

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN**

CASE NO. C243/99

In the matter between:

A S PARKER Applicant

and

V3 CONSULTING ENGINEERS (PTY) LTD Respondent

Date of hearing: 24 March 2000

Date of judgment: 27 March 2000

Representation: For the Applicant, Mr B A Barichievy, union official

For the Respondent, Mr P D Gallie

JUDGMENT

ARENDSE AJ:

1. This applicant was dismissed by the respondent on 30 October 1998 on the grounds of operational requirements. The applicant's legal representative referred the dismissal for conciliation on 13 November 1998 and on 11 December 1998 the CCMA issued a certificate of outcome that the matter remained unresolved as at that date.
2. On 10 May 1999 (some 5 months later,) the applicant's attorney at the time requested from the CCMA that the matter be arbitrated pursuant to the provisions of section 191(5)(a) of the Act. This was despite the fact that the

commissioner described the dispute on the certificate of outcome as follows:

“Termination...operational requirement - (Labour Court)”.

3.The CCMA notified the applicant by telefax on 28 May 1999 that the matter should be referred to this Court on the grounds that the CCMA did not have jurisdiction to hear the matter.

4.On 8 June 1999, the applicant (now assisted by a trade union) referred the dispute to this Court for adjudication alleging that the reason for the dismissal is based on the employer’s operational requirements as provided for in section 191(5)(b)(ii) of the Act. The application is some 90 days late and the Court is requested to condone its late filing. The “*good cause*” relied upon by the applicant is that the applicant’s erstwhile attorneys were negligent in conducting the matter on behalf of the applicant.

5.The respondent opposes the referral of the matter to this Court on two grounds. **Firstly**, this Court has no jurisdiction to hear the matter. The respondent contends that having requested the CCMA to **arbitrate** his operational requirements dispute, and the CCMA having declined to do so, the applicant was obliged to follow the procedure provided for in section 191(6) to transfer the dispute to this Court. The applicant did not do so. **Secondly**, and in any event, no good cause has been shown for condonation to be granted since the referral of the dispute to this Court is very late (see section 191(11)(a) of the Act).

6.In dealing with the first objection relating to jurisdiction, the respondent relies on this Court’s decision in **Magubane & Others v Mintroad Sawmills (Pty) Ltd [1998] 2 BLLR 143 (LC) at 145A-H** where my learned colleague **Jali AJ** expressed the following view:

“Needless to say that it is possible that description which may be given by an employee of the nature of the dispute, might lead to a matter going to an incorrect forum when it should have been in another forum. However, the Act does not make provision for dealing with that eventuality in the event of the matter being in the one forum or the other. The relevant sections of the Act are section 191(6) and section 158(2). Section 158(2) deals with the situation where the matter was at the Labour Court when it ought to have been heard before the CCMA and section 191(6) deals with the situation where the matter is at the CCMA when it should have been at the Labour Court.

The section which concerns this particular case is section 191(6). What is apparent in both sections is that there is a set procedure for transferring the matter from one forum to the other. A party cannot, merely because he or she has decided that the matter should have been in the other forum just transfer the matter without following an appropriate procedure...”.

After describing section 191(6) of the Act, my learned colleague went on to say:

:This sub-section sets out the procedure a litigant has to follow if he wishes to take the matter with which the CCMA is seized to the Labour Court.

The procedure as set out in terms of the said sub-section is clearly that if the applicant felt that the reasons for the dismissal was because of operational requirements they should have moved an application with the director of the CCMA for the transfer of the matter to the Labour Court. This would have been an application which would have been appropriately considered in terms of section 191(6)(a). In the circumstances, it is clear that the applicants were obliged to follow this procedure if the applicants sought to take the matter away from the CCMA”.

7.Mr Gallie, who appeared for the respondent, argued that I should dismiss the application on the grounds that the procedure which my learned colleague in the Magubane matter had prescribed, was not followed, and that therefore I should dismiss the application on that ground alone.

8.I am however in respectful disagreement with the views expressed in the Magubane matter in relation to section 191(6) of the Act.

9.Section 191(5)(a)(i), (ii) and (iii) make it clear that a council or the CCMA must “*arbitrate*” a dismissal dispute (where conciliation failed or has not taken place 30 days after its referral) related to an employer’s conduct or capacity or where the reason is related to a constructive dismissal or where the reason for the dismissal is not known.

10.Section 191(6) provides that “*despite*” the fact that such disputes (referred to in section 191(5)(a)(i), (ii) and (iii) “*must*” be referred to arbitration, such disputes may nevertheless be adjudicated in this Court. This Court may however only adjudicate such disputes where the director has referred it to this Court upon application by any

party to the dispute and after considering the factors described in section 191(6)(a)-(e) of the Act.

11. In other words, section 191(6) of the Act applies only where a dispute (which is “*arbitrable*” i.e. a 191(5)(a)(i), (ii) or (iii) dispute, in the ordinary course by the council or the CCMA) is referred to this Court for adjudication upon application by any party to the dispute.
12. In my view, section 191(6) has nothing to do with an incorrect or wrong referral to a council or the CCMA. Such an incorrect or wrong referral (for example one concerning operational requirements) can in any event not confer jurisdiction upon the council of the CCMA).
13. Indeed, section 191(6) comes into operation only after a deliberate and intentional process involving an application (presumably in writing) by any party to the dispute which sets out the reason for the dismissal, whether there are any questions of law raised by the dispute, the complexity of the dispute, whether there are conflicting arbitration awards that need to be resolved, and the public interest. In fact, the director of the CCMA is required to consider not only those issues (referred to in section 191(6)(a)-(e), but in terms of section 191(7) the director is also required to give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations. In other words, section 191(6) read together with section 191(7) of the Act requires that the director give to all the parties to the dispute as well as the commissioner who attempted to conciliate the dispute, a gearing, albeit in an attenuated form on the basis of (written) representations. Indeed, section 191(8) of the Act requires that the director “must” notify the parties of the decision and then refer the dispute to either the CCMA or this Court for adjudication and moreover section 191(9) provides that the director’s decision is final and binding.
14. Most importantly, the section 191(6) procedure is only triggered by a party to a dispute in respect of which the CCMA has jurisdiction. The CCMA has no jurisdiction over operational requirements disputes unless jurisdiction is conferred by agreement in terms of section 141(1) of the Act.
15. In my view, where a party has referred a dispute based on operational requirements to arbitration and has done so wrongly, then such a party is not required by section 191(6) of the act to make application to the director to have the matter transferred to this Court as suggested in the Magubane matter. Indeed, in my view, there is nothing preventing a party who has referred a dispute (wrongly or erroneously) to arbitration from also referring the dispute to the Labour Court for adjudication in terms of section 191(5)(b) of the Act. (see

ZONDO AJP's remarks in NUMSA & Others v Driveline Technologies (Pty) Ltd & Another (2000) 2ILJ 142 (LAC)@ para 54). For example, where an employee does not know (or is uncertain) what the reason is for the dismissal, the employee may refer the matter to arbitration in terms of section 191(5)(a)(iii) of the Act and at the same time refers the dispute to this Court for adjudication alleging as a reason any one of the grounds referred to in (i)-(iv) set out in section 191(5)(b) of the Act. Where a matter is referred (wrongly or erroneously) to arbitration and it emerges during the arbitration proceedings that the true reason for the dismissal is not a reason provided for in section 191(5)(a)(i)-(iii), i.e. it was not an "arbitrable" ground, then the arbitrator may make an appropriate costs' order as provided for in section 138(10) of the Act. Similarly, section 158(2) of the Act provides that if at any stage after a dispute has been (wrongly or Erroneously) referred to this Court and it becomes apparent that the dispute ought to have been referred to arbitration, this Court may stay the proceedings and refer the dispute to arbitration with an appropriate costs' order, or with the consent of the parties (and if it is expedient to do so) continue to hear the matter with the Court sitting as an arbitrator. (See section 158(2)(a) and (b)).

There is clearly no correlation or connection between section 191(6) and section 158(2) of the Act as suggested in the Magubane matter.

16. Accordingly, in my view, the applicant did not have to follow the procedure provided for in section 191(6) in order to have this dispute adjudicated by this Court.

17. The respondent's objection to the matter being adjudicated by this Court on the grounds that it has been referred late, has merit however. It is common cause that the dispute was referred to this Court some 90 days late. The reason given by the applicant for referring the matter late is entirely unconvincing. Having regard to the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case, the application for condonation is dismissed. The old industrial court, the High Court and the Labour Appeal Court have often said that there is a limit to which a litigant can rely on the incompetence or negligence of a representative, In some cases the line must be drawn (see Mokoena v Naik [1997] 12 BLLR 1543 (LAC) at 1544I-J). In my view this is one of those cases in which the line must be drawn. The applicant in this case was not without blame. The applicant does not appear to be an illiterate or unformed lay-person. The applicant must have realised that the delay was excessive and he should have placed pressure on his erstwhile attorney to expedite the matter. Instead, the applicant took no action at all - until it was too late.

18. Accordingly, the Court's order is as follows:

18.1 The application is dismissed.

18.2 There is no order as to costs.

ARENDSE AJ