REPUBLIC OF SOUTH AFRICA

Not reportable
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THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 177/13

In the matter between:

PAMELA GEZU **APPLICANT**

and

THE SOUTH AFRICAN LOCAL GOVERNEMNT

BARGAINING COUNCIL **FIRST RESPONDENT**

MARTIN KOORTS *NO* **SECOND RESPONDENT**

MAKANA MUNICIPALITY **THIRD RESPONDENT**

Heard: **24 April 2015**

Delivered: **29 April 2015**

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a ruling made by the second respondent, to whom I shall refer as 'the arbitrator'. In his ruling, issued on 22 October 2013, the arbitrator condoned the failure by the third respondent to institute disciplinary proceedings against the applicant within the time limits established by clause 6.3 of the SALGBC disciplinary code and procedure.

[2] The material facts giving rise to this application are not in dispute. The disciplinary code in question provides:

> 6.3 The employer shall proceed forthwith or as soon as reasonably possible with a Disciplinary Hearing but in any event not later than 3 (three) months from the date upon which the Employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC.

[3] The form in which an application for condonation is to be made is prescribed by the main collective agreement that regulates the municipal sector. The agreement requires that applications (which include an application for condonation) must be supported by an affidavit.

[4] The arbitrator's ruling (correctly) records the factors that are to be taken into account in an application for condonation. The arbitrator found that for the purposes of the disciplinary code, it was probable that the third respondent became aware of the allegations of misconduct against the applicant on 23 October 2012. Disciplinary action was instituted against the applicant on 4 April 2013. period of the delay was 73 days, described as 'fairly serious' but 'not substantial'. The reasons for the delay are canvassed in the ruling: in essence,

the third respondent contended that in the absence of the applicant, there was no other person with the requisite knowledge of the applicable procedure and that it was only after advice was sought from another municipality that the third respondent became aware of the time limits and acted promptly to institute the proceedings. In relation to the prospects of success, the arbitrator recorded that he was satisfied that the third respondent had established a prima facie case against the applicant. With regard to the issue of prejudice, the arbitrator concluded that the applicant would suffer no prejudice if the disciplinary enquiry were to go ahead (at least in the sense that she would be afforded a fair disciplinary hearing) whereas if condonation were to be refused, the third respondent would be seen to have condoned serious misconduct. On this basis, the arbitrator concluded that the third respondent had shown good cause for the late institution of disciplinary proceedings against the applicant, and ordered the third respondent to institute disciplinary proceedings against the applicant within 30 days.

[4] The applicant seeks to review the ruling on a number of grounds. In her founding affidavit, the applicant seeks to attack the merits of the disciplinary charges brought against her, and limits her attack on the condonation ruling itself to averments made, in respect of each of the factors considered by the arbitrator, that he erred in coming to the conclusions that he did. There is nothing in the founding affidavit that discloses a legal basis for a review of the ruling, given the reasonableness test that applies. It is not sufficient for an applicant to simply aver, as the applicant has done in the present proceedings, that the arbitrator erred in a number of respects. Arbitrators are allowed to err. It is well-established that this court is empowered to intervene if and only if the decision to which the arbitrator came was so unreasonable that no reasonable decision maker could come to that decision. It is equally well-established that a case to this effect must necessarily be made in the founding papers; it cannot be made by way of reply or in heads of argument.

[5] The only point with any potential merit that arises from the founding papers (and the only point pursued with any vigour at the hearing of this application) is made in the applicant's supplementary affidavit (referred to as an 'amended founding affidavit'). Here, the applicant contends that the document filed by the third respondent in support of the application for condonation was not an affidavit, and that the application that served before the arbitrator was therefore fatally defective.

[6] Adv. Grogan, who appeared for the applicant, submitted that the arbitrator was required to make a ruling on the basis of evidence, and that since the document before him did not comprise a proper affidavit there was no 'evidence' before him upon which to make a ruling. In the absence of a ruling made on any the basis of any evidence, the decision to grant condonation for the failure to institute disciplinary proceedings timeously falls to be reviewed and set aside.

[7] The application that served before the arbitrator was submitted on a pro forma document, headed 'Affidavit'. It purports to be an affidavit deposed to by Mzukisi Madlavu, who describes himself as the third respondent's director of corporate services. In the document, in respect of each of the factors that the third respondent was required to address, the document states 'See annexure "A" attached hereto'. Page 3 of the pro forma, the last, indicates that the document was served on 3 October 2013. On the same page, the document reflects that it was commissioned on 2 October 2013 by Etienne W Mager, who is described as an *ex officio* commissioner of oaths. There is no signature on page 3 which is clearly identifiable as that of the deponent. Attached to the affidavit, as I have indicated, is an annexure, some 10 pages long, in which the substantive averments in support of the application have been set out. The annexure is signed, at its foot, by Mr. Madlavu. (This much is apparent from the annexed letter of suspension – on the face of it, an identical signature appears in that document on a line below which is recorded "Signature : Director Corporate Services M Madlavu').

[8] It is immediately apparent that the document does not clearly provide for a signature by the deponent to the pro forma affidavit. Below paragraph 8 on page 3 (that which provides for acknowledgment of receipt of the application) is a line for signature following the word “signed”. Whether the deponent to the affidavit is meant to sign on that line, or whether that is reserved for the signature of the person acknowledging receipt of the document, is unclear. In the present instance, there is what might be described as an initial in the space provided. It is not clear who affixed this initial; it may well have been that of Siphiwo Mthini, the person on whom the document was served on 2 October 2013.

[9] While the signature of the deponent and the commissioner of oaths ought ideally to have appeared on the same page, and while it cannot be said that the signatures of Madlavu and the commissioner do so appear, it seems to me that the applicant’s objections to the format of the application for condonation elevate form over substance. The pro forma, as I have indicated, is crafted in the form of an affidavit. The annexure is clearly an integral part of that affidavit. The annexure is signed, at its foot, by the deponent. It is not disputed that the signature on page 3 of the pro forma is that of a commissioner of oaths, nor can it be disputed that the signature at the foot of the affidavit is that of Madlavu. It would be overly technical, in my view, in the present circumstances, to find that the affidavit is of no value or effect, and that the ruling on which it is based ought for that reason to be set aside only because the deponent’s signature appears on the annexure and not immediately above that of the commissioner of oaths.

[10] The pro forma affidavit, together with the annexure, set out the third respondent’s grounds for review in a comprehensive manner; the applicant’s union filed a notice of intention to oppose after receiving the document and filed an answering affidavit in opposition to the application. Neither the applicant nor her trade union made any objection to the form of the application at that stage. The arbitrator made a ruling on the basis of the documents before him, in circumstances where he had both the case of the third respondent and that of the applicant fully articulated. As I have indicated, the founding affidavit does not make out a case

for the unreasonableness of any of the conclusions to which the arbitrator came in respect of any of the factors that the arbitrator was required to consider, even less does it challenge the reasonableness of the decision to which he ultimately came. For these reasons, the application stands to fail. There is no reason why costs ought not to follow the result.

I make the following order:

1. The application is dismissed, with costs.

Andre van Niekerk

Judge

REPRESENTATION

For the applicant: Adv. J Grogan, instructed by Leon Keyter Attorneys

For the third respondent: Adv. F le Roux, instructed by Smith Tabata Inc