IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Not reportable
CASE NO. D 595/09

In the matter between:

MFANAFUTHI SIBIYA Applicant

and

MHLATHUZE WATER BOARD Respondent

Date of Hearing: 25 AUGUST 2011

Date of Judgment: 30 SEPTEMBER 2011

JUDGMENT

REDDY AJ

Introduction

[1] This is an application for condonation for the late delivery of the applicant's (the "employee") statement of case. The employee also seeks costs in the event of the application being opposed. The application is opposed by the respondent (the "employer").

Factual Background

[2] The employee was employed as a human resources manager until his dismissal. The charges he faced can be summarised as follows:

1. Representing a fellow employee, Mr Sithole (Sithole) who was at that time the CEO, at a disciplinary hearing when the employee's employment as a human resources manager and his status as a member of the executive committee of the employer precluded him from doing so;

2. In representing Sithole, the employee was in breach of his fiduciary duty to act in the best interests of the employer;

3. Gross negligence in that the employee authorised full payment to a service provider when the services were incomplete.

[3] This dispute was referred to the CCMA for arbitration. The arbitration hearing was set down for 7 July 2009. The employer raised a jurisdictional point in respect of charges 1 and 2 at the arbitration hearing on 7 July 2009. It was submitted by the employer that the Labour Court had jurisdiction to hear the matter as these charges related to an automatically unfair dismissal. Agreement between the parties (that the employee abandons the relief applicable to automatically unfair dismissals and only claim relief for an unfair dismissal) could not be reached. The entire matter was then referred to this Court.

Condonation

The delay

[4] Following the dismissal, the employee referred an unfair dismissal dispute to the CCMA. A conciliation hearing was held and a certificate of outcome recording the non-resolution of the dispute was issued on 15 April 2009. The statement of case was due on or before 15 July 2009. It was served on 5 October 2009 and filed on 7 October 2009.

[5] The application for condonation was filed in July 2010 – nine months after the statement of case was delivered.

[6] The employee's representative submitted that the delay in respect of the statement of case is either two days or three months depending on the interpretation of the LRA provisions adopted by the Court.

[7] The submission that it was delivered two days late is premised on the reasoning that the CCMA was seized with the matter until 7 July 2009 and there is no provision in the LRA for the time limits within which to refer a dispute to the Labour Court once the CCMA rules that it does not have jurisdiction to hear the matter. In such circumstances, the employee's representative submitted, the referral to the Labour Court must be made

within a reasonable time. It was further submitted that section 191 (11) (a) of the Labour Relations Act (LRA)[1] does not apply to these circumstances.

[8] The employer disagreed with this submission and contended that section 191 (5) and (11) of the LRA applies, that is that the referral to this Court was due 90 days after the matter was certified as unresolved.

[9] In the matter of *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood,*[2] the employee had referred an automatically unfair dismissal dispute to the CCMA. The referral to conciliation recorded the dismissal as being related to the employee's pregnancy. The certificate of outcome recorded that the dispute must be referred to arbitration. The matter was accordingly referred to arbitration and the employer raised a *point in limine* that the CCMA lacked jurisdiction. A ruling was issued confirming the CCMA's lack of jurisdiction and the referral to the Labour Court was lodged shortly after three months had expired. The Court per Basson J held that

> "Although no specific time period is prescribed by the LRA in terms of which a dispute must be referred to the Labour Court after a ruling was issued by the CCMA at arbitration, it is trite that the LRA is premised on the principle of the speedy resolution of disputes and that all parties to a dispute are required to play their respective parts in ensuring compliance with this underlying principle of the LRA… It is also trite that where the LRA does not prescribe a specific time period within which a step in the

[1] 66 of 1995.
[2] [2008] 11 BLLR 1111 (LC) at para 4.

> proceedings must be taken, a party to the dispute must take such a step within a reasonable time."

[10] The Court in the *Vorster* case further held that the referral to the Labour Court was made within a reasonable time and condonation was granted.

[11] In this matter, a written ruling by the CCMA was not issued. Rather when the issue of the CCMA's jurisdiction was raised in July 2009, a discussion ensued between the parties and the commissioner and it would appear that the commissioner agreed that the matter must be referred to this Court. The employee submits he understood that he had 90 days from that date to refer the matter to this Court, which he did in October 2009.

[12] In referring his dispute to conciliation, the employee described the dispute as one pertaining to his representing a fellow employee and the discrimination that followed in dismissing him as a result of such representation. The description is clearly that of an automatically unfair dismissal in terms of sections 5 and 187 of the LRA. The certificate of non-resolution defines the dispute as a dismissal and records an arbitration hearing as the next step.

[13] The description of the dispute by the employee is at odds with the next step to be taken as recorded in the certificate. However for the purposes of further litigation, that anomaly is irrelevant. In terms of section 135(5) (a) of the LRA, the certificate that the commissioner is obliged to issue only requires a statement that the dispute remains

unresolved. The remaining content of the certificate is irrelevant to the future conduct of the proceedings. The forum for the further litigation of the matter is determined by the description of the dispute by the employee (See *NUMSA and Others v Driveline Technologies SA (Pty) Ltd and Another.*[3].) As the employee described the dispute as an automatically unfair dispute the matter should have been referred to the Labour Court in terms of section 191 (11) (a) of the LRA.

[14] Section 191 (11) (a) provides that a referral of a dispute to the Labour Court for adjudication must be made within 90 days of the dispute being certified as unresolved. That is the time limit that applies.

[15] Should the time limit not be complied with, the Labour Court may condone, on good cause shown, any non-observance of the time limits in terms of section 191 (11)(b) of the LRA.

[16] The dispute ought to have been referred to the Labour Court in accordance with the employee's description thereof. For the above reasons, I disagree with the judgement in the *Vorster* matter. The referral to the Labour Court is accordingly three months late.

Explanation for the delay

[17] In addition to those reasons set out above further grounds were submitted on behalf of the employee explaining the delay. .

[3] (2000) 21 ILJ 142 (LAC) at para 9.

[18] The employee was unrepresented until his application for condonation for the late filing of the statement of case was lodged. He is a lay person. He accordingly did not appreciate the import of the various provisions of the LRA referred to above and took the certificate of outcome at face value. He referred the dispute to arbitration. This step, although incorrect, is a reasonable explanation for some of the delay.

[19] The employer submits that it advised the employee on 7 July 2009 that he would have to apply for condonation when referring the matter to this Court. The statement of case was only delivered in October 2009 and the application for condonation was delivered in July 2010, a year after being so advised.

[20] I accept as a reasonable explanation the mistaken belief that the employee operated under in understanding that the referral to this Court was only due 90 days after the CCMA sitting in July 2009.

[21] On receipt of the statement of case and on 14 October 2009, the employer wrote to the employee requesting a condonation application for the late filing of the statement of case. The employee replied to that letter disputing that condonation was necessary as he was advised by the Labour Court that the *dies* only ran from 7 July 2009, when the CCMA confirmed that it did not have jurisdiction to hear the matter.

[22] Clearly the advice from, I assume the general office of the Labour Court was incorrect. I accept that the employee, being unrepresented, accepted this advice as correct. I also accept that the employee subjectively was not in position to accept advice from the employer as they were adversaries.

[23] The statement of case was drafted by the employee. He only acquired legal representation prior to the lodging of the application for condonation in July 2010. The immediate result of the legal representation was the lodging of the application for condonation. I accept as reasonable that the employee was mistaken in his understanding of the time limits. He acted in accordance with his mistaken understanding and delivered the statement of case approximately 90 days from the CCMA sitting in July 2009. This mistaken understanding was further cemented by the "advice" from the "Labour Court". It is also clear that once he received advice from his own legal representatives, he lodged the required application for condonation.

[24] The employer also failed to file its response to the statement of case within the applicable time limits. This resulted in this Court setting the matter down for default judgement on the unopposed roll on 5 February 2010. The employer attended the hearing but prior thereto filed a response to the statement of case. The employee did not attend Court on 5 February 2010. This resulted in the matter being struck from the roll and the employee was directed to file an application for condonation.

[25] The employee submitted that he did not receive the notice of set down for 5 February 2010 and accordingly did not attend Court on that day. The employee did not receive a copy of the Court order. These averments have not been challenged by the employer and I accept them as undisputed.

[26] I accept the *bona fides* of the employee's explanation that he believed that the statement of case was only due 90 days from 7 July 2009. The statement of case was delivered within this mistaken time limit.

[27] As stated above, the application for condonation was delivered approximately nine months after the delivery of the statement of case. Although a separate application for condonation was not delivered by the employee, this issue was raised by the employer in argument. In order not to delay the proceedings any further by adjourning it for a further application for condonation to be delivered both parties were given leave to address the Court on this issue.

[28] It is trite that the application for condonation must be lodged at the time that the party is aware that it is due. It was submitted by the employee's representative that the employee only became aware of this when he engaged legal representatives and was advised of the applicable time limits. The application for condonation was accordingly lodged in July 2010. The employee ought to have taken steps earlier than July 2010 to verify whether condonation was indeed necessary. Although this explanation for the delay in applying for condonation is not as satisfactory as the explanations for the other

periods of delay, I exercise a wide discretion in determining this application. I am persuaded that it is justiciable to exercise this discretion in favour of the employee insofar as the explanation is concerned. To close the door to the employee for want of a more satisfactory explanation for the late filing of an application for condonation,would be to bar him from having his matter heard in its entirety. This would be a grave injustice. There are important legal issues that require determination by the trial court. The explanation is accordingly accepted.

Prospects of success

[29] As stated above the employee faced three charges, two of which could result in the dismissal being declared automatically unfair.

[30] It was submitted by the employer's representative that the right to be represented at a disciplinary hearing does not carry with it the corollary that the person representing an employee is granted protection from dismissal or discrimination. It was further submitted that only unions have this right. I disagree with these submissions.

[31] Firstly, if the protection against discrimination or dismissal of the representative employee is not available to that employee then the dismissal would merely be unfair and not automatically unfair. Such a submission flies in the face of the employer's insistence that the Labour Court hears the dismissal dispute as it fell within the realm of an automatically unfair dismissal.

[32] Secondly, it makes no sense whatsoever for an employee to be guaranteed the right to representation without the representative employee being guaranteed protection from discrimination or dismissal for enabling the exercise of that right. Not to protect the representative employee from discrimination or dismissal would render the right to representation at disciplinary hearings nugatory as no employee would logically want to risk his employment by representing a fellow employee.

[33] The trial court will be best placed to decide this issue of law according to the parties' interpretations of the various sections in the LRA and any evidence that may be used in support thereof.

[34] I do not intend burdening this judgement with the detail of the various allegations in respect of the various charges, save to state that I am satisfied that the further allegations in respect of charges one and two, and the charge in respect of the over payment to the service provider, require evidence to be led and require the trial court's decision. There are various factual issues which are disputed and the employee has prospects of success in defending these charges against him.

Prejudice

[35] It is apparent that the employee did not wilfully delay in referring the matter to this Court. He operated under a mistaken belief. Any relief that may be due to him can be

tempered to minimise any prejudice the employer may have suffered as a result of the delay in prosecuting this matter.

[36] The employer suggested that witnesses' memories fade with time. There is no detail in the opposing affidavit as to which of the witnesses have forgotten the issues or the facts of the matter. I am not persuaded that the employer's witnesses will not recall any of the factual issues required for the employer to establish that the dismissal was fair.

[37] Even if this is so, there must be a recording of the disciplinary proceedings or notes from the representatives who were involved in the matter which can be used to assist those witnesses whose memories may have faded.

[38] The employee on the other hand will be severely prejudiced should this matter not go to trial. His right to not be unfairly dismissed will not have been ventilated.

Importance of the matter

[39] This matter has important issues that must be decided by the trial court. *Prima facie,* the following issues, which may fall to be decided by the trial court, are critical to the right to representation provided in the LRA:

1. what protection does that right carry insofar as the representing employee is concerned;

2. whether employers retain the prerogative to disallow certain categories of employees from representing fellow employees when the LRA is silent on this issue.

It is in the public interest that the matter be heard. Having considered those principles enunciated in *Melane v Santam Insurance Co Ltd*[4] and the facts before me, I am persuaded that condonation should be granted.

Costs

[40] I am persuaded that the employer was entitled to oppose the application. Having considered the issues, I am of the view that the interests of justice and fairness dictate that the employee pay the taxed costs of the employer. I accordingly make the following order:

1. The application for condonation for the late filing of the statement of case is granted;
2. The late delivery of the application for condonation is condoned;
3. The applicant is to pay the taxed costs of the respondent. .

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Reddy AJ

[4] 1962 (4) SA 531 (AD).

Appearances:

1. For the applicant: Mr Ungerer instructed by Siza Khumalo Attorneys
2. For the respondent: Ms Nel instructed by Truter James de Ridder Attorneys