



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS146/13

In the matter between:

JOHN MOKGAKELE MOEKETSI

Applicant

and

BRAAM VAN VWK, NO

First Respondent

AG JANSE VAN VUUREN, NO

Second Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION ("CCMA")

Third Respondent

TSHWANE UNIVERSITY OF TECHNOLOGY

Fourth Respondent

Heard: 7 November 2014

Delivered: 7 November 2014

Reasons:

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] This was an application for condonation for the late filing of the applicant's statement of case. The application was opposed by the first respondent and I dismissed it on 7 November 2014.
- [2] The Applicant has since sought reasons for the order and I deal with them hereunder.

Factual background

- [3] The applicant was employed by the fourth respondent as an assistant: Inter-Library Loans. Sometime in August 2012, he applied for a vacant and advertised position of Information Literacy Training at Pretoria Campus. However, he was never shortlisted and a grievance he had lodged consequently was never resolved amicably.
- [4] A section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended ("LRA") dispute was referred to the CCMA wherein the applicant obviously challenged the fourth respondent's failure to promote him. This dispute was conciliated unsuccessfully and set for arbitration on 7 February 2013. The first respondent issued a ruling to the effect that, despite the certificate of outcome empowering CCMA to arbitrate the matter, the CCMA lacked jurisdiction since the parties were in agreement that the heart of the dispute was about unfair discrimination and victimization. Instead of ruling on the matter, the first respondent stated in his ruling that the matter was to be referred to the court by agreement between the parties.
- [5] The applicant did not refer the dispute to this court as per the agreement chronicled in the first respondent's ruling. On 24 June 2013, he referred the same dispute to the CCMA afresh. The conciliation sat on 10 July 2013 and the second respondent, seized with the matter, ruled that the CCMA lacked jurisdiction to entertain the matter since it had been to the CCMA before and there was a ruling that it should be referred to this court. He found that the principle of *ne bis idem*, also commonly known as double jeopardy, was applicable.

- [6] The applicant was then left with no option but to refer this matter to this court. However, since his referral was late, he had to first deal with the application for condonation.

Condonation application

- [7] In *SATAWU v South African Airways (Pty) Ltd*¹ the Labour Appeal Court confirmed that the 90-day period for referral in section 136(1)(b) of the LRA applies also to unfair discrimination disputes.

- [8] There is a growing trend that is emerging in this court where litigants simply contend that condonation should be granted in the interest of justice as if it is a sole consideration. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,² the Constitutional Court, contextualising what is meant by interest of justice, stated that:

“...It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of applicant’s explanation for the delay or defect.” (Footnote omitted.)

- [9] In essence, the standard set down in *Melane v Santam Insurance Co Ltd*³ is still applicable. In *NUM v Council for Mineral Technology*,⁴ the Labour Appeal Court stated that ‘without a reasonable and acceptable explanation for the

¹ [2015] 2 BLLR 137 (LAC)

² [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

³ 1962 (4) SA 531 (A).

⁴ [1999] 3 BLLR 209 (LAC) at 211G-H.

delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.' Whilst in *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service*⁵ the court stated that :

"A party seeking condonation must, among other things, give a full and satisfactory explanation for whatever delays non-compliance has occasioned; an inadequate explanation could well bar the grant of condonation..."

- [10] In this instance, the degree of lateness is almost a year if regard is had to the date on which the applicant's statement of claim was delivered, i.e. 18 February 2014, and date the first respondent's ruling was issued, i.e. 7 February 2013.
- [11] The applicant chose to account for only the four months thereof, counting from the date of the second ruling by the second respondent, i.e. 10 July 2013. Even then, the explanation given for the delay is that the applicant's erstwhile attorneys delayed his referral.
- [12] It is, however, trite that the incorrect advice or ineptness of a party's legal representative does not constitute good cause for condonation of a late filing.⁶ In the light of the extensive degrees of lateness and in adequate explanation proffered for the delay, ordinarily there would not be a need to consider the prospects of success. I, however, deem it appropriate to deal with the prospects solely for purposes of addressing the issue of jurisdiction.

Jurisdiction of this court

- [13] This matter was correctly referred to the CCMA for arbitration the first time around since it pertains to an unfair labour practice. The applicant clearly challenged the fourth respondent's decision not to shortlist him for appointment to a senior position he had applied for.
- [14] The first respondent's ruling purports to be an agreement between the parties granting this court jurisdiction to arbitrate an unfair labour practice dispute simply because the parties are of the opinion that some of the allegations

⁵ 2002 (4) SA 281 (SCA) at paragraph 15.

⁶ *Jusayo v Mudau NO* [2008] 7 BLLR 668 (LC)

point to discrimination. My take on the ruling is that the first respondent never applied his mind to the real issues of jurisdiction but simply assisted the parties to outline their agreement ousting his jurisdiction and purporting to grant this court jurisdiction. It is an established principle that the parties cannot, by consent, confer jurisdiction on a tribunal if none exists and, conversely, the parties cannot strip a tribunal its jurisdiction.⁷

[15] Nonetheless, in the absence of the applicant's application to review the CCMA's rulings, this court is bound to determine this matter on the basis of the applicant's pleadings. Even though both CCMA rulings directed that this matter be referred to this court since it pertains to discrimination, the applicant persists in his referral that it is a section 186 (2) (a) of the LRA dispute. Also, the respondent raised various points *in limine* and pertinently to the effect that this court lacks jurisdiction to deal with the matter since there is no reference to section 10 of the Employment Equity Act 55 of 1998 as amended ("EEA"), which confers jurisdiction on this court.

[16] In the premises, there are no prospects of success since the court lacks jurisdiction to deal with the matter as pleaded. The application for condonation stands to be dismissed.

[17] On costs, given the persisting relationship between the parties, I am disinclined to grant costs.

Order

[18] In the circumstances, I make the following order:

1. The application for condonation is dismissed; and
2. No order as to costs.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

⁷ *Shoprite Checkers (Pty) Ltd v CCMA & others* [1998] 5 BLLR 510 (LC) at para 23.

APPEARANCES:

For the Applicant: Adv Cobus Prinsloo

Instructed by: Helena Strijdom Attorneys

For the Respondents: Johan du Toit

Instructed by: Henk Kloppers Attorneys

LABOUR COURT