REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D 190/13

In the matter between:

SMANGALISO F, NTULI **Applicant**

and

THE DEPARTMENT OF EDUCATION, KZN **First Respondent**

THE HONOURABLE MR S MCHUNU
(In his capacity as MEC for the Department) **Second Respondent**

THEMBA A ZUNGU **Third Respondent**

Heard: **31 October 2014**

Delivered: **12 December 2014**

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

[1] In this application the First and Second Respondents ["Respondents"] seek an order condoning their failure to deliver their response to the Applicant's statement of claim in accordance with Rule 6(3)(c).

[2] The Applicant is opposing the application. I must state that this matter originally before Cele J on 20 June 2014 and was postponed in order to allow parties to engage in settlement discussion with costs reserved. The Applicant has also applied for a default judgement which was obviously interrupted by

the Respondents' subsequent late filing of their statement of opposition and hence these proceedings.

Factual background

[3] The applicant is currently employed by the First Respondent as a deputy principal at Langalibalele Primary School. In 2008, whilst acting as a principal, he applied for that position. The applicant was shortlisted, interviewed and recommended for appointment.

[4] On 8 December 2008 the Applicant was issued with a letter of appointment and was required to commence in his new position as of 1 January 2009. However, it is apparent from the said letter that the First Respondent reserved its right to withdraw the appointment in the event of a grievance being lodged challenging it.

[5] Indeed the Applicant commenced his duties as a principal on 1 January 2009. However, on 19 June 2009 the applicant received a letter which withdrew his appointment pending a satisfactorily resolution of a grievance that had been lodged against the post. The applicant challenged the said withdrawal by referring an unfair labour practice dispute to the Education Labour Relations Council ("ELRC"). The ELRC ruled that it has no jurisdiction to deal with the matter, firstly, because it was referred out of time and, secondly, because it pertained to a contractual dispute. Condonation was accordingly refused.

[6] The Applicant then launched a review application to set aside the said ruling under case number D1167/11. The First Respondent filed a notice of intention to oppose the review application. Subsequently, the Applicant withdrew that matter and launched the main action.

[7] In main proceedings the applicant is claiming breach of contract and seeks specific performance with necessary compensation as a relief.

Condonation application

[8] In *Lourens v Commission for Conciliation Mediation and Arbitration and Others*[1] Gush J dealt extensively with the principles applicable to an application for condonation as set out by courts and I fully endorse his analysis. The upshot thereof is that the standard set down in Melane *v Santam Insurance Co Ltd*[2] has been endorsed in different judgements of this court.

[9] The Respondents' counsel submitted that it is in the interest of justice that condonation should be granted. Well, I have no qualm with this submission; save to warn that meaning of interest of justice incorporates the *Melane* yardstick. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others,*[3] the Constitutional Court, contextualising what is meant by interest of justice, stated that:

> *"…It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of applicant's explanation for the delay or defect." (Footnote omitted.)*

[10] In *NUM v Council for Mineral Technology*,[4] the Labour Appeal Court stated that 'without a reasonable and acceptable explanation for the delay, the

[1] (C788/2011) [2013] ZALCCT 16. 1962 (4) SA 531 (A)
[2] 1962 (4) SA 531 (A).
[3] [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.
[4] [1999] 3 BLLR 209 (LAC) at 211G-H.

prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.' In *Toyota South Africa Motors* (*Pty*) *Ltd v Commissioner*, *South African Revenue Service*[5] the court stated that :

> *"A party seeking condonation must, among other things, give a full and satisfactory explanation for whatever delays non-compliance has occasioned; an inadequate explanation could well bar the grant of condonation…"*

[11] The Applicant's statement of claim was delivered on 8 March 2013. The Respondent's delivered their statement of response on 18 September 2013. Accordingly, the degree of lateness is about 117 days, an extensive delay indeed.

[12] Despite conceding that the State Attorney forwarded the Applicants statement of claim to the First Respondent as early as 18 March 2013, the delay is blamed on the unavailability of either the First Respondent's officials. The said officials were apparently inundated with a wide variety of governmental issues, so the assertion goes. Clearly this explanation is repugnant. The First Respondent's officials have shown no respect for court processes and administration of justice as they unashamedly allowed this matter to take a back seat whilst they attended to supposedly pertinent government issues.

[13] In light of the extensive degrees of lateness and the irrational explanation proffered for the delay, there is no need to consider the prospects of success.

[14] In the circumstances, the application for condonation is dismissed with costs.

<u>Default proceedings</u>

[15] With the Respondents being refused indulgence to serve and file their statement of response, the matter remains unopposed. I, now deal with the application for a default judgment.

[16] In *Mogotlhe v Premier of the North-West Province and Another,*[6] Van Niekerk J adroitly navigated through the treacherous waters of case law on forum

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[5] 2002 (4) SA 281 (SCA) at paragraph 15.
[6] [2009] 4 BLLR 331 (LC) at para 30.

shopping and jurisdiction of this Court to deal with contractual disputes in terms of s77(3) of the BCEA. He concluded with the following:

> *"…the approach adopted by the majority of the SCA in Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA) remains intact post-Chirwa - the LRA does not expressly or impliedly abrogate an employee's common law entitlement to enforce contractual rights. As controversial as the judgments in Gumbi, Boxer Superstores and Murray might be as a matter of law or policy, they unequivocally acknowledge a common-law contractual obligation on an employer to act fairly in its dealings with employees. This obligation has both a substantive and a procedural dimension. In determining the nature and extent of the mutual obligation of fair dealing as between employer and employee, the court must be guided by the unfair dismissal and unfair labour practice jurisprudence developed over the years. If any "dual stream" jurisprudence emerges as a consequence and if this represents an undesirable outcome from a policy perspective, that is a matter for the legislature to resolve. Finally, if an employer acts in breach of its contractual obligation of fair dealing, the affected employee may seek to enforce a contractual remedy which may, by virtue of s77(3) of the BCEA, be sought in this court."*

[17] In *Ditsamai v Gauteng Shared Services Centre*,[7] dealing with special plea of *res judicata*, the court referred with approval to *Dial Tech CC v Hudson and Another.*[8] In that case the employee successfully obtained compensation for constructive dismissal based on the allegation of sexual harassment proceeded to claim compensation for sexual harassment on same facts and circumstances. The Court held that:

> *"[63] Whilst the cause of action in both the constructive dismissal and the sexual harassment cases may arise in the same facts and circumstances, the remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and the EEA respectively.*
>
> *[64] In terms of the constructive dismissal, the matter is firstly, before reaching arbitration or adjudication, processed through conciliation in terms of section*

[7] [2009] 5 BLLR 456 (LC); see *Gauteng Shared Services Centre v Ditsamai* [2012] 4 BLLR 328 (LAC) which upheld this judgment.
[8] (2007) 28 ILJ 1237 (LC).

> *135 of the LRA. If conciliation failed the employee is entitled to refer the matter to arbitration under the auspices of the CCMA or a bargaining council whichever is applicable. However, dismissal disputes, referred to conciliation in terms of section 187 of the LRA, are adjudicated by the Labour Court if conciliation fails."*

[18] In this matter, the Applicant seeks to enforce a contractual remedy. In the statement of claim the applicant states that he never accepted the First Respondent's withdrawal of his appointment as a principal of Langalibalele Primary School.

[19] Even though there was a grievance by one of the candidates that were not appointed challenging the Applicant's appointment, that grievance was subsequently abandoned. Instead of reinstating the Applicant, at least, the First Respondent re-advertised the impugned post and appointed the Third Respondent.

[20] In terms of section 6(1)(b) of the Employment of Educators Act 76 of 1998 the power to appoint an educator in the service of a provincial department of education resides with the Head of Department. Whilst in terms of section 11(1)(f) 'the employer may, having due regard to the applicable provisions of the Labour Relations Act, discharge an educator from service… if the educator was appointed in the post in question on the grounds of a misrepresentation made by the educator relating to any condition of appointment'. Such termination would be deemed to have been on the account of misconduct in term of section 11(2) thereof.

[21] The First Respondent could not have acted in terms of the above sections as the Applicant is still in its employ. However, consequent to its conduct to withdraw the Applicant's appointment, the Applicant's contract of employment as a principal was terminated without due regard to the Applicant's right to be heard before effecting any adverse decision. In *Mogotlhe* the court stated that the employer has a common-law contractual obligation to act fairly in its

dealings with employees and this obligation has both a substantive and a procedural dimension.[9]

[22] Accordingly, it is my view that the conduct of the First Respondent in withdrawing the Applicant's appointment as a principal of Langalibalele Primary School and subsequently appointing the Third Respondent in the same position is unlawful and amounts to a breach of contract. The Applicant has been done a great injustice. When the breach of contract took place, he had assumed duties as a principal for 6 months. In that regard the Applicant's counsel submitted that the unlawful withdrawal of his appointment did not only affect his salary and benefits but also was an embarrassing experience. Absolutely, his colleagues, family and the community at large must have viewed the Applicant's unlawful relegation as a punitive measure for a wrong doing on his part when the truth is that he was a victim of an inconsiderate bureaucratic system.

[23] The Applicant seeks specific performance as a relief. Even though the courts will not order specific performance where a contract of employment is breached, in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd & Another*[10] the court stated that specific performance (reinstatement) is not excluded as a remedy for the employee. I must reiterate that the Applicant is still in the employ of the First Respondent, holding a position of a deputy principal at the same school, Langalibalele Primary School.

[24] I note that Third Respondent is the incumbent principal who is obviously cited as a party in this matter but opted not to oppose the main action. The First Respondent, however, cannot be exonerated from its contractual obligation simply because it has since filled the impugned position. In this instance I align myself with the following Brassy's sentiments as endorsed by Landman J in *Volkswagen SA (Pty) Ltd v Brand NO & others*:[11]

[9] Above n 6.
[10] 1082 4 SA 151 (T).
[11] (2001) 5 BLLR 924 (LC) at para 102; *see Manyaka v Van Der Wetering Engineering (Pty) Ltd* (1997) 11 BLLR 1458 (LC).

"[Reinstatement] will also be invoked when the employee's job has been filled by a replacement, but care must be taken lest this become a ready means by which an employer can escape her obligations. In cases of this sort an employee should normally be reinstated and the employer be left to do what he or she traditionally does when there are too many employees on the payroll – commence the process of dismissal for operational requirements. By such means the court/arbitrator can ensure that the rights of the reinstated employee as an incumbent of the workforce (consequent on seniority or, at least, to pension and severance payouts) are given their proper respect and weight."[12]

Conclusions

[25] In light of the above, there is no reason why the Applicant should not be reinstated to the position of a principal at Langalibalele Primary School retrospective to 20 June 2009 and without loss of remuneration and benefits. In essence, the Applicant must not only be appointed back to his position as a principal, but must be paid the difference between his current remuneration and benefits package and that of a principal retrospectively.

Order

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

1. The First and Second Respondents' application for condonation is dismissed with costs.
2. The withdrawal of the Applicant's appointment is set aside, and the Applicant is reinstated to a position of a principal at Langalibalele School Primary retrospective to 20 June 2009 without loss of remuneration and benefits with immediate effect.

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Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

[12] *Brassy Employment and Labour law* Vol 3 at A8:70.

APPEARANCES:

FOR THE APPLICANT:	Advocate MG Sibisi
	Instructed by Zwane & Company
FOR THE RESPONDENTS:	Advocate A Vahed
	Instructed by State Attorney