



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J619/14

In the matter between:

SALAMINAH SELLY THIBE AND OTHERS

Applicants

and

BADER SOUTH AFRICA (PTY) LTD

Respondent

Heard: 25 August 2018

Delivered: 28 September 2018

Summary: Jurisdiction – the applicants failed to prove that the unfair dismissal was ever referred to conciliation – alternatively, condonation is refused as the degree of lateness is extensive and the explanation is unreasonable and inadequate.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In this application the applicants seek the Court's indulgence to condone the late filing of their statement of case and to allow an amendment thereof. The

late referral is not the only obstacle facing the applicants. The respondent takes issue with the jurisdiction of this Court on the basis that a dispute relating to the dismissal of the applicants was never referred to conciliation.

Was the dispute ever conciliated?

[2] On 2 February 2018, Lagrange J issued an order directing the applicants to satisfy the Court that:

- 2.1. The dismissal dispute had been referred for conciliation;
- 2.2. A copy of the alleged referral of the dismissal dispute was served on the respondent; and
- 2.3. The dismissal dispute was dealt with at conciliation.

[3] The applicants did indeed file the supplementary papers in response to the directive by Lagrange J. In the papers filed, there is a document purporting to be the referral form (LRA 7.11) referring the unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA). The respondent denies having been served with the said referral.

[4] It is common cause, however, that the applicants did refer an unfair labour practice dispute that was duly conciliated and a certificate of non-resolution was issued on 27 July 2012 under case number GAJB15597-12. The unfair labour practice dispute was subsequently referred to arbitration. There is no explanation provided as to why the arbitration proceedings only sat on 14 January 2014. Nonetheless, commissioner SS Molapo ruled that the CCMA lacked jurisdiction to arbitrate the dispute as it relates to a unilateral change to terms and conditions of employment and directed the parties to refer the dispute to this Court.

[5] Nowhere in the ruling does the commissioner refer to the unfair dismissal dispute. This is so despite the applicants having been dismissed on 25 June 2012. The LRA 7.11 form referring the unfair labour practice was only filed

with the CCMA on 10 July 2012 and the dispute was conciliated on 27 July 2012. The allegation that the unfair dismissal dispute had been consolidated with the unfair labour practice dispute is not supported by the CCMA documents. It boggled one's mind why the applicants found it so hard to obtain proof that indeed the unfair dismissal dispute had been referred and conciliated accordingly by the CCMA. Unlike in this Court, the CCMA case management systems is electronic and it would have taken just a click of a button to retrieve the whole history of this matter and pertinent documentation.

[6] Conversely, the applicants expect this Court to accept some illegible LRA 7.11 form which is dubiously looking, as proof that the unfair dismissal dispute had been referred to the CCMA and conciliated. The respondent denies that it was ever served with the illegible LRA 7.11. In any event, it is not typical of the CCMA to fail to properly identify the next forum that has jurisdiction once the matter remains unresolved at conciliation. The commissioner would have directed the applicants to approach this Court as early as 27 October 2012. Since the applicants were represented by the union, they ought to have been better advised in terms of dispute resolution processes in any way.

[7] I am not convinced the unfair dismissal dispute had been referred to the CCMA or that it was ever conciliated. In the circumstances, the Court lacks jurisdiction to adjudicate the unfair dismissal dispute.

Condonation

[8] For completeness sake, I have also looked at the condonation application. The degree of lateness is extensive as 16 months had already lapsed when the proceedings in this Court were launched. The explanation is patently unreasonable and inadequate. There is no account given for the delay of about 14 months. The applicants incorrectly commence the calculation of the degree of lateness from 20 January 2014, the date of the CCMA ruling. Even

though the respondent raised this point in its answering affidavit, nowhere is it addressed in the applicants' replying or supplementary affidavits.

[9] In the applicants' own version, they were members of very experienced trade unions, NUMSA and SACTWU at the time of their dismissal. They choose to bring a new trade union that referred the dispute to the CCMA on their behalf. Other than asserting that they joined the new union because they were in the dark after their dismissal, the applicants are not open to the Court about the reasons that led their erstwhile unions to bail out on them. Therefore, their counsel's impassioned plea that they should be indulged because they had no one to guide them is untenable.

[10] In *Collet v Commission for Conciliation Mediation and Arbitration and Others*,¹ expounding the principles applicable when dealing with a condonation application, the Labour Appeal Court stated that:

'[38] There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology*, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–D. [also reported at [1962] 4 All SA 442 (A) – Ed] should be followed but:

“(T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

[11] Similarly, there is no need to consider the prospects of success in the circumstances of this case. However, having perused the file, I am of the view that the prospects of success are hopeless.

¹ (2014) 35 ILJ (LAC); 2014 6 BLLR 523 (LAC) at para 38.

Conclusion

[12] In the circumstances, the Court lacks jurisdiction to deal with the matter because the unfair dismissal dispute has never been referred to conciliation. Alternatively, the applicants have failed to show good cause for the grant of condonation for the late filing of their statement of case.

Costs

[13] On the issue of costs, Mr Grogan, for the respondent, sought an order as to costs. I am disinclined to grant costs as the applicants are individual litigants and their attorneys of record and counsel entered appearance on a *pro bono* basis.

[14] In the premises, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicants: Advocate LMS Mello

Instructed by: LMK attorneys

For the respondent: Advocate J Grogan

Instructed by: Lexicon Attorneys