

SOUTH AFRICA / JUDGMENT

Ferreira v Tyre Manufactures Bargaining Council and Others (P 22/11) [2012] ZALCPE 8; (2013) 34 ILJ 364 (LC) (18 May 2012) [2012] ZALCPE 8

COURT

Labour Court Port Elizabeth

BEFORE

R Lagrange

CASE / FILE NUMBER

P 22/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN PORT ELIZABETH

JUDGMENT

Case no: P 22/11

In the matter between:

NEWTON FERREIRA Applicant and THE TYRE MANUFACTURERS BARGAINING COUNCIL First Respondent BOTHA DU PLESSIS (N.O.) Second Respondent GOODYEAR SOUTH AFRICA (PTY) LTD Third Respondent

Heard: 08 May 2012

Delivered: 18 May 2012

Summary: (Review - ruling dismissing referral to arbitration for dilatoriness - ultra vires).

LAGRANGE, J

Introduction

This is an application to set aside a ruling by an arbitrator, the second respondent, who was appointed to arbitrate an unfair

dismissal dispute referred to the New Tyre Manufacturers Bargaining Council ('the bargaining council'), by the applicant, Mr N Ferreira.

The arbitrator did not arbitrate the dismissal dispute but issued a ruling on 15 November 2010 that the applicant's referral of his dispute to arbitration should be dismissed. The respondent employer, Goodyear South Africa (Pty) Ltd ('Goodyear')

had objected to the late hearing of the matter, even though it was common cause that the original referral of the dispute for

arbitration was within the prescribed time limit.

Brief chronology of the matter

I do not intend to detail every exchange between the parties, but simply to outline the process leading up to this ruling for the sake of contextualising the issues. The sequence of events summarised in the ruling is essentially not in dispute, save that the arbitrator erred in stating that in February and March 2008, Goodyear's attorneys requested dates for an arbitration meeting but received no response.

The applicant was dismissed in June 2006 for alleged poor work performance. He timeously referred an unfair dismissal dispute to the bargaining council and after conciliation he referred it to the first respondednt, a bargaining council ('the council'

or 'the bargaining council'), for arbitration on 31 October 2006, also within the statutory time limits. In November

that year the parties agreed that legal representatives could appear in the arbitration proceedings and the parties would provide

mutually suitable dates for the hearing. Thereafter progress in the matter was slow.

In May 2007, Goodyear furnished the applicant with a letter of pre-arbitration issues to which the applicant did not reply. The

following month, the applicant withdrew his mandate from his previous representative and instructed his present attorney of record in the matter, Mr W van Rensburg, to represent him.

Between July 2008 and March 2008 the respondent made various attempts to elicit a response to its pre-arbitration enquiries. The applicant, after not responding for some months, requested documentation from the respondent and made a partial response in early December 2008, but did not answer further repeated requests to complete his response. In June 2009, following a silence of nearly three months on the part of the applicant, he contacted the respondent to try to identify a suitable date for a hearing.

On 17 June 2009, in answer to this request, the respondent first indicated its view that the applicant had waived his right to pursue the matter and thereafter advised it would resist any attempt to set the matter down. The respondent pointed out that seventeen months had elapsed since it had made a preliminary bundle of documents available to the applicant and he had failed to respond to its pre-arbitration enquiries.

In October 2009, the matter was set down for arbitration but the hearing was again postponed because of the unavailability of the respondent. The respondent subsequently formalised its objection to the arbitration proceeding after the delay in convening the hearing.

Some of the details in the sequence above are set out in more detail in evaluating the merits of the application.

The ruling

The basis of the arbitrator's ruling may be summarised as follows:

It is an objective of the Labour Relations Act 66 of 1995 ('the LRA' or 'the Act') to promote the effective

resolution of disputes and this entails an expeditious process.

The respondent never waived its right to bring the application to dismiss the referral to arbitration.

The applicant never communicated his view that he was not obliged to respond to its pre-arbitration enquiries to the respondent.

As an arbitrator he had a discretion to decide whether or not to allow the arbitration to proceed and in exercising that discretion

he was guided by the principles of justice and fairness.

It was unfair for an employer to have a sword hanging over it indefinitely and was entitled to finality.

In conclusion, the applicant had thwarted the fundamental objectives of the LRA and infringed the respondent's right to the expeditious resolution of disputes.

The arguments

The first issue is a legal one. The applicant maintains that the arbitrator had no power and, by implication, no discretion to make the ruling he did. Secondly, in so far as the respondent might have suffered prejudice resulting from the delay it must accept part of the blame because it was entitled to approach the bargaining council to set the matter down, and the parties had agreed they would find a mutually convenient date. In any event, the applicant argues the respondent had failed to place any evidence of the prejudice it had suffered before the arbitrator.

The respondent points out, correctly, that the Labour Court has deprived applicants of the right to pursue remedies in circumstances

where an applicant has unduly delayed the prosecution of a claim. It is now a common practice when an applicant has delayed unduly in prosecuting a review application for a respondent to bring an application dismissing the review proceedings under Rule 11 of the Labour Court rules. Similarly, where an applicant has been excessively slow in finalising the steps necessary to have a matter set down for trial once pleadings have closed, the court will also entertain such applications. If the respondent is right on the legal question, the second issue is whether the arbitrator's decision was in some other way irregular or unreasonable.

The powers of the arbitrator

The key legal question is whether bargaining councils or the CCMA may also entertain similar applications. The first point to make is that this court's power to dismiss referrals and applications for lack of diligence on the part of applicants in pursuing their matters is not derived from the Rules of Court, as such. Rule 11 is merely a convenient procedural vehicle for bringing an application before court for consideration. The power to dismiss matters is a power that the court exercises in the course of exercising its own inherent powers as a high court.¹ A commissioner or panellist of a bargaining council performs a quasi-judicial statutory dispute resolution function and exercises

no inherent jurisdiction like a court. Their powers must be sourced in the provisions of the governing statutes. *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2006] ZACC 9; 2007

(1) SA 343 (CC), the Constitutional Court reaffirmed the principle that:

'(t)he doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law.'²

A commissioner or an arbitrator charged with the obligation to determine a dispute can only dismiss an applicant's claim on the basis of excessive delays in prosecuting the claim, if that is a power which is expressly granted, or is reasonably necessary for exercising their express powers.

*"It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given."*³

If a dismissed employee fails to refer an unfair dismissal dispute timeously to conciliation under s 191(1)(b)(i), or subsequently

fails to refer the dispute to arbitration in terms of s 136(1)(b), the employee may be barred from proceeding in the absence of obtaining condonation. The CCMA and bargaining councils are specifically empowered to permit an employee to refer the dispute

for conciliation after the 30 day time limit under s 191(2) of the LRA, or to arbitration after the 90 day time limit under s 136 (1)(b), on good cause shown.

Once the conciliation phase has passed, the council or the CCMA ‘must arbitrate the dispute at the request of the employee’

in terms of s 191(5)(a)(i). Section 191(5A)(c) further states that the council must commence the arbitration immediately after

certifying the dispute remains unresolved if the dispute concerns an alleged unfair dismissal for misconduct or incapacity, if no party has objected to the matter being dealt with in terms of that section. The latter provision was clearly introduced to reduce the delay between conciliation and arbitration, where possible.

It is plain from the provisions of s 191(5)(a) that the council is under an obligation to arbitrate the dispute if the employee refers it to arbitration within the 90 day period in s 191(1)(b)(ii). The council has a statutory duty to convene the arbitration hearing once it receives a timeous referral, or if condonation for a late referral is granted.

Clause 14 (5) of the bargaining council’s constitution provides:

"the arbitration proceedings must be conducted in accordance with CCMA practice and procedure, and well as with the provisions of section 138 and 142 and, if applicable, sections 139, 140 and 141, of the Act, read with the changes required by the context."

In terms of s 138(1), once the appointed arbitrator has the matter before her, she is empowered to conduct the arbitration in a manner that she “considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial

merits of the dispute with the minimum of legal formalities”. Section 138(9) states:

“ (9) The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award-

- (a) that gives effect to any collective agreement;
- (b) that gives effect to the provisions and primary objects of this Act;
- (c) that includes, or is in the form of, a declaratory order.”

Rule 31(1)(c) of the CCMA rules provides for a party to bring preliminary or interlocutory applications, and rule 31(10) provides

that the application may be determined in any manner the arbitrator deems fit.

Section 1(d)(iv) of the LRA provides that a primary object of the Act is the “effective resolution of labour disputes”. A number of decisions of the courts have held that an important characteristic of an effective dispute resolution is that it should be expeditious.⁴ It follows, in my view, that a party that is dilatory in exercising its rights under the Act may, in cases of unjustifiable delay,

thwart the aim of an expeditious dispute resolution process, and can be prevented from dragging a matter out indefinitely by its own inaction. I believe that it is clear also that an arbitrator does have the power to dismiss a matter referred to arbitration in such cases, because this is reasonably incidental to a commissioner's power to make an award which gives effect to one of the primary objects of the Act, in terms of s 138(9)(b). In this instance, the bargaining council constitution has also adopted that provision as applicable to arbitrator's performing its statutory dispute resolution functions, and has expressly adopted the CCMA practices and procedures, which include the consideration of interlocutory applications. Even though the primary responsibility for advancing the matter rested with the applicant, the respondent did have another remedy of approaching the bargaining council to set the matter down for arbitration and the bargaining council would have been obliged to perform its statutory obligation to arbitrate the dispute, if necessary on pain of the respondent obtaining a mandamus compelling the council to do so. But I do not believe it was confined to that remedy.

The arbitrator's exercise of his power to dismiss the claim

In this instance, the respondent was the party trying to get the arbitration proceeding underway. It drafted a notice for a pre-arbitration minute. On the topics of common cause facts, facts in dispute and issues the arbitrator was required to decide, the relevant paragraph of the notice read:

"With a view to determining those facts that are common cause and those that are in dispute between the parties, and in order to determine the precise ambit of the issues that the arbitrator is required to decide, the Applicant is called upon to respond to the issues/enquiries raised hereunder.

2.1 In precisely what respect, if at all, does the Applicant contend that his dismissal was substantively unfair? Full and proper

particulars are required.

2.2 In precisely what respect, if any, does the Applicant contend that his dismissal was procedurally unfair?"

The two questions posed in 2.1 and 2.2 ought to have been relatively simple to answer, even if only in outline, and without having to provide details that would be the subject matter of evidence. It was only on 17 October 2007 that the applicant's attorney of record requested a copy of the documents the respondent intended relying on in the arbitration proceedings. This came after several requests were made by the respondent for a response from the applicant to the pre-arbitration notice queries and to hold a pre-arbitration conference. The respondent suggested that documents could be exchanged at the pre-arbitration meeting and it did not see why its queries could not be answered without the documents. The applicant then made a limited response, but claimed he needed the documents to do anything more. On the central questions mentioned above, all the applicant was prepared to say was that his dismissal was substantively and procedurally unfair and that he would provide full particulars once documentation was received. A less forthcoming response could not have been made.

Despite the fact that no pre-arbitration meeting took place, the respondent did make disclosure of certain documents to the applicant

on 21 January 2008 to facilitate a response. Despite three requests during February and March 2008 to respond to the pre-arbitration

enquiries, no response was forthcoming from the applicant. It was only more than a year after this that he contacted the respondent,

out of the blue, with a view to identifying a suitable date for the hearing. As the respondent also notes, by then it was three years after the applicant had been dismissed. Notably, the applicant had provided no further answers to the pre-arbitration notice in all the intervening time and now simply wanted to proceed to arbitration directly. The applicant adopted the view that unless the bargaining council had directed that a pre-arbitration meeting be held, he was under no obligation to attend one, nor to respond to the queries in the pre-arbitration notice. This stance had never previously been conveyed to the respondent. On the contrary, he had conveyed the impression that he was not averse to meeting with the respondent to conclude a pre-arbitration minute, once he had enough information from it to do so.

At this juncture the respondent made its view clear, namely that it regarded the applicant as having waived his right to pursue his dispute and that it would oppose any attempt to set the matter down for arbitration. On 15 January 2010, the respondent launched an application at the bargaining council to dismiss the applicant's unfair dismissal claim, and the award in that application is the subject matter of this review.

The applicant was indeed entitled to have his dispute arbitrated, but he adopted a virtually supine attitude to advancing the matter once agreement had been reached to settle on agreed dates for the hearing. There is no evidence of him trying to reach agreements on future dates with the respondent. When the respondent started to advance the process by means of a proposed pre-arbitration minute, the applicant's assistance was negligible at best. Before the applicant attempted in June 2009 to set the matter down for arbitration, more than nine months of complete silence on his part had passed.

In the circumstances, the applicant's approach can only be characterised as an abuse of process. Merely because he had a right to proceed to arbitration did not mean that he did not have an obligation to exercise his right timeously. It could never have been the intention of the legislature that once a request for arbitration had been made, but an employee party had made an arrangement with the employer party in terms of which the parties would revert on dates which suited them, that the employee could elect on any date in the future to invoke his right to arbitration, irrespective of what subsequently transpired. Once agreement on a mutually acceptable date was not forthcoming within a reasonable time for whatever reason, the applicant should have requested the bargaining council to set the matter down. In this case, there is little evidence that he even made much effort to arrange a convenient date with the respondent.

In the circumstances, I am satisfied in this instance that there was nothing unreasonable about the arbitrator's exercise of his power to dismiss the applicant's claim for the reasons he gave on the facts before him.

Order

Accordingly,

The applicant's review application to set aside the arbitrator's ruling of 01 December 2010, under the first

respondent's case number NTBC30/2006 is dismissed.

The applicant is ordered to pay the respondent's costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: W van Rensburg of Wikus van Rensburg Attorneys

FIRST RESPONDENT: J Partington instructed by Chris Baker Attorneys

1Solidarity & Others v Eskom Holdings Ltd (2008) 29 ILJ 1450 (LAC) at 1466-7,[38]-[39]

2Per Langa, CJ at 372-3,[68]

3Per Ngcobo, J in Matatiele Municipality and Others v President of the RSA and the RSA and Others 2006 (5) SA 47 (CC) at 64,[50] where the learned judge also cited with approval the dictum of Van Zyl, J in Moleah v University of Transkei and Others 1998 (2) SA 522 (Tk) at 536H-537D, viz: "When the scope of the authority of an administrative organ has to be determined the rules of interpretation are often used to determine whether there are implied powers (see Steyn Die Uitleg van Wette 5th ed at 208--14). Applying the principles applicable to the interpretation of statutes, it is clear that, if certain conduct is required or authorised, the authorising act should be interpreted as impliedly including authorisation to do that which is 'reasonably necessary' to achieve the main purpose or to perform the action effectively or that which is 'reasonably incidental' or 'reasonably ancillary' to those powers expressly conferred. Such implied powers are construed according to the so called *ex consequentibus* (*quando lex aliquid alicui concedit conceditur et id sine quo res ipso esse non potest*) and *ex accessoris eius*, *de quo verba luquuntur* rules of construction. (See Steyn (op cit at 51--4, 209--13); Devenish Interpretation of Statutes at 86--8; Baxter (op cit at 404--5); Johannesburg City Council v Makaya 1945 AD 252; Lekhari v Johannesburg City Council 1956 (1) SA 552 (A); Jauka v Port Alfred Municipality 1960 (4) SA 296 (E); Pretoria City Council v South African Organ Builders (Pty) Ltd 1953 (3) SA 400 (D); Yanqua Middeldrift (Edms) Bpk v Aspoortbesproeiingsraad 1974 (4) SA 473 (C); Middelburg Municipality v Gertzen 1914 AD 544; Bloemfontein Town Council v Richter 1938 AD 195; Brakpan Town Council

v Burstein 1932 TPD 335 and Maris en Andere v Verkiesingsbeamppte, Galeshewe Munisipaliteit, en Andere 1990 (2) SA 531 (NC).) It is clear from the reading of the aforementioned decisions that the Courts seldom draw a clear distinction between these grounds for interpretation by implication. It is, however, for purposes of this judgment not necessary to comment thereon. It is sufficient to state that the scope of authority of an administrative organ can be held to be impliedly extended if such authority is 'reasonably necessary' or 'incidental' to the authorised power.” (emphasis added)

⁴See, for example, CWIU v Darmag Industries (Pty) Ltd

[1999] 8 BLLR 754 (LC) at 759,[32] and POPCRU obo Sifuba v Commissioner of the SAPS & others [2009] 12 BLLR 1236 (LC) at 1243,[30] relying on National Education Health and Allied Workers Union v UCT 2003 (3) SA 1 (CC) at paragraph 31.

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