

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS419/21

In the matter between:

**MINE ENGINEERING AND DISTRIBUTORS WORKERS
UNION OF SOUTH AFRICA (MEDWUSA)**

First Applicant

MANI HAPPINESS AND 35 OTHERS

Second Applicant

and

MORIA OLD HOME t/a RESIDENTIA

Respondent

Heard: 05 August 2023

Delivered: 26 January 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 26 January 2024.)

REASONS FOR ORDER

PHEHANE, J

[1] Two issues served before me on 5 August 2022.

[2] The first was an application in terms of rule 11 in which two preliminary points were raised by the respondent.

2.1 The first preliminary point is that this Court lacks jurisdiction to adjudicate the unfair dismissal dispute on the basis that they did not refer an alleged unfair

dismissal dispute within 30 days after the date of dismissal in accordance with the provisions of section 191(1)(b) of the Labour Relations Act¹ (LRA).

2.2 The second preliminary point is that this Court lacks jurisdiction to adjudicate the applicants' referral on the basis that the referral was referred to this Court outside the 90-day time period as contemplated in section 191(11) of the LRA.

[3] The second application is an application by the applicants for condonation for the late filing of their statement of claim.

[4] Both applications were opposed.

[5] On 5 August 2022, I handed down an order upholding the preliminary points on jurisdiction and refusing the grant of condonation for the late filing of the statement of claim and ordered the first applicant (MEDWUSA) to pay the costs of the condonation application.

[6] MEDWUSA sought reasons for the order on 19 August 2022. The reasons follow below.

Brief chronology

[7] The brief chronology relating to the main events (which are largely common cause) and the filing of the pleadings are as follows:

7.1 On 1 to 3 July 2020 the individual applicants, employed in an essential service, participated in an unprotected strike action.

7.2 On 10 July 2020, the individual applicants were dismissed by the respondent.

7.3 On 20 August 2020, the applicants referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

7.4 On 5 August and 11 September 2020, certificates were issued by the CCMA that the dispute remained unresolved.

7.5 On 13 April 2021, the Commissioner issued a jurisdictional ruling.

¹ Act 66 of 1995, as amended.

7.6 On 17 June 2021, the applicants delivered their statement of claim.²²

7.7 On 23 June 2021, the respondent delivered a statement of response containing the following preliminary points:

- i. The dispute was referred late to the CCMA and the Commissioner ignored this.
- ii. The referral to this Court is outside the 90-day period as contemplated in section 191(5)(b)(iii) read with section 191(11) of the LRA.
- iii. The attachment of the statement of claim had not been received rendering it defective (this point appears not to have been pursued in the pre-trial minute that was signed by the parties).

7.8 On 11 October 2021, the parties signed a pre-trial minute. Paragraph 11, 11.1 and 11.2 of the pre-trial minute deal with the preliminary points raised by the respondent and how the parties agree they will be dealt with. It is stated that a rule 11 application will be launched to dispose of the preliminary points and they will be enrolled on the interlocutory roll for determination.

7.9 On 4 November 2021, the rule 11 application was delivered by the respondent, in which the respondent raised a jurisdictional challenge to the statement of claim and avers that the applicants failed to lodge an unfair dismissal dispute with the CCMA within 30 days of the dismissal and that it is common cause that the dismissal was in July 2020. The respondent requests the Court to dismiss the applicants' statement of claim for lack of jurisdiction. The applicants opposed the rule 11 application. They aver that proceeding with the rule 11 application was the wrong route for the respondent to take. This, despite the pre-trial minute that they signed in which they agreed that the preliminary points be dealt with by way of the rule 11 application and be enrolled on the interlocutory roll.

7.10 On 26 October 2021, a condonation application was delivered wherein the applicants sought condonation for the late filing of their statement of claim. They aver that they had referred their dispute (an unfair dismissal for participation in an

²² See: para 22 of the respondent's heads of argument.

unprotected strike action) to arbitration and following the issue of the jurisdictional ruling, they approached this Court and their referral of their dispute to this Court is more than 100 days late.

Argument

Preliminary points

[8] The applicants contend that the first preliminary point ought to be dismissed on the ground that this Court is not empowered to remit the matter for conciliation in circumstances where a certificate of non-resolution of the dispute has been issued. They contend that the respondent failed to bring an application to review the certificate of non-resolution of the dispute.

[9] They further contend that the second preliminary point should be dismissed on the grounds that the rule 11 application is inappropriate.

[10] In my view, since the preliminary points on jurisdiction were raised in the statement of response, there was no need to bring a rule 11 application setting out the same preliminary points. The parties could have simply approached the Registrar to set down the adjudication of the preliminary points on the interlocutory roll. The parties, however, deemed it fit to bring a rule 11 application to dispose of these preliminary points. The applicants' contention that the rule 11 application was not the proper course to take has no merit as the parties agreed in a pre-trial minute, that a rule 11 application would be launched to dispose of the preliminary points.

[11] The preliminary points on jurisdiction have merit.

[12] In *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and others*,³ the Labour Appeal Court (LAC) held that a certificate of

³ [2015] ZALAC 26; (2015) 36 ILJ 2581 (LAC). See also: *Zimema v Commission for Conciliation, Mediation and Arbitration* [2001] 2 BLLR 215 (LC) where van Niekerk AJ (as he then was) stated that the provisions of section 191 of the LRA are peremptory and this Court does not have the power to adjudicate a dismissal that should have been referred to conciliation and arbitration in terms of section

non-resolution of the dispute was a nullity in circumstances where there was the late referral and a failure on the part of the employee condonation.

[13] The respondents contend that the applicants do not deny that their referral to the CCMA was late.⁴ In the absence then, of a condonation application for the late referral of their dispute to the CCMA, the CCMA lacked jurisdiction to determine their dispute. This in effect means that the unfair dismissal dispute has not been conciliated. In the circumstances, as this Court is not a Court of first instance, it lacks jurisdiction to adjudicate the applicants' referral.

[14] The first preliminary point therefore succeeds.

[15] In *NUM v Hernic Exploration (Pty) Ltd*,⁵ the LAC stated that jurisdiction is conferred on this Court in terms of section 191(5)(b) read with section 191(11) of the LRA when the CCMA (or the council with jurisdiction, as the case may be), issues a certificate that the dispute remains unresolved. This was followed by this Court in *National Union of Metalworkers of SA and another v BMW (SA) (Pty) Ltd*.⁶

[16] The certificates of non-resolution of the disputes were issued on 5 August and 11 September 2020. The provisions of section 191(11) of the LRA are peremptory – there is accordingly no basis to contend that the time frame within which to approach this Court started running on 13 April 2021 when the jurisdictional ruling was issued.

[17] It is for the aforesaid reason that the second preliminary point was upheld.

Condonation

[18] The test to succeed in a condonation application is trite.⁷ The period of delay in approaching this Court is egregious. It is 182 days late.⁸ There is no detailed

191 of the LRA, nor to conduct such non-compliance. See also: *Van Rooy v Nedcor Bank Ltd* [1998] 5 BLLR 540 (LC) at para [14].

⁴ Respondent's heads of argument at para 10.

⁵ [2003] 4 BLLR 319 (LAC) at para [45].

⁶ (2019) 40 ILJ 1818 (LC).

⁷ *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A).

⁸ See: respondent's heads of argument at para 26.

account for every period of delay. An applicant seeking condonation is required to explain every period of delay.⁹ The reason for the delay proffered by the applicants is unsound – they allege that they had referred their dispute to arbitration (notwithstanding that it is a dispute as contemplated in section 191(5)(b)(iii) of the LRA) and they approached this Court after a jurisdictional ruling was issued by the CCMA on 13 April 2021.

[19] In *NEHAWU and others v Vanderbiljpark Society for the Aged*,¹⁰ this Court held as follows with regard to the observance of prescribed time frames in the LRA and emphasized that trade unions are not to fall foul of the time limits in the LRA:

‘The LRA has been in existence for more than fifteen years, and the time limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of its members...’

[20] In the circumstances of the condonation application being delivered long after the applicants knew their referral to this Court was late and in the absence of reasons for not launching a condonation application soon after they were aware they were out of time, I find that no good cause shown for the delay. In view of no good reasons proffered for the delay, there was no need to consider the prospects of success in the main dispute.¹¹

[21] In *Grootboom v National Prosecuting Authority and another*,¹² the Constitutional Court stated as follows in explaining in what circumstances the interests of justice would determine whether or not condonation ought to be granted:

‘The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is

⁹ *Independent Municipality and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LAC).

¹⁰ [2011] ZALCJHB 10; [2011] 7 BLLR 690 (LC) at para [9].

¹¹ *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children’s Home* [2004] ZALAC 9; (2004) 25 ILJ 2195 (LAC) at para [23].

¹² [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para [51].

no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.' [Emphasis added]

[22] It is for the aforesaid reasons of the delay being inordinate and no sound explanation being proffered for the delay, that condonation for the late filing of the statement of claim was refused.

Costs

[23] The applicants are represented by a trade union which is also an applicant before this Court. Following the points *in limine* of jurisdiction raised in the statement of response, in their statement of reply, the applicants denied that their referral to this Court was out of time. They perpetuated this denial when they opposed the rule 11 application. They conceded for the first time, in their condonation application launched on 26 October 2021, that their referral was late. In paragraph 17 of the applicants' founding affidavit in the condonation application, it is apparent that MEDWUSA knew that it, as an applicant, is to refer its dispute to this Court within 90-days in terms of the provisions of section 191(11) of the LRA.

[24] Being a trade union, it ought to know the provisions of the LRA, in this regard, relating to the resolution of disputes in the appropriate fora. The manner in which the applicant union conducted itself in defending the rule 11 application without merit and bringing a hopeless condonation application warranted an order as to the payment of costs.

[25] As stated above, there was no need to bring a rule 11 application as the preliminary points were already raised in the statement of response. As the parties agreed to dispose of the preliminary points through a rule 11 application, I exercised my discretion against issuing a costs order against the applicants in the rule 11 application.

[26] However, in light of the unmeritorious condonation application launched on 26 October 2021, a day after the applicants denied in the opposing affidavit in the rule 11 application filed on 25 October 2021 that their referral was late, I exercised my discretion in terms of the provisions of section 162(2) of the LRA to order MEDWUSA to pay the costs of the condonation application due to their conduct as aforesaid.

M. T. M. Phehane

Judge of the Labour Court of South Africa