THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C137/2024

In the matter between:

ROOILAND TEMBELANI **Applicant**

and

PHANGELA GROUP SECURITY SERVICES **Respondent**

Heard: **20 November 2024**

Delivered: **20 November 2024**

Summary: Special plea that the Court lacks jurisdiction to hear an alleged automatically unfair dismissal claim where the matter was referred to Court late and in the absence of a condonation application. Special plea upheld

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JUDGMENT

GANDIDZE, AJ

Introduction

[1] An *ex-tempore* judgment was handed down at the hearing of the matter. However, the Court has deemed it appropriate to prepare a brief written judgment for the records of the applicant, who is an individual employee and may need to refer to a written judgment for future purposes

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[2] The Court was called upon to decide whether the Court has jurisdiction to determine the alleged automatically unfair dismissal dispute that Mr. Thembelani Rooiland referred to this Court on 25 June 2024. The respondent raised this issue as a special plea on 2 July 2024.

[3] The applicant was dismissed on 9 August 2022, after which he referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The referral to the CCMA was made on 10 August 2022, with the assistance of the applicant's then union, Kungwini Amalgamated Workers Union (KAWU).

[4] On 8 September 2022, following failed conciliation, the CCMA issued a certificate of non-resolution of the dispute. The certificate was issued within 30 days of the referral to the CCMA.

[5] In terms of section 191(11)(a) of the Labour Relations Act[1] (LRA), a referral in terms of section 191(5)(b)(i) of the LRA dealing with an automatically unfair dismissal claim must be made to this Court within 90 days of the issue of the certificate of outcome.

[6] Therefore, in this case, the 90 days is calculated from 8 September 2022, and the 90-day period expired on or around 7 December 2022. The referral to this Court was made on 25 June 2024, a year and a half late.

[7] In the intervening period, the CCMA issued a jurisdictional ruling dated 26 March 2024, which records that the matter was set down for arbitration on 20 March 2024. In that jurisdictional ruling, it was found that the CCMA did not have jurisdiction to hear an automatically unfair dismissal. Incidentally, a KAWU official raised that point at the CCMA, leaving one wondering why the CCMA was requested to arbitrate the matter in the first place. Perhaps an explanation will be provided in due course.

[8] In answer to the respondent's special plea, the applicant, who was unrepresented at the time, disagreed that the Court lacked jurisdiction to

[1] No 66 of 1995.

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determine the matter. He submitted that it would have been premature for him to refer the matter to this Court after 8 September 2022 because, as of 20 March 2024, the matter was still pending at the CCMA. In his view, he referred the matter to this Court within the prescribed time frames, that a condonation application was not required, and that the Court had jurisdiction to determine the matter.

[9] As I have demonstrated above, the applicant's contention is not supported by the explicit provisions of section 191(11)(a), read together with section 191(1)(5) of the LRA. Therefore, the matter was referred to this Court late, and without a condonation application, the Court lacks jurisdiction to determine the applicant's claim.

[10] In argument, Mr. Helu, a union official from NUFAS, conceded that the referral to the Court was late, and he sought to explain that the union that had given the applicant wrong advice had since abandoned him. That may be the to be provided in due course and not in these proceedings.

[11] What, then, is the appropriate order to be granted? Mr Du Preez for, the respondent, submitted that the applicant's claim falls to be dismissed. In *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*[2] *(PT Operational),* the Court stated the following:

> '[35] Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word 'dismissed' is used, it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits then the order is final. If not, then it is not final. A finding that a matter is not urgent does not mean that there are no merits in the applicant's case. Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance.

[2] [2012] ZALAC 34; (2013) 34 ILJ 1138 (LAC) at paras 36 – 38.

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[36] The same applies in my judgment to applications for rescission that are out of time and not accompanied by an application for condonation. Although the appropriate order would be to strike it from the roll, dismissing it does not mean that the merits of the rescission application have been considered. A commissioner may only hear the rescission application if it is accompanied or preceded by a proper application for condonation.

[37] To sum up. The commissioner could not consider the rescission application which was out of time without an application for condonation. He could therefore not exercise his powers, duties or functions in terms of section 144 because a condition precedent (condonation) has not been fulfilled. His order dismissing the application was just another way of saying 'I cannot consider the application at this stage because there is no application for condonation. Without such application, I have no jurisdiction to exercise my powers in terms of section 144 of the LRA'.

[12] These principles apply in the instant matter. Dismissing the applicant's claim in circumstances where the merits have not been considered would be inappropriate. Taking guidance from what the LAC said in *PT Operational*, an appropriate order is one in terms of which the applicant's claim is struck from the roll, which can be re-instated if and when condonation for the late referral of the dispute to this Court is granted.

[13] In the premise, I make the following order:

Order

1. The respondent's special plea is upheld as the Court lacks jurisdiction to determine the applicant's claim, which was referred to Court late.

2. The applicant's claim is struck from the roll

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T Gandidze

Acting Judge of the Labour Court of South Africa

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Appearances

For the Applicant:	Mr Helu (union official)
Instructed by:	NUFAS
For the Respondent:	Advocate Du Preez
Instructed by:	B Schiff of Bargraims Attorneys