

SOUTH AFRICA / JUDGMENT

Maloka v Liberty Holdings (PTY) Ltd (J 05/21) [2022] ZALCJHB 125 (6 June 2022)

[2022] ZALCJHB 125

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J 05/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: J 05/21

In

the matter between:

RAKOKWANE
MALOKA
Applicant
and
LIBERTY
HOLDINGS (PTY) LTD
Respondent

Heard:

12 November 2021

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 6 June 2022.

JUDGMENT

TLHOTLHALEMAJE, J

- [1] In this application, the applicant seeks condonation for the late filing of his claim in terms of section 187(1)(f) of the Labour Relations Act[1] (LRA). The application is opposed by the respondent.
- [2] The applicant was employed by the respondent with effect from 2003. On 30 October 2019, the applicant was suspended from by the respondent on account of allegations of misconduct related to gross negligence and misappropriation of company funds. A disciplinary hearing subsequently held in regards to the allegations led to the dismissal of the applicant on 31 December 2019.
- [3] Since his dismissal, the applicant has referred multiple disputes to the Commission for Conciliation Mediation and Arbitration (CCMA) and to this Court. The history and nature of these disputes is set out in the judgment delivered on 25 March 2022 under Case No: JS 21/21. The application before the Court in that matter also pertained to condonation for the late filing of his statement of claim in respect of an alleged unfair discrimination claim. The Court also had to consider the respondent's application for condonation for the late filing of its statement of response. In its judgment and order, the Court had dismissed the applicant's application and granted that of the respondent. Effectively, the applicant's claim of unfair discrimination was dismissed.
- [4] Subsequent to the delivery of the judgment under case number J21/21, the applicant has since pointed out that the two matters under case numbers JS21/21 and J5/21 ought to have been determined together

since they were both set-down on the same date. The Court has since verified that it is indeed correct that the two matters were to be determined simultaneously. The Court's omission in this regard can be forgiven given the voluminous and unpaginated nature of the documents in both matters, which was exacerbated by the failure to attend to any proper or meaningful indexing in any coherent manner for the convenience of the Court.

- [5] It has already been stated that the applicant had also referred multiple disputes to the CCMA, one of which was on 28 January 2020 in respect of an alleged unfair dismissal dispute. The dispute was conciliated on 5 March 2020 resulting in a certificate of outcome being issued. An alleged unfair labour practice dispute was also referred, which was then followed by a claim of alleged unfair discrimination. The latter referral was at some stage withdrawn by the applicant on 26 August 2020, who in his correspondence to the respondent had not only confirmed the withdrawal but also emphasised that he would only pursue the alleged unfair dismissal and alleged unfair labour practice disputes. Having withdrawn the alleged unfair

discrimination referral at the CCMA, the applicant referred the said dispute to the Equality Court. In its directive issued on 16 October 2020, the Equality Court effectively declined to determine the matter.

[6] The alleged unfair labour practice dispute was dismissed by the CCMA on 2 November 2020. The applicant subsequently approached this Court with an application for ‘rescission’ of the dismissal of his alleged unfair labour practice claim in this Court.

[7] On 6 January 2021, the applicant filed his notice of motion in respect of the alleged automatically unfair dismissal claim under section 187(1)(f) of the LRA. On 22 February 2021, the CCMA notified the parties of the arbitration hearing in respect of the alleged unfair dismissal dispute. The applicant averred in his supplementary

affidavit that on 1 March 2021, he had made a request to the CCMA for the dispute to be transferred to this Court for adjudication. On 15 April 2021, the CCMA dismissed the applicant’s claim of unfair dismissal in the absence of the applicant. In this regard, the applicant has yet again referred another application for a review under JR 696/21. That matter is still pending before the Court.

[8] To the extent that the applicant persists with the alleged automatically unfair dispute before this Court based on his initial referral of an alleged unfair dismissal dispute, section 191(11) (a) of the LRA provides that such a claim must be referred to this Court within 90 days from the date in which the CCMA had declared the dispute as unresolved.

[9] The respondent in opposing the application for condonation had contended that this Court nevertheless lacks the jurisdiction to adjudicate the alleged automatically unfair dismissal dispute since it was not referred to the CCMA for conciliation. It was further pointed out that the applicant’s alleged automatically unfair dismissal was also brought by way of motion proceedings rather than action proceedings in terms of Rule 6 of the Rules of this Court. This was particularly in view of the material disputed facts which the applicant ought to have foreseen.

[10] In respect of the issue of jurisdiction, in *Association of Mineworkers & Construction Union & others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) & others (‘AMCU’)*[2], to which the respondent had referred to in its papers, the Court held that a distinction ought to be made between a cause of action and a dispute which is referred to the CCMA in terms of section 191 of the LRA. This is so since an employee could have referred a dispute for conciliation and during the conciliation process the true reason for the dismissal could emerge. Those reasons could thus be those stipulated in subsection 5(b) and as a result, the employee would retain the option to refer the matter to this Court for adjudication based on the true nature of the dispute. This therefore means that the employee simply has to refer the fairness of the dispute to the CCMA and any characterisation of the dispute would therefore not preclude the employee from referring the dispute to the correct forum subsequent to conciliation.

[11] In this matter, it is common cause that the employee referred a claim for unfair dismissal to the CCMA and which was declared unresolved on 5 March 2020. The applicant referred his claim before the Court prior to the dismissal of the alleged unfair dismissal. Notwithstanding the dismissal of the alleged unfair dismissal dispute at a later stage and to the extent that the applicant had sought to utilise the certificate of outcome issued in respect of that matter to refer an alleged automatically unfair dismissal, the Court will therefore accept on the authority of Ngululu Bulk Carriers[3] that indeed the certificate of outcome issued in respect of the alleged unfair dismissal should be sufficient for the purposes of the referral of the alleged automatically unfair dismissal. This means that in terms of section 191(11)(a) of the LRA the applicant had 90 days from 5 March 2020 to file his claim under section 187(1)(f) of the LRA. He only did so on or about 6 January 2021. This therefore means that the application was filed some 240 days belatedly.

[12] The provisions of section 191(11)(b) affords this Court with a discretion to condone, on good cause shown, the non-compliance with the timeframes provided for in terms of section 191(11)(a) of the LRA. In considering an application for condonation, the Court must exercise its discretion judicially, taking into account all the relevant facts, including the extent of the delay, the reasons advanced for the delay, the prospects of success in the main application, any prejudice that the parties may suffer and the importance of the issues in the main[4]. In the end, the interests of justice upon a consideration of all these factors will dictate whether non-compliance with applicable time frames should be condoned or not.

[13] As mentioned above, the extent of the delay is some 240 days. This is undoubtedly excessive and demands a full, detailed and accurate

account for the causes of the delay and to what extent those factors had constrained the applicant from complying with the statutory

timeframes.[5]

[14] It must be stated that from the applicant's affidavits, the explanation for the delay is not easily discernible, and what is apparent is that once the alleged unfair dismissal dispute was declared unresolved on 5 May 2020, the applicant had on 29 March 2020 elected to refer the matter for arbitration. It was only at a belated stage that it occurred to him that he should refer an alleged automatically unfair dismissal to this Court. In this regard, and to the extent that I understand his reasoning, the applicant sought to blame the CCMA for not referring the dispute to this Court.

[15] In my view, the applicant's explanation, which is essentially that the matter was pending and that the CCMA failed to either refer or transfer the matter to this Court is hardly satisfactory. It needs to be re-emphasised that even though it may be accepted for the purposes of an automatically unfair dismissal dispute that it was referred for conciliation, to the extent that the applicant had pursued the alleged unfair dismissal claim and also sought to do so in respect of the alleged automatically unfair dismissal claim, he could simply have done so without having to engage the CCMA insofar as its conduct in scheduling the matter for

arbitration was concerned. It is not clear from the applicant's averments as to exactly what his intentions were throughout with the various referrals. The referral of the alleged automatically unfair dismissal dispute to this Court was not dependent on the outcome or processes followed by the CCMA in handling the alleged unfair dismissal claim. Furthermore, it was not for the CCMA to have transferred the applicant's dispute to this Court on his behalf to the extent that he sought to blame the CCMA for failing to do so despite requests.

- [16] Further to the extent that the applicant has not provided a satisfactory explanation for the extensive delay, and since the Court may be inclined to consider his prospects of his success on the merits, it needs to further be pointed out that it is not clear at what point of all the various disputes emanating from a dismissal for misconduct, these had morphed into either a discrimination or automatically unfair claim.
- [17] The averments made by the applicant in alleging automatically unfair dismissal as correctly pointed out by the respondent, do not come close to disclosing any cause of action. In fact it is difficult to comprehend what the applicant's claim is all about. Essentially, the applicant places reliance under section 187 (1)(f) of the LRA on what he deems 'arbitrary ground of prejudice and harassment' based on the following;
- (a) 'The Employer has irrationally dismissed my submission that malicious complaint which has been lodged against me by the key customer was the most likely cause of the misconduct that I have committed in another case.
 - (b) The Employer has abused my financial records to fabricate the fictitious disciplinary charge of misappropriation of company funds against me.
 - (c) The Respondent has engaged in an active concealment of own faults in the same case to which I have been accused of misconduct in order to direct full responsibility of the cause of potential harm against me.
 - (d) The Employer has disregarded my complaint against an employee who had concealed his prior involvement in the same case which revealed his contributory negligence when he lodged the complaint of fraud against me
 - (e) The Respondent has synchronised the termination of my employment contract with the invoking of business process that an Employer has failed to produce as the proof in the disciplinary hearing
 - (f) The Respondent has lied to me and had also made false statement under oath to have reported the criminal complaint of theft against me to the SAPS in an effort to justify the reason to terminate my employment contract' (Sic)

[18] It is clear from the above summary of the applicant's averments that one cannot make sense of the basis of the alleged automatically unfair dismissal. It has been repeatedly stated in this Court that an employee must produce credible evidence showing that he or she has been subjected to an automatically unfair dismissal before an employer is behoved to show that the dismissal is not for a prohibited reason[6].

[19] To the extent that the applicant's alleged automatically unfair dismissal is located in section 187(f) of the LRA, this provision is in reference to an alleged unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination

Act[7]. This therefore implied that the applicant had to produce some credible evidence to demonstrate that the real reason for his dismissal was not related to misconduct, but was based on some or other discriminatory basis. Mere references to 'arbitrary ground of prejudice and harassment' is meaningless, and clearly from his averments as summarised above, the applicant has failed to lay a basis for any claim under the provisions he relied on. Effectively therefore, that ought to be the end of the matter.

[20] It is therefore not even necessary to deal with the issue related to the manner with which the claim was brought before the Court. It can only be reiterated that disputes surrounding any alleged automatically unfair dismissals ought ordinarily be brought by way of action proceedings. This is so in that motion proceedings are unsuited for such claims for obvious reasons, which are mainly the disputes of fact that may arise and that ought to be anticipated. Thus, even if the applicant was to be granted condonation, he would still needed to explain the reason that his claim was brought before the Court in the manner he did, and why the it ought to be determined.

[21] In summary, the excessive delay in approaching the Court with the alleged automatically unfair dismissal has not been explained, and to the extent that there is any explanation, it is neither satisfactory nor reasonable. Furthermore, even if there was some form of explanation for the excessive delay, the applicant's prospects of success on the merits are utterly hopeless, and the respondent stands to suffer unnecessary prejudice in having to defend such a hopeless case. In the light of these considerations, it follows that it would not be in the interests of justice that the applicant be granted condonation.

[22] I have further had regard to the requirements of law and fairness in regards to an award of costs, and I am of the view that such an order would not be appropriate given the circumstances of the applicant.

[23] Accordingly, the following order is made;

Order:

1. The applicant's application for condonation of the late filing of his claim of an alleged automatically unfair dismissal is dismissed.
2. The applicant's claim of an alleged automatically unfair dismissal is dismissed.

3. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: In person

For the Respondent: D. Bouchier, of Cliffe Dekker Hofmeyr Incorporated

[1] Act 66 of 1995, as amended

[2] CCT15/18) [2020] ZACC 8; 2020 (7) BCLR 779 (CC); (2020) 41 ILJ 1837 (CC) where the Court held: [16] Although unfair dismissal disputes such as the ones we are concerned with here fall within the jurisdiction of the Labour Court, the exercise of that jurisdiction is deferred until a dispute has been conciliated. The LRA is structured in a manner that obliges parties to disputes to first make use of non-litigation dispute-resolution mechanisms, before approaching courts. Of importance in this regard is s 191, which requires dismissed employees to refer disputes about the 'fairness of a dismissal to conciliation'. ... [18] It is important to keep in mind that what is referred to conciliation is the dispute and not causes of action or claims which may arise from that dispute. Moreover, conciliation involves both sides to the dispute, that is the dismissed employee and the employer that dismissed her. Both parties are usually familiar with the dispute sought to be resolved through conciliation. However, while the reasons for a dismissal are always known to the employer, the employee may not know them at the time the referral is made. Those reasons may be revealed to the employee during conciliation. And [21] The flaw in the Labour Court's reasoning stems from its characterisation of an automatically unfair dismissal as a dispute separate from an unfair dismissal dispute that was referred to conciliation. That court overlooked the fundamental issue which is that what was referred to conciliation was the unfairness of the dismissal, regardless of whether the unfairness concerned was automatic or otherwise. And that it is not reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal.

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And

[21] The flaw in the Labour Court's reasoning stems from its characterisation of an automatically unfair dismissal as a dispute separate from an unfair dismissal dispute that was referred to conciliation. That court overlooked the fundamental issue which is that what was referred to conciliation was the unfairness of the dismissal, regardless of whether the unfairness concerned was automatic or otherwise. And that it is not reasons for a dismissal which must be referred to conciliation but the unfairness of the dismissal.

[3] Supra

[4] See *United Plant Hire (Pty) Ltd v Hills* 1976(1) SA 717 (A) at 720 E –G

[5] See *Uitenhage Transitional Local Council v South African Revenue Service* 2004

(1) SA 292 (SCA) at para [6]

[6] *Kabe v Nedbank Ltd* (JS633/13) [2018] ZALCJHB 173; (2018) 39 ILJ 1760 (LC)

[7] Act 4 of 2000

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