THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1042/17

In the matter between:

LAGADIEN FADILA **Applicant**

and

MINISTER OF DEPARTMENT OF SCIENCE AND TECHNOLOGY **First Respondent**

DIRECTOR GENERAL OF THE DEPARTMENT OF SCIENCE AND TECHNOLOGY **Second Respondent**

Heard: **02 August 2019**

Delivered: **06 August 2019**

Summary: ***Points in limine*** **of unreasonable delay and lack of jurisdiction – where there are prescribed time periods, the common law principle of undue delay does not find application. The Labour Court retains jurisdiction where the referring party alleges automatically unfair dismissal. Until reviewed and set aside by a competent court, a ruling of the commissioner remains binding and effective. Held (1): The** ***points in limine*** **are not upheld. (2): No order as to costs.**

JUDGMENT

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MOSHOANA, J

Introduction

[1] Before me serves an interlocutory application raising two *points in limine* as raised by the first and second respondents. The first one relates to undue delay and the other relates to lack of jurisdiction. This matter is a referral and has a long and unfortunate history. It is not necessary for the purposes of this judgment to repeat such history. Suffice to mention that the dispute alleged herein occurred on 28 July 2014, which is now five years old. Given the view I take in this judgment; the dispute would still be in this Court for another year or two. This is unfortunate for a labour dispute.

Background facts

[2] On 28 July 2014, the applicant tendered a resignation as an employee of the Department of Science and Technology (the Department). Subsequent thereto, on 19 August 2014, the applicant referred a dispute to the Government Public Service Sector Bargaining Council (GPSSBC) alleging unfair dismissal. On 23 September 2014, the applicant withdrew the dispute. At the same time, the dispute was re-referred and accompanied by an application seeking condonation of the late referral to conciliation.

[3] On or about 9 December 2014, a ruling was issued refusing the condonation sought. I pause and mention that this ruling was not taken on review. Later on, on 22 June 2015, the applicant referred another dispute and alleged unfair discrimination in terms of section 10 of the Employment Equity Act[1]. This dispute was certified as being unresolved. I again pause to mention that it is unclear as to what eventually happened to this dispute.

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[1] No 55 of 1998.

[4] Later, the applicant attempted to rescind the ruling of 9 December 2014. On 11 June 2015, a ruling was issued refusing the rescission application. Again, I pause to mention that this ruling was not taken on review. On or about 22 April 2016, the applicant yet again referred a dispute to the GPSSBC alleging unfair dismissal. On or about 14 October 2016, the GPSSBC declined jurisdiction and directed the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[5] On or about 23 January 2017, the applicant referred the "dismissal[2]" of 28 July 2014 to the CCMA. In this referral, she labelled the dismissal as being automatically unfair. On 10 March 2017, Commissioner L Du Plessis issued a ruling refusing to assume jurisdiction and transferred the dispute to the GPSSBC, since the parties fell under the GPSSBC. Yet again none of the parties challenged this ruling.

[6] For some unexplained reasons, Commissioner L Dekker, on 31 October 2017, issued a ruling to the effect that by agreement between the parties, the ruling of Du Plessis was rescinded and the late referral was condoned. This ruling was not challenged by the respondents. In addition, Dekker issued a certificate, certifying that the alleged automatically unfair dismissal remains unresolved

[7] On 29 January 2018, the dispute that was certified to be unresolved was referred to this court for adjudication. In response to the statement of claim, the respondents took the *points in limine* mentioned above.

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Evaluation

[2] The applicant resigned and alleged constructive dismissal.

[8] Two points ought to be made upfront. Firstly, the Labour Relations Act[3] (the LRA) empowers this Court to review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law. By issuing a ruling rescinding the ruling of Du Plessis and condoning the late filing as well as issuing a certificate of non-resolution, Dekker was performing or purporting to perform the functions provided for in the LRA. It is doubted by this Court that Dekker is empowered in terms of section 144 of the LRA to rescind the ruling of Du Plessis. Secondly, an administrative action stands until reviewed and set aside by a competent court of law. I do not mean to say that the actions of Dekker had assumed legality thereby.

[9] Turning to the *points in limine*. Section 191(11) of the LRA provides that a referral for adjudication to the Labour Court must be made within 90 days of certification that the dispute remains unresolved. In this matter, the certification was made on 31 October 2017. The 90 days lapsed on 31 January 2018. The applicant referred the dispute before the lapse of the 90 days. Where a time period is prescribed by a statute, the common law rule of undue delay does not apply. Accordingly, the point of undue delay cannot be upheld.

[10] Section 191 (5) (b) (i) of the LRA provides that the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is automatically unfair. The applicant made such an allegation in the statement of case, thus this Court retains jurisdiction. Should it turn out that there was no dismissal, this Court and/or the CCMA or Bargaining Council would lack jurisdiction. It ought to be emphasized that where an employee alleges that he or she resigned because the employer made continued employment intolerable, such an employee is seeking to show that a dismissal within the meaning of section 186 (1)(e) has occurred. It is unfortunate that section 191 (5)(a)(i) provides that the CCMA or Council must arbitrate the dispute at

[3] Act 66 of 1995, as amended.

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the request of an employee if the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable.

[11] In my view, making continued employment intolerable cannot be a reason for dismissal. What it does is to convert a termination made by an employee to be a dismissal within the meaning of section 186 (1) (e) of the LRA. Nonetheless, the Commission or Council is obligated to arbitrate if requested by an employee. In *casu*, the applicant did not request the CCMA or Council to arbitrate. For these reasons, the point of lack of jurisdiction cannot be upheld.

[12] Regarding costs, I am of a view that an appropriate order to make is that of no order as to costs.

[13] In the results, I make the following order:

<u>Order</u>

1. The *points in limine* are not upheld.
2. No order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Advocate B Mashabane

Instructed by: Mr Juan-Henry Cavanagh of Cavanagh & Richards Attorneys, Centurion.

For the Respondents: Advocate MM Mojapelo

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Instructed by: State Attorney, Pretoria.

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