

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2233/21

In the matter between:

CLEMENCE MATUNGA

Applicant

and

G AND R HYDRAULICS (PTY) LTD

First Respondent

COMMISSIONER M. SOMAN N.O.

Second Respondent

COMMISSIONER I. SIRKHOT N.O.

Third Respondent

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

Fourth Respondent

Heard: 30 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

Introduction

[1] On 30 August 2023, I issued an order condoning the late filing of the review application, reviewing and setting aside the rulings by the second and third

respondents and remitting the dispute regarding an automatically unfair dismissal to the fourth respondent to be conciliated afresh before a commissioner other than the second and third respondents.

[2] The first respondent seeks reasons for the order. Brief reasons follow below.

Brief chronology and background

[3] On 17 January 2020, an unfair labour practice dispute was referred by the applicant to the fourth respondent. The dispute concerned the issuance of a final written warning by the first respondent against the applicant.

[4] On 5 February 2020, the fourth respondent issued a certificate of outcome recording that the unfair labour practice dispute remained unresolved. On 17 March 2020, the applicant was dismissed from the employ of the first respondent for misconduct.

[5] On the same day (17 March 2020) the applicant referred an unfair dismissal dispute to the fourth respondent. The unfair dismissal dispute was set down for conciliation on 16 April 2020. The conciliation did not take place due to the lockdown regulations that were imposed as a result of the Covid-19 pandemic.

[6] On 14 August 2020, the applicant referred his unfair dismissal dispute to arbitration. (The applicant contends that his dispute is an automatically unfair dismissal dispute).¹

[7] On 8 September 2020, the second respondent consolidated the unfair dismissal and unfair labour practice disputes. A consolidation ruling was issued.² The consolidated dispute was set down for arbitration on 3 December 2020, at which hearing, the third respondent ruled that the fourth respondent lacked jurisdiction to determine “*dismissals based on victimization and intimidation*”.³

¹ Founding affidavit at para 12 on p 8.

² Founding affidavit at para 12 on p 15.

³ Founding affidavit at para 12 on p 16.

[8] On 30 December 2020, the automatically unfair dismissal dispute was referred to this Court for adjudication. The first respondent raised a jurisdictional point in the referral before this Court by way of special plea, contending that this Court lacks jurisdiction to adjudicate the automatically unfair dismissal as the referral was launched out of time.⁴

[9] The special plea was adjudicated by this Court per Mohamed AJ.

[10] The words of Mohamed AJ are not far off the mark when he states that before him was a “*complicated jurisdictional egg peppered with facts which go back to a period shortly before the cursed Covid-19 pandemic reached South African shores in 2020*” which was necessary to unscramble. His judgment assesses a number of judgments in this Court and in the LAC that considered when this Court is conferred with jurisdiction in disputes concerning automatically unfair dismissals. I refer to two of such judgments below.

[11] In a judgment dated 29 September 2021, Mohamed AJ found that in the absence of a certificate of non-resolution of the dispute issued by the bargaining council, this Court lacked jurisdiction to adjudicate the automatically unfair dismissal dispute.⁵ The following orders were issued by Mohamed AJ:

‘1. The Labour Court does not have jurisdiction to adjudicate the claim of an automatically unfair dismissal in that the MEIBC has not issued a certificate of deadlock under section 191(5)(b) read with section 191(11) of the Labour Relations Act 66 of 1995, as amended (“the LRA”).

2. The claim filed by the applicant under the above case number is stayed pending:

2.1 The finalisation of an application to be launched by the applicant to review and set aside the rulings issued by the MEIBC under case number is MEGA55697 and a MEGA56063 dated 8 September 2020 3 December 2020 respectively;

⁴ See: para 3 of the judgment by Mohamed AJ on p 18.

⁵ See: para 47 and 50 of the judgment by Mohamed AJ on p 34 and 35.

2.2 Should the applicant be successful in the review application, the MEIBC is then directed to either enrol the automatically unfair dismissal claim for conciliation or issue a certificate of deadlock in respect of the automatically unfair dismissal claim;

2.3 Within 30 days thereafter the applicant is to file a supplementary statement of claim establishing the jurisdiction of this Court in respect of the automatically unfair dismissal whereafter the dispute of an automatically unfair dismissal will further proceed in this Court.

3. Should the applicant not file the review application referred to in 2.1 within 30 days of this order, the order to stay the automatically unfair dismissal claim for automatically lapse and in such instance the order in paragraph 1 will come into effect.

4. There is no order for costs.⁶

[12] Pursuant to the aforesaid order by Mohamed AJ, the applicant launched this review application in terms of section 158(1)(g) read with section 145 of the Labour Relations Act⁷ (LRA) to review and set aside the condonation ruling by the second respondent dated 8 September 2020 and the jurisdictional ruling by the third respondent dated 3 December 2020. The review application is accompanied by an application for condonation for its late filing.

Argument

Condonation

[13] Condonation is opposed by the first respondent.

[14] The applicant avers that the *dies* within which to launch the review application in respect of the consolidation ruling expired on 19 October 2020 and expired on 13 January 2021 in respect of the jurisdictional ruling. In the circumstances, the delay is approximately 252 and 191 days late respectively. The degree of lateness is excessive.

⁶ Founding affidavit at para 12 on p 36.

⁷ No. 66 of 1995, as amended.

[15] The reasons proffered for the delay are that the consolidated dispute was referred this Court on 30 December 2020 and subsequent to the judgment by Mohamed AJ, the referral was stayed and the applicant was granted an opportunity to launch this application within 30 days, which the applicant did in compliance with the order by Mohamed AJ.

[16] The applicant contends that it has excellent prospects of success on review and that the first respondent stands to suffer no prejudice as the purpose of the review is to ensure the jurisdictional defects which were successfully raised by the first respondent in a special plea in the referral before this Court are dealt with.

[17] In weighing up the degree of delay, and the reasons therefore, the prejudice to both parties and the prospects of success review application, in the interests of justice, I exercised my discretion to grant condonation for the late filing of the review application.

Merits of review application

[18] The applicant contends the second respondent exceeded his powers in consolidating the unfair labour practice dispute and automatically unfair dismissal disputes which resulted in the consolidated dispute being set down for arbitration in circumstances where the fourth respondent lacked jurisdiction to arbitrate the automatically unfair dismissal dispute.

[19] The ground of review in respect of the jurisdictional ruling by the third respondent is not eloquently pleaded – the applicant states that both the second and third respondents ought not to have rendered their rulings in circumstances where the automatically unfair dismissal dispute had not been certified as unresolved. No supplementary affidavit was filed – the applicant filed a notice in terms of rule 7A(8)(b), stating that he stands by his notice of motion.

[20] In opposing the ground/s of review, the first respondent does not put up any serious opposition other than to state that the jurisdictional ruling is reviewable. The first respondent concedes that the applicant referred an automatically unfair

dismissal dispute to the fourth respondent, which was ultimately consolidated with his unfair labour practice dispute and denies that the consolidation ruling is reviewable.⁸

[21] In *National Union of Mineworkers v Hermic Exploration (Pty) Ltd*⁹ the Labour Appeal Court (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 Commission for Conciliation, Mediation and Arbitration (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 South Africa and Another v BMW (South Africa) (Pty) Ltd*.¹⁰

[22] On the facts of the present case, no such certificate was issued by the fourth respondent. The applicant was unrepresented when he referred his automatically unfair dismissal dispute to arbitration. The second respondent, sitting as an arbitrator, exceeded his powers when he consolidated the automatically unfair dismissal dispute with the unfair labour practice dismissal in circumstances where the fourth respondent lacked jurisdiction to determine the automatically unfair dismissal dispute. (The records of the fourth respondent referral show that the applicant's dispute is unfair dismissal on account of him having referred an unfair labour practice dispute to the fourth respondent).¹¹ As stated above, the first respondent concedes the dispute is one of an automatically unfair dismissal. The automatically unfair dismissal dispute was at no stage, conciliated.

[23] The third respondent sitting as an arbitrator of the consolidated dispute, loosely states that the fourth respondent lacks jurisdiction to determine dismissals based on victimization and intimidation without engaging as to the nature of the dispute before him. I repeat that it is common cause that the nature of the dispute is an automatically unfair dismissal. No certificate of the non-resolution of the dispute is issued by the third respondent conferring jurisdiction on this Court as contemplated in section 191(11) of the LRA.

⁸ Answering affidavit at paras 5.1 to 5.3 on p 126.

⁹ [2003] 4 BLLR 319 (LAC) at para 45.

¹⁰ (2019) 40 ILJ 1818 (LC).

¹¹ Record: referral for conciliation, p 85 request for arbitration, pp 74, condonation application, p 72.

[24] The review application succeeded due to the second respondent exceeding his powers and in my view, due to the third respondent failing to exercise his powers in determining the dispute before him.

[25] The order by Mohamed AJ states that should the review succeed, which it does, the MEIBC (fourth respondent) is to enrol the automatically unfair dismissal dispute for conciliation or issue a certificate of non-resolution of the dispute, after which, the applicant is to file a supplementary statement of claim in his referral before this Court.

[26] In view of the afore-going, I am not persuaded that the automatically unfair dismissal dispute has been conciliated. It is for the aforesaid reasons that the aforementioned order was made, remitting the matter to the fourth respondent.

M. T. M. Pehane

Judge of the Labour Court of South Africa