IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case Number: J6084/99

In the matter between:

RG` Applicant

and

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

JUDGEMENT

PILLAY J

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1999 ("the LRA") to review, correct or set aside the appeal proceedings under Case No 6/778/99 conducted under the auspices of the First Respondent ("the Bargaining Council") and Second Respondent ("the DRC"), and the decision of the Third Respondent ("Adv Pio") dismissing the application for condonation of the late referral for conciliation to the Bargaining Council.

[2] The Applicant was employed by the Fifth Respondent ("the Employer") as a marketing manager for about two months from March to May 1999. He was dismissed in circumstances which were alleged to be unfair.

[3] The dispute was referred incorrectly to a bargaining council that did not have jurisdiction. The mistake was discovered on 1 June 1999. Attempts to serve the referral on the Bargaining Council were frustrated

because it could not be sent by fax and 2 June 1999 was a public holiday. The referral was served on 3 June 1999, one day late.

[4] At the request of the Bargaining Council, the Applicant furnished reasons for the late referral. The Employer was invited to respond to the application for condonation. The Fourth Respondent ("Mr Nagee") granted condonation after considering the submissions from both parties.

[5] The Employer appealed against the decision of Mr Nagee to Adv Pio who upheld the appeal.

[6] Several points *in limine* were raised in this application.

6.1 **The delay in complying with Rule 7A(8).**

6.1.1 Ms Munro-Flint for the Employer contended that the Applicant had failed to comply with Rule 7A(8) of the Rules of this Court in that it did not deliver within ten days a Further Notice of Motion after the registrar had made available the record on 8 February 2000. The Further Notice was only delivered on 22 June 2000.

6.1.2 It is common cause that the DRC and not the registrar had made the record available to the Applicant. The Applicant delivered its Further Notice after he received the Notice of Set Down from the registrar on 13 June 2000.

6.1.3 The Applicant was therefore not out of time in complying with Rule 7A(8)(b). If the Employer wanted the Applicant to comply with the Rule sooner on the basis that the record had already been made available by the DRC, then it should have put the Applicant on terms. (**Purcell V De Villiers & Co (1995) 16 ILJ 1273 (LC); Hlongwane & Others v Nu-World Industries (Pty) Ltd (1994) 15 ILJ 183 (IC); Cedar-Radex Paint & Lacquer Industries (Pty) Ltd V SA Chemical Workers Union & Others (1992) 13 ILJ 271 (IC); Ntimbane v Indian Ocean Fertilizer (Pty) Ltd (1992) 13 ILJ 940 (LAC); National Union Of Metal Workers v C Rees No & Another (1995) 4 LCD 18 (LAC))**

6.2 **The delay in instituting the review**

6.2.1 The Employer contended that the Applicant had failed to institute this application for review within a reasonable period, that is within six weeks (**Librapac CC v Fedcraw & Others (1999) 20 ILJ 1510 (LAC)**, **Ntsieni v CCMA & Others J630/9(unreported)**). As the reason for the decision had been provided by 18 October 1999 and the Notice of Motion was delivered on 17 December 1999, the application, it was submitted, was more than two weeks late.

6.2.2 This review is in terms of section 158(1)(g) and not in terms of section 145 which prescribes a period of six weeks for review applications. Section 158(1)(g) does not prescribe any time limits. (**Moolman Brothers v Gaylard NO & Others (1998) 19 ILJ 150 (LC))** While the time limits provided for in section 145 may serve as a guide as to what might be a reasonable period for instituting proceedings in terms of s158(1)(g), it is not definitive.

6.2.3 In considering whether the application for review was brought within a reasonable time I have taken into account the criteria discussed in **Radebe v Government of the Republi of South Africa and Others 1995 3 SA 787 (N) at 799B.** Although the issues are not complex, as a non party to the Bargaining Council the Applicant can not be expected to act in an overhasty manner.

6.2.4 I find that a period of two months to institute these proceedings is not *per se* unreasonable. (**Mlaba v Masonite (Africa) Ltd & others [1998] 3 BLLR 291 (LC); Sithole V Nogwaza No & Others (1999) 20 ILJ 2710 (LC))** An application for condonation was therefore nor necessary. (**Setsokosane Busdiens v Nasionale Vervoerkommissie 1986 2 SA 57 (A) 59 H-J)**

6.3 **Jurisdiction of the Labour Court: application of section 24**

6.3.1 It was submitted for the Employer that as the dispute related to whether there was a collective agreement binding on the parties, it should have been referred in terms of section 24 to arbitration after conciliation.

6.3.2 Section 24 provides:

(1) Every collective agreement, excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

(a) the collective agreement does not provide for a procedure as required by subsection (1);
(b) as the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement."

6.3.3 The referral in terms of section 24(1) is invoked by the collective agreement. Section 24(1) does not compel the referral of every dispute about the interpretation and application of a collective agreement to conciliation and arbitration. It makes it compulsory for every collective agreement to provide such a procedure. Where a collective agreement does not provide such a procedure, section 24(2)(a) may be invoked.

6.3.4 Section 24(2) of the LRA provides the specific circumstances when a dispute about the interpretation and application of a collective agreement can be referred to the CCMA. None of these circumstances apply to this dispute.

6.3.5 The Employer relied on the so-called DRC Terms of Reference and Procedures as being the collective agreement that was binding on it as a member of the employer's organisation that was party to the agreement, and on the Applicant in terms of section 51 of the LRA.

6.3.6 According to Mr van Jaarsveld, the director of the DRC, during 1997 the DRC had resolved to adopt the DRC Terms of Reference and Procedures as an internal procedure. From this I also understood that it had not been published in the Government Gazette.

Section 51 provides:

" 51 Dispute resolution functions of council

(1) In this section, dispute means any dispute about a matter of mutual interest between-

on the one side-

one or more trade unions;

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

(b) on the other side-

more employers' organisations;

one or more employers; or

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

(a) (i) The parties to a council must attempt to resolve any dispute between themselves in accordance with the constitution of the council.

(ii) For the purposes of subparagraph (i), a party to a council includes the members of any registered trade union or registered employers' organisation that is a party to the council.

(b) Any party to a dispute who is not a party to a council but who falls within the registered scope of the council may refer the dispute to the council in writing.

(c) ¼¼

(3) If a dispute is referred to a council in terms of this Act and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute-
through conciliation; and

(b) if the dispute remains unresolved after conciliation, the council must arbitrate the dispute if-

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

(ii) all the parties to the dispute consent to arbitration under the auspices of the council.

6.3.8 The procedure for resolving disputes between those who are parties to the council and those who are not, is therefore distinguished.

6.3.9 While the employer is a member of an employers' organisation that is party to the Bargaining Council and the DRC Terms of Reference and Procedure the Applicant is not a party to the Bargaining Council. He is also not a party to the DRC Terms of Reference and Procedures. Nor is he a member of any trade union that is a party to either the Bargaining Council or the DRC Terms of Reference and Procedures. Neither the Main Agreement of the Bargaining Council nor the DRC Terms of Reference and Procedures were extended in terms of section 32 of the LRA to non parties. Hence the dispute is about the applicability of the DRC Terms of Reference and Procedures.

6.3.10 As stated above, the referral to arbitration must, in terms of section 24(1) of the LRA, be in terms of the collective agreement. In this case the Applicant denies that it is bound by any applicable collective agreement.

6.3.11 The Employer misconstrued the Applicant's case by pleading that the latter denies that the Main Agreement of the Bargaining Council was binding on the parties to the Bargaining Council. The Applicant did not make such a denial

6.3.12 This review may require consideration of the collective agreements of the Bargaining Council. However, that would not make the dispute one about the interpretation and application of the agreement. As the Applicant denies the applicability of the collective agreement to him he cannot be expected to invoke the very agreement which he refutes to enforce his rights. However, if at any stage during these proceedings it becomes apparent that the dispute ought to have been referred to arbitration the court may stay the proceedings and refer the dispute to arbitration. (Section 158(2)(a)) .

6.3.13 Furthermore, the Applicant has framed the dispute as a review in terms of section 158(1)(g). The DRC Terms of Reference and Procedures expressly provide that the next step after an appeal in a condonation application is a review to the Labour Court. Consequently, even if the DRC Terms of Reference and Procedures did apply, the Applicant would be in the correct forum. The Employer's objection to jurisdiction on this ground is therefore frivolous and vexatious.

6.3.14 Lastly clause 29 of the Main Agreement provides:

"(1) For the purpose of this Agreement, "dispute" means any dispute about the application, interpretation or enforcement of this Agreement, or any other collective agreements entered into by the parties to the Council."

As the Applicant was not a party to the Bargaining Council, and as the Main Agreement had not been extended to non parties, it was not binding on the Applicant.

In the circumstances all three points *in limine* are dismissed.

[7] Mr Buirski submitted that as the Applicant was not bound by the "DRC Terms of Reference and Procedures for the reasons discussed above, its procedures for applying for condonation and appealing against the refusal of condonation should not have been applied to him. The application for condonation should have been dealt with as prescribed by the LRA. In support of the submission he referred to sections 51(3) and 191.

[8] As the DRC Terms of Reference and Procedures is a collective agreement providing for an internal dispute procedure its application is proscribed in terms of section 23 of the LRA. As stated above the Applicant was neither party to the DRC Terms of Reference and Procedure nor was he a member of a party to it. It is conceivable however, that non parties to a collective agreement may be bound by it in terms of section 23(1)(d) of the LRA which reads:

23 Legal effect of collective agreement

(1) A collective agreement binds-

(a) ¼¼

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2)¼¼.

[9] Section 23 does not apply in this case as the DRC Terms of Reference and Procedures do not identify the non party employees nor does it expressly bind them.

Subsections 191(1) and (2) provide :

Disputes about unfair dismissals

If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction.

If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the 30-day time limit has expired.

¼..

[11]Having established that the Applicant was a non-party to the Bargaining Council, it follows that section 51(3) read with section 191 would apply to him. His dispute should have been channeled through a process of conciliation and arbitration. The section 191(1) time limit of 30 days to refer the dispute would apply.

[12]The decision in **Portnet V La Grange & Others (1999) 20 ILJ 916 (LC)** confirmed that parties to a council must attempt to resolve any dispute in accordance with the constitution of the council. It did not consider the position of non parties to that council. As the Applicant referred the dispute outside the 30-day time limit the bargaining council must consider an application for condonation in terms of section 191(2).

[13]Neither the LRA nor its regulations provide a procedure for matters such as applications for condonation to a bargaining council. A bargaining council would in practice have to develop rules, procedures, and an administration to process disputes. Did the Bargaining Council have the authority to develop such rules and procedures for non parties?

[14]Bargaining councils derive their powers from the LRA and their constitutions.

[15]Section 28 of the LRA provides:

Powers and functions of bargaining council

(1) The powers and functions of a bargaining council in relation to its registered scope include the following-

to conclude collective agreements;

to enforce those collective agreements;

to prevent and resolve labour disputes;

to perform the dispute resolution functions referred to in section 51;
¼¼."

[16] Section 30 of the LRA specifies what the minimum requirements for the constitution of a bargaining council should be. They include :

"(h) the determination through arbitration of any dispute arising between the parties to the bargaining council about the interpretation or application of the bargaining council's constitution;

(i) the procedure to be followed if a dispute arises between the parties to the bargaining council;

(j) the procedure to be followed if a dispute arises between a registered trade union that is a party to the bargaining council, or its members, or both, on the one hand, and employers who belong to a registered employers' organisation that is a party to the bargaining council, on the other hand;

¼."

[17] Bargaining councils are neither compelled nor precluded by section 30 of the LRA from including in their constitutions the procedure to be followed if a dispute arises in which one of the parties is a non party to it but who falls within its registered scope. It would be perfectly permissible for a bargaining council to include such a provision in its constitution as it is authorized by section 28(1)(d). Furthermore, section 30

is not an exhaustive but a minimum list of the requirements for a constitution of a bargaining council. However, the absence of such a provision in the constitution cannot mean that a bargaining council may not execute its powers and functions in terms of section 28(1)(c) and (d).

[18] In the absence of any provision in the constitution of a bargaining council as to how it would execute its powers and functions in terms of section 28(1)(c) and (d) in relation to non parties, it must be implied that the bargaining council would apply procedures that are fair, reasonable and consistent with the LRA in order to give effect to section 191(2). The way in which it applies the procedures is also relevant to determining procedural fairness. The non party should at least be made aware of the procedure, even if it does not consent to it.

[19] Whether the Bargaining Council in this case is empowered by its constitution is not known as the constitution was not produced or relied upon during the hearing. However, the DRC Terms of Reference and Procedures were developed as the procedure to be followed in disputes in the industry. That is the basis on which the Bargaining Council and the parties to it had decided to administer disputes in the industry.

[20] Bargaining councils may design their own dispute systems in ways that ensure efficient and cost effect resolution and prevention of disputes. From the DRC Terms of Reference and Procedures, there is nothing inherently prejudicial to non parties. It provides a procedure for conciliation and arbitration of disputes and for granting condonations. It is consistent with the LRA. There is therefore no reason for the Court to interfere by imposing any other procedure.

[21] In the circumstances the DRC Terms of Reference and Procedures can be applied to non parties not as a collective agreement but as a procedure developed by the Bargaining Council for the industry in order to give effect to its obligations in terms of section 51(3) and 191(2) in order to carry out its functions in terms of section 28(1)(c) and (d).

[22] It was further submitted that the DRC procedure was inconsistent with the LRA which did not permit a party who was aggrieved by the outcome of an application at a bargaining council to apply to the same body to review and set aside the decision. Accordingly it was submitted that the appeal should be found to be unfair and *ultra vires* the LRA.

[23] Firstly, bargaining councils must be allowed the flexibility to design their own dispute systems so that the most inexpensive and effective procedures are adopted. If that means having a condonation application followed by an internal appeal, so be it. Even if the LRA makes no express provision for such an appeal, it would be consistent with the general policy of encouraging maximum use of private and internal dispute

resolution mechanisms and the settlement of disputes at the lowest possible level.

[24] Secondly, if the appeal is to the same body but a different adjudicator, it cannot be said that the rules of natural justice have been compromised. As was demonstrated by Mr Nagee and Adv Pio in this case, each member of the DRC acts independently of any other member.

[25] In the circumstances, the appeal procedure was not unfair or *ultra vires* the LRA.

[26] As mentioned above, the way in which the procedures are applied to non parties is also a consideration in determining whether a non party had a fair opportunity to present its case.

[27] The DRC Terms of Reference and Procedures provide a procedure for applying for condonation which requires the case management officer (CMO) to request the referring party to apply for condonation within 5 days. The application must be made on affidavit. The contents of the affidavit are specified.

[28] The CMO must, on receipt of the application, refer it to the other parties to the dispute who have 14 days to respond on affidavit to the application. The response must be served on the DRC and the applicant for condonation, who then has 7 days thereafter to reply.

[29] A member of the DRC will then rule on the application. Any party aggrieved by the outcome of the application for condonation may advise the CMO accordingly. The director of the DRC or any member delegated by it will then consider the matter afresh on the same papers "on appeal". The final step is a review of the decision of on appeal to the Labour Court.

[30] The Bargaining Council's criteria for considering an application for condonation are:

a. the degree of lateness;
the explanation given for the delay;
the prospects of success;
d. the importance of the case (which may include the number of applicants);
e. the opposite party's attitude to an application for condonation or, alternatively, the fact that the opposite party raises the delay as a point *in limine*;
hardship for any of the parties;
labour unrest;
h. an endeavour to settle the dispute through negotiation if the other party agrees to such a *modus operandi*.

[31] The Bargaining Council and the DRC in particular omitted to comply with the DRC Terms of Reference

and Procedures in several respects. Firstly, the Applicant was not invited to make an application for condonation but directed to deal with only one aspect of an application for condonation, namely to provide reasons why the referral was outside the 30 day period.

[32]Secondly, the Applicant was not served with a copy of the Employer's answer in order to reply.

[33]Thirdly, it is not evident that the Applicant was served with the Employer's response to the grounds on which condonation had been granted by Mr Nagee. While the DRC Terms of Reference and Procedures do not specifically provide for service of the response on the Applicant, the principles of natural justice compels such service. Otherwise the Director or member might hear only one party on an issue on appeal. As it transpires in this case the Applicant ought to have had an opportunity to reply to the Employer's submissions on appeal.

[34]Fourthly, none of the submissions were on affidavit.

[35]Fifthly, the Applicant had no knowledge and had not been informed by the Bargaining Council of the procedure it intended to apply. This omission by the Bargaining Council was grossly unfair to the Applicant, a non party to the Bargaining Council.

[36]Sixthly, as a result of the omission referred to above, the Applicant did not comply with the DRC Terms of Reference and Procedures. This non compliance proved fatal to his application for condonation on appeal. Adv Pio granted the appeal and refused condonation because, amongst other things, the Applicant had not dealt with the prospects of success.

[37]The procedure followed by the DRC was inconsistent with its Terms of Reference and Procedures and such procedure as was used was misleading and prejudicial to the Applicant.

[38]The submission for the Employer that the Applicant regarded himself as bound by the collective agreement, namely, the DRC Terms of Reference and Procedures, since he performed in accordance with it and failed to object to it is entirely without merit as the Applicant had no knowledge at the time of its existence.

[39]The decision of Adv Pio is challenged on the further ground that he concluded that no proper application for condonation had been made as it was made by labour consultants who had no *locus standi* in terms of the LRA.

[40]The Employer had not objected to the application for condonation on the grounds that the application had

been signed by labour consultants and not the Applicant personally. This was not a ground raised with or considered by Mr Nagee. It was also not raised on appeal. Adv Pio of his own accord considered the point and rejected the application.

[41]While there are circumstances when an adjudicator may consider a jurisdictional point of his own accord, fairness requires that he should not decide the issue without first giving the parties an opportunity to address him.

[42]Adv Pio also failed to adopt an even handed approach to both parties. He relied on the judgement of Gon AJ in **Rustenburg Platinum Mines Limited (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others (1998) 19 ILJ 327 (LC)**, where the court ruled that a referral signed by a labour consultant was invalid since section 191(1) of the LRA refers to "the dismissed employee".

[43]However, he failed to apply the decision in **Etschmaier v Commission for Conciliation, Mediation and Arbitration and Others (1999) 20 ILJ 144 (LC),** to the Employer. Oosthuizen AJ in that case ruled that a referral signed by an attorney was invalid. The Employer was represented in the condonation application by attorneys.

[44]In view of the irregular procedures followed in both the application for condonation and the appeal, the decisions of Mr Nagee and Adv Pio may be reviewed and set aside. However, the Applicant claimed relief against the decision of Adv Pio and not against the decision of Mr Nagee. In the circumstances, the Court grants an order in the following terms:

1. The appeal proceedings under case number 6/778/99 carried out under the auspices of the First and Second Respondents is hereby reviewed and set aside.

2. The decision of the Third Respondent under case number 6/778/99 is hereby reviewed and set aside.

The Fifth Respondent is directed to pay the costs of the application.

SIGNED AND DATED AT JOHANNESBURG ON THIS 21st DAY OF SEPTEMBER 2000.

_____

D PILLAY

JUDGE OF THE LABOUR COURT

For the Applicant: ADV BUIRSKI

Instructed by: MOLL, VAN DER MERWE ATTORNEYS

For the Fifth Respondent: MS MUNRO-FLINT ATTORNEYS

Instructed by: MUNRO-FLINT ATTORNEYS