THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR566/23

In the matter between:

ZAMA MASEKO **First Applicant**

NNYAMBENI PATIENCE VHURUMO **Second Applicant**

AYABULELE ANDRIES MNCIKANE **Third Applicant**

SIKHUMBUZO OBED MFAZWE **Fourth Applicant**

THOKOZANI SIBISI **Fifth Applicant**

MUSIWA YVONNE RAPHULU **Sixth Applicant**

MAKOTSETSOANE PAUL RAMOGALE **Seventh Applicant**

AVUYILE DAMANE **Eighth Applicant**

XOLANI REFUGE HADEBE **Ninth Applicant**

TSHILIDZI JOYCE MONAMA **Tenth Applicant**

and

ISIDINGO SECURITY SERVICES **First Respondent**

NATHALIE WILLEMSE *N.O.* **Second Respondent**

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **Third Respondent**

Heard: 8 December 2023

Date Delivered: **22 January 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 22 January 2024

Summary: Application in terms of section 158(1)(g) – Condonation for late filing of referral for remuneration in terms of section 198B(10) – principles distinguishable from decision of *Nama Khoi Local Municipality v SA Local Government Bargaining Council and Others* (2019) 40 ILJ 2092 (LC)

JUDGMENT

SAVANT, AJ

Introduction

[1] This is an unopposed application in terms of section 158(1)(g) of the Labour Relations Act[1] (LRA). The applicants seek to review and set aside a condonation ruling issued by the second respondent (commissioner) under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).

Background

[1] No. 66 of 1995, as amended.

[2] This matter affects approximately 10 former employees of the first respondent, Isidingo Security Services (Isidingo Security), all of whom earned below the statutory threshold in terms of section 6(3) of the Basic Conditions of Employment Act[2] (BCEA). Save for the ninth applicant, the applicants commenced employment during January 2018 until 30 April 2022.[3]

[3] Isidingo Security employed the applicants on fixed term contracts in circumstances contemplated by section 198B(4)(d) of the LRA. Section 198B(4) contains justifiable reasons to keep employees employed for longer than 3 months without triggering their permanent employment in terms of section 198B(5). Section 198(B)(4) reads as follows:

> "Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee-
>
> (d) is employed to work exclusively on a specific project that has a limited or defined duration".

[4] The applicants claim that following the termination of their employment, Isidingo Security did not pay their remuneration in terms of section 198B(10) of the LRA. Section 198B(10) requires an employer to pay an employee on a fixed term contract contemplated in section 198B(4)(d) one week's remuneration for each completed year of the contract, calculated in accordance with section 35 of the BCEA upon the expiry of the contract.

[5] Between August 2022 and January 2023, the applicants consulted with their attorney and submitted claims to the CCMA against Isidingo Security, *albeit* for "severance pay" in terms of section 41 of the BCEA. The applicants' attorney referred claims on different dates on behalf of various of the applicants until all their claims were referred in terms section 41 of the BCEA between August 2022 and January 2023.

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[2] No, 75 of 1997, as amended.
[3] The ninth applicant was employed for 2 years and 11 months. His services were also terminated on 30 April 2022.

[6] On 24 January 2023, the first to the sixth applicants' matter was enrolled for arbitration. At the arbitration proceedings Isidingo Security rightly raised a point *in limine*, as I understand it, objecting to the CCMA's jurisdiction to arbitrate the matter as it was referred in terms of section 41 of the BCEA as opposed to section 198B of the LRA (for remuneration in terms of section 198B(10)).

[7] Shortly thereafter, on 26 January 2023, the applicants referred a dispute to the CCMA for a claim for remuneration in terms of section 198B(10). Per section 198B(3), the applicants ought to have referred their dispute within six months after the act or omission concerned (in this case, Isidingo Security's alleged failure to remunerate the applicants in terms of section 198B(10) following the expiry of their employment contracts). The applicants accordingly ought to have referred their dispute for remuneration by approximately 30 October 2022. Having only referred their dispute on 26 January 2023, the applicants were approximately 88 days late. The applicants therefore applied for condonation for the late filing of their referral, which Isidingo Security opposed. On 27 February 2023, the commissioner issued a ruling under the auspices of the CCMA, refusing condonation.

<u>Condonation ruling</u>

[8] The commissioner in dismissing the applicants' condonation application for their late filing of their referral for remuneration:

8.1 Noted that whilst the applicants' delay in referring the dispute to the CCMA was excessive, their explanation was "substantiated" (or reasonable as it would appear). The commissioner was cognizant that the applicants were not wilful in their delay in referring the dispute and demonstrated "*their active pursuit of the dispute*"; and

8.2 With reference to the Labour Court's decision in *Nama Khoi Local Municipality v SA Local Government Bargaining Council and Others*[4] held that the applicants "*have very poor prospects, should the main case be heard…*".

Grounds of review

[9] The crux of the applicants' grounds of review is the commissioner's application of the *dicta* in *Nama Khoi*. The applicants aver that the commissioner committed a fatal error in her application of *Nama Khoi* and thus failed to apply her mind by finding that they have poor prospects of success in their main dispute.

Evaluation

[10] In *Nama Khoi* the Labour Court correctly held that "*reinstatement*" is an incompetent remedy in an order triggering the deeming provision of employment on an indefinite basis in terms of section 198B(5) of the LRA absent an unfair dismissal referral.[5] In terms of section 198(B)(5), employment is deemed to be on an indefinite basis if it is renewed or concluded contrary to the provisions of section 198B(3). Section 198B(3) permits employment on a fixed term contract basis for periods in excess of three months if the nature of the work for which the employee is employed is of a limited or definite duration or if the employer can demonstrate any other justifiable reason for fixing the term of the contract.

[11] Although the court in *Nama Khoi* was seized with a review application concerning an arbitration award granting reinstatement after finding that a former employee was deemed to have been permanently employed in terms of section 198B, it also made some general remarks in respect of sections

[4] (2019) 40 ILJ 2092 (LC).
[5] Given that reinstatement is an unfair dismissal remedy.

198A, 198B, 198C and 198D. In this regard, the commissioner quotes the following excerpt from *Nama Khoi*[6] *:*

> "[35] I consider s 198D to be a process designed to be proactive. It places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by ss 198A, 198B and 198C during the currency of the employment relationship. Section 198D as a dispute-resolution process is not intended to be applied once the employment relationship has terminated. For that, employee parties already have the required protection in the unfair dismissal provisions of the LRA."

[12] The statement made by the court in *Nama Khoi* must be viewed in the context of the dispute that was before it. The Labour Court in *Nama Khoi* was not concerned with a dispute for remuneration in terms of section 198B(10) read with section 198D(3) of the LRA. Interpreting section 198B in a manner that requires an ongoing employment relationship would make it impractical and/or impossible for employees to claim remuneration in terms of section 198B(10). This is because the remuneration in question only becomes due upon the expiry of the employment contract and not during its tenure. Such a claim can therefore only follow *after* the expiry of the employment relationship.

[13] The commissioner accordingly misconstrued the application for a claim of remuneration in terms of section 198B(10) and found that the applicants had "very poor" prospects of success in their main claim. On the contrary however, it appears that the applicants have very good prospects of success in their main claim.

[14] That being said, whilst the applicants can be criticised for not having correctly referred the matter to the CCMA for a remuneration claim in terms section 198B(10) read with section 198D(3) of the LRA, especially because this cause of action was available to them from the onset and because they had the benefit of being legally represented, I am inclined to agree with the

[6] See: *Nama Khoi* (Id fn 4) at para 35 and para 21 of the condonation ruling.

commissioner that the applicants' failure to have correctly referred the dispute was not wilful and that they have demonstrated an active pursuit of their dispute. Indeed, shortly after Isidingo Security raised their above point *in limine* the applicants properly referred the dispute. These factors ought to tilt in the favour of providing a reasonable and acceptable explanation for their delay in filing their dispute. On this score, the record reveals that the applicants averred that they referred the dispute some 88 days late, whilst Isidingo Security complained that they referred the dispute 99 days late as the applicants only served the referral on it on or about 6 February 2023. The record however contains proof that the referral was emailed, at least on the face of it, to Isidingo Security 88 days late. In any event, not much turns on this discrepancy, given that the applicants have referred their dispute to the CCMA for remuneration shortly after Isidingo Security's point *in limine* whether or not it was referred 88 or 99 days late. Even if the explanation for the late referral of the dispute is unreasonable and unacceptable, I do not believe that the interests of justice would have required the dismissal of the condonation application, especially in circumstances which involves vulnerable (former) employees, where it appears that they have very good prospects of success in the main claim and where it cannot be gainsaid that the applicants have actively pursued their dispute.

[15] In summary, whilst the commissioner's finding that the applicants proffered an acceptable explanation for the delay in referring the dispute cannot be faulted, the condonation ruling stands to be reviewed and set aside. The condonation ruling is not rational and justifiable in light of the commissioner's misapplication of the *Nama Khoi* decision (as outlined above).

[16] I do not believe this matter ought to be re-considered by a different arbitrator. This court is in as a good a position to determine the matter based on the record before it. Accordingly, I am satisfied that it would be appropriate to substitute the finding dismissing condonation.

[17] In the premises, the following order is made:

Order

1. The ruling under case number GAJB2030-23 is hereby reviewed and set aside.

2. The ruling is substituted by the following:

   "Condonation for the late filing of the referral dated 26 January 2023, under case number GAJB2030-23 is granted".

MI Savant

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants : Keamogetse Nwaila, Nwaila Attorneys Inc.