



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D659/15

In the matter between:

SACTWU

First Applicant

MSOMI & 273 OTHERS

**Second and further
Applicants**

and

CAPACITY (PTY) LTD

First Respondent

TRANSMAN (PTY) LTD

Second Respondent

CAPITAL OUTSOURCING (PTY) LTD

Third Respondent

EDCON (PTY) LTD

Fourth Respondent

Heard: 8 November 2017

Delivered: 18 December 2017

JUDGMENT: POINT IN LIMINE/CONDONATION

- [1] The applicants in this matter filed a statement of claim with this Court claiming that the second and further applicants had been unfairly dismissed by the respondents arising from a strike. The application is opposed by the respondents and the pleadings in the matter are closed. A pre-trial conference has been held and the parties have filed the minute. As a result, trial dates had been allocated.
- [2] Before the trial was due to commence, and arising from a point *in limine* raised by the respondents in the reply to the statement of claim and also in the pre-trial minute, in response to an application brought by the respondents, the parties agreed that the point *in limine* issue should be dealt with prior to the trial commencing.
- [3] The preliminary issue raised by the respondents, and the subject of this judgment, is the averment by the respondents that the applicants had filed their statement of claim out of time.
- [4] Accordingly, it was averred that in the absence of condonation being granted, the Court did not have jurisdiction to determine the main application. The applicants, in turn averred, that in the light of the provisions of Section 191(11) of the Labour Relations Act 66 of 1995, the referral to the court was within the time limits and condonation was unnecessary.
- [5] The parties agreed that in order to fully and properly deal with the point *in limine*, the applicants would file an application for condonation, in so far as it may be necessary, to be dealt with together with the *point in limine*.
- [6] This application for condonation was duly filed and was opposed by the respondents.
- [7] This judgment deals only with the respondents' *point in limine* and the applicants' application for condonation.

[8] It is necessary to set out a brief chronology and summary of the facts relevant to the dispute surrounding the averred late filing by the applicants of their statement of claim. The facts and chronology are common cause:

- a. the applicants were dismissed in December 2014;
- b. the applicants referred a dispute concerning their dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 19 January 2015. The CCMA decided that the referral was outside the statutory 30-day period and marked the referral “incomplete”. The CCMA notified the applicants that an application for condonation was required in order for the CCMA to consider the referral.
- c. The applicants duly filed an application for condonation on 10 March 2015 and the CCMA enrolled the condonation application for consideration on 16 April 2015. The condonation application was not opposed.
- d. On 16 April 2015, the CCMA granted condonation for the late referral and at the same time issued a certificate of outcome dated 16 April 2015.
- e. It is common cause that the applicants referred their dispute to this Court for consideration within 90 days of the certificate being issued by the CCMA.

[9] The respondents, relying on the judgment of the Labour Appeal Court in the matter of *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others*,¹ (*Manentza*) argued that the referral of the dispute to the Labour Court had to be made within 120 days after receipt by the CCMA of the referral of the dispute for conciliation and that should the dispute be referred to the court outside this time limit the applicants would require condonation for the late referral of the dispute.

[10] In the *Manentza* judgment, the court was required to consider whether a **referral to arbitration** made within 90 days after the issuing of a certificate of

¹ [2015] 9 BLLR 894 (LAC).

non-resolution requires the referring party to apply for condonation where the certificate was issued after the expiry of 30 days and the referral was made more than 120 days after the dispute was referred for conciliation.

[11] In concluding that a referral to arbitration had to be made within 120 of the referral to the Court relied on the time limit set out in section 191(5) (30 days) and the 90 days provided for in section 136(1).

[12] In determining the time limits for the referral of disputes for arbitration the court in the *Manentza* judgment considered firstly the provisions of Section 191(5) of the Act:

‘If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the commission received the referral and the dispute remains unresolved the council or the commission must arbitrate the dispute at the request of the employee...’

[13] The Court held that despite the use of the disjunctive “or” it was required of an employee who intended to refer a dispute arbitration to do so after 30 days or the issue of a certificate whichever occurred first.

[14] The *Manentza* judgment however held that the time period within which the employee or “any party” was required to refer the dispute to arbitration is the 90-day period set out in section 136(1) but that that period commenced from the expiry of the 30 from the date of the referral of the dispute. Section 136(1) provides that the

‘If this Act requires a dispute to be resolved through arbitration,

The Commission must appoint a commissioner to arbitrate that dispute if:

(a) A commissioner has issued a certificate stating that the dispute remains unresolved; and

(b) Within 90 days after the date on which that certificate was issued any party to the dispute has requested that the dispute be resolved through arbitration. (The section carries on to allow the arbitrator to condone non observance of that time limit)’ (my emphasis)

[15] The Court in *Manentza* however distinguished between sections 135 and 136 of the Act on the one hand and section 191(5) of the Act on the other.

[16] In the *Manentza* judgment, the court relied on the imperative that disputes are speedily resolved in applying the 90-day period to section 191(5).² As for sections 135 and 136 the court concluded that:

Therefor unlike in section 135(5) and section 136(1) of the LRA where the legislature has sought to link the right of referral to arbitration to the conciliation process by obliging the Commissioner when the conciliation has failed, or at the end of the 30 day period or any further period agreed between the parties to issue a certificate stating whether the dispute has been resolved and by requiring that such certificate be issued before a Commissioner is appointed to arbitrate the dispute, the provisions of section 191 of the LRA contain no such requirements. Nor has the legislature in section 191 of the LRA sought to link the validity of the referral to arbitration and the jurisdiction of the CCMA or a bargaining council to arbitrate the dispute to the certificate of the outcome of the conciliation.³

[17] However, in this matter the Court is required to consider the circumstances and time limits prescribed by the Act in relation to a referral to the Labour Court (section 191(11)) for adjudication and not as was the issue in the *Manentza* case a referral to arbitration. The issue in this matter concerns the Labour Courts jurisdiction to adjudicate disputes.

[18] Section 191(11) provides that disputes may be referred to the Labour Court 90- days after the dispute is certified to be unresolved.

[19] The 90-day period within which a dispute may be referred for adjudication and the basis upon which the Court has jurisdiction is only dealt with in section 191(11). to arbitration and stipulates that the 90 period runs from the issuing of the certificate.

[20] Section 191(5) does not deal with the time limits for referrals to adjudication.

² At Paragraph 33.

³ At Paragraph 37.

[21] The provisions of section 191(11) are abundantly clear and unequivocal when dealing with the time limits applicable to referrals to the Labour Court:

‘The referral, in terms of subsection (5), 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.’

[22] The express wording of the section does not permit an interpretation that is at odds with the plain and unambiguous meaning of the section.

[23] The court *a quo* in the *Manentza* case had mistakenly relied on the provisions of section 191(11) in determining the 90 time limit applicable to referrals of disputes to arbitration as opposed to section 136(1) which deals with referrals to arbitration.⁴ The LAC in its judgment in *Manentza* does not consider nor interpret the provisions of section 191(11) but relied on the 90 day limit set out in section 136(1). The Constitutional Court had, in the *F&J Electrical*.⁵ matter, prior to the *Manentza* judgment dealt with Section 191(11) and its relevance to conferring jurisdiction on the Labour Court when dealing with referrals of disputes for adjudication.

[24] After having reserved judgment in this matter the parties filed further submissions. These representations, in essence added nothing new added to the argument presented by the parties when the matter was heard save for the Second Respondent’s “Submissions in respect of *F&J Electrical*.”⁶

[25] In his Submissions on behalf of the second respondent, “In respect of *F&J Electrical*,” Mr Bosch referred to that part of the judgment where the Court said:

In terms of section 191(5) read with section 191(11)(a) of the LRA an employee must, within 90 days from the date of the expiry of 30 days from the date of receipt by the bargaining council or CCMA, as the case may be, of the referral of a dismissal dispute for conciliation, refer the dispute to the Labour Court for adjudication or request the bargaining council or CCMA to arbitrate

⁴ *Manentza* at paragraph 18.

⁵ *F & J Electrical CC v MEWUSA obo E Mashatola and Others* 2015 (4) BCLR 377 (CC).

⁶ *F & J Electrical CC v MEWUSA obo E Mashatola and Others* 2015 (4) BCLR 377 (CC).

the dispute. Whether a dispute qualifies to go to arbitration or adjudication is governed by the provisions of section 191(5).⁷

[26] This Mr Bosch cites this as authority for the proposition that the 90-day period in respect of section 191(11) despite the express reference to “90 days after the commissioner has certified that the dispute remains unresolved” runs from the expiry of 30 days from the referral.

[27] This passage however, given what the Court held later in the judgment in respect of the Courts jurisdiction to hear referrals, appears to deal specifically with Section 191(5) in the context of the circumstances that determine whether a matter is to be referred either to the CCMA or a Council for arbitration; or to the Labour Court for adjudication.

It is not necessary to go into details about the provisions of section 191(5). It is sufficient to say that, as a general proposition, whether a dispute qualifies for adjudication or arbitration depends upon what the employee alleges is the reason for dismissal.⁸

[28] When the Constitutional Court turns to deal with the Labour Court’s jurisdiction to adjudicate a dispute it holds:

Before the Labour Court may adjudicate a dispute, it, like any other court, should first satisfy itself that it has jurisdiction. In this case the Labour Court failed to do so. **The certificate of non-resolution was issued on 3 March 2009.** In terms of section 191(5) of the LRA the employees were obliged to refer the dispute to the Labour Court or to the bargaining council or CCMA, as the case may be, within 90 days from 3 March 2009. **The Labour Court would not have jurisdiction to adjudicate the dispute if the dispute was referred to the Labour Court after the expiry of 90 days from that date** unless the employees applied for condonation and showed good cause.⁹ (My emphasis)

[29] In this judgment, the Constitutional Court has clearly relied on the provisions of Section 191(11) as determining that the date upon which the period of 90-

⁷At paragraph 14

⁸ At Paragraph 15

⁹ At Paragraph 29.

days runs, is from the date of the issuing of the certificate in order to establish jurisdiction.

[30] The applicants' response to the Respondents' application *in limine* is simply that the referral was made with the time limit as set out in section 191(11), viz. 90-day from the issue of the certificate that the dispute has not been resolved, and that the Court accordingly has jurisdiction to hear the matter.

[31] The second point argued by the applicants is that it was only once the CCMA had condoned the late filing of the referral of the dispute that the 30-day period could commence running. As the certificate was issued immediately after condonation was granted the 90-day period commenced on that day. Accordingly, as the referral was made within 90 days it was not out of time.

[32] It certainly would appear that a requirement that a matter be referred for adjudication before condonation for the late referral of a dispute has been granted may lead to the absurd situation where matters are referred to the court before the CCMA or bargaining council has established its own jurisdiction.

[33] In the circumstances, I am satisfied that the referral of the dispute to this Court by the applicants complied with the time limits and provisions of section 191(11) and that the court accordingly has the jurisdiction to deal with the matter. It follows therefore that it is not necessary for me to consider the applicants' application for condonation.

[34] As far as costs are concerned there is no reason why costs should not follow the result.

[35] For these reasons, I make the following order:

- a. The respondents' point *in limine* is dismissed with costs.

D H Gush

APPEARANCES

FOR THE APPLICANTS:

Adv. P Schumann

Instructed by: Brett Purdon Attorneys

FOR THE FIRST RESPONDENT:

C Kirchmann: Kirchmanns Inc.

FOR THE SECOND RESPONDENT:

Adv. C Bosch

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