



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 7/2019

In the matter between:

MANDLENKOSI LIONEL MNGADI

Appellant

and

GARTH JENKIN NO

First respondent

THE CCMA

Second respondent

HULAMIN LIMITED

Third Respondent

Heard: 22 September 2020

Delivered: 24 November 2020

Summary: *CCMA conciliation proceedings—Referral of dispute—Date when dispute arises—Alleged unfair discrimination in terms of Employment Equity Act 55 of 1998—Conduct complained of not single act but continual and repetitive—Unnecessary therefore to specify date that dispute arose—Dispute ongoing—Referral not out of time or requiring condonation of late referral.*

Coram: Coppin JA, Murphy AJA and Savage AJA

JUDGMENT

MURPHY AJA

- [1] This is an appeal against a judgment of the Labour Court (Gush J) dismissing an application to review a ruling of the first respondent (“the commissioner”) refusing condonation for the alleged late referral of a dispute in terms of section 10 of the Employment Equity Act¹ (“the EEA”).
- [2] The appellant was employed by the third respondent in 1999 and remains in employment. He has been employed as a shift leader grade 11 since 2008. Prior to 2008, he was employed as an operator. As a grade 11 employee, the appellant does not fall within the defined bargaining unit and thus the scope of the collective agreement (“the house agreement”) concluded by the third respondent and the trade unions representing employees within the bargaining unit. The appellant maintains that his exclusion from the scope of the house agreement since his promotion in 2008 amounts to discrimination in that he is paid less than his subordinates and does not qualify for certain benefits. His complaint more specifically relates to: i) the payment of lesser annual salary increments since October 2008; ii) the incorrect payment of his “standing-in allowance” in January–February 2013 and 2015; iii) not being appropriately compensated for his “off days” in January–February 2013 and 2015; and iv) not being appropriately compensated for working the “Four/Continental shift system” since 2008.
- [3] On 21 July 2016, the appellant referred an unfair discrimination case to the second respondent (“the CCMA”) in terms of section 10 of the EEA alleging unfair discrimination on an arbitrary ground in contravention of section 6(1) of the EEA.

¹ Act 55 of 1998.

- [4] The issue in this appeal relates to the interpretation and application of sections 10(2) and 10(3) of the EEA which read as follows:

‘(2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.

(3) The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit set out in subsection (2).’

- [5] In a statement attached to his referral to the CCMA, the appellant averred (in relevant part) as follows:

‘Section 10(2) of the EEA requires that a party to a dispute in terms of s 6 “may refer the dispute in writing to the CCMA within 6 months after the act or omission that allegedly constitutes unfair discrimination.” Condonation for a late referral can be granted, in terms of s 10(2), on good cause shown.

On parity of reasoning with *SABC Ltd v CCMA and others* [2010] 3 BLLR 251 (LAC) (where it was found that the date that an unfair labour practice arises does not coincide with its commencement date when the nature of the unfair labour practice is such that it is ongoing – in such case, the dispute can be referred at any time), it is submitted that there is no need for a condonation application....In the event that this is incorrect, condonation is applied for in the alternative in respect of the failure to pay the correct standing-in allowance...’

- [6] In an affidavit annexed to his referral, the appellant made out a case for condonation by addressing the relevant issues: the degree of lateness; the reasons for lateness; and the prospects of success. However, he confined the condonation application to the issue of his not being paid “the correct standing-in allowance” per the house agreement in February 2013 and February 2015. He thus recorded the degree of lateness as being two years and 11 months and 11 months respectively. As regards the reasons for lateness, he set out that he had been pursuing internal remedies and seeking legal advice. As for his prospects of success, he merely averred that he had

excellent prospects without setting out clearly the evidence or submissions upon which he based that conclusion.

- [7] The third respondent filed an answering affidavit contesting *inter alia* the appellant's application for condonation in terms of section 10(2) of the EEA. It denied that it refused to correct the alleged act or omission "on an ongoing basis", submitted that the appellant's explanation for the degree of lateness was not a reasonable explanation for the delay and challenged the appellant's claim of reasonable prospects of success, principally on the ground that as a salaried employee, he did not qualify for the benefits under the house agreement.
- [8] It is trite that before the CCMA can have jurisdiction to conciliate a dispute, the dispute must have been referred to it within the prescribed time periods or condonation must have been granted for a failure to do so.² This may require a preliminary determination of jurisdiction by the commissioner. The CCMA has no capacity or power to conciliate without the necessary jurisdiction. There can be no conciliation, once a jurisdictional point arises until jurisdiction has been determined. Unless the necessary jurisdictional facts are found to be present, the process of conciliation cannot be engaged and thus jurisdiction must necessarily be established at the outset of the process.³ The determination of the jurisdictional issue of necessity must precede the conciliation process.⁴
- [9] The commissioner in his ruling on jurisdiction did not pronounce on whether the referral was out of time but appears to have assumed that it was, at least in some respects. He formulated the enquiry he proposed to undertake as follows:

'While copious argument has been presented by both parties relating, *inter alia*, to the degree of lateness, whether or not condonation is even required for certain aspects of the dispute – due to the ongoing nature of the alleged

² *Fidelity Guard Holdings (Pty) Ltd v Epstein NO and Others* [2000] 12 BLLR 1389 (LAC) para 16

³ *Shell SA Energy (Pty) Ltd v National Bargaining Council for Chemical Industry & others* (2013) 34 ILJ 1490 (LAC) paras 11-13 and 21.

⁴ *Shell SA Energy (Pty) Ltd v National Bargaining Council for Chemical Industry & others* (2013) 34 ILJ 1490 (LAC) para 13.

discrimination, what aspects of the dispute could possibly require condonation and whether or not certain aspects of the Applicant's claim have prescribed. I intend firstly to deal with the essence of the parties' arguments in regard to the Applicant's prospects of success.'

[10] Although the commissioner did not say as much, in deciding the application for condonation he had in mind the factors normally relevant: the degree of lateness; the explanation given for the lateness; the prospects of success; and the importance of the matter.⁵ The commissioner was evidently aware of the appellant's contention that condonation was not required because the alleged dispute related to ongoing or repetitive discrimination. However, he failed to engage with the question or to make a ruling in relation to it. Instead, he refused condonation for what he believed was a late referral and declined jurisdiction to conciliate on the grounds that good cause had not been shown as the appellant had poor prospects of success on the merits.

[11] The commissioner's ultimate conclusion though rested on his view that the appellant's "prospects of succeeding in proving that he has been/is being unfairly discriminated against, on arbitrary grounds, are poor." The commissioner considered the following factors: i) the claim was primarily rooted in differences in remuneration arising out of collective bargaining; ii) the appellant voluntarily accepted the appointment to salaried staff; iii) salary differentials resulting from collective bargaining and other factors are not unusual; and iv) the appellant's remuneration was on par with other grade 11 employees. He then refused condonation on the following basis:

'I am not convinced that Applicant has made out a *prima facie* case showing that he has prospects of proving that he has been discriminated against on the grounds that his grade is not covered by the House Agreement viz. that the reason for his grade not being covered by the House Agreement is arbitrary/irrational.'

[12] The appellant filed an application for review with the Labour Court seeking an order setting aside the commissioner's jurisdictional ruling and requesting in prayer 2 of the notice of motion an order to the effect that condonation for the

⁵ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

referral of the unfair discrimination case “outside of the 6-month period prescribed by section 10 of the [EEA] is not required”.

[13] The prayer in paragraph 2 of the notice of motion is somewhat ambiguous. However, the appellant set out his case in the founding affidavit. With reference to the decision of this court in *SABC Ltd v CCMA and Others*,⁶ he maintained that there was no need for him to have applied for condonation of the referral “outside of the time period prescribed” by section 10(2) of the EEA since the unfair discrimination related to remuneration and benefits and was ongoing in nature. The time bar in section 10(2) of the EEA, he argued, does not apply to ongoing and repetitive discrimination. He pointed out that he had applied for condonation in the alternative solely in relation to his not having been paid the correct standing-in allowance, which he accepted might not have been an act or omission of an ongoing nature. He accordingly contended that the commissioner had misdirected himself in failing to address his primary submission that an application for condonation was not necessary at all because of the ongoing or repetitive nature of the alleged discrimination.

[14] The Labour Court noted in its judgment that the parties had agreed that the only issue it was required to decide in the application was whether the appellant “in fact required condonation”. The Labour Court defined the issue thus:

‘The crisp issue therefore relates solely to the question whether the referral of the dispute regarding the alleged discrimination was referred timeously. Did the act or omission that founds the applicant’s alleged discrimination take place or occur at the time of the applicant’s acceptance of his promotion or was it ongoing? If I am satisfied that the alleged discrimination was ongoing then the award of the first respondent should be reviewed and set aside and the applicant be entitled to pursue his dispute through conciliation.’

[15] Counsel for the appellant submitted to the Labour Court that it should not consider the merits of whether a case of discrimination had been made out but rather limit the review to determining if there was a right to refer a dispute to conciliation. The Labour Court rejected that contention as follows:

⁶ [2010] 3 BLLR 251 (LAC).

'It could never be the intention of the legislature that an unsubstantiated and unspecified claim of discrimination would found a dispute capable of adjudication. This is particularly so in the light of the provisions of section 11 of the [EEA] that requires an employer to prove on a balance of probabilities that the discrimination complained of did not take place; or was rational and not unfair; or is otherwise justifiable.....I am conscious of the decision of the Labour Appeal Court in the [SABC] matter... in which the court found that the discrimination was ongoing accordingly the provisions of section 10 of the [EEA] did not apply. In this matter however the applicant's dispute arises solely from his promotion to grade 11. The absence of any detail as to how the promotion constituted unfair discrimination determines the date on which the act or omission arose (sic) and accordingly the commencement of the six-month time within which to refer a dispute. In determining a fixed period within which a dispute may be referred it could not have been within the contemplation of the legislature to allow an employee who is aware and conscious of the discrimination of which he complains as well as the cause and date of the act or occurrence he relies on, to simply wait an inordinate amount of time (8 years) before seeking redress by availing himself of the provisions of the Act.'

- [16] The Labour Court accordingly held that the appellant was obliged to apply for condonation. In light of a concession by the appellant not to challenge the commissioner's ruling if condonation was required, the Labour Court dismissed the application and upheld the ruling.
- [17] The appellant's claim that he was unfairly discriminated against on the arbitrary ground that his grade is not covered by the house agreement, and was paid at a lower rate, in effect alleges that the discrimination was ongoing since his promotion or at least was a repetitive monthly act or omission occurring with every salary payment.
- [18] Both the Labour Court and the commissioner proceeded on the assumption that the dispute had been referred out of time and, accordingly, that condonation was required. Both failed to appreciate the appellant's argument that the dispute was not out of time because the discrimination was ongoing or repetitive. The commissioner, though aware of the contention, did not

address or apply his mind to it but simply determined the matter on the assumption that condonation was required. The Labour Court found that condonation was required because of the “absence of detail about the discrimination”.

- [19] The Labour Court’s finding that the merits of a dispute are relevant to the determination of jurisdiction is mistaken. Whether a claim is meritorious or whether it is good in law is immaterial to the question of jurisdiction.⁷ Where jurisdiction depends on the discretionary power to grant condonation, the merits will play a role insofar as the commissioner or court is required to consider the prospects of success. But when, as in this case, a party alleges that jurisdiction *ratione temporis* exists (and condonation is therefore not necessary) the merits of the claim are unrelated to that enquiry. It was hence incorrect for the Labour Court to find that the CCMA had no jurisdiction to conciliate the dispute merely because it had doubts about the merits of the dispute.
- [20] In *SA Broadcast Corporation Ltd v Commission for Conciliation, Mediation and Arbitration & others*⁸ the applicants complained about the promotion of three artisans resulting in ongoing discrimination in terms of which those artisans were favoured at their expense. This court held that since the applicants were continually being paid at a lower rate, the discrimination was not a single act but a “continuing or repetitive” act that recurred on each pay date. Applying that reasoning to the present case, the appellant’s referral of his dispute in relation to the alleged ongoing and repetitive discrimination was not out of time, at least in relation to the payment of his salaries (discrete repetitive acts) in the six months prior to his referral. Condonation was not required to conciliate the alleged dispute with regard to those past payments and intended future payments. Consequently, the commissioner erred in declining jurisdiction entirely to conciliate the alleged dispute and the Labour Court erred in holding otherwise.

⁷ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 95.

⁸ (2010) 31 ILJ 592 (LAC).

[21] The appropriate remedy is for the dispute to be referred back to the CCMA to be conciliated by a different commissioner in accordance with the findings of this judgment.

[22] Fairness dictates that there should be no order for costs.

[23] The appeal is upheld. The ruling of the commissioner is set aside and the dispute is remitted to the second respondent for conciliation in terms of section 10(7) of the EEA read with section 135 of the Labour Relations Act⁹ by a commissioner other than the first respondent.

JR Murphy

Acting Judge of Appeal

Coppin JA and Savage AJA concur in the judgment

APPEARANCES:

FOR THE APPELLANT:

Adv. DP Crampton

Instructed by Austin Smith Attorneys

FOR THE RESPONDENT:

Adv LR Naidoo

Instructed by Edward Nathan Sonnenberg

⁹ Act 66 of 1995.