

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG.**

Case No. JA 26/04

In the matter between

MODISI JOHANNES MOILA

Appellant

And

PIET SHAI N.O

First Respondent

**COMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

UNIVERSITY OF THE NORTH

Third Respondent

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal from a judgment and order of the Labour Court in a review application that had been brought to that Court by the appellant to have a certain decision of the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”), the second respondent herein, reviewed and set aside. The CCMA’s decision was made by the first respondent, a commissioner of that body. In terms of that decision the first respondent dismissed an application that had been brought by the appellant to the CCMA for the condonation of his delay in referring to it for arbitration a

dispute between himself and the third respondent concerning his allegedly unfair dismissal by the University of the North (now the University of Limpopo) the third respondent. The Labour Court, through Landman J, dismissed the appellant's application for review. With the leave of the Labour Court, the appellant now appeals to this Court against that order.

Is the third respondent before Court?

- [2] Before going any further, it is necessary to first deal with a preliminary point raised by the appellant. The appellant has taken the point that the third respondent is not properly before this Court. As at the time of the hearing of this appeal by this Court a firm of attorneys, namely Hlatshwayo Du Plessis Van der Merwe Nkaiseng purported to represent the third respondent in this matter and had delivered a document purporting to be a power of attorney authorising them to represent the third respondent and authorising the Vice-Chancellor to sign all the necessary documents. They had also filed Heads of Argument to oppose the appeal and had briefed Counsel to appear in this Court and argue for the dismissal of the appeal.
- [3] By consent of all parties concerned on the day of the hearing of this appeal, Counsel who had been briefed to represent the third respondent was allowed to present argument and the attorneys instructing him were to file proof by a given date that the third respondent had authorised the opposition of the appellant's appeal

and that the attorneys had authority to represent the third respondent. In due course the aforesaid attorneys delivered a substantive application for the condonation of the late delivery of a power of attorney and a “**resolution**” purporting to give the required authority. The affidavit filed in support of the condonation application was deposed to by one Susan Du Toit who is an attorney and a professional assistant in the firm Hlatshwayo Du Plessis Van der Merwe Nkaiseng.

- [4] Du Toit annexed to her affidavit a document purporting to be a resolution of the Council of the third respondent signed by Prof N.M. Mokgalong, the Vice-Chancellor of the third respondent. The document is dated 22nd September 2006. A document purporting to be a power of attorney authorising Hlatshwayo Du Plessis Van der Merwe Nkaiseng to represent the third respondent was also annexed to the affidavit. It was also signed by Prof Mokgalong. In the document purporting to be a resolution of the council Prof Mokgalong stated that that document was a resolution of the council of the third respondent that had been passed by the University Council on the 21st September 2006.
- [5] The appellant filed an opposing affidavit to oppose the application for condonation and to challenge the “**resolution**” and the power of attorney. The appellant said in his affidavit that the University council had not held any meeting on the 21st September 2006 where it could have passed the resolution attached to Du Toit’s

affidavit. He said that the document signed by Prof Mokgalong purporting to be a resolution of the university council was a “fake”. He said that he had **“called some members of university who are all not aware of an urgent Council meeting that was held on Thursday 21st September 2006.”** He gave dates for scheduled meetings of the university council. The 21st September 2006 was not one of them.

- [6] The appellant stated that Prof Mokgalong was aware that no council meeting had been held on the 21st September 2006 and that the document he presented as a resolution passed by the council was not a resolution of the council and had not been passed by the third respondent’s council. If the document purporting to be a resolution passed by the third respondent’s council is not such a resolution because the third respondent’s council never passed such a resolution, it will follow that the document also signed by Prof Mokgalong and presented as a power of attorney authorising Hlatshwayo Du Plessis Van der Merwe Nkaiseng to represent third respondent as attorneys is also unauthorised. This is because Prof Mokgalong is supposed to have been authorised by the resolution to sign such power of attorney.

- [7] Hlatshwayo Du Plessis Van der Merwe Nkaiseng thereafter filed a replying affidavit deposed to by Prof Mokgalong. In the replying affidavit he conspicuously avoided dealing head-on with the appellant’s allegation that no meeting of the council took place on

the 21st September. If, indeed, the university council had met and or passed the resolution, one would have expected Prof Mokgalong to repeat the version that the “**resolution**” he had signed was not a fake but was genuine. He did not do so but went on to advance a different basis to show that the opposition of the appeal had been authorised. In the replying affidavit he put up another document and said that it showed that he had delegated authority to oppose the appeal. He did not take the Court into his confidence to explain why he had signed a document earlier on in which he had said that the University Council had passed a resolution if, indeed, no such resolution had been passed by the council and why such a resolution would have been necessary if he had delegated authority to oppose the appeal anyway. The document that Prof Mokgalong annexed to the replying affidavit also has not been shown to be authentic. It seems that Prof Mokgalong made copies of a few pages from some document. Even if that document was authentic, it would still not prove authority to oppose the appellant’s appeal in this Court. It refers to proceedings in certain Courts which it identifies but does not refer to proceedings of any kind in this Court.

- [8] I have no hesitation in upholding the appellant’s contention. The opposition of the appellant’s appeal has not been authorised and Hlatshwayo Du Plessis Van der Merwe Nkaiseng have not been authorised as attorneys to act for the third respondent and to oppose the appellant’s appeal. I also uphold the appellant’s contention that no meeting of the university council was held on the 21st

September 2006 and that no resolution was passed by the University Council to authorise the opposition of the appellant's appeal. The document purporting to be a resolution of the council is not authentic.

[9] It is a matter of grave concern that Prof Mokgalong appears to have signed a document to the effect that the University Council had passed a resolution on the 21st September 2006 authorising the opposition of the appellant's appeal when in fact nothing of the sort had happened. That such an untrue statement has been made is very bad. That it was made by a person occupying such a high position in an institution of higher learning is totally unacceptable. It is hoped that somebody will bring this matter to the attention of the university council to consider investigating it further to establish whether he has an acceptable explanation for this.

[10] In the light of the above it seems to me that it would be appropriate either to strike out the documents purportedly filed on behalf of the third respondent in this appeal including the Heads of Argument filed by the attorneys purporting to act on the third respondent's behalf or to disregard those documents including the Heads of Argument. I shall disregard those documents in considering this appeal. That, however, does not extend to the affidavits and other documents that were filed on behalf of the third respondent in the CCMA and in the Labour Court in opposition to the application for condonation filed by the appellant in the CCMA and those filed in the Labour Court in opposition to the appellant's review

application. In the CCMA and the Labour Court no ruling was made that those who purported to act on behalf of the third respondent were not authorised and that such opposition was not authorised. Accordingly, in deciding whether the Labour Court was right or wrong in making the decision that it did and whether the first respondent committed any reviewable irregularity in dismissing the appellant's condonation application, the Court must have regard to all the affidavits and other documents that were legitimately before those fora. With the above background, I now proceed to set out the facts of this case.

The facts

[11] The appellant entered the third respondent's employ as a lecturer in 1987. On the 15th August 2000 the third respondent extended an offer to its employees to accept a voluntary retrenchment package. On the 21st August 2000 the appellant accepted that offer. In terms of that voluntary retrenchment package the appellant's resignation or the termination of his employment would take effect on the 30th November 2000.

[12] Subsequent to the appellant's acceptance of the offer and that of other staff members the third respondent purported to withdraw the offer and refused to give effect to the acceptance thereof. This attitude was persisted in beyond the 30th November 2000. Indeed, it seems to have been abandoned only some time in 2002. This was after the third respondent had lost cases before the Labour Court and this Court on the question whether it was obliged to give effect to the acceptance of its offer of a voluntary retrenchment package.

[13] The appellant did not leave the third respondent's employ on the 30th November 2000. He nevertheless, informed the third respondent that the latter was obliged to give effect to his acceptance of the offer of the voluntary retrenchment package and to pay him in accordance therewith. The appellant maintained that his permanent employment with the third respondent had come to an end on the 30th November 2000 in terms of his resignation and acceptance of the third respondent's offer of a voluntary retrenchment package and that from the 1st December 2000 there was a temporary contract of employment between himself and the third respondent.

[14] The appellant stated in his condonation affidavit that in December 2000, January and February 2001 he was paid a salary that was less than the salary that he had been paid prior to the termination of his original contract of employment. It would appear that during December 2000, January and February 2001 although the appellant was, on his version, in a temporary employment with the third respondent, he refused to perform any duties. On the 28th February 2001 the appellant wrote a letter to the third respondent in which he said that he was resigning from the third respondent's employ with effect from the 1st March 2001. The body of that letter reads as follows:

“WITHOUT PREJUDICE

**RE: RESIGNATION FROM THE EMPLOY OF THE
UNIVERSITY – MJ MOILA:
PERSONNEL NUMBER 9910484.**

- 1. The above matter refers.**
- 2. This letter serves to notify you of resignation from the University of the North, without prejudice to any of my rights, effective from Thursday 1st March 2001.**
- 3. I have refused to take any duties allocated to me for this academic year due to the retrenchment offer initiated by the University and accepted by myself on the 21st August 2000. I therefore need NOT tender another resignation letter with a notice of three Months.**
- 4. I therefore instruct your Office to expedite the release of my pension funds with immediate effect.”**

[15] The importance of the appellant’s letter of the 28th February lies in the fact that in his condonation affidavit he made it clear that the dismissal dispute that he sought to pursue related to what he alleged was a temporary contract of employment between himself and the third respondent. The appellant’s case was that with effect

from the 1st December 2000 there was a temporary contract of employment between himself and the third respondent and that the appellant dismissed him from such temporary employment. It is that alleged dismissal which he regarded as unfair and sought to pursue in the CCMA.

[16] The appellant's case was that around the 15th March 2001 he had been informed by an official or employee based in the third respondent's financial division that his salary had been stopped. The appellant said that on learning this he had then assumed that, as he had not resigned, the stoppage of his salary meant that he had been dismissed. He wrote to Prof Fitzgerald, who had been appointed by the Minister of Education as administrator of the third respondent, to ask why his salary had been stopped. On the 26 March 2001 Prof Fitzgerald had responded by a letter to the effect that it was because he, that is the appellant, had resigned and the third respondent had accepted that resignation. The appellant says in his condonation affidavit that he wrote back to Prof Fitzgerald asking him where he derived the authority from to terminate his services and challenging his "**interpretation**". In this regard it must be pointed out that Prof Fitzgerald had not said that the third respondent had terminated the appellant's services but had said that the third respondent had accepted a resignation received from the appellant.

[17] On or about 23 March 2001 the appellant referred his alleged dismissal dispute relating to the alleged temporary employment

contract to the CCMA for conciliation. On 17 May 2001 the CCMA issued a certificate to the effect that the dispute remained unresolved. From the 17th May 2000 the appellant had 90 days within which to request the CCMA to arbitrate the dispute if that was what he wanted. If he failed to make that request within that period, the CCMA could only arbitrate his dispute if he applied for the condonation of his failure to make the request timeously and he showed good cause. If the CCMA condoned his failure, the dispute would then be arbitrated. It was only on the 10th September 2002 that the appellant requested the CCMA to arbitrate his alleged dismissal dispute. This means that he was late by a period of about one year and 22 days in requesting the CCMA to arbitrate the dispute. That period is calculated from the expiry of 90 days since the issuing of the certificate of outcome.

- [18] Before I can conclude the setting out of the facts, it is important to also observe that about mid-2001 the appellant brought an urgent application to the Pretoria High Court against the third respondent for a spoliation order. The third respondent had evicted him from its campus against his will without an order of court. The third respondent handled this eviction in a totally unacceptable manner. The appellant was apparently put on the back of a truck when it was raining. It also seems that his belongings were damaged. It is not clear why the appellant had to be treated in such an undignified manner. This was completely unacceptable and it should not have happened.

[19] The appellant's application to the Pretoria High Court resulted in a rule nisi with an interim order being granted. However, the third respondent had allowed the appellant back on campus before the Pretoria High Court could issue the rule nisi and grant the interim order. On the return or extended return day the third respondent opposed the confirmation of the rule. Bertlesmann J, who heard the matter, ultimately delivered a judgment in terms of which he discharged the rule nisi. He granted a counter-application that was brought by the third respondent for the eviction of the appellant.

[20] In dealing with the issues before him Bertlesmann J inquired into whether there was a temporary contract of employment between the appellant and the third respondent after 30 November 2000. He found that there was none. He further concluded that, even if there had been one, it had come to an end when the appellant resigned by way of the letter of the 28th February 2001 referred to above. Attempts by the appellant to take Bertlesmann J's judgment on appeal were unsuccessful.

[21] Before the appellant referred the dispute to arbitration and filed his condonation application, he and the third respondent signed a settlement agreement in terms of which the dispute relating the voluntary retrenchment package was settled.

The commissioner's ruling

[22] In dealing with the appellant's condonation application, the commissioner considered the degree of lateness, the reasons for

lateness, the prospects of success and the prejudice to the parties. With regard to the degree of lateness he approached the matter on the basis that the appellant was one year and 26 days late. The appellant had said in his affidavit that he was late by one year and twenty two days. Whether the correct period is one year and 22 days or one year and 26 days does not make any material difference in this case. The commissioner found this period of delay to be excessive. I can find nothing wrong with that conclusion.

- [23] As to the reason for the delay, the commissioner stated that the appellant's case was that the late referral was solely and exclusively caused by the third respondent. The commissioner said: **"He goes a long way blaming the management style and qualifications or lack thereof of the third respondent's administrator, Prof Fitzgerald."** The commissioner observed that the appellant did not describe in any detail how the third respondent's management's style and the absence of proper qualifications on the part of the third respondent's administrator caused the delay. He also referred to the fact that the appellant accused the third respondent of having taken this dispute to the Pretoria High Court and yet the appellant was the one who had instituted the application that was heard by the Pretoria High Court. Although the commissioner did not say so expressly, it is quite implicit from the way he dealt with the reasons for the delay that he regarded the reasons advanced as unacceptable.

[24] The commissioner then proceeded to deal with the prospects of success. In this regard the commissioner concluded that the appellant had resigned by way of his letter of the 28th February 2001. He came to the conclusion that, because of this, the appellant's prospects of success were, to say the least, very slim.

Proceedings in the Labour Court

[25] The Labour Court considered the appellant's review application and concluded that there was no basis to interfere with the ruling of the commissioner. Indeed, it, too, concluded that there had been no temporary contract of employment between the appellant and the third respondent after the 30th November 2000 but, that, even if there had been one, the appellant had resigned from such temporary employment by way of his letter of the 28th February 2001.

The appeal

[26] In order to try and persuade the CCMA that there was good cause for his delay in referring his alleged dismissal dispute to arbitration, the appellant dealt in his condonation affidavit with:

- (a) the degree of lateness
- (b) the reasons for the lateness, and,
- (c) the prospects of success

The period of delay

[27] In terms of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”) the appellant was required to have made his request to the CCMA to arbitrate the dispute within a period of ninety (90) days from the date of the issuing of the certificate of outcome. In this matter the certificate of outcome was issued on 17 May 2001. Ninety days from that date expired around 17 August 2001. It was

only on the 10th September 2002 that the appellant requested that the dispute be arbitrated. In his condonation affidavit the appellant says that he was late by a period of one year and twenty two days in requesting that the dispute be arbitrated. He certainly was late by, without any doubt, a period exceeding a year. In a case where a dispute is one which is required to be dealt with expeditiously and the request that the dispute be arbitrated is required to be made within 90 days from a certain event, a delay of over a year – that is over three times the prescribed period is, without doubt, an excessive delay. The commissioner was right in concluding that the period of delay was excessive.

The reasons and explanation for the delay

- [28] In par 6.1 of his condonation affidavit the appellant submitted that **“the Respondent has conducted itself in a manner contrary to this agreement, and has indeed gone above the tribunal with jurisdiction in this dispute misrepresented the facts and the law, by referring this dispute in a mala fide fashion to a white Judge of the TPD”** The agreement referred to in this statement was not any agreement giving the appellant an extension of time within which to request the CCMA to arbitrate the dispute. The appellant also did not substantiate this statement. In paragraph 8.3 of his condonation affidavit the appellant states that **“the referral to arbitration”** was late **“due to misfortune and no fault on my part.”** He does not substantiate this statement either.

[29] In paragraph 7.2 of his condonation affidavit the appellant states that “... **my intention to refer this dispute to arbitration has been frustrated by Respondent (lead (sic) by a white man Mr Patrick Fitzgerald) and its racially motivated Judges of the TPD**”. The appellant also did not substantiate this statement. In the first sentence in par 9 of his condonation affidavit the appellant states that Prof Fitzgerald “**is the sole and exclusive cause of the late referral to arbitration.**” In par 11 the appellant states that “**the conduct of the so-called ‘Professor’ Patrick Thomas Fitzgerald wholly, solely and exclusively lead (sic) to the delay in referring this dispute to arbitration, and the late filing of this application for condonation.**”

[30] In paragraph 17 of his condonation affidavit the appellant made a submission that “**due to this ill-preparedness and inappropriate claim to various fields of management of public institutions, Mr Patrick Fitzgerald used underhanded (sic) techniques and methods of delaying, to my prejudice, the referral of this dispute to arbitration.**” Either nothing is said to substantiate this statement or the appellant says certain things about Prof Fitzgerald which are completely irrelevant.

[31] In paragraph 18 the appellant says in part that his condonation application should succeed “**on the reasons of Mr Patrick Fitzgerald’s inappropriate experience to lead and give**

direction in terms of the laws and the Constitution of this country as shall be evident from what is stated further hereunder.” Later on in the condonation affidavit the appellant once again blames his delay in requesting the CCMA to arbitrate the dispute on the third respondent.

[32] It is clear from the above that the appellant blames everyone except himself for his delay of over a year in requesting that his dispute be arbitrated. At some stage he blames the delay on some Judges of the Transvaal Provincial Division of the High Court. At another stage he blames the delay on misfortune and says that there was no fault on his part. On many occasions he blames the delay on Prof Fitzgerald. On some occasion he blames the third respondent.

[33] The appellant's statements putting the blame on misfortune, Prof Fitzgerald, certain Judges of the Transvaal Provincial Division and on the third respondent are completely without any foundation. The appellant does not say why the only person who could have decided to request the CCMA to arbitrate his dispute when conciliation failed did not do so over a period going beyond a year nor does he blame that person for not taking the necessary steps to communicate the request that the dispute be arbitrated. He does not explain why that person was able to deal with the litigation in the TPD, and in the Labour Court but did not take the simple step of writing a one sentence letter to the CCMA requesting that his dispute be arbitrated. Of course, that person is the appellant himself and the appellant is not prepared to accept responsibility for his

failure or omission in this regard but prefers to blame everyone else instead.

[34] I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "**explanation**" has been given but such "**explanation**" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.

[35] In **Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A)** at 532 C-F Holmes JA set out the factors that need to be taken into account in considering an application for condonation where sufficient cause – which is the same as good cause – must be shown before condonation can be granted. One of the principles he set out is that, although the factors he set out therein are interrelated and are not individually decisive, "**if there are no prospects of success there would be no point in granting condonation.**" In **Chetty v Law Society, Transvaal 1985(2) 756**

(AD) Miller JA, on behalf of a unanimous Court, dealt with the term “**sufficient cause**” or “**good cause**” when used in the context of an application for rescission of a judgment. At 765 D-E he said: “**For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.**” (My underlining).

- [36] Although the underlined part of this passage was said in respect of an application for the rescission of a judgment, I can see no reason why as a matter of principle it cannot or should not hold good in respect of an application for condonation such as the one the appellant made to the CCMA in this case. Although I do not think that it can be said that the reason for the appellant’s failure to timeously request that his dispute be arbitrated was his disdain for the relevant provisions, I do not think that Miller JA meant to lay down disdain for the rules or statutory provisions as an essential requirement before the principle he enunciated could apply. I think that was simply an example he used to illustrate the point. I am sure it would apply in a case where there was no disdain but negligence or carelessness. Indeed, it is clear **from PE Bosman**

Transport Wks Com v Piet Bosman Transport 1980(4)SA 794(4) at 799 D that in a case such as this one, it is not necessary to consider the prospects of success and that condonation could be refused no matter how strong the prospects of success are in a case such as the present one. PE Bosman was a case where the appellant had failed to note the appeal and deliver the appeal record timeously and there were periods of delay for which there was either no acceptable explanation or no explanation at all and the breach of the rules was serious.

- [37] In the light of all the above I would dismiss the appellant's appeal without even considering the prospects of success. However, even if I were to consider the prospects of success, it seems to me that it was shown that there are no reasonable prospects of success. I proceed to consider the prospects of success for what such an exercise is worth. I shall do so within the context of considering whether the commissioner dealt with it in any manner that renders his finding reviewable.

Does the appellant have reasonable prospects of success in the alleged dismissal dispute?

- [38] The question whether or not the appellant has reasonable prospects of success must be answered in relation to the dispute that he wants the CCMA to arbitrate. He has made it clear in his condonation affidavit that that dispute relates to the termination of what he contends was a temporary contract of employment that he says

existed between himself and the third respondent with effect from the 1st December 2000. The Pretoria High Court found in the spoliation matter that there was no such contract between the parties during the relevant time. However, I am prepared to assume in the appellant's favour, without deciding, that there was such a contract.

[39] If the appellant was given a chance of having the dispute about his alleged dismissal arbitrated by the CCMA, in terms of sec 188 of the Act he would bear the onus of showing that he was dismissed from that temporary employment with the third respondent. His case is not that his dismissal occurred before the 28th February 2001. His case is that about the 15th March 2001 he was informed by an employee of the third respondent who was employed in the finance division that his salary had been stopped. He goes on to say that he then “**assumed**” that he had been dismissed because he knew that he had not resigned. I assume that his contention is that an employee's salary would only be stopped if he had resigned or had been dismissed and that he thought that, as he had not resigned, the stoppage of his salary meant that he had been dismissed. The fact that his case of dismissal is, on his own version, based on an assumption that he made when his salary was stopped renders his case a very weak one.

[40] There is also the question whether or not the appellant's letter of the 28th February 2001 can be taken into account since the

appellant had marked it “**without prejudice**”. Bertlesman J considered this issue in his judgment between the parties in the spoliation matter and came to the conclusion that it could be taken into account. I have considered the reasons that he gave for that conclusion and am persuaded that he was right. Accordingly, I would adopt those reasons. I do not consider it necessary to repeat them herein. The parties are in possession of copies of that judgment and will only need to read the judgment to know the reasons.

[41] It is apparent that the appellant would face two or three problems at arbitration. The first is that by way of his letter of 28 February 2001 which he addressed to the third respondent he resigned from the third respondent’s alleged temporary employment. The letter is crystal clear in this regard. Another problem is that nobody ever told him that he was dismissed. On his own version he “**assumed**” that he had been dismissed. He made this assumption when he was told that his salary had been stopped in circumstances when he says that he knew that he had not resigned. Of course that he knew that he had not resigned is untrue. He knew that he had resigned because he had written the letter of the 28th February expressly saying that he was resigning with effect from the 1st March 2001. He feigned ignorance of the reason why his salary was being stopped when he knew the reason full well.

[42] In his condonation affidavit the appellant says that he wrote to Prof

Fitzgerald to ask why he had been dismissed or why his salary had been stopped. This was at some stage after 15 March 2001. He says that Prof Fitzgerald wrote to him in reply on the 26th March and told him that his salary had been stopped because he had resigned and the third respondent had accepted his resignation. If the appellant knew nothing about having resigned or if he had never intended to resign when he wrote the letter of the 28th February, one would have expected that, when he learnt that Prof Fitzgerald said that he had resigned, his immediate reaction would have been to write back or telephone him or to go and see him and ask him what resignation he was talking about or to explain that, although he had written the letter of the 28th February, he had never intended to resign. That was not the appellant's reaction. His reaction was to write a letter asking Prof Fitzgerald, not what resignation he was talking about, but where he derived the authority from to dismiss him and to challenge his **“interpretation”**. In other words he chose to continue to ignore the fact that he had written the letter of the 28th February.

- [43] The above the appellant did not anywhere in his condonation affidavit explain the circumstances in which he wrote the letter of the 28th February which he thought called for that letter not to be taken as a resignation letter. This is particularly important because the appellant prepared that affidavit after the Pretoria High Court had found that by way of that letter he had resigned even if there

had been a temporary employment contract between himself and the third respondent. I see that in his heads of argument filed in this Court in regard to this appeal the appellant suggests that in writing that letter he did not intend to resign but wrote it because he was asked to submit such a letter in order to facilitate the processing of the payment of his voluntary retrenchment package.

- [44] The first answer to this is that, as he did not say this in the condonation affidavit, it cannot be legitimately considered. The second answer is that, even if it could be considered, it cannot help him because, if he was told what he says he was told, all he needed to do was to give a copy of his letter of the 21st August 2000 in terms of which he accepted the offer of a voluntary retrenchment package. His letter of the 28th February said that he was resigning with effect from 1 March 2001. A person like the appellant - who appears to be a relentless fighter for what he perceives to be his rights – would not have agreed to such a suggestion from people representing an institution with which he already had a dispute. The third answer is that, if the appellant had been misled into writing a letter of resignation, he would have said this in his affidavit in the spoliation matter in the Pretoria High Court. Indeed, he would also have said so in his condonation affidavit before the CCMA. He would also have said it to Prof Fitzgerald when in March 2001 the latter told him that his salary had been stopped because he had resigned. It is very difficult to accept that, without anybody putting a gun to the appellant's head, the appellant could have agreed to write a letter to the effect that he was resigning

when he had no intention of resigning.

[45] Even if it is true that some or other official of the third respondent had asked the appellant to submit a letter of resignation so as to facilitate the payment of his severance package in terms of the offer of a voluntary retrenchment package, and the appellant had written the letter of the 28th February to comply with such request, that would not necessarily mean that he did not intend to resign his so-called temporary employment when he wrote the letter of the 28th February. In fact resignation for such a reason would be consistent with two things. First, the offer of a voluntary retrenchment package had as its purpose that those staff members who accepted the offer would not continue to be employed by the third respondent. Secondly, there was a clause in the document containing the offer which was to the effect that staff members who accepted such offer would not in the future be employed by the third respondent except in exceptional circumstances.

[46] In this case the third respondent's officials knew that in terms of the offer of a voluntary retrenchment package, the appellant should have left the third respondent's employ on the 30th November 2000 but that this had not happened. They could have been concerned that, if in February - which was three months after the date when the appellant should have left - they paid the appellant his severance pay, he could, after accepting his severance package, turn around and want to continue working for the third respondent

on the basis that a new contract of employment had arisen after the 30th November which is exactly what has happened. It would, therefore, have been understandable if officials of the third respondent had asked the appellant to provide a further letter of resignation. Second, if the appellant was asked to provide a further letter of resignation so as to facilitate the payment of his severance package, for him to provide such a letter and to intend it as a letter of resignation would be consistent with the fact that the reason why he had not left on the 30th November 2000 was because he had not been paid his severance benefits. Accordingly, he would have been prepared to resign as soon as he could be paid his severance pay. The appellant's attempt to try and pursue an alleged dismissal dispute even after he was paid his severance benefits must simply have been an attempt thought out at some stage in order to try and get as much out of the third respondent as possible.

[47] In all of the above circumstances it seems to me that there is no room for any conclusion that the appellant did not resign but was dismissed. Indeed, the probabilities that the conclusion would be that he resigned are just too overwhelming. Accordingly, the commissioner's conclusion that the prospects of success were slim was not only justifiable but correct. The Court a quo was also correct in coming to the same conclusion.

[48] In the premises the appeal falls to be dismissed. As the appeal was unopposed, the issue of costs does not arise.

[49] In the result the appeal is dismissed.

Zondo JP

I agree.

Mc Call AJA

I agree.

A Kruger AJA

Appearances:

For the appellant	:	Mr Moila
For the respondent	:	Mrs Moyses
Instructed by	:	Hlatshwayo Du Plessis Van der Merwe
Date of judgment	:	10 January 2007