THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 558/20

In the matter between:

NDABA NDLOVU **Applicant**

and

DRAGER SA (PTY) LTDOSES MPSHE **Respondent**

Heard: **30 July 2021 (virtual hearing)**

Delivered: **03 August 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 3rd August 2021 is deemed to be the date of delivery of this judgment).**

Summary: Due to Covid19 lockdown, this application was determined by hearing submissions virtually and the parties agreed to this arrangement. Condonation application – late delivery of a statement of case – no proper case made for condonation. The dispute belongs to the CCMA since the true reason for the dismissal is related to misconduct. Held: (1) The application for condonation is refused. (2) The applicant to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Mr Ndaba Ndlovu (Ndlovu) launched the present application seeking to have the late filing of the statement of case condoned in terms of section 191 (11) (b) of the LRA. In terms thereof the Labour Court may condone non-observance of the prescribed 90 days' timeframe provided *good cause* is shown. The application is opposed by the employer.

Background facts

[2] Ndlovu was employed as a sales representative and later as an account manager by Drager SA (Pty) Ltd (Drager). He commenced employment in October 2012 and had a break in employment for a period of a year. Following a disciplinary hearing enquiring into the allegations of desertion, dishonesty and fraud, Ndlovu was found guilty and dismissed on 2 March 2020.

[3] As a sequel of the dismissal, Ndlovu assisted by his attorneys of record referred a dispute to the CCMA on 10 March 2020 alleging unfair dismissal for reasons of misconduct. On 12 April 2020 a certificate of outcome was issued certifying that the referred dispute of unfair dismissal remained unresolved and could be resolved through arbitration. Arbitration proceedings were scheduled on 25 August 2020. Prior thereto Ndlovu and his legal team formed a view that the CCMA does not have jurisdiction to arbitrate his own dispute. Having formed that view an application in terms of section 191 (6) of the LRA was launched. The section allows the director of the CCMA to refer a dispute to this Court if certain requirements are met. It is unclear as to what became of the section 191 (6) application.

[4] For some peculiar and strange reason, Ndlovu raised a point that the CCMA lacked jurisdiction to entertain his dispute through arbitration. It is unclear

whether the CCMA ruled that it lacked jurisdiction to arbitrate the dispute. It is apparent that it was only on 25 August 2020 that Ndlovu and his legal team became aware that a certificate of non-resolution was issued on 20 April 2020 already.

[5] On or about 2 September 2020, Ndlovu launched a statement of case in the Labour Court. Simultaneously Ndlovu launched the present application.

Evaluation

[6] As required by section 191 (11) (b) of the LRA, Ndlovu must show *good cause* why the 90 day period was not complied with. It must be stated upfront that the 90 day period is reckoned from 20 April 2020 and not from the day Ndlovu and his legal team became aware of the existence of the certificate. Therefore, the 90 day period expired on 20 July 2020. Thus, the referral was made two months outside the prescribed time period. In the context of labour disputes the delay is excessive. Labour disputes are required to be resolved expeditiously and without delay. The submission by Mr Rametse, who appeared on behalf of Ndlovu, that the delay is not excessive is rejected.

[7] Of importance is the explanation proffered by an applicant for an indulgence. Ndlovu does not offer an explanation for the period 20 July 2020 to September 2020. The fact that he and his attorney only became aware of the existence of the certificate on 25 August 2020 is of no moment. In terms of the LRA, the CCMA must attempt to resolve a referred dispute through conciliation within 30 days of the date the Commission received the referral. This must have been within the knowledge of Ndlovu since he was legally represented from the onset. Having referred the dispute on 10 March 2020, it must have been within the knowledge of Ndlovu and his legal team that by 10 April 2020, the CCMA was obligated by section 135 (3) of the LRA to attempt conciliation.

[8] The fact that Ndlovu acted soon after gaining knowledge of the existence of the certificate is unhelpful to him. There is no indication that after 10 April 2020 Ndlovu and his legal team made any attempts to obtain the certificate from the CCMA since the legislated 30 day period had expired. It is no answer to simply supinely seat back until 25 August 2020. Accordingly, Ndlovu has not provided a reasonable and acceptable explanation for the non-observance of the time frame. Where no reasonable explanation is offered condonation must be refused irrespective of the prospects of success.

[9] However, Ndlovu failed to set out in any detail his prospects of success. He scantly suggested that his dismissal is unfair both substantively and procedurally. Recently the LAC in *NEHAWU and others v Metrofile (Pty) Ltd and others*[1] held that a party is required to detail the prospects of success and address them in the founding affidavit. In complete contradistinction Ndlovu alleged that his dismissal is automatically unfair because he was dismissed for making a protected disclosure. On the undisputed facts, Ndlovu was dismissed for misconduct. That being the true reason for his dismissal, the Labour Court lacks jurisdiction over misconduct dismissals. There seem to be no legal basis for the ebullient view held by Ndlovu and his legal team that the CCMA lacked jurisdiction over the dismissal dispute. As indicated earlier there is no indication that the CCMA declined jurisdiction over the dispute, Ndlovu must simply return to the CCMA to have his dispute arbitrated. Accordingly the interests of justice does not demand that a wrong referral to this Court ought to be condoned.

[10] I now turn to the issue of costs. This Court is alive to the recent decision of the Constitutional Court on the issue of costs in the Labour Court. I take into account that there is no longer an employer and employee relationship between Ndlovu and the respondent. During submissions, Mr Rametse conceded that he made certain mistakes. He did not accept that those mistakes evinces negligence on his part. It became clear to this Court that Mr Rametse simply

[1] (JA53/2019) [2021] ZALAC 8 (29 March 2021)

lacks dearth in labour matters. Had it not been for that, this Court was minded to consider costs *de bonis propriis*. I take this opportunity to warn practitioners not to accept matters where they have no dearth. Doing so is a professional misconduct in my view, particularly where a practitioner raise a fee for a possible shoddy work. Rametse should not have dispensed with an advice that the CCMA lacked jurisdiction to entertain a referral made by him on behalf of Ndlovu. It is no defence to state that he referred the dispute to the CCMA for arbitration without consulting with Ndlovu. In fact such aggravates the professional misconduct.

[11] Nevertheless, it is not fair to mulct the respondents with the costs of this ill-fated and ill-conceived application. In the *Nehawu* matter, the LAC before awarding costs in a similar application said:

> "[24] Truth be told, the appellants and their legal representatives bungled their case. Their argument went off tangent and did not meaningfully, at all address their prospects of success…"

[12] I am afraid similar sentiments must be echoed about Ndlovu and his legal representative. It was strange for them to refer a dispute to a forum and then make a *volte face* to say such a forum lacks jurisdiction. A ploy to launch a section 191 (6) of the LRA application and leave it high and dry is a masterpiece and superlative beyond measure. Accordingly like in *Nehawu*, a costs order is warranted in this matter.

[13] In the result the following order is made:

Order

1. The application for condonation is dismissed.
2. The applicant is to pay the costs of the application.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr T Rametse of A Mathada Inc, Roodeport.

For the Respondent: Ms S Bismilla

Instructed by: MC Incorporated Attorneys, Lonehill. .