

SOUTH AFRICA / JUDGMENT

Ndou and Others v Colefax Trading (Pty) Ltd and Others (J1330/22) [2024] ZALCJHB 454 (20 November 2024) [2024] ZALCJHB 454

COURT

Labour Court Johannesburg

BEFORE

Seedat

CASE / FILE NUMBER

J1330/22

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: J1330/22

In

the matter between:

NTSHUNDENI
NDOU AND 159 OTHERS
Appellants
and
COLEFAX
TRADING (PTY) LTD
First
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second
Respondent
GCOBISA
GOSA
Third
Respondent

Heard:

10 OCTOBER 2024

Delivered:	20 November 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 20 November 2024 is deemed to be the date of delivery of this judgment).
Summary:	(1) This is an appeal in terms of s 10(8) of the Employment Equity Act against the decision of third respondent that the appellants had failed to prove that the conduct of the first respondent constituted discrimination on arbitrary grounds. (2) The first respondent raised a point in limine that the appellants were out of time in noting the appeal outside 14 days of the award. The appellants responded that because the Rules of the Labour Court were applicable the appeal was within time. Held because “day” is not defined in the Employment Equity Act, the Interpretation Act, and not the Rules of the Labour Court, apply. The appeal was therefore out of time. (3) On condonation, it was held that this matter raises an important point of law and it would be in the interest of justice for it to be determined as it concerns discriminatory practices between employees following the transfer of a business.

JUDGMENT

SEEDAT AJ

Introduction

- [1] The appellants, all employees of the first respondent (Colefax), referred a dispute to the second respondent (CCMA) in terms of s 6 of the Employment Equity Act 55 of 1998 (EEA) claiming discrimination on arbitrary grounds.
- [2] It is common cause that the Appellants do not receive benefits of transport allowance and night shift allowance that other employees, doing the same job, enjoy.
- [3] On 9 September 2022, the third respondent (commissioner) dismissed the dispute on the grounds that the Appellants had failed to prove that the conduct of Colefax constituted discrimination on arbitrary grounds.
- [4] The appellants then lodged an appeal against the commissioner’s award in terms of s 10(8) of the EEA.

- [5] Colefax has raised the point that the appeal is out of time and without a condonation application should be dismissed.

The dies for noting an appeal in terms of the EEA

- [6] Section 10(8) of the EEA says that a person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in s 10(6)(aA) may appeal to the Labour Court within 14 days of the date of the award.
- [7] While Colefax says that the award was served on both parties on 9 September 2022, the appellants claim that they received the award only on 2 October 2022. Colefax does not appear to challenge this date because on its calculations, the appellants, in either event, are out of time in noting their appeal.[1]
- [8] When the matter came before me on the 10 October 2024, I gave the parties the opportunity to file supplementary heads of argument on the need for condonation.
- [9] Both Mr De Villiers, for Colefax and Mr Marweshe for the appellants, are not correct in their postulations that the appeal must be noted within 14 days of receipt of the award. Section 10(8) of the EEA, unlike s 145 of the Labour Relations Act 66 of 1995 (LRA),[2] provides that an appeal against an award must be made within 14 days of the date of the award.
- [10] The appellants maintain that the appeal is governed by the Rules of the Labour Court and as they are within the prescribed time period there is no need to seek condonation.
- [11] Because a “day” is not defined in the EEA, submits Mr De Villiers, s 4 of the Interpretation Act 33 of 1957 should prevail by giving “day” its ordinary meaning of a calendar day. The appellants, therefore, should have filed their appeal within 14 ordinary days. Failure to do so, must result in the dismissal of their appeal.
- [12] The thrust of Mr Marweshe’s objections to the jurisdictional point is that because a day is not defined in the EEA, the Rules of the Labour Court should apply which says that “a day means any day other than a Saturday, Sunday, public holiday ... “
- [13] Mr Marweshe, calls on a number of cases to support his view that this court should follow its own rules. However, these cases expound on the principles for the interpretation of statutes rather than support his arguments.
- [14] Furthermore, the reliance by Mr Marweshe on the decision of the Constitutional Court in *Mamasedi v Chief of South African National Defence Force*[3] is somewhat misplaced. This case turns on its own fact and concerns the interpretation of s 59(3) of the Defence Act 42 of 2002 which provides that if a member of the defence force is absent from official duty for a period exceeding 30 days without the permission

of their commanding officer, they[4] will be regarded as having been dismissed on account of misconduct. The applicant, a member of the regular force, was not obliged to work on Saturdays, Sundays and public holidays. He was absent for more than 30 calendar days without the permission of his commanding

officer. The court concluded that the reference to 30 days in s 59(3) is a reference only to the days on which a member is required to be on official duty. Weekends and public holidays cannot be included in calculating the 30 days if the member is not obliged to be on official duty on those days.[5]

[15] The insistence by Mr Marweshe that because I am seized with the matter, the rules that govern proceedings in this court should apply, lacks juridical substance.

[16] The enabling Act that allows a dissatisfied party to appeal a decision is the EEA. This Act gives the appellant 14 days to appeal the finding. But, as noted, the EEA does not define a day.

[17] It is firmly established that sections 1 and 4 of the Interpretation Act 33 of 1957 govern the calculation of days in any legislation that does not specify how the days are to be calculated. In *Nedcor Bank Ltd v The Master*

[6] Mthiyane JA said:

“When reckoning days in a statutory provision a Court is enjoined to apply the provisions of s 4 of the Interpretation Act unless there is something in the language or context of the particular provision repugnant to such provision or unless a contrary intention appears therein.”

[18] Section 1 of the Interpretation Act provides:

“The provisions of this Act shall apply to the interpretation of every law in force, at or after the commencement of this Act, in the Republic or any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.”

There is nothing in the language of the EEA that indicates how days should be computed or that disallows the application of the provision of s 4 of the Interpretation Act.

[19] Section 4 reads:

“When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.”

Neither the context nor the language of the EEA suggest that the calculation of days envisaged in s 4 of the Interpretation Act should be jettisoned.[7]

- [20] The rules of the Labour Court regulates the conduct of proceedings in that court. These rules only become operative once the court has been seized of the matter. The basis on which a matter can be brought before the court is predicated on the provisions of the enabling statute. The situation is analogous to s 145 of the LRA which stipulates that any party who wants to challenge an arbitration award must do so within six weeks of the date that the award was served on that party. Because time periods are not defined in the LRA, we do not appropriate the rules of the Labour Court to determine the six weeks but look to the common law that includes weekends and public holidays in the computation.[8]
- [21] The appellants were compelled to file their notice of appeal within 14 ordinary days, as determined by the Interpretation Act, of the award. This they did not do.
- [22] The late noting of the appeal constitutes a failure to comply with a statutory requirement and not a breach of a time limit prescribed by the rules of this court. In the absence of an application for condonation, it would stand to be dismissed.

Condonation

- [23] The application for condonation was only delivered by the Appellants with the supplementary heads of argument.
- [24] Section 10(8) of the EEA says that the Labour Court may on good cause shown condone the late filing of the notice of appeal.
- [25] Given the fact that the 14 days are to be counted from the date of the award, that is, 9 September 2022, the appeal should have been lodged with the labour court on 23 September 2022. It was, however, only filed, 24 days later, on 17 October 2022. The explanation proffered for the late appeal is that the appellants believed that the days had to be reckoned in terms of the Rules of the Labour Court.
- [26] An application for condonation involves the exercise of a discretion that will be informed by the requirements of good cause which is constituent of a number of determinants. This entails consideration of the nature of relief sought, the importance of the issues raised, the extent of the delay, the reasonableness of the explanation for the delay, prejudice and the prospects of success. These factors, as an amalgam, are subservient to the overarching principle of the interest of justice.[9] In *Steenkamp and others v Edcon Ltd*[10] the Constitutional Court restated that the granting of condonation must be in the interests of justice and it referred with approval to its decision in *Grootboom v National Prosecuting Authority and Another*: [11]

“ ... The standard for considering an application for condonation is the interest of justice. However, the concept ‘interests of

justice’ is so elastic that it is not capable of precise definition[12] ... The interests of justice must be determined with reference to all the relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances.”[13]

[27] The factors advanced by the Appellants in support of their application for condonation are egregiously deficient. Indeed, the reason given by the appellants for the late lodgement of the appeal is flaccid and betrays a lack of enthusiasm by the Appellants’

attorneys in diligently pursuing their clients’ claims. As for the prospects of success, the appellants simply make a bald, frugal statement that the commissioner erred and his finding is against the “rule of law”.

[28] However, this matter does raise an important point of law as to whether the new employer and the old employer in a transfer of a business can agree to arbitrarily discriminate between employees, doing the same work, in the provision of benefits.

[29] Despite the deficiencies in the other determinant factors and having regard to the particular circumstances of the matter, it would be in the interest of justice for this question of law to be explored and determined.

Order

1. The late noting of the appeal by the appellants is condoned.
2. This matter is to be placed on the opposed motion roll.
3. The issue of costs is reserved.

S SEEDAT

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Attorney M De Villiers of De Villiers & Du Plessis Attorneys For the First Respondent: M Marweshe of Marweshe Attorneys

[1] The application for condonation was only filed by the appellants with the supplementary heads of argument.

[2] Where a party may apply to the labour court for an order setting aside an arbitration award within six weeks of the date that the award was served on the applicant.

[3] 2024 (11) BCLR 1345 (CC)

[4] I have opted for the widely used “they” as a singular pronoun to refer to an individual person of unknown or non-binary

gender.

[5] Para 43

[6] 2002

(1) SA 390 (SCA) at para 12

- [7] Mooi River Valley Seed Potato Growers' Association v Steyn 1975
- (3) SA 642 (N) at page 647
- [8] Zululand Anthracite Colliery v Commission for Conciliation Mediation & Arbitration (2001) 22 ILJ 1213 (LC) at para 80; Somdaka v Northern Assurance Co Ltd 1961
- (4) SA 764 (N) at page 769A.
- [9] Brummer v Gorfil Brothers Investments (Pty) Ltd [2000] ZACC 3; 2000
- (2) SA 837 (CC); Steenkamp and others v Edcon Ltd [2019] 11 BLLR 1189 (CC); Ngwenya v Trustees for the time being of Sishen Iron Ore Company Community Development Trust [2024] 6 BLLR 585 (LAC) at para 14
- [10]
- [2019] 11 BLLR 1189 (CC) at para 36
- [11]
- (2014) 35 ILJ 121 (CC)
- [12] Ibid at para 22
- [13] Ibid at para 51

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Prepared on 11 October 2026 · Esheria