

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS576/2010

In the matter between:

MARGARET MASANGO

Applicant

and

LIBERTY GROUP LIMITED

Respondent

JUDGMENT

FRANCIS J

Introduction

1. The applicant brought an unfair discrimination dispute against the respondent for compensation in terms of section 60 of the Employment Equity Act 55 of 1998 (the EEA). She alleges that she was sexually harassed by her regional manager and that although she reported this to the respondent, it did nothing.
2. The application was opposed by the respondent. It raised two points *in limine*. The first is that the dispute was referred to this Court for adjudication after the 90-day period referred to in section 191(11)(a) of the Labour Relations Act 66 of 1995 (the LRA) had expired, without applying for condonation. The second point *in limine* is that the dispute should have been referred to this Court by way of action proceedings as opposed to motion proceedings and that there are material disputes of fact that cannot be resolved without the leading of oral evidence.
3. The matter was argued before me on 24 August 2011 when judgment was reserved until 25 August 2011. However during the afternoon of 24 August 2011 both parties

were notified that the Court wanted them to avail themselves for further arguments. They agreed to do so. The issue that the Court wanted the parties to address it on was whether the provisions of section 191 of the LRA are applicable in an unfair discrimination dispute.

The background facts

4. The applicant was employed by the respondent and had resigned after she had accused a regional manager of having sexually harassed her. She referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 26 November 2009. On 22 December 2009 the CCMA issued a certificate of outcome stating that the matter remained unresolved and that it could be referred to the Labour Court. The applicant stated that the CCMA did not notify her attorney that the matter had been set down for conciliation on 22 December 2009. It is unclear from the papers whether the respondent appeared at the conciliation meeting. The applicant upon making enquiries about the matter at the CCMA was informed about the certificate of outcome. In January 2010, the applicant's attorney made enquiries with the CCMA about the conciliation proceedings and was informed that a certificate of outcome was issued on 22 December 2009. The applicant in January 2010 referred a dispute to the CCMA for arbitration. The matter was set down for a hearing on 20 May 2010 when a commissioner ruled that the CCMA lacked jurisdiction to entertain the dispute referred to it in terms of chapter II of the EEA which was an unfair discrimination dispute.
5. The applicant referred the dispute to this Court on 18 June 2010 by way of motion proceedings. The application was opposed by the respondent who raised two points *in limine*. The first point *in limine* is as follows:

- “4.1 The conciliation herein took place on 22 December 2009. I refer the Court to the certificate of outcome attached to the founding affidavit as “CESI”.
- 4.2 In terms of the Employment Equity section 10(7), read with the Labour Relations Act 66 of 1995 (as amended) (hereinafter the ‘LRA’) section 191(11), the Applicant was obliged to refer the present dispute to the Labour Court for adjudication within 90 (ninety) days of the said certificate of outcome, that is by 22 March 2010.
- 4.3 Given that the present application has been served and filed on the Respondent and the Court on 18 June 2010 the referral to adjudication is late by some 87 days.
- 4.4 The application moreover is not accompanied by an application for condonation as contemplated by section 191(11)(b) of the LRA or at all.
- 4.5 In the premises as the referral of the present matter for adjudication is outside the correct statutory timeframe, it is submitted that this application is fatally defective and that the application as such falls to be dismissed with costs on a scale as between attorney and client.”

6. The second point *in limine* is as follows:

“I now turn to deal with the merits of the dispute. It is noted that the Applicant is claiming compensation from the Respondent on the basis of alleged unfair discrimination and that the Applicant requires the Court to determine this dispute on notice of motion and by way of an affidavit evidence. As will be seen below there are clear and serious disputes of fact which arise on papers and which are incapable of resolution of papers. These disputes are real and should have been anticipated by the Applicant in advance of lodging this application. It is submitted that for this reason

alone, the application falls to be dismissed with costs on a scale as between attorney and client.”

7. The applicant pleaded in her replying affidavit that the conciliation meeting took place on 22 December 2009 but she was not aware of the conciliation since her attorney did not receive notification from the CCMA about the hearing. It was only in January 2010 when her attorney enquired at the CCMA about the allocation of the date that they were informed by the CCMA that the matter was heard on 22 December 2009. After her attorneys were made aware of this, they referred the matter to the CCMA and the matter was set down for a hearing on 20 May 2010. The commissioner made a ruling that the CCMA lacked jurisdiction to hear the dispute. The application to this Court was served and filed on 18 June 2010 well within the 90 days as stipulated in section 191(11) of the LRA. The referral of a dispute in terms of 191(5)(b) of the LRA to this Court for adjudication must be made within 90 days after the Council or Commission has certified that the dispute remained unresolved. The applicant had referred the matter to the Commission for arbitration. It was heard on 20 May 2010. She had attempted to settle the dispute before she could refer it to this Court for adjudication. It was contended that this application was made within the required time frame and that she had been pro active to settle the dispute with the respondent according to the provisions of the LRA.

Analysis of the facts and arguments raised

8. The respondent contended in paragraph 4.2 of the point *in limine* that in terms of section 10(7) of the EEA read with section 191(11) of the LRA, the applicant was obliged to refer the present dispute to this Court for adjudication within 90 days of the said certificate. Both parties proceeded on the basis that the provisions of section

191(11) of the LRA were applicable to the applicant's dispute. The applicant's case was that the 90-day period started running from the date when the commissioner had issued the ruling on 20 May 2010 and that the application was made within 90 days from that date. The respondent's case was that the 90-day period started running from 22 December 2009 which was when the certificate of outcome was issued.

9. It is common cause that the applicant referred an unfair discrimination dispute to the CCMA and that on 22 December 2009 the conciliating commissioner issued a certificate outcome stating that the dispute remained unresolved. Since this is a claim for compensation in terms of the EEA, the applicant had to comply with the provisions of section 10 of the EEA. The section reads as follows:

"10. Disputes concerning this Chapter

- (1) In this section, the word 'dispute' excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.*
- (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.*
- (3) The CCMA may at any time permit a party that show good cause to refer a dispute after the relevant time limit set out in subsection (2).*
- (4). The party that refers a dispute must satisfy the CCMA that -*
 - (a) a copy of the referral has been served on every other party to the dispute; and*
 - (b) the referring party has made a reasonable attempt to resolve the*

dispute.

- (5). The CCMA must attempt to resolve the dispute through conciliation.*
- (6). If the dispute remains unresolved after conciliation -*
 - (a) any party to the dispute may refer it to the Labour Court for adjudication; or*
 - (b) all the parties to the dispute may consent to arbitration of the dispute.*
- (7). The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.”*

- 10. The LRA is divided into nine chapters. Some chapters are divided into different parts. Disputes other than disputes about unfair dismissals and unfair labour practices are dealt in some of the chapters of the LRA and not in chapter VIII of the LRA. Chapter VIII deals with unfair dismissals and unfair labour practice disputes. It is headed “Unfair Dismissal and Unfair Labour Practice”. Sections 185 to 197B falls under chapter VIII. Chapter VIII is not divided into any parts unlike chapter VII of the LRA. Chapter VII is headed “Dispute Resolution”. It starts from sections 111 to 184 of the LRA and has parts A to F. Chapter VIII does not deal with unfair discrimination disputes and these must be dealt with in terms of chapter II of the EEA read with parts C and D of chapter VII of the LRA.
- 11. Section 10(1) of the EEA states that the word ‘dispute’ in the section excludes a dispute about an unfair dismissal which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of chapter VIII of the LRA. Section 10(7) of the EEA states specifically that the relevant provisions of Parts C and

D of chapter VII of the LRA with the changes required by context apply in respect of a dispute in terms of chapter II of the EEA. Chapter II of the EEA deal with unfair discrimination disputes and excludes unfair dismissal disputes.

12. Since the applicant's claim is founded in the EEA and is not a claim for an unfair dismissal, the provisions of section 191 of the LRA are not applicable. I have pointed out earlier that section 191 falls under chapter VIII of the LRA and deals with disputes about unfair labour dismissals and unfair labour practices. The applicant's claim for unfair discrimination may be referred to this Court for adjudication in terms of section 10(6)(a) of the EEA once the dispute remains unresolved after conciliation. There is no time limit stated in section 10 (6)(a) of the EEA within which an unfair discrimination dispute should be referred to this Court for adjudication.
13. What remains to be determined is whether there are any time limits set out in parts C and D of chapter VII of the LRA in relation to an unfair discrimination dispute. Chapter VII of the LRA deals with dispute resolutions. Part C which covers sections 133 to 150 deals with resolution of disputes under the auspices of the Commission. Part 5 deals with the Labour Court and is covered by sections 151 to 166. The relevant sections that are applicable are sections 133 and 135 of the LRA.
14. Section 133 of the LRA deals with resolution of disputes under the auspices of the Commission. It provides as follows:

“(1) The Commission must appoint a commissioner to attempt to resolve through conciliation -

(a) any dispute referred to it in terms of section 134; and

- (b) *any other dispute that has been referred to it in terms of this Act*
- (2) *If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if -*
 - (a) *this Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration;*
 - or*
 - (b) *all the parties to the dispute in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission.”*

15. Section 135 of the LRA deals with resolution of disputes through conciliation and provides as follows:

- “(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.*
- (2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral. However the parties may agree to extend the 30-day period.*
- (3) The commissioner must determine a process to attempt to resolve the dispute, which may include -*
 - (a) mediating the dispute;*
 - (b) conducting a fact-finding exercise; and*
 - (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.*
- (3A)*
- (4)*

(5) *When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties*

(a) *the commissioner must issue a certificate stating whether or not the dispute has been resolved;*

(b) *the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and*

(c) *the commissioner must file the original of that certificate with the Commission.*

(6) *.....”.*

16. It is clear that parts’ C and D of chapter VII of the LRA do not deal with a referral of an unfair discrimination dispute to this Court for adjudication.

17. To summarise. An unfair discrimination dispute may be referred to the CCMA for conciliation within six months from the date when the act or omission was alleged to have arisen. The CCMA may condone a late referral of the dispute for conciliation. Once the dispute has been referred to the CCMA for conciliation, the CCMA must attempt to resolve the dispute through conciliation. If the dispute remains unresolved after conciliation, the dispute may be referred to this Court for adjudication and/or to the CCMA for arbitration if both parties have consented to do so. This is so in terms of section 10(7) of the EEA. There is no time limit within which such a dispute should be referred to this Court for adjudication. It should be made within a reasonable period. Section 191 of the LRA does not apply to an unfair discrimination dispute.

18. It is not clear from the provisions of section 10 of the EEA whether this Court can condone a referral that is not made within a reasonable period. It is for purposes of this judgment not necessary to deal with this. It is also not necessary to deal with what the consequences would be if a commissioner does not attempt to conciliate the dispute in terms of section 10(5) of the EEA. It is also not clear what a commissioner should do where both parties have failed to attend the conciliation meeting. A commissioner is in terms of section 135(5)(b) required to serve a copy of the certificate on each party to the dispute or on their representatives. It is not necessary to deal with what the consequences of the commissioner's failure to do so would be.
19. The respondent's point *in limine* stands to be dismissed since it was raised on the basis that the referral should have been made within 90 days from the date when conciliation had failed in terms of section 191(11)(a) of the LRA. Section 191(11)(a) of the LRA is not applicable. There is no time limit either in the applicable sections of the LRA or the EEA within which an unfair discrimination dispute should be referred to this Court for adjudication. The dispute should be referred to this Court within a reasonable period. Even if it could be inferred from the point *in limine* that it was contended that the dispute was not brought within a reasonable period, which is not what was pleaded, the dispute was clearly brought to this Court within a reasonable period. What is reasonable would depend on the facts of each case. There was therefore no need for the applicant to apply for condonation.
20. This brings me to the second point *in limine* which is whether the applicant should have anticipated when it proceeded by way of motion proceedings that a material dispute of fact would have arisen. The applicant for reasons best known to her did

not deal with this issue in her replying affidavit.

21. The applicant should have anticipated when it brought the application by way of motion proceedings that material disputes of facts would have arisen. She should have anticipated that the regional manager would have denied the sexual harassment and that the respondent would have denied that it took no immediate steps to have dealt with the matter when it was brought to its attention.
22. Despite all of the foregoing I do not believe that this Court should dismiss the application on the basis that the applicant should have anticipated that there would be material dispute of facts. The Court should use its discretion and use the provisions of rule 7(7) of the Labour Court rules that provides as follows:

“(7) The court must deal with an application in any manner it deems fit, which may include -

 - (a) an order to hold a pre-trial conference;*
 - (b) referring a dispute for the hearing of oral evidence; and*
 - (c) an order as to costs”.*
23. Since both parties have been partly successful I do not believe that this is a matter where costs should follow the result. An appropriate order would be that each party is to pay its own costs.
24. In the circumstances I make the following order:

24.1 The first point *in limine* is dismissed.

24.2 The second point *in limine* is partly up held.

24.3 The matter is referred for trial and the parties are to convene a pre-trial conference within ten days of date of this order.

24.4 Each party is to pay its own costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT :J H DE LA REY INSTRUCTED TC HITGE INC

FOR RESPONDENT :P BUIRSKY INSTRUCTED BY HLATSHWAYO DU
PLESSIS VAN DER MERWE INC

DATE OF HEARING : 24 AND 29 AUGUST 2011

DATE OF JUDGMENT : 31 AUGUST 2011