

5. JURISPRUDENCE

The Referral of Alleged Unfair Dismissal or Unfair Labour Practice Disputes to the Council for Arbitration – The Implications of SAMWU Obo Manentza V Ngwathe Local Municipality and Others [2015] 9 BLLR 894 (LAC) (Article by Adv James Ngoako Matshekga Part-time Resident Panellist)

5.1 Introduction

In giving effect to the constitutionally entrenched right of everyone to fair labour practices, the LRA, in section 185 thereof, gives every employee the right, not to be unfairly dismissed and not to be subjected to an unfair labour practice. Where an employee feels an employer has violated his/her right as provided in section 185 of the LRA, he/she may challenge the fairness of the employer's conduct by referring a dispute to the Council.

Section 191 of the LRA governs the referral of alleged unfair dismissal and unfair labour practice disputes to the Council. Section 191(5)(a) requires the Council to arbitrate a dispute if the Council or a commissioner has certified that the dispute remains unresolved, or if thirty (30) days or any further period as agreed between the parties has expired since the Council received the referral and the dispute remains unresolved.

The vexed questions that arise from a reading of section 191(5)(a) of the LRA are: When does an employee obtain the right to refer an alleged unfair dismissal or unfair labour practice dispute to the Council for arbitration? Put differently; does an employee have to wait for the Council to issue a certificate of non-resolution before requesting the Council to arbitrate an allegedly unfair dismissal or unfair labour practice dispute? Does the time period begin to run when either the certificate of non-resolution is issued or when thirty (30) days has lapsed since the dispute was referred to the Council, whichever event occurs first? Does the section give an employee the option of deciding when his dies begin; either the employee can choose to refer his/her dispute to arbitration after thirty (30) days from when he/she referred his/her dispute has expired (in which case the dies begins at the expiry of the thirty-day period) or the employee can wait for the certificate to be issued, irrespective of whether this happens after the expiry of the thirty-day period, (in which case the dies begins from date of certificate)? These are the questions that the Labour Appeal Court answered in its judgement delivered on 24 June 2015 in SAMWU.

5.2 The Concise Facts

Mr KI Manentza (the appellant) referred a dispute to the South African Local Government Bargaining Council (SALGBC) alleging that he was unfairly dismissed by the Ngwathe Local Municipality (the respondent). At a conciliation that took place on 03 April 2003, the parties agreed to extend the life of the conciliation by a further seven (7) days. After the lapse of seven (7) days, the appellant requested the SALGBC to issue a certificate of outcome. However, instead of issuing a certificate of outcome, SALGBC erroneously enrolled the matter for arbitration on 01 December 2003. A certificate of outcome was issued on 15 April 2004. On 24 June 2004, the appellant referred the dispute to arbitration. The arbitration was set down for hearing on 29 July 2004. During the arbitration hearing, the respondent raised a preliminary issue contending that SALGBC

lacked jurisdiction to arbitrate the dispute because the referral to arbitration was late (as a result of the late issue of the certificate of outcome). The arbitrator found that there was no need to apply for condonation as the certificate of outcome was issued on 15 April 2004, and the referral was made within ninety (90) days of the date of issue of the certificate of outcome. The arbitrator accordingly found that the bargaining council had jurisdiction to determine the fairness of the dismissal.

In the review application before the Labour Court, the respondent 'attacked' the arbitrator's finding that condonation was unnecessary. The Labour Court found that the referral to arbitration was out of time and reasoned as follows:

'Section 191(5) of the LRA provides that if the Council has certified that the dispute remains unresolved or if thirty (30) days have expired since the Council received a referral, and the dispute remains unresolved, the Council must arbitrate the dispute at the request of the employee, if certain identified conditions are met. Section 191(11) (a) of the LRA prescribes a maximum period of ninety (90) days within which a dispute must be referred to arbitration after conciliation failed to resolve it. If good cause is shown to exist where a referral is made after the expiry of the ninety (90) days, in my view, the Council may grant condonation just as this Court is specifically empowered by section 191(11) (b) to grant condonation. To hold otherwise would result in an absurdity on the face of a clearly prescribed maximum period within which a referral ought to be made to the Council. Holding otherwise would render the prescribed period of ninety (90) days nugatory. After thirty (30) days since the Council received a referral but before the lapse of 90 days, Mr Manentza was at liberty to refer the dispute for arbitration, see Ceppawu and Others v R & B Timbers CC t/a Harding Treated Timbers. He did not. Nor did he apply for condonation for such lateness. His unexplained inactivity must have fatal consequences for his case.



Adv James Ngoako Matshekgu

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I am consequently persuaded by the submission of the [Municipality] in holding that the [Bargaining Council] and, therefore, the [arbitrator] had no jurisdiction to arbitrate a dispute in this matter in the absence of a condonation application, where the period of the delay in referring the dispute was in the region of 9 months.' [Footnote omitted]

5.3 The Issues in the LAC

In his appeal against the judgment of the Labour Court, the appellant contended that read disjunctively, section 191(5) of the LRA gives an 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. In other words, the appellant contended that the dies to refer an alleged unfair dismissal dispute to arbitration commenced in accordance with an employee's choice.

5.4 The LAC's Findings

The LAC, in rejecting the appellant's contention and dismissing the appeal, made the following important findings:

- (a) Although the presence of the conjunctive "or" in section 191(5) of the LRA calls for a disjunctive reading of the provision, the Court disagreed 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.
- (b) 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 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 Council's receipt of the referral.
- (c) The effect of this interpretation is that the occurrence of either of these two events entitles an employee to request the Council 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.
- (d) Section 191(5) of the LRA provides for the occurrence of either of the events: the issue of a certificate or expiry of 30 days from receipt of the referral as an objective fact which found the employee's right to proceed to arbitration or adjudication.
- (e) The employee's entitlement to refer the matter to arbitration or adjudication as contemplated in section 191(5)(a) and (b) of the LRA respectively, does not arise from any election on the employee's part as contended for by the appellant, but rather from whichever of the two jurisdictional events occurs first in sequence of time.
- (f) Thus, where conciliation takes place under the auspices of the Council within the 30-day period contemplated in section 191(5) of the LRA, and a certificate of non-resolution is issued within that period, the employee's right to refer the dispute to arbitration or adjudication will be triggered by the issue of the certificate as the jurisdictional event conferring this right. In this case, the subsequent expiry of the 30-day period will play no role in founding the employee's right to refer the dispute to arbitration or adjudication.
- (g) Similarly, where the 30-day period contemplated in the subsection lapses without the holding of a conciliation meeting proceeding and the Council certifying that the dispute remains unresolved, the lapse of the 30-day period will form the jurisdictional trigger entitling the employee to refer the dispute to arbitration. This right, having accrued to the employee upon the lapse of the 30-day period contemplated in section 191(5) of the LRA will not be affected by the convening of any subsequent conciliation proceedings or the issue of a certificate of outcome consequent thereupon.

- (h) The issue of the certificate, in the latter scenario, would have no effect in law as it would be superfluous to the employee's right to refer the unfair dismissal or unfair labour practice dispute to arbitration since this right would have already accrued to the employee on the lapse of 30 days from the date that the Council had received the referral.
- (i) In section 191 there is no obligation as in section 135(5) of the LRA, on a commissioner of the Council to issue a certificate of outcome stating whether the dispute has been resolved when the conciliation has failed, or at the end of the 30 day or any further period agreed between the parties.
- (j) There is no requirement in section 191 of the LRA that the Council must only appoint a commissioner to arbitrate a dispute where the commissioner has issued a certificate stating that the dispute remains unresolved, and within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration.
- (k) Section 191(5) of the LRA contemplates that the Council will have jurisdiction to arbitrate an unfair dismissal and unfair labour practice dispute on the lapse of 30 days from the date on which the Council received the referral, regardless of whether a certificate of non-resolution had been issued by the Council.
- (l) The issue of a certificate of non-resolution does not found the right of referral to arbitration or adjudication under section 191(5) of the LRA, as the subsection confers this right upon the lapsing of the 30-day period contemplated in the subsection regardless of whether conciliation actually takes place or a certificate of non-resolution is issued by the Council.
- (m) Neither the holding of an actual conciliation nor the issue of a certificate of non-resolution by the Council, is a pre-requisite for purposes of referring an unfair dismissal or unfair labour practice dispute to arbitration or adjudication in terms of section 191(5)(a) and (b) of the LRA, where there has been a lapse of 30 days from the date on which the Council received the referral and the dispute remains unresolved.
- (n) Since the issue of a certificate of non-resolution by the Council is not a pre-requisite for a referral to arbitration in terms of section 191(5)(a) of the LRA, it cannot cure the lack of jurisdiction of the 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 Council received the referral, and the employee has not sought condonation for its non-observance of that timeframe.
- (o) 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. A reasonable time within which a referral to arbitration in terms of section 191(5)(a) of the LRA should be made would be 90 days from the date of whichever of these two events occurs first: (a) the issue of the certificate of non-resolution by the Council; or (b) the lapse of the 30-day period contemplated in the subsection.

5.5 Concluding Remarks

The findings made by the LAC are not only far-reaching but also provide us with very important lessons. Chief amongst those is that alleged unfair dismissal or unfair labour practice disputes must be referred to the Council for arbitration within 90 days of (a) the issue of the certificate of non-resolution by the Council; or (b) the lapse of the 30-day period contemplated in the subsection **whichever occurs first** (my emphasis).

If a referral is made outside the prescribed period, an application for condonation is necessary as in the absence thereof the Council lacks jurisdiction to deal with the dispute. More importantly, there is no need for and no practical legal purpose will be served by the Council issuing a certificate of non-resolution after the lapse of the 30-day period from the date on which an employee referred the dispute to the Council. Accordingly, the Council and its commissioners will, as a matter of practice and legal compliance, not be issuing certificates of non-resolution where the 30-day period has lapsed from the date on which an employee referred an alleged unfair dismissal or unfair labour practice dispute to the Council.