CCMA conciliation a pre-requisite for adjudication in the Labour Court

Pillay v Automa Multi Styrene (Pty) Ltd (LC) (unreported case number JS 1658/14, 9-6-2015) (Mosime AJ)

By Warren Sundström

Having been dismissed from his workplace the applicant referred an unfair dismissal dispute to the Commission of Conciliation, Mediation and Arbitration (CCMA) in which he claimed that he was victimised because of information he had discovered, which he believed amounted to fraud. Before the matter was set down for conciliation the applicant approached the Labour Court (LC) and filed a statement of case claiming that his dismissal was automatically unfair and based on racial discrimination, white nepotism and sexual harassment. The dispute was conciliated at the CCMA and categorised as a dispute envisaged in terms of s 187 of the Labour Relations Act 66 of 1995 (LRA) – victimisation on the basis of a protected disclosure. The matter was certified as unresolved and the certificate issued by the commissioner indicated that the matter may be referred to the LC for adjudication. It was common cause that at the time the conciliation hearing took place the applicant had already lodged a statement of case at the LC, which was based on the same cause of action.

On becoming aware of this, the respondent applied for the applicants statement of claim to be dismissed on the basis that it was premature and the applicant did not have the necessary authority to refer the matter to the LC at the time which he did. The respondent contended that in terms of s 191 of the LRA the applicant was obliged to first refer the matter to the CCMA and only once a certificate of outcome had been issued or a period of 30 days had elapsed since the date of his referral to the CCMA, could the applicant have approached the LC. The respondent contended that these requirements were peremptory in every scenario involving a dismissal dispute and as such the applicant had not followed the correct procedure and his application was, therefore, irregular and the LC lacked jurisdiction to hear the matter. In addition the respondent relied on s 157(4)(*a*) and (*b*) of the LRA, which sets out that the labour court may refuse to determine any dispute, other than an appeal or review, if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

In determining the present matter, the court considered and followed the decision of the Labour Appeal Court in *Intervalve (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members* (2014) 35 ILJ 3048 (LAC), which held that the LC does not have jurisdiction to entertain a dispute in circumstances where such dispute was not first referred to conciliation. In *Intervalve* the court held that '... the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication', and in the absence of conciliation a litigant is not entitled to refer a dismissal dispute to the LC. It is significant to note that National Union of Metalworkers of South Africa (NUMSA) lost on appeal and challenged this aspect at the Constitutional Court, but were unsuccessful.

In the present case the applicant attempted to refer a dispute to the LC without exhausting the conciliation process or allowing a 30 day period from the date he referred the matter to the CCMA to elapse. The court held that the applicant had not fulfilled the prerequisite conditions required in s 191(5) of the LRA and as such he had not required the competence to refer the matter to the LC at the time which he did. The court held that even if the applicant's statement of case at the LC was deemed to be a separate dispute to the one he had referred to the CCMA, the applicant would still have had to refer the matter to the CCMA and attempt to resolve the dispute through conciliation, or to allow a 30 day period to elapse, before the LC could entertain his dispute. The court therefore found that the applicant's statement of case was premature and lacked competence and should be dismissed. The court further found that the respondent had acted reasonably by advising the applicant of his defects and allowing him an opportunity to withdraw his statement of case before applying for it to be dismissed. The applicant, however, was found to have acted unreasonably and prejudicially in refusing to withdraw his application and persisting with the matter, and as such costs were awarded against the applicant.

- McLarens Attorneys appeared for the respondent in the above matter

Warren Sundström *BA LLB (Unisa)* is an attorney at McLarens Attorneys in Johannesburg.