IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1050/2018

In the matter between:

MINISTER OF CORRECTIONAL SERVICES **Applicant**

and

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL **First Respondent**

COMMISSIONER M NAIDOO N.O. **Second Respondent**

PSA OBO BOUCHER AND OTHERS **Third Respondent**

Heard: **15 March 2021**

Delivered: **17 March 2023**

JUDGMENT

LANCASTER, AJ

Introduction

[1] The Applicant applies, in terms of section 145(1) of the Labour Relations Act[1] (LRA) to this Court for a review of the arbitration award issued on 17 March 2018 (Arbitration Award) by the Second Respondent, M Naidoo in his official capacity as Commissioner, under the auspices of the First Respondent, the Public Service Co-ordinating Bargaining Council (PSCBC).

[2] The Third Respondent, PSA obo Boucher and others, is opposing the review application.

Condonation

[3] In their founding affidavit, the Applicant applied for condonation.

[4] The application for review to this Court was due on or before 5 May 2018. It was not filed until 6 June 2018.

[5] The Applicant submitted that they received the Arbitration Award on 24 March 2018. The office of the State Attorney received instructions to file the review application on 23 April 2018. The matter was allocated to Mr Duvenhage in the State Attorney's office, but it was discovered that he was on leave. Upon this discovery, the matter was reallocated to Mr Nhlanhla Mkhwanazi who is currently on instruction on this matter. Counsel was briefed on 3 May 2018.

[6] According to the papers, the Applicant only consulted with counsel on 15 March 2018 in order to apply for condonation, but it can only be assumed that the Applicant intended to state that they consulted with counsel on 15 May 2018.

[7] The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[2] and *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)*[3] stated that, in hearing a condonation application, a

[1] No. 66 of 1995, as amended.
[2] 2000 (2) SA 837 (CC).

court must consider the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation of the delay, the importance of the issue to be raised in the intended application and the prospects of success.

[8] In determining the extent of the delay, one must consider section 145(1)(a) of the LRA. In terms of this section, review proceedings of the arbitration award must be initiated within six weeks of service of the arbitration award.

[9] The Applicant stated that they were approximately three weeks late with their review application calculated against the prescribed time period required in terms of section 145 of the LRA. On an appropriate calculation, the review application is in fact five weeks late. The Applicant avers that this degree of lateness is not excessive.

[10] In considering the degree of lateness, I have taken cognisance of the Applicants' submissions regarding the delay from the State Attorney. In terms of the Applicants' submission, the degree of lateness is not excessive, which submission the Third Respondent admitted.

[11] In considering the effect of the delay, the Labour Appeal Court (LAC) in *SAMWU obo Shongwe v Commissioner Moloi NO and others* (*Shongwe*),[4] held:

> '…this Court held in respect of the delay in the prosecution of a review brought in terms of the LRA, essentially, that the Labour Court has the discretionary power to dismiss a review for that reason, but it was a power that had to be exercised with circumspection and in exceptional circumstances, because of a litigant's rights in terms of section 34 of the Constitution to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. It was held further there, that in the exercise of that discretion, the delay must not be considered in a vacuum, but must be evaluated in light of all the relevant factors, including the prejudice to the parties, the possible consequences of

[3] 2008 (2) SA 472 (CC).
[4] [2021] 5 BLLR 464 (LAC) at para 26.

granting, or of not granting the relief sought in respect of the merits, and the prospects of success, although there is no closed list. This Court also held that, ultimately, the interests of justice were paramount.'[5]

[12] By taking into account that the Applicant referred the matter to the State Attorney on 23 April 2018, which left them with 7 days to finalise the review application, I find that the delay in filing the review application was not the cause of any wilful default by the Applicant. The Applicant should not be prejudiced for the delay caused by the State Attorney's administration.

[13] One of the factors to be considered in a condonation application is the prospects of success of the party applying for condonation.

[14] Given the remainder of my judgment herein below, I am not convinced of the Applicant's prospects of success, however, as the LAC held in *Shongwe*, the interests of justice were paramount in considering whether to grant a condonation application. In the matter before me, it is in the interest of justice to consider the Applicant's argument in creating certainty for the employees working as centre-based officials.

[15] Currently, the employees are being forced to apply for leave on public holidays, which the Third Respondent submitted was unwarranted as neither the resolutions nor the directives provide therefore.

[16] Should I refuse condonation, these employees will remain in the dark as to whether they are required to apply for leave and the litigation is bound to continue. Further, this will also create uncertainty for future employees employed on the same basis.

[17] In the condonation application before me, the Applicant has made out a case for the delay in filing the review application. The delay is not so excessive as to be

[5] See, *inter alia*, *City of Johannesburg Metropolitan Municipality and others v Independent Municipal and Allied Workers Union and others* (2017) 38 ILJ 2695 (LAC); The Constitution of the Republic of South Africa, 1996.

vitiated by the prospects of success and it is in the interest of justice to grant condonation to the Applicant.

[18] In light of the above, the late filing of the Applicant's review application is condoned.

Factual background

[19] The following is common cause between the parties:

19.1. The 23 respondents that collectively make up the Third Respondent (employees) are employed at the Department of Correctional Services and stationed at Modderbee Management Area.

19.2. On 3 August 2017, pursuant to a certificate of non-resolution being issued, the employees, through their trade union, referred an interpretation and/or application dispute to the PSCBC for arbitration.

19.3. The Third Respondent's main point of contention lay in the fact that the employees did not believe they were obliged to apply for leave when they were to be absent from work on a public holiday or weekend as they worked fixed shifts from Monday to Friday.

[20] The Third Respondent contended, during the arbitration proceedings, that the employees required the Commissioner to determine the correct interpretation and application of the provisions of clause 7 of the Public Service Co-ordinating Bargaining Council Resolution No 7 of 2000: Improvement in the Conditions of Service of Public Service Employees or 2000/2001 Financial Year (PSCBC 7/2000), which deals with leave.

[21] In their evidence before the PSCBC, the employees testified that:

21.1. They fell within the category of employees that work a forty-five (45) hour work week, but they worked only from Mondays to Fridays, 06h00 to 16h00.

21.2. Part of their duties was to provide support services to the Centre – which duties were performed from 07h00 to 16h00 on weekdays (excluding public holidays).

21.3. They commenced their daily work by performing duties that are associated with the work normally performed by the categories of employees called the "7-day establishment officials".

21.4. They performed this work from 06h00 to 07h00 on weekdays (excluding public holidays) at the prisons.

21.5. It was common cause that the 7-day establishment officials work on 5-day shift rosters and are required to work on public holidays, Saturdays and Sundays should they be restored to work on those days.

21.6. It was also common cause that these 7-day establishment workers work at the prisons and were obliged to apply for leave if they absented themselves from work during any day of their 5-day shift, even where their absence was on a public holiday.

21.7. However, the employees are not able to work on Saturdays, Sundays and public holidays as the support work performed by them, to the managerial staff at the Centres, cannot be performed on those days as the managers in question are not required to work on those days.

21.8. It was contended therefore that it was grossly unreasonable and unfair to interpret the collective agreements and ancillary instruments to mean that they have to apply for leave on days for which they cannot be rostered to work, nor are they able to perform their duties on such days, due to the nature of their work.

[22] The Applicant submitted, during arbitration, that the above contention is despite the fact that the employees were part of a 7-day post establishment created by clause 13 of the General Public Service Sector Bargaining Council Resolution No 2 of 2009: Agreement on the Implementation of an Occupational Specific Dispensation (OSD) for Correctional Services Officials (OSD).

[23] In line with the abovementioned clause 13 of the OSD, the employees are center-based officials and as such are expected to perform their duties for 45 hours per week, in shifts, which may include work on public holidays, Saturdays and Sundays.

[24] The Applicant further contented, during the arbitration proceedings, that the interpretation of the OSD forms the basis of the dispute and thus the dispute should have been referred to the General Public Service Sector Bargaining Council (GPSSBC).

The application for review

[25] In terms of section 145(1) of the LRA:

> 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award...' (Own emphasis)

[26] In terms of section 145(2) of the LRA:

> 'A defect referred to in subsection (1), means –
>
> *(a)* that the commissioner –
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> *(b)* that an award has been improperly obtained.' (Own emphasis)

[27] In my opinion, the Applicant puts forth essentially two grounds in support of its application for review. These grounds are set out below.

First ground

[28] The Applicant contends that the Arbitration Award is reviewable because the Second Respondent failed to make a finding in respect of the jurisdiction of the PSCBC. The Applicant submitted that since this matter turns on the interpretation and application of the Directive, which directive was issued pursuant to the OSD Agreement concluded in the GPSSBC. According to the Applicant, the matter was thus to be arbitrated by the GPSSBC and not by the PSCBC. The Applicant thus averred that the matter was referred to the incorrect forum and thus there are jurisdictional issues which first had to be dealt with, prior to the Second Respondent being able to entertain the matter. In failing to address the aforesaid and making a determination on an issue in respect of which the PSCBC had no jurisdiction, the Second Respondent committed a gross irregularity, resulting in a defect in the proceedings.

[29] In response to the above, the Third Respondents submitted that since the Second Respondent was required to interpret the relevant clauses and application of the PSCBC 7/2000, the PSCBC was the correct forum and thus had jurisdiction to entertain this matter.

[30] This Court in *J & J Nfreeze Trust v Statutory Council for the Squid & Related Fisheries of SA and others,*[6] held that:

> '…the test in reviews concerning the jurisdiction of the CCMA or the bargaining council is not that of a reasonable decision-maker as is the case in the general review cases but whether the objective facts as they existed formed the basis upon which the CCMA or bargaining council could assume jurisdiction. It would seem even the issue of the correctness or otherwise of the decision of the

[6] [2011] 11 BLLR 1068 (LC) at para 22.

> commissioner is in this respect irrelevant. In other words, the court in the jurisdictional review may well find that the decision of the commissioner or the arbitrator was correct, but it is critical that the court has to apply its own mind and determine whether the objective facts as presented gave the commissioner or the arbitrator the jurisdiction upon which the dispute could be entertained by the CCMA or the council.' (Own emphasis)

[31] I am thus faced with the task of considering whether the objective facts, as they existed during the course of the arbitration proceedings, formed a basis upon which the PSCBC could assume jurisdiction. In order to make a finding in this regard, it is thus necessary to determine whether the PSCBC 7/200 or the OSD Agreement concluded under the auspices of the GPSSBC, finds application in this matter.

[32] The Applicant's arguments are misdirected in that the employees in fact conceded during the arbitration proceedings that they form part of the 7-day post establishment. The dispute that was brought before the Second Respondent dealt with the fact that although the employees formed part of the 7-day post establishment, they did not work the same hours as the 7-day shift workers and that they worked fixed shifts from Monday to Friday from 06h00 to 16h00 at the request and by the design of the Applicant. The issue the Second Respondent thus had to arbitrate on was whether these employees have to apply for leave on public holidays and from which resolution and/or directive the aforesaid can be derived.

[33] Considering that the OSD does not make any mention of leave provisions, PSCBC 7/2000 constitutes the authority on this issue as it specifically makes mention of leave provisions in clause 7 thereof.

[34] In addition, the OSD was derived from PSCBC 7/2000. As the OSD makes no provision for leave, the issue of leave application must be determined in terms of the law that stood when the OSD was created – thus PSCBC 7/2000.

[35] Furthermore, the Labour Court in *Shange v SAPS*[7] found that the authority on which forum has jurisdiction over the interpretation and application of PSCBC 7/2000 is contained in the collective agreement itself, read with section 24 of the LRA.

[36] The Second Respondent seemingly also considered, in coming to his decision, the additional instruments presented to him, being the Ministerial Directive on Leave in the Public Service, issued pursuant to and as a consequence of PSCBC 7/2000 and the directives issued by Departmental Officials interpreting the provisions of those instruments.

[37] Although the Second Respondent did not expressly make a finding in respect of jurisdiction, it can be derived from the actions that followed, that the Second Respondent indeed considered the PSCBC to be the forum that has jurisdiction as the Second Respondent found that PSCBC 7/2000 is the applicable resolution and thus continued with the arbitration in the PSCBC.

[38] Further, in considering the objective facts, the Second Respondent thus did not exceed his powers in continuing with the arbitration in the PSCBC, and thus tacitly found that it was the correct forum to hear the matter.

[39] Having regard to the fact that the only instruments that address the issue of leave in the Public Service are PSCBC 7/2000 and the Ministerial Directives issued as a consequence thereof, the arbitrator could not have been incorrect in this finding and I am of the view that the PSCBC was the correct forum to adjudicate on a dispute in relation to the interpretation and/or application of these instruments.

[40] I, therefore, find that the Second Respondent's award, albeit tacit, regarding jurisdiction must stand.

<u>Second ground</u>

[7] [2011] JOL 27886 (LC).

[41] Having found that the PSCBC was indeed the correct forum to hear the matter, I will continue to determine whether the Second Respondent was correct in his interpretation of clause 7 of PSCBC 7/2000.

[42] The Applicant contends that the Second Respondent misconstrued and incorrectly interpreted the issues and thus reached a decision that another decision-maker would not have reasonably made.

[43] It is trite that the threshold test for the reasonableness of an award was laid down by the Constitutional Court in the matter of *Sidumo and another v Rustenburg Platinum Mines Ltd and others,*[8] as follows*:*

> 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[44] The LAC held in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others,*[9] that in assessing the grounds of review and the reasonableness, the five pillar requirements, stated below, are to be considered:

> 'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence? In respect of the first pillar, as stated

[8] [2007] 12 BLLR 1097 (CC) at para 110.
[9] [2014] 1 BLLR 20 (LAC) at para 20.

above, it does not seem that the Applicant takes issue with this and thus this is not one of the grounds on which the Arbitration Award in question is sought to be reviewed.'

[45] In respect of the second pillar read with the third and fourth pillar, as stated above, it can be deducted from the averments made by the Applicant that one of the grounds for the application for review is that the Second Respondent allegedly failed to properly identify the dispute that he had to arbitrate, that he did not deal with the substantial disputes and failed to correctly determine what the dispute is all about.

[46] The evidence presented by the Applicant in support of the above averments was that the Second Respondent was sought to arbitrate on the interpretation and application of clause 8 of the Determination and Directive on Leave of Absence in the Public Service[10] (Directive). The Applicant further submits that the Second Respondent erred by, instead of interpreting and applying the aforesaid Directive, interpreting and applying clause 7 of the PSCBC 7/2000, which PSCBC 7/2000 is irrelevant according to the Applicant.

[47] Lastly, in respect of the fifth pillar, as stated above, the Applicant submits that taking into account the totality of evidence provided, the Second Respondent's decision is not one that another decision-maker could have reasonably arrived at.

[48] In response, the Third Respondents submitted the following:

48.1. In support of its contentions in the arbitration proceedings, the Third Respondent presented two witnesses, Ms Swarts and Ms Boucher. Both these witnesses testified that since they were appointed in the centre-based support staff positions in 2009, they only worked from Mondays to Fridays from 06h00 to 16h00 and did not work on public holidays as the administrative department was closed on such days[11] (I pause here to mention that this evidence was not refuted by the Applicant).

[10] Issued by the Minister for the public Service and Administration, June 2015.
[11] Record of proceedings pages 53-54.

48.2. These witnesses further testified that they never worked on public holidays and were never required to apply for leave on public holidays. It was only in March 2017, that certain officials started implementing leave applications on public holidays for centre-based support staff. Ms Boucher testified that the new rule was not implemented in writing and was communicated to them during a general meeting.[12]

48.3. The OSD does not deal with leave management, but PSCBC 7/2000 deals with this. Thus, it cannot be said that PSCBC 7/2000 is irrelevant, as the interpretation of PSCBC7/2000 was in fact the dispute before the Second Respondent. Thus, by considering the interpretation and application of PSCBC 7/2000, the Second Respondent indeed understood and correctly determined the dispute that was in front of him.

48.4. The Directive that was issued records in Part 4 thereof, specifically at clause 1.2[13], that it is issued to give effect to clause 7 of PSCBC 7/2000 and later agreements entered into (in the PSCBC) pursuant thereto and in order to clarify the issue of leave management.

48.5. It cannot be argued that there would be any unjust or prejudicial consequences should the Arbitration Award stand, since the purpose of the referral to the PSCBC by the Third Respondents was simply to obtain an award that confirmed the *status quo*. It was not the employees who created the conundrum that the Applicant finds itself in, but it was in fact self-created.

[49] In the recent matter of *Herbert v Head of Education: Western Cape Education Department and others,*[14] the LAC held as follows:

[12] Record of proceedings page 72.
[13] Record of review page 369.
[14] (2022) 43 ILJ 1618 (LAC) at paras 13 and 24.

'[13] …the Supreme Court of Appeal 'has explicitly pointed out that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous'.

…

[24] …the reasonableness test is appropriate to both value judgments and legal interpretations. If not, "correctness" as a distinct test is necessary to address such matters.'

[50] The aforesaid is exactly what the Second Respondent was faced with in this matter; (a) a value judgment in respect of precedents set in the past with regards to the public holidays and the fact that the employees in question were not required (or even requested) to put in a leave request for such public holiday if such holiday fell on a Monday to Friday, and the context in which this happened; and (b) the legal interpretation of the collective agreements and directions in question.

[51] The LAC in *North East Cape Forests v SA Agricultural Plantation & Allied Workers and Others,*[15] emphasised that, in addition to applying the ordinary principles of interpretation of contracts, an interpreter of a collective agreement should enquire as to whether the interpretation yielded by these principals accords with the objectives of the LRA.

[52] Having regard to these authorities, it is necessary to mention that neither the Directive, the OSD, nor PSCBC 7/2000 provides that employees are required to apply for leave on public holidays. This effect is seemingly derived from clause 8 of the Directive dealing with the Management of Annual Leave for Shift Workers. Ironically this same clause provides, in clause 8.4.1 thereof that annual leave is counted according to the work days the employee is scheduled for shifts.

[15] (1997) 18 ILJ 971 (LAC).

[53] Further, neither PSCBC 7/2000 nor the Ministerial Directive make provision for the special category of employees (such as the Third Respondents) known as the centre-based support staff.

[54] Mr Mofokeng, the representative for the Applicant in the arbitration proceeding, during cross-examination, put it to Ms Swarts that "*there is no clause in that resolution that says in the Department of Correctional Services you are not expected to submit leave on a public holiday*"[16]. This statement was confirmed by Ms Swarts.

[55] From a reading of clause 7 of PSCBC 7/2000, this statement is indeed true. However, in making this statement, Mr Mofokeng inadvertently drew attention to the fact that clause 7 of PSCBC 7/2000 also does not state that the employees have to apply for leave on public holidays. In fact, not only is this clause, but the entirety of PSCBC 7/2000, the OSD and the Ministerial Directive, silent as to the employees of the Department of Correctional Services having to apply for leave on public holidays.

[56] In terms of the above Directive[17], 7-day shift workers must apply for leave should their shift fall on a public holiday. However, the Directive does not make provision for the special category of employees known as the centre-based support staff who can neither be rostered to work on public holidays or weekends nor work on those days, as the Management staff whom they serve and, therefore, the work provided to them is not available on those days. Therefore, the Applicant is not able to or has not provided any work for the individual Third Respondents to do on these days.

[57] Due to the silence in both resolutions and the directive on the application for leave (or rather taking of leave) on public holidays, the Departmental Directives S 9/2/4 titled Guidelines on Ordinary Work Performed on Saturday, Sunday and

[16] Record of proceedings page 57.
[17] Refer to para 45 above.

Public Holiday in line with: 7-day Establishment: DCS must serve as an aid in interpreting PSCBC Resolution 7/2000. The Directive states:

> 'Centre Based support staff personnel perform their duties from Monday to Friday, these officials will be regarded as off duty on any Public Holiday, Saturday and Sunday, and cannot be required to submit leave for such days.'

[58] Accordingly, based on the Applicant's own Directives, the employees are not expected to apply for leave on public holidays and thus cannot be forced to do so by senior management.

[59] In fact, the Directive clearly confirms the *status quo* and is, in my view, the correct application of the legal instruments informing the employment relationship and leave arrangements between the parties.

[60] The Third Respondent correctly summarised the matter in stating that the Applicant has applied a rule or agreement that is not founded on the contractual relationships between the parties. The Second Respondent correctly found that the Applicant cannot require the employees to apply for leave on public holidays.

[61] At the very least his findings are not findings which no reasonable decision-maker could come to under the circumstances, as averred by the Applicant. Even applying the correctness test, the arbitrator's finding cannot, in my view, be said to be incorrect.

Conclusion

[62] Based on an objective reading of the relevant directives and resolutions and keeping in mind the context in which the aforesaid law has to be interpreted, I find that the Second Respondent correctly interpreted clause 7 of PSCBC 7/2000 to mean that the employees do not have to apply for leave on public holidays and in fact that the leave application cannot be applied to the employees as there is no rule to be applied.

[63] When the centre-based support staff function was created, it was clearly the intention that these employees would not have to apply for leave on public holidays as it is objectively impossible for them to perform their intended functions on such days as the offices are closed.

[64] Even should the Ministerial Determination not play a role and should PSCBC 7/2000 have been interpreted in isolation, the Second Respondent is still correct by having determined that the *status quo* stands, for the following reasoning:

64.1. The Applicant created its own conundrum when it implemented the position of center-based support staff. These employees cannot be categorised together with the employees employed in terms of the 7-day post establishment in that the employees in question work fixed shifts and hours from Monday to Friday from 06h00 until 16h00.

64.2. Furthermore, it would be unreasonable to expect of these employees to apply for leave on public holidays as the administration offices are closed on public holidays, Saturdays and Sundays. The majority of the employees' days are spent assisting the administrative staff at the relevant Centres in that they only work in the prisons from 06h00 to 07h00.

[65] The decision the Second Respondent came to was thus not unreasonable and is in my view not subject to review.

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

Order

1. The Applicant's application for condonation for the late filing of the review application is granted.

2. The Applicant's application for review of the Arbitration Award is dismissed, with costs.

S Lancaster

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M H Mhambi
Instructed by:	State Attorney, Pretoria.
For the Third Respondent:	Ms L Khumalo, L Khumalo Attorneys