

SOUTH AFRICA / JUDGMENT

Khumalo v Security Specialised Services t/a Securitas SA (Pty) (JS 121/2020) [2023] ZALCJHB 212 (19 July 2023) [2023] ZALCJHB 212

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 121/2020

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Source record**THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG****Not Reportable****Case No: JS****121/2020**

In the matter between:

MOKETE

KHUMALO

Applicant

and

SECURITY

SPECIALISED SERVICES T/A SECURITAS SA (PTY)

Respondent

Heard:

18 July 2023

Delivered:

19 July 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 19 July 2023.)

JUDGMENT**VAN NIEKERK, J**

- [1] This matter was called on the trial roll. The respondent has raised a point in limine to the effect that the dispute was never conciliated and that no certificate of outcome was issued prior to the referral made by the applicant.
- [2] The applicant was dismissed on 25 September 2019. On 9 October 2019, the applicant's union referred an unfair dismissal dispute to the CCMA. In the referral, the substantive fairness of the applicant's dismissal was contested. A conciliation meeting was convened on 28 January 2020. The applicant states that at the conciliation meeting, when he described the circumstances of his dismissal (which, as he contends, amounted to an infringement of his statutory rights) he was advised by the commissioner that the matter could not be referred to arbitration, and would need to be referred to this court for adjudication. In these circumstances, the applicant signed the pro forma 'Case Withdrawal Form' in which he recorded that he voluntarily withdrew his referral and abandoned his dispute against the respondent. The applicant recorded the reason for withdrawal as "I wish to refer the matter to the Labour Court as an automatically unfair dismissal instead".
- [3] The applicant then referred the dispute to this court.
- [4] Section 191(11) of the LRA requires a referral of a dispute made in terms of subsection (5)(b) to be made 'within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved'. Subsection
- (5) provides for a dispute to be referred after a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the CCMA received the referral.
- [5] To the extent that the respondent submits that the dispute referred to the CCMA was not described as one that concerned an automatically unfair dismissal and that a dispute of that nature was thus never conciliated, it is well-established that an employee is entitled to refer an automatically unfair dismissal dispute to this court provided that the dispute referred is one of an unfair dismissal. Put another way, it is not necessary specifically to stipulate on the referral form that the dismissal was effected for a reason that the employee regards as automatically unfair.
- [6] To the extent that the respondent submits that for the purposes of section 191(11) no certificate of outcome was issued and that he was thus precluded from referring the dispute to this court for adjudication, this court has held that section 191(11) ought to be read with section 191(5), to the effect that if a certificate of outcome has been issued, the referral must be made within 90 days from the date of issue, but if no certificate has been issued, an employee remains entitled to refer the dispute provided

that 30 days have elapsed from the date of referral of the dispute and that the referral is made within a reasonable time after that date. In *Sappi Timber Industries (Pty) Ltd v CCMA* (2003) 24 ILJ 846 (LC), the court held that a reasonable time would be a period of 90 days.

[7] Applying that principle to the present case, it is common cause, as I have indicated, that no certificate of outcome was issued. It remained for the applicant then to refer his dispute to this court within 90 days of the date of the referral of his dispute to the CCMA, i.e., by 9 January 2020. The applicant filed the statement of claim on 20 March 2020. On this reckoning, the referral

was made late, and condonation is required. In the absence of condonation, this court has no jurisdiction to entertain the applicant's claim.

[8] In any event, the applicant has signed what appears to be a withdrawal of his referral. Whether he did so on the understanding that this was a necessary step prior to a referral to this court is not a matter that I am able to decide on the papers. On the face of it, the document indicates a withdrawal of the unfair dismissal dispute referred to the CCMA. The referral would have been sufficient to found the basis of the referral of an automatically unfair dismissal dispute to this court, and there was no need to withdraw it. But given the fact of the withdrawal, while it stands, there is no dispute before the court and the court lacks jurisdiction

for that reason.

I make the following order:

1. The application is struck from the roll for lack of jurisdiction.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Self

For the respondent: D Louw, Union official

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