

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Of interest to other Judges

Case no J 183/2018

In the matter between

**LEBOHANG JOSHUA DLAMINI & 7
OTHERS**

Applicants

and

SEDTRADE

First Respondent

TSUBANE KIEWIT SOLO

Second Respondent

Heard: 8 November 2019

Delivered: 12 November 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application for condonation for the late referral of a statement of case. The application makes reference to a letter issued on 15 January 2018 proposing a meeting with the respondents and a subsequent visit to the office of the first respondent. These engagements appear to have been directed at an attempt at an amicable resolution of the dispute between the parties. The applicants submit that the late filing of the statement of claim was not done intentionally or deliberately, but solely for the purpose of affording the respondent's ample time to resolve the matter amicably. The applicants aver further that the referral is five days late and that they have good prospects of success.

[2] The court file is incomplete and the statement of case is not attached to nor recorded on the index. That notwithstanding, the first respondent confirms that the statement of case was served, with some pages missing, on 5 February 2019. When the matter was called, I enquired of the applicant's representative when the certificate of outcome was issued by the CCMA in terms of s 135 (5) of the LRA. The enquiry was based on the principle established by the Constitutional Court in *National Union of Metalworkers of SA v Intervolve (Pty) Ltd* (2015) 36 ILJ 363 (CC) in which the court held that in any dismissal dispute, this court has no jurisdiction if the dispute was not referred to conciliation. At paragraph 108 of the judgment, Zondo J (as he then was) noted that this court does not even have a discretion to adjudicate a dismissal dispute that has not been referred to conciliation. Mr Tlali, who represented the applicants, conceded that in so far as the applicant's claim is one of unfair dismissal, there had been no referral to the CCMA. That being so, it is manifestly clear that this court lacks jurisdiction to entertain any claim of unfair dismissal made by the applicants. Mr Tlali urged me to refer the matter to the CCMA for conciliation. That is not a course of action that is open to the court. The applicants are required to make a proper referral in terms of the LRA and to the extent that the referral will be made outside of the prescribed time limit, it will be necessary for them to apply for condonation. That is a matter to be dealt with by the CCMA should the applicants elect to refer a

dispute but for reasons that appear here under it does not appear to me that their prospects of success in any application for condonation are good, if any prospects of success exist at all.

[3] This brings me to the balance of the applicant's claim which I have been able to discern, with some difficulty, from the terms of the statement of case. The applicants describe themselves as parties to a joint venture with the second respondent. What they seek, in terms of paragraph 7 of the statement of case, is the unconditional reinstatement of the joint venture (to the exclusion of the second respondent, payment of outstanding wages in full to the joint venture, payment of 'lost wage', compliance with 'relevant legislation is of the RSA' and alternative relief. In the confirmatory affidavits, the individual applicants deposed to the fact that they are all directors, co-directors of companies and members of Glasgow operations and that those companies were one of a number which formed the joint venture. There are no averments in the statement of case that establish any form of employment contract or employment relationship between the parties. What there is a written joint venture agreement that was entered into between the applicants themselves. The relief sought by the applicants extends to sought payments to the joint venture, and the non-payment of mandatory requirements such as safety payments. The applicants also claim a site establishment payment and make reference to work measurement sheets all of which point to a dispute that is not one capable of description as employment-related. It is clear from the that the applicants approach this court not in their capacity as employees, but as members of a joint venture in a commercial dispute.

[4] This conclusion is reinforced by the terms of a 'proposal of appointment' and 'acceptance of appointment' handed up when Tlali's right of appearance was questioned. In terms of this document, signed by each of the individual applicants in respect of companies that they represent, Tlali is appointed as the human resources manager and legal adviser on labour matters. The proposal is

accepted by Tlali, on the basis that since they are small enterprises' they would be entitled to avail themselves of the use of his office building and tools to 'run your project successfully'. The LRA confers jurisdiction on this court in respect of matters that in terms of the LRA or any other law or to be determined by the court. Generally speaking, the court has jurisdiction in employment related disputes, i.e. disputes between employers and employees. (The exceptions to the general proposition not relevant for present purposes.)

- [5] This court does not have jurisdiction over commercial disputes between joint ventures and their commercial partners. I understood Tlali to accept this, but he submitted that this court ought to refer the matter to the High Court. It is not for this court to transfer a matter to the High Court, especially not on the basis of the ineptly drafted papers that have been filed in this matter. The High Court has its own rules and procedures relevant to the issuing of process. The appropriate order is for the application to be dismissed for lack of jurisdiction. In these circumstances and to the extent that there appears to be on the roll an application to condone the late filing of the first respondent's response to the statement of claim, it is not necessary to make any ruling in that regard.
- [6] Finally, in relation to costs, the first respondent sought an order for costs against Tlali. Section 162 (3) of the LRA provides that the court may order costs against a party to a dispute or against any person who represented that party in proceedings before the court. Tlali acted as the representative of the applicants. He has required the first respondent to oppose the application for condonation, and to be present in court in circumstances where the application was entirely misguided and the papers so poorly drafted that the court had considerable difficulty understanding precisely what it was that was sought to be condoned in what circumstances. This is the epitome of a hopeless case, one that constitutes an abuse of the process of this court. All of the individual applicants, so the court was advised, are indigent. Tlali on the other hand is on the face of it a man of some means. heading as he does what he refers to as the 'Tlali Group of

Companies' with its head office in Clocolan, and offering a variety of services including what is described as a 'general legal advice service'. Tlali manifestly has no right of appearance in this court, yet he persisted with spurious submissions as to why he should be heard. Ironically, it was his submission that he was employed by the applicants as their human resources manager that gave the lie to any pretence that they were employees who had been wronged in an employment-related dispute. The right of appearance in this court is strictly regulated by the LRA. It is a right that is often abused and increasingly the subject of ingenious attempts to circumvent the statutory limitations. Tlali is no more than a businessman who has egregiously fabricated an employment relationship to secure the right of appearance. In these circumstances, and in the exercise of the broad discretion conferred on the court in terms of s 162, it seems to me that the interests of the law and fairness are best served by an order that Tlali be ordered to pay the costs of these proceedings in his personal capacity.

I make the following order:

1. The application is dismissed for want of jurisdiction, with costs, such costs to be paid by Mr ME Tlali in his personal capacity.

André van Niekerk
Judge