

SOUTH AFRICA / JUDGMENT

Smith and Others v Department of Health (KwaZulu-Natal) and Others (D1609/2018) [2021] ZALCD 79 (15 December 2021)

[2021] ZALCD 79**COURT**

Labour Court Durban

BEFORE

H Cele

CASE / FILE NUMBER

D1609/2018

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, DURBAN****Case****No: D 1609 / 2018****Not****Reportable****In****the matter between:**

K.J. SMITH AND 23
OTHERS Applicant
and
THE DEPARTMENT OF
HEALTH (KWAZULU-NATAL) First
Respondent
THE PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL Second
Respondent
COMMISSIONER JAMES N.
MATSHEKGA, N.O. Third
Respondent

Heard:

26 February 2021

Delivered:

15 December 2021

Summary: Condonation – late filing of review application – period of delay fairly short – explanation satisfactory - slight delay and a good explanation helps to compensate for prospects of success which are not strong – prospects

JUDGMENT

CELE J,

Introduction

[1] This is an application seeking for the arbitration award dated 23 July 2018, issued by the Third Respondent, the Commissioner, to be reviewed and set aside in terms of section 158 (1) (g) of the Labour Relations Act[1] as amended. The Commissioner had found that the First Respondent (hereafter referred to as the Department) had correctly interpreted and applied clause 3.2.5.3 of the Occupational Specific Dispensation for Nurses, the OSD, when it translated the employment positions of the Applicants. The review application was filed out of time and condonation is sought for such lateness. The application was opposed by the Department.

[2] There has been an undue delay in delivering judgment in this matter. A point in limine was raised by the Department on the livelihood of the review application. I sustained that point some days after the matter had been argued. This was wrong, as I had already ruled that the review application was well alive. That ruling regrettably caused a delay until the parties brought this to my attention. For this error, I tender my sincere apology to both parties as this judgment

should and could have been rendered within three months of its hearing. What makes the situation worse is that this review application is before Court for the second time albeit under a different case number, D417/2015. It was remitted for a de novo arbitration hearing.

[3] During the presentation of this matter, it came to light that the Applicants prepared themselves only for the point in limine raised by the Respondent and for the condonation application. They did not argue on the actual merits of the review application as is normally done. The Respondent presented heads of argument dealing with both the condonation application and the review application. I can only deal with the condonation application at this stage.

Factual Matrix

[4] The facts of this matter are essentially common cause save for the interpretation to be accorded to the applicability of the OSD. The Applicants are nurses and employees of the Department at various psychiatric hospitals and clinics in KwaZulu-Natal. However, some might have by now retired or moved to other institutions. On 10 September 2007 a Collective Agreement was reached in the public health sector under the auspices of the PHSDSBS. This

Collective Agreement was published as Resolution 3 of 2007 and was termed the Agreement on Implementation of an Occupational Specific Dispensation for Nurses (OSD). Clause 3.2.5.3 of the OSD deals with the translation of Professional Nurses, (Registered Nurses) to speciality posts and it reads:

“A Professional Nurse (Registered Nurse) who occupies a post in a nursing specialty and who –

- a) Is in possession of a post-basic clinical nursing qualification listed in Government Notice R212 as amended, shall translate to the appropriate specialty post; and
 - b) Is not in possession of a post-basic clinical nursing qualification listed in Government Notice R212 as amended, but who has been permanently appointed in a post in a specialty unit and has been performing these duties of the specialty post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level.”
- [5] Clause 3.1.3.2 of the OSD is of relevance when interpreting the provisions of clause 3.2.5.3 as it provides context and amplifies the meaning of “specialty post” as well as qualification under R212 referred to in clause 3.2.5.3. Clause 3.1.3.2 reads:

“Posts in Specialty Nursing refer to those positions where a post-basic qualification listed in Government Notice R212 as amended, is an inherent requirement to perform the duties attached to the post. This also includes similar post-basic qualifications with duration of at least one year in the relevant specialty recognised by the SANC prior to the publishing of Government Notice R212.”

- [6] Government Regulation R212 (R212) was published on 19 February 1993. It constitutes Regulations relating to the Course in Clinical Nursing Science leading to the registration of an Additional Qualification. If a registered nurse in the Republic of South Africa (who has a basic nursing qualification) wishes to obtain an additional qualification to specialise in, for instance Psychiatric Nursing, then a post-basic course recognised in terms of R212 will be obtained, that is R212 1 (g). The then Minister of Health then released a circular dated 14 April 2008, which sought to assist all MEC’s for Health and Provincial Departments of Health (and Social Services) with the Implementation of the Occupational Specific Dispensation for Nurses. The circular consists of 17 paragraphs and the words “Government Notice R880,” are only mentioned once at paragraph 13 of the circular. Paragraph 14 is also of significance and both paragraphs read: as follows:

“13 The qualification contained in Government Notice R880, (Diploma in Psychiatric Nursing for Registration as a Psychiatric Nurse), is not a post basic course and will also not be recognised for speciality purposes.

14 Furthermore, the old three- year course in Psychiatry and the two year course in Midwifery will also not be regarded as post basic course. Those nurses who have these qualifications will first have to obtain the relevant Government Notice No R212 qualification before they would qualify for grade progression in the specialty stream.”

The condonation application

1. Period of delay

[7] The arbitration award which the Applicants seek to review and set aside is dated 23 July 2018. The Applicants said that they received the arbitration award on 24 July 2018 and lodged their review application on 27 September 2018. A copy of the review application was faxed to the Labour Court on 13 September 2018. They did not file an application for condonation, contemporaneously with the review application. The condonation application was filed much later, on 26 February 2020. According to them the delay is of 7 to 10 days. The Respondent contested this period, saying the delay was about three weeks. I notice that on 19 September 2018 the Bargaining Council sent the record of the arbitration proceedings to the Registrar of this Court. Then on 21 September 2018 the Registrar made the record available to the parties in terms of rule 7A (5)[2]. I am bound then to accept that the review application was filed on or about 13 September 2018. A simple calculation from 24 July 2018 to 7 September 2018 gives us 6 weeks. The delay is accordingly from 8 September 2018 to 13 September 2018 and is of 6 days. It is a very short period of delay.

(b) Reasons for the delay

[8] The deponent to the application is Mr Pieter Johannes Strydom of Strydom Attorneys, Pretoria. He experienced logistical challenges in obtaining a mandate from all 24 Applicants in KwaZulu-Natal (KZN). On 30 August 2018 the Applicants confirmed that they wanted the review application to proceed. Counsel was approached on 5 September 2018 to assist in drafting the review application. There was a voluminous bundle of documents to peruse. The draft application papers were then transmitted to Mr Strydom on 10 September 2018. These were circulated to all Applicants for their perusal and comments and Applicants signed them on 13 September 2018. An attorney based in KZN, Mr Grobbelaar, was appointed as Correspondent Attorney to handle the logistical arrangements for service of the application. The application was sent by telefax to the Registrar of this Court on 13 September

2018. There is no evidence to countenance these factual submissions. I accordingly accept the explanation, mindful that the period in question is fairly short. No prejudice has been demonstrated to be suffered by any party, except the usual delay to finality of the matter.

(c) Prospects of success

[9] The merits of the review application have to be considered here to the extent relevant for a condonation application. What is under attack are the chief findings of the Commissioner. The Commissioner made the following main findings:

“33 As already stated, for a professional nurse to be translated to an appropriate speciality post he/she had to have a post-basic clinical qualification listed in Government Notice R212. The Applicants were not in possession of a post-basic clinical nursing qualification listed in Government Notice R212. Accordingly, they could not correctly so be translated in terms of clause 3.2.5.3 (i) (a) of the OSD for nurses.

34 Throughout the testimony of the 23rd Applicant during the arbitration and in their closing arguments, the Applicants sought out to make a case that they were in possession of a similar post-basic qualification with duration of at least one year in the relevant specialty recognised by the SANC (South African Nursing Council) prior to the publication of Government Notice R212. It is not necessary for me to determine whether the Government Notice R212 qualification that the Applicants possessed is a similar post-basic qualification. That debate has been surpassed by factual and legal events. In other words, that determination is of academic interest only. I demonstrate the point.

35 Clause 3.1.3.2. which the Applicants rely on deals with “definition” of “posts in specialty nursing.” It defines those as positions where a post-basic qualification listed in Government Notice R212 is an inherent requirement to perform the duties attached to the post but also includes similar post-basic qualifications with duration of at least one year in the relevant specialty recognised by the SANC prior to the publication of Government Notice R212. All what clause 3.1.3.2 does is to tell us what a “post in a specialty nursing” refers to for purposes of differentiation in salary scale.

36 There is nothing in both the wording and spirit of clause 3.2.5.3 (i) (a) that says or remotely suggests that professional nurses that possess similar post-basic qualifications with duration of at least on year in the relevant specialty recognised by the SANC prior to the publication of Government Notice R212 should be translated in terms of that clause.

37 Clause 3.1.3.2. is only relevant where there is a dispute about whether or not Psychiatric Nursing Science was a specialty. In other words, clause 3.1.3.2 would become relevant if there is a dispute between the parties on whether or not the posts occupied by the Applicants were “posts in specialty nursing”. No such dispute exists in this matter.

38 On the evidence that has been placed before me, I am satisfied that the respondent correctly applied and interpreted clause 3.2.5.3 of the OSD for nurses. There was no need for the respondent to have regard to clause 3.1.3.2 of the OSD for nurses in its interpretation and application of clause 3.2.5.3 unless there was a dispute between the parties on whether the posts the Applicants occupied were “posts in specialty nursing”.

39 In so far as the alleged incorrect translation of the 10th Applicant is concerned, the 10th Applicant presented no evidence either documentary or oral setting out the basis of her incorrect translation. All Mr Strydom argued was that the respondent failed to provide proof that the 10th Applicant was not entitled to OSD translation. The 10th Applicant is the one who alleged incorrect translation. Accordingly, the onus and evidential burden was on her to prove on a balance of probabilities the foundation of her claim. That she failed to do. As a consequence, her claim of incorrect of incorrect translation must also fail.”

Grounds for review

[10] The Applicants outlined a number of grounds for review in support of this application. They include the averments that the Commissioner: -

10.1 Failed to appreciate and/or give effect to his powers and duties in terms of section 138 of the LRA;

10.2 Adopted an approach unjustified on the facts and inconsistent with his statutory duty;

10.3 Accordingly, did not exercise the powers conferred upon him properly in accordance with the LRA or at all;

10.4 Wrongly and unjustifiably made certain factual findings and/or assumptions against the Applicants;

10.5 Did not properly and fairly apply his mind in arriving at the findings which he did in the arbitration award; and

10.6 acted grossly unreasonably and unjustifiably in arriving at the decision and conclusions that he reached.

[11] In elaboration, it was contended that the Commissioner correctly captured the essence of the employer's version but incorrectly accepted their version as correct. The employer's version was that a Government Notice R880 qualification was a basic and not post-basic qualification. According to the Applicants a plain reading of R880 revealed that Psychiatric Nursing Diploma (under R880) is a post-basic qualification to a person that is already qualified as a nurse. Put differently, the registered nurse, by completing the one year R880 Psychiatric Nursing course, obtains a diploma in Psychiatric Nursing in addition to her basic nursing qualification.

[12] The Commissioner was said to have erred in holding that: "It is not necessary for me to determine whether the Government Notice R212 qualification that the Applicants possessed is a similar post-basic qualification." This was said to be a material error by the Commissioner as that was the very point that he had to decide in the arbitration. His failure to determine this aspect made him to arrive at an unreasonable reviewable conclusion. His reasoning was said to fall short when he said that: "All what clause 3.1.3.2 does is to tell us what a post in specialty nursing refers to for purposes of differentiation in salary scale." The Commissioner accepted that clause 3.1.3.2 was relevant when determining a dispute about "posts in specialty nursing" but for some or other indeterminable reason the same clause was found not to be relevant when determining a dispute about the post-basic qualification of a nurse in such specialty post. His reasoning was said to fall short of the reasonable test. The drafters of the OSD clearly envisaged the inequality that might arise to those registered nurses that obtained diplomas in Psychiatric Nursing (regulated under R880) prior to the publishing of R212 and in all fairness, submitted the Applicants, included that they should also benefit under the OSD. This interpretation was said to be the only fair and reasonable one for clause 3.2.5.3.

- [13] Finally, the Commissioner was said to have unduly and irregularly interfered with how the Applicants were leading their evidence and when Applicants' representative cross-examined the employer's witness, Mr Gwala resulting in crucial evidence of Applicants not being led, (apart from the conduct of the Commissioner being grossly irregular) . The ultimate effect of this was that the Commissioner reached an unreasonable award.
- [14] In opposing this review application the Department said that it concurred with the correctness and the logic raised by the Commissioner in the analysis of evidence, which led to his finding that the Department had correctly applied and interpreted the OSD resolution. It said that the Applicants wrongly contended that R880 was a post-basic qualification or advanced qualification or additional qualification that led to specialty and as such was equivalent to R212 qualification. It submitted however that, a mere paging through Resolution 3 of 2007, nowhere would one find the words "Government Notice R880" mentioned. The resolution was a mere 9 pages long. On the other hand the words "Government Notice R212" were mentioned:
- 14.1 Twice in clause 3.1.3.2;
- 14.2 Four times in clause 3.2.5.3; and
- 14.3 Clauses 3.1.3.2 and 3.2.5.3 were the ones Applicants allege were not properly interpreted and applied.
- [15] It referred to the circular from the erstwhile Minister of Health, dated 14 April 2008, which consisted of 17 paragraphs and the words "Government Notice R880," were only mentioned once at paragraph 13 of the circular. On the other hand, Government Notice No. R 212 (including other specialty qualifications equivalent to it) was mentioned at Paragraphs 5, 9, 10, 11, and 14. In light of the aforesaid, it was submitted that arbitration award was rationally connected to the evidence presented before the third respondent on the aspect of the interpretation and implementation of the OSD for Nurses, taking into account the Applicants' qualifications at the relevant time of translation, during the arbitration proceedings and therefore stood to be upheld.
- [16] The Applicants were said to have failed to provide any evidence that the third respondent failed to take into account any fact or failed to place weight on any relevant fact, which led to an unreasonable outcome. The fact that the Commissioner reached conclusions and made a finding that the first respondent had correctly applied and interpreted the OSD for Nurses, which

Analysis.

- [17] In *Melane v Santam Insurance Co Ltd*[3] the view was held that the factors for condonation are interrelated and not individually decisive. The weight to be attached to any one of these factors may vary from case to case. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong, or the importance of the issue and strong prospects of success may tend to compensate for a long delay[4]
- [18] In *Arnott v Kunene Solutions and Services (Pty) Ltd*[5] the Court agreed with the submission that the Applicant should not be punished for the ills of his attorneys. The onus is on the Applicant to satisfy the Court that condonation should be granted. There are limits, however, even where the Applicant's attorneys are largely to blame for the delay, beyond which the courts are not prepared to assist the Applicant. As the period of delay is short, the set limit has not been exceeded here.
- [19] On merits, there is a reasonable prospect that this Court might agree with the Applicants when they say that the Commissioner erred in holding that: "It is not necessary for me to determine whether the Government Notice R212 qualification that the Applicants possessed is a similar post-basic qualification." This could be a material error by the Commissioner as that was the very point that he had to decide in the arbitration. His failure to determine this aspect might have made him to arrive at an unreasonable reviewable conclusion. His reasoning might have fallen short when he said that: "All what clause 3.1.3.2 does is to tell us what a post in specialty nursing refers to for purposes of differentiation in salary scale." The Commissioner accepted that clause 3.1.3.2 was relevant when determining a dispute about "posts in specialty nursing". This could have been a proper approach to adopt in this interpretation. However, and for some or other indeterminable reason, the same clause was found not to be relevant when determining a dispute about the post-basic qualification of a nurse in such specialty post. His reasoning might be found to have fallen short of the reasonable test.
- [20] The drafters of the OSD clearly envisaged the inequality that might arise to those registered nurses that obtained diplomas in Psychiatric Nursing (regulated under R880) prior to the publishing of R212 and in all fairness, might have included that they should also benefit under the OSD. This interpretation might be the only fair and reasonable one for clause 3.2.5.3.
- [21] In referring to the circular from the erstwhile Minister of Health, dated 14 April 2008, it might be found that this was self-corroboration by a functionary of the Department that is a party to the dispute. This minute could be held to be an indication of the bona fides of the Department to its belief in its interpretation of clause 3.2.5.3, which however should not have been relied on.

[22] Clearly therefore, the Applicants have demonstrated that there are some prospects of success on the merits of their review application. As already pointed out, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. In the circumstances, the following order shall issue:

1. The review application did not lapse. (This finding was made during the hearing of this application.)
2. Condonation for the late filing of the review application is granted.
3. Parties are to submit or re-submit, if deemed necessary, their closing arguments on the merits of the review application within 14 days of the receipt of this order.
4. Costs for the condonation application shall be costs in the review application.

H Cele

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicants: W P Bekker instructed by Strydom Attorneys, Pretoria.
 2. For the First Respondent: C M Kulati instructed by The State Attorney, Durban.
- [1] Act Number 66 of 1995, the LRA.
- [2] Page 43 of the Index to notices and pleadings.
- [3] 1962
- (4) SA 531 (A) at 532B-E
- [4] See SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration & Others (2003) 24 ILJ 999 (LC).
- [5] (2002 23 ILJ 1367 (LC).

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