INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 56/13

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

OBO K I MANENTZA **Appellant**

and

NGWATHE LOCAL MUNICIPALITY **First Respondent**

VIOLET PHATSOANE *N.O* **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Third Respondent**

Heard: **06 November 2014**

Delivered: **24 June 2015**

Summary: Review of jurisdictional ruling – interpretation of section 191(5) of the LRA - employee referring dispute to the bargaining council for conciliation – conciliation unresolved and the 30 day period and the agreed extension period lapsing – employee not referring dispute to arbitration within the 90 day

period after the lapse of the abovementioned period– commissioner assuming jurisdiction – Labour Court setting aside arbitration award on the basis that bargaining council not having jurisdiction without an application for condonation for the late referral. Appeal – employee contending that a proper interpretation of section 191(5) read with section 135 and 136 of the LRA giving dismissed employee an election to refer the dispute to arbitration or adjudication on the lapse of the period of 30 days as contemplated in the subsection, or await the the issue of a certificate of outcome – employee contending that the issuance of the certificate of outcome a pre-requisite to referral of dispute to arbitration or adjudication - jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal or unfair labour practice dispute not conditional upon the issue of a certificate of outcome – employee's right of referral to arbitration accruing on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral and the dispute remaining unresolved. Sections 135 and 136 serving different purpose and having no application to the resolution of unfair dismissal and unfair labour practice dispute under the LRA –

Time period for referral to arbitration not provided for in section 191(5)(a) – employee expected to refer within a reasonable time – reasonable time within the context of the LRA is 90 days as contemplated by sections 191(11) and 136(1)(b) of the LRA. Employee ought to have referred his unfair dismissal dispute to the bargaining council for arbitration within 90 days from the lapse of the 30 day period contemplated in s191(5) of the LRA or such extended period agreed upon by the parties - bargaining council not having jurisdiction - Appeal dismissed.

Coram: Waglay JP, Dlodlo AJA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This matter concerns an appeal and cross-appeal against the judgment of the Labour Court (Cele J) in which it reviewed and set aside the jurisdictional ruling of the second respondent ("the arbitrator"), made under the auspices of the South African Local Government Bargaining Council ("the Bargaining Council"), on the basis that the Bargaining Council lacked jurisdiction to arbitrate the dispute because the referral was made outside the time period specified in s191(5) of the Labour Relations Act, 66 of 1995 ("the LRA"), and the appellant failed to apply for condonation.

[2] The appellant was employed as a casual worker by the Ngwathe Local Municipality ("the Municipality") from June 2001, and was paid R50 per day. He was called to render services as and when required by the Municipality. On 11 March 2002, the Ngwathe Municipal Council ("the Council") resolved that the position of Clerical Assistant: Clearance Certificate & Debt Collection is filled. On 27 March 2002, the Municipality advertised the position as a "staff vacancy". The advertisement was signed by the Municipal Manager, Mr SK Khota ("the Municipal Manager"). It did not identify the grade of employment or the salary that the successful incumbent would receive, but it did indicate that the salary would be negotiated with the successful candidate on an individual basis.

[3] The appellant applied for the position on 11 June 2002. He was interviewed by the Municipal Manager and, on 19 August 2002, the Council resolved to employ the appellant "Mr K I Manentza (temporary worker)" into the position of Clerical Worker Parys in the Finance Department. On 20 August 2002, the Municipal Manager issued a letter of appointment to the appellant. The appellant signed acceptance of the letter on 23 August 2002, and was appointed, on probation, for a period of six months on the R34 639 notch of the salary scale (job level 13/11). The period of termination was one month. The probation period was to commence on 1 September 2002. The Municipal Manager was expressly authorised to conclude the contract pursuant to the Council resolution of the previous day.

[4] On 18 September 2002, the Municipal Manager issued another letter of appointment dated 20 September 2002 to the appellant. This letter of

appointment replaced or substituted the previous letter of 20 August 2002. Once again, the letter recorded that the probation period would commence on 1 September 2002, but that the appellant would be employed on the R69 977 notch of the salary scale (unevaluated job level 7). The appellant accepted the revised offer on 19 September 2002. Importantly, the appellant was advised in the letter that the post level at which he had been appointed, had yet to be evaluated and that, if the evaluation required a change upwards or downwards, the appellant would be obliged to accept this condition.

[5] On 30 October 2002, the appellant was informed by the Director: Administration that the Council had resolved that he will be appointed at job level 13/11 (in terms of the first offer). The resolution attached to another letter of appointment dated, 20 August 2002, had a space for the appellant to accept acknowledgement of the appointment and the letter. The appellant also received a salary advice on 25 October 2002 indicating that his salary would be reduced to R34 639.00 (as per the first letter of appointment).

[6] It is common cause that the appellant had, at this time, been actually rendering services to the Municipality. The appellant was short-paid on the lower level and, as a result, referred a dispute concerning unilateral changes to his conditions of employment to the Bargaining Council on 8 November 2002. The chronology thereafter shows that the Municipal Manager had acted irregularly when he replaced the first offer. The appellant maintained the view that the Municipality was bound by the second offer. The Municipality, in turn, took the view that the second offer was null and void, but never questioned the validity of the first contract.

[7] On 11 December 2002, the Municipality addressed another letter to the appellant indicating that the second letter, dated 18 September 2002, which substituted the letter of appointment, dated 20 August 2002, was null and void. The appellant was given seven days to indicate his acceptance of the first letter of appointment, failing which it would be assumed that *"you do not accept your appointment as Clerical Assistant (Clearance Certificates and Debt Collections) at job Level 13/11 and therefore we will be left with no alternative but to terminate your employment with the Council".*

[8] The Municipality, thereafter, changed stance. It took the view that the position to which the appellant was appointed was not on its organogram, and it prepared another revised letter of appointment, dated 17 December 2002. It adopted this approach even though it had expressly resolved, on 19 August 2002, to approve the appointment of the appellant. In terms of the revised letter, the appellant was to be appointed from 1 September 2002 on *"the R37 718 notch of the salary scale "job level 12/12)"* (two levels higher than the original, but obviously lower than the second appointment grade). The appellant maintained that the second letter of appointment was valid.

[9] On 24 December 2002, the Municipality wrote another letter to the appellant indicating to him that his appointment at job level 7 was invalid, and informing him that if he did not accept the new revised letter, he would not be allowed to tender his services and would be left without any contract of employment with the Municipality. The appellant signed the revised offer, on 30 December 2002, but annotated it with the words "*sign without prejudice of right*".

[10] The Municipality appeared to have wrongly taken this to be a counter offer, and did not accept the annotation. It wrote to the appellant on 30 December 2002, indicating that his acceptance "without prejudice of right" was not accepted, and that if he did not sign the letter, dated 17 December 2002, without qualification, he would be left without a contract of employment from 7 January 2003.

[11] This led to a stand-off between the parties. The employee refused to back down from his reservation of rights, whilst the Municipality insisted on it. This then led to the letter dated 10 January 2003 in which, the Director: Administration informed the appellant that because he had not signed the revised letter of appointment, he was deemed to have rejected his appointment in terms of the Council resolution of 19 August 2002. The letter ended by thanking the appellant for his services.

[12] The appellant treated this as a dismissal and, on 10 February 2003, referred a dispute for conciliation to the Bargaining Council. He alleged that he had been unfairly dismissed, and sought reinstatement. The referral to the Bargaining

Council was made within the 30 day time limit for the referral of an unfair dismissal dispute in terms of s191(1)(b)(i) of the LRA. The conciliation was set down on 3 April 2004. It was extended for a period of seven days. An agreement was signed recording this extension. The agreement indicated that depending on the outcome of the Municipality's consultation with its principals, *"the Bargaining Council will be approached for issuing the certificate of outcome".* After the lapse of seven days, the appellant requested the Bargaining Council to issue a certificate of outcome. However, instead of issuing a certificate of outcome, the Bargaining Council erroneously enrolled the matter for arbitration on 1 December 2003. A certificate of outcome was issued on 15 April 2004.

[13] On 24 June 2004, the appellant referred the dispute to arbitration. The arbitration was set down for hearing on 29 July 2004. During the arbitration hearing, the Municipality accepted that, at all material times before the termination letter, the appellant had in fact been rendering services to the Municipality. The Municipality raised three points *in limine* at the arbitration in which it contended that:

(a) The Bargaining Council lacked jurisdiction to arbitrate the dispute because the referral to arbitration was late (as a result of the late issue of the certificate of outcome).

(b) The appellant was not dismissed.

(c) The appellant sought a declaratory order in a contractual dispute between the parties, which the Bargaining Council had no jurisdiction to arbitrate.

[14] The arbitrator found that there was no need to apply for condonation as the certificate of outcome was issued on 15 April 2004, and the referral was made within 90 days of the date of issue of the certificate of outcome. The arbitrator relied on *Sappi Timber Industries (Pty) Ltd t/a Boskor Sawmills v CCMA and Others,*[1] in which, the Labour Court held that the delay in issuing a certificate

[1] (2003) 24 ILJ 846 (LC).

of outcome did not result in its invalidity, and that if a party lost a right to arbitration or access to the Labour Court as a result of the delayed action of the CCMA, this would be inherently unjust. The arbitrator found that the Municipality did not question the validity of the certificate, and that the Bargaining Council could not, in any event, treat it as irregular on the basis of the judgment of this Court in *Fidelity Guards Holdings (Pty) Ltd v Epstein and Others (Fidelity Guards)*.[2]

[15] Having summarised the background facts which led to the various letters of appointment and the parties' respective arguments, the arbitrator found that it was common cause that the appellant was employed by the Municipality on 20 August 2002 as a Clerical Assistant. She also found that he had signed the second letter of appointment dated 18 September 2002. She then highlighted the text of the letter of 11 December 2002 in terms of which, the appellant was informed that if he did not accept the initial offer, the Municipality would be left with no alternative but to terminate his employment. She also drew attention to the fact that the appellant was advised in the letter dated 10 January 2003, that his services would not be required from Monday, 13 January 2003.

[16] The arbitrator found that the appellant had in fact been rendering services to the Municipality from 20 August 2002, and that his services came to an abrupt end on 10 January 2003. She found that the contract of employment had commenced on 20 August 2002 and that the Municipality terminated the contract on 10 January 2003. She indicated that even if the letters of appointment were invalid, the appellant had been employed on a temporary basis prior to his appointment in terms of these letters and was, therefore, entitled, as a temporary worker, to protection under the LRA. She, accordingly, found that there was an employment relationship between the appellant and the Municipality and that the Municipality had dismissed him.

[17] She rejected the contention that the appellant was shut out or locked out, and instead found that there was a dismissal, and that the Municipality was required to prove the fairness of the dismissal at the arbitration. In respect of the third point *in limine,* she indicated that the dispute was not about

[2] (2000) 21 ILJ 2282 (LAC) at para 12.

declaratory relief in a contractual matter, but that it concerned a dismissal and its fairness. She accordingly found that the Bargaining Council had jurisdiction to determine the fairness of the dismissal.

[18] In the review application, the Municipality attacked all three findings of the arbitrator. The Labour Court, however, only dealt with the first issue and found that the referral to arbitration was out of time. It reasoned as follows:

> 'Section 191(5) of the LRA provides that if the council has certified that the dispute remains unresolved or if 30 days have expired since the council received a referral, and the dispute remains unresolved, the council must arbitrate the dispute at the request of the employee, if certain identified conditions are met. Section 191(11) (a) of the LRA prescribes a maximum period of 90 days within which a dispute must be referred to arbitration after conciliation failed to resolve it. If good cause is shown to exist where a referral is made after the expiry of the 90 days, in my view, the council may grant condonation just as this Court is specifically empowered by section 191(11)(b) to grant condonation. To hold otherwise would result in an absurdity on the face of a clearly prescribed maximum period within which a referral ought to be made to the council. Holding otherwise would render the prescribed period of 90 days nugatory. After 30 days since the council received a referral but before the lapse of 90 days, Mr Manentza was at liberty to refer the dispute for arbitration, see *Cappwawu and Others v R & B Timbers CC t/a Harding Treated Timbers.* He did not. Nor did he apply for condonation for such lateness. His unexplained inactivity must have fatal consequences for his case.
>
> …
>
> I am consequently persuaded by the submission of the [Municipality] in holding that the [Bargaining Council] and therefore the [arbitrator] had no jurisdiction to arbitrate a dispute in this matter in the absence of a condonation application, where the period of the delay in referring the dispute was in the region of 9 months.' [Footnote omitted]

[20] The appellant appeals against the judgment of the Labour Court on the basis that the arbitrator was correct in finding that there was no need for the appellant to apply for condonation because the referral to arbitration was

within the 90 day time period from the date of the certificate of outcome. The Municipality cross-appeals against the failure of the Labour Court to pronounce upon the two remaining issues. In short, it is the appellant's case that the arbitrator was correct on both remaining issues: the appellant was clearly dismissed and the true nature of the dispute was a standard unfair dismissal dispute which the Bargaining Council had jurisdiction to arbitrate.

[21] The first ground of appeal relates to the question of whether the Bargaining Council had jurisdiction to arbitrate the dispute. In a jurisdictional challenge, the test on review is simply whether the Bargaining Council had jurisdiction, on the objective facts and on the law, to arbitrate the dispute.[3] Section 191[4] of

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[3] *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC).

[4] Section 191 of the LRA provides:

"(1)(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.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.

(4) The council or the Commission must attempt to resolve the dispute through conciliation.

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the council or the Commission must arbitrate the dispute at the request of the employee if –

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity unless paragraph (b)(ii) applies;
(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
(iii) the employee does not know the reason for the dismissal; or
(iv) the dispute concerns an unfair labour practice; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is−

(i) automatically unfair;
(ii) based on the employer's operational requirements ;

the LRA sets out the regulatory framework for the resolution of unfair dismissal and unfair labour practice disputes. Section 191(1)(a) of the LRA provides that a dispute about the fairness of a dismissal or a dispute about an unfair labour practice may be referred by the dismissed employee, or the employee alleging the unfair labour practice to a bargaining council if the parties to the dispute fall within the registered scope of the bargaining council, or to the CCMA if no bargaining council has jurisdiction. Section 191(1)(a) of the LRA, accordingly, confers jurisdiction on a bargaining council to resolve unfair dismissal or unfair labour practice disputes if the parties to the dispute fall within the registered scope of the bargaining council.

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

(5A) Despite any other provisions in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns –

(a) the dismissal of an employee for any reason relating to probation;

(b) any unfair labour practice relating to probation;

(c) any other dispute contemplated in subsection (5) (a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

(6) Despite subsection (5) (a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering –

(a) the reason for the dismissal;

(b) whether there are questions of law raised by the dispute;

(c) the complexity of the dispute;

(d) whether there are conflicting arbitration awards that need to be resolved;

(e) the public interest.

(7) When considering whether the dispute should be referred to the Labour Court, the director must give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations.

(8) The director must notify the parties of the decision and refer the dispute –

(a) to the Commission for arbitration; or

(b) to the Labour Court for adjudication.

(9) The director's decision is final and binding.

(10) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be.

(11) (a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commission has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that time frame on good cause shown.

(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

(13) (a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5) (b).'

[22] Section 191(4) of the LRA obliges the bargaining council or the CCMA to attempt to resolve the dispute through conciliation. Section 191(5)(a) obliges either the bargaining council or the CCMA, at the request of an employee alleging any of the circumstances listed in subsections (a)(i) to (iv), to arbitrate the dispute if the bargaining council or a commissioner of the CCMA has certified that the dispute remains unresolved, or if 30 days have expired since the bargaining council or the CCMA received the referral, and the dispute remains unresolved. Section 191(5)(a) of the LRA provides:

> 'If a council or a commissioner has certified that the dispute remains unresolved or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved−
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if−
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies;
>
> (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
>
> (iii) the employee does not know the reason for dismissal; or
>
> (iv) the dispute concerns an unfair labour practice; or
>
> (b) …'

[23] The jurisdictional question in this appeal turns on the interpretation of s191(5) of the LRA. The appellant contends for a disjunctive interpretation of s191(5) by virtue of the presence of the conjunctive "or" in the subsection. The appellant submits that read disjunctively, s191(5) of the LRA gives the

employee an election or choice to speed up the process by referring the dispute to arbitration after the expiry of the 30 day period, contemplated in the subsection, or wait for conciliation to take place and for a certificate to be issued. It relies in support of this interpretation of s191(5) of the LRA on the decision of *Fidelity Guards* in which this Court held as follows in relation to the operation of s191(5) of the LRA:

> 'It will be clear from the provisions of ss(1) to (5) of sec 191 above that, when there is a dispute about the fairness of a dismissal, a certain process may be followed which ultimately leads to the resolution of such dispute either by way of arbitration or by way of adjudication. The first step in that process is the referral of the dispute to a council or the CCMA for conciliation. The second is that the applicant must satisfy the CCMA or the council that a copy of the referral has been served on the other party to the dispute. Subject to sec 191(5) the third step is that the council or the CCMA must attempt to resolve the dispute through conciliation. In terms of sec 191(5) the commissioner must then issue a certificate of outcome to the effect that the dispute remains unresolved or a period of 30 days must expire after the council or the CCMA received the referral. Thereafter comes the arbitration of the dispute by the council or the CCMA or the adjudication of the dispute by the Labour Court, as the case may be. The dispute is required to be referred to either a council or the CCMA within 30 days of the date of dismissal. However, if it is not referred within that period, the council or the CCMA has power to permit a late referral on good cause shown.
>
> In my view the language employed by the legislature in sec 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and, the council or commissioner has issued a certificate in terms of sec 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of

outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate.'[5]

[24] The correctness of this interpretation, it argues, is also evident from the provisions of s191(5) which, it submits, foreshadows a pre-conciliation phase at which the parties could agree to extend the conciliation phase beyond the 30 day period (as has happened in this case). It finds support for this contention in the provisions of s135[6] of the LRA which makes provision for the resolution of disputes through conciliation by the CCMA.[7] Section 135(1)

[5] At paras 11 and12.

[6] Section 135 of the LRA provides:

'(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30 day period.

(3) The commissioner must determine a process to attempt to resolve the dispute, which may include –

(a) mediating the dispute;
(b) conducting a fact-finding exercise; and
(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

(3A) If a single commissioner has been appointed, in terms of subsection (1), in respect of more than one dispute involving the same parties, that commissioner may consolidate the conciliation proceedings so that all the disputes concerned may be dealt with in the same proceedings.
[Sub-s.(3A) inserted by s.8(a) of Act 127 of 1998]

(4) …
[Sub-s. (4) substituted by s.8(b) of Act 127 of 1998 and deleted by s. 26 of Act 12 of 2002]

(5) When conciliation has failed, or at the end of the 30 –day period or any further period agreed between the parties−

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;
(b) the Commission must serve a copy of the certificate on each party to the dispute or the person who represented a party in the conciliation proceedings;
(c) the commissioner must file the original of that certificate with the Commission.
[Sub-s. (5) amended by s. 36 (b) of Act 42 of 1996.]

(6) (a) If a dispute about a matter of mutual interest has been referred to the Commission and the parties to the dispute are engaged in an essential service then, despite subsection (1), the parties may consent within seven days of the date the Commission received the referral−

(i) to the appointment of a specific commissioner by the Commission to attempt to resolve the dispute through conciliation; and
(ii) to that commissioner's terms of reference.

(b) If the parties do not consent to either of those matters within the seven-day period, the Commission must as soon as possible−

(i) appoint a commissioner to attempt to resolve the dispute; and
(ii) determine the commissioner's terms of reference.'

[7] The provisions of sections 133 to 150, which are found in Chapter VII, Part C of the LRA apply to the resolution of disputes under the auspices of the CCMA. They also apply to accredited bargaining councils which have received accreditation from the Governing Body of the CCMA pursuant to s 127(6) of the LRA which provides:
'The terms of accreditation must state the extent to which the provisions of each section in Part C of this Chapter [reference to Chapter VII] apply to the accredited council or accredited agency.'

provides that when a dispute has been referred to the CCMA (or a bargaining council), the CCMA must appoint a commissioner to attempt to resolve it through conciliation. Section 135(2) of the LRA then provides that the commissioner appointed by the CCMA must attempt to resolve the dispute through conciliation within 30 days of the date the CCMA received the referral; however the parties may agree to extend the 30 day period. Section 135(5) of the LRA provides:

> 'When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties−
>
> (a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;
>
> (b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and
>
> (c) the commissioner must file the original of that certificate with the Commission.'

[25] The appellant submits that it is clear from the provisions of s135(5) of the LRA that the conciliation phase, if extended (in terms of s135(2) of the LRA), is brought to an end by the issuing of a certificate by the commissioner stating whether the dispute has been resolved. It argues that the commissioner appointed by the CCMA or a bargaining council to resolve the dispute is obliged in terms of s135(5)(a) of the LRA to issue a certificate of non-resolution when conciliation has failed, or at the end of the 30 day period or any further period agreed between the parties. It contends in this regard that, the provisions of s191(5) of the LRA foreshadow the possibility that the parties may have elected to extend the conciliation phase beyond the 30 day period and it, therefore, provides the employee with a choice not to refer the dispute to arbitration on the expiry of the 30 day period contemplated in s191(5) of the LRA, but to wait for conciliation to take place and for a certificate to be issued. This, it contends, calls for s191(5) to be read together with the provisions of

s136(1)(a) and (b)[8] of the LRA which provide that if the LRA requires a dispute to be resolved through arbitration, the CCMA must appoint a commissioner to arbitrate that dispute if: a commissioner has issued a certificate stating that the dispute remains unresolved; and within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. It points out that s136(1)(b) confers the CCMA with a discretion, on good cause shown, to condone a party's non-observance of that timeframe and allow a request for arbitration after the expiry of the 90-day period.

[26] In addition, the appellant contends that this election is also available in s191 (11) of the LRA which provides that the referral in terms of subsection (5)(b) of a dispute to the Labour Court for adjudication, must be made within 90 days after the bargaining council or (as the case may be) the commissioner of the CCMA has certified that the dispute remains unresolved. This election, it contends, is also evident from the provisions of s64(1)(a)(i) and (ii) of the LRA, which deal with the right to strike and the recourse to lock-out. Section 64 (1) provides:

> 'Every employee has the right to strike and every employer has recourse to lock-out if−
>
> (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –
>
> (i) a certificate stating that the dispute remains unresolved has been issued; or
>
> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; …'

[8] Section 136(1) of the LRA provides: 'If this Act requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate that dispute if−

(a) a commissioner has issued a certificate stating that the dispute remains unresolved; and

(b) within 90 days after the date on which that certificate was issued; any party to the dispute has requested that the dispute be resolved through arbitration. However, the Commission, on good cause shown, may condone a party's non-observance of the time-frame and allow a request for arbitration filed by the party after the expiry of the 90-day period.'

The contention thus advanced by the appellant is that these sections of the LRA make it abundantly clear that a referring party may wait for the issuing of a certificate of outcome before taking the next step and that, the Labour Court erred by not giving effect to the clear wording of the LRA.

[27] Accordingly, the appellant submits that it is clear from the text of s191(5) read in the context of the LRA as a whole, that an employee is entitled to wait for a certificate to be issued before referring a dispute to the CCMA because the 90 days as provided for in s136(1)(b) of the LRA, only starts running from the date on which the certificate of outcome is issued. It reiterates that the employee has a choice to speed up the process by referring the dispute to arbitration after the expiry of the 30 day period contemplated in s191(5) of the LRA, but is not obliged to do so. The purpose of s191(5) of the LRA, it points out, is to encourage the parties to attend conciliation in an effort to resolve the dispute and, although attendance is not compulsory, the Legislature seeks to encourage the parties to achieve consensus through a conciliation process. The appellant, accordingly, contends that the referral of this unfair dismissal dispute, by the appellant to arbitration was clearly within the stipulated time period as provided for in s136(1)(b) of the LRA and that the Labour Court erred in finding that the Bargaining Council had no jurisdiction to arbitrate the dispute because it had not sought condonation.

[28] I am unable to agree with the interpretation of s191(5) of the LRA which the appellant contends for. Although the presence of the conjunctive “or” in s191(5) of the LRA calls for a disjunctive reading of the provision, I disagree that it gives an employee an election to speed up the process by referring the dispute to arbitration on the expiry of the 30 day period contemplated in the subsection, or wait for conciliation to take place and for a certificate to be issued. On a proper interpretation, s191(5) of the LRA entitles an employee to refer an unresolved unfair dismissal or unfair labour practice dispute for arbitration to the CCMA or a bargaining council, in terms of subsection (a) thereof, or for adjudication to the Labour Court, in terms of subsection (b) thereof, upon the occurrence of either of two events: the issue of a certificate of non-resolution of the dispute or the expiry of the 30 day period from either

the CCMA's or the bargaining council's receipt of the referral. The effect of this interpretation is that the occurrence of either of these two events entitles an employee to request the bargaining council concerned or the CCMA to arbitrate the dispute in terms of s191(5)(a) of the LRA or to refer the dispute to the Labour Court for adjudication in terms of s191(5)(b) thereof.

[29] Section 191(5) of the LRA provides for the occurrence of either of the events: the issue of a certificate or expiry of 30 days from receipt of the referral as an objective fact which founds the employee's right to proceed to arbitration or adjudication. The employee's entitlement to refer the matter to arbitration or adjudication as contemplated in s191(5)(a) and (b) of the LRA respectively, does not arise from any election on the employee's part as contended for by the appellant, but rather from whichever of the two jurisdictional events occurs first in sequence of time. Thus, where conciliation takes place under the auspices of the CCMA or a bargaining council within the 30 day period contemplated in s191(5) of the LRA, and a certificate of non-resolution is issued within that period, the employee's right to refer the dispute to arbitration or adjudication will be triggered by the issue of the certificate as the jurisdictional event conferring this right. In this case, the subsequent expiry of the 30 day period will play no role in founding the employee's right to refer the dispute to arbitration or adjudication.

[30] Similarly, where the 30 day period contemplated in the subsection lapses without the holding of a conciliation proceeding and the CCMA or a bargaining council certifying that the dispute remains unresolved, the lapse of the 30 day period will form the jurisdictional trigger entitling the employee to refer the dispute to arbitration. This right, having accrued to the employee upon the lapse of the 30 day period contemplated in s191(5) of the LRA will not be affected by the convening of any subsequent conciliation proceedings or the issue of a certificate of outcome consequent thereupon. As correctly pointed out by the Municipality, in the latter scenario, the issue of the certificate would have no effect in law as it would be superfluous to the employee's right to refer the unfair dismissal or unfair labour practice dispute to arbitration since this right would have already accrued to the employee on the lapse of 30 days

from the date that the CCMA or the bargaining council had received the referral.

[31] The correctness of this interpretation is aptly illustrated in two judgments of this Court, namely *NUMSA v Driveline Technologies (Pty) Ltd and Another (Driveline Technologies*),[9] and *Premier of Gauteng and Another v Ramabulana NO and Others (Ramabulana).*[10] In *Driveline Technologies,* this Court held that:

> 'The [LRA] does contemplate that the Labour Court will have jurisdiction to adjudicate a dispute even when there has been no meaningful conciliation in respect of such a dispute. This is supported by the fact that section 191 (5) of the Act contemplates, among others, that a dispute may be referred to arbitration or adjudication if the dispute remains unresolved after a period of 30 days has lapsed since the council or the CCMA received the referral of such dispute for conciliation. Obviously, this provision was the product of past experience under the old Act.
>
> Under the old Act our experience taught us that, without a provision such as [section 191(5) of the LRA], there could be long delays in the conciliation of disputes. All an employer would need to do in order to frustrate the process if a meeting for conciliation was a *sine qua non* before a dispute could be adjudicated, would be to ensure that he did not cooperate in having the conciliation meeting held.'[11]

[32] Similarly, eight years later, in *Ramabulana*, this Court held as follows in regard to the import and meaning of s191(5) of the LRA:

> 'What the provision of section 191(5) of the [LRA] means is that two eventualities are provided for when the CCMA or a bargaining council has received the referral of a dismissal dispute within the prescribed period for conciliation. Either there will be attempts to conciliate or there will be no attempts at conciliation within the prescribed period. It seems to me that there will be no attempts where none can be made because the one party is not present at the conciliation

[9] [2000] 1 BLLR 20 (LAC).
[10] [2008] 4 BLLR 299 (LAC).
[11] At paras 66 and 67.

meeting and can simply not be contacted during that period. In such a case no attempts can be made. The other is where attempts can be made. Where they have been made and they have been unsuccessful, the conciliator can or must issue a certificate that the dispute remains unresolved.

Where no attempts could be made or were made − maybe because one of the parties was out of reach or could not for some or other reason be reached, no certificate is made that the dispute remains unresolved but, once a period of 30 days from the date when the CCMA or bargaining council received the referral has lapsed, the consequence is the same. It is that the employee acquires the right to have his dispute either arbitrated if he so requests or to have it adjudicated by the Labour Court if he refers it to that Court for adjudication.

Whether the dispute goes to arbitration or adjudication depends on whether the case falls within the ambit of either section 191(5) (a) or (b) of the [LRA]. This means that a failure by the employee to attend a conciliation meeting convened pursuant to the referral of his dispute to the CCMA or a bargaining council for conciliation does not take away, and cannot possibly take away from him the right which section 191(5) (a) or (b) gives to him to have his dispute arbitrated if he so requests or adjudicated if he refers it to the Labour Court for adjudication.'[12]

[33] By the same token, in interpreting the similarly worded jurisdictional requirement for embarking on a protected strike in terms of s64(1)(a) of the LRA, the Labour Court in *City of Johannesburg Metropolitan Municipality and Another v SAMWU and Others (Johannesburg Metropolitan Municipality*)[13] dismissed the employer's contention that the commissioner's ruling that the bargaining council had no jurisdiction to entertain the union's referral of the strike issue for conciliation could serve to render the strike unprotected for its failure to comply with the requirements for a protected strike in terms of s64(1)(a) of the LRA on the basis that:

'[I]t is not necessary under the LRA for a conciliation hearing actually to take place before a strike can be protected. In terms of section 64(1)(a) of the

[12] At paras 11-13.
[13] [2011] 7 BLLR 663 LC.

> LRA, it is sufficient if 30 days have lapsed since the referral of the dispute. In other words, the commissioner's ruling affected only the convening of the conciliation process; it says no more than that the bargaining council did not have the jurisdiction to conciliate the dispute. Since a conciliation meeting is not a precondition for a strike to be protected (because it is sufficient that 30 days have elapsed after the date of referral), the commissioner's ruling is not a relevant factor.'[14]

[34] The disjunctive interpretation of s191(5) and 64(1)(a) of the LRA as applied by this Court in *Driveline Technologies* and *Ramabulana* and by the Labour Court in *Johannesburg Metropolitan Municipality* respectively, is consistent with the core objective of the LRA, which is to provide for the speedy resolution of disputes in the workplace.[15] This leaves no room for the appellant's contention that an employee who refers an unfair dismissal or unfair labour practice dispute to the CCMA or a bargaining council for arbitration or the Labour Court for adjudication, can elect which of the two events to rely upon in founding his or her right to a referral to arbitration or adjudication in terms of s191(5)(a) or (b) of the LRA.

[35] It is imperative to the interpretative process to distinguish the provisions of s191 of the LRA from those of s135 and 136 of the LRA thereof, in relation to their purpose in the overall scheme of the LRA. Section 191 which is found in Chapter VIII of the LRA, regulates the resolution of unfair dismissal and unfair labour practice disputes through conciliation and arbitration by a bargaining council with jurisdiction or the CCMA where no bargaining council has jurisdiction or through adjudication by the Labour Court. The purpose of s191 is to regulate the resolution of these specific disputes by the CCMA, bargaining councils or the Labour Court. In comparison, the purpose of s135 and 136 which are found in Part C Chapter VII of the LRA, is to regulate the resolution of disputes of a general nature[16] referred to the CCMA in terms of s133(1)(b)[17] of the LRA and disputes about matters of mutual interest referred

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[14] At para 15.
[15] *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC) at para 1.
[16] *NUM v Hernic Exploration (Pty) Ltd* [2001] 2 BLLR 209 (LC) at para 11.
[17] Section 133 of the LRA provides:
'(1) The Commission must appoint a commissioner to attempt to resolve through conciliation –
(a) any dispute referred to it in terms of section 134; and

to the CCMA in terms of s134[18] thereof. Although the regulation of the resolution of unfair dismissal and unfair labour practice disputes is not expressly excluded from the ambit of Part C Chapter VII of the LRA, its provisions must necessarily be interpreted as impliedly excluding the resolution of unfair dismissal and unfair labour practice disputes from its regulatory ambit, as any other interpretation, in my view, would lead to a conflict with s191 of the LRA.

[36] There are marked differences between the manner in which s191 regulates the resolution of unfair dismissal and unfair labour disputes and the manner in which s135 and 136 do so, respectively. The most fundamental difference between s191 of the LRA on the one hand, and s135 and 136 on the other, is that in s191 there is no obligation as in s135(5)[19] of the LRA, on a commissioner of the CCMA or a bargaining council to issue a certificate of outcome stating whether the dispute has been resolved when the conciliation has failed, or at the end of the 30 day or any further period agreed between the parties. Importantly, whilst it is implicit from s191(5) of the LRA that the conciliation proceedings must take place prior to the lapse of 30 days from the date of receipt of the referral by the CCMA or a bargaining council, and that the commissioner of the CCMA or a bargaining council must issue a certificate of non-resolution within this period for the certificate to form the jurisdictional foundation for the referral to arbitration or adjudication of the dispute, there is

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(b) any dispute that has been referred to it in terms of this Act.

(2) If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if –

(a) this Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration; or

(b) all the parties to the dispute in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission.'

[18] Section 134 of the LRA provides:

'(1) Any party to a *dispute* about a matter of mutual interest may refer the *dispute* in writing to the Commission, if the parties to the *dispute* are−

(a) on the one side−

(i) one or more trade unions

(ii) one or more employees; or

(iii) one or more trade unions and one or more employees; and

(b) on the other side

(i) one or more employers' organizations*;*

*(*ii) one or more employers*;* or

(iii) one or more employers' organizations and one or more employers.

(2)The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute.'*

[19] See s135(5) of the LRA.

no requirement in the subsection, as in s 135(2) of the LRA, that the parties may agree to extend the 30 day period. This is because s191(5) of the LRA contemplates that an employee will be entitled to refer his or her unresolved unfair dismissal or unfair labour practice dispute to arbitration or adjudication, on expiry of 30 days from the date that the CCMA or bargaining council received the referral. Thus any extension of this 30 day period, will effectively deny the dismissed employee or an employee alleging an unfair labour practice the right to refer his or her dispute to arbitration or adjudication on the lapse of the 30 day period contemplated in s191(5) of the LRA.

[37] Likewise, unlike in s136(1) of the LRA, there is no requirement in s191 of the LRA that the CCMA must only appoint a commissioner to arbitrate a dispute where the commissioner has issue a certificate stating that the dispute remains unresolved, and within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. It is also notable that whilst a request for arbitration or referral to adjudication under s191 of the LRA may only be made by a dismissed employee or an employee alleging an unfair labour practice, a request for arbitration, under s136 of the LRA, may be made by any party to the dispute.

[38] Therefore, unlike in s135(5) and s136(1) of the LRA where the legislature has sought to link the right of referral to arbitration to the conciliation process by obliging the commissioner when the conciliation has failed, or at the end of the 30 day period or any further period agreed between the parties to issue a certificate stating whether the dispute has been resolved and by requiring that such certificate be issued before a commissioner is appointed to arbitrate the dispute, the provisions of s191 of the LRA contain no such requirements. Nor has the legislature in s191 of the LRA sought to link the validity of the referral to arbitration and the jurisdiction of the CCMA or a bargaining council to arbitrate the dispute to the certificate of outcome of the conciliation. This is because s191(5) of the LRA contemplates that the CCMA or a bargaining council will have jurisdiction to arbitrate an unfair dismissal and unfair labour practice dispute on the lapse of 30 days from the date on which the CCMA or

bargaining council received the referral, regardless of whether a certificate of non-resolution has been issued by the CCMA or the bargaining council concerned.

[39] Thus, unlike under s136 of the LRA, the issue of a certificate of non-resolution does not found the right of referral to arbitration or adjudication under s191(5) of the LRA, as the subsection confers this right upon the lapsing of the 30 day period contemplated in the subsection regardless of whether conciliation[20] actually takes place or a certificate of non-resolution is issued by the CCMA or the bargaining council concerned. It follows that neither the holding of an actual conciliation nor the issue of a certificate of non-resolution by the CCMA or the bargaining council concerned, is a prerequisite for purposes of referring an unfair dismissal or unfair labour practice dispute to arbitration or adjudication in terms of s191(5)(a) and (b) of the LRA, where there has been a lapse of 30 days from the date on which the CCMA or bargaining council received the referral and the dispute remains unresolved.[21]

[40] The provisions of s191 of the LRA on the one hand, and those of s135 and 136 on the other, are mutually exclusive. Put differently, they do not and quite simply cannot both regulate the process to be followed by a dismissed employee or an employee alleging an unfair labour practice when referring his or her dispute to the CCMA or a bargaining council for conciliation and arbitration or the Labour Court for adjudication, as this would surely lead to a conflict between them. As demonstrated, they serve distinct roles and objectives in the overall scheme of the LRA. Sections 135 and 136 of the LRA, therefore, have no application to the resolution of unfair dismissal and unfair labour practice dispute under the LRA. The appellant's reliance on s 135(5) and 136(1)(a) and (b) of the LRA in support of its interpretation of s191(5) of the LRA, as providing the employee with a choice to refer the dispute to arbitration or adjudication on the lapse of the period of 30 days as

[20] *Driveline Technologies* at paras 66 and 67 and *Ramabulana* at paras 11-13.

[21] Although the actual convening of a conciliation is not required under s 191(5) for the dispute to be referred to arbitration within the 30 day period, contemplated in the subsection, the dismissed employee or employee alleging an unfair labour practice is obliged in terms of s 191(1)(a) and (b) of the LRA to refer the matter to a bargaining council with jurisdiction, or to the CCMA, where no bargaining council has jurisdiction, for conciliation.

contemplated in the subsection, or await the outcome of the conciliation process and the issue of a certificate of outcome is entirely misplaced.

[41] Whilst conceding that an employee acquires a right in terms of s191(5) of the LRA to proceed to arbitration on the expiry of the 30 day period contemplated in the subsection without the issue of a certificate of outcome, the appellant contends that the employee is entitled to elect not to do so and to await the conciliation and the issue of a certificate consequent thereupon, before referring the dispute to arbitration because the 90 days contemplated in s136(1)(b) of the LRA, will only start running when the certificate is issued. The appellant contends that in so electing, the issue of a certificate is then a pre-requisite for referring the matter to arbitration. I disagree for two primary reasons. First because as demonstrated above, s136 of the LRA has no application to the process that an employee is required to follow when referring an unfair dismissal or unfair labour practice dispute to the CCMA or a bargaining council for conciliation and arbitration or, the Labour Court for adjudication and second, whilst it is open to the employee to elect not to proceed to arbitration, and to await the outcome of the conciliation proceedings, since s191(5) of the LRA contains no bar to doing so, the flaw in the appellant's argument lies in its erroneous premise that where the 30 day period has lapsed and the employee elects to await the outcome of conciliation prior to referring the matter to arbitration − an election not envisaged in the provisions of s191 (5) of the LRA − he or she would then require a certificate of outcome to enable him to proceed to arbitration.

[42] I repeat, that upon the 30 day period expiring prior to the issue of a certificate of outcome, the issue of a certificate is not required to found the employee's right of referral of the dispute to arbitration or adjudication. As alluded to above, the issue of a certificate of non-resolution is not a pre-requisite for a referral to arbitration or adjudication in these circumstances since the right of referral would have already accrued to the employee on expiry of the 30 day period contemplated in the subsection. To my mind, the issue of a certificate of outcome following such accrual, would be superfluous to the employee's right of referral to arbitration, as would be the holding of conciliation

proceedings, pursuant to which such certificate is issued, since s191 of the LRA does not envisage that on the lapse of the 30 day period contemplated in subsection (5), a further attempt at conciliation should be made. Thus, the subsequent holding of conciliation proceedings will have no impact upon the employee's right to refer his or her dispute to arbitration or adjudication on the lapse of the 30 day period contemplated in s191(5) of the LRA.

[43] The appellant also relies on the decision of this Court in *Fidelity Guards* in support of its interpretation of s191(5) of the LRA. I am of the view that such reliance is equally misplaced because, as will be illustrated below, the decision is wrong. *Fidelity Guards* concerned an appeal against a dismissal of a review application in which, one of the grounds of contention was that the arbitrator lacked jurisdiction to hear the dispute as the conciliation proceedings were invalid due to the employee's failure to apply for condonation for the late referral of the dispute for conciliation outside the statutory period of 30 days for an unfair dismissal dispute in terms of s191(1)(b)(i) of the LRA. The Court held that the fact that a dispute is referred to the CCMA or a bargaining council for conciliation outside the statutory period of 30 days, and no application for condonation is made or one is made but no decision on it is made, would not affect the jurisdiction of the CCMA or the bargaining council concerned to arbitrate the dispute, provided the certificate of outcome has not been set aside. It is the setting aside of the certificate of the outcome, the Court held, that would render the CCMA or the bargaining council concerned to be without jurisdiction to arbitrate.[22]

[44] In arriving at this conclusion, the Court appears to have impermissibly grafted the provisions of s135 and 136(1)(a) and (b) of the LRA onto the referral, by an employee, of his unfair dismissal dispute to the CCMA for conciliation and arbitration[23] which, as demonstrated above, is regulated exclusively by s191 of the LRA. Having gone astray in this respect, the Court then, erroneously, proceeded to link the setting aside of the certificate of outcome to the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal

[22] *Fidelity Guards* at paras 11 and 12.

[23] In paragraphs 9 and 10 of the Judgment, the Court made specific reference to the relevance of sections 135(5) and 136(1)(a) and (b) of the LRA to the referral, in terms of s191(5) of the LRA, of the unfair dismissal dispute in question to conciliation and arbitration.

dispute. As alluded to above, the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal or unfair labour practice dispute is not conditional upon the issue of a certificate of outcome, as an employee's right of referral to arbitration accrues on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved.

[45] Whilst the issue of a certificate of outcome by a commissioner of the CCMA or bargaining council may found the right of referral of an unfair dismissal or unfair labour practice dispute to arbitration or adjudication prior to the lapse of the 30 day period contemplated in s191(5) of the LRA, as the right of referral accrues on the issue of such certificate and is, consequently, a pre-requisite for a referral to arbitration or adjudication in those circumstances only, the subsection does not impose an obligation on a commissioner of the CCMA or a bargaining council to issue a certificate of outcome on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved. Since the issue of a certificate of non-resolution by the CCMA or a bargaining council concerned, is not a pre-requisite for a referral to arbitration in terms of s191(5)(a) of the LRA, it cannot, in my view, cure the lack of jurisdiction of the CCMA or a bargaining council to arbitrate an unresolved unfair dismissal or unfair labour practice dispute, where such certificate is issued after the elapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the employee has not sought condonation for its non-observance of that timeframe.

[46] It is thus evident from the general scheme of s191(5) of LRA that either of the two events: the issue of a certificate of non-resolution by a commissioner of the CCMA or a bargaining council or the expiry of 30 days from the date on which the CCMA or bargaining council received the referral and the dispute remains unresolved, entitles an employee to request arbitration or adjudication. Section 191 of the LRA is, however, silent, on the time period within which the referral to arbitration is to be made from the date of the happening of either of the two events referred to in subsection (5) of the LRA.

Since s191 of the LRA does not prescribe the specific time period within which an unfair dismissal or unfair labour practice is to be referred to arbitration in terms of subsection (5)(a) of the LRA, the dismissed employee or the employee alleging an unfair labour practice must refer such dispute to arbitration within a reasonable period of time.[24]

[47] What would constitute a reasonable period of time in respect of a referral to arbitration, in terms of s 191(5)(a) of the LRA may, to my mind, be decided with reference to s191(11) of the LRA which provides in relation to the referral of a dispute to the Labour Court for adjudication in terms of subsection (5)(b) of the LRA, that such referral must be made within 90 days after the commissioner of the CCMA or a bargaining council has certified that the dispute remains unresolved. Although not applicable to the referral to arbitration of an unfair dismissal or unfair labour practice dispute under the LRA, due regard may also be had to s 136(1)(a) and (b) of the LRA, which provide that the CCMA may only appoint a commissioner to arbitrate a dispute, which the LRA requires to be resolved through arbitration, if a commissioner has issued a certificate stating that the dispute remains unresolved, or within 90 days after the date on which the certificate was issued, any party to the dispute has requested that the dispute be resolved. Both the CCMA under 136(1)(b) of the LRA, and the Labour Court, under 191(11) of the LRA are, however, afforded a discretion to condone a party's non-observance of the 90 day time-frame, and allow a request for arbitration or adjudication (as the case may be) after the expiry of the 90 day period.

[48] In view of the legislative objective of expediting the resolution of employment disputes through the effective and timeous utilisation of the dispute resolution machinery created by the LRA, I see no reason why a different standard should be applied to the referral of disputes to arbitration in terms of s 191(5)(a) of the LRA.[25] Thus, a reasonable time within which a referral to

[24] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 398 A-B; *JDG Trading (Pty) Ltd t/a Bradlow's Furnishers v Lake NO and others* (2001) 22 ILJ 641 (LAC); *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (2009) 30 ILJ 407 (LC) at 411A-B.

[25] *Sappi Timber Industries (Pty) Ltd t/a Boskor Sawmill v Commission for Conciliation, Mediation and Arbitration and others* (2003) 24 ILJ 846 (LC).

arbitration in terms of s191(5)(a) of the LRA should be made would be 90 days from the date of whichever of these two events occurs first: (a) the issue of the certificate of non-resolution by the CCMA or a bargaining council; or (b) the lapse of the 30 day period contemplated in the subsection. Accordingly, the appellant was required to refer his unfair dismissal dispute to the Bargaining Council for arbitration within 90 days from the lapse of the 30 day period contemplated in s191(5) of the LRA.

[49] The appellant referred his unfair dismissal dispute to the Bargaining Council for conciliation on or about 10 February 2003. In terms of s191(5) of the LRA, he acquired the right to refer his unfair dismissal dispute to arbitration on 12 March 2003 upon the expiry of the 30 day period contemplated in the subsection. The appellant, however, elected not to refer the dispute to arbitration at that stage, but rather to await the outcome of the conciliation process (which ensued on 3rd April 2003) and the issue of a certificate of outcome following thereupon. In the event, the certificate of non-resolution was only issued on 15 April 2004, a full year after the conciliation took place, following which the appellant referred the matter to arbitration on 24 June 2004, being more than 13 months after he acquired the right to refer the dispute to arbitration (on 12 March 2003), upon expiry of the 30 day period contemplated in the subsection. Thus, in so far as he chose to await the outcome of the conciliation process and the issue of a certificate of outcome by the Bargaining Council, before referring the dispute to arbitration, the appellant was obliged to seek condonation from the arbitrator for his failure to refer the dispute to arbitration within 90 days of the date of expiry of 30 days from the date that the Bargaining Council had received the referral.

[50] The appellant was, consequently, required to refer his unfair dismissal dispute to arbitration within 90 days of 12 March 2003, which was no later than 10 June 2003. The appellant, however, only referred his unfair dismissal dispute to arbitration more than 12 months after the referral was due on 24 June 2004, but failed to seek condonation, from the Bargaining Council for this inordinate delay. The arbitrator, accordingly, erred in finding that the Bargaining Council had jurisdiction to arbitrate the dispute. I, accordingly, consider the setting aside of the arbitration award by the Labour Court to have

been properly and correctly made, on the grounds that the referral to arbitration was lodged substantially more than 90 days after the lapse of 30 days from the date on which the Bargaining Council had received the referral for conciliation, and in the absence of an order condoning the delay, the Bargaining Council had no jurisdiction to arbitrate the dispute.

[51] The finding of this Court on the jurisdictional issue is dispositive of the issues on appeal and cross-appeal. Accordingly, the Labour Court did not err in failing to decide the remaining issues in the review. For the same reason, it is not necessary for this Court to determine the issues in the cross-appeal. In the premises, I find that the arbitration award was correctly reviewed and set aside by the Labour Court. The appeal, therefore, falls to be dismissed.

[52] Since the appeal concerns issues concerning the interpretation of key dispute resolution provisions of the LRA, and that it is manifestly in the public interest that interpretative clarity be sought on appeal, the Municipality does not seek a costs order against the appellant. I see no reason in law or equity to adopt a contrary approach to the issue of costs.

[53] In the result, I make the following order:

‘The appeal is dismissed with no order as to costs.’

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Kathree-Setiloane AJA

I Agree

_____

Waglay JP

I Agree

_____

Dlodlo AJA

APPEARANCES:

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