IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG.

CASE NO: JA 35/ 03

In the matter between:-

NEHAWU on behalf of MOFOKENG
AND OTHERS **Appellant**

And

CHARLOTTE THERON CHILDREN'S HOME **Respondent**

JUDGMENT

DAVIS AJA.

INTRODUCTION.

[1] During the latter part of 1999 respondent retrenched three of its workers, Elizabeth Ndaba, Lucia Mofokeng and Sheila Diamond, all members of the appellant union on whose behalf the appellant has acted.

[2] There is some dispute as to when the three workers were dismissed. Appellant contended that the workers were dismissed on 20 November 1999. Respondent contended that their dismissal took place on 1 December 1999. Nothing turns on this particular dispute.

[3] Shortly after their dismissal, appellant referred a dispute for Conciliation to the Commission for Conciliation, Mediation and Arbitration ('CCMA'),on December

1999. The dispute was conciliated by a CCMA Commissioner and was certified as unresolved with effect from 17 July 2000.

[4] It took the CCMA seven months to conciliate the dispute. It was common cause that this was not due to any fault on behalf of appellants.

[5] The Commissioner certified the dispute to be unresolved and described it as one concerning 'unfair discrimination'. He directed appellants to refer the matter to the Labour Court in terms of the certificate. Appellants referred the matter to the Labour Court on 2 March 2001, some seven months and eighteen days after the certificate of non-resolution was issued.

[6] Appellants then delivered a statement of claim and an application for condonation. In part, the statement of claim reads thus:

'The Respondent dismissed three applicants unlawfully on the 29 November 1999. Respondent refuses to disclose relevant information informing his decision to retrench. Respondent failed to hear our alternative view because applicants were black'

[7] In the application for condonation appellants by way of an affidavit from Mr Motoia Masooa said:

"The dispute about the dismissal of the three applicants happened on November 1999 after the Respondent failed to respond to the alternative argument we put on the table. On the 17th July 2000 the case was put on the roll for conciliation hearing by the CCMA and on the same day we got a certificate of non-resolution. The case should have

been referred on or before the 17th October 2000. It therefore means that this case is late by four months to date. The delay is therefore not unreasonably late to render it unattainable.

EXPLANATION OF THE DELAY

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 work place, were/are laypersons in law and could not understand nor appreciate the consequences of the delay."

[8] 4The respondent took two points in limine when it delivered its response together with an answering affidavit. The one point in limine was that the Labour Court did not have jurisdiction to entertain the dismissal dispute on the basis that such dispute had not first been referred to conciliation as required by sec 191 of the Labour Relations Act, 1995 (Act 66 of 1995) ("the Act"). The other point in limine was that the dispute relating to an alleged unfair labour practice based on discrimination was required to have been referred to the Labour Court for adjudication within 90 days from the date of the issue of the CCMA outcome certificate but was referred way out of that period and that, therefore, the Labour Court did not have jurisdication to entertain that dispute either. The referral of the allegedly automatically unfair dismissal dispute to the Labour Court was clearly out of time because of the failure to comply with the ninety day time period prescribed in section 191. That is assuming that that dispute had been referred to conciliation. The other dispute had also been referred out of the 90 days period but there was a dispute between the parties on whether or not that dispute was required to have been referred to the Labour Court within 90 days.

[10] Appellant contended in the court ***a quo*** that the ninety day time period was however not applicable to the referral of the unfair labour practice dispute. It was contended that the unfair labour practice dispute related to the failure on the part of respondent to employ black housemothers to take care of white children. They further contended that the respondent's answering affidavit manifested that this practice had been in existence at the time of the deposition of the affidavit and that respondent had a policy in terms of which it did not wish to employ black housemothers to take care of white children. Accordingly, appellant sought to declare the policy an unfair labour practice.

[11] The court ***a quo*** held that the unfair labour practice referral had to be determined with reference to the Employment Equity Act 55 of 1998 ('Equity Act'). This Act came into force on 12 October 1998 and was applicable to the unfair labour practice dispute between the parties. The Court ***a quo*** found that the provisions of section 10(7) of the Equity Act required appellants to comply with the ninety day time period set out in the Act in order to have the unfair labour practice dispute adjudicated. Appellants were therefore required to apply for condonation, but the court concluded that there were no prospects of success on the merits, and that, for that reason the application for condonation was refused.

APPELLANT'S CASE ON APPEAL.

[12] With regard to the unfair dismissal, Barrie AJ refused to deal with the point in limine that the Labour Court had no jurisdiction as the dispute had not been referred to conciliation. The learned Acting Judge took the view that it was arguable that the referral of the unfair labour practice dispute may have been wide enough to include the unfair dismissal dispute. However, he said that oral evidence was required to decide that. He could not hear oral evidence as he was sitting in Motion Court when this matter came before him. He said that **"(i)t is a matter that has to be determined by the trial Court whether separately in limine or during the course of the trial."** No appeal was noted against this finding and, accordingly, this issue was not before this Court. In the light thereof appellants may take such steps as they may deem appropriate in regard to it.

[13] Mr Boda raised two particular arguments to support appellants' case in relation to the refusal by the Court a quo of the condonation application relating to the unfair labour practice dispute based on unfair discrimination. The one related to the time period and the other the merits of the case.

THE TIME PERIOD.

[14] Mr Boda submitted that the Court ***a quo's*** conclusion that the appellants had to apply for condonation in respect of the unfair labour practice dispute on the basis that a ninety day time period applied equally to section 10 of the Equity Act was incorrect.

[15] The Court ***a quo's*** decision in this regard rests upon the interpretation of section 10(7) of the Equity Act. Relying upon the provisions of section 10(7) of the Equity Act the Court ***a quo*** concluded that 136(1) (b) of the Act required a dispute to be referred for arbitration within ninety days after it was certified as being unresolved, That period applied to the referral to the Labour Court of an unfair labour practice dispute under the Equity Act for adjudication.

[16] Section 10(7) of the Equity Act provides: "The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by the context, apply in respect of the dispute in terms of this Chapter". Section 136(1) of the Act provides: "if this Act requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate a dispute if –

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

(b) within ninety days after the date on which that certificate was issued…."

[17] Mr Boda submitted that the provisions of section 136 were not applicable as they applied to arbitrations and not to adjudications. Indeed the heading to this section is 'employment of a Commissioner to resolve disputes through arbitration'. The appellants' referral of the unfair discrimination dispute was thus a referral for adjudication at the Labour Court in terms of section 10(6)(a) of the Equity Act and was not a referral to the CCMA for arbitration.

[18] Mr Boda thus submitted that the legislature had deliberately decided upon a different procedural regime for the referral of unfair discrimination disputes under the Equity Act as compared with disputes under the Act. He contended that this was evident, firstly from the fact that a party alleging an unfair labour practice had six months as opposed to thirty days to refer a matter for conciliation. He contended that the legislature

deliberately failed to stipulate a specific time period in section 10(6) of the Equity Act for reference to the Labour Court whereas time periods had been stipulated elsewhere in the Equity Act such as in sections 39(1), 39(2), 39(4) and 40(2).

[19] Mr Boda contended further that the court ***a quo*** erred in coming to the conclusion that appellant was required to refer the dispute for adjudication within ninety days in respect of the unfair labour practice dispute. He contended that the absence of a specified time period could be cured by the application of the Prescription Act 68 of 1969; hence, the existence of the three year time period which would clearly have made any application for condonation unnecessary in the present dispute.

[20] However, as Ms Da Costa, who appeared on behalf on respondent submitted, section 10(6) of the Equity Act provides, 'If the dispute remains unresolved after conciliation –

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

(b) all the parties dispute may consent to arbitration of the dispute''

Reading section 10(6) and 10(7) of the Equity Act together, it would appear that the Equity Act must be read together with the applicable provisions of the Act. By reference to the words 'with the changes required by the context' in section 10(7) the ninety day time period as provided for in section 136(1) of the Act, which itself appears in part C of Chapter VII of the Act, becomes applicable to the dispute. In other words, although the present dispute involves adjudication after an unresolved conciliation and section 136(l) refers expressly to arbitration, the savings provision in section 10(7) of the Equity Act then becomes operative; hence the ninety day requirement is of equal application in the new context to the adjudication as envisaged in section 10(6) of the Equity Act.

[21] On this reasoning, appellant was significantly out of time and for this reason an application for condonation was necessary. That application for condonation contained the skeletal excuse proffered in the unfair dismissal dispute as referred to in paragraph seven above. For this reason, the question of the merits of appellants' case becomes of critical importance.

THE MERITS.

[22] Mr Boda submitted that appellants had a strong case in respect of the allegation of an unfair labour practice. In his submission, the merits of appellants' case rested upon a concession contained in the answering affidavit to the effect that respondent had a policy of employing black housemothers to look after white children. The relevant passage of the answering affidavit deposed to by Reverend

Botha on behalf of respondent reads thus:

'At the time of the consultative process very few children of a black race were accommodated in the home. The respondent was and still is busy with the transformation process, which process is not something which can be meaningfully implemented overnight. It was made clear to the applicant that once sufficient numbers of black children were admitted to the home a black housemother with the necessary skills and qualifications will be appointed as respondent recognized these black children's rights to be brought up by someone understanding their cultural and social background and other relevant considerations. To this extent a skilled and competent black housemother was appointed during 2000 and she is presently in control of her unit filled with black children.'

[23] Ms Da Costa submitted that Reverend Botha's affidavit notwithstanding, the appellants who were employed as cleaners had not disputed on the papers that they did not possess the necessary qualifications to be employed as housemothers. Furthermore, appellants now sought to make out their case on the basis of the answering affidavit. In her submission, no proper case had been made out on the founding affidavit.

EVALUATION.

[24] This court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial:

Miya v Putco Limited; unreported judgment of the Labour Appeal Court DA

17/98 See also **PPAWU and Others v A F Dreyer and Company (Pty) Ltd** [1997] 9 BLLR 1141 (LAC); **Toyota Marketing v Schmeizer** [2002] 12 BLLR 1164 LAC at para. 15. It should be noted that in the two latter cases, the approach as set out in **Miya** was qualified with a measure of flexibility, in that failure to provide a reasonable and acceptable explanation for a delay was not regarded necessarily as an absolute bar to condonation.

[25] In the present dispute, appellants' case is based upon a statement by respondent's duly authorized representative that makes clear that respondent followed a policy in which only white housemothers could supervise white children. On this basis, appellants contended that they could never have been considered for appointment as housemothers precisely because of their race. If properly proved by appellants, this allegation represents the most egregious form of an unfair labour practice. It would be a practice of a kind that is fundamentally subversive of the very constitutional community that is promised in the Constitution of the Republic of South Africa Act 108 of 1996.

[26] It is clearly in the interests of justice that this kind of case be heard, particularly when appellants are able to support their submissions regarding the prospects of success with a statement of respondent's policy given on affidavit and which appears to confirm that the policy is saturated with a racist outlook.

[27] In a dispute of this exceptional nature, less weight should be given to the unexplained delay than would usually be the case. There is the important additional consideration which flows from respondents' papers, namely, that the racism inherent in only permitting white housemothers to look after white children may be an 'ongoing' practice.

[28] For these reasons, appellants' application for condonation should have been granted in respect of the alleged unfair labour practice, based as it is, on a

substantial allegation of a racist policy.

[29] For the reasons given I make the following order:

1. The appeal is upheld with costs.

2. The order of the Court a quo is set aside and replaced by the following order:

"(a) The applicant's failure to refer the dispute to the Labour Court within 90 days from the date of the issue of the certificate that was unresolved at conciliation is hereby condoned.

(b) the respondent is to pay the costs of this application."

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DAVIS AJA

I agree

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ZONDO JP

I agree

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WILLIS

JA

Appearances

For the appellant : Mr F.A Boda

Instructed by	:	Kathrada Norval Rice Patel Attorneys
For the respondent	:	Mrs B Da Costa
Instructed by	:	Grant Rae Attorneys
Date of judgement	:	9 July 2004