



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: JR642/20

In the matter between:

**NATIONAL EDUCATION, HEALTH AND ALLIED
WORKERS UNION obo MAKHUBELE, E & 6 OTHERS** **Applicant**

and

RAMALATSO, M.I. N.O **First Respondent**

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL (GPSSBC)** **Second Respondent**

STATISTICS SOUTH AFRICA **Third Respondent**

Heard: 6 May 2025

Supplementary heads: 9 May 2025

Delivered: 13 May 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be 13 May 2025.05.13

JUDGMENT

MAKHURA, J

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act¹ (LRA) to review and set aside a jurisdictional ruling. The test applicable in this review application is that of correctness - whether the commissioner's ruling is right or wrong, and therefore the ruling is reviewable on objectively justifiable grounds.²

[2] The applicant also applies for condonation for the late delivery of the review application, which is unopposed. Having considered the matter, the condonation application is granted.

[3] The facts leading to the jurisdictional ruling are common cause. The applicant, the National Education, Health and Allied Workers' Union (NEHAWU), acting on behalf of the seven individual applicants who are its members, previously declared a dispute and referred it to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. That dispute was one of equal pay for equal work in terms of section 6 of the Employment Equity Act³ (EEA) and was referred to the CCMA on 11 April 2018. The applicant stated in this referral that the dispute arose on 11 April 2018.

¹ Act 66 of 1995, as amended.

² *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC); [2008] ZALAC 3 at paras 39 – 41; *Zeuna – Starker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC); (1999) 20 ILJ 108 (LAC) at para 6; *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 2; *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others* [2015] ZALAC 26; [2015] 9 BLLR 894 (LAC) at para 20; *Ukweza Holdings (Pty) Ltd v Nyondo NO & others* (2020) 41 ILJ 1354 (LAC); [2020] ZALAC 7 at para 12;

³ Act 55 of 1998, as amended.

[4] Subsequent to an unsuccessful conciliation, the applicant referred the dispute to this Court under case number JS691/18. In terms of the referral to this Court, the individual applicants claimed that they should be remunerated at salary level 8, as opposed to level 7 and that this constituted unfair discrimination on the arbitrary ground of “unreasonableness”. The matter was unopposed and was enrolled for default judgment application. On 19 July 2019, this Court dismissed the application for default judgment.

[5] Aggrieved, the applicant elected not to appeal the decision. Instead, it elected to refer an unfair labour practice dispute to the General Public Service Sectoral Bargaining Council (GPSSBC), based on the same or similar set of facts and seeking substantially the same or similar relief. The applicant detailed the dispute procedures followed as:

‘Employer has failed and/or refused to provide a final, approved report as an outcome.

A grievance was lodged on or about 5 October 2016.

On 21 December 2017 respondent made a decision to appoint DPSA official to verify a fresh grading of the applicant employee positions. To date, no final report from DPSA has been received.’

[6] This new dispute was referred on 16 October 2019. The applicant explained that five of the individual applicants are employed as Data Processor Supervisors and two as Professional ICD 10 Coders. They are all employed on salary level 7. Their other colleagues, so the applicant contends, who are also Data Processor Supervisors and Professional IDC 10 Coders, are employed on salary level 8. The applicant’s complain is that the third respondent’s conduct:

‘in failing to accord [the individual applicants] the same benefits granted to employees on salary level 8 constitutes an unfair labour practice as defined in section 186(2)(a) in that [they] do not receive the same benefits as their colleagues employed on the salary level 8, in particular relating to pension, bonuses and medical aid contributions...’

[7] At the proceedings before the GPSSBC, the third respondent contended that the dispute was referred outside the 90-day period in terms of section 191(1)(b)(ii) of the LRA, the applicant did not apply for condonation, and therefore the second respondent had no jurisdiction to arbitrate the dispute. In addition, the third respondent raised a plea of *res judicata* and argued that the same dispute arising from the same set of facts was determined by the Labour Court.

[8] In response, the applicant contended that the dispute was continuous and therefore it was not necessary to apply for condonation. Reliance was placed on *SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁴ (SABC), where the Labour Appeal Court (LAC) determined whether the conduct of the employer was a single act or a continuous or repetitive act. The act complained of was the non-promotion of the employees. The LAC held that:

‘Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice / unfair discrimination commenced because it is not a single act of discrimination [or an unfair labour practice] but one which is repeated monthly.’⁵

[9] On *res judicata*, the applicant contended that the cause of action in this dispute is not the same as that which was referred to the CCMA for conciliation and later determined by the Labour Court. The cause of action in the current dispute, so they argued, is one of unfair labour dispute and the Labour Court determined an unfair discrimination claim. For this, the applicant relied on *Gcaba v Minister of Safety & Security & others*⁶ where the Constitutional Court held that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law that may be pursued in different courts or fora.

[10] The commissioner determined the *res judicata* point without first determining whether he had jurisdiction. He ruled that the second respondent had no powers or

⁴ (2010) 31 ILJ 592 (LAC); [2010] 3 BLLR 251 (LAC).

⁵ *Ibid* at para 28.

⁶ (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 53.

jurisdiction to determine a dispute which had already been determined by the Labour Court. It is clear that the commissioner conflated the issue of his competence to preside over the dispute and the powers he had to make certain orders as the commissioner.

[11] The first question was whether the GPSSBC had jurisdiction to entertain the matter in the sense that the dispute was referred outside the prescribed 90-day period. It is only after the jurisdiction of the GPSSBC is confirmed that the issue of *res judicata*, which is a defence to a claim that is properly before the Court or tribunal, could be entertained.

[12] The jurisdiction of the bargaining council is not an issue that falls to be finally determined by the commissioner because that decision could be reviewed by this Court on objectively justifiable grounds. The question before this Court remains whether the commissioner was correct in finding that the GPSSBC had jurisdiction to arbitrate the dispute.

[13] The applicant had referred a dispute in terms of section 186(2)(a) of the LRA. In terms of this provision, unfair labour practice is defined as “*any unfair act or omission that arises between an employer and an employee*”. The essence of the applicant’s complaint of provision of benefits is promotion or a placement to a higher salary level. The applicant alleges that this dispute is continuous.

[14] Section 191(1) of the LRA regulates inter *alia* the time period within which disputes about unfair act or omission may be referred to the bargaining councils or CCMA. It provides that:

- ‘(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to -
 - (i) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (ii) the Commission, if no council has jurisdiction.

- (b) A referral in terms of paragraph (a) must be made within -
- (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
 - (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.' (Emphasis added)

[15] Accordingly, a dispute about an unfair act or omission which is alleged to constitute an unfair labour practice, as in the present case, must be referred within 90 days of the date of the act or omission or within 90 days of the date on which the employee became aware of the act or omission. The dispute may be referred and permitted outside the 90-day period on good cause shown.⁷

[16] During the hearing, the Court brought to the parties' attention two decisions of the LAC in *Mngadi v Jenkin NO and others*⁸ (*Mngadi*) and *Amalungelo Workers' Union obo Mayisela and others v Commission for Conciliation, Mediation and Arbitration and others*⁹ (*Amalungelo*), and directed them to file supplementary heads of argument addressing the matter with specific reference to *Amalungelo*. The applicant has filed its supplementary heads. The third respondent did not.

[17] In *Mngadi*, the employee referred an unfair discrimination dispute, where he alleged that the unfair discrimination was continuous or repetitive. The LAC held that it was unnecessary for Mngadi to apply for condonation because the unfair discrimination was perpetrated afresh on each occasion he was paid a lower salary compared to his subordinates and therefore, the unfair discrimination was continuous and repetitive on a monthly basis.¹⁰

⁷ Section 191(2) of the LRA.

⁸ (2021) 42 ILJ 768 (LAC); [2021] 3 BLLR 248 (LAC)

⁹ [2021] ZALAC 55; (2022) 43 ILJ 600 (LAC).

¹⁰ *Mngadi* at para 20.

[18] In *Amalungelo*, the LAC was confronted with a dispute that was referred in terms of section 198D(3)¹¹ of the LRA. The LAC held that:

‘The “act or omission” referred to in subsection (3) is clearly that which gave rise to the dispute. And the dispute, as long as it is the same one, only has one initial date on which it arose. The fact that the dispute is ongoing, in the sense that it recurs after it arose, may be because it is either never resolved, or satisfactorily resolved. But that does not imply that the parties, as it were, necessarily have a new “act or omission” or “wrong” every time the same dispute erupts again.

The appellant employees’ reliance on what this court held in *SABC* and what the Supreme Court of Appeal held in *Lombo*, or any of the decisions allegedly based on them, is misplaced. The facts of those cases are distinguishable on their facts. There the courts were not dealing with the interpretation of s 198D of the LRA, or anything approximating the wording of that section, or s 198A, 198B or 198C, to which s 198D applies.

In any event, as explained in *Eskom*, not even all unfair labour practices which occur on a monthly basis constitute ‘a continuing wrong’ as envisaged in *SABC*. To use the language of s 198D, what would occur in certain instances is not the act or omission, for example, to promote (as in *Eskom*) or not to employ persons on a permanent basis (as alleged in this instance), but the consequences of the failure to promote or the failure to appoint on a permanent basis, which would constitute the concerned act or omission. However, in the light of the outcome of the analysis in this matter, it is not necessary to elaborate on that aspect.’¹²

[19] Insofar as the commissioner did not deal with the issue relating to the referral of the dispute outside the 90 day period, the applicant submitted that it is not unreasonable to infer that the commissioner believed that the dispute was continuous per the *SABC* principle. It matters not what the commissioner may have believed and by implication

¹¹ Section 198D(3) of the LRA. It provides that “A party to a dispute contemplated in subsection (1), other than a dispute about a dismissal in terms of section 198A (4), may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned”.

¹² Ibid at paras 20 - 22.

found. His ruling remains reviewable on objectively justifiable grounds and this Court is enjoined to consider whether the GPSSBC had jurisdiction to entertain the matter.

[20] The applicant submitted that the Court should follow *SABC* and find that the unfair labour practice dispute is ongoing and repetitive monthly. Further, the applicant urged this Court to consider the context of the dispute and to distinguish their dispute with that which the LAC dealt with in *Amalungelo*. In the context of unfair labour practice disputes, so the applicant submitted, the fact that unfair labour practice is defined as “*any unfair act or omission that arises*”, means in this case that for each month the employer provides the other employees on salary level 8 the benefits that are more favourable to the individual applicants, an unfair act or omission arises.

[21] The third respondent had already addressed the issue in its original heads with reference to this Court's judgment in *City of Cape Town v Nevin & others*¹³. In this judgment, Lagrange J, dealing with an alleged unfair demotion dispute and with reference to the *Amalungelo* judgment, held that:

‘Where a single, discrete omission or act by an employer is the foundation of an *unfair labour practice claim* it cannot be said to be continuous until that act or omission is reversed, merely because it has ongoing consequences.’¹⁴

[22] In terms of *Amalungelo*, there can only be one initial date that gave rise to the dispute. I must also add, in terms of the latter part of section 191(1)(b)(ii) of the LRA, there can only be one date when the employee became aware of the act or omission that allegedly constitutes the unfair labour practice and gave rise to the dispute.

[23] In *casu*, it is common cause that on 11 April 2018, the applicant referred an unfair discrimination dispute to the CCMA relying on the same set of facts that served before the GPSSBC. In that referral, the applicant expressly alleged that the dispute arose on 11 April 2018. However, when the same set of facts were used to refer the

¹³ [2022] ZALCCT 29; [2022] 11 BLLR 1026 (LC).

¹⁴ *Ibid* at para 87

unfair labour practice dispute 18 months after the first referral, the origin of the dispute suddenly became continuous and was no longer 11 April 2018.

[24] The sudden change of the date of dispute from 11 April 2018 to *continuous* was a deliberate attempt to circumvent compliance with the 90 day period. The fact that the individual applicants sought backpay limited to 90 days prior to the referral does not bring the matter within the jurisdiction of the GPSSBC. The enquiry is – when did the act or omission arise or when did the individual applicants become aware of the act or omission that they now allege constitutes unfair labour practice.

[25] The record before this Court shows that the individual applicants were aware of the act or omission as early as 5 October 2016 when they lodged the grievance. The current dispute was referred on 16 October 2019, three years after the individual applicants lodged the grievance.

[26] The applicant's submission that each month the third respondent provides benefits to the other employees that are more favourable to the individual applicants a new act or omission arises is unsustainable. Section 186(2) defines unfair labour practice as an act or omission that arises between an employer and an employee. Section 191 regulates the period within which disputes relating to the unfair act or omission that allegedly constitutes unfair labour practice must be referred. As I have found above, the individual applicants have been aware of the act or omission as early as 5 October 2016, if not prior.

[27] *Amalungelo* was concerned primarily with the interpretation of the phrase *after or of the act or omission that allegedly constitutes unfair act*. Section 198D(3) of the LRA requires a dispute to be referred "*within six months after the act or omission concerned*". Section 191(1) requires a dispute to be referred within "*90 days of the date of the act or omission*" or of the employee gaining knowledge of the alleged unfair act or omission. The two provisions are the same or substantially the same. The LAC in *Amalungelo* held:

'Section 198D does not treat 'dispute', and the 'act or omission' giving rise to the dispute, as synonymous. Section 198D(3) does not provide that the dispute must be referred within six months of it arising, but that the dispute must be referred within six months after 'the act or omission concerned'. The section recognises that there is an act or omission (alleged or otherwise) that gave rise to, or preceded, the dispute. The crucial starting date of the time-limit is after the act or omission concerned. It is thus important to establish that date in order to determine whether, in more general parlance, the 'dispute' was referred in time.'¹⁵

[28] Equally, in section 191(1), a dispute and an act or omission are not synonymous. The dispute must be referred within 90 days of the act or omission that allegedly constitutes unfair labour practice, or within 90 days of the employee gaining knowledge of the act or omission that allegedly constitutes unfair labour practice.

[29] The act or omission in this case, according to the applicant, is the failure to provide the individual applicants with the same benefits as their counterparts. However, this alleged failure to provide them with the level 8 benefits was brought about by the third respondent's alleged unfair act to place them on salary level 7 or omission to place the individual applicants on salary level 8. That act or omission occurred, on the record before this Court, on 5 October 2016 if not prior, or the individual applicants became aware of that act or omission on or before 5 October 2016. The consequence of that act or omission is that the individual applicants' benefits, which they receive monthly, are limited to that of the employees on salary level 7. Therefore, this dispute relates to the alleged unfair act or omission that occurred on or before 5 October 2016. That the consequence of the act or omission manifests itself monthly does not mean that a new act or omission occurs monthly. There was only one discrete and separate act or omission and the individual applicants became aware of it on before 5 October 2016. The applicant was therefore required to apply for condonation for the late referral of its unfair labour practice dispute.

¹⁵ *Amalungelo* at para 23.

[30] In my view, the time to hide behind the alleged “*continuous*” or “*repetitive*” nature of the dispute has come to an end. Therefore, whether continuous or non-continuous, labour disputes must be referred within a reasonable time because they are not only inherently urgent in nature but also because delays may cause irremediable prejudice on the part of the other party. A reasonable time in disputes referred in terms of the LRA is determined with reference to section 191. Therefore, even a continuous dispute and/or a dispute with no specific timeframes, in my view, should be referred within a reasonable period.¹⁶ It would be untenable and against the purpose of resolving labour disputes expeditiously to permit or enrol matters without enquiring into the delays, even where the employee became aware of the issue or act or omission which forms the subject of the referral, years before referring the dispute.

[31] For the above reasons, the unfair labour practice dispute was referred outside the prescribed 90 day period. The GPSSBC had no jurisdiction to determine the dispute in the absence of a successful condonation application. Whilst the commissioner’s reasons are erroneous, his decision that the GPSSBC had no jurisdiction is correct. On this basis, the application stands to be dismissed, and the GPSSBC and indeed this Court has no jurisdiction to consider or entertain the third respondent’s plea of *res judicata*

[32] In the premises, the following order is made:

Order

1. Condonation for the late delivery of the review application is granted.
2. The review application is dismissed.
3. There is no order as to costs.

¹⁶ See *Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal* (2016) 37 ILJ 1839 (LAC); [2016] 7 BLLR 649 (LAC), where the LAC discussed the referral of interpretation or application disputes which is not subject to time frames. The LAC held that the referral must still be made within a reasonable time and that section 191 is a yardstick to determine the period of reasonableness.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr. T Finck of Finck Attorneys

For the Third Respondent:

Ms. L Pillay

Instructed by:

Zarina Walele Attorneys

LABOUR COURT