



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

**Case no: J 837/17**

In the matter between

**ABSA BANK LIMITED**

**Applicant**

and

**DIRECTOR GENERAL: DEPARTMENT OF  
LABOUR**

**First Respondent**

**MINISTER OF LABOUR**

**Second Respondent**

**Heard: 13 April 2017**

**Delivered: 25 April 2017**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J:**

*Introduction:*

[1] The applicant approached this Court on an urgent basis to seek a declaratory order in the following terms:

“1. ....

2. declaring that the applicant has complied with section 21 of the Employment Equity Act, 55 of 1998 ("EEA") in that it submitted its employment equity report for 20015/2016 reporting period ("Report") to the first respondent on 15 January 2017;
3. Alternatively to prayer 2, and in the event that this Honourable Court does not conclude that the applicant submitted its Report to the first respondent 15 January 2017, condoning the applicant's failure to comply with section 21 of the EEA in regard to the form or timing of its submission and/ or directing the first respondent to receive the applicant's report and condone the non-compliant submissions thereof;
4. Directing the second respondent to reflect the applicant's name on the register published in terms of section 41 of the EEA, confirming that it has complied with section 21 of the EEA

..."

- [2] The respondents in their answering affidavit do not appear to vehemently oppose the applicant's application. They are not litigants in the ordinary sense and are mere custodians of the EEA, whose only interest in the matter is to ensure implementation, compliance and enforcement of the provisions of that Act. They merely seek to demonstrate that according to their records, it cannot be said that ABSA has submitted its Report for 2015/2016.

*Background:*

- [3] The applicant, ABSA Bank Limited is a public company registered as a bank in terms of the Banks Act<sup>1</sup>. It is a designated employer in terms of the provisions of the EEA. Section 21 of the EEA<sup>2</sup> places an obligation on every designated employer to submit an annual employment equity report (Report) to the Department of Labour (DOL). The first respondent, the Director General, is the administrative head and accounting officer, and by virtue of the provisions of section 21, every designated employer must submit employment equity reports to his office annually.

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<sup>1</sup> Act 94 of 1990

<sup>2</sup> Section 21(1) provides; a designated employer must submit a report to the Director-General once every year, on the first working day of October or on such other date as may be prescribed.

- [4] The second respondent, the Minister of Labour is the Executive head of the DOL and by virtue of the provisions of section 41 of the EEA, she is responsible for maintaining the register and publication of the annual Report as submitted by designated employers.<sup>3</sup>
- [5] The applicant's Report was due for submission either on the first working day of October 2016<sup>4</sup> or on the 15 January 2017<sup>5</sup>. Central to this dispute is whether the applicant had submitted its 2015/2016 report on 15 January 2017.
- [6] The prescribed procedure of submitting reports is done through the DOL's online computerized system, in terms of which the representative of the designated employer, must first login and proceed to capture the employment equity data in each corresponding field. The system is designed in such a way that the representative may log in and out before the data is submitted. The data already captured is however not lost as the system allows the representatives to "save" the data and on a future log, proceed from where they had left off.
- [7] The data may be accessed and edited by the representative any time prior to the 15 January deadline or formal submission. Once the deadline has passed, the system is not accessible to the representative. The system prior to the deadline requires the representative once satisfied with the data captured, to press the "submit" button to confirm submission. Once the 'submit' button has been pressed, a computer generated email is sent to the Chief Executive of the designated employer confirming the submission of the Report.

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<sup>3</sup> Section 41 provides;

(1) The Minister must keep a register of designated employers that have submitted the reports required by section 21.

(2) The register referred to in subsection (1) is a public document.

<sup>4</sup> Section 21(1) of the Employment Equity Act *supra*

<sup>5</sup> Regulation 10(1) and (2):

(1) A designated employer must submit a report to the Director General in terms of section 21 of the Act annually on the first day of October or by 15 January of the following year only in the case of electronic reporting using EEA2 form.

(2) Employment equity reports must be addressed to the Employment Equity Registry, Department of Labour... or submitted electronically using the online reporting system available on the departmental website, [www.labour.gov.za](http://www.labour.gov.za)

- [8] The applicant avers that its Employee Relations Manager – Human Resources, Ms Denise Mantle, was tasked with the uploading and submission of the Report online on this occasion. The Report was completed on the Online Platform prior to the deadline for submission after the entering of all required data. It was further averred that Mantle experienced technical difficulties in logging in during 48 hours preceding the deadline. In spite of those difficulties, at approximately 19h46 on 15 January 2017, Mantle was able to complete and submit the report by pressing the “submit” button.
- [9] On or about 19 January 2017, the DOL, at Mantle’s request, sent to ABSA via email, what is purported to be the Report as completed by her. On 13 February 2017 however, an email was sent to ABSA stating that the Report was not successfully submitted. On the same day, another email was received by ABSA which *inter alia* stated that:
- “In the unfortunate event that you may have received today, 13 February 2017, a reminder notifying you of the closure of the EE system on 15 January 2017, please ignore as it was sent in error.”*
- [10] On 28 February 2017, the DOL notified Mr Sifiso Lukhele of the applicant’s Head of Employee Relations via telephone that the applicant had not successfully submitted its report. On 1 March 2017, an urgent meeting was held between ABSA and the DOL to clarify the issue of the submission of the Report. At that meeting, ABSA was advised that the Report was completed but not submitted, as the ‘submit button’ was not pressed by Mantle. Further to that, officials of the DOL in that meeting indicated that they had no authority to condone the “late” submission of the Report.
- [11] At a further meeting held on 2 March 2017 between ABSA and high-ranking officials of the DOL, it was reiterated that the Report had been completed but not submitted in the manner described. In the light of the impasse, ABSA then approached this court with the current application.

*Jurisdiction and Urgency:*

[12] It was correctly pointed out on behalf of the applicant that this Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the EEA in terms of the provisions of sections 49 and 50. The respondents did not further contest the urgent nature of this matter. I am satisfied that on the pleadings, having had regard to the provisions of Rule 8 of the Rules of this Court, the applicant has equally made out a case for urgency, more specifically in view of the imminent publication of the section 41 register by the Minister, and the reputational harm and associated commercial prejudice that may follow if the relief sought is not obtained.

*The submissions:*

[13] The consequences for the failure to comply with the provisions of section 21 of the EEA for the applicant are that;

- a) It will be not be included in a register of complying employers which will be published by the Minister in terms of section 41 of the EEA;
- b) It will consequently suffer severe reputational harm and associated commercial prejudice.

[14] It was accordingly submitted on behalf of the applicant that on the evidence, it had indeed complied with its obligations under section 21 to submit the report, or at most, it had substantially complied with its obligations, and therefore entitled to the order sought. In this regard, it was submitted that the Director General appears to accept that ABSA duly entered all the relevant information to be contained in the Report on the Online Platform prior to the deadline, and that he had access to the completed report from the date that it was completed.

[15] ABSA contends that once the report was submitted it became a public document, and that to the extent that the DOL insisted that it did not have

any record of the ABSA's act of electronic submission, this could conceivably only be put down to a technical system glitch, which had prevented the submission from being reflected on the DOL's system.

[16] The applicant's alternative argument, if it was concluded that it had not complied with its obligations or where there was no evidence of 'sufficient' compliance, was that this Court or the DOL should grant it condonation regarding the limited non-compliance with the provisions of section 21 of the EEA.

[17] The respondents on the other hand merely sought to put all relevant facts before the court and to identify the statutory provisions and the law applicable. It is maintained that the applicant has not complied with the requirement entailing the submission of the report by pressing the 'submit' button when it purportedly did so. It was contended that the objective evidence suggested that ABSA had failed to submit its report in that the 'submit' button in the online form was not pressed before midnight on 15 January 2017. To this end, the argument was that the only issue for consideration before the Court was whether the court should condone ABSA's failure to submit timeously.

*Evaluation:*

*Was there compliance with the provisions of section 21 of the EEA?*

[18] Section 21 of the EEA read with regulation 10 of the Employment Equity Regulations, 21 (Regulations) prescribes the manner of reporting and submission of reports. Regulation 10 (2) envisages reports being submitted electronically using the online reporting system available on the DOL's website.

[19] It was correctly pointed out on behalf of the respondents that there is nothing in section 21 or Regulation 10 that expressly provides that reports are deemed to have been submitted when the employer's representative presses the 'submit' button. That requirement is merely meant for the DOL's own proper and effective administration of the process of reporting.

[20] I am further in agreement with the submissions made on behalf of the respondents that a completion of the form online cannot amount to a submission as employers are still at liberty to amend those forms before submission. In this case however the issue is whether the alleged failure to press the 'submit' button meant that the process of submission was not completed. This in my view is a factual question in view of Mantle's contention that she had indeed pressed the 'submit' button. It is also a legal question to the extent that the definition of 'serve' or 'submit' in section 1 of the EEA provides that;

'serve' or 'submit' in relation to any communication means;

- (a) To send it in writing delivered by hand or registered post;
- (b) To transmit it using any electronic mechanism as a result of which the recipient is capable of printing the communication; or
- (c) To send or transmit it in any other prescribed manner'

[21] In this case, I did not understand it to be contested that;

- (a) Mantle on 15 January 2017 at 19h46 had completed and transmitted the report on the DOL's Online Platform. The ABSA's record of login as per page 113 of the bundle indicates a successful transmission of the report.
- (b) On 19 January 2017, the DOL, at Mantle's request e-mailed her the submitted report, which implies that it was in possession of the report as it was on its database, and further able to print that report. The fact that the DOL had not formally acknowledged receipt of the report after it was immediately transmitted does not imply that it was not received.
- (c) At no stage did the DOL advise Mantle that the report was not received until 18 February 2017 and subsequent dates leading to various meetings and communication between the parties. This was notwithstanding the fact that the DOL had emailed back the report to Mantle on 19 January 2017, or that DOL's own e-mail of 13 February

2017 informed ABSA that a system generated email notification sent erroneously stating that the report was not successfully submitted should be ignored.

- (d) It is common cause that the report remains final, could not be altered, was in the DOL's possession, and thus accessible to members of the public.

[22] Inasmuch it is acknowledged that the pressing of the 'submit' button on the online platform is essential for the DOL to establish whether indeed a document was submitted, this in my view takes form over substance. It is not suggested that the pressing of the 'submit' button is unimportant in view of the acknowledgement that a mere completion of the form is not sufficient, and also in view of the purpose that this requirement serves. What is being suggested is that the requirement/obligation imposed by the DOL to press the 'submit' button is merely administrative and not a statutory one. Thus, once it is established that the communication was transmitted using the online mechanism, and that the DOL could access and print that report, as contemplated in (b) of the definition of 'serve' or 'submit', the employer has discharged its obligations.

[23] To illustrate the above point, and without suggesting that this may be the case in point, if for example, a report or any documents was submitted or electronically transmitted to the DOL, and for some reason its computerised system experienced some technological glitch which was unknown to the sender, can it still be said that the document or report was not received by the recipient or sent by sender at the time of the technological glitch? Equally so, can it be said in these circumstances that since the DOL had not sent an acknowledgement of receipt it should be concluded that the document or report electronically submitted was not received? The emphatic answer should clearly be in the negative. To hold otherwise would be to place an even more onerous burden on the sender, to prove submission or service beyond what is contemplated in the definition of 'serve' or 'submit'.



[24] Similarly, the form or manner of online submission as devised by the DOL for its own convenience and effective administration of the submission process cannot supersede statutory provisions. Thus in my view, once there is a submission as contemplated within the meaning of 'serve' or 'submit' in the definition section of the EEA, that should be the end of the matter. The mere fact that a particular mode of submission or transmission of reports is put in place for the DOL's own administrative purposes and convenience, cannot be a standard upon which compliance is measured. What is of consequence is whether the requirements of 'serve' or 'submit' as contemplated in the definition of the EEA have been met.

[25] In this case, in view of the common cause and/or the undisputed facts as advanced by ABSA, and the evidence analysed above, it should be found that it had indeed submitted its 2015/2016 Report in compliance with the provisions of section 21 of the EEA.

[26] In the light of the above, no purpose would be served in determining whether in the alternative ABSA had 'substantially' complied with section 21 or not. Equally so, it would not be necessary to determine whether there is a need for condonation or whether this Court is empowered in terms of the provisions of section 50 (1) to grant condonation to the extent that it was alleged that there was non-compliance with the provisions of section 21.

[27] Neither party sought a cost order and there is no basis in law or fairness to make any such order. Accordingly, the following order is made;

*Order:*

1. In accordance with the provisions of Rule 8 of the Rules of this Court, the applicant's non-compliance with the ordinary rules for service and time-periods is condoned.
2. It is declared that the applicant has complied with the provisions of section 21 of the Employment Equity Act, 55 of 1988, and has

accordingly submitted its employment equity report for the 2015/2016 reporting period to the first respondent on 15 January 2017.

3. The second respondent is directed to reflect the applicant's name on the register to be published in terms of section 41 of the Employment Equity Act, confirming that it has complied with the provisions of section of that Act.
4. There is no order as to costs

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E Tlhotlhemaje

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant:

Advocate A Redding SC with  
Advocate S Budlender & Advocate M  
Sikhakhane

Instructed by:

Baker & McKenzie Attorneys

For the First and Second Respondents: Advocate TJ Bruinders SC

Instructed by:

The State Attorney: Pretoria

LABOUR COURT