

SOUTH AFRICA / JUDGMENT

Ngebe v Cfao Motors (Pty) Ltd t/a Buffalo Toyota Automark (PS 17/22)

[2024] ZALCPE 19 (21 May 2024)

[2024] ZALCPE 19

COURT

Labour Court Port Elizabeth

BEFORE

Thys

CASE / FILE NUMBER

PS 17/22

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THE LABOUR COURT OF
SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PS 17/22

In the matter between:

LWANDISWA
NGEBE
Complainant
and
CFAO
MOTORS (PTY) LTD
t/a
BUFFALO TOYOTA AUTOMARK
First Defendant
NELIUS
CLOETE
Second Defendant
CHRISTIAAN
MOSTERT
Third Defendant

Heard:

20 May 2024

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 21 May 2024.

JUDGMENT

THYS, AJ

Introduction

- [1] Labour disputes often find their way to the Labour Court, which, in certain instances, serves as a court of first instance.
- [2] The Labour Relations Act [1] (LRA) has incorporated provisions designed to manage these disputes, with efficiency, because section 1(d)(iv) of the LRA campaigns for the effective resolution of labour disputes.
- [3] In my interpretation, the term “effective” as used in section 1 (of the LRA) signifies not only efficiency but also “expediency”.
- [4] Section 136(1) serves as a notable illustration of the LRA’s agenda of efficient and swift resolution of labour disputes. This section stipulates that a dispute must be referred to the Labour Court for adjudication within 90 days following the certification by the Bargaining Council or the CCMA, as applicable, that the dispute remains unresolved.
- [5] Section 136(1) with this time limit, as a result, aligns seamlessly with the LRA’s program, emphasizing speedy and effective dispute resolution.
- [6] Expediency is a fundamental and inherent characteristic of labour law.
- [7] It is, therefore, no surprise that this court in *National Education Health & Allied Workers Union on behalf of Leduca v National Research Foundation* held that there exists, a particular requirement of expedition when it comes to the prosecution of employment law disputes [2] and the Constitutional Court in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Others* emphasized that one of the fundamental purposes of the LRA was to establish a system for the simple, quick, cheap and informal adjudication of labour disputes. [3]
- [8] In order to line up with this inherent characteristic, parties must commit to this “rapid program” and strive to strictly comply with the timeframes stipulated in the LRA.
- [9] Delays and/or non-compliance with the stipulated time-frames not only hinder effective dispute resolution but also negatively impact the parties’ constitutional right to fair labour practice. This interpretation of the LRA’s framework, along with my understanding of the campaign outlined in Section 1, must be accurate – otherwise, the Constitutional Court in the case of *CUSA v Tao Ying Metal Industries and Others*[4] would not have emphasized the need for a swift resolution of labour disputes and mentioned that any “delay in resolving labour

disputes could be detrimental not only to the workers ..., but it may, in the long run, have a detrimental effect on an employer ...”.

Background

[10] The papers, of this matter, indicate that:

10.1 On 31 January 2022, the Complainant lodged an alleged unfair discrimination dispute with the CCMA for resolution.[5]

10.2 Regrettably, this attempt was unsuccessful, and a certificate declaring the dispute unresolved was issued on 25 February 2022.

10.3 On 28 June 2022, the Complainant submitted a statement of claim to this court, which was met with a statement of response and followed by pre-trial, discovery and ‘set-down’ processes.

10.4 Consequently, the case was scheduled for trial on 20 May 2024.

[11] In sum:

11.1 The CCMA declared the dispute as unresolved on 25 February 2022 and on 28 June 2022 the Complainant delivered her statement of claim.

11.2 This is after 90 days – as there are more than 90 days between 25 February 2022 and 28 June 2022.

11.3 In reality, the referral was submitted 33 days behind schedule.

11.4 No application for condonation was either attached to the referral or submitted subsequently – i.e. due to the aforementioned lateness.

Submissions

[12] The delay is an important consideration because the LRA in its DNA advocates that a 90-day time limit applies to referrals of disputes to the Labour Court – section 191(11)(a). The EEA is or seems silent on the matter.

[13] The Complainant does not perceive this 90-day issue as problematic and contends that, given the said silence, this court has jurisdiction

over this matter – as per section 10(6)(a) of the EEA of 1998. [6]

[14] In the event that her perception is found to be wrong, the Complainant has implored me to consider her application for condonation on the spot and upon successful approval, she requests that the matter be heard and adjudicated accordingly.

Analysis

[15] I respectfully dissent.

[16] I am mindful that this court has “previously determined” that the 90-day stipulation, referenced earlier, does not apply to disputes concerning unfair discrimination.

[17] This court, for example, in *Masango v Liberty Group Ltd*[7]held that:

17.1 Section 191(11)(a) of the LRA is not applicable, because there is no time limit either in the applicable sections of the LRA or the EEA within which an unfair discrimination dispute may elevate from CCMA conciliation to Labour Court adjudication.

17.2 These types of disputes should be referred to this court merely within a reasonable period and what is reasonable would depend on the facts of each case.

[18] I highlighted the aforementioned point (or the Masango example) because the legal stance has since evolved.

[19] The law at present (and/or by the authority of *NEHAWU obo Mofokeng and Others v Charlotte Theron Children’s Home*) [8] provides that the 90-day time limit set by the LRA, also applies to referrals of disputes to the Labour Court, under the EEA.

[20] The LAC in *South African Transport and Allied Workers’ Union obo Members v South African Airways (Pty) Ltd and others* [9] expressly held that the Labour Court’s findings in the Masango matter, referred to above, is against the binding authority of this Court and consequently does not represent the correct legal position.

[21] Therefore, the law presently is that:

21.1 Although the EEA does not explicitly specify a time period, a combined reading of sections 10(6) and 10(7) makes it clear that the EEA must be read in conjunction with the applicable provisions of the LRA.

21.2 The phrase “with the changes required by the context” in section 10(7) implies that the 90-day time period, as stipulated in section 136(1) of the LRA, becomes applicable to referrals of this nature.

21.3 Despite the fact that section 136(1) of the LRA uses the term “arbitration” rather than “labour court”, the provision of section 10(7) of the EEA is applicable.

21.4 Therefore, the section 136(1) or 90-day requirement applies equally to the adjudication process as outlined or contemplated in section 10(6) of the EEA.

[22] This exposition (of the past and present legal positions) is important because it shows that given this, new or current legal reality, the Complainant’s referral should have been submitted to this court for adjudication within 90 days – from the date of issue of the CCMA certificate of outcome, which declared the matter unresolved.

[23] The Complainant (as a matter of common cause) did not meet this deadline, and this failure negatively impacts the jurisdiction of this court.

- [24] However, this does not signify the end of the road for the Complainant. She retains the option to request condonation for her inability to adhere to the 90-day time constraint.
- [25] I cannot or am however reluctant to, come to the Complainant's aid by entertaining her application for condonation 'at the scene of the event' (as per the request of her legal representative – referred to at paragraph 14 above).
- [26] This is particularly so because the LAC in *South African Transport and Allied Workers' Union and another v Tokiso Dispute Settlement and others*[10] held that when a person files its review application outside the statutory period, even by one day, the Labour Court cannot assist that party without first addressing the issue of condonation.
- [27] In this regard the court in *Ellerine Holdings Ltd v CCMA and Others*[11] held that:
- “Where the non-compliance relates to a statutory provision, i.e. as set out in an Act, then failure to comply with those provisions goes to jurisdiction. The late filing of a review application constitutes a failure to comply with a statutory provision and not a time limit prescribed by the Rules and the applicant had to apply for condonation”.*
- [28] I propose that a formal application, as outlined in Rule 7 of this court's rules[12], should be applicable – because it is, in effect, initiated due to non-compliance with a “statutory” parameter.
- [29] The rationale behind this proposal, and/or Rule 7, is that an affidavit is a recognized method for submitting and accepting evidence.
- [30] In my opinion, impromptu addressing this application, given the circumstances, would not only undermine our established procedures for evidence tendering and acceptance but also contradict well-established legal precedents.
- [31] The (present) situation could have been significantly different in the event of non-compliance with the rules. This is because, unlike a statute, a “rule is designed to promote disciplined litigation”, not to establish jurisdiction. See – *Lentsane and others v Human Science Research Council*. [13]
- [32] To clarify, a party's non-adherence to the “rules” of court typically does not intrude upon the court's jurisdiction. The same applies to the CCMA and Bargaining Councils.
- [33] The jurisdiction of a court, conferred either by the constitution or by statute, remains unpolluted despite any violations of court rules. Ditto-CCMA and Bargaining Councils.
- [34] However, it is crucial to underscore that while such non-compliance may not undermine jurisdiction, it could potentially result in proceedings being deemed irregular and consequently set aside.
- [35] Moreover, such non-compliance could be detrimental to the administration of justice, potentially tarnishing its reputation.

[36] As far as costs are concerned, this court's legal philosophy is settled and provides that the ordinary rule that costs generally follow the result does not apply in labour matters.

[37] Instead, the LRA and the jurisprudence suggest that the Labour Court, when deciding on costs in labour disputes, must take into account the demands of fairness and lean towards not deterring parties from seeking the courts for the peaceful settlement of labour disputes.

[38] This means, if costs are to be awarded in labour matters, there must be justifiable reasons for the court's decision to deviate from the norm that a losing or defaulting party (before it) should not bear the costs in labour disputes.

[39] It is my view that, in this particular case, the law does not warrant such a deviation, principally because:

39.1 This jurisdictional issue was not raised or taken by the defendants.

39.2 The Defendants' rights are, in any case, reserved.

39.3 The Defendants, through their silence, played a role in the pause or potential end of proceedings.

[40] Given the circumstances, I hereby issue the following order:

Order:

1. The case is hereby removed from the court roll.
2. No ruling is made with respect to legal costs.

Mark Thys

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr. V. Tshangana of the Tshangana Attorneys Inc.

For the Respondent: Adv. R. Goslett

Instructed by: AC Nothnagel Attorneys

[1] Act 66 of 1995, as amended.

[2] (2017) 38 ILJ 430 (LC); [2016] 3 BLLR 217 (LC).

[3] (2016) 37 ILJ 313 (CC); [2016] 3 BLLR 217 (CC).

[4] [2009] 1 BLLR 1 (CC); 2009 (1) BCLR 1 (CC).

[5] The term 'Complainant' is utilized to denote the employee/referring party, rather than 'Applicant.' –

because this choice of terminology is in alignment with the EEA's characterization of a referring party. For further reference, please see – section 11(2) of the Employment Equity Act. It is also important to note that these are 'action'

proceedings, justifying the use of 'complainant' over 'applicant' - contrasting with motion proceedings.

[6]. At para 20 of the Statement of Claim.

[7].

[2012] 3 BLLR 303 (LC); (2012) 33 ILJ 414 (LC).

[8]. [2004] 10 BLLR 979 (LAC); (2004) 25 ILJ 2195 (LAC).

[9]. [2015] 2 BLLR 137 (LAC); [2014] ZALAC 40.

[10]. [2015] 8 BLLR 818 (LAC); (2015) 36 ILJ 1841 (LAC).

[11]. [2008] ZALAC 6; (2008) 23 ILJ 1282 (LC).

[12] GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

[13] (2002) 23 ILJ 1433 (LC); [2002] ZALC 149.

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