

Sneller Verbatim/HVDM

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS214/01

2003-03-25

In the matter between

NEHAWU

obo MOFEKENG AND OTHERS

Applicant

and

CHARLOTTE THERON CHILDREN'S HOME

Respondent

---

-

J U D G M E N T

---

-

BARRIE, A J:

[1] The respondent in this matter is a children's home in Bethlehem, Free State Province. The second, third and fourth applicants ("the individual applicants") used to be employed by the respondent as cleaners. Their services were terminated for operational reasons in 1999. There is a dispute about when exactly that occurred. According to the applicants it occurred on 29 November 1999. According to the respondent it only gave notice of termination of the individual applicants' services on 1 December 1999.

[2] The first respondent ("the union") referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation. The dispute that was referred was connected to the dismissal of the individual applicants. On the papers before me,

however, the dispute that was referred did not relate to dismissal but to a claim made by the union that, in not agreeing to the individual applicants being trained as housemothers for children in the children's home the respondent had unfairly discriminated against them on racial grounds.

[3] It is not apparent on the papers exactly when the dispute was referred. According to the respondent it happened on 30 November 1999 in terms of a document dated 29 November 1999. However, the "Certificate of outcome of dispute referred to conciliation" that the CCMA subsequently issued on 17 July 2000 states that the dispute was referred on 9 December 2000. Even at that stage i.e. in July 2000 when the certificate was issued the dispute was still described as a dispute concerning "unfair discrimination i.t.o. SCH 7, item 2(1)", no doubt referring to the residual unfair labour practices that were referred to in schedule 7 to the Labour Relations Act 66 of 1995 ("the LRA"), prior to the enactment of the Employment Equity Act 55 of 1998 and subsequent amendment of the LRA by Act 12 of 2002.

[4] A statement of claim was delivered to this court on behalf of the applicants on 2 March 2001. In it the union on behalf of the individual applicants referred a dispute regarding not only alleged unfair discrimination to this court for adjudication, but also an unfair dismissal dispute. Affidavits from the individual respondents, a union organiser of the union in Phuthaditjhaba, and a legal officer of the union accompanied the statement of claim. The affidavit of the legal officer was presented under the heading "Condonation" and was clearly intended to serve as the foundation for an application for the condonation of the late referral of the dispute to this court.

[5] The respondent received the referral on 2 March 2001. It delivered a statement of case to this court on 16 March 2001. The statement of case was accompanied by a detailed affidavit from a member of the respondent's management board.

[6] In its statement of defence the respondent *in limine* raised that the alleged unfair dismissal dispute that had been referred to this court had never been referred to conciliation in terms of section 191(1) of the LRA. The point *in limine* raised a jurisdictional issue (see *National Union of Metal Workers of SA and Others v Driveline Technologies (Pty) Ltd and Another* 2000 21 ILJ 142 (LAC)).

[7] The respondent opposed the application for condonation with

reference to the issues that are usually primarily relevant in this regard, i.e. the duration of the delay, the explanation for the delay and the prospects of success.

[8] The matter was set down in the opposed motion court. It served before me on Wednesday, 19 March 2003. In terms of the heads of argument the parties intended to argue the point *in limine* as well as the condonation application. I declined to hear the former issue. Whether the dispute that was referred to and served before the CCMA eventually encompassed a dismissal dispute is a question of fact that should not necessarily be decided with reference to the contents of the CCMA's certificate of outcome alone (see the *Driveline Technologies* judgment paragraph 63 at page 158A-C of the reported judgment). It is a matter that has to be determined by the trial court whether separately *in limine*, or whether during the course of the trial. I accordingly heard argument regarding the condonation application only.

[9] The case for condonation is made in the affidavit of the union's legal officer. It is supported by the affidavits from the union organiser in Phuthaditjhaba, in so far as that affidavit traverses the merits of the dispute. Only the latter affidavit is confirmed by the individual applicants in their affidavits. In other words the explanation for the delay that has been put forward by the union's legal officer is not confirmed under oath by either the union's organiser in Phuthaditjhaba, or the individual applicants.

[10] In the affidavit of the union's legal officer he accepts that the statement of case should have been delivered by 17 October 2000, i.e. 90 days after the CCMA's certificate of non-resolution had been issued. His explanation for the delay until 2 March 2001 is that:

"The applicants were scattered over an inaccessible places after they were dismissed and it was difficult for me to consult with them and get the proper instructions. The applicants, including their representative at the workplace were/are lay persons in law and could not understand nor appreciate the consequences of the delay."

[11] It is quite apparent from a letter dated 13 September 2000 that the union's Phuthaditjhaba's office sent to the union's legal officer on that day that the legal officer operates out of the union's Johannesburg office. The letter was annexed to the applicants' founding papers. Arising from the contents of the letter one can also conclude that it is highly likely that the union in Phuthaditjhaba was in contact with the individual applicants at the time.

[12] The contents of the affidavit of the union's legal officer, as I have stated, is not confirmed by the individual applicants or the union organiser in their affidavits. The legal officer moreover does not state on what basis he professes to have the knowledge that he attests to in his affidavit. This applies not only to his explanation for the delay, but also to his version of the merits of the dispute, which is characterised by hyperbole.

[13] Mr Boda, who represented the applicants, readily and properly conceded that the explanation for the delay was unsatisfactory. However, he argued that I should not attach overriding importance to it, in any event not to the exclusion of an assessment of the applicants' prospects of success. Regarding the latter aspect he argued that even on the respondent's own papers it is apparent that the individual applicants' race played a role in the decision that they were unsuitable to be trained as housemothers. He also pointed out that the referral of the unfair discrimination dispute to conciliation and then for adjudication did not occur in terms of schedule 7 of the LRA, but in terms of section 10 of the Employment Equity Act 55 of 1998 ("the EEA"). That act came into operation on 7 August 1999. It allows six months after the act or omission that allegedly constitutes unfair discrimination for the referral to conciliation. It does not provide that a dispute can be referred for adjudication or arbitration without an attempt at conciliation under the auspices of the CCMA having taken place (as opposed to section 191(5) of the LRA). It also does not stipulate any time period within which the matter has to be referred to adjudication or arbitration. Mr Boda submitted that it can be accepted that a party nevertheless has to refer a dispute for adjudication within a reasonable time, but argued that the fact that the legislature allowed six months for the referral to conciliation must be regarded as an indication that the 90 day time period stipulated in section 191(11) of the LRA should not necessarily be regarded as a *prima facie* indication of what a reasonable time is to refer an unfair discrimination dispute for adjudication. Mr Boda suggested that the legislature intended that greater latitude should be afforded to the referring party in the case

of an unfair discrimination dispute.

[14] Ms Da Costa, on behalf of the respondent, submitted that on any interpretation the referral of the dispute, both in regard to the alleged unfair dismissal (which she did not concede was valid) and in regard to the alleged unfair discrimination, occurred well outside any time period that can be regarded as reasonable, more so as the dispute had arisen in December or November 1999 already. She argued that, taking into account the length of the delay, the unsatisfactory explanation for it and the case that the respondent has put forward in its papers in answer to the charges of unfair dismissal and racism, fairness dictates that the respondent should no longer have to defend itself against a suit that has been so tardily prosecuted.

[15] The first question that I need to address is what should be regarded as a reasonable time after conciliation for an unfair discrimination dispute to be referred for adjudication or arbitration in terms of section 10(6) of the EEA.

[16] The EEA has to be read in conjunction with the Labour Relations Act and the Basic Conditions of Employment Act 75 of 1997. In fact it would be difficult to make sense of the EEA without doing so. There are a number of instances of cross references in the EEA to the LRA and the BCEA, and in present context more importantly, the EEA utilises the same institutions for dispute resolution than the LRA.

[17] Chapter 2 of the EEA is a replacement and refinement of the portions of the prior items 2, 3 and 4 of schedule 7 to the LRA that previously, before the EEA was introduced, addressed unfair discrimination against employees. The remainder of the residual unfair labour practice provisions in schedule 7 have now been moved into the main body of the LRA in terms of the amendments to section 186, 191 and 193 of the LRA by Act 12 of 2002. Previously, item 3(4) of schedule 7 to the LRA also did not stipulate any time limit for the referral of disputes about unfair labour practices to conciliation or to adjudication or arbitration.

[18] The re-enacted unfair discrimination provisions in chapter 2 of the EEA imposes the six month time limit for a referral to conciliation, but, as I have already mentioned, still does not specify any time limit for a subsequent referral of the dispute to

adjudication or arbitration. The re-enacted residual unfair labour practice provisions in terms of the amendments of section 186, 191 and 193 of the LRA imposes a 90 day time period for referrals of disputes about unfair labour practices for conciliation. Section 191(5A) of the LRA now provides that the CCMA must in principle arbitrate a dispute immediately after certifying that a dispute has remained unresolved. A further referral or request for arbitration has accordingly become unnecessary, unless the matter has to be heard by the labour court, in which event the 90 day time period specified in section 191(11) of the LRA applies.

[19] The present section 191 of the LRA does not bear out the proposition that because a longer period is allowed to refer an unfair labour practice dispute to conciliation than an unfair dismissal dispute, an unfair labour practice dispute, once referred, does not need to be addressed with the same urgency as an unfair dismissal dispute.

[20] To my mind the longer time period that is granted to refer unfair labour practice disputes for conciliation, rather relates to the fact that, as opposed to a dismissal, which is final and is usually preceded by some form of disciplinary or consultative process, the introduction of a labour practice that is perceived to be unfair is often succeeded by a consultative or grievance or dispute procedure. It is also not necessarily characterised by the same finality as applies to a dismissal. Employees, once they become aware of the practice, and their employers should be afforded sufficient time to attempt to resolve the dispute domestically amongst themselves, before the dispute resolution mechanisms of the LRA should be burdened. This would also apply to unfair discrimination, with the even longer time period possibly explainable with reference to the fact that an act or omission at a particular time may only subsequently, once it takes effect, be susceptible of identification as unfair discrimination. In all cases however, because the facts and circumstances governing relationships between employers and employees are dynamic, once it is apparent that a dispute cannot be resolved by agreement, it is imperative that it be resolved by adjudication or arbitration as soon as possible thereafter. As was stated by Kennedy AJ in *Mothibela v Western Vaal Metropolitan Substructure* 2000 1 BLLR 85 (LC) at 86: "The fair and meaningful resolution of labour disputes ordinarily requires that they be resolved expeditiously."

(Emphasis added).

[21] It is not necessary to explore all the fairly self-evident reasons why the employment field is in this regard distinguishable from other areas of human endeavour that regularly give rise to disputes. (See however *Chemical Workers Industrial Union v Darmag Industries (Pty) Ltd* 1999 20 ILJ 2037 (LC) at 2042A-2043B.)

[22] The legislature has allowed a 90 day time period for unfair dismissal disputes to be referred to the labour court for adjudication. Arguably that period is too long. However, it would be sensible to apply the same period to unfair discrimination disputes.

[23] Any delay beyond 90 days in referring an unfair discrimination dispute to the labour court is *prima facie* unreasonable and needs to be fully explained to the court in a condonation application that will also need to traverse all other relevant facts.

[24] This conclusion is also supported by the wording of section 136(1)(b) of the LRA. It provides that:

"(1) 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 that time frame and allow a request for arbitration filed by the party after the expiry of the 90 day period."

Section 10(7) of the EEA provides that:

"(7) The relevant provisions of parts C and D of chapter 7 of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this chapter."

Accordingly, if parties agree in terms of section 10(6)(b) of the EEA that an unfair discrimination dispute should not be

referred to the labour court, but should be resolved by arbitration, it has to occur in terms of part C of chapter 7 of the LRA. Section 136(1) would apply and a 90 day time limit would need to be complied with when the matter is referred to the CCMA for arbitration.

[25] In the present case the time period that it took the applicants to refer their alleged unfair dismissal dispute and their unfair discrimination dispute to this court extended four and half months beyond 90 days. The explanation for the delay is poor and has been deposed to by a person who, on the face of it, does not have first hand knowledge of the facts he deposes to. The explanation is in all probability false.

[26] Mr Boda referred me to the reported case of *Toyota SA Marketing v Schmeizer* 2002 12 BLLR 1164 (LAC) at 1169B-F as authority for the proposition that even a wholly unacceptable explanation for a delay is not necessarily the end of the matter. That proposition is correct. However, what the judgment also bears out is that an unacceptable explanation for the delay, of itself, can nevertheless justify refusal of condonation. If an explanation for the delay is unacceptable the other facts that could influence the court when considering to grant the indulgence must be of considerable moment.

[27] In the *Schmeizer* judgment the LAC reaffirmed the established principles regarding the assessment of condonation application. Van Dijkhorst AJA stated:

"The legal principles applicable to applications for condonation for non-compliance with the time limits laid down in rules are well known. A reference to the abundance of authority is not necessary. The appellant had to show sufficient cause for the relief sought. The decision is to be based on fairness having regard to all the relevant facts. These are usually the degree

of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily they are interrelated and not individually decisive. But if there are no prospects of success the granting of condonation would be pointless. (*Melane v Santam Insurance Co Ltd* 1962 4 SA 531 (A) at 432C). To these four categories of relevant facts may be added the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the respondent's interest in the finality of a judgment. (*United Plant Hire (Pty) Ltd v Hills and Others* 1976 1 SA 717 (A) at 720E). And still this list is not a *numerus clausus*. The present case demonstrates that as set out hereunder."

[Paragraph 15 at 1168I-1168B of the reported judgment.]

[28] In assessing the applicants' prospects of success I take into account that the respondent has answered the applicants' allegations fully and that the applicants have made no reply thereto. More particularly, while it is apparent that the applicants do not contest that the respondent no longer had a need for the individual applicants' services as cleaners, they do not provide any particulars of why they should have been regarded as suitable for the alternative positions they suggest, why the respondent's assessment that they were not, was wrong, or why the respondent's actions lacked a commercial rationale.

[29] On the papers before me I assessed the applicants' prospects of success on both the alleged unfair discrimination and the alleged unfair dismissal disputes as poor. There are no other facts before me that persuade me that the applicants should still be permitted to prosecute claims that were initially pursued with so little urgency. To the contrary, it would be highly unfair to expect of the respondent to have to contest claims that resurfaced in March 1999,

four and a half months after the respondent was entitled to assume that finality had been reached and a year and three months after the issues that were allegedly the subject matter of the dispute had arisen.

[30] In all the premises the application for condonation is dismissed.

[31] No reasons have been advanced to me why costs should not follow the event. Accordingly the applicants are ordered to pay the respondent's costs, jointly and severally, the one paying the others to be absolved.

[32] I have been urged by Ms Da Costa to make an order, if I were to dismiss the application for condonation, dismissing the applicants' case for the relief that has been sought in this court. That is not necessary. Because the application for late referral of the dispute has been dismissed, the matter has been finalised and is no longer pending in this court.

—

---

F G BARRIE

Acting Judge of the Labour

Court

REPRESENTATION:

ON BEHALF OF APPLICANTS:

ADV. F A BODA

ON BEHALF OF RESPONDENT:

ADV. M B G DA COSTA