

Not reportable/ not of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

JR597/2010

In the matter between:

KENTZ ENGINEERING (PTY) LTD

APPLICANT

AND

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

1st RESPONDENT

COMMISSIONER KATLHOLO WABILE

2nd RESPONDENT

THABABI IAN MOYO

3rd RESPONDENT

JUDGMENT

AC BASSON, J

- [1] This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (“the LRA”) in terms of which the applicant (Kentz Engineering (Pty) Ltd – “Kentz”) seeks an order to review and set aside the certificate of outcome issued by the 2nd respondent (“the commissioner”) concerning an alleged unfair discrimination dispute between the 3rd respondent (Mr. Moyo – “Moyo”) and Kentz. The review is opposed.
- [2] The record of the proceedings comprises of the LRA form 7:11, the certificate of outcome and the condonation application filed by Moyo at the CCMA.
- [3] When a commissioner decides an application (condonation) in terms of section 191(2) of the LRA, the commissioner performs a function as contemplated in section 158(1)(g) of the LRA. Such a ruling is therefore reviewable on any grounds that are permissible in law (see *NUMSA & Another v Voltex (Pty) Ltd t/a Electric Centre & Others* [2000] 5 BLLR 619 (LC) and *Mould v Roopa NO & Others* (2002) 23 ILJ 2076 (LC)).
- [4] In the present case Moyo was appointed as an assistant accountant during July 1996 until 30 April 1999 when he was dismissed on the basis of operational requirements. His dismissal was found to be fair by the CCMA. Moyo did not file a review against the award of the CCMA.
- [5] More than 10 years later on 18 January 2010 Moyo referred a dispute about discrimination to the CCMA. He also applied for condonation for the late filing of the discrimination dispute. In the present case the act of

omission which allegedly constituted the unfair discrimination in terms of the Employment Equity Act 55 of 1998 (“the EEA”) therefore allegedly occurred whilst Moyo was still employed by Kentz. Moyo alleged that he was underpaid by Kentz. On the facts before this court it can therefore safely be concluded that the latest that such an act or omission could have occurred was in April 1999 just prior to his dismissal.

- [6] It needs to be mentioned that Moyo has referred the discrimination dispute to the Labour Court. The dispute is still pending. The present application only deals with the review of the certificate of outcome that was issued by the commissioner consequent to the conciliation proceedings. If the certificate is reviewed and set aside it will therefore dispose of the matter currently pending before this Court.

The certificate

- [7] The certificate of outcome issued by the commissioner states that the dispute remained unresolved and that condonation was “*not applicable*”. The commissioner indicated that condonation was not applicable despite the fact that Moyo himself had filed a condonation application and despite the fact that the CCMA notice of setdown indicated that the *in limine* point (namely the condonation application) was to be determined first. The commissioner therefore proceeded with conciliation without determining the condonation application first. To make matters worse, the commissioner then indicated that condonation was “*not applicable*”.

Legal principles

[8] An employee who refers an alleged unfair discrimination case to the CCMA does so in terms of section 10(2) and (3) of the EEA. Section 10 reads as follows:

“10 Disputes concerning this Chapter

(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**¹ that allegedly constitutes unfair discrimination.*

(3) *The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit setout in subsection (2).”*

[9] Where a dispute about an unfair dismissal or an unfair labour practice is referred to the CCMA, the LRA likewise requires that the dispute be referred to conciliation within a certain prescribed time limit: 30 days of the date of a dismissal in the case of an unfair dismissal dispute and 90 days of the date of the act or omission (or within 90 days of the date on which the employee **became aware** of the act or occurrence).

[10] There are sound policy considerations as to why the LRA and the EEA require disputes to be referred to the CCMA for conciliation within a certain prescribed time limit. The court in *Van Rooy v Nedcor Bank Limited* [1998] 5 BLLR 540 (LC), for example, stated that it is important to

¹ My emphasis.

require referrals to be done in a certain time to ensure that finality is reached in disputes. Where a party fails to apply for condonation the CCMA will not have jurisdiction to hear the matter. The Court held as follows:

“The purpose of the 30 day period set out in section 191(1) is, in my mind, to regulate referrals and to ensure that there is finality in each matter that arises. I am of the view that the 30 day time period in section 191 is peremptory. I say peremptory as condonation is necessary for a dispute that was referred beyond that time period to be consolidated. Thus the fatality of a late referral is cured by condonation if granted and only then will the Commissioner have jurisdiction to conciliate the dispute.”

[11] Van Niekerk, J in *Bombardier Transportation (Pty) Ltd v Lungile Mtiya NO & Others* (JR 644/09 of 11 March 2010 similarly held at paragraph [13]:

“[13] The first step in this approach is to recognise that many “jurisdictional issues” raised by parties in conciliation proceedings are not jurisdictional questions in the true sense. For example, whether a person is an independent contractor or an “employee” as defined in section 213 of the LRA is more properly a question that falls within the power of the CCMA to determine in the course of the arbitration proceedings (ie the adjudication stage of the matter) in relation to a dispute before it. It is not a question that must

necessarily be determined prior to conciliation taking place, nor is it a jurisdictional question contemplated by rule 14 of the CCMA's Rules. A challenge to the CCMA's jurisdiction on the basis that there was no dismissal falls into the same category. The only true jurisdictional questions that are likely to arise at the conciliation phase are whether the referring party referred the dispute within the time limit prescribed by section 191(1)(b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment-related matter at all.² The distinction to be drawn is one between facts that the Legislature has decided must necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power) and facts that the Legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising its statutory powers.³ The power given to the CCMA to determine the fairness of a dismissal includes the power to determine whether or not an applicant was an employee, and whether she was dismissed. These questions ordinarily fall to be determined in the course of the CCMA's adjudication functions. It follows that a conciliating commissioner is under no obligation to determine them at the conciliation phase."

[12] I am in agreement with the submission that these principles equally apply to disputes about alleged unfair discrimination in terms of section 10 of the EEA. In terms of this section disputes must be referred to the CCMA within six months. The same policy considerations that underlie referrals in of disputes about unfair dismissals apply in the case where an alleged unfair discrimination dispute is referred to the CCMA. It is clear from a reading of section 10 of the LRA that the six month time limit is peremptory. A commissioner is, however, given the power to grant condonation where applicable. Put differently, non compliance with the prescribed time limit can only be cured by an application for condonation. Failure to apply for condonation will result in the CCMA not having jurisdiction to conciliate the matter.

[13] It appears that both the commissioner and Moyo are of the view that the referral may be made within six months of the date on which the employee *became aware* of the act which allegedly constituted unfair discrimination. This may be so in the case of an unfair labour practice in terms of section 191(b)(ii) of the LRA. In terms of this section a dispute about an unfair labour practice must be referred to the CCMA within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice . If it is a later date, within 90 days of the date on which the employee became aware of the unfair labour practice. A similar provision namely that a dispute may be referred to the CCMA within 90 days of the date on

which the employee *became aware of the act or occurrence* of the act of discrimination was not included in section 10(2) of the EEA. Accordingly, the only interpretation that can be given to the time limit prescribed in section 10(2) of the EEA is that the dispute about unfair discrimination may be referred to the CCMA within six months *after the act or omission that allegedly constitutes unfair discrimination*. If it was the intention of the legislature to have made provision for the situation where an employee may refer a dispute to the CCMA within six months after having become *aware* of the act or omission it would have provided for that scenario and would have included wording similar to that which is employed in section 191(1)(b)(ii) of the LRA. In the premises, the certificate issued by the commissioner is defective and therefore falls to be reviewed and set aside.

- [14] There is also a further ground on which the certificate falls to be reviewed and set aside. The commissioner clearly committed an error of law in performing his duties in terms of the LRA when he issued the certificate of outcome. This court has, on numerous occasions, held that errors of law is reviewable where they lead to injustice to a party. See *Purefresh Foods (Pty) Ltd v Dayal* (1999) 20 ILJ 1590 (LC) at 1596G – 1597A. In the present case the commissioner clearly committed an error of law when he concluded that condonation was “*not applicable*”. The commissioner erred in circumstances where section 10(2) of the EEA requires that a dispute about discrimination be referred to the CCMA within six months after the

act or omission that allegedly constituted the discrimination. In the present case Moyo referred the dispute more than 10 years after the act or omission that allegedly constituted discrimination. The commissioner therefore erred in not appreciating the fact that condonation is a jurisdictional precondition and that he must consider such an application. If the commissioner had correctly considered the law he would have realized that the CCMA does not have jurisdiction to conciliate a discrimination dispute that has been referred to the CCMA ten years out of time without a condonation application. In the event the certificate also stands to be reviewed and set aside on this ground.

- [15] In addition to the foregoing there is also one further ground of review. In the present case the commissioner's conduct was grossly unreasonable and amounted to misconduct when he failed to apply his mind properly to the facts that were before him. Where a commissioner fails to have regard to material facts before him (in the present case the fact that there was a condonation application before him), it cannot be said that the commissioner fulfilled his mandate. In disregarding the condonation application the commissioner prevented the aggrieved party from placing his dispute before the CCMA. In these circumstances the decision of the commissioner falls to be reviewed and set aside. See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at paragraph [165]:

“[165] Thus construed, the commissioners are required to act fairly in the determination of unfair dismissal disputes. If a commissioner fails to do so he or she commits a gross irregularity in the conduct of the arbitration proceedings and the ensuing arbitral award falls to be reviewed and set aside. Similarly, if a commissioner makes an award which is inconsistent with his or her obligations under the LRA, he or she acts in excess of the powers conferred by the LRA and the award falls to be reviewed and set aside.”

....

[189] The general powers of review of the Labour Court under s 158(1)(g) are therefore subject to the provisions of s 145(2) which prescribe grounds upon which arbitral awards of CCMA commissioners may be reviewed. These grounds are misconduct by the commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where the commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA commissioners may be reviewed by the Labour Court under s 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under s 145(2) must found his or her cause of action on one or more of these grounds of review.”

.....

[276] As public officials who exercise public powers, commissioners may only make those awards which are consistent with their obligations under the LRA and the Constitution. Where a commissioner renders an award that is inconsistent with his or her powers conferred on a commissioner by the LRA, in my view, the commissioner exceeds his or her powers and the award falls to be reviewed and set aside under s 145(2)(a) (iii) of the LRA. Given the constitutional right to fair labour practices, the provisions of s 188 read with items 1, 2 and 7 of the code, an award which is manifestly unfair to either the employer or employee can hardly be said to be consistent with the powers conferred upon a commissioner to make an award that is fair. In effect, if a commissioner fails to determine the dispute fairly, he or she is in breach of the statute that is the source of his or her power to conduct the arbitration and is also in breach of the doctrine of legality, which is a constitutional constraint upon the exercise of his or her powers. This conduct on the part of the commissioner is ultra vires, that is, beyond powers conferred on the commissioners as contemplated in s 145(2)(a) (iii)."

[16] In the event the award also falls to be reviewed and set aside on the basis that the commissioner failed to apply his mind and failed to consider the condonation application placed before him

Costs

[17] I have decided in the interests of fairness not to award costs against Mr. Moyo.

Order

[18] In the event the following order is made:

1. The certificate of outcome issued by the 2nd Respondent under case no GAJB1355-10 is reviewed and set aside.
2. There is no order as to costs.

.....

AC BASSON,J

DATE OF HEARING: 22 September 2010

DATE ORDER: 22 September 2010

DATE OF JUDGMENT: 19 October 2010

On behalf of the applicant:

Mr Gwaunza of Edward Nathan Sonnenbergs Inc.

On behalf of the respondent:

In person.