IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA13/2016

In the matter between:

K MOODLEY	**Appellant**
and	
THE DEPARTMENT OF NATIONAL TREASURY	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
P G Z PEKALSKI NO	**Third Respondent**
M S BALOYI NO	**Fourth Respondent**

Heard: **17 November 2016**

Delivered: **10 January 2017**

Summary: Substitution of a lesser sanction with dismissal by an employer – chairperson of disciplinary imposing demotion and employer changing sanction to one of dismissal – arbitrator ordering employer to revert to chairperson's sanction. Appeal – arbitrator failing to consider section 193 of the LRA – ie whether is practicable to reinstate employee or considering the nature of the misconduct for which employee charged. Such failure vitiates the award. Constitutional Court's judgment in Kruger restated. Appeal dismissed Labour Court's judgment upheld albeit for different reasons.

Coram: Ndlovu JA, Coppin JA and Savage AJA

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JUDGMENT

COPPIN JA

[1] This is an appeal against the whole judgment of the Labour Court (Tlhotlhalemaje AJ, as he then was) in terms of which it reviewed and set aside an arbitration award made, in favour of the appellant ("*Ms Moodley*"), by the third respondent (also referred to as "*the arbitrator*" where the context allows) on 2 July 2012, acting under the auspices of the second respondent ("*the GPSSBC*"), and remitting the matter back to the GPSSBC for a hearing *de novo* before someone other than the third respondent. The court *a quo,* which made no order as to costs, granted leave to appeal to this Court.

Background

[2] In about August 2007, the first respondent ("*the Department*") employed Ms Moodley as Director: Facilities Management and her duties also included the procurement of goods and/or services.

[3] On 19 April 2011, the Department charged Ms Moodley with 11 counts of misconduct relating mainly to non-compliance with procurement procedures and the failure to disclose her interests relating to certain transactions and the receipt of a gift.

[4] The disciplinary hearing was chaired by the fourth respondent (also referred to as "*the Chairperson*" where the context allows), an independent advocate, who was engaged by the Department. Ms Moodley was legally represented throughout the process.

[5] The Chairperson found Ms Moodley guilty of nine of the 11 charges. The Chairperson imposed a sanction in respect of each charge – and then imposed an overall sanction in respect of all the charges, which was "*dismissal with an alternative of demotion*". At some stage, the Department asked the Chairperson for clarification of the sanction. The Chairperson's response, in essence, was that "*the sanction of dismissal was imposed with a*

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demotion as an alternative sanction" and that paragraph 7.5.18 of the Employer's Employee Relations Guidelines applied. The Chairperson went further to explain the sanction as follows:

> '*Paragraph 7.5.18 of the Employer's Employee Relations Guidelines empowers the Chairperson of a disciplinary hearing involving a member of the SMS to impose a sanction of dismissal with the alternative of, inter alia, demotion. Accordingly, the primary sanction imposed is dismissal and the alternative of demotion applies only should the employee agree to be demoted instead of dismissal.*
>
> *Paragraph 7.5.18 requires that the sanction as determined by me, namely, 'dismissal with demotion as an alternative', must be presented to the employee who must make an election whether to accept dismissal (the primary sanction) or demotion instead of dismissal (alternative sanction). The employee is given an option to accept a lesser sanction as an alternative to the primary sanction of dismissal. Should the employee elect demotion instead of dismissal, the Employee Relations Guidelines provides that such an employee shall not be eligible to apply for a promotion before the expiry of one year after the sanction was imposed.'*

[6] It is common cause that Ms Moodley, through her legal representative, in response to the clarification by the Chairperson, and in a letter dated 15 February 2012, addressed to the Department, accepted the lesser sanction of demotion.

[7] The letter further states that Ms Moodley "*can be contacted directly regarding the arrangements for her return to work*". There was a disagreement in argument before us about the date when this acceptance was communicated. Ms Moodley's legal representative contends that it is the 15th of February 2012, being the date appearing on the letter of acceptance, while the Department's counsel submitted that the acceptance was actually communicated on 20 February 2012.

[8] In any event, it is common cause, that notwithstanding the lesser sanction imposed by the Chairperson, and Ms Moodley's acceptance thereof, by letter dated 15 February 2012 the Director-General of the Department informed Ms

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Moodley that she was "*discharged from the Public Service, in terms of section 16B(1) of the Public Service Act, 1994 (as amended), on account of misconduct*", having been found guilty of the charges referred to earlier in this judgment. In addition, Ms Moodley was informed, that she could have recourse to "*the dispute settlement mechanisms*" provided by the Labour Relations Act[1] ("LRA") if she did not agree with the sanction, and that her dismissal was "*effective immediately*".

[9] Ms Moodley declared a dispute of unfair dismissal and the matter, which had been referred to the GPSSBC, ultimately went to arbitration. The *crux* of Ms Moodley's complaint was that the Department could not have substituted the Chairperson's lesser sanction of demotion with a dismissal and that such a substitution was inherently unfair. Ms Moodley sought reinstatement.

[10] Both Ms Moodley and the Department were legally represented at the arbitration. It is further common cause that no evidence was led before the arbitrator. It is not entirely clear precisely which documents were contained in, or omitted, from the agreed bundle that was placed before the arbitrator. Indications from counsel are that the documents included the outcome of the disciplinary hearing prepared by the Chairperson and that the parties (by agreement) addressed the essential issue, namely the fairness of the sanction of dismissal imposed by the Department, by way of heads of argument that were submitted to the arbitrator.

[11] At the arbitration, the facts leading up to the dismissal were common cause and Ms Moodley did not dispute the procedural fairness and the outcome of the disciplinary process chaired by the Chairperson. The only issue was the fairness of the sanction of dismissal imposed by the Department in the circumstances sketched above.

[12] The arbitrator concluded as follows in her award dated 2 July 2012, under the heading "*Analysis of Evidence and Argument*":

[1] Act No. 66 of 1995.

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'*The duty of an arbitrator is to decide whether or not the dismissal was fair. The arbitrators are precluded from imposing the correct sanction (De Beers Consolidated Mines Ltd v CCMA and Others (2000) 21 ILJ 105 (LAC).*

The first question to be answered is whether the Chairperson dismissed the Applicant or not. The answer is clear from the clarification of the chairperson's sanction. Although she decided that the primary sanction was dismissal, she afforded the Applicant a choice to be demoted instead of being dismissed. The Applicant thereafter decided to elect the sanction of demotion instead of being dismissed, thus rendering the sanction of dismissal ineffective.

It is clear from the Respondent's own interpretation and understanding of section 16B of the Public Services Act, 1994 that the employer may only execute the decision of the Chairperson and not change or amend it. The sanction of demotion of the Applicant in accordance with the chairperson's ruling in relation to the sanction or demotion should thus stand. The unilateral decision of the Respondent to change the chairperson's decision after the Applicant elected to be demoted rendering the Applicant's dismissal unfair.

In the premises I find that the applicant was unfairly dismissed.'

[13] The arbitrator proceeded to make the following award:

'*5.1 The sanction of demotion should stand and the Respondent is ordered to reinstate the Applicant retrospectively,*

5.2 The Respondent is ordered to pay the Applicant her salary from 21 February 2012 calculated at the salary scale of the Applicant at the time of her dismissal;

5.3 The said amount must be paid on or before 30 July 2012

5.4 I make no order as to costs.'

[14] The Department brought an application in the Labour Court on 21 September 2012 in which it sought to review and set aside the award of the arbitrator. I shall deal with the basis and grounds for review in due course. In addition, it sought to have the matter remitted to the GPSSBC for a hearing *de novo*

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before a different arbitrator. As alternative relief, it sought to review and set aside the Chairperson's sanction of demotion. Its notice of motion expressly states that the application is brought in terms of section 158(1)(h) of the LRA.

[15] The Department's application was opposed by Ms Moodley, who was legally represented. Various sets of documents were exchanged in those proceedings, certain of which gave rise to issues which the court *a quo* had to deal with, and which I will deal with later in this judgment.

[16] Having condoned the late bringing of the review application by the Department, the court *a quo* in its judgment proceeded to find that the arbitrator's award could be reviewed in terms of section 145 of the LRA, notwithstanding that the application stated expressly that it was one brought in terms of section 158(1)(h) of the LRA, and pursuant to a request and disavowal of reliance on section 158(1)(h) by the Department's counsel at the hearing.

[17] The court *a quo* found that the arbitrator's award did not fall within the "*band of reasonableness*". According to the court *a quo*, arbitrators are required to determine, having regard to a variety of factors (including those in Schedule 8 of the LRA), whether the sanction of dismissal was fair. And what was required was for the arbitrator to determine what was fair and did not require the arbitrator to defer to the employer's decision, but to consider all relevant circumstances.

[18] The court *a quo* concluded:

> '*The arbitrator clearly failed to apply his mind to issues which were material to the determination of the case before him, and does commit a reviewable irregularity. The issue before him was not whether he was required to impose a 'correct sanction' or not. To the extent that the arbitrator approached the issue before him by reference to imposing the 'correct sanction' it follows that the arbitrator failed to appreciate his mandate, and essentially misconceived the nature of the enquiry before him and invariably arrived at an outcome that did not fall within the band of reasonableness.'*

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[19] As motivation for remitting the matter back to the GPSSBC, the court *a quo* held, in effect, that it was not in a position to determine whether the dismissal was fair, because the decision to dismiss was a decision of the Department and not that of the Chairperson of the disciplinary process and that for the court *a quo* to determine the fairness of the sanction "*would be to countenance the circumvention of the very express provisions of the LRA disavowed*" by the Department.

[20] Ms Moodley sought leave to appeal the court ***a quo's*** judgment on certain grounds. In brief, on the ground that the court *a quo* had erred in concluding that the arbitrator's award was unreasonable; and in finding, in effect, that an employer may change a sanction of the Chairperson of the disciplinary enquiry even though that sanction is not merely a recommendation; and in deciding the review in terms of section 145 of the LRA after the Department had forsaken reliance on section 158(1)(h) of the LRA; and in failing to take into account the Department's "*wholesale*" disregard for the rules and in condoning the Department's failure to comply with the rules.

[21] The court *a quo* granted leave to appeal to this Court, *inter alia,* after having had regard, at that stage, to the most recent judgment of this Court on the issue of whether an employer could substitute the final sanction of a Chairperson of a disciplinary enquiry, namely, *South African Revenue Service v CCMA and Others*[2] (which matter I shall refer to as "*the Kruger case*" or "*Kruger*").

[22] In brief, in *Kruger* the SARS' employee had been found guilty by a chairperson of having made serious racist statements. The chairperson there imposed a sanction of a final written warning valid for six months as well as a suspension, without pay for 10 days, and had ordered the employee to undergo counselling. The employer (SARS), however, changed the sanction to a dismissal without affording the employee an opportunity to challenge this "*new*" sanction. The employee referred the matter to the Commission for Conciliation, Mediation and Arbitration ("*CCMA*") for conciliation and later arbitration, challenging the fairness of his dismissal. The CCMA commissioner

[2] [2016] 3 BLLR 297 (LAC); (2016) 37 ILJ 655 (LAC).

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was to decide whether the employee's dismissal was procedurally and substantively unfair and whether the employer was empowered to substitute the sanction of a warning and suspension with one of dismissal. According to the employee in that matter, the employer could only have altered the sanction through a review of the chairperson's decision in that matter in terms of section 158(1)(h) of the LRA – which was not done.

[23] The CCMA commissioner in *Kruger* found for the employee, namely, that it was not legally permissible for the employer to change or substitute the sanction imposed by the chairperson of the disciplinary proceedings - the basis being that the employer was bound by a collective agreement in terms of which it had effectively waived its power to alter the chairperson's sanction. At the time there were also other decisions of this Court that supported that conclusion, namely, *Country Fair Foods (Pty) Ltd v CCMA* ("*Country Fair Foods*");[3] *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration*[4] (referred to as "*the Chatrooghoon case*" or "*Chatrooghoon*") and *Hendriks v Overstrand Municipality.*[5]

[24] The arbitrator in *Kruger*, apparently, having merely, albeit implicitly, found that the employee's dismissal was substantively unfair, ordered the employer to reinstate the employee on the conditions stated by the chairperson of the disciplinary enquiry, namely, a final written warning for six months, suspension without pay for 10 days and an order that the employee undergoes counselling.

[25] The employer (SARS) in *Kruger* unsuccessfully challenged the arbitrator's decision in an application for review in the Labour Court. The employer then appealed to this Court. This Court, referring, *inter alia,* to *Country Fair Foods* and *Chatrooghoon* confirmed the Labour Court's decision and dismissed SARS's appeal.

[26] Sutherland JA writing for this Court in *Kruger* stated:[6]

[3] (2003) 24 ILJ 355 (LAC).
[4] [2013] ZALAC 26; now reported in (2014) 35 ILJ 656 (LAC). See at para 35.
[5] [2014] ZALAC 49; now reported in (2015) 36 ILJ 163 (LAC).
[6] At para 48.

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'*The established law about an employer being disallowed from interfering in the outcome of a disciplinary enquiry where the Chair has the power to make a final decision, which is the crucial issue in this appeal has as its aim the protection of workers from arbitrary interference with discipline in a fair system of labour relations. The principle is worthy of preservation.'*

[27] That was the state of the law on the topic at the time leave to appeal in this matter was dealt with. In the interim, the employer in *Kruger* appealed to the Constitutional Court.

[28] The Constitutional Court gave judgment in that matter on 8 November 2016.[7] Granting the employer leave to appeal this Court's decision, the Constitutional Court, in effect, reversed this Court's decision in the matter. While the Constitutional Court seemingly accepted that the commissioner in *Kruger* could have concluded that the dismissal was unfair, because of the substitution of the sanction by SARS and in circumstances where the employee was not granted a hearing before the dismissal, it held that having made such a finding, the commissioner was, nevertheless, enjoined by the law, namely section 193(2) of the LRA, to determine whether the employer was to reinstate or re-employ the employee and the commissioner could only order reinstatement in the circumstances set out in section 193(2).

[29] The section provides that the Labour Court or arbitrator (which includes a CCMA commissioner) "*must require the employer to reinstate or re-employ the employee unless – (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure*".

[30] The Constitutional Court in *Kruger* held that the commissioner had failed to make the section 193(2) determination and had in fact ignored and had failed to take into account evidence that the reinstatement or re-employment of the

[7] See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC).

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employee would be intolerable and that the failures were unreasonable.[8] Mogoeng CJ, writing for a unanimous court, stated:[9]

> '*After concluding that Mr Kruger's dismissal was unfair, the arbitrator immediately ordered his reinstatement without taking into account the provisions of section 193(2). She was supposed to consider specifically the provisions of section 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering SARS to reinstate Mr Kruger despite its contention and evidence that his continued employment would be intolerable. She was required to say whether she considered Mr Kruger's continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate and those are the key-factors she ought to have considered before she ordered SARS to reinstate Mr Kruger.'*

In this matter

[31] In this matter, counsel for the Department, who had replaced earlier counsel, made submissions on the merits of the review and placed great reliance on the Constitutional Court's decision in *Kruger*. The argument of the Department before us was, essentially, that the arbitrator in the present matter had failed to do what she was supposed to do before ordering reinstatement. Reference was made to the serious nature of the charges which Ms Moodley had been found guilty of and the fact that in respect of five of those nine charges, the arbitrator had imposed dismissal as a sanction. Counsel for the Department also pointed out that the overall primary sanction was also dismissal even though the arbitrator had purported to impose demotion as an alternative sanction. It was submitted, in effect, that the arbitrator's overall sanction did not make sense, because one could not impose a sanction of dismissal together with an alternative sanction of demotion.

[32] As regards the merits, Ms Moodley's legal representative tried to distinguish the present matter from that of *Kruger* on the basis that here there was no

[8] See para [44].
[9] See at para [44].

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evidence at all placed before the arbitrator. The parties had defined the issues and by agreement had only dealt with the matter by way of argument. Ms Moodley's counsel submitted that the Chairperson's sanction was in line with paragraph 7.5.18 of the Department's Employee Relations Guidelines – which the Chairperson had also referred to in her sanction and in the clarification of the sanction. Ms Moodley's legal representative also continued with an attack on the court *a quo's* judgment on the procedural issues.

[33] I will deal with the procedural attack later. In respect of the merits, it is apparent from the arbitrator's award that he or she did not refer at all to section 193 of the LRA. Like the arbitrator in *Kruger,* she, or he, does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. The arbitrator's failure to do so, in circumstances where she, or he, was legally obliged to do so, is justifiably criticised as being unreasonable and as a failure to apply his or her mind to the issues.

[34] The court *a quo* perhaps presciently held that the arbitrator was required to consider all the relevant circumstances and that the arbitrator had "*essentially misconceived the nature of the enquiry before him* [or her]".

[35] The appellant however has also attacked the court *a quo*'s entertainment of the Department's review application. The argument in this regard was that the court *a quo* should have dismissed the review essentially because the application was fatally defective. It was submitted, in particular, that the court *a quo* erred in reviewing the arbitrator's award in terms of section 145 of the LRA when the Department had expressly in its founding papers made a case for a review in terms of section 158(1)(h) of the LRA, and in circumstances where the Department's counsel merely in oral argument at the hearing relied on section 145 and disavowed reliance on section 158(1)(h). Secondly, for taking into account the supplementary affidavit which the Department filed in circumstances where it was not entitled to do so and, thirdly, in condoning the late bringing of the review application. I will consider these arguments briefly.

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[36] The court *a quo* - mindful of the trite principles in motion proceedings, that a party should stand or fall by its notice of motion and the averments made in its founding papers and that it was not permissible to make out a case in the replying affidavit –[10] held that "*the legal basis*" of the Department's claim was to a large extent founded on section 145.

[37] Applying the principle – stated in *Gcaba v Minister for Safety and Security and Others,*[11] albeit made there with reference to the determination of jurisdiction, namely, that jurisdiction is determined by establishing from the pleadings, properly interpreted, what the legal basis of an applicant's claim is– the court *a quo* concluded that the Department's founding papers, properly construed, confirmed that its claim was "*largely founded upon section 145 of the LRA*".

[38] The court *a quo* reasoned that despite the reference to section 158(1)(h) in the notice of motion, the Department in prayer 1 of its notice of motion sought to review and set aside the award of the arbitrator and that prayer 3 of the notice of motion, which related to the setting aside of the award of the Chairperson, which would ordinarily have been competent in terms of section 158(1)(h), had been abandoned. Further, that in the founding affidavit the deponent for the Department had explained that the purpose of the application was to set aside the arbitrator's award on the basis that the arbitrator had committed a gross irregularity. And, that in the Department's supplementary affidavit it was expressly stated that the arbitrator's award was defective within the meaning of section 145 of the LRA. The court *a quo* also, seemingly, found that Ms Moodley had properly anticipated the review in terms of section 145 and had sufficiently dealt with the averments in her answering papers.

[39] In this Court, the appellant (Ms Moodley) did not complain of any prejudice that she sustained because the matter was construed as a review in terms of section 145, but the argument made on her behalf emphasised the express reference to section 158(1)(h) in the notice of motion; the unacceptability of the Department's supplementary affidavit; and the disavowal by counsel for

[10] This principle has been restated in many cases and was restated recently by the Constitutional Court in *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) at para 29 and *Khumalo and Another v MEC for Education: KwaZulu-Natal* 2014 (3) BLLR 333 (CC) at para 87.
[11] 2010 (1) BCLR 35 (CC) at paras 74 to 75.

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the Department at the hearing of a reliance on section 158(1)(h). I cannot see that the appellant was in any way prejudiced by the fact that the court *a quo* construed it as a section 145 review. It is trite that the awards of the kind, made by the arbitrator in this case, are properly reviewed in terms of section 145 and not in terms of section 158(1)(h) of the LRA.

[40] Section 145 is for the review of awards made in relation to disputes in arbitration proceedings under the auspices of the CCMA, and, though not expressly stated in section 145, also for the review of awards made in relation to disputes in arbitration proceedings conducted under the auspices of a duly accredited bargaining council. The latter performs the function of dispute resolution in place of the CCMA[12] and a bargaining council may even enter into an agreement with the CCMA in terms of which the CCMA is to perform on its behalf its dispute resolution functions.[13]

[41] The reviews contemplated in section 158(1)(h) are not in respect of awards of the kind made by the arbitrator in this matter. Section 158(1)(h) is intended to generally empower the Labour Court to review other kinds of decisions on such grounds as are permissible in law.

[42] While I am sceptical of the court ***a quo's*** recognition of the supplementary affidavit of the Department, for the reasons I will briefly deal with later, I am of the view that it did not err in construing the review of the arbitrator's decision as one brought under section 145 of the LRA. There was clearly no resultant prejudice. In these circumstances, the point, in my view, appears to be purely and overly technical.

[43] In her notice of appeal, the appellant does criticise the court ***a quo's*** condonation of the Department's failure to comply with Rule 7A(8) of the Labour Court Rules. In particular the appellant criticises the court *a quo* for allowing the supplementary affidavit which was filed, despite the fact that no Rule 7A(8) notice and no record had been delivered, and even though the supplementary affidavit had been filed eight months late.

[12] See section 28(1)(c) of the LRA read with section 127(1)(a) and (b) and section 51 of the LRA.
[13] See section 51(6) of the LRA.

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[44] It is indeed so that a general condonation application was delivered by the Department in which it sought condonation for "*the late serving*" of its review application as well as for the "*the transcribed record",* "*the explanatory affidavit on compliance of Rule 7A*", even in respect of "*the answering affidavit*" and its notice of motion and supplementary affidavit, its notice of intention to amend, its notice of motion with reference to paragraph 25 of its replying affidavit and for the late delivery of the very condonation application.

[45] It is common cause that this application for condonation application was bizarre in some respects, in that condonation was sought, for example, for the late filing of the appellant's "*answering affidavit*", and for the late delivery of documents that had never been delivered at all. This condonation application was seemingly brought in anticipation that certain documents would be delivered, but which were never delivered.

[46] Nevertheless, before us the appellant's criticism was largely levelled at the court *a quo's* condonation of the late bringing of the review application and its, seeming, admission of the Department's supplementary affidavit.

[47] It is trite that condonation requires the exercise of a discretion in deciding whether good or sufficient cause has been shown for the failure to comply with the rules.[14] The discretion has to be exercised judicially, taking into account all relevant facts and circumstances, but, in the final analysis, it is a matter of fairness requiring the balancing of at least the following factors: the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case. A slight delay and a good explanation may make up for weak prospects of success and on the other hand, the importance of the issues and good prospects of success may make up for a long delay.[15]

[48] A court on appeal will only interfere where it is shown that the discretion has not been properly and judicially exercised.

[14] See example *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-E.
[15] *Ibid.*

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[49] The Department's application had to be brought within six weeks of the award in terms of section 145(1)(a) of the LRA. The award in this matter was issued on 2 July 2012 and the application for review was only brought on 21 September 2012, meaning that it was brought about six weeks late, as was also found by the court *a quo*.

[50] The appellant gave an explanation for the delay. The matter had previously been handled by another state attorney and had been taken over by the deponent to the affidavit in support of the condonation application, who assumed that certain steps had been taken in time, whereas they were not. The deponent, at the time of deposing to the affidavit, also seems not to have appreciated that the application was one in terms of section 145 which ought to have been brought in six weeks.

[51] The court *a quo* concluded as follows on the issue of condonation:

> '*[17] I have regard to the extent of the delay, which in my view is not excessive in the extreme. I further had regard to the explanation proffered for the delay, which in my view is satisfactory. Crucially however is the prejudice to be suffered by the applicant if condonation was not granted, especially in view of the circumstances that led to the dismissal of Moodley, the fact that she did not challenge the verdict of the Chairperson, and the party's prospects in respect of the main claim. In my view, considerations of justice in the light of the material circumstances of this case dictate that condonation should be granted.*
>
> *[18] Further in the light of the above considerations, it is also deemed appropriate to condone the applicant's non-compliance of* [sic] *the provisions of Rule 7A. Account is also taken of the first respondent's late filing of the record in terms of Rule 7A(4) of the Rules of this Court on 27 November 2012, which was accompanied by an 'explanatory affidavit' in view of non-compliance with the time period. The delay essentially was caused by the arbitrator who had not responded to the first respondent's repeated requests to file a record.'*

[52] I cannot find that the discretion had been exercised wrongly. The court *a quo* was conscious and took into account the relevant facts in coming to a

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pragmatic and fair conclusion. The delay was not unduly excessive and the weak explanation was compensated for by the fact that the issues were of great importance and the prospects of the application were good. In my view, the supplementary affidavit as such added no further substance to the grounds relied upon by the Department. The main issue is very narrow. In any event, the appellant had an opportunity to, and did in fact, answer to the Department's founding papers as supplemented.

[53] I do not agree with the reasoning of the court *a quo* on the merits, but I find that its conclusion that the arbitrator's award had to be set aside is correct. I have earlier pointed out why the arbitrator's award, in light of the Constitutional Court's decision in *Kruger*, is unreasonable, or not an award a reasonable arbitrator would have made.

[54] The order of the court *a quo,* including the order that the matter be referred back to the GPSSBC for a hearing *de novo,* cannot be faulted, although I do not agree with the reasons given by the court *a quo* for remitting the matter. This Court can only do what the arbitrator ought to have done if it is placed in possession of all the facts that were before the arbitrator. In this instance, the record or bundle that was before the arbitrator was not filed and there is an issue about whether the arbitrator was bound by law to have called for further information in deciding whether an order of reinstatement was appropriate in the circumstances.

[55] I am of the view, taking into account all of the circumstances and the law and fairness, that, notwithstanding the outcome of this appeal, there should be no order as to costs.

[56] In the result, the appeal is dismissed.

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P Coppin

Judge of the Labour Appeal Court

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Ndlovu JA and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	B Conradie of Bradley Conradie
	Halton Cheadle Attorneys
FOR THE RESPONDENTS:	B R Tokota SC with M Gwala
	Instructed by The State Attorney Pretoria

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