

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Reportable
Case No: JS696/19**

In the matter between:

COMMUNICATIONS WORKERS' UNION

First Applicant

NOSIPHO MAGAZI AND 18 OTHERS

Second Applicant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD

Respondent

Heard: 23 April 2024

Delivered: 24 April 2024

This judgment was handed down electronically by circulation to the parties and/or the parties' legal representatives by email. The date for hand-down is deemed to be 24 April 2024.

JUDGMENT

MAKHURA, J

Introduction

- [1] This is an application in terms of item 16.2 of the Practice Manual of the Labour Court of South Africa¹ (Practice Manual), read with Rule 7 of the Rules for the Conduct of Proceedings in the Labour Court², for the retrieval of the archived file.

Material facts

- [2] Following an agreed facilitated retrenchment process, the second applicants (individual applicants or employees) were dismissed by the respondent with effect from 31 May 2019.
- [3] Aggrieved by the respondent's decision, the first applicant, the Communications Workers Union (CWU) and the employees referred an unfair dismissal dispute to this Court on 23 August 2019. The respondent filed its statement of response on 6 September 2019.
- [4] Despite the parties conducting a pre-trial conference on 27 November 2019, the pre-trial minutes were never finalised nor were there any steps taken to prosecute the matter for a period of 11 months.
- [5] During October 2020, further attempts to finalise the pre-trial minutes were made. On 4 November 2020, the respondent submitted an amended draft of the pre-trial minutes to CWU.
- [6] On 18 January 2021, the respondent acknowledged receipt of CWU's comments on the draft pre-trial minutes. On 13 May 2021, the respondent submitted a further amended pre-trial minutes to CWU. On the same day, the official of CWU, Booysen Mashego (Mashego), informed the respondent that he was no longer employed by CWU and directed the respondent to correspond with Aubrey Tshabalala (Tshabalala), the CWU President.

¹ Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

² GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

- [7] On 17 May 2021, Mashego forwarded a copy of the email he sent to the respondent on 13 May 2021 to Tshabalala and Nosipho Magazi, one of the individual applicants in this matter. The email attached the draft pre-trial minutes.
- [8] On 1 April 2022, the applicants' current attorneys of record placed themselves on record, after being instructed by CWU in March 2022. On the same day, the attorneys addressed a letter to the respondent's attorneys of record enquiring whether the pre-trial minutes had been signed, alternatively requesting the latest version of the draft pre-trial minutes for their client's consideration.
- [9] On 12 April 2022, the respondent's attorneys responded to the applicants' attorneys' letter. They recorded that the last action by the applicants in this matter was on 23 August 2021 and that the file is therefore archived in terms of item 16 of the Practice Manual. The applicants then brought these proceedings.

Evaluation

- [10] It is now well-established that an application for retrieval of the file is effectively an application for condonation.³ The provisions of the Practice Manual are binding.⁴ The legal principle applicable to condonation applications is trite – condonation should be granted if it is in the interest of justice and refused if it is not.⁵
- [11] Item 16.1 of the Practice Manual provides that the Registrar will archive the file *“in the case of referrals in terms of Rule 6 when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken*

³ *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC) at para 17.

⁴ *Ibid* at para 15.

⁵ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); [1962] 4 All SA 442 (A) at 532; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC); (1998) 3 LLD 448 (LAC) at 211; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3, where the Constitutional Court held that the interest of justice must be determined by reference to all relevant factors, including the *“nature of relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect of the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.”*; *Grootboom v National Prosecuting Authority and another* (2014) 35 ILJ 121 (CC); [2014] 1 BLLR 1 (CC).

by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed”.

The extent of the delay

- [12] The statement of claim was filed on 23 August 2019. The last process, which is the statement of response, was filed on 6 September 2019. The six months period expired on 23 February 2020 or 6 March 2020. The next process filed was the application for retrieval on 20 May 2022. The delay is 27 months.
- [13] The applicants contend that the delay is not exorbitant and that it has provided a reasonable and acceptable explanation for it. How the applicants argue that the 27-month delay is not exorbitant is beyond comprehension. This period of delay is excessive.

The explanation for the delay

- [14] The explanation for the delay is based on (1) the Covid-19 pandemic, (2) the reduction of employees and officials within the CWU and (3) the internal procedures.
- [15] The applicants' explanation is as follows:

‘On or about 27 November 2019, the parties duly held a pre-trial conference and it was agreed that the pre-trial minute would be completed and signed thereafter, via correspondence between the parties.

Regrettably, despite the parties exchanging several items of correspondence in relation to the pre-trial minute and due to several disputes regarding same, the pre-trial minute was never finalised or signed by the parties.’

- [16] The applicants then attempt to provide specific details of their explanation. They continue:

'With regard to 2020, the CWU was negatively affected by the advent of the Covid-19 global pandemic. The CWU was forced to reduce its workforce and, ultimately, it lost several staff members, including Booysen Mashego who was handling this matter.

Therefore, in truth, the Covid-19 pandemic derailed the CWU and, consequently, this matter along with other matters handled by CWU.

During 2020 and the early part of 2021, the CWU then sought to hire new employees to replace the former ones (including Booysen Mashego), in order to have competent and qualified personnel to handle this matter, along with other employment matters.

Unfortunately, this search did not yield any positive of (sic) fruitful results. As a result, during 2021, the CWU then decided to rather appoint and instruct external legal offices to represent the applicants in this matter and bring it to finality.

The internal process for CWU to appoint external legal offices (i.e. attorney firms) is rather cumbersome and prolonged. I explain this process below.

The CWU is required to obtain approval from its head office to brief external attorneys to proceed with the matter. However, in order for CWU to formally instruct external legal representatives to assist, it is necessary for CWU to obtain a written mandate for its President to allow the matter to be transferred to an attorney. In order for the President of CWU to obtain and provide this mandate, he must obtain the Deputy General's approval for the matter to be transferred to an attorney. The Deputy General sits in the CWU's National Office and the board only sits on specific date throughout the year.

The National Office had to convene a special National Executive Committee meeting in order to consider and approve the request. Once

this meeting was convened, the Committee had to consider and deliberate on the matter and ultimately make an informed decision as to whether or not the matter should be transferred to an external third-party legal office.

Eventually, in the early part of 2022, CWU instructed the office of Eversheds Sutherland to represent the applicants and continue with this matter.'

- [17] The Covid-19 regulations and lockdown came into effect on 26 March 2020.⁶ The six months period had already expired. After the pre-trial meeting held on 27 November 2019, the applicants failed to act on their matter for the next four months. Even if I were to consider the Covid-19 pandemic, the applicants have not pleaded how this hampered or derailed their efforts to conclude, sign and file the pre-trial minutes.
- [18] The applicants then state that in 2020, CWU was forced to reduce its personnel, including Mashego. Then, again in 2020 and early 2021, it sought to appoint new employees to fill the vacant positions, including that of Mashego. In 2021, CWU abandoned its recruitment process and decided to rather "*appoint and instruct external legal offices*" to deal with their matters.
- [19] After CWU took the decision to appoint and use external legal practitioners, it then complains that its internal process to appoint external legal practitioners are cumbersome and prolonged. This explanation is contrived. The union decided to shed jobs in 2020, within the same year it decided to recruit to fill the positions left vacant as a result of its decision and within a year or less, it decided to abandon the recruitment process in favour of appointing external legal practitioners. Such decisions cannot and are not taken by some lower structures within the union. Inexplicably, the union, which already took the decision to

⁶ These Directions are issued in terms of section 27(2) of the Disaster Management Act, 2002 following the Declaration of a National State of Disaster and published in Government Gazette No. 43096 on 15 March 2020 and must be read together with the COVID-19 Regulations published under Government Notice No.318 on 18 March 2020, and COVID-19 Regulations on the 21-day lockdown period published on 25 March 2020.

appoint external legal practitioners, contends that the President must then obtain a written approval and mandate from the Deputy General Secretary (DGS), and the DGS must first convene a special NEC meeting, which must consider and deliberate on the matter before deciding to refer it to the external legal practitioner. No specific dates are attached to any of the events explained.

- [20] Not a single period of delay has been reasonably or sufficiently explained. Even if I were to generously overlook and condone the period until 13 May 2021, the period from May 2021 to 1 April 2022 is unexplained or very poorly explained. Therefore, the explanation for the delay is non-existent alternatively is unreasonable and insufficient. The explanation provided on the alleged impact of Covid-19 regulations, the recruitment of employees and the decision to appoint an external legal practitioner is woeful, unhelpful and unsustainable.
- [21] Ill-discipline and complacency on the part of the practitioners and their clients are unacceptable and undermine the purpose of the LRA to resolve labour disputes speedily and expeditiously. The employees in this matter did not provide any explanation on what they have done to attempt to have their dispute finally determined. They have either abandoned the claim or lost interest in the outcome of the matter. They cannot therefore complain about any prejudice if they showed no interest in the finalisation of the matter. Their personal circumstances are unknown to this Court.
- [22] I am unable to find any reason how the interest of justice would be best served by granting this application and retrieving the file. The delay is excessive, the explanation is not only extremely weak but is contrived and the employees have shown no interest in the outcome of the matter. The prospects of success are immaterial, but in any event, as it will be apparent below, they are weak. The application stands to be dismissed.
- [23] Whilst this application falls to be dismissed on this basis alone, I find it necessary to comment on the issue raised by the respondent relating to the jurisdiction of

this Court to entertain the claim. The prospects of success are dependent on a successful opposition by the applicant to the respondent's jurisdictional point.

Jurisdiction

[24] The respondent has raised a point in *limine* that this Court has no jurisdiction to adjudicate this dispute. This point was pertinently raised in the respondent's statement of response and persisted with in opposition of this application.

[25] The point is crisp. The applicants agreed to the facilitation of the retrenchment process. Therefore, section 189A of the Labour Relations Act⁷ (LRA) applies to the dispute. Section 189A(7) of the LRA provides that:

'(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) –

(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and

(b) a registered *trade union* or the *employees* who have received notice of termination may either –

(i) give notice of a *strike* in terms of section 64(1)(b) or (d); or

(ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11).'

[26] Section 191(11) of the LRA provides that:

⁷ Act 66 of 1995, as amended.

‘(11)(a) The referral, in terms of subsection (5)(b), of a *dispute* to the Labour Court for adjudication, must be made within 90 days after the *council* or (as the case may be) the commissioner has certified that the *dispute* remains unresolved.’

- [27] Subsection 5(b) provides that if a “*council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved*”, the employee may refer the dispute to this Court.
- [28] The respondent contends that the applicants were required to refer the dispute for conciliation, that they failed to do so and therefore this Court lacks jurisdiction to adjudicate the claim.
- [29] The applicants have avoided dealing with the issue in reply and in their heads of argument. However, during the hearing, Mr Anestidis, appearing on behalf of the applicants, relied on two judgments of this Court - the *National Union of Metalworkers of South Africa (NUMSA) obo Members and Others v Bell Equipment Company SA (Pty) Ltd*⁸ and *NUMSA and others v Industrial Oleo Chemical Products*⁹ (*Industrial Oleo Chemical*). Both judgments found that a dismissal dispute pursuant to a facilitated retrenchment process need not be referred for conciliation. They found that employees are entitled to refer the dispute directly to the Labour Court for adjudication.
- [30] In *Industrial Oleo Chemical*, reliance was placed first on the *Facilitation Regulations*¹⁰ which provides that “*a dispute in terms of section 189A(7)(b)(ii) must be referred to the Labour Court within 90 days of the notice of termination or, if no notice is given, within 90 days of the dismissal*”.¹¹ Secondly, the Court

⁸ [2010] ZALC 27 at paras 24 – 27.

⁹ [2022] JOL 56702 (LC); [2022] ZALCD 14.

¹⁰ Regulations for the Conduct of Facilitations in terms of Section 189A, GNR. 1445 of 10 October 2003: Facilitation regulations.

¹¹ Item 9 of the Facilitation Regulations.

relied on the Labour Appeal Court (LAC) decision in *Edcon v Steenkamp and others*¹² where the Court held that:

‘The notice given by the employer in terms of section 189A(7)(a) of the LRA, after the 60-day period allowed for facilitation has elapsed, triggers the right of the employees or their representatives to resort to either strike action in terms of s 189A(7)(b)(i) of the LRA or litigation in terms of section 189A(7)(b)(ii) of the LRA. There are two notable features of the right to strike conferred by s 189A(7)(b)(i) of the LRA. The first is that the dispute does not have to be referred to a bargaining council or the CCMA for conciliation over a 30-day cooling-off period, as is normally required in terms of s 64 of the LRA. Where there has been a facilitation process, it would be unnecessary duplication to require an additional 30-day conciliation process at the end of the 60-day period allowed for facilitation – bearing in mind that the parties may agree to extend the facilitation period in terms of section 189A(2)(c) of the LRA. Likewise, the envisioned referral to the Labour Court in terms of section 191(11) of the LRA does not require a prior referral to conciliation...’ (Own emphasis)

[31] The above *dictum* is unambiguous. It is not a precondition for the referral of the retrenchment dispute pursuant to a facilitation process to be referred to conciliation.

[32] However, the Constitutional Court in *National Union of Metalworkers of SA v Intervale (Pty) Ltd and others*¹³ (*Intervale*), referring with approval to the majority decision of the LAC in *National Union of Metalworkers of SA and others v Driveline Technologies (Pty) Ltd & another*¹⁴ (*Driveline*), held that:

‘[31] On the point crucial to this case, the majority firmly rejected the proposition that the Labour Court has jurisdiction to adjudicate a dispute not referred to conciliation at all. It said that it was —

¹² (2015) 36 ILJ 1469 (LAC); [2015] 6 BLLR 549 (LAC) at para 15.

¹³ (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC).

¹⁴ 2000 (4) SA 645 (LAC); (2000) 21 ILJ 142 (LAC).

'as clear as daylight that the wording of s 191(5) imposes the referral of a dismissal dispute to conciliation before such dispute can either be arbitrated or referred to the Labour Court for adjudication'.

[32] The reasoning of the *Driveline* majority is, in my view, convincing. Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour-law history for nearly a century. We should not tamper with it now.¹⁵

[33] Addressing the notion that where retrenchment is facilitated, the unfair dismissal dispute may be referred to the Labour Court without first being conciliated, Prinsloo J in *National Union of Metalworkers of SA on behalf of Members v SAA Technical (Pty) Ltd*¹⁶ (*SAA Technical*), found this contention meritless. The Court found that the purpose served by facilitation and conciliation processes are distinct. The learned Judge found further that the facilitated retrenchment process is a pre-dismissal process focused on compliance with and serving the requirements of section 189(3) of the LRA, whereas conciliation is a post dismissal process aimed at resolving the alleged unfair dismissal dispute. The Court concluded:

'In short: facilitation and conciliation are two different processes. Facilitation happens pre-dismissal, as part of the consultation process with a view to avoid retrenchment and to ensure compliance with the provisions of s 189(3) of the LRA. When the facilitation process happens,

¹⁵ *Ibid* at paras 31 - 32.

¹⁶ (2023) 44 ILJ 2000 (LC); [2023] ZALCJHB 154.

there exists no dispute, but rather a contemplation of dismissal based on the employer's operational requirements.'¹⁷

- [34] Section 189A(7)(b)(ii) of the LRA requires that a substantively unfair dismissal dispute pursuant to a facilitation process be referred to this Court in terms of section 191(11) of the LRA. Section 191(11)(a) of the LRA states that the referral to this Court of the dispute in terms of subsection (5)(b), including dismissal based on operational requirements without qualification, must be made within 90 days after the dispute has been certified unresolved. Subsection 5(b) makes it clear that an employee may refer a dismissal dispute based on operational requirements after either a certificate of non-resolution issued by the CCMA or bargaining council, or after 30 days or any agreed period have elapsed since the referral to the CCMA or bargaining council was made.
- [35] *Driveline* was decided before the promulgation of section 189A of the LRA and the *Facilitation Regulations*. *Intervalve* and *SAA Technical* are silent on the meaning and impact of the *Facilitation Regulations*. However, Prinsloo J in *SAA Technical* considered the meaning of sections 189A(7) and (8), and 191(11), with reference to the principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁸. She concluded that if the legislature intended to allow direct referral to the Labour Court of an unfair dismissal dispute following a facilitation process, they would not have made reference to section 191(11) of the LRA. Put differently, if the legislature intended to allow direct referral of unfair dismissal disputes following facilitated retrenchment process, this would have been expressly stipulated.
- [36] During facilitation process, there is no dismissal dispute between the parties. The focus at that stage is on the provisions of section 189(3) of the LRA. After the termination notices are issued, the employees declare a dispute. That dispute had, at that stage, not been conciliated. The preconditions for the dispute to be referred to the Labour Court for adjudication are - a certificate of non-resolution

¹⁷ *Ibid* at para 50.

¹⁸ 2012 (4) SA 593 (SCA) at para 26.

must have been issued, or 30 days must have passed since the dispute was referred to the CCMA or council.

[37] Considering the LRA provisions and the *Intervolve* judgment, it is my view that there is force in Prinsloo J's judgment. The provisions dealing with referrals of unfair dismissal disputes for operational requirements make no distinction between sections 189 and 189A of the LRA. The *Facilitation Regulations* cannot triumph over the provisions of the LRA.¹⁹

[38] Accordingly, condoning the non-compliance, retrieving the file and reinstating a claim that is likely to be dismissed for lack of jurisdiction will serve no purpose and cannot be in the interest of justice.

Costs

[39] The parties are *ad idem* that there should be no costs order awarded against each other. I agree.

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

Order

1. The application is dismissed.
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

¹⁹ Section 210 of the LRA.

For the Applicants: Mr. T. Anestidis of Eversheds Sutherland (SA) Inc.

For the Respondent: Adv. Z. Ngwenya

Instructed by : Webber Wentzel

LABOUR COURT