



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS98/2019

In the matter between:

SEENATSO RIBA

Applicant

and

EMALAHLENI LOCAL MUNICIPALITY

Respondent

Heard: 11 October 2023

Delivered: 05 February 2024

JUDGMENT

MUKOME, AJ

Introduction

- [1] The Respondent has raised various points *in limine* and exceptions against the Applicant's statement of case.
- [2] The points *in limine* were on the basis that this court has no jurisdiction to entertain the Applicant's unfair discrimination dispute, and the exceptions were that the statement of case was vague and embarrassing.

Relevant facts

- [3] On 8 March 2018, the Applicant applied for the position of Labour Relations Officer as advertised by the Respondent.
- [4] In terms of the advert, *"If no response is received from Emalahleni Local Municipality within 60 days after the closing date, it must be regarded that your application has not been successful"*.
- [5] The application process closed on 14 March 2018, and on 26 March 2018, the shortlisted candidates were approved and signed off by the Acting Municipal Manager.
- [6] Following the closing date, the Applicant visited the Respondent and was shocked to be informed that the positions were filled in May 2018, he was also informed that the Respondent does not address walk-in complaints regarding advertised positions and that he should reduce his enquiry to writing.
- [7] On 12 July 2018, the Applicant addressed an email to the Respondent enquiring about the progress of the applications.
- [8] A response was sent to the Applicant on 16 July 2018, informing him that the position had already been filled.
- [9] On 18 July 2018, the Applicant then requested details regarding the candidate that had been chosen. He sent the email again on 21 September 2018.
- [10] A response was sent to the Applicant on 11 December 2018, informing him that the position had been filled and the regret letters were sent to the unsuccessful candidates.
- [11] The Applicant then referred his dispute to the CCMA on 7 January 2019.

Respondent's submissions

Point in limine 1: Jurisdiction

- [12] The Respondent submits that this Court does not have jurisdiction to adjudicate the Applicant's referral due to it being made out of time, and without a condonation application.
- [13] The Respondent contends that the job advertisement stated that should an applicant not receive a response from the Respondent within 60 days from the closing date, 14 May 2018, then the application is unsuccessful. The Applicant should have referred his dispute on or before 14 November 2018 being 6 months from 14 May 2018, but only referred the dispute on 7 January 2019.
- [14] The Applicant has failed to take this Court into his confidence by failing to state the date on which he physically attended to the Respondent and was informed that the position was filled.
- [15] The CCMA had no jurisdiction to hear the unfair discrimination dispute due to late referral and failure to bring a substantive application for condonation.

Point in limine 2: Onus of proof

- [16] In respect of the second point *in limine*, the Respondent submits that in terms of section 11(2) of the Employment Equity Act¹ (EEA), whenever unfair discrimination is alleged on an arbitrary ground, the applicant must prove, on a balance of probabilities that the conduct complained of is not rational, amounts to discrimination and discrimination is unfair.
- [17] Therefore, absent any proof, the Applicant's claim must fail.

First exception

- [18] The Applicant's pleadings are vague and embarrassing in that it is not clear whether the Applicant's claim is founded on –

18.1. An alleged breach of any right in the Constitution.

18.2. An alleged breach of section 6(1) of the EEA.

¹ Act 55 of 1998.

18.3. Unlawfulness as a cause of action or the grounds of the alleged unlawfulness.

18.4. Any other right; or

18.5. One or more of the above.

Second exception

[19] The Applicant has pleaded that he was discriminated on the basis that he has a record of a previous dismissal.

[20] The Respondent submits that the Applicant's pleadings are vague and embarrassing as he relies on discussions made during the conciliation hearing, and thus it is not aware of the case it is called to meet where there is privileged information before this Court.

Third exception

[21] The Applicant's pleadings are vague and embarrassing as it is not clear whether he relies on a breach of the direct Constitutional right to human dignity and equality or relies in arbitrary grounds as a separate category of discrimination not premised on the right to dignity or equality.

Fourth exception

[22] The Applicant has failed to plead any unfairness or set out why the Respondent's approach constitutes unfair discrimination, particularly the elements stated under section 6 of the EEA.

Fifth exception

[23] The Applicant's pleadings are contradictory as he complains of the Respondent's approach being discriminatory and in the same breadth concedes that it is not discriminatory.

Sixth exception

- [24] The Applicant has failed to set out the basis for his holding a legitimate expectation that his application would be assessed solely on the criteria set out in the advertisement.

Applicant's submissions

- [25] The Applicant argues that he only became aware that the position was filled on 16 July 2018, when he received formal communication from the Respondent.
- [26] The issue of the referral being out of time was not raised at the CCMA, highlighting that the Respondent implicitly agreed to continue with the referral.
- [27] With regards to the onus of proof, the Applicant argues that this will be determined by the trial court based on the grounds presented to it.
- [28] He was unable to provide the required particulars in his pleadings, as he had requested documents from the Respondent without any response regarding the particulars of the incumbent and/or reasons why he had not been selected for the role.

Discussion

- [29] Prior to determining the Respondent's exceptions, it is important to deal with its first point *in limine* being whether this Court has jurisdiction to adjudicate the Applicant's referral.

- [30] The EEA, under section 10(2) provides the following –

‘(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.’ (own emphasis)

- [31] In the matter of *Amalungelo Worker's Union obo Mayisela and Others v Commission for Conciliation, Mediation and Arbitration*² (*Amalungelo*), the

² [2021] ZALAC 55; (2022) 43 ILJ 600 (LAC).

Labour Appeal Court (LAC) considered section 198D(3) of the Labour Relations Act³ (LRA), which similarly provides that the referral of a dispute under section 198D(1) may be referred, in writing, to the Commission or the bargaining council, within six months after the act or omission concerned.

- [32] The Labour Appeal Court (LAC) in *Amalungelo*, stated the following with regard to when an “*act or omission*” would have been said to have arisen⁴ -

‘The “act or omission” referred to in subsection (3) is clearly that which gave rise to the dispute. And the dispute, as long as it is the same one, only has one initial date on which it arose. The fact that the dispute is ongoing, in the sense that it recurs after it first arose, may be because it is either never resolved, or satisfactorily resolved. But does that not imply that the parties, as it were, necessarily have a new “act or omission” or “wrong” every time the same dispute erupts again.’

- [33] Therefore, should the above qualification be applied to the provisions of Section 10(2) of the EEA, it would mean that an act or omission, constituting unfair discrimination, only has one initial date.

- [34] In this matter, it is common cause that the position the Applicant had applied for was filled by the Respondent. The Applicant alleges that he was unfairly discriminated against by the Respondent, in that he was not appointed due to him being previously dismissed by his former employer.

- [35] The act or omission of unfair discrimination took place at the time that the Applicant was not appointed, and another candidate was appointed.

- [36] In *Amalungelo*, the LAC held that the “*clock starts after the act or omission concerned occurs, and not when a consequence of that act or omission is experienced or becomes manifest*”.⁵

³ Act 66 of 1995, as amended.

⁴ *Amalungelo* at para 20.

⁵ *Amalungelo* at para 25.

[37] The Applicant pleads that when he attended the Respondent's offices to enquire regarding the position, he was informed that the position had been filled during May 2018.

[38] The above illustrates that the clock started in May 2018, when the position was filled and not when the Applicant became aware that the position had been filled.

[39] It was therefore incumbent upon the Applicant to have referred the dispute to the CCMA within six months after it had occurred. The Applicant only referred the dispute on 7 January 2019, 8 eight months after the act or omission concerned, by which time it was late.

[40] In light of the fact that the Applicant's referral is out of time, this Court does not have jurisdiction to adjudicate the referral⁶, making it unnecessary to deal with the Respondent's second *point in limine* and its exceptions.

[41] In the result, the following is ordered:

Order

1. The Respondent's first point *in limine* is upheld.
2. The Applicant's referral is dismissed.

L Mukome

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: SS Riba

Instructed by:

For the Respondents: Adv Tshepang Segage

Instructed by: De Swardt Myambo Hlahla Attorneys

⁶*South African Transport and Allied Workers Union (SATAWU) and Another v Tokiso Dispute Settlement and Others* [2015] ZALAC 12; (2015) 36 ILJ 1841 (LAC) at para 18.