

SOUTH AFRICA / JUDGMENT

NTM and Others v Specialised Security Services (J329/2017) [2022] ZALCJHB 96 (11 May 2022)

[2022] ZALCJHB 96

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J329/2017

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The

Labour Court of South Africa, Johannesburg

Not Reportable

Case

No: J 329/2017

In

the matter between:

NTM

obo THATANA and 192 OTHERS

Applicants

and

SPECIALISED SECURITY

SERVICES

Respondent

Heard: 9 May 2022

(In

view of the measures implemented as a result of the Covid 19 pandemic, this judgement was handed down electronically by circulation

to the parties' representatives, by email. The date on which the judgment is delivered is deemed to be 11 May 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants have referred a dispute to this court, contending that they were dismissed by the respondent for their alleged participation in an unprotected strike. After an engagement with the parties, in an effort to identify and narrow the issues in dispute, the parties produced a supplementary pre-trial minute. One of the issues in dispute is whether the applicants' referral of the dispute to the CCMA was made within the 30-day period prescribed by section 191 (1) (b) (i) of the LRA. I heard argument on this point, with reference to the papers before me, and reserved judgment on the jurisdictional point.
- [2] The respondent contends that the court has no jurisdiction, on account of the fact that the referral of the dispute to the CCMA, made by the National Transport Movement (the union) on 12 January 2017, was made outside of the 30-day time limit prescribed by section 191 (1) (b) of the LRA, which requires that a referral be made:
- ... within –
- (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal; ...
- [3] The respondent submits that the individual applicants were dismissed on 8 November 2016, and that the referral to have been made by no later than 9 December 2016.
- [4] In *Van Rooy v Nedcor Bank Ltd*
- [1998] 5 BLLR 540 (LC), Mlambo J (as he then was) held that the purpose of the 30-day time limit for referrals of disputes to the relevant statutory dispute resolution agency was to 'regulate referrals and to ensure that there is finality in each matter that arises'. Further, a failure to comply with a time limit can only be cured by an application for condonation directed, in this case, to the CCMA, in terms of section 191 (2). In the absence of condonation for the late referral of any dispute, the CCMA was deprived of jurisdiction to conciliate the dispute, and so is this court, should the dispute be referred (as was the present dispute) for adjudication in terms of section 191 (1) (b). An objection to the court's jurisdiction may be made at any time, given that a court is not entitled to exercise powers that are not conferred on it by law.
- [5] The material facts are not in dispute. On 8 November 2016, the individual employees embarked on what the respondent contends was an unprotected strike action. At 6:55 that morning, an ultimatum was issued requiring the employees to return to work within 30 minutes of receipt of the ultimatum, failing which they would 'face appropriate disciplinary action which will lead to your summary dismissal'. A second ultimatum was issued at 9:45, requiring the individual applicants to return to work and start working by no later than 11:00 on the same morning. The ultimatum notes 'If you do not comply with this, the second

ultimatum, you will be summarily dismissed’.

- [6] The respondent contends that the employees failed to return to work. On 14 November 2016, a Mr. Manthey, the respondent’s labour consultant, addressed a letter to the general secretary of the union referring to a meeting that had been conducted at OR Tambo airport on 11 November 2016. The letter confirms the respondent’s intention to ‘make the necessary arrangements to proceed with a joint disciplinary hearing for your members who embarked on procedural/unlawful industrial action at Victor Logistics on Tuesday, 8 November 2016, and that it was planned to proceed with the joint disciplinary hearings on Thursday, 17 November 2016. The letter went on to note that a suitable venue for the joint disciplinary hearing had not been secured and that agreement would be sought in due course on the date and time for the conduct of the hearings. On 21 November 2016, Manthey addressed a further letter to the general secretary of the MTN in which he proposed that the disciplinary hearings be held at the Protea Hotel Midrand. The general secretary responded on 22 November 2016 advising that the union agreed to the hearings being held at the Protea Hotel and that they be ‘penciled in’ for Friday 25 November. Manthey responded on 23 November 2016 noting certain difficulties and proposed that the hearing commence on 1 December 2016.
- [7] A transcript of the hearing records that on 1 December 2016, a meeting was convened and attended by Mr. Crafford, an independent attorney, and also by Manthey, representing the respondent. In the absence of union’s general secretary, Mr. Ephraim Mphahlele, the meeting was postponed to 5 December 2016. On that date, the union confirmed that the charge against the individual applicants was that they had committed gross misconduct in that they had participated in the unprotected industrial action on 8 November 2016. In the opening address by Mphahlele, the status of the individual applicants was raised and in particular, the fact that they had not been given any letters of suspension in circumstances where the employees had not attended at work, nor had they been paid, since 8 November 2016. Crafford clarified with Manthey that the employees had not been suspended, and Mphahlele recorded that the issue of the employment status of the individual applicants needed to be clarified before the hearing could proceed. What followed was a debate as to the nature of the proceeding and in particular, whether the employees had been suspended pending the outcome of a disciplinary hearing, or whether the employees had been dismissed on 8 November 2016.
- [8] In his address, Manthey made a statement to the effect that after the second ultimatum had expired, ‘they were dismissed at that time on that day’. The purpose of the hearing, according to Manthey, was to afford the individual applicants the opportunity to make representations, through their union representative, and for the chairperson to either confirm the dismissals retrospective to 8 November 2016 or not. Mphahlele objected to this approach, recording that in his view, it was the Crafford’s function to determine whether the individual applicants were guilty of any misconduct and if so, to recommend a sanction that the respondent would then impose. In his submission, Crafford had no jurisdiction to

determine whether any dismissal is effected on 8 November 2016 should be confirmed.

- [9] Crafford ruled that the respondent should commence leading evidence and that he would rule on the nature of the enquiry in due course. The respondent then led the evidence of its first witness with proceedings extending into 6 December 2016, when the hearing adjourned.
- [10] On 10 January 2017, the union addressed a letter to Manthey demanding clarification of the employment status of the individual employees. The letter placed on record that Van der Linde had informed the employees (it would seem, at a conciliation convened in response to the union's referral of an unfair suspension dispute to the CCMA) that they had been dismissed, and called on the respondent to clarify whether the employees are 'suspended or dismissed' and further to produce either letters of suspension or dismissal. The letter specifically records that the respondent is 'amazingly conducting disciplinary hearings against the employees whom your company claim to have dismissed.'
- [11] Manthey replied to the union on 12 January 2017, advising that the respondent's position was that the individual applicants had failed to comply with the second ultimatum, that the ultimatum had stipulated that they would be summarily dismissed if they refused to comply with its terms, and that their refusal to comply with the ultimatum had the effect that 'they were summarily dismissed on 8 November 2016'. The letter explained further that the purpose of the hearing was to ensure compliance with the audi alteram partem rule and for the chairperson to decide whether the dismissal was 'correct in law'. Manthey proposed that the hearing continued and that Crafford 'make an informed and objective decision regarding the legality of the dismissal of your members'.
- [12] On the same date, 12 January 2017, the union called on the respondent to furnish it with copies of the dismissal letters failing which the union 'will accept that you dismissed them today through your letter dated 12 January 2017.'
- [13] As I have indicated, on 12 January 2017, the union referred the dispute to the CCMA recording that the dispute concerned an automatically unfair dismissal. The date of dismissal was recorded as 12 January 2017.
- [14] On 19 January 2017, Van der Linde addressed letters to the individual applicants advising them that the notification 'serves to confirm your dismissal from special security services which was effective from 8 November 2016'.
- [15] On 15 February 2017, the hearing before Crafford continued. The evidence of Van der Linde and a second witness Botes was concluded and after Mphahlele arrived late, the parties proceeded to address Crafford. Again, the nature of the enquiry was the subject of discussion. Manthe recorded that he had clearly stated on 6 December 2016 that on account of the failure to comply with the second ultimatum, the individual applicants had been dismissed on 8 November 2016, so that it could not be said that the applicants were unaware of this fact. Manthey then referred to various authorities to submit that the purpose of the

enquiry was to afford individual applicants an opportunity to be heard prior to confirming the dismissal. Mphahlele submitted that the employees had been dismissed, and that in consequence, a dispute concerning the automatically unfair dismissal had been referred to the CCMA which had issued a certificate and that the present referral was being finalised. In the circumstances, in the absence of an employment relationship between the respondent and its dismissed employees, he submitted that it was not open to Crafford to conduct a disciplinary hearing, at least not in the absence of the retrospective reinstatement of all of the individual applicants. Manthey again reiterated that the respondent's position was that the individual applicants had been dismissed on 8 November 2016 and that the proceedings before Crafford comprised a post-dismissal hearing at which the union was afforded the opportunity to make representations on why the dismissal should not stand.

- [16] On 6 March 2017, Crafford issued a finding which he recorded that on the evidence before him, the individual applicants were guilty of the charge of gross misconduct brought by the respondent and confirmed the sanction of dismissal in what he referred to as 'this post dismissal enquiry /hearing.'
- [17] On 17 July 2017, CCMA issued an arbitration award in the unfair labour practice dispute referred by the union in relation to what is contended to be the unfair suspension of its members between 8 November 2016 on 12 January 2017. The award records the union's contention that the individual applicants were uncertain about their employment status during the period 9 November 2016 to 12 January 2017 and that on 12 January 2017, they were informed in writing that they had been dismissed with effect from 8 November
2016. The arbitrator records that the union's case rested on two primary submissions; first, the individual applicants had not been issued with any dismissal letters until 12 January 2017; secondly, since some form of disciplinary hearing was held in January 2017, they must have been employed between the period 8 November 2016 to 12 January 2017 albeit that they were not working or permitted to work, i.e. they could only have been suspended. The arbitrator further recorded the respondent's case to the effect that the employees had in fact been dismissed with effect from 8 November 2016 and that the disciplinary hearings were done post-dismissal. In his analysis of the evidence, the arbitrator referred to the provisions of section 190 (2) (b) of the LRA. In terms of that subsection, if an employer refuses to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work. After noting that the timing of a disciplinary hearing is not statutorily prescribed and that there was no obligation to suspend an employee pending a disciplinary hearing, the arbitrator concluded that nothing in the evidence indicated that the applicants were in fact suspended during the period 9 November 2016 to January
2017. On the contrary, the evidence indicated that the employer refused to allow the employees to resume work as of 9 November

2016. In short, the arbitrator dismissed the unfair suspension claim on the basis that the employees had been dismissed on 9 November 2016 when the respondent refused to allow them to return to work. The award was not challenged.

[18] Section 190 of the LRA provides:

190 Date of dismissal

(1) The date of dismissal is the earlier of-

- (a) the date on which the contract of employment terminated; or
- (b) the date on which the employee left the service of the employer.

(2) Despite subsection (1)-

- (a) if an employer has offered to renew on less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract;
- (b) if the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work;
- (c) if an employer refused to reinstate or re-employ the employee, the date of dismissal is the date on which the employer first refused to reinstate or re-employ that employee;
- (d) if an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, if it is an earlier date, the date on which the employee is paid all outstanding salary.

[19] The date of dismissal for the purposes of the LRA is to be determined by reference to this provision. Since the employee party in any unfair dismissal dispute bears the onus to establish the existence of a dismissal (section 192(1)), it follows that the employee bears the onus to establish the date of dismissal, when that is in dispute. The date of dismissal was also a matter to be objectively determined on a conspectus of all the evidence, and regardless of any assumptions made by any of the parties.

[20] In the present instance, even if I accept in the applicant's favour that the wording of the second ultimatum does not unequivocally reflect a summary termination of the individual applicants' employment and that the respondent's position on the nature of the enquiry before Crafford was unclear to (say the least), it does not follow that their employment terminated on 12 January 2017. Initially, the respondent appears to have taken the view that the purpose of the enquiry was to determine whether the individual applicants had committed the misconduct alleged and if so, to determine an appropriate sanction. However, by 6 December 2016, the date on which the enquiry commenced, Manthey stated unequivocally that the respondent's position was that on expiry of the second ultimatum, the employees were 'dismissed at that time, on that day'. He could not have put the

respondent's position in clearer terms. All of the parties present, which included the union and its members, could have been under no illusion that the respondent's view was that it had summarily dismissed its employees.

- [21] Put another way, whatever uncertainty that may have existed until 6 December 2016 about the individual applicant's employment status, was removed. In cases of alleged misconduct, dismissal takes place at the initiative of the employer, and ordinarily requires some act on the part of employer that brings the employment contract to an end. In other words, even if the individual applicants' failure to comply with the second ultimatum issued on 8 November 2016 did not have the effect that the respondent had terminated their employment, by 6 December 2016, there was no uncertainty. The respondent's

unequivocal position was that the individual respondents' employment had terminated.

- [22] At best for the applicants then, the 30-day period within which to refer an unfair dismissal dispute expired on 5 January 2017.
- [23] For reasons that are not apparent, the union failed to respond to the Manthey's statement. Mphahlele was personally present in the meeting, yet directed correspondence to the respondent only on 10 January 2017, stating the respondent was 'refusing to clarify the employment status of the employees who had been stopped from working with effect from 9th November 2016' and that Van der Linde had advised them that they had been dismissed. Mphahlele knew full well by then what the respondent's attitude was.
- [24] To the extent that the applicants rely on section 19 (1) (b) to suggest that the referral to the CCMA must have been made within 30 days of the date of dismissal, or if it is the later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal, it does not assist them to contend that any final decision was taken only after the hearing conducted by Crafford confirmed their dismissals. Crafford's finding clearly comprises a confirmation of the sanction dismissal in what he refers to as a 'post-dismissal' enquiry, and in any event, on this version, given that the finding was made only in March 2017, the referral to the CCMA on 12 January 2017 was premature and invalid for that reason.
- [25] Mphahlele appears to have been distracted from the real issues by his dogmatism regarding the purpose of the enquiry. Until the end, in February 2017, he contested the respondent's right to hold a form of hearing post-dismissal and insisted that the only proper form of hearing was a disciplinary enquiry into the merits of the charge brought by the respondent and, if necessary, an enquiry into sanction. What escaped Mphahlele is that it was the respondent's prerogative to conduct the hearing in the form it chose, with any attendant risks of a later adverse finding. While the union was entitled to make the demands it did, neither the respondent nor Crafford were bound by them.
- [26] To the extent that the respondent relies on the arbitration award issued in 2017 in the unfair suspension dispute in support of a submission that best for the individual respondents, the date of dismissal was 9 November 2016, it seems to me that section 190 (2)

- (b) must necessarily be read together with the definition of dismissal in section 186 (1) and in particular with section 186 (1) (c), which makes reference to a refusal to allow an employee to resume work only in circumstances where the employee takes maternity leave. The reference to a refusal by an employer to allow an employee to resume work for the purposes of the determination of the date of dismissal must, in my view, necessarily be read in that context. However, the arbitration award even though it remains uncontested, is not binding on this court.
- [27] For the above reasons, the dispute is the subject of these proceedings was referred to the CCMA outside the prescribed time limit, without any application for condonation. The CCMA thus had no jurisdiction to entertain the dispute and it could not be validly referred to this court for adjudication. The applicants' referral thus stands to be dismissed.
- [28] Finally, I have some sympathy with the submissions made on behalf of the applicants to the effect that there was uncertainty regarding the employment status of the individual applicants and that is the author of that uncertainty, the respondent ought not to be entitled to benefit from it. What this submission ignores, on the facts, that any uncertainty had been addressed by no later than 6 December 2016 and that in any event, it was not open to the union to demand clarity in circumstances where clarity had been given and to assume that in the absence of any satisfactory response to the demand, it was open to the union to determine the date of dismissal. Time limits for the referral of disputes are peremptory, and non-compliance can be condoned only on application. Why the union did not file an application for condonation with the referral it made on 12 January 2017 is not apparent. On the facts, it is most probable, if not inevitable, that condonation would have been granted. The tragedy of this case is that it comes before this court some 5 ½ years after the individual respondents were dismissed. Ordinarily, the respondent would raise a special plea regarding jurisdiction, which would be determined separately and on a more expeditious basis on this court's interlocutory role. There is no explanation for the delay in this matter but since this court is not empowered to entertain matters over which it has no jurisdiction, that is not a relevant consideration.

I make the following order:

1. The referral is dismissed.
2. There is no order as to costs.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Union official for certain of the applicants; Mr. Ntsokontsoko, Ndomiso Voyi
Attorneys for others.

For the respondents: Mr. M Maeso, Shepstone Wylie Attorneys

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