IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Reportable

Case No: PA 02/10

In the matter between:

NATIONAL COMMISSIONER, SAPS **First Appellant**

PROVINCIAL COMMISSIONER, SAPS **Second Appellant**

and

MBULELO EMMANUEL MFEKETO **Respondent**

Heard : **17 May 2011**

Delivered: **28 February 2012**

Summary : Labour Law – transitional provisions of the Labour Relations Act no 66 of 1995 – dispute arose before establishment of the Labour Court and bargaining council having jurisdiction – not prosecuted in terms of 1956 procedures – CCMA lacked jurisdiction as well as Labour Court – appeal dismissed.

JUDGMENT

MLAMBO JP and MOCUMIE AJA

[1] This is an appeal against the judgment of the Labour Court (Mthembu AJ) leave having been granted by this Court. The matter has a long history dating back to 1995 and I sketch this in what follows. As I will demonstrate, the

matter should have been laid to rest very early in its journey through the dispute resolution institutions and the Labour Court.

[2] The respondent whilst in exile was a member of the African National Congress (ANC) armed wing UMkhonto Wesizwe (Umkhonto). Upon the attainment of democracy, some members of Umkhonto, including respondent, were integrated into the South African Police Service (SAPS) in 1996. It is common cause that his colleagues, who, like him held the rank of Lieutenant in Umkhonto, were appointed as Commissioned Officers in SAPS. The respondent however, was appointed to the rank of Sergeant in the VIP Unit, Bisho during July 1996. This was after a criminal case that was pending against him was disposed of. It appears that even though the disparity in their appointments in SAPS was a concern to the respondent, he started making enquiries only in August 1998, alleging that he was being discriminated against.

[3] On 25 January 1999, in response to his persistent enquiries about the matter, he was advised that his appeal could not be considered due to insufficient documents. He was also advised that the Appeals Committee which would have entertained his matter was at that time no longer in existence and that he was to follow the procedures prescribed for the lodging of grievances and for applications for promotion. This is the same communication that was directed to the respondent in December 2000 in response to his further enquiries about his appointment. He continued with the enquiries until he was notified on 11 December 2001 by the second appellant confirming the rank he was placed in initially. In January 2002, he lodged a grievance regarding what he termed his non promotion. He subsequently referred a dispute to the Safety and Security Bargaining Council (SSBC) in East London which is the institution responsible for the resolution of disputes within the safety and security forces in terms of the Labour Relations Act (LRA)[1]. He characterised his dispute as a failure to promote him when his colleagues were promoted. It is unclear on what date the referral was made.

[1] Act no. 66 of 1995 as amended.

[4] It appears that, upon receipt of the dispute referral, the SSBC scheduled an *in limine* hearing on 28 March 2002 to determine if it had the necessary jurisdiction to entertain the dispute. That did not take place and arguments were made that the parties file representations on 3 and 10 April 2002 respectively. The Commissioner[2] appointed to determine the *in limine* point issued an award on 8 may 2002. She found that the SSBC lacked the necessary jurisdiction to entertain the dispute. She reasoned that the dispute arose on 25 July 1996, when the respondent was appointed to the rank of Sergeant. In view of this, the Commissioner found that as the SSBC had not been established at that time it lacked the necessary jurisdiction. This should have been the end of the matter as the award was neither taken on review nor set aside.

[5] Respondent however took further action. On 22 May 2002, he referred the same dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) but the dispute remained unresolved and an outcome certificate to that effect was issued on 28 June 2002. The respondent then referred his case to the Labour Court for an order directing the appellants to enlist him as a Captain, amongst others. On 18 October 2002, the Labour Court (Ngcamu AJ) granted the following order in the absence of the appellants:

> '1. The respondents are ordered to show cause on 01/11/2002 why an order should not be made in the following terms:
>
> 1.1 The applicant was discriminated against in not being enlisted as a Captain.
>
> 1.2 The applicant should not be given a rank of a Senior Superintendent.
>
> 2. The order should be served on both Respondents by hand or registered post. '

[6] On 31 October 2002, the appellants filed an answering affidavit in opposition to the confirmation of the aforesaid *rule nisi*. The matter came before Pakade AJ on 2 March 2004**.** He postponed it 'to a date still to be arranged with the

[2] The Commissioner is Mhlantla NZ, who has since been appointed to the Eastern Cape High Court and thereafter to the Supreme Court of Appeal.

Registrar.' For the next seven years, none of the parties took any action to prosecute the matter. On 19 May 2009, the matter came before Mthembu AJ for hearing and on that day, Mthembu AJ made an order, per agreement between the parties, in the following terms:

> '1. The matter is postponed sine die.
>
> 2. The respondents are ordered to apply for rescission of the order made by Mr Acting Justice Ngcamu in October 2002.'

[7] It is not clear if Mthembu AJ prepared a reasoned judgment as none was included in the record. It is this order that is on appeal before us. The appellants argue that the court *a quo* erred in granting the order; that the learned judge was misdirected in ordering that the appellants should bring an application for rescission within 30 days against the order of Ngcamu AJ; and that he erred by ordering that the matter be postponed and the appellants pay the costs of the proceedings. The basis of the appeal in essence is that the Labour Court did not have jurisdiction to deal with the matter.

[8] That is the issue we have to unravel. The SSBC reasoned as pointed out earlier that the dispute arose on 25 July 1996 and that as a result, it had no jurisdiction to entertain the dispute. The respondent then went next door, so to speak, to the CCMA, referring the same dispute. That referral is not in the record before us and as such, we are unaware as to when, in that referral, the respondent alleges the dispute arose. He however used the dispute resolution procedures contained in the LRA. Based on the reasoning of the SSBC, Commissioner took the view that the dispute arose in July 1996, we must consider the matter in terms of the transitional provisions of the LRA.

[9] Schedule 7 Part E of the LRA provides:

> *'*21. Disputes arising before commencement of this Act
>
> (1) Any dispute contemplated in the labour relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed.*'*

Clearly therefore, on the basis of the SSBC *in limine* ruling, the matter fell to be handled in terms of the pre 1996 LRA regime.

[10] The act applicable before the current regime is the Labour Relations Act 28 of 1956 (The 1956 LRA). In terms of that Act, disputes regarding unfair labour practices had to be referred either to an industrial council having jurisdiction or in the absence of such a council, an application for the establishment of a conciliation board had to be made. This had to happen no later than 180 days from the date when the act complained of arose. Section 27 A(1) of that Act provides:

> '**27A Settlement of Dispute by industrial council**
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> No dispute shall be referred to an industrial council-
>
> (i) unless, in the case of a dispute concerning an unfair labour practice, the reference is made within 180 days from the date on which the unfair labour practice has commenced or ceased, as the case may be, or such later date upon which the parties to the dispute may agree or which is fixed by the Director-General, on good cause shown for such late referral.'

Insofar as conciliation boards are concerned, the situation is regulated by Section 35(1)(d).[3]

[11] Clearly, in terms of section 27A (and/or section 35(1)(d)) of the 1956 LRA read with Schedule 7 of the current LRA, the respondent should have lodged his dispute within 180 days from the date of notification of his non-promotion i.e. 25 July 1996 to an industrial council having jurisdiction, in the absence of which he should have applied for the establishment of a conciliation board. This did not happen. That means that the matter should have ended there as no one had jurisdiction to deal with it afterwards, including the Labour Court. It is unclear on what basis the CCMA entertained the matter but on the record before us, it also had no jurisdiction over the matter. The reality is that by the time the respondent lodged his referral for the first time in 2002 with the

[3] 'No conciliation board shall be established – (i) unless, in the case of a dispute concerning unfair labour practice, the application is lodged within 180 days from the date on which the unfair labour practice has commenced or ceased, as the case may be, or such later date upon which the parties to the dispute may agree which is fixed by the Director-General, on food cause shown for the late lodging of such application' LRA Section 35(1)(d).

SSBC, his 180 days had long lapsed and he at no stage applied for condonation for that late referral. My view is based on the SSBC *in limine* award, which has not been challenged or overturned as pointed out earlier.

[12] Counsel for the respondent argued that the legislature could not have intended such dire consequences such as to close the door in this manner on litigants such as the respondent to access the court in order to pursue his claim. He sought an indulgence to submit further heads of argument to advance his point that the mere fact that the SSBC did not have jurisdiction to adjudicate this matter did not bar the Labour Court or this Court from hearing the matter. The indulgence was granted. Counsel has however not taken the matter any further.

[13] Assuming that the respondent is correct that the dispute arose on 11 December 2001 when he received confirmation of his rank, he still has an insurmountable hurdle. At that time, the SSBC was in existence and it is the bargaining council that has jurisdiction over the matter. Conciliation is a jurisdiction pre-condition for a dispute to be entertained by the Labour Court in terms of the LRA. This dispute failed in the SSBC, which has jurisdiction but went through the CCMA, which had none. Clearly the Labour Court on this basis lacked jurisdiction to deal with the matter. The appeal is clearly a non starter and it is unfortunate that the matter has travelled this far.

[14] The last aspect relates to costs. In considering whether to grant costs I'm guided by the provisions of section 162(1) of the LRA to the effect: '(1) The Labour Court may make an order for the payment of costs, according to the requirements of law and fairness.' In terms of this section, costs in the Labour Court do not always and automatically follow the result. (See *Callguard Security Services (Pty) Ltd v Transport and General Workers Union and Others,*[4] where the court stated that: 'costs in this court do not automatically follow the results because of the provisions of section 162 of the LRA.'[5]

[4] (1997)18 ILJ 380 (LC).See also *SAMWU and Another v SA Local Government Association* ,unreported judgment case number C229/07 and *City of Cape Town v SAMWU* [2008] 7 BLLR 618 (LC) also reported as [2008] JOL 21770 (LC).

I am satisfied that both parties could have done more within their means to expedite the finalisation of this matter. Whatever delays referred to in this judgment are equally attributable to both parties. In other words it is only fair that each party bear its own costs.

[15] Consequently, I make the following order:

15.1 The appeal is upheld.

15.2 The order of the Labour court dated 19 May 2009 is set aside.

15.3 The order of the Labour court dated 18 October 2002 is set aside and substituted with the following:

‘1. The matter is struck off the roll.

2. There is no order as to costs.’

15.4 Each party to pay their own costs.

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MLAMBO JP and MOCUMIE AJA

Sandi AJA concurs in the judgment of Mlambo JP and Mocumie AJA

APPEARANCES:

FOR THE APPELLANT:	Advocate Ngcamane Instructed by State Attorney, Port Elizabeth
FOR THE RESPONDENT:	Advocate DC Mpofu Instructed by Mzwai Mqanto & Associate, Port Elizabeth