



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 657/22

In the matter between:

NOMATHAMSANQA PRIDE MSIMANGA

Plaintiff

and

JOHANNESBURG WATER SOC LTD

Defendant

Heard: 3 July 2025

Delivered: 22 August 2025

JUDGMENT

EDWARDS, AJ

Introduction

[1] In its response to the plaintiff's statement of claim, in which she alleged that she had been and was continuing to be unfairly discriminated against, the defendant raised two points *in limine* relating to this Court's jurisdiction to adjudicate this matter.

[2] The first point *in limine* is that this Court does not have jurisdiction to adjudicate the plaintiff's claim as the referral to this Court was not made within 90 days of the certificate of outcome being issued by the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and no application for condonation has been brought by the plaintiff.

[3] The second point *in limine* related to the plaintiff's alleged failure to refer a dispute to the CCMA in terms of section 6(3) of the Employment Equity Act¹ ("EEA") with the result that no attempt had been made to conciliate a harassment dispute, and the jurisdictional prerequisites for such a dispute had not been met. This point was abandoned in the heads of argument of counsel for the defendant dated 27 June 2025.

[4] I shall therefore only deal with the first point *in limine*.

Background

[5] The plaintiff has been employed by the defendant since 1 February 2010.

[6] The plaintiff alleges that, after his transfer to the Olifantsvlei Works by the defendant in November 2019 to take up the position of Works Manager for the site, Lesego Motsepe ("Motsepe") acted in such a way that she was forced to raise several grievances against him for intimidatory, discriminatory and demeaning conduct towards her. On 2 November 2021, the plaintiff eventually referred an unfair discrimination dispute to the CCMA relating to Motsepe's alleged conduct towards her. This dispute was conciliated on 24 November 2021 and, after agreement between the parties to extend the 30-day period for conciliation, again on 22 December 2021.

[7] As the dispute remained unresolved, a certificate of outcome was issued by the CCMA on this later date.

¹ Act 55 of 1998.

[8] The plaintiff had 90 days from the date of issue of the certificate to refer the matter to this Court for adjudication, but instead of doing so, she referred it to arbitration at the CCMA. The dispute was thereafter scheduled for arbitration on 7 March 2022, on which date the dispute was conditionally settled.

[9] As those conditions were not met by 12 April 2022, the dispute was revived.

[10] According to the defendant, it was recorded in the settlement agreement that the CCMA did not have jurisdiction to arbitrate the dispute, as the plaintiff earned above the earnings threshold² and therefore the dispute ought to be referred to this Court for adjudication.

[11] The defendant submits that, since the plaintiff only referred the dispute to this Court for adjudication on 27 June 2023, the referral was significantly outside of the 90-day period, and the plaintiff was required to deliver an application for condonation. As the plaintiff did not bring an application for the condonation of the late filing of her statement of claim, the defendant argues that this Court lacks jurisdiction to adjudicate the claim.

[12] The basis for the defendant's averment that the plaintiff had to refer the dispute to this Court within 90 days is section 10(7) of the EEA, which provides that the relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act³ ("LRA"), with the changes required by context, apply in respect of a dispute in terms of Chapter II of the EEA, which deals with the prohibition of unfair discrimination.

Evaluation

[13] Part C of Chapter VII of the LRA deals with dispute resolution in the CCMA and section 136(1) therein provides that, if the LRA requires a dispute to be resolved through arbitration, the CCMA must appoint a commissioner to arbitrate that dispute

² As set in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997.

³ Act 66 of 1995, as amended.

if a certificate of outcome has been issued and any party to the dispute has requested that the dispute be resolved through arbitration within 90 days after the date of the issue of the certificate.

[14] Counsel for the defendant relied on the judgments of the Labour Appeal Court (“LAC”) in the matters of *NEHAWU obo Mofokeng v Charlotte Theron Children’s Home*⁴ (“*NEHAWU*”) and *Aspen Pharmacare v Makhari*⁵ (“*Aspen Pharmacare*”) as authority for the assertion that the provisions of section 136(1) apply equally to unfair discrimination disputes that are referred to this Court for adjudication in terms of section 10(6)(a) of the EEA.

[15] The LAC in *Aspen Pharmacare*⁶ confirmed the principle in *NEHAWU*⁷ that: ‘Reading section 10(6) and 10(7) of the [Employment] Equity Act together, it would appear that the [Employment] Equity Act must be read together with the applicable provisions of the [Labour Relations] Act. By reference to the words with the changes required by the context in section 10(7), the 90-day time period as provided for in section 136(1) of the Act, which itself appears in Part C of Chapter VII of the Act, becomes applicable to the dispute. In other words, although the present dispute involves adjudication after an unresolved conciliation and section 136(1) refers expressly to arbitration, the savings provision in section 10(7) of the [Employment] Equity Act then becomes operative; hence the 90-day requirement is of equal application in the new context to the adjudication as envisaged in section 10(6) of the [Employment] Equity Act.’

[16] In response to this point *in limine*, the plaintiff submits that condonation is not necessary. In argument, Mr Grové for the plaintiff did not dispute the assertion made by counsel for the defendant that, ordinarily, the 90-day period in section 136(1) of the LRA is applicable to disputes referred to this Court for adjudication in terms of section 10(6)(a) of the EEA. Rather, what he argued on behalf of the plaintiff was that, since the six month time period prescribed in terms of section 10(2) of the EEA

⁴ [2004] 10 BLLR 979 (LAC) at para 19.

⁵ [2024] 12 BLLR 1234 (LAC) at paras 7 – 9.

⁶ *Aspen Pharmacare* at para 8.

⁷ *NEHAWU* at para 19.

for the referral of a dispute to the CCMA for conciliation has been found not to apply in cases where the unfair discrimination complained of is ongoing in nature, this principle should also apply to the 90-day period in which a dispute in respect of which a certificate has been issued must be referred for adjudication.

[17] In making that argument, Mr Grové relied on the LAC's judgment in *Mngadi v Garth Jenkin NO and others*⁸ ("*Mngadi*") and this Court's unreported judgment in *Masubelele v Rand Water*⁹ which applied the *Mngadi* judgment.

[18] In *Mngadi*, the LAC applied its judgment in *SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & Others*.¹⁰ In that matter, it had held that unfair discrimination may be continuous, continuing or repetitive and that such discrimination does not end until the employer stops the discrimination. It had found that, in such circumstances, the date of dispute recorded in the referral to the CCMA does not have to coincide with the date upon which the unfair discrimination commenced because it is not a single act but one which is repeated or continuous. There is therefore no need to specify a date on which the dispute arose.¹¹

[19] The LAC therefore found in *Mngadi* that the appellant's referral of his dispute was not out of time.¹²

[20] In reply, counsel for the defendant agreed with Mr Grové that all of the authorities supported the principle that, in the case of continuing unfair discrimination, the six-month time period in section 10(2) of the EEA does not apply. He pointed out, however, that all of the authorities related to referrals to the CCMA for conciliation, rather than to referrals to adjudication once a certificate of outcome has been issued.

[21] I am in agreement on this point. As I see it, the rationale for the principle enunciated in the authorities relied on by the parties that the six month time period

⁸ [2021] 3 BLLR 248 (LAC).

⁹ (JS141/19) [2021] ZALCJHB 372 (20 October 2021)

¹⁰ (2010) 31 ILJ 592 (LAC)

¹¹ *Ibid* at paras 27 – 28.

¹² *Mngadi* at para 20.

prescribed in section 10(2) of the EEA for the referral of an unfair discrimination dispute does not apply to disputes in which the unfair discrimination complained of is continuous is that the start and end of that six-month period would be a continuously moving target in the case of ongoing unfair discrimination. It would require repeated referrals to the CCMA if the party complaining of the unfair discrimination was required to record a date on which the dispute arose in the referral. This would be absurd.

[22] The plaintiff asks this Court to find that the 90-day period within which an unfair discrimination dispute must be referred to this Court for adjudication ought also not to apply to disputes in which the unfair discrimination complained of is continuous.

[23] In my view, this proposition cannot be sustained. The rationale for the six-month time period not applying to such disputes does not exist in respect of those disputes once a certificate of outcome has been issued. The 90-day period commences from the date of issue of the certificate, which date is fixed and will not change regardless of whether the discrimination complained of is ongoing.

[24] In the circumstances, I am of the view that the defendant is correct in its assertion that the plaintiff was required to bring an application for the condonation of the late filing of her statement of claim, even though the unfair discrimination she complains of is ongoing. In the absence of one, this Court does not have jurisdiction to adjudicate this dispute.

[25] Instead of dismissing the plaintiff's claim due to the unsuccessful legal stance adopted by her legal representatives, which in my view would be an unduly harsh consequence for the plaintiff, as it would close the door to her completely, it is my view that the more appropriate order would be to strike the matter due to lack of jurisdiction.

[26] With regard to the question of costs, counsel for the defendant submitted that, as there is an ongoing relationship between the parties, costs ought to be dealt with by the trial Court. Mr Grové, for the plaintiff, was in agreement with this submission.

[27] In my view, this Court is in a better position to determine the issue of costs as this jurisdictional point has been ventilated before this Court and will not be dealt with by the trial Court.

[28] Costs in this Court are governed by the provisions of section 162 of the LRA, which provides that this Court may make an order for the payment of costs according to the requirements of the law and fairness and in doing so, this Court may take into account, *inter alia*, the conduct of the parties in proceeding with or defending the matter before the Court and during the proceedings before the Court.

[29] The Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and others*¹³ confirmed the principle that the rule of practice that costs follow the result does not apply in Labour Court matters, as held by the LAC in *MEC for Finance, KwaZulu-Natal and another v Dorkin NO and another*.¹⁴ In that matter, the LAC held that orders of costs in the Labour and Labour Appeal Courts are to be made in accordance with the requirements of the law and fairness and that the norm ought to be that costs orders are not made unless these requirements are met.

[30] This principle was further elaborated on by the Constitutional Court in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and others*¹⁵ where it held that:

‘In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in section 162, and the constitutional and statutory imperatives that underpin it...’

[31] In my view, fairness dictates that I depart from the norm that costs orders should not usually be granted in this Court in this matter. This is so because of the

¹³ [2018] 4 BLLR 323 (CC) at para 24.

¹⁴ [2008] 6 BLLR 540 (LAC) at para 19.

¹⁵ [2021] 12 BLLR 1173 (CC) at para 35.

plaintiff's election to proceed with the argument that a condonation application was not necessary, despite the fact that the necessity was brought to her and her representative's attention when the statement of response was delivered in July 2023. Instead of delivering a condonation application in an abundance of caution, even if she and her representatives did not agree with the point, the plaintiff elected to continue with this stance, without any authority to substantiate it, with the consequence that the defendant has had to incur the costs of arguing the point. There is no reason why it should not be able to recover the costs of having to do so.

Order

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

1. The plaintiff's claim is struck off the roll for lack of jurisdiction.
2. The plaintiff is to pay the defendant's costs.

M. Edwards

Acting Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff: G Grové of CGG Inc Attorneys

For the Defendant: SB Nhlapo and T Malungani

Instructed by: Bright Rikhotso Inc