REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JS 1135/12

In the matter between:

DENNIS PEARSON AND 14 OTHERS Applicant

and

TS AFRIKA CATERING SOLUTIONS First Respondent

SODEXO SOUTHERN AFRICA (PTY) LTD Second Respondent

Heard: 28 February 2014
Judgment: 28 February 2014
Edited: 28 March 2014

***EX TEMPORE* JUDGMENT**

VAN NIEKERK J

[1] The applicants have filed a statement of claim in terms of Rule 6, in which they seek a declaratory order to the effect that the cancellation of the outsourcing contract between the first respondent and Media 24, and

the subsequent awarding of the same contract by Media 24 to the second respondent, constitutes the transfer that business as a going concern for the purposes of section 197 of the Labour Relations Act.

[2] The applicants also seek a declaratory order to the effect that their contracts of employment transferred to the second respondent with no loss of benefit, and that this order operates retrospectively from 1 May 2012. The statement of claim was drafted and the referral to this Court made by the applicants' erstwhile attorney of record. He withdrew a week ago.

[3] In response to the statement of claim, the second respondent submits that the declaratory relief sought by the applicant is not competent and that regardless of the merits of the claim, the referral should be dismissed for that reason. In essence, as I understood the argument, the second respondent contends that the failure by the applicants to refer an unfair dismissal dispute to this Court renders the relief they seek, i.e. a declaratory order as to whether section 197 applies, to be of no consequence. At the outset of the trial, which commenced yesterday, the parties' representatives were invited to address the Court on this issue.

[4] The material facts relevant to the preliminary issue I have outlined are briefly the following. On 14 April 2012, Media 24 advised the first respondent that the second respondent would take over the business of providing catering at its premises, with effect from 1 May 2012. When the applicants presented themselves after a handover to the second respondent, they were told that there were no jobs for them at the site and they say that they were evicted from Media 24's premises.

[5] It appears from the pre-trial minute that the majority of the applicants were employed by the first respondent on fixed-term contracts, on other sites, with effect from June 2012 and that they remain so employed. I

accept that the terms of that employment may be different, but the fact remains that in respect of all but three of the applicants continue to be employed by the first respondent.

[6] On 5 May 2012, the applicants referred disputes to the CCMA. They categorised the dispute as ones concerning an unfair dismissal and indicated that they wish to be reinstated or compensated. On 22 May 2012, for reasons that are not apparent to me, the applicants referred a dispute to the Bargaining Council, in which they claimed that they had been unfairly dismissed by the second respondent.

[7] That dispute was categorised as a dispute concerning an unfair retrenchment. The reason for that categorisation is not apparent. The dispute remained unresolved after conciliation meeting and on 2 August 2012, a significant date for the purposes of the preliminary issues that have been raised, a certificate of outcome to this effect was issued by the Council.

[8] For reasons that are not apparent, the matter was thereafter referred to the CCMA for arbitration. The arbitration was set down for 26 November 2012. The hearing was preceded by correspondence between the parties' respective attorneys. Specifically, the second respondent's attorney advised the applicants' erstwhile attorney that given the nature of the claim the CCMA lacked jurisdiction to arbitrate the dispute and that the matter ought to have been referred to this Court. Despite that advice, the applicants persisted with their claim in the CCMA. Not surprisingly, the commissioner ruled that the CCMA lacked jurisdiction

[9] On 7 March 2013, the applicants' erstwhile attorney filed the statement of case to which I have referred. The statement of case makes no mention of any dismissal, let alone an unfair dismissal. The high watermark for the applicants is an averment to which I have made reference regarding events when the applicants presented themselves at Media 24 after 30

April when the applicants in effect say that their tender of services was refused.

[10] It is often forgotten that this Court is a creature of statute, that its powers of jurisdiction are defined and conferred by the LRA and other labour related legislation. The Court has authority and inherent powers only in relation to matters under its jurisdiction. Section 157 of the Act provides that the Court has for exclusive jurisdiction in respect of matters that either in terms of the LRA or any other law are required to be determined by this Court.

[11] Rule 6 of the Rules of this Court regulates matters that may be referred for determination and establishes the procedure to be followed. Rule 7 and 7(A) applies to those matters required to be brought by way of application. In other words, this Court does not operate on the principle applicable in the High Court where the foreseeability of any material dispute of fact largely dictates the appropriate procedure. In this Court, the Rules are far more prescriptive. The nature of the dispute between the parties both serves to confer jurisdiction on the Court but also dictates the manner in which a matter is to proceed, whether by way of action or motion. This Court is afforded a large range of powers in terms of section 158 of the Act, including the power to make declaratory orders. But the Court may not exercise any of its powers if it has no jurisdiction.

[12] The applicants sought a declaratory order, by way of a Rule 6 referral, to the effect that s 197 applies to a particular transaction. As I have indicated, it appears to me from the pleadings filed (which is the basis on which jurisdiction is to be determined), that this Court has no jurisdiction to entertain the applicants' claim. There is no unfair dismissal claim that has been referred to this court. The applicants ought at least to have asserted the existence of a dismissal, and averred sufficient facts to sustain the claim that the reason for the dismissal is a transfer in terms of

section 197, or a reason related to the transfer. In other words, in the statement of case, the applicants failed to plead facts to sustain a course of action recognisable by this Court in terms of Rule 6. I do not understand the applicants to dispute this proposition.

[13] This morning, after the proceedings were stood down yesterday in order for the Court to prepare a ruling in regard to the preliminary issues raised by the second respondent, the applicant filed an amendment in terms of which the intention to amend the statement of case in a number of respects was foreshadowed. That amendment seeks to introduce a reference to the existence of a dismissal and the reason for the dismissal, being one related to a transfer contemplated in section 197.

[14] The terms of the amendment further acknowledge that the applicants have failed to comply with section 191(5)(b)(i) of the Act, in that the statement of claim was filed outside of the 90-day period, which runs from the date on which the certificate of outcome was issued. As I have indicated, the statement of claim was filed some seven months after that date, thereby being some four months out of time. In the notice of amendment, the applicants seek to explain the reasons for the delay. These reasons relate to advice received, it would appear, from the Bargaining Council, and subsequent directions issued by the CCMA.

[15] The amendment also contemplates the substitution of the relief sought by incorporating prayers which would have the effect of condoning the late referral of the dispute for adjudication, and an order to the effect that the applicants were dismissed for an automatically unfair reason in terms of section 187(1) of the Act. More specifically, each of the applicants claims 24 months' remuneration calculated at the rate of remuneration as at the date of their dismissal.

[16] Mr Watt-Pringle SC, on behalf of the second respondent, objected to the proposed amendment and submitted that the applicants had failed to

file a substantive application for amendment setting out all of the relevant facts and circumstances in which the amendment was sought, and that in the absence of such a substantive application and in view of the prejudice that would be caused to the second respondent should the amendment be granted, the amendment should be refused.

[17] This Court has a broad discretion as to whether or not to allow amendment to pleadings. Obviously, this Court will generally lean toward granting an application to amend pleadings, but the overriding consideration is that where an amendment is allowed it must be done without prejudice and without causing an injustice to any party.

[18] In my view, the inevitable delay that any postponement for that purpose would occasion the prejudice that would be occasioned must necessarily weigh heavily with me. Given that this matter has taken almost some two years to reach this Court, to postpone this matter further would not only substantially prejudice the second respondent, it would also serve to frustrate the statutory purpose of expeditious dispute resolution established by the Labour Relations Act. For that reason, an amendment to the statement of claim at this late stage ought to be refused.

[19] More fundamentally, there is no proper application for condonation before this Court. Any application for the condonation of the late referral of a dispute must necessarily be a substantive application in which the applicant sets out precisely the period of delay and the reasons for that delay in a manner that take this Court into the deponent's confidence, and which enables this Court to exercise the discretion that it must necessarily exercise in determining whether or not condonation should be granted.

[20] In the present circumstances, there is no such application. If a dispute is referred late to this Court and there is no proper application for

condonation, this Court has no jurisdiction to entertain the referral. So it seems to me that even if I were inclined to grant the amendment, in the absence of a proper and full substantive application for condonation, this Court has no jurisdiction to entertain the claim that has been referred to it. For this reason, in my view, the applicants' claim stands to be dismissed.

[21] In so far as costs are concerned, section 162 of the Act confers a broad discretion on this Court to make orders for costs on the basis of the requirements of the law and fairness. Although the institution of this litigation was misguided to say the least, I suspect that the applicants relied heavily on the advice of Mr Samuels, their previous attorney of record. They were badly advised. The irony is that had the applicants approached this Court April 2012 by way of an urgent application for the declaratory order that they now seek, the Court would in all likelihood have entertained that application. The irresistible conclusion to be drawn is that Mr Samuels, having realised that the statement of claim was out of time, contrived to avoid the applicable time limits by recasting the terms of the dispute. In these circumstances, it would be inappropriate to hold the applicants personally liable for the respondent's costs.

[22] In so far as the further postponement of these proceedings is sought, in my view, any further delay in this matter should not be countenanced. I come to this conclusion, as I have indicated, particularly mindful of the fact that unfair dismissal disputes in particular are required to be diligently pursued and expeditiously resolved.

[23] The Labour Relations Act imposes strict time limits on the referral of disputes to the CCMA or a Bargaining Council, and for further referral either to arbitration or to this Court. This Court too has been reproached by the Supreme Court of Appeal and the Constitutional Court for what has been termed systemic delays in the resolution of labour disputes. But while no doubt this Court as an institution is on occasion guilty of

perpetrating systemic delay, it is not in all cases that this is so. There are cases, the present case being an example, where a matter has been pursued other than with the degree of diligence required by the Labour Relations Act thus frustrating the purpose of expeditious dispute resolution.

For those reasons, I make the following order:

1. The applicants' referral is dismissed.
2. There is no order as to costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT