



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR1609/13

In the matter between:

ITUMALENG ABRAHAM LILANDA

Applicant

and

MR J N MTHUKWANE

First Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

MINISTER OF POLICE

Third Respondent

SOUTH AFRICAN POLICE SERVICE:

COMMISSIONER OF POLICE

Fourth Respondent

Heard: 8 July 2015

Delivered: 8 October 2015

Summary: Review of jurisdictional ruling that Safety and Security Sectorial Bargaining Council does not have jurisdiction

JUDGMENT

COOK AJ;

Introduction

- [1] The Applicant seeks to review and set aside the jurisdictional ruling of the First Respondent (“the Commissioner”) dated 11 June 2013 (“the ruling”), pursuant to which the Commissioner found that the Second Respondent (“SSSBC”) does not have jurisdiction to entertain the decision and substituting the Commissioner’s ruling with an order that the matter be set down for con-arb by the SSSBC, alternatively that the point *in limine* be heard by another arbitrator appointed by the SSSBC. The Applicant also seeks an order that Respondents who oppose the application should pay the costs thereof jointly and severally; the one paying the other to be absolved.
- [2] The matter was opposed by the Third and Fourth Respondents, who sought that the review be dismissed with costs.

BACKGROUND

- [3] The Applicant was dismissed from the employer, the Third Respondent, on 8 January 2009 after being charged with rape of a 16-year-old girl in Thabazimbi. The Applicant’s criminal conviction and sentence was set-aside on 23 April 2012.¹

- [4] The Applicant failed to lodge an appeal within ten days as prescribed by the
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¹ Page 81 of the indexed bundle.

employee's disciplinary code of 2006, instead the Applicant lodged an appeal three years after he was dismissed. The application for leave to appeal was accompanied by a condonation application.²

- [5] The Appeal Authority considered the appeal together with the application for condonation and concluded, on 15 November 2012, that late submission of grounds for appeal could not be condoned. The Applicant, thereafter, referred the matter to the SSSBC as an unfair dismissal dispute on 4 December 2012.
- [6] Commissioner ruled that the SSSBC did not have jurisdiction to entertain the dispute as it was referred to the Council outside the 30-day period prescribed by Council Rules and the Applicant had not applied for condonation.

The arguments

- [7] It was the Fourth Respondent's argument that the Applicant filed his notice of appeal late and that his application for condonation was refused by the internal appeals authority.
- [8] The Fourth Respondent argued that the SSSBC does not have jurisdiction to entertain the unfair dismissal for the following reasons:
 - a. The date of the Applicant's dismissal is the date on which the Fourth Respondent had taken a decision to dismiss him and not the time when the Applicant was informed about the appeal.
 - b. The fact that the Applicant appealed and that the appeal was accompanied with an application for condonation should not be regarded as exhausting the internal procedures.
 - c. The Applicant must apply for condonation to the SSSBC and it must first be granted.
 - d. The date of dismissal is the date when the Applicant was dismissed at his

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² Paragraphs 4 and 5, page 2 of the Third and Fourth Respondents' heads of argument

disciplinary hearing and not the date of decision by the appeals authority.³

- [9] It was argued on behalf of the Applicant that although the Applicant submitted his appeal outside the 10-day period provided for in terms of section 17 of the disciplinary regulations of the SAPS, in terms of Section 17, provision is made for application for condonation, if the employee submits his appeal outside the prescribed period and Applicant indeed filed such an application for condonation.
- [10] It was argued that the unfair dismissal dispute was therefore referred to the SSSBC within the prescribed 30 days after the internal appeals procedure was exhausted as provided in terms of paragraph 1.5(c) of the SSSBC dispute procedure.
- [11] It is submitted that the SSSBC dispute resolution procedure, more specifically clause 3.5.1(b), stipulates that:
- ‘The dispute must be referred to the Council within 30 days after all internal procedures have been exhausted as set out in paragraphs 1.5(b) and (c).’
- [12] It is further submitted that from the above clauses, the Applicant has indeed exhausted the internal appeal procedures as stipulated in the outcome of appeal dated 15 November 2012; and that he has submitted the referral to the Council within the 30 days after the internal appeal procedure had been exhausted. It is further argued that the internal appeals procedure was exhausted on 15 November 2012 and the unfair dismissal dispute was referred to the Council on 4 December 2012 in terms of paragraph 1.5(a), (b) and (c) of the SSSBC dispute procedures.
- [13] It is further submitted that the final decision of the employer was only taken on 15 November 2012.
- [14] The Fourth Respondent argues that the date of dismissal is 8 January 2009 and that he should have referred the matter to the SSSBC within 30 days after such

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³ Paragraphs 5.3 to 5.4.4, pages 3-4 of the Applicant's heads of argument

date and not the date 15 November 2012 when the appeal was finalised.

Case law

[15] In *Herholdt v Nedbank Limited, (Congress of South African Trade Unions as amicus curiae)*,⁴ the SCA described the standard of review as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

The relevant sections

[16] In terms of the South African Police Service Discipline Regulations of 2006:

'17. Appeal

(4) The employer must within ten (10) working days of receiving the notice of the final outcome of the hearing, submit the appeal to the administrative officer of the appeals authority.

(5) The appeals authority may on good cause shown condone the late lodging of an appeal.'

[17] In terms of the dispute procedure for the Safety and Security Sectoral Bargaining Council:

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⁴ [2013] 11 BLLR 1074 (SCA)

'1.5 This procedure applies to all disputes that may be referred to the council including:

...

unfair labour practice disputes after the internal grievance procedure has been exhausted; or

disputes with reference to unfair dismissals or disciplinary measures short of dismissal, after the internal appeals procedure has been exhausted, or the time period as stipulated in the relevant prescripts has lapsed.

and

3.5 Disputes that the Council jointly conciliates and arbitrates:

3.5.1 If the dispute is one that is contemplated in terms of clause 3.1(c), that is a dispute that in terms of the Act the Council must conciliate and arbitrate, it must be referred to the Council for joint conciliation and arbitration. Such disputes include disputes over dismissals for misconduct and incapacity, unfair labour practice disputes (excluding disputes concerning alleged discrimination). In respect of these disputes, the following procedure applies:

...

(b) the dispute must be referred to the Council within 30 days after all internal procedures have been exhausted as set out in clause 1.5 (b) and (c) above.'

Conclusion

[18] In terms 1.5(c) of the Dispute Procedure for the Safety and Security Sectoral Bargaining Council:

'After an internal appeals procedure has been exhausted or the time period as stipulated and the relevant prescripts have lapsed.'

- [19] The above clause envisages two scenarios. The first is that if an appeal has been lodged, then the 30-day period starts to run when the appeal has been exhausted. The second is that if an appeal has not been lodged, then the 30-day period starts to run from the expiry of the time to lodge the appeal.
- [20] The time period as stipulated in section 17 of South African Police Service Discipline Regulations of 2006 to lodge an appeal is within 10 working days of receiving the notice of the final outcome of the hearing.
- [21] Accordingly, the referral to the bargaining council ought to have been made within 30-days after the period to lodge an appeal had expired, namely 10 working days day after receiving the notice of the final outcome of the hearing.
- [22] Any other interpretation of clause 1.5(c) read with 3.5.1(b) would result in intolerable outcomes as it would provide an employee with the opportunity to refer a matter to the bargaining council without the need for condonation by simply lodging an appeal with a condonation application and then stating that the internal procedures were only exhausted once the condonation application was refused.
- [23] This would have ridiculous and unacceptable consequences as, theoretically, the employee could wait 50 years and then bring a condonation application for his late appeal and then simply refer the matter to the bargaining council. This interpretation would completely violate a fundamental principle of labour law that the matters should be resolved speedily.
- [24] Accordingly, the Court finds that the ruling of the Commissioner that the council does not have jurisdiction to entertain the dispute as it was referred to the council outside the 30-day period prescribed by the council rules is one that a reasonable decision maker would have reached on the facts before the commissioner.

[25] Accordingly, the Court makes the following order:

1. The review application is dismissed;
2. The Applicant is ordered to pay the costs.

Cook, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: J M Gouws

Instructed by: Johan Gouws Attorneys

For the Respondent: Advocate M I Malowa

Instructed by: The State Attorney