THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JS 740/18

In the matter between:

NATIONAL UNION OF METAL

WORKERS OF SA **First Applicant**

FRANCIS MAGDALENA KING **Second Applicant**

and

BMW (SOUTH AFRICA) (PTY) LTD **Respondent**

Heard: 15 February 2019

Judgment delivered: 19 February 2019

JUDGMENT

VAN NIEKERK J

[1] This dispute concerns what is alleged to be an automatically unfair dismissal for reasons that amount to discrimination on the grounds of age. The dispute was referred to the CCMA for conciliation on 15 February 2018. For reasons that are not apparent, the conciliation meeting was held only on 13 July 2018, when a certificate of outcome was issued by the commissioner recording that the dispute remained unresolved. On 11 October 2018, the applicants referred a dispute to this court for adjudication.

[2] The respondent has filed a special plea, contending that the dispute was referred to this court out of time. The applicant contends that the dispute was referred timeously; alternatively, that any late referral that is found to exist should be condoned.

[3] Section 191 of the LRA regulates the resolution of disputes about dismissals that are alleged to be unfair. Where the CCMA has jurisdiction (as it does in the present instance), the dispute must be referred to the CCMA within 30 days of the date of dismissal. In the present instance, the referral was made within that time limit. Subsection (4) requires the CCMA to attempt to resolve the dispute through conciliation. Subsection (5) reads as follows:

> (5) If a *council* or a commissioner has certified that the *dispute* remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the *council* or the Commission received the referral and the *dispute* remains unresolved—

(*a*) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if—

(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct or capacity, unless paragraph (*b*) (iii) applies;

(ii) the *employee* has alleged that the reason for *dismissal* is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the *employee* alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the *employee* does not know the reason for *dismissal*; or

(iv) the *dispute* concerns an unfair labour practice; or

(*b*) the *employee* may refer the *dispute to* the Labour Court for adjudication if the *employee* has alleged that the reason for *dismissal* is—

(i) automatically unfair;
(ii) based on the employer's *operational requirements*;
(iii) the *employees* participation in a *strike* that does not comply with the provisions of Chapter IV; or
(iv) because the *employee* refused to join, was refused membership of or was expelled from a *trade union* party to a closed shop agreement.

[4] Subsection (11) (a) reads as follows:

(11) (a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may on which the CCMA received the referral, although this period can be

> extended by be) the commissioner as certified that the dispute remains unresolved.

[5] Section 135 provides that when a dispute is referred to the CCMA, the CCMA must appoint a commissioner to attempt to resolve the dispute through mediation. The appointed commissioner must do so within 30 days of the date of referral, although this period can be extended by agreement.

[6] The referral of disputes to arbitration is regulated by s 136. That section provides, amongst other things, that the CCMA must appoint a commissioner to arbitrate a dispute if the Act requires the dispute to be arbitrated, and if the commissioner has issued a certificate stating that the dispute cannot be resolved, and if within 90 days after the date on which the certificate is issued, any party to the dispute has requested that the dispute be resolved through arbitration.

[7] *NUM v Hernic Exploration (Pty) Ltd* [2003] 4 BLLR 319 (LAC) concerned a dispute about a dismissal for operational requirements (and thus justiciable by this court) that was referred to conciliation on 16 December 1998. The 30-day period expired on 15 January 1999. A certificate of outcome was issued only on 18 February 1999, more than a month later. The dispute was then referred to this court by way of a statement of case on 28 April 1999, inside the 90-day period calculated from the date of the certificate but after the expiry of the 30-day period. The court said the following in respect a cross-appeal against this court's dismissal of a point in *limine* to the effect that the referral was out of time:

> [44] In this case the CCMA received the referral of the dispute for conciliation on 16 December 1998. The 30-day period within which the CCMA was required to conciliate the dispute expired on 15 January 1999. The respondent did not attend the conciliation meeting. On 18 February 1999 the Commissioner certified that the dispute remained unresolved. No agreement had been reached between the parties to extend the period of 30 days. Section 191(5) (b) makes provision for the circumstances in which a dismissal dispute is required to be referred to the Labour Court for adjudication. Section 191(11) (a) reads:

> "The referral, in terms of subsection (5) (b), of the dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved."

[45] On behalf of the respondent it was contended that a commissioner is required to certify that the dispute remains unresolved on or before the 30th day (or on or before the last day of the extended period where the 30-day period has been extended) and that he is not entitled to so certify once the 30-day period or the extended period (where there has been an extension) has expired. It was submitted that, where he so certifies outside the 30-day period or the extended period, the statutory 90 days within which the dispute must be referred to the Labour Court runs from the expiry of the 30-day period and not from the date when or after the commissioner certifies or has certified that the dispute remains unresolved. I am unable to agree with this contention. Section 191(11)(a) is clear in its provision that the referral of a dismissal dispute to the Labour Court for adjudication in terms of section 191(5)(b) must be made within 90 days after the council or the Commissioner "has certified that the dispute remains unresolved." In any event section 191 which deals with the referral of dismissal disputes to conciliation, arbitration and adjudication does not anywhere provide for such disputes to be referred to the Labour Court for adjudication within 90 days from the expiry of the 30-day period or any extended period.

[46] If the legal position is that, once the 30-day period or the extended period, if there has been an extension, has expired, the Commissioner has no power to certify that the dispute remains unresolved, but a commissioner certifies after the expiry of that period, then the position would be that, until the certificate has been set aside by a court of competent jurisdiction, it stands and must be treated as valid and all concerned can act upon it. (*Fidelity Guards Holdings* (*Pty*) *Ltd v Epstein NO & others* (2000) 21 *ILJ* 2382 (LAC)). The provisions of section 191(11) (a) would apply as soon as the Commissioner has certified that the dispute remains unresolved.

[47] Accordingly, the cross-appeal must fail.

[8] The applicant submits that the present case is on all fours with *Hernic*, and that in circumstances where the referral was made on the 88th day after the certificate was issued, the referral was in time and no condonation is necessary.

[9] The respondent relies on *SAMWU v Ngwathe Local Municipality and others* (2015) 36 *ILJ* 2581 (LAC). In that case, the employee alleged that he had been unfairly dismissed and referred a dispute to the bargaining council on 10 February 2003. The referral was made within the 30-day period prescribed by s 191 (1) (b) (i). Instead of issuing a certificate of outcome, the council erroneously enrolled the matter for arbitration on 1 December 2003. A certificate of outcome was issued only on 15 April 2004. The dispute was referred to arbitration on 24 June 2004. The respondent employer raised a point in *limine* to the effect that the dispute had been referred out of time. The arbitrator held that there was no need to apply for condonation since the certificate of outcome had been issued 15 April 2004, and the referral made within 90 days of that date. This court, on review, held that the arbitrator had no jurisdiction to entertain the dispute because it had been referred more than 90 days after the lapse of the 30-day period referred to in s 191 (5) (a). The lapse of the 30-day period was the earlier event, and the 90-day limit was to be calculated from that date, and not the later date of the issuing of the certificate of outcome. The LAC dismissed an appeal against that ruling. The court framed the issue as follows:

> [23] The jurisdictional question in this appeal turns on the interpretation of section 191(5) of the LRA. The appellant contends for a disjunctive interpretation of section 191(5) by virtue of the presence of the conjunctive "or" in the subsection. The appellant submits that read disjunctively, section 191(5) of the LRA gives the employee an election or choice to speed up the process by referring the dispute to arbitration after the expiry of the 30-day period, contemplated in the subsection, or wait for conciliation to take place and for a certificate to be issued.

[9] The court rejected this submission, and held:

> [28] I am unable to agree with the interpretation of section 191(5) of the LRA which the appellant contends for. Although the presence of the conjunctive "or" in

section 191(5) of the LRA calls for a disjunctive reading of the provision, I disagree that it gives an employee an election to speed up the process by referring the dispute to arbitration on the expiry of the 30-day period contemplated in the subsection, or wait for conciliation to take place and for a certificate to be issued. On a proper interpretation, section 191(5) of the LRA entitles an employee to refer an unresolved unfair dismissal or unfair labour practice dispute for arbitration to the CCMA or a bargaining council, in terms of subsection (a) thereof, or for adjudication to the Labour Court, in terms of subsection (b) thereof, upon the occurrence of either of two events: the issue of a certificate of non-resolution of the dispute or the expiry of the 30-day period from either the CCMA's or the bargaining council's receipt of the referral. The effect of this interpretation is that the occurrence of either of these two events entitles an employee to request the bargaining council concerned or the CCMA to arbitrate the dispute in terms of section 191(5)(a) of the LRA or to refer the dispute to the Labour Court for adjudication in terms of section 191(5)(b) thereof…

And

[45] Whilst the issue of a certificate of outcome by a Commissioner of the CCMA or bargaining *council may found the right of referral of an unfair dismissal or unfair labour practice dispute to* arbitration or adjudication prior to the lapse of the 30-day period contemplated in section 191(5) of the LRA, as the right of referral accrues on the issue of such certificate and is, consequently, a prerequisite for a referral to arbitration or adjudication in those circumstances only, the subsection does not impose an obligation on a Commissioner of the CCMA or a bargaining council to issue a certificate of outcome on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved. Since the issue of a certificate of non-resolution by the CCMA or a bargaining council concerned, is not a prerequisite for a referral to arbitration in terms of section 191(5)(a) of the LRA, it cannot, in my view, cure the lack of jurisdiction of the CCMA or a bargaining council to arbitrate an unresolved unfair dismissal or unfair labour practice dispute, where such certificate is issued after the elapse of 30 days from the date on which the CCMA or bargaining

council received the referral, and the employee has not sought condonation for its non-observance of that time frame.

[46] It is thus evident from the general scheme of section 191(5) of LRA that either of the two events: the issue of a certificate of non-resolution by a Commissioner of the CCMA or a bargaining council or the expiry of 30 days from the date on which the CCMA or bargaining council received the referral and the dispute remains unresolved, entitles an employee to request arbitration or adjudication. Section 191 of the LRA is, however, silent, on the time period within which the referral to arbitration is to be made from the date of the happening of either of the two events referred to in subsection (5) of the LRA. Since section 191 of the LRA does not prescribe the specific time period within which an unfair dismissal or unfair labour practice is to be referred to arbitration in terms of subsection (5)(a) of the LRA, the dismissed employee or the employee alleging an unfair labour practice must refer such dispute to arbitration within a reasonable period of time….

[49] The appellant referred his unfair dismissal dispute to the bargaining council for conciliation on or about 10 February 2003. In terms of section 191(5) of the LRA, he acquired the right to refer his unfair dismissal dispute to arbitration on 12 March 2003 upon the expiry of the 30-day period contemplated in the subsection. The appellant, however, elected not to refer the dispute to arbitration at that stage, but rather to await the outcome of the conciliation process (which ensued on 3 April 2003) and the issue of a certificate of outcome following thereupon. In the event, the certificate of non-resolution was only issued on 15 April 2004, a full year after the conciliation took place, following which the appellant referred the matter to arbitration on 24 June 2004, being more than 13 months after he acquired the right to refer the dispute to arbitration (on 12 March 2003), upon expiry of the 30-day period contemplated in the subsection. Thus, in so far as he chose to await the outcome of the conciliation process and the issue of a certificate of outcome by the bargaining council, before referring the dispute to arbitration, the appellant was obliged to seek condonation from the arbitrator for his failure to refer the dispute to arbitration within 90 days of the date of expiry of 30 days from the date that the bargaining council had received the referral.

> [50] The appellant was, consequently, required to refer his unfair dismissal dispute to arbitration within 90 days of 12 March 2003, which was no later than 10 June 2003. The appellant, however, only referred his unfair dismissal dispute to arbitration more than 12 months after the referral was due on 24 June 2004, but failed to seek condonation, from the bargaining council for this inordinate delay. The arbitrator, accordingly, erred in finding that the bargaining council had jurisdiction to arbitrate the dispute. I, accordingly, consider the setting aside of the arbitration award by the Labour Court to have been properly and correctly made, on the grounds that the referral to arbitration was lodged substantially more than 90 days after the lapse of 30 days from the date on which the bargaining council had received the referral for conciliation, and in the absence of an order condoning the delay, the bargaining council had no jurisdiction to arbitrate the dispute.
>
> [51] The finding of this Court on the jurisdictional issue is dispositive of the issues on appeal and cross-appeal. Accordingly, the Labour Court did not err in failing to decide the remaining issues in the review. For the same reason, it is not necessary for this Court to determine the issues in the cross-appeal. In the premises, I find that the arbitration award was correctly reviewed and set aside by the Labour Court. The appeal, therefore, falls to be dismissed.

[10] The *SAMWU* judgment was one that dealt with a referral made to a bargaining council in terms of s 191(5) (a). The present case is distinguishable; it is a referral for adjudication made in terms of s 191 (5) (b). To the extent that the judgment makes references to any referral for adjudication under s 191 (5) (b), these are *obiter*. Further, it seems to me, contrary to what the respondent submits, that the LAC did not refer to or explicitly overturn *Hernic*. The judgment makes no reference to s 191 (11), which specifically provides that a dispute be referred for adjudication (as opposed to arbitration) within 90 days of the date that the CCMA certifies that the dispute remains unresolved. There is no corresponding provision that applies to referrals to arbitration. This may well be anomalous, but the plain wording of s 191 (11) draws a clear distinction between

the processes of arbitration and adjudication, and the time limits applicable to each.

[11] Counsel also referred to the decision by the Constitutional Court in *F & J Electrical v MEWUSA obo E Mashatola and others* 2015 (4) BCLR 377 (CC). In that case, the Constitutional Court upheld an appeal against a refusal by this court to rescind a judgment granted by default, in circumstances where the union had referred the matter for adjudication after the CCMA had issued a ruling to the effect that it had no jurisdiction to arbitrate the dispute. The dispute was one that concerned an alleged unfair dismissal based on the employer's operational requirements, a dispute that, like the present dispute, is regulated by s 191 (5) (b). The Constitutional Court observed that the dispute had been referred outside of the period of 90 days calculated form the date on which the certificate of outcome was issued, and that the default judgment had accordingly been erroneously granted since the court had no jurisdiction on account of a late referral with no application for condonation. The union had contended that the 90-day period commenced running on the (later) date of the commissioner's jurisdictional ruling. At paragraph 30 of the judgment, the court said the following:

> The union contended that the referral of the dispute to the Labour Court was within the prescribed period. It seems that this contention was based on a misconception that the 90-day period was to be reckoned from the date of the ruling of the CCMA. That is not so. In this case, the period had to be reckoned from the date when the certificate was issued.

[12] It is not apparent from the judgment when the 30-day period after the date of the referral of the dispute to the CCMA expired (and in particular, whether that period expired before or after the issuing of the certificate). But it is of some significance that the court was concerned only with the date of the certificate, and that it specifically regarded the issuing of the certificate as the trigger for the 90-day period. Had the court considered that the date of expiry of the 30-day period post referral was relevant, it would have said so.

[13] In summary: in the case of a dispute that is required to be referred for adjudication (as opposed to arbitration), s 191 (11) requires the dispute to be referred within 90 days of the issuing of a certificate of outcome, regardless of the date of which the 30-day period immediately following the date of referral of the dispute expired. The applicants' referral to this court was made within 90 days of the date of the certificate of outcome, and was thus timeously made. Condonation for a later referral is not required, and it is not necessary for me to consider the applicants' submissions in this regard. The special plea accordingly stands to be dismissed.

[14] Finally, in relation to costs, both parties agreed that this was a matter in which regardless of the result, it was appropriate that each party pay its own costs.

I make the following order:

1. The special plea is dismissed.
2. The registrar is directed to enroll the matter for trial.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. I De Vos, instructed by Ruth Edmonds Attorneys

For the respondent: Adv. G van der Westhuizen, instructed by Norton Rose Fulbright