on 21 July 2015 and the matter was delayed by the disappearance of the NEHAWU union official. The Department opposed the application and submitted that the Applicant failed to provide a compelling explanation for the delay.

[41] In his analysis of the aforesaid factors the arbitrator made reference to the applicable principles as set out in the relevant authorities and the principle that where the explanation for the lateness is not adequate, there was no need to consider the prospects of success.

[42] The arbitrator considered the explanation tendered and stated that a proper explanation entails an explanation for every period of the delay. He found the Applicant's explanation to be hollow, lacking in explaining why the Public Service Commission was only approached in November 2014 and why the dispute was only referred to the First Respondent in November 2016 when the outcome of the grievance was already given to the employee in July 2015. No details were given of when the NEHAWU official disappeared and the submissions made were so vague that it was impossible to assess the reasons for lateness objectively. The arbitrator held that the Applicant failed to tender an adequate explanation and were condonation to be granted in the absence of an explanation, the purpose and spirit of the LRA would be defeated.

[43] It is evident from the explanation tendered that it was sketchy and bereft of any detail. In fact, it did no more than to list events which took place during the period in question. Glaringly absent is an explanation for the time that lapsed between the events.

[44] In argument Ms Matshala for the Applicant conceded that the explanation tendered was indeed a poor one. In the Applicant's heads of argument, it has been submitted that the delay is lengthy and the explanation is poor, but that the arbitrator ought to have considered the prospects of success

Grounds for review and applicable legal principles:

[45] The Applicant raised a number of grounds for review, *inter alia,* that the arbitrator ignored evidence, that he failed in his duties when he dismissed the Applicant's case, that he made an error in finding that there was no prospect of success and that he should have granted condonation. Glaringly absent from the Applicant's review application is any allegation that the arbitrator's findings were unreasonable.

[46] In considering the merits of this application, a consideration of the applicable principles is necessary.

The test for the grant of condonation

[47] The relevant legal principles to be applied in an application for condonation, are well established.

[48] The court or relevant tribunal has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides[5].

[49] In *Melane v Sanlam Insurance Co Ltd*[6] it was held that:

> "…. Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts."

[50] In this Court however the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.

[51] The approach that in the absence of a satisfactory explanation for a delay, the applicant's prospects of success are ordinarily irrelevant, has been conventionally applied.[7] This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home*[8] where the Labour Appeal Court held that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial.

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[5] 'Civil Procedure in the Superior Court, Harms at B27.6.

[6] 1962 (4) SA 531 (A) at 532 C - F.

[7] See *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

[8] (2004) 25 *ILJ* 2195 (LAC) at

[52] In *Collett v Commission for Conciliation, Mediation and Arbitration*[9] the Labour Appeal Court confirmed that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[53] The onus is on the applicant to satisfy the court or tribunal that condonation should be granted. In employment disputes there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*[10]:

> 'There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.'

[54] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and others*[11] the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court or relevant tribunal must not lose sight of this purpose.

[55] In summary: The Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

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[9] (2014) 6 BLLR 523 (LAC).
[10] (2015) 36 *ILJ* 232 (LC)
[11] (2016) 37 ILJ 313 (CC).

[56] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application for condonation seeks an indulgence and bears the onus to show good cause.

[57] It is trite that an applicant in an application for condonation seeks an indulgence from the court or the relevant tribunal and bears the onus to satisfy the court or tribunal that condonation should be granted and it is incumbent upon such applicant to provide a full explanation for every period of the delay. The explanation for the delay must be both comprehensive and persuasive and should cover every period of the delay.

[58] In *IMATU obo Zungu v SALGBC and Others*[12] the principle was confirmed that it is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court properly to assess the reasonableness of the explanation.

[59] The longer the delay, the better the explanation should be.

The test on review

[60] I have to deal with the merits of the review application within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[13] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[61] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. I have considered this question after perusal of the condonation application and record, the ruling and the grounds for review raised by the Applicant.

[12] (2010) 31 ILJ 1413 (LC).
[13] 2007 28 ILJ 2405 (CC) at para 110.

[62] I am not convinced that the arbitrator ignored material evidence or that he should have come to a different conclusion based on the evidence that was before him. The arbitrator considered the application, the applicable principles and his ruling is well-reasoned and based on the totality of facts placed before him and the principles to be applied in an application for condonation.

[63] The arbitrator's conclusion falls within a range of decisions that a reasonable decision maker could make based on the evidence placed before him and there is no reason for this Court to interfere with it on review. It follows that the application for review stands to fail.

[64] This Court has a wide discretion in respect of costs. Representatives for both parties argued that the cost should follow the result. Effectively both submitted that the general rule should be applied and no arguments were submitted to deviate from the general rule. The Applicant has not considered the merits of this application before approaching this Court and forcing the Department to engage in meritless litigation.

[65] In my view this is a matter where a cost order is warranted as the application for review is meritless and should not have been brought in the first place.

[66] In the premises I make the following order:

Order

1. The application is dismissed with costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Matshala

For the Third Respondent: Advocate Ngumbela

Instructed by: The State Attorney