



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable/ Reportable

Case no: PS 44/2013

In the matter between:

SIMPHIWE NOKO

Applicant

And

PHARMACARE LTD

Respondent

Heard: 22 April 2015

Delivered: 24 April 2015

- [1] This is an application to condone the late referral of an unfair dismissal dispute to this court. The circumstances that led to the later referral are dealt with below.
- [2] The applicant was dismissed for misconduct on 20 December 2011. The applicant contested the fairness of his dismissal and referred the matter to the bargaining council. A certificate to the effect that the dispute remained unresolved was issued by the bargaining council on 13 February 2012. The

dispute was subsequently referred to arbitration. An arbitration hearing commenced on 16 May 2013, under the auspices of the bargaining council. On the same day, the applicant testified in support of his claim. During cross-examination, he stated that he was of the view that he had been discriminated against in that only those individuals who formed the leadership of the laboratory technician (of whom he was one) had been dismissed whereas others, who are not in the leadership, were given a sanction short of dismissal. The arbitrator, at the instance of the respondent, was then asked to make a ruling on jurisdiction. The basis of the request was that the issue of discrimination had not been raised at the commencement of the hearing, nor had this been put to any of the respondent's witnesses or raised by the applicant's witnesses.

- [3] The arbitrator came to the conclusion that where a party alleges discrimination as a basis for the dismissal, this falls within the ambit of the automatically unfair reasons for dismissal referred to in section 187 (1) of the LRA and that the dispute or to be referred to this court. The arbitrator went on to hold that the bargaining council had no jurisdiction 'to entertain such a dispute at the arbitration stage' and dismissed the matter on account of the lack of jurisdiction. The ruling is dated 16 May 2013.
- [4] The applicant filed a statement of claim in this court on 1 November 2013. In terms of the applicable law, the time period the referral of dispute to this court commences on the date of the certificate, i.e. 13 February 2012. It is common cause that the referral is accordingly some one year and eight months after the certificate was issued, and five months from the date of the jurisdictional ruling issued by the bargaining council.
- [5] In his application for condonation, the applicant states that after the jurisdictional ruling was made, he was informed by his union representative, a Mr Adams, that the matter would be referred to his seniors. The applicant waited approximately two months for a response. He was advised at the end of July 2013 that the union would not be able to assist him on account of a lack of funds. Adam told him that should he wish to take the matter to the Labour Court, he would have to

secure the services of a private attorney. Adams also advised the applicant that he had a period of six months to refer the matter to the Labour Court from the date of receipt of the jurisdictional ruling. The applicant avers that he was under the bona fide impression that he was well within the prescribed time limit when the statement of case was referred. During the course of September 2013 the applicant visited Legal Aid SA who agreed to assist him. He consulted with an attorney during the course of October 2013 when the statement of claim was drafted and ultimately filed, as I have indicated, on 1 November 2013.

- [6] While the delay in referring the dispute to this court is not insubstantial, I must necessarily take into account the fact that the applicant pursued what he perceived to be his rights by referring the matter to the bargaining council and in particular, to arbitration, within the applicable time limits. I must also take into account the undisputed averment that the applicant was under the bona fide impression that he had six months from the date of the jurisdictional ruling within which to file his statement of claim in this court. He sought advice and the statement was ultimately filed on his behalf within this period. There is no indication on the papers before me that there was any undue delay on the part of Legal Aid SA in taking the necessary instructions and serving and filing the statement of claim. On the contrary, they acted with due diligence and regard to the fact that the referral was late.
- [7] Although the period of delay is not insignificant, I am satisfied that the applicant has proffered a reasonable explanation for that delay. Insofar as the applicant's prospects of success are concerned, it seems to me that the applicant's case is that he was discriminated against in the sense that the real rather than apparent reason for his dismissal was his involvement in the employees' forum. Of course, this is more properly an averment of victimization rather than discrimination, but it seems to me that such a case is properly pleaded in the statement of claim. It is always difficult to take a view of an applicant's prospects of success only from the terms of the statement of claim, but the court has traditionally held that all that is required is that the statement discloses a prima facie case, which if proved

at trial, would entitle the applicant to the relief he or she seeks. In most circumstances, provided that this hurdle is overcome, the prospects of success are inevitable a neutral factor. In so far as the element of prejudice is concerned, it seems to me that any prejudice to the respondent in granting condonation would be outweighed by the prejudice that the applicant would suffer were he to be precluded from having his claim adjudicated by this court. On balance, and having regard to all of the relevant factors, I am persuaded that the late referral of the applicant's statement of claim ought to be condoned.

- [8] Finally, I wish to comment on the jurisdictional ruling made by the arbitrator. As I have indicated, this was a ruling made at the instance and request of the respondent, after the applicant had given evidence to the effect that he considered that the respondent had discriminated against him and committed an act of victimization. It is not for commissioners and arbitrators, when such evidence is given, to intervene in the proceedings and make jurisdictional rulings which have the effect of bringing a halt to the proceedings and occasioning an inevitable delay when the matter is then referred to this court. An applicant in an unfair dismissal claim makes an election to refer the matter to arbitration or to refer the dispute to this court for adjudication. The applicant is *dominus litis* and the election made by the applicant as to the forum in which the dispute is to be determined ought to be respected. Given the structure of the Act, the election is in most instances dictated by the reason for dismissal. In a case such as the present, where the applicant was dismissed for misconduct and referred a dispute for arbitration on those terms, it was not for the presiding arbitrator, after hearing some mention of discrimination and victimization, to make a decision on that basis alone to the effect that those are the real rather than apparent reasons for dismissal, and that he or she therefore has no jurisdiction. In effect, what the arbitrator did was to make a decision for the applicant (and his union) as to what their case ought to be. An applicant's case ought ordinarily to stand or fall on the merits, on the terms in which it was referred. Intervention of the sort permitted in the present instance allows the respondent employer in effect to dictate the course of the proceedings, often to the prejudice of the applicant employee.

- [9] I appreciate that there are inevitably those cases where a referring party is unaware of the jurisdictional divide between this court and the CCMA or a bargaining council based as it is, on the reason for dismissal and that in some cases, particularly at the phase of conciliation, guidance is appropriate. What is not appropriate, as I have sought to indicate above, is the patronizing approach indicated by the facts in the present instance where on the basis of a bald assertion made during the course of giving evidence in chief or cross-examination, the arbitrator decides on that basis alone that he or she has no jurisdiction to further entertain the claim.
- [10] The consequence of this practice (and from what I have observed, it is widespread) is that in many instances, a dispute is referred to this court by the applicant acting on a jurisdictional directive or ruling, only for the evidence to disclose that the claim, in reality, does not concern an automatically unfair reason for dismissal at all. It is not uncommon to have applicants before this court in such proceedings, having incurred the costs of referral, to disavow any reliance on an automatically unfair reason for dismissal and state that the only reason for the referral is the directive or ruling issued by the commissioner. The result is the inevitable referral of the matter back to the CCMA or a bargaining council for arbitration. (Although this court is empowered, by consent between the parties, to continue the hearing by sitting as an arbitrator, for obvious reasons, this is not a desirable practice.) In other instances, unscrupulous employers who have taken the jurisdictional points prior to or during arbitration hearings that have occasioned the referral, then except to the statement of claim as disclosing no cause of action justiciable by this court.
- [11] In short: commissioners and arbitrators must determine disputes referred to arbitration on the merits. If the case presented by the referring party discloses an unfair dismissal, that party is entitled to a remedy within the limits prescribed by the LRA. If not, the claim must be dismissed. It is not open to commissioners and arbitrators to discontinue proceedings on account of a lack of jurisdiction only because there is some suggestion that the nature of the claim may be one that

potentially could give rise to a case of dismissal for a reason listed as automatically unfair and the enhanced compensation awards that accompany such claims.

[12] For the above reasons, I make the following order:

1. The late referral of the applicant unfair dismissal claim to this court is condoned.
2. There is no order as to costs.

Andre van Niekerk

Judge

Instructed By:

For the applicant: Ms. E van Staden, Legal Aid SA

For the third respondent: Mr J vd Walt, Labuschagne Van Der Walt Inc.