

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN**

Case No. D51/08

Not reportable

In the matter between:

SANTHA DEVI PERUMAL

Applicant

And

SMITH MANUFACTURING (Pty) LTD

Respondent

JUDGMENT

GUSH, J.

1. In this matter I granted the respondent's application to dismiss the applicant's claim on the grounds that the applicant filed her statement of claim out of time without seeking condonation and ordered the applicant to pay the respondent's costs. At the time I gave brief reasons for my order. These are my full reasons for granting the respondent's application to dismiss the applicants claim.
2. This Respondent applied to dismiss the applicant's claim on the grounds firstly that the applicant, having filed its statement of claim out of time has not applied for condonation and secondly that the statement of claim was served on the incorrect address and therefore does not constitute proper service.

3. The background to the matter is that the applicant was dismissed by the respondent on the 12th of July 2007 for misconduct. She was dissatisfied with her dismissal and referred her dispute regarding an unfair dismissal to the Metals and Engineering Bargaining Council.
4. The applicant served the referral on the respondent at its place of business where it was received by the respondent's HR manager Mr T Faku.
5. The dispute was enrolled on the 8th of October 2007 for a con/arb process to take place. At this stage of the proceedings the applicant was unrepresented and according to the bargaining council's attendance register the respondent's Mr Faku was present.
6. For reasons that are unexplained in the papers the matter was not arbitrated immediately after conciliation. The bargaining council issued a certificate of outcome which reflects that the dispute remained unresolved.
7. There was nothing in the referral to the bargaining council to suggest that the applicant was alleging that her dismissal was as a result of unfair discrimination as opposed to her being dismissed for misconduct and specifically the applicant's "summary of the facts" and "outline of any special features" did not give any indication that the applicant was alleging an automatically unfair dismissal on grounds of discrimination. As a result the conciliator recorded that the dispute concerned an unfair dismissal for misconduct and marked the block on the prescribed form which indicated that the applicant could refer the dispute to arbitration if it remained unresolved.

8. Subsequent to the conciliation hearing but prior to the arbitration the applicant sought legal advice and was represented by her attorney at the arbitration when the matter was enrolled by the bargaining council on 20 November 2007.
9. At the arbitration the applicant's attorney appeared on her behalf and the respondent was again represented by Mr Faku.
10. At the commencement of the arbitration the applicant's attorney somewhat surprisingly raised a point in limine on behalf of the applicant that the bargaining council did not have jurisdiction to arbitrate the matter as it concerned an alleged automatically unfair dismissal. This point in limine was not opposed by the respondent. The arbitrator considered the applicant's argument and issued an award on the following day simply dismissing the applicant's application. The arbitrator's award reads: *"The DRC lacks the necessary jurisdiction to determine this dispute. The application is dismissed"*.
11. Nothing further transpired until the 25th of February 2008 when the applicant presumably with the assistance or at least the knowledge of her attorney filed a statement of claim with the court alleging an automatically unfair dismissal. The statement of claim is signed by "Roopnarain S" as *"Applicant or duly authorised representative"* and the applicant's attorney is reflected as the service address.
12. The statement of claim
 - a. does not disclose the date of dismissal;
 - b. does not disclose whether or not the dispute was referred to a bargaining council or the CCMA;

- c. does not set out the background to the referral to the bargaining council and the subsequent dismissal of the applicant's claim;
- d. does not attach or explain the nature and importance of any of the documents listed under the heading "schedule of documents";
- e. under the heading "statement of facts" alleges that the applicant was dismissed as a result "an elaborate plot of victimisation", "harassment and victimization for lodging grievances" and quotes the contents of section 187(1)(f) of the Labour Relations Act 66 of 1995 (LRA).

13. The statement of claim was served by facsimile on what the applicant averred was the respondent's facsimile number. It transpired that the facsimile number was not the correct number and the respondent did not receive the statement of claim.
14. In the absence of any opposition the applicant requested the Registrar to enrol the matter. The matter was enrolled for default judgement on the 27th of August 2008. The notice of set down was posted by registered post by the Registrar to the respondent at the postal address recorded by the applicant in her statement of claim. The respondent received the notice of set down and filed a notice of opposition and application for the condonation of its late filing of its notice of opposition and opposing affidavit.
15. The respondent explained in its application for condonation that the reason it had not timeously opposed the matter was due to the fact that the statement of claim had been served on the incorrect facsimile number. The facsimile number used by the Applicant was that of a different company, Smith's Plastics (Pty) Ltd. In support of this the

respondent attached copies of letters addressed to the applicant on its letter head which reflected the correct physical postal and facsimile addresses. For example the respondent filed a copy of a letter addressed to the applicant in 2007 by the respondent concerning her appeal against her dismissal which letter clearly reflects the respondents correct facsimile number.

16. The respondent in its notice of opposition raised two preliminary points. The first point related to the service of the statement of claim by facsimile on the respondent's incorrect facsimile number. The second point related to the applicant's late filing of the statement of claim and the absence of an application for condonation.
17. The respondent raised these issues on the 26th of August 2008. The applicant's filed a reply on the 20th of February 2009 which purported to deal "*merely with the points in limine raised by the respondent*".
18. Regarding the first point in limine it is clear from the documentation and affidavits filed by the respondent that the statement of claim was in fact served on the incorrect address. The applicant's response to the point dealing with the service address for the statement of claim was to aver that Mr Faku had given that address at the arbitration and therefore the applicant was entitled to rely on the facsimile number when serving the statement of claim.
19. As far as the second point in limine is concerned the respondent averred that the application was filed some 135 days after the bargaining council certified (on the 8th October 2007) that the dispute remained unresolved and that the applicant had not sought condonation for the late filing of the statement of claim.

20. The applicant's response to the second point in limine was that it was not necessary to apply for condonation on the grounds that she did not have to comply with any time limits but could file within a reasonable time and/or that the arbitration award constituted a certificate and that accordingly the statement of claim had been filed timeously.
21. Neither averment is correct.
22. In the circumstances and faced with the applicant's refusal to apply for condonation on the grounds that it was not necessary the respondent filed an application for the dismissal of the applicant's case. This is that application.
23. The respondent seeks an order dismissing the applicants claim firstly on the grounds that the failure to serve the statement of claim on the respondents correct address, does not constitute proper service and that the application is accordingly not properly before the court. Secondly that the court cannot hear the application in that the applicant, having filed the statement of claim outside of the 90 day period has failed to apply for condonation.
24. Regarding the first ground, it is clearly established that the statement of claim was served on the incorrect facsimile number and that the applicant signed and filed a service affidavit when filing her statement of claim which stated that the facsimile number used to effect serve of the statement of claim is "*indeed the facsimile number used by the respondent*". Quite why the applicant chose a facsimile number to serve the statement of claim as opposed to using the physical address which the applicant recorded as the respondent's address on the

statement of claim or why, as the applicant had claimed, Mr Faku would have given an incorrect address is not explained.

25. However in the circumstances of this matter this issue is only relevant to the respondent's application for the condonation of the late filing of its notice of opposition and reply to the applicant's statement of claim and given the order I have made it is not necessary to decide the issue regarding condoning the respondent's late filing of its notice of opposition to the applicant's application.
26. As far as the second ground is concerned the applicant in her opposing affidavit to the respondent's application to dismiss her application steadfastly denied that it was necessary to apply for condonation. The applicant suggested that the 90 day period did not apply to her and that she was entitled to refer the dispute within a reasonable time of the date of the arbitration award dismissing her claim and/or that the arbitration award constituted a certificate as provided for in section 191(5) of the LRA.
27. The arbitration award is simply an award dismissing the applicant's application on the grounds that the bargaining council did not have jurisdiction to consider the matter. The dismissal of the applicants claim was what the applicant sought at arbitration and she was granted the relief she wanted.
28. The facts however are that the only certificate that has been issued is the one issued by the commissioner on the 8th October 2007 and that the statement of claim was filed and served outside the prescribed 90 day limit from the date of the certificate.

29. This was pointed out to the applicant by the respondent on the 26th August 2008 in the respondent's opposing papers and again in this application.
30. Inconceivably, faced with an application to dismiss her claim, the applicant has steadfastly persisted with her refusal to apply for condonation.
31. It is equally inconceivable is that when faced with the situation where the applicant's attorney became aware that the nature of the dispute was an allegedly automatically unfair dismissal, didn't refer the dispute to this court but the attorney waited for the arbitration to be set down and then sought to have the applicant's application dismissed by the bargaining council for lack of jurisdiction.
32. The provisions of the section 191(5) of the LRA are clear. In order for a dispute to be arbitrated by a bargaining council or CCMA or adjudicated by the court, a council or the CCMA must simply certify that the dispute remains unresolved. That part of the certificate which allows the commissioner to give an indication of the appropriate forum to which an applicant may refer their dispute is superfluous. It is neither required by the LRA nor is it binding on the parties.
33. For the court to have jurisdiction to determine an alleged automatically unfair dismissal the dispute must firstly have been referred to the bargaining council which in turn is required to attempt to resolve the dispute through conciliation. Secondly, if conciliation fails the

bargaining council must issue a certificate that the dispute remains unresolved. Thirdly the certificate entitles an applicant to refer the dispute within 90 days of the date of the certification for arbitration or adjudication.

34. If this done outside of the 90 day period the court is entitled to condone non observance of that time-period on good cause. This however requires an applicant to apply for condonation by means of a substantive application. (see section 191(4), (5) and (11) of the LRA).
35. The applicant however, despite her attention having been drawn to the fact that the only certificate that has been issued by the bargaining council was issued on the 8th of October 2007 and that the statement of claim was filed and served more than 90 days after the date of the certificate, has steadfastly failed or refused to bring such application.
36. In the absence of an application for condonation the applicant has not complied with the provisions of section 191(11)(a) and the applicants application therefore must be dismissed.
37. Whilst the circumstances surrounding the service of the statement of claim are disturbing given the failure and refusal of the applicant to apply for condonation and the resultant absence of jurisdiction it is unnecessary for me to deal with this point. The same applies to the respondent's application for condonation for the late filing of its notice of opposition.
38. In the circumstances:

1. The respondent's application to dismiss the applicant's claim on the grounds that the applicant has filed her statement of claim out of time without seeking condonation is granted
2. The applicant is ordered to pay the respondent's costs.

Gush J

DATE OF HEARING : 2 DECEMBER 2009
DATE OF JUDGMENT : 2 DECEMBER 2009

APPEARANCES

FOR APPLICANT : Adv J GATES
Instructed by : LUSHEN PILLAY ATTORNEYS

FOR RESPONDENT : A ROCHER of FARRELL &
ASSOCIATES