

**REPORTABLE  
HELD AT DURBAN**

CASE NO: D 759/99

In the matter between:

Applicant

and

Respondent

**JUDGMENT**

**WAGLAY J:**

1. The two issues before this Court for determination are whether the Applicant should be granted condonation for the late filing of his statement of case in terms of Rule 6 of the rules of this Court and the other whether this Court has jurisdiction to entertain the application instituted by the Applicant.
2. With respect to the condonation application, Applicant referred the dispute about his dismissal to the CCMA for conciliation. On the day that the Commissioner issued a certificate of non-resolution of the dispute at conciliation, the Applicant referred the matter to arbitration. The arbitration was set down for hearing on 1 June 1999 this was 90 days after the request by the Applicant for arbitration and 90 days after the issue of the certificate by the CCMA. The CCMA refused to entertain the matter on the grounds that the dispute

referred to it by the Applicant for arbitration was an issue over which it did not have jurisdiction and was required to be referred to this Court.

3.The Applicant then sought the assistance of a firm of attorneys to refer the matter to this Court, the attorneys, informed the applicant that the dispute which Applicant raised against the Respondent was not a dispute over which this Court had jurisdiction as it was a dispute which had to be referred to the CCMA for arbitration. The attorneys accordingly “prepared the necessary papers to refer the matter to the CCMA again”. On 8 July the CCMA wrote back to Applicants attorneys advising them that Applicant had “withdrawn” the matter from the CCMA and it could not therefore set the matter down again for arbitration.

4.Applicant could not afford the fees demanded by his then attorneys in pursuing the matter and on 10 September 1999 launched an application to this Court in terms of Rule 6. In his Statement of Case Applicant defined his dispute to the effect that Respondent’s discriminatory conduct led to his constructive dismissal which dismissal then constituted an automatically unfair dismissal as provided for in s 187(1)(f) of the Act.

5.In order for this Court to grant condonation for a late filing of an application it must be satisfied that Applicant has shown good cause for the delay and in assessing good cause the Court has to consider the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. This application was some 100 days late, however the actions of Applicant demonstrated that the Applicant had at all times intended to pursue his claim/action against the Respondent. When on 12 July it became evident that CCMA was not intent on entertaining his claim he within 60 days thereof filed his statement of claim, this he did without any legal assistance. However the period of delay is not the only factor that I am obliged to consider, there are also further factors which must be considered the more important one being the prospects of success. While I have always held the view that in dismissal matters it is not tenable to expect an Applicant to set out his prospects of success as this is in effect to expect the Applicant to anticipate Respondent’s case, such reasoning only applies where the fact of dismissal is not disputed by the

Respondent and therefore the onus to prove the fairness of dismissal is upon the Respondent. This matter is however different. Applicant here alleges that he was constructively dismissed - this is not admitted by the Respondent, the onus is therefore on the Applicant to satisfy this Court that there are good prospects of success. In determining the prospects of success it is appropriate to consider the point in limine raised by the Respondents.

6. In essence Applicant relying on s 186(e), which provides that

“Dismissal means that -

- (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for an employee.”
- alleges that it was because he was “discriminated against” that his continued employment became intolerable and he therefore left the Respondent’s employ.

7. If I accept this then the route that Applicant was required to follow so Respondent argues, is to refer the dispute to CCMA for arbitration as s 191(5)(a)(ii) provides

- “(5) If a council or commissioner has certified that a dispute remained unresolved...(at conciliation)
- (a) the council or commissioner must arbitrate the dispute at the request of the employee if -
- (i) ...
- (ii) the employee has alleged that the reason for dismissal is that the employee made continued employment intolerable;”

8. The fact that the Applicant referred the dispute to the CCMA for arbitration and the CCMA refused to entertain the dispute as Applicant alleges in his affidavit for condonation does not mean that this Court therefore has jurisdiction to entertain the dispute. The dispute before this Court so Respondent submits is not one of discrimination but of a constructive dismissal. Respondent then argues that the fact that discrimination may have given rise to the employment relation becoming intolerable and therefore resulting in constructive

dismissal does not imply that the dispute relates to discrimination. The issue in dispute is one of the fairness of the dismissal and the dismissal that Applicant alleges to be unfair is the dismissal as defined in s186(e) of the Act.

9.If I accept Respondents argument then a dispute relating to dismissal as defined in s 186(e) of the Act is required as stated earlier in terms of s 191(5)(a)(ii) to be referred to arbitration as in terms of s 157(5) of the Act this Court does not have jurisdiction to “adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration” however this subsection also provides an exception to that provision . The exception is provided for in s 158(2) of the Act. Section 158(2) of the Act provides that:

- “(2) If at any stage after a *dispute* has been referred to the Labour Court, it becomes apparent that the *dispute* ought to have been referred to arbitration, the Court may -
- (a) stay the proceedings and refer the *dispute* to arbitration; or
  - (b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.”

In terms of the exception I am satisfied that even if I find that the Labour Court has no jurisdiction I am entitled not to dismiss but to stay the proceedings and refer the matter to the CCMA. In deciding to stay the proceedings I am entitled to look further than simply the question of jurisdiction. I am entitled to also consider merits as pleaded by the Applicant. With regard to the merits Applicant in his condonation application simply alleges that he has a “strong case”. This is rather unhelpful however I believe that I am entitled to consider his Statement Of Case. The Statement Of Case simply states that the grounds for “dismissal” was that the Applicant was never given or considered for salary increases when in fact Respondent increased salaries of other staff members. In effect Applicant’s claim of unfair discrimination is based so it appears on the grounds that he was treated differently to all of Respondent’s other employees by not being given or considered for a salary increase. Whether or not the above grounds are sufficient to prove constructive dismissal I am not inclined to decide upon, prima facie it may be therefore the Applicant

should be given an opportunity to have his claim heard by such body which has jurisdiction to do so.

10. The Applicant claim, however goes further than simply a case of constructive dismissal. Applicant appears to state in his Statement Of Case that once his resignation is found to be a dismissal that dismissal was in fact an automatically unfair dismissal because it was occasioned as a result of unlawful discrimination. This argument is not without merit.

11. Section 187 which deals with “Automatically Unfair Dismissals” provides:

- “(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to s5 or, if the reason for the dismissal is -
- (a) ...
  - (b) ...
  - (c) ...
  - (d) ...
  - (e) ...
  - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race...”

The words underlined are recorded in italics indicating that the meaning attached to these words are provided for in the Act. Dismissal is defined in the Act to include constructive dismissal. In the circumstances this is not simply a matter, as Respondent has argued, that of an constructive but a matter relating to an automatically unfair dismissal. I arrive at this conclusion on the basis that if Applicant satisfies this Court that he was dismissed as envisaged by s 186(e) of the Act, he is entitled to claim that the dismissal was an automatically unfair dismissal as provided for in s 187 of the Act, because 186(e) simply provides a meaning or a definition of dismissal and once the definition is satisfied then there is no bar on the Applicant categorising his dismissal as he deems expedient and proper.

12. Having fashioned his dismissal as an automatically unfair dismissal he was required to refer his matter in terms of s191(5)(b)(i) i.e refer the matter to this Court. This he has properly done. In the circumstances I am satisfied that the point in limine should be dismissed as the Court has jurisdiction to entertain the dispute referred by the Applicant.

13. Returning then to the issue of condonation. Having regard to what I have said here before while Applicant has not eloquently set out his case I am satisfied that Applicants prospects of success are not altogether without merit. Although I must add that the prospects of success as the papers presently stand appear to be somewhat thin when assessed together with reasons for the delay I am satisfied that this is a matter in which condonation should be granted.

14. In respect of costs I am not satisfied that this is a matter in which a costs order is warranted.

15. In the result:

16. Applicant's late referral of its claim is condoned.

17. The point in limine raised by the Respondent is dismissed.

18. There is no order as to costs.

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WAGLAY J

Appearance for the Applicant: Mr Mdledle of Motloli, Mdledle & Partners

Appearance for the Respondent: Ms Pillay of Yunus Mohammed & Associates

Date of judgment: 31 August 2000