

SOUTH AFRICA / JUDGMENT

Mbombi v Bluespec Holdings (JS1058/20) [2021] ZALCJHB 338 (6 October 2021)

[2021] ZALCJHB 338**COURT**

Labour Court Johannesburg

BEFORE

Cithi

CASE / FILE NUMBER

JS1058/20

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****No: JS 1058/20****In****the matter between:**

JOSEPH
LUCKY
MBOMBI Applicant
And
BLUESPEC
HOLDINGS
(REGISTRATION

NO:

2000/015694/07) Respondent
Heard: 7
JULY 2021
Delivered: 6
October 2021
In view of the measures
implemented as a result of the Covid-19 outbreak, this judgment was
handed down electronically by circulation
to the parties'
representatives by email. The date and time for hand-down is deemed
to be 6 October 2021.

Summary:

Due to Covid-19 lockdown, this application, per the parties' agreement, proceed by means of a virtual oral hearing. Condonation application for the late delivery of the Applicant's statement of case – Applicant retrenched following a consultation procedure that only applied to him. Applicant referred matter to CCMA for arbitration. Respondent raised a jurisdictional point at the commencement of the arbitration proceedings alleging that two other employees were retrenched and therefore the CCMA had no jurisdiction to arbitrate the Applicant's dispute. The Commissioner upheld the Respondent's jurisdictional point. Section 189(3) letter issued to the Applicant on 20 May 2020 states that the Applicant was the only employee affected by the retrenchment procedure that commenced on that day. Held: In terms of section 191 (12) of LRA, an employee may elect to refer the dispute either to arbitration or to the Labour Court if the employer followed a consultation procedure that applied to that employee only. On the objective facts on this matter, the other two employees were retrenched 2 months after the Applicant's retrenchment. It follows, therefore, that the Applicant was within his right to refer the dispute to arbitration. However, since the Commissioner issued a jurisdictional ruling ousting the CCMA's jurisdiction to entertain the dispute (albeit incorrectly so) which had not been challenged, and the Applicant has filed a condonation application seeking condonation for the late delivery of his statement of case, this Court will deal with that application. The Court is satisfied that the Applicant has made out a case for the granting of his condonation application. Accordingly, condonation is granted.

JUDGMENT

CITHI, AJ

Introduction

- [1] Before me is an opposed condonation application. The Applicant seeks condonation for his late filing of his statement of case in this matter. The Applicant was dismissed on account of the Respondent's operational requirements. Through his referral and statement of case, the Applicant seeks to challenge the Respondent's decision to terminate his employment.

Background

- [2] I will only detail the background of this matter insofar as it is relevant to the determination of the Applicant's application for condonation.
- [3] On 31 May 2020, the Applicant was dismissed by the Respondent (ostensibly) due to the Respondent's operational requirements. On 15 June 2020, the Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The matter was set down for conciliation on 17 July 2020. On 17 July 2020, however, conciliation did not proceed owing to the non-attendance of the conciliating commissioner on the Microsoft Teams meeting through which conciliation was set to proceed. After unsuccessfully endeavouring to obtain a new date for conciliation, the Applicant, through his attorneys of record, referred his dispute for arbitration on 20 August 2020.
- [4] The arbitration was set down to proceed on 24 November 2020. However, at the commencement of the arbitration proceedings on 24 November 2020, the Respondent raised a point in limine and contended that the CCMA lacked jurisdiction to arbitrate the matter. In brief, the Respondent contended that the CCMA lacked jurisdiction to arbitrate the dispute because there were two other employees of the Respondent who were also terminated by the Respondent based on its operational requirements.
- [5] In substantiation of its point in limine, the Respondent led the evidence of Ms Carly Fourie ("Fourie") who testified inter alia that she was involved in the consultation of two other employees of the Respondent, who were dismissed due to the Respondent's operational requirements. Fourie's evidence was that these two other employees were dismissed on 31 July 2020. After the Respondent closed its case on its point in limine, the Applicant conceded that the CCMA did not have jurisdiction to arbitrate the dispute and that the matter ought to be referred to the Labour Court for adjudication.
- [6] On 8 December 2020, the commissioner ("Commissioner") that was seized with the matter issued a ruling ("Ruling"), whereby she found that the CCMA lacked jurisdiction to arbitrate the dispute and that the matter must be referred to the Labour Court.

- [7] On 17 December 2020, the Applicant's statement of case and condonation application (i.e. this application) were served on the Respondent via registered post. The Applicant's statement of case was filed at the Labour Court on 18 December 2020. On 11 January 2021, the Applicant's statement of case and condonation application were sent to the Respondent via email. The Respondent filed its opposition to this condonation application on 25 January 2021.

The Applicant's condonation application

- [8] Neither the Applicant's nor the Respondent's respective affidavits do their cases any favours. The Applicant, for example, does not actually allege when he believes his statement of case ought to have been delivered by. The Respondent's answering affidavit is for the most part a bare denial without any real engagement in what the Applicant alleged in respect of his explanation for his delay.
- [9] The Applicant alleges that his statement of case was filed some 55 days late. The Applicant does not allege why his statement of case is 55 days late[1], or when, on his version, he ought to have referred his matter to the Labour Court by. I can only assume that the Applicant contemplates that, because there was no conciliation, he had in effect 120 days[2] from when the CCMA received his referral to refer the matter to the Labour Court. In seeking to explain this delay, the Applicant merely outlines the chronology of the matter and tries to emphasise that his statement of case was delivered shortly after receiving the Ruling. It must be said that the Applicant should have done better in making out his case. From the Respondent's answering affidavit, it is hard to ascertain the basis of the Respondent's opposition. The Respondent, in its answering affidavit, makes a series of bald denials and denies allegations which, I assume, are objectively verifiable.[3] Nevertheless, from reading the Respondent's answering affidavit, together with its heads of argument, it is apparent that the Respondent's opposition to the Applicant's condonation application is based primarily on the following:
1. the Applicant ought to have known from the get-go, especially because he was legally represented, that his matter should have been referred to the Labour Court and not the CCMA. The Respondent contends that it would have been "common knowledge" that the Applicant ought to have referred his matter to the Labour Court;
 2. the Respondent will suffer prejudice if condonation is granted; and
 3. the Applicant failed to provide any explanation for his delay.

Should condonation be granted?

[10] Prior to considering whether condonation ought to be granted, it warrants mentioning that I am not totally persuaded that the Applicant's referral has actually been made late. However, and perhaps luckily, this more difficult question need not be determined now as the Applicant has in any event sought condonation. I will, therefore, deal with this matter on the basis that the Applicant's referral to the Labour Court was late.

The point in limine raised by the Respondent before the commencement of the arbitration proceedings which gave rise to the

Ruling

[11] While I am cognisant that only the Applicant's condonation application is before me, considering the basis of the Respondent's opposition to the condonation application, it is necessary for me to briefly consider the point in limine. The Respondent, in essence, contends that it was so obvious that the Applicant ought to have referred his matter to the Labour Court for adjudication, that the Applicant should now be denied the opportunity to challenge his dismissal in the Labour Court, owing to his late referral. I do not agree.

[12] The Respondent's point in limine was founded in, and turned on, section 191(12) of the Labour Relations Act 66 of 1995 ("LRA") which states:

"(12) An employee who is dismissed by reason of the employer's operational requirements may elect to refer the dispute either to arbitration or to the Labour Court if—

- (a) the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189;
- (b) the employer's operational requirements lead to the dismissal of that employee only; or
- (c) the employer employs less than ten employees, irrespective of the number of employees who are dismissed."

[13] On the Respondent's own version, at the time of its consultations with the Applicant, the Applicant was the only employee who had received a notice in terms of section 189(3) of the LRA. Furthermore, the section 189(3) notice received by the Applicant (which is dated 20 May 2020) recorded that it was likely that only 1 employee (i.e. the Applicant) was to be affected, and that the proposed method of selection was that the Applicant's position was to be made redundant. It appears that it was only during the proceedings at the CCMA on 24 November 2020, that it was made known to the Applicant that the dismissal of other employees from the Respondent may be relevant to his case.

[14] Accordingly, the Applicant would only have found out during the proceedings on 24 November 2020 that other employees had been dismissed due to the Respondent's operational requirements some two months after his employment was terminated. How the Respondent can submit in its heads of argument that it "finds it strange and unacceptable that the Applicant's attorneys at no stage prior to the arbitration advised the Applicant that

the CCMA did not have the necessary jurisdiction to arbitrate the dispute is hard to comprehend. Hypothetically, it would have been on the Respondent to draw to the Applicant's attention that the section 189(3) notice that he received was totally misleading, and in fact it was contemplated that other employees were to be dismissed too.

[15] The two employees who Fourie testified were also dismissed due to the Respondent's operational requirements were only dismissed on 31 July 2020; two months after the Applicant was dismissed and some 14 days after the Applicant's matter was set to be conciliated. In my view, therefore, those two employees' dismissals cannot have any relevance to, or effect on, the election that the Applicant made regarding where to refer his dispute to after conciliation never took place on 17 July 2020.

[16] Furthermore, as held in *PGC Group of Companies (Pty) Ltd v CCMA*

[2007] ZALC 59; [2021] 3 BLLR 287 (LC) ("*PGC Group*"), the CCMA has jurisdiction to arbitrate a dispute relating to an alleged unfair dismissal based on the employer's operational requirements where the employer followed a consultation procedure that applied to that employee only, [4] even when more than one employee was dismissed. [5] On the facts in this matter, the Respondent followed a consultation procedure vis-à-vis the Applicant that applied to the Applicant alone.

[17] While it is not for this Court to pronounce on the Ruling, what I can comfortably find is that, contrary to the Respondent's contention, the Applicant's election to refer his alleged unfair dismissal dispute to the CCMA for arbitration was not contrary to common knowledge, reckless or ill-advised. The Applicant's decision to refer his matter for arbitration was in fact a sensible one, and his concession that the CCMA did not have jurisdiction to arbitrate the dispute was erroneous and cannot oust the CCMA's jurisdiction. Seen thus, the election the Applicant made to refer his dispute to arbitration was correct on the objective facts and sound in law.

[18] It is unfortunate that the Commissioner, the Applicant and the Respondent appear to have all been labouring under the same misunderstanding. It is even more unfortunate that this misunderstanding has had, and will have, the effect of delaying the resolution of this dispute. It is trite that employment disputes ought to be resolved expeditiously. Had the matter remained at the CCMA and arbitrated, it is likely that the matter would have been fully concluded some time ago.

Has the Applicant made out a case for condonation?

[19] The requirements for condonation are trite. [6] It is also trite that employment disputes ought to be resolved expeditiously. In my view, condonation in this matter ought to be granted.

- [20] The Applicant alleges that his statement of case was delivered some 55 days late. In the circumstances of this matter, this delay is not excessive. The chronology of the matter satisfactorily explains the delay. It was correct for the Applicant to refer his matter to arbitration. This is not a case where the Applicant dragged his heels in seeking to challenge his dismissal. In my view, and as it is demonstrated by the chronology of this matter, the Applicant acted with the requisite haste at all junctures.
- [21] In the circumstances of this matter and considering what has been set out above, the Applicant's referral of his unfair dismissal dispute to arbitration at the CCMA was sensible and reasonable. Shortly after receiving the Ruling the Applicant delivered his statement of case to the Labour Court.
- [22] I have considered what the Applicant and the Respondent have set out regarding the Applicant's prospects of success. In my view, the Applicant has sufficient prospects of success to weigh in favour of condonation being granted.
- [23] The Applicant received his section 189(3) notice on or about 20 May 2020 and was dismissed with effect from 31 May 2020, as the section 189(3) notice stated would be the case. In the Applicant's section 189(3) notice it is alleged that the reason for his contemplated retrenchment is to inter alia "reduce costs and streamline productivity". However, that notice contemplates that of the Respondent's staff compliment of over 80, only the Applicant was to be terminated for operational reasons. The common cause chronology, and the Applicant's employment history with the Respondent and its associated business, speaks for itself too. The Respondent will have some explaining to do at the trial.
- [24] With regard to prejudice, the Respondent has not demonstrated why the 55-day delay will cause it prejudice. The Applicant will, all facts considered, be irreparably prejudiced if he is not given an opportunity to challenge the fairness of his dismissal.

Final points

- [25] Two final issues require attention. The first is around the Applicant's service of his statement of case. The Applicant alleges that his statement of case was served on the Respondent via registered post on 17 December 2020. The Respondent alleges that the Applicant's statement of case was only served on 11 January 2021, via email, and that the Applicant is therefore also required to provide an explanation for the period between 18 December 2020 and 10 January 2021.
- [26] The service affidavit deposed to by the Applicant's representative confirming service of the Applicant's statement of case via registered post, read together with the Applicant's replying affidavit and the confirmatory affidavit thereto, sufficiently demonstrate that the Applicant's statement of case was served via registered post on 17 December 2020. No notice of objection was delivered against the Respondent's answering affidavit.

[27] The Applicant seeks an order condoning the “late filing” of his statement of case. Clearly, what the Applicant is seeking condonation for is the late delivery of his statement of case, or more generally, condonation for the late referral of his matter to the Labour Court. Nothing should turn on these technicalities, and my order will reflect this.

Conclusion

and costs

[28] Both parties have sought costs. It has recently been reiterated by the Constitutional Court that in labour matters, costs do not follow the result.[7] There is nothing in law or fairness which in my view warrants a departure from this. In the end, this condonation application has been precipitated by the Commissioner’s, Applicant’s and the Respondent’s shared misappreciation of the applicable principles. Things may have been different, perhaps, had the judgment in PGC Group been reported earlier than it was or had the Applicant fiercely opposed or objected to the Respondent’s point in limine.

[29] The expeditious resolution of the Applicant’s (alleged) unfair dismissal dispute has already, in my view, been derailed once by the point in limine. Fairness, the interests of justice, and the precepts of the LRA warrant condonation being granted. The Applicant has shown sufficient good cause for condonation to be granted. The Applicant ought to be afforded an opportunity to challenge the fairness of his dismissal. To the extent that the Respondent bemoans having to participate in legal proceedings instituted against it, the Respondent has been the author of its alleged misfortune in this regard by raising a clearly misguided point in limine which derailed the speedy resolution of this dispute.

[30] Accordingly, I make the following order:

Order:

1. the Applicant’s late referral of his dispute to the Labour Court in this matter is condoned; and
2. there is no order as to costs.

Doctor Cithi

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: C Mouton

Instructed by: Vermeulen Attorneys

For the Respondent: R Mokoele

Instructed by: De Beers Mokoele Attorneys

- [1] As opposed to some other period.
- [2] Being cumulatively the 30-day period outlined in section 191(5), together with the 90-day period outlined in section 191(11)(a) of the LRA.
- [3] As an example, the Respondent blanket denies each and every allegation made by the Applicant in paragraph 27 of his founding affidavit. Those allegations detail the chronology of the matter which I assume is actually common cause.
- [4] At paragraph 15.
- [5] At paragraph 18.
- [6] See: *Melane v Santam Insurance Co* 1962
- (4) SA 531 (A).
- [7] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited* [2021] ZACC 26.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2021/338.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mbombi-v-bluespec-unknown-topic-alcjhb-2021>

Prepared on 28 October 2026 · Esheria