

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 452/17

In the matter between:

LOYISO MAKAPELA

Applicant

and

COMMISSIONER ANNA MARIA FOURIE N. O

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

THE UNIVERSITY OF FREE STATE (“UFS”)

Third Respondent

Heard: 22 August 2019

Delivered: 28 August 2019

Summary: Application for review of an award with regard to an alleged unfair labour practice – the award is one that a reasonable commissioner may arrive at. Costs – vexatious and frivolous application. Held: (1) The application for condonation and review is dismissed. (2) The applicant to pay the costs of the application.

JUDGMENT

MOSHOANA, JIntroduction

[1] The applicant, a highly qualified lawyer alleged that the University has committed an unfair labour practice relating to promotion against her. She referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for resolution. The commissioner found that the applicant was not subjected to an unfair labour practice. Aggrieved thereby, she approached this Court, outside the prescribed period, for relief to review and set aside the award made by the commissioner. The application is opposed by the University.

Background facts

[2] The applicant is a former student of the University. Around November 2012, the University advertised 2 posts of a lecturer in the Department of Constitutional and Philosophy of Law in the Faculty of Law. The applicant applied for one of the posts. She was shortlisted and interviewed but was not successful. At that time the applicant was a holder of Bachelor of Laws and Master of Law (International Economic Law) degrees.

[3] Shortly thereafter, she was offered and accepted a position as a junior lecturer in the Department of Mercantile Law. She commenced in that junior lecturer position in April 2013. Around September 2013, the University awarded her scholarship to read for another Masters degree in the United Kingdom. She remained in the United Kingdom for a period of a year. She returned to the University around October 2014. Shortly thereafter she applied for a promotion to the post of a lecturer. Effective 1 January 2015, she was appointed a lecturer in the Department of Mercantile Law. In her application for promotion, she raised a complaint that she should have been appointed as a lecturer at the commencement of her appointment in accordance with the

criteria outlined in the Evaluative Standards contained in the University's Academic Promotions Document Version 4L (APDV4L). This complaint was investigated and a conclusion was reached on 2 November 2015 to the effect that there were no irregularities in the application of APDV4L. Dissatisfied with the conclusion, the applicant referred a dispute alleging unfair labour practice.

- [4] The first respondent was appointed to resolve the dispute through arbitration. A jurisdictional point was unsuccessfully raised by the University. After hearing evidence, the first respondent published a detailed and lengthy award, which is now impugned by the applicant. The first respondent concluded therein that the applicant failed to prove on the balance of probabilities that the University perpetrated an unfair labour practice against her. She ordered the applicant to pay the legal costs of the University in the amount of R6000.00.
- [5] The applicant received the impugned award on 25 November 2016. In terms of the Labour Relations Act (LRA), she had six weeks from that day to seek a review of the award. The said six weeks' period expired on 6 January 2017. The applicant only launched the application around May 2017. Owing to that she sought condonation for the late filing of the application. As pointed out above, the application was opposed by the University.

Grounds of review

- [6] In her founding papers, the applicant did not specify which would be her grounds for review. What the Court could decipher is her complaint that the first respondent did not offer her assistance as a person who lacked the necessary experience to deal with the matter, and because the first respondent failed to advise her, she did not act as a reasonable commissioner. She concludes that the ruling or award is not one a reasonable decision maker could ever make.

Evaluation

- [7] This Court does not have jurisdiction to entertain a review launched outside the prescribed period unless the failure is condoned by the Court. In her founding affidavit, the applicant dedicated three paragraphs towards the asking for condonation. Her explanation of the delay therein is wholly inadequate and unacceptable. She chose to consult with an attorney on an undisclosed date in December 2016. The information provided is sparse and scanty. Other than a bald allegation that she possesses excellent prospects of success she provides no actual information in support of the allegation. The explanation is so weak that it actually amounts to no explanation at all and therefore condonation can never be granted where an explanation is bereft.
- [8] Since the applicant failed to provide an explanation, this Court lacks jurisdiction to entertain this application. Even if the Court was minded to exercise jurisdiction, the award is not reviewable in law. The transcript reveals that the first respondent explained the process¹ to the parties and the applicant was effectively assisted by this explanation. The applicant is a lawyer by profession and could have enlisted the services of a legal representative if she wished to have one. The award of the first respondent is detailed and perusal thereof points to the fact that it is one that a reasonable decision maker can arrive at.
- [9] The applicant did a disservice to herself by representing herself in this Court. It took the Court almost half an hour to follow any of her submissions. She did not have her own papers. She could not refer the Court to the relevant documents in the record. Effectively, she was ill prepared.
- [10] It was truly difficult to understand her claim for unfair labour practice. The policy, APDV4L did not support her contention that in 2013, she ought to have been appointed as a lecturer. She was not eligible for promotion as prescribed in the policy. She only entered the University in 2013 as a junior lecturer. At that time, she never held any permanent academic appointment before as required by clause 68 of APDV4L. Her claim was frivolous from the get go and

¹ Paragraph 2 of the award records this.

she unfairly dragged the University to this Court in order to defend a meritless case. This conduct is one that invites this Court to make an order as to costs.

[11] When it comes to costs, this Court possesses a wide discretion. This is one of those hopeless cases that come to this Court. The dictates of the law and fairness commands that an order as to costs must be made. The applicant is an admitted Advocate of the High Court. She chose to represent herself in this matter, an unwise decision in the Court's view. In her own papers she states that she lacks experience in labour litigation. With that assertion, it baffled me why she chose to be counsel in her own matter. Her heads of argument were only provided to the Court on the day of argument. In the heads, she raised irregularities that do not appear in her founding papers. Clearly, the applicant's conduct in this matter is one that warrants a cost order. It would be unfair to mulct the respondent with the costs of this ill-conceived litigation.

[12] The first respondent expressed concern about the applicant's conduct before awarding costs against her. It does seem that the applicant did not take a lesson out of that. The first respondent was entitled to make an order of costs against the applicant. Similarly, I take a firm view that a cost order is warranted in this application.

[13] In the results, the following order is made:

Order

1. The application for condonation is dismissed.
2. The application for review is subsequently dismissed.
3. The applicant is to pay the costs of the application.

G. N. Moshwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant : In Person (roped as counsel) (heads signed by L A Roux)

Instructed by : R Green Attorneys, Bloemfontein.

For the 3rd Respondent : Mr T Mokwayi of Phatshoane Henney Attorneys, Bloemfontein.

LABOUR COURT