

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1716/13

In the matter between:

T H MAILA AND 3 OTHERS

Applicants

and

THE CITY OF JOHANNESBURG

First Respondent

COMMISSIONER MG RABYANYANA N. O

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

Delivered: 22 November 2019

JUDGMENT

TLHOTLHALEMAJE, J

- [1] The applicants seek an order reviewing and setting aside the ruling of the second respondent (Commissioner Rabyanyana) issued under the auspices of the third respondent (SALGBC). They further seek an order that their late referral of a dispute to the SALGBC be condoned. In the alternative, they seek an order declaring that the SALGBC has jurisdiction to determine the condonation application, and referring the matter back to it to be heard *de novo* before another commissioner.
- [2] The dispute between the parties has a protracted history dating back to 2004. It has its source in the respondent's Johannesburg Metropolitan Police

Department's (JMPD) decision to stop paying risk allowances to the individual applicants. It is not necessary for the purposes of this judgment to deal with the details of the dispute other than to highlight the following common cause facts;

- 2.1 The individual applicants are employed by the respondent, City of Johannesburg in different capacities in its JMPD. They were previously employed in the Traffic Department of the erstwhile Soweto City Council, where they used to be paid a risk allowance equivalent to 5% of their monthly basic salary.
- 2.2 The Soweto City Council was amalgamated into the City of Johannesburg. The individual applicants were then transferred to the JMPD, which was formed in 2001. Their terms and conditions of employment remained the same, other than the fact that with effect from June 2004, the payment of the risk allowance was stopped in respect of some of the individual applicants, and again in February 2012 in respect of the others.
- 2.3 Flowing from several discussions between the individual applicants and the respondent's management, and the failure to resolve a grievance that was lodged by the applicants in 2012, an alleged unfair labour practice dispute was then referred to the SALGBC on 20 March 2013, in which it was recorded that the dispute arose on '*1 March 2013 and continuing wrong*'(Sic).
- 2.4 The matter came for conciliation on 25 April 2013 before Commissioner Hlatshwayo. Following a preliminary point raised by the respondent in those proceedings in regards to the late referral of the dispute, Commissioner Hlatshwayo issued a ruling and held that the SALGBC lacked jurisdiction to hear the matter in the absence of an application for condonation. This was despite the fact that as can be gleaned from the ruling, Commissioner Hlatshwayo had dealt with the preliminary point as if there was such an application before him.

2.5 Following Commissioner Hlatshwayo's ruling, the individual applicants then filed a substantive application for condonation in April 2013, which the respondent had opposed by filing an equally substantive answering affidavit. The individual applicants also filed a replying affidavit.

2.6 The application came before Commissioner Rabyanyana on 3 June 2013, who had issued a ruling on 5 June 2013, in terms of which the application for condonation was dismissed on the basis that the earlier ruling issued by Commissioner Hlatshwayo stood. Commissioner Rabyanyana further reasoned that;

2.6.1 When the matter first came for conciliation and upon the preliminary point having been raised, Commissioner Hlatshwayo had dealt with the application for condonation of the late referral of the dispute by considering submissions made before him, and had found that the SALGBC lacked jurisdiction.

2.6.2 The subsequent application for condonation was erroneously lodged as the matter was dealt with by Commissioner Hlatshwayo. To revisit the condonation application therefore would amount to acting outside of her powers.

2.6.3 If the applicants were not content with the condonation ruling of Commissioner Hlatshwayo, they had the option to seek a variation or rescission of that ruling under the provisions of section 144(a) to (c) of the Labour Relations Act (LRA)¹, or alternatively, to have it reviewed.

[3] In determining whether the above ruling is reviewable, it is correct as submitted on behalf of the respondent, that Commissioner Rabyanyana's ruling must be considered in the context of the earlier condonation ruling of Commissioner Hlatshwayo, to the extent that the latter was called upon to determine whether or not the SALGBC had jurisdiction to hear the matter in the absence of a condonation application.

¹ Act 66 of 1995 (as amended)

- [4] The respondent further contended that there is no merit in the applicants' submission that Commissioner Rabyanyana misunderstood and/or failed to apply her mind to the objective facts when determining that the SALGBC lacked jurisdiction. It was argued that at the conciliation hearing before Commissioner Hlatshwayo, and after the preliminary point was raised, the applicants did not seek an opportunity to bring a formal application for condonation, and had instead argued that the issue be decided in the absence of a formal application. It was on those grounds that Commissioner Hlatshwayo had issued his condonation ruling.
- [5] It was further submitted on behalf of the respondent that even if Commissioner Rabyanyana was wrong, and that Commissioner Hlatshwayo's ruling should have been read and interpreted to imply that the applicants were obliged to bring an application for condonation, that application should in any event be dismissed. It was submitted that since a complete set of the papers in respect of the condonation application was before the Court, there was no merit in remitting the matter back for reconsideration, and that the Court was in a good position to determine and dismiss it.
- [6] Certain difficulties however arise with this review application. The first is that as apparent from her ruling, Commissioner Rabyanyana did not deal with the merits of condonation application at all. She had only based her reasoning on a reading and interpretation of Commissioner Hlatshwayo's ruling. The basis of the dismissal of the application was essentially that the matter had been determined by Commissioner Hlatshwayo. The second difficulty in this regard is that the latter's ruling is not the subject of these review proceedings. In these circumstances, it is not for this Court to deal with the merits of the condonation application as suggested by both parties, in the light of the uncertainties created by the ruling of Commissioner Hlatshwayo.
- [7] These difficulties are highlighted in view of what the applicants' case is in seeking to have Commissioner Rabyanyana's ruling set aside. First, it was argued that it cannot be correct as Commissioner Rabyanyana had found, that it was common cause that Commissioner Hlatshwayo had issued a condonation ruling. This contention lacks merit, as clearly, Commissioner

Hlatshwayo ruling is titled “*Condonation Ruling*”, and as can further be gleaned from that ruling, the Commissioner dealt with factors relevant for consideration in such applications, as if there was an application before him.

- [8] It is however common cause that there was no condonation application before Commissioner Hlatshwayo, and whether his ruling in that regard was dispositive of the matter or whether flowing from that ruling it can be inferred that the applicants were entitled to file an application for condonation, is not easily discernable for the ruling, nor is it a matter for this Court to determine, as that ruling is not the subject of these review proceedings.
- [9] The applicants further contend that Commissioner Hlatshwayo stated in his ruling that the SALGBC did not have jurisdiction in the absence of condonation being sought, and that it was illogical that he would have made such a finding when he had made a determination on condonation in any event. The applicants’ submissions in this regard raises serious concerns with some of the rulings that this Court is routinely called upon to review and set aside. A commissioner’s decision to grant or refuse condonation is by its nature final and binding, unless obviously taken on review. Such rulings can be dispositive of disputes or at most, afford a party an opportunity to pursue a matter. Given the importance of these rulings, inasmuch as it is accepted that Commissioners must give brief reasons for their decisions, at the same time, it is expected of such rulings to be issued in clear and unambiguous terms, so as to enable the parties to the dispute to determine whether any further steps should be taken in respect of that dispute.
- [10] Thus, if the application for condonation was dealt with by Commissioner Hlatshwayo in circumstances where it is alleged that the applicants chose not to file an application but to argue the matter from the ‘bar’, then surely it would have been expected of Commissioner Hlatshwayo to unambiguously state that the application was dismissed, rather than simply coming to a conclusion in his analysis to the effect that the SALGBC had ‘*no jurisdiction to hear the matter in the absence of an application for condonation*’. The terms of the ruling are clearly ambiguous and open to any interpretation.

- [11] In the light of the above difficulties arising from a lack of clarity in Commissioner Hlatshwayo's ruling, one cannot therefore find fault with Commissioner Rabyanyana's conclusions that her hands were tied, and that the doctrine of *functus officio* applied. Once a ruling was made by Commissioner Hlatshwayo that the SALGBC had no jurisdiction to hear the matter, in the absence of any clarity sought by the applicants in respect of Commissioner Hlatshwayo's ruling, that ought to have been the end of the matter.
- [12] To the extent that the applicants had subsequently filed a substantive application for condonation, without first seeking clarity in Commissioner Hlatshwayo's ruling, Commissioner Rabyanyana was therefore correct in concluding that if they were aggrieved with the first ruling, they were at liberty to invoke the provisions of section 144 of the LRA rather than merely filing an application for condonation. To be precise, the provisions of section 144(b) of the LRA would have been more appropriate in the light of ambiguities in Commissioner Hlatshwayo's ruling.
- [13] In the light of the above considerations, it follows that there is no basis for this Court to interfere with Commissioner Rabyanyana's ruling. I have further had regard to the requirements of law and fairness in regards to costs, and I am of the view that a costs order is not warranted given the circumstances of this case.
- [14] Accordingly, the following order is made;

Order:

1. The application to review and set aside the condonation ruling dated 3 June 2013 issued by the Second Respondent under case number JMD 041301 is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicants:
Inc

J Ewang of Hogan Lovells (South Africa)

For the First Respondent:

C Beckenstrater of Moodie & Robertson

LABOUR COURT