REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA 54/13

In the matter between:

SATAWU obo MEMBERS	**Appellant**
and	
SOUTH AFRICAN AIRWAYS (PTY) LTD	**First Respondent**
MXOLISI GONIWE	**Second Respondent**
SIPHO CHISI	**Third Respondent**
MMABATHO PHAGE	**Fourth Respondent**

Heard: **30 May 2014**

Delivered: **14 August 2014**

Summary: Condonation for the late filing of the statement of claim in respect of claim in terms of the Employment Equity Act, 55 of 1998 (EEA). Appellant filing statement of claim after CCMA ruling that it lacked jurisdiction. Appellant contending that the 90 day period to refer dispute for adjudication starts from the date when the jurisdictional ruling was issued. Appellant further contending that section 10 of EEA not prescribing a time period for referral. Requirements that after failed conciliation dispute must be referred for adjudication within the 90 day period restated and confirmed previous decision of this court that the reasonable period for bringing a claim in terms

of the EEA was 90 days. However, explanation for the delay, given the circumstances, is reasonable- as regards the prospects, the issue in dispute relating to unfair discrimination- the employer bears the onus to prove the fairness of the discrimination- in casu, employment equity policy document important-in absence of cannot conclude at condonation stage that the claim does not have good prospects-condonation granted.

CORAM: Tlaletsi DJP, Coppin et Sutherland AJJA

JUDGMENT

TLALETSI DJP

Introduction

[1] This appeal is against the judgment and order of the Labour Court (Lagrange J) concerning the appellant's application for condonation for the late filing of its statement of case. The application was opposed by the first respondent, South African Airways and was dismissed with no order as to costs. The appeal is with leave of the Labour Court.

Factual Background

[2] What follows is a brief background of the facts pertinent to the determination of the appeal. The appellant, a registered trade union, referred a dispute of unfair discrimination to the Commission for Conciliation, Mediation and Arbitration. ("the CCMA"). The dispute could not be resolved through conciliation and a certificate to that effect was issued on 14 November 2011. In addition, the appellant's referral of the dispute was dismissed by the same conciliating commissioner due to no appearance on the part of the appellant. However, soon thereafter, the appellant successfully instituted rescission proceedings against the dismissal of the referral.

[3] The appellant requested the CCMA to arbitrate the dispute and the arbitration was set down for 12 March 2012. All the parties attended the arbitration. The

commissioner ruled that the CCMA lacked jurisdiction to arbitrate the dispute since it related to an alleged unfair discrimination.

[4] The appellant filed its statement of claim in the Labour Court on 12 June 2012. The reasons given by the appellant why the statement of claim was only filed on this date was that it was due to the internal processes that had to be followed at the appellant before a decision could be taken to institute proceedings in the Labour Court through the attorneys. The explanation, in brief was that the shop steward, who was handling this matter, referred it to the Kempton Park local office on 30 April 2012. From there the matter was referred to the Provincial Office, which, in turn, had to refer it to the appellant's Head Office after following certain procedures. The attorneys were only instructed to act on 24 May 2012. The first consultation with the attorneys was held on 25 May 2012. The subsequent consultation between the attorney and the affected employees was held on 6 June 2012. Another consultation was held with the appellant's President on 11 June 2012 where all the required information was finalised for the statement of claim to be filed the following day on 12 June 2012.

[5] In the statement of claim, the appellant contended that its members were unfairly discriminated against by the first respondent in that:

5.1 The first respondent has an Employment Equity Policy which has been in operation since 1 October 2011. The policy deals, *inter alia*, with recruitment and selection procedures in implementing employment equity when a position is available within the first respondent;

5.1.1 the positions must first be advertised internally;

5.1.2 no unfair discrimination processes and assessment methods will be employed in the selection and recruitment;

5.1.3 every vacancy that becomes available must aspire towards achieving Affirmative Action goals and those persons who fall within such category will be afforded first consideration and steps must be taken for promotions and Affirmative Action campaigns;

5.1.4 the first respondent should take steps to attract suitable Affirmative Action candidates for promotion;

5.1.5 in the event that no suitable Affirmative Action candidate is available within the organisation, the first respondent may recruit a suitable external Affirmative Action candidate;

5.2 The first respondent advertised three vacant positions of Human Resource Business Partner (HRBP) internally on 27 June 2011.

5.3 All three employees, who possessed the required qualifications and experience, applied for these positions.

5.4 None of the three employees were shortlisted, or called to attend the interviews, despite meeting the requirements.

5.5 Despite requesting reasons from the first respondent for its failure to shortlist and or interview the employees, the first respondent failed to comply with the request.

5.5 The first respondent, acting contrary to the policies, appointed the second to the fourth respondents, who were not recruited from within the organisation.

5.6 The first respondent discriminated against the employees unfairly, in contravention of Section 6(1) of the Employment Equity Act[1], by, in addition, to overlooking the internal candidates and not complying with its policies, employing two males and only one female, thereby discriminating against all three employees who are all females.

[6] The application for condonation is opposed by the respondents. In the answering affidavit, it was averred on behalf of the respondents that the employees did not meet the requirements of the selection for the posts. The requirements for the posts were fully set out in the advertisements for the posts. It is further averred that the employees did not meet the first respondent's strategic and operational requirements and that the contention

[1] Act 55 of 1998.

by the employees that the first respondent acted in breach of its Employment Equity Policy in not appointing them is patently incorrect and based on an improper interpretation of that policy.

Judgment of the Court *a quo*

[7] The Labour Court heard the matter on 12 December 2012 and granted the order, dismissing the condonation application, on 18 December 2012. The reasons for the order were furnished subsequent to the order. In its reasons the Labour Court made the following remarks and findings:

7.1 Since the dispute was unsuccessfully conciliated on 14 November 2011, the appellants ought to have filed the statement of case on 12 February 2012. The referral was therefore four months late, the effect thereof being that the appellants took seven months after the unsuccessful conciliation to formulate and file their claim.

7.2 The delay of this magnitude is excessive and strong justification would be required to permit the matter to proceed in spite of it.

7.3 The condonation application was only filed some five months after the statement of case, which in itself ought to have been explained, as condonation applications should be filed as soon as possible.

7.4 The principal explanation for the delay is that the matter was initially referred to arbitration and the commissioner ruled that the CCMA had no jurisdiction. The shop steward representing the individual employees was under the impression that the 90 day period, within which the matter had to be referred to court, only began when the jurisdictional ruling was made. It is not explained why the union officials in question did not concern themselves with the applicable statutory limits.

7.5 The justification for the delay is weak since the appellants rely entirely on the ignorance of a shop steward who was not the only person dealing with the matter.

7.6 Failure by the first respondent to comply with its policy, requiring it to appoint any suitably qualified internal candidate before external candidates were considered, does not amount to unfair discrimination on one of the grounds identified in sec 6(1) of the EEA.

7.7 In so far as the appellants seek to positively enforce their rights to promotion in compliance with the employer's Affirmative Action Policies, it is now well established that the remedy for compelling compliance with employment equity policies is not to be found in a claim of unfair discrimination under sec 6(1) of the EEA.

7.8 On the face of it, a claim of unfair discrimination based on sex might have some moment and is a claim that the court can adjudicate under sec 6(1) of the EEA, however on the available evidence, there does not appear to be *prima facie* prospects of success in this regard, because one of the three successful candidates was a female and, as a result, it does not appear that the first respondent was only appointing male candidates.

7.9 In general, the Court was not persuaded that the appellants had established any basis for believing that they had some prospects of success with the claim.

7.10 Claims of unfair discrimination are not to be lightly brushed aside, but that does not mean that every claim must be entertained no matter how slender the factual basis of the grounds advanced.

7.11 The claim does not raise any novel issue in the jurisprudence of unfair discrimination.

[8] The Labour Court concluded thus:

> 'Given the relatively long delay and an inadequate explanation therefor, coupled with what appeared to be slim prospects of success and a lack of any special features of this case which would make adjudication desirable, I am

satisfied that the matter should not be allowed to proceed and condonation should not be granted.'

The Appeal

[9] In this Court, the appellant contended that sec 10 of EEA does not prescribe a time period and that, accordingly, referrals of such claims to the Labour Court are to be made within a reasonable time. Counsel submitted that since there is no prescribed time period it was not necessary for the appellant to apply for condonation. The appellant relied on the judgment of *Masango v Liberty Group Limited*[2] and *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*[3] as authority for its submissions.

[10] It is in my view appropriate to dispose of this contention at this stage before considering other contentions made on behalf of the appellant. This issue has been authoritatively decided by this Court in *NEHAWU obo Mofokeng and Others v Charlotte Theron Childrens Home*.[4] In that case, this Court had to determine a point *in limine* in which it was contended that the dispute, relating to an alleged unfair labour practice based on discrimination, was required to have been referred to the Labour Court for adjudication within 90 days from the date of the issue of the CCMA outcome certificate, but was referred way out of that period and that, therefore, the Labour Court did not have jurisdiction to determine that dispute. In rejecting the contention that the 90 day period does not apply and that the dispute must be referred within a reasonable time, this Court held that:

'However, as Ms Da Costa, who appeared on behalf of the respondent submitted, section 10(6) of the Equity Act provides:

"If the dispute remains unresolved after conciliation –

(a) any party to that dispute may refer it to the Labour Court for adjudication; or

[2] (2012) 3 BLLR 3003 (LC).
[3] (2009) 30 ILJ 403(LC).
[4] [2004] 10 BLLR 979 (LAC).

> (b) all the parties to the dispute may consent to arbitration of the dispute."
>
> Reading section 10(6) and 10(7) of the Equity Act together, it would appear that the Equity Act must be read together with the applicable provisions of the 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 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 Equity Act.'[5]

[11] The legal principle established by this Court in *NEHAWU obo Mofokeng* is that the 90 day time limit set by the LRA, applies to referrals of disputes to the Labour Court under the EEA. Therefore, the Labour Court's findings in the *Masango* matter referred to above that- : "*The respondent's point in limine stands to be dismissed since it was raised on the basis that the referral should have been made within 90 days from the date when conciliation had failed in terms of section 191(11)(a) of the LRA. Section 191(11)(a) of the LRA is not applicable. There is no time limit either in the applicable sections in the LRA or the EEA within which an unfair discrimination dispute to this Court must be referred within a reasonable period"*- is against the binding authority of this Court and consequently does not represent the correct legal position.

[12] The appellant further relied on remarks made in the *Vorster* judgment to the effect that:

> 'There is no provision in the LRA which prescribes the time period within which a referring party must refer her statement of claim to the Labour Court once the Commissioner at arbitration rules that it does not have jurisdiction to adjudicate the dispute and that the dispute must be referred to the Labour Court. Where in the past this Court had to consider what would constitute a

[5] At para 19.

reasonable time within which a party to a dispute must perform a procedural step, the Court had regard to comparable provisions in the LRA where time periods have in fact been prescribed for a similar or comparable procedural step. The most pertinent example is where the Court had to determine what a reasonable time period would be within which to file a review application in the context of section 158(1)(g) of the LRA. With reference to section 145 review applications where a time limit of 6 weeks has been prescribed by the legislature within which to file a review application, the Court has concluded that a reasonable time within which to file a section 158(1)(g) review application is interpreted to mean 6 weeks.'

[13] The difficulty I have with the above remarks is that it cannot be expected of the legislature to make provision for a time period within which a party may refer a dispute to the Labour Court for adjudication after a ruling by the CCMA that it lacks jurisdiction in arbitration proceedings, since a referral to arbitration where arbitration is not required by the LRA is, in itself, an irregular step. What the law prescribes is that a party, after conciliation has failed, should proceed directly to the Labour Court for adjudication of the dispute. Therefore, the Labour Court should have reckoned the time period from the conciliation stage to the day of the filing of the Statement of Claim. This is the correct approach, according to what was held in *NEHAWU obo Mofokeng*. It may have been that the decision was not brought to the attention of the court in both the *Masango* and *Vorster* matters, because no reference was made to it in those matters. Any departure from the decision in *NEHAWU obo Mofokeng* could only have been on the basis that it was distinguishable from the facts of the case under consideration, otherwise the decision was binding on the Labour Court. The appellant's arguments to the contrary should therefore fail. The 90 day period applied.

[14] The next consideration is the period of delay. The 90 day period should be calculated from 14 November 2011 which is the day on which the certificate of outcome of the conciliation proceedings was issued. The period expired on 14 February 2012. Since the statement of case was only filed on 12 June 2012, the appellant was out of time by about four months.

[15] The Labour Court has discretion to condone the late filing of any document or late referral of any dispute to the court.[6] A party seeking condonation for the late referral of a dispute must show good cause for the discretion to be exercised in its favour. The correct approach in determining whether good cause has been shown was laid down in *Melane v Santam Insurance Co. Ltd:*[7]

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerges from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases."[8]

[16] The uncontested explanation for the delay is that most of the period of the delay was taken up by the referral to arbitration. The remainder of the period was caused by the internal processes within the appellant in taking a decision to proceed with the claim and instructing attorneys accordingly. Although the period is lengthy, it has been, in my view, adequately explained and it would be unfair to punish the individual employees for a process they did not have direct control. Furthermore, the condonation application was filed two days after the filing of the statement of case. The mistake made in the court *a quo* that it was filed after five months, has been acknowledged by that court in its judgment on the application for leave to appeal.

[6] Section 158(1)(f) of the LRA.
[7] 1962(4) SA 531 (AD).
[8] At 532C-F.

[17] I am in agreement with the Court *a quo*'s remark that claims of unfair discrimination are not to be lightly brushed aside and that by that it does not mean that every claim must be entertained no matter how slender the factual basis of the grounds advanced. It is however also important to note that the appellant is seeking to assert its members' rights in terms of the EEA. The purpose of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.

[18] Section 3 of the EEA decrees that the Act must be interpreted:

> *(a) "in compliance with the Constitution;*
>
> *(b) so as to give effect to its purpose;*
>
> *(c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and*
>
> *(d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation."*

[19] It must be borne in mind that the EEA enjoins every employer to take steps to promote equal opportunity in the workplace by *inter alia*, eliminating unfair discrimination in any employment policy or practice.[9] Section 6(1) lists instances that are regarded as prohibited grounds for discrimination. Gender and sex are included in that list. An employee who complains of unfair discrimination in terms of the EEA is only required to "allege" unfair discrimination and the employer against whom the allegation is made must prove that it is fair.

[20] The appellant's claims of unfair discrimination are not well articulated in the statement of claim. However, in light of the fact that the burden of proof is on

[9] Section 5 provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

the employer to establish fairness, one should be loath to shut the door for the employees in cases of this nature. It may be a good consideration that a female candidate has been employed or that some of the candidates who were shortlisted for the positions were female. However, it does not necessarily mean that the first respondent did not unfairly discriminate against the individual employees by employing one female candidate together with male candidates. This is an issue that can properly be determined in due course when all the facts are placed before court and not in an application for condonation.

[21] The other concern I have in this matter is that the Employment Equity Policy refers to other documents such as an Employment Equity Plan. The latter document is supposed to contain all objectives, action plans, target dates and responsibilities necessarily required in implementing Employment Equity. Such a document is not attached and one does not know what information is contained in it and, importantly, whether it has been complied with. Such issues can only be resolved when the matter is fully ventilated with all information placed before court.

[22] In my view, the *ipse dixit* of the first respondent that it has acted in accordance with the Employment Equity Policy is not sufficient for one to conclude that it has done so. More factual basis was required from the respondent to show how it has complied with the Employment Equity Policy and other related policies and plans since it carries the *onus* to do so. It is only a Court trying the issue that will have an opportunity to consider all these matters.

[23] In conclusion, I am of the view that the reason for the delay has been satisfactorily explained; that the appellant had throughout the process desired to have the dispute adjudicated to finality; that the subject–matter of the dispute is substantial and of importance to the appellant and its members; and that the appellant has made out a case with some prospects of success. For the reasons outlined above, I am of the view that the condonation for the late filing of the Statement of Case should have been granted and the matter

allowed to run its normal cause. This is a matter that each party must carry its costs on appeal.

[24] In the result, the following order is made:

a) The appeal is upheld and the order of the Labour Court made on 18 December 2012 is altered to read:

'a) The applicant's condonation application for the late referral of the Statement of Claim is granted.'

b) Each party is to carry its own costs.

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Tlaletsi DJP

Deputy Judge President of the Labour Appeal Court

Coppin and Sutherland AJJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT: Adv Memani

Instructed by Mabaso Attorneys

FOR THE RESPONDENTS: Adv T. Manchu

Instructed by Poswa Incorporated