THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: CA15/2024

In the matter between:

TRUWORTHS LIMITED **Appellant**

and

THEMBELANI PETER **Respondent**

Heard: **14 May 2025**
Delivered: **05 June 2025**
Coram: **Savage JA, Musi *et* Waglay AJJA**

JUDGMENT

WAGLAY, AJA

Introduction

[1] This appeal, with the leave of the court *a quo,* concerns a special plea relating to the Labour Court's jurisdiction to determine an automatically unfair dismissal

dispute, alternatively, an alleged unfair labour practice dispute, in circumstances where such dispute/s had not been referred for conciliation prior to its referral to the Labour Court for adjudication.

[2] The employee, Mr Thembelani Peter, opposes the appeal without any legal assistance.

[3] The appellant has sought condonation for the late filing of its appeal record, which was late by a total of seven court days. The reasons for the delay are explained and acceptable to this Court. Condonation is thus granted, and the appeal is reinstated.

Background

[4] The dispute carries a long history, most of which is not relevant for the purposes of this appeal. In that respect, a brief discussion of the background will follow.

Employment history

[5] The employee was employed with Truworths (appellant) as a TDC Technician from 15 August 2017 until his dismissal in July 2022.

[6] From March 2018 until 9 October 2018, the employee and appellant were embroiled in an internal dispute in which the employee asserted an entitlement to overtime payment. When such payment was not forthcoming, and the employee was disciplined for a refusal to work overtime without pay, a referral to the CCMA was made, which culminated in a settlement between the parties.

[7] Approximately one year after the overtime issue was resolved and on 15 October 2019, the employee referred a complaint to the appellant's anonymous tipline alleging that company assets, including electrical cables, trolleys, and electrical appliances, had gone missing, and he urged the appellant to investigate the issue.

[8] On 16 November 2019, the employee received a response to his tip-off in which he was provided with a reference number and was informed that his tip had been compiled into a report and escalated for further action.

[9] It is common cause that the employee's tip-off resulted in an investigation and the discipline of certain implicated employees.

[10] On 4 December 2019, the employee submitted another tip-off, this time the employee alleged that he had suffered victimisation, harassment and bullying due to the fallout from his initial tip-off of October 2019, particularly from the distribution centre manager, Mr James Steward and his 'allies'. The employee alleged that the appellant had shared his initial tip-off with certain implicated employees who, in turn, attempted to 'cover their tracks'. The employee further alleged that the perpetrators had gone as far as bringing in a non-employee into the workplace to pose as an auditor who went on to interrogate the employee to determine the extent of his knowledge surrounding the reported misconduct.

[11] The employee alleged that the appellant had failed to protect him as a whistleblower despite him having made a protected disclosure.

[12] Nothing else is said in the statement of case with respect to the alleged victimisation experienced in December 2019, and by all accounts, it appears it was business as usual between the employee and appellant in the time after his second tip-off of December 2019.

[13] In March 2020, the employee had applied for a position within the appellant, and although he had been shortlisted and interviewed, his application was unsuccessful.

[14] In the years of 2020 and 2021, the employee made numerous allegations of sabotage within the appellant's distribution centre. As the allegations went, a ghost technician had been sabotaging the employee's work or company machines, and in one instance, the employee had even seen a specific member of the Appellant's staff

walking away from a machine which was later determined to be tampered with. The allegations of sabotage had been reported, meetings between the employee and senior managers of the distribution centre had been held, an investigator had been appointed, and ultimately, it was determined that the appellant was unable to find evidence supporting the allegations of sabotage, and the investigation was closed as of April 2022.

[15] Also, sometime in March 2022, the employee became injured on duty, requiring attendance at the company doctor and a further consultation with a private doctor. It was the evidence of the employee that the appellant, more particularly his line manager, insisted that his injury be referred for a workers' compensation assistance (WCA) claim, despite his protests to the process. Over the course of three months, from May 2022 to July 2022, some back and forth occurred between the employee, his line manager and the safety manager over the submission of the WCA claim and the provision of a certified ID copy on the part of the employee. After numerous requests for a copy of his ID from his line manager, the employee in an email dated 7 July 2022 to his manager indicated that he felt harassed by her conduct, that he had provided her with the necessary documentation as requested (sans the ID copy) and he requested that she stop communicating with him regarding the matter.

[16] On 20 May 2022, the employee received a disciplinary letter in terms of which he was accused of gross insubordination, insolence and breach of company policy and procedure.

[17] The basis of the disciplinary letter and the accusations therein can be summarised as follows:

17.1. Gross insubordination in that, despite being instructed to escalate any concerns he might have to his direct line manager in respect of the alleged tampering and sabotage of machines, and to refrain from conducting his own investigations through the questioning of staff members, the employee on 26 April 2022 allegedly conducted his own investigation into a breakdown of a machine, resulting in him questioning staff. The appellant in its correspondence alleged that the conduct of the employee contributed to a

disharmonious work environment, that he had ignored a direct instruction and that his conduct jeopardised the integrity of the appellant's investigation.

17.2. Failure to abide by a reasonable instruction on 13 April 2022 as, when the employee requested time off to attend to a personal appointment, which time was granted with the stipulation that he return to work after an hour, the employee failed to return to work at the stipulated time (or for the remainder of the day) and did not notify his line manager that he would not return to work, and as a result, the company was unable to timeously make alternative arrangements to attend to unforeseen machine breakdowns.

17.3. The employee had on short notice, cancelled his facilitation of a training session without a valid reason, despite having been aware of his duty to facilitate the meeting, thus refusing a reasonable instruction.

17.4. Ignoring a valid instruction in that on 12 and 13 May 2022, the employee was requested to bring tools to the distribution centre in order to complete planned maintenance. This instruction was ignored by the employee, resulting in a delay in the maintenance works planned.

17.5. Failure to abide by the company's Mobile Device Policy, which required him to immediately report any damage to a company handset issued to him. The employee failed to do so, and it was only when he was requested to bring his handset into work did he disclose to his line manager that it had become damaged.

[18] The disciplinary letter constituted a final written warning, valid for a period of 12 months, however, the letter went on to state that, if the employee did not agree with the contents of the allegations against him, he would be entitled to a disciplinary hearing in which he would be able to respond to the allegations. The employee indicated that he did not accept the contents of the disciplinary letter and instead wished for an opportunity to defend himself.

[19] On 25 May 2022, the employee was issued with a notice to attend a disciplinary hearing scheduled to take place on 27 May 2022 to answer to the allegations as contained in the disciplinary letter. It appears that after the hearing, the final written warning was confirmed.

[20] On 8 July 2022, one day after his email to his line manager regarding the request for a copy of his ID was sent, the employee received a suspension letter in terms of which he would be suspended, pending the outcome of a disciplinary investigation.

[21] On 18 July 2022, the employee was issued with a disciplinary notice, he was facing charges of insolence, gross insubordination and incompatibility. While the charges of insolence and insubordination are in respect to his conduct and correspondence dated 7 July 2022, which the appellant viewed as rude, unprofessional and disrespectful towards his line manager, the charge of incompatibility alleged that the employee had continuously failed to work in harmony within the workplace and that he had failed to conduct himself in an acceptable and respectful manner.

[22] The disciplinary hearing was held on 20 July 2022, and it was the evidence of the employee that he had been bullied, discriminated against and threatened during the course of the hearing. Furthermore, it was alleged that he was unable to cross-examine witnesses without intervention from the chairperson, who would prevent him from asking specific questions or raising specific topics. When he raised that he was unfairly treated during the hearing, he alleged that he had been threatened and given warnings.

[23] The employee was subsequently found guilty of the charges and dismissed on 20 July 2022.

Arbitration proceedings

[24] The employee referred an unfair labour practice dispute to the CCMA, which he summarised on the referral as relating to having received a final written warning without prior warning, and that the disciplinary hearing was procedurally unfair, biased and not in accordance with company policy and procedure. With regards to the substantive issues, he indicated that he had been victimised, discriminated against and shouted at by witnesses during the disciplinary hearing. The employee sought his reinstatement.

[25] The employee alleged that his claim had been incorrectly assigned by the CCMA as a section 186(2)(a) complaint relating to unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provisions of benefits to an employee.

[26] In the form referring his matter to the CCMA for conciliation, the employee recorded that he was referring both an unfair labour practice dispute and a constructive dismissal dispute.

[27] On 30 August 2022, a con/arb hearing was held (the appellant was not in attendance), and on 12 September 2022, a default arbitration award was issued.

[28] In the arbitration award, the commissioner refers to an exchange between himself and the employee in which the commissioner had asked the employee to clarify the nature of his dispute based on the allegation that the information on his referral had been changed without him being informed. When asked whether the dispute constituted an unfair labour practice or an unfair dismissal dispute, the employee stated that the commissioner's conduct amounted to cross-questioning. In that respect and after having regard to the categorisation of the nature of the dispute in the employee's referral and the evidence led during the arbitration, the commissioner found that the employee's dispute was two-fold, one of unfair labour practice which related to a final written warning and a claim of constructive dismissal. Based on the evidence before him, the commissioner found that, as the employee's dismissal referral had been made outside of the 30-day period, the CCMA lacked the necessary jurisdiction to deal with the constructive dismissal dispute and, rather curiously, proceeded to deal with the unfair labour practice dispute.

[29] On the unfair labour practice dispute, the commissioner found that the employee had not perpetrated an unfair labour practice against the employee, and accordingly, the referral was dismissed.

Labour Court

[30] After having received the commissioner's findings, the employee referred his claim to the Labour Court. His statement of claim contained several allegations against the appellant, ranging from failure to pay overtime to the appellant, non-payment of salaries and creating a hostile, toxic and unbearable working environment in an attempt to force the employee to resign.

[31] Relevant for the purposes of this judgment are the allegations regarding his tip-off of October 2019.

[32] In his amended statement of claim, the employee alleged that his tip-offs in October and December 2019 amounted to protected disclosures in terms of the Protected Disclosures Act[1] (PDA) and, as such, he had suffered an occupational detriment, making his dismissal automatically unfair.

[33] The appellant excepted to the amended statement of claim on 11 grounds, including that the Court *a quo* lacked jurisdiction to hear the automatically unfair dismissal dispute or the unfair labour practice dispute, as they had not been referred for conciliation in terms of section 191(5)(b) of the Labour Relations Act[2] (LRA).

[34] The appellant's special pleas were upheld, except for the jurisdictional pleas relating to the Labour Court's power to hear the automatically unfair dismissal dispute and/or unfair labour practice dispute without conciliation of the disputes.

[35] In its submissions before the court *a quo*, the appellant argued that the disclosures made by the employee in December 2019 did not amount to a protected disclosure as it was not made in good faith but rather in retaliation for the overtime dispute that had occurred between the parties, which gave rise to the employee being disciplined. This averment, which is not common cause and is in fact a dispute of fact, is not a matter that may be raised by a party raising a special plea.

[36] The appellant further argued that had the employee been of the view that his suspension or dismissal was unfair due to his protected disclosures, he should have

[1] Act 26 of 2000, as amended.
[2] Act 66 of 1995, as amended.

filed an automatically unfair dismissal dispute to the CCMA within the stipulated time period.

[37] The Labour Court held that it had jurisdiction to determine the automatically unfair dismissal dispute, despite the employee's failure to comply with the time periods as stipulated in referring the matter for conciliation.

[38] The appellant's appeal thus turns on the limited question of the Labour Court's jurisdiction to decide the automatically unfair dismissal dispute in the absence of a referral of the dispute for conciliation.

[39] The employee, as I stated earlier, was unrepresented and unhelpful. He simply persisted in saying what he wished, failed to respond to questions from the bench, nor was he prepared to consider the useful suggestions proposed by the bench.

Evaluation

[40] Although it is not necessary, because of the statements made by the employee, I feel the need to make some comment on the employee's claim (without dealing with the merit of what he says) before dealing with the issue before this Court.

[41] The dispute between the parties invokes two provisions of the LRA concerning protected disclosures, first being section 186(2), which defines an unfair labour practice as when an employee suffers an occupational detriment (other than a dismissal) on account of having made a protected disclosure as defined in the PDA. In the second instance, section 187(1)(h) provides that where an employee has been dismissed on account of having made a protected disclosure and thus the employer is in contravention of the PDA, such dismissal is automatically unfair.

[42] The PDA aims to make provision for procedures in terms of which employees and workers may disclose information regarding wrongful or illegal conduct of their

employer or their co-employees, and to provide for the protection of such whistleblowers against retaliation for the disclosures made.

[43] Section 3 of the PDA prohibits retaliation for the making of protected disclosures, termed as occupational detriments. Occupational detriments include the discloser being subjected to *inter alia* disciplinary action; being dismissed, suspended, demoted, harassed or intimidated; or being denied appointment to any employment, profession or office.

[44] The PDA defines a disclosure as:

> '… any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) that the health or safety of an individual has been, is being or is likely to be endangered;
>
> (e) that the environment has been, is being or is likely to be damaged;
>
> (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
>
> (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed…'

[45] To qualify as a protected disclosure under section 6 of the PDA, such disclosure must be made to the discloser's employer and must be made in good faith. The PDA at s 6(1)(a) provides that the disclosure must be made substantially in accordance with any procedure authorised by the employer for reporting, and the employee must be aware of the procedure to be followed.

[46] Section 4 of the PDA provides that any employee who has been subjected to or may be subjected to an occupational detriment in breach of section 3 of the Act may approach any court having jurisdiction, including the Labour Court, for appropriate relief or pursue any other process allowed or prescribed by any law.

[47] To determine whether the Labour Court has jurisdiction to hear the automatically unfair dismissal and/or the unfair labour practice dispute, it is necessary to consider each claim separately as the LRA prescribes distinct dispute resolution processes to be followed, depending on the nature of the claim.

Automatically unfair dismissal

[48] Section 191 of the LRA sets out the dispute resolution process to be followed where a dispute about the fairness of a dismissal or a dispute about an unfair labour practice arises.

[49] In the context of an automatically unfair dismissal dispute, the Act requires that the dispute be referred to a bargaining council or the CCMA within 30 days of the date of dismissal for conciliation. Where conciliation fails and the dispute remains unresolved, the employee may refer their dispute to the Labour Court for adjudication if the alleged reason for the dismissal is that of an automatically unfair dismissal.

[50] Although an employee in an automatically unfair dismissal dispute has the discretion, as conferred to them in terms of section 5(b) of the LRA; to refer their dispute to the Labour Court for adjudication or to proceed to arbitration within the council or CCMA, such an employee must refer their dispute for conciliation before exercising this discretion. Conciliation is not discretionary.

[51] Accordingly, it is not open to an employee to bypass the conciliation process to directly approach the Labour Court for adjudication of their automatically unfair dismissal dispute. Thus, where an employee alleges that their dismissal is in relation to the making of a protected disclosure, and that he has suffered an occupational

detriment, such dismissal constitutes an automatically unfair dismissal, and such an employee must first approach the CCMA to conciliate their dismissal dispute before referring their claim to the Labour Court for adjudication.

[52] In this matter, the employee referred his dispute to the CCMA for conciliation. In his 7.11 form, the employee indicated that his dispute concerned an unfair labour practice and a constructive dismissal. In summarising the facts of the dispute, he indicated the following:

> '1. Given a final written without any prior warning.
> 2. Failure to follow the right procedure during a disciplinary hearing.
> 3. Witnesses giving false information.
> 4. Outcomes of the disciplinary hearing not a true and honest reflection of the hearing.'

[53] In discussing the procedural and substantive issues of his dispute, the employee indicated that:

> '1. There was a dispute against the chairperson…
> 2. Failure to follow Truworths policies by holding a biased disciplinary hearing.'
> And
> 'Victimised and discriminated against during disciplinary hearing. Shouted at by witnesses. Witnesses giving false information.'

[54] The CCMA set the matter down for a con/arb hearing, which implies that if the dispute(s) fail to be resolved at the conciliation stage, the dispute will immediately proceed to arbitration. At the commencement of proceedings, the commissioner attempted to determine what was the true nature of the dispute, whether it constituted an unfair labour practice or a constructive dismissal. As recorded earlier, if regard is had to what the commissioner states in his findings, he was getting little or no assistance from the employee and was accused of "cross-questioning him when in fact the Commissioner appears to have done so to get clarity on the disputes. Having regard to the referral form and the evidence presented, the commissioner established that the disputes concerned both an unfair labour practice

dispute in that the employee had been issued with a final written warning without prior warning, and a constructive dismissal dispute.

[55] Firstly, it needs to be said that the commissioner made a finding at the hearing of the con/arb. He found that the dismissal referral was not made timeously, and the CCMA therefore had no jurisdiction to entertain the dismissal dispute. It must be noted that the reference to the out-of-time referral had to be the referral to conciliation, as there was no referral of the dispute to arbitration.

[56] Much is made about the referral of the dismissal dispute being referred to by the employee as a constructive dismissal (or, as he suggests, it was the CCMA itself that determined the dismissal as constructive dismissal). The label attached to dismissal referred to conciliation is of no consequence. The issue as to the kind of dismissal only becomes relevant at the time of arbitration or adjudication, and if unclear, it might only become clear after all the evidence is presented at the arbitration or the adjudication.

[57] For purposes of conciliation though, the label attached to the dismissal is irrelevant, as the purpose of the conciliation of a dismissal dispute, as the word suggests, is to try and get the parties to settle their dismissal dispute.[3] Had conciliation taken place, then, notwithstanding that the referral was fashioned as a constructive dismissal, the employee would still be able to proceed with his automatically unfair dismissal claim that he had referred to the Labour Court, in that the Labour Court would have had jurisdiction to entertain the matter, and the special plea would fail. However, because the CCMA held that it had no jurisdiction to deal with that dismissal dispute, then, absent the setting aside of the CCMA findings, that finding stands and amounts to a failure by the employee to refer his dismissal dispute for conciliation.

[58] In the circumstances, the employee could only have been able to proceed with his dismissal dispute if he had successfully reviewed the CCMA finding that his

[3] See: *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and Others* [2020] 10 BLLR 959 (CC); *September and Others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC).

referral was not timeously made, or he had successfully obtained condonation for the late referral of his dismissal dispute.

[59] In the result, the Labour Court had erred in dismissing the appellant's special plea as, absent a proper referral of the dismissal dispute for conciliation, the Labour Court has no jurisdiction to adjudicate the referred dismissal as there was proper referral of the dismissal dispute for conciliation- a condition precedent before referring a dismissal dispute to arbitration or adjudication.

[60] In the premises, the following order is made:

Order

1. The late filing of the appeal record is condoned, and the appeal is reinstated.
2. The appeal is upheld, with no order as to costs, and paragraph 1 of the Labour Court judgment under case no: C07/2023 is substituted with the following order:

'1. The employer's special pleas are upheld with no order as to costs.'

WAGLAY AJA

Savage JA and Musi AJA concur.

APPEARANCES:

FOR THE APPELLANT: B Conradie of Bradley Conradie Halton Cheadle

FOR THE EMPLOYEE: Self