

**LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case: J 2778/05

In the matter between:

T I MOYO

Applicant

and

EXECUJET

First Respondent

JUDGMENT

LAGRANGE, J:

^{1]} This matter was set down for trial on 2 June 2011. In arriving at this point, the applicant, Mr Moyo, has followed a long and winding litigation trail. However, if the trial is to proceed, two special pleas raised by the respondent employer, Execujet, have to be determined in his favour. At the outset, it must be mentioned, that the respondent should not have waited until the trial date to deal with these issues, but should have approached the registrar to set them down on the opposed motion roll, to avoid clogging the trial roll with preliminary motion proceedings.

2] Before dealing with these preliminary objections, it is useful to present a brief chronology of important aspects of the litigation trail up to this point. In January 2005, Mr Moyo referred a dispute concerning an alleged unfair discrimination claim in terms of section 10 of the Employment Equity Act 55 of 1998 ('the EEA') and an ordinary unfair dismissal claim under the Labour Relations Act 66 of 1995 ('the LRA'). It appears that the EEA claim arose out of his employment on a three-month temporary contract, which he saw as a precursor to full-time employment, and the failure of the employer to appoint him to a full-time position when it became available. Instead, the employer engaged a white female in the full-time position. In his referral form Mr Moyo identifies the ostensible reason for his dismissal, presumably provided by Execujet, as the lapsing of his contract.

3] The dispute was set down for conciliation at the CCMA on 3 February 2005. At the conciliation proceedings, the parties concluded a written agreement entitled 'Agreement as the provisions of section 52 (3) (b) of the EEA 55 of 1998'. The agreement read:

"Parties by signing this agreement consent to the jurisdiction of the

Commission to determine this dispute which would otherwise fall within the jurisdiction of the Labour Court. Arbitration dates to be decided by parties."

It should also be mentioned that the certificate of the outcome issued by the Commissioner on the same date simply describes the dispute as one concerning "*alleged unfair discrimination 10 chapter II – EEA*".

^{4]} The reference to section 52(3)(b) of the EEA in the agreement is clearly misplaced. That section deals with disputes relating to the protection of employees against victimisation for exercising rights under the Act and not with the direct enforcement of unfair discrimination claims. It is the latter type of dispute the parties were involved in and hence the reference in the certificate of outcome to section 10. Whatever else the parties disagreed about they clearly understood that the agreement they concluded on 3 February 2005 dealt with Mr Moyo's claim of unfair discrimination. At no stage in this saga was victimisation under section 51 of the EEA raised as an issue.

^{5]} The provision the parties clearly meant to refer to was section 10(6)(b) of the EEA, which is identical in form to section 52(3)(b), but provides for disputes over unfair discrimination (excluding dismissal disputes). Sections 10(6) and 10(7) of the EEA read:

“(6) If the dispute remains unresolved after conciliation-

- (a) any party to the dispute may refer it to the Labour Court for adjudication; or*
- (b) all the parties to the dispute may consent to arbitration of the dispute.*

(7) The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.”

6] The relevant portions of section 141 of the LRA, which falls under Part C of Chapter VII (dealing with disputes referred to the CCMA) sets out the terms which apply to an agreement concluded under section 10(6)

(b):

“141 Resolution of disputes if parties consent to arbitration under auspices of Commission

(1) If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission.

(2) ...

(3) The arbitration agreement contemplated in subsection (1) may be terminated only with the written consent of all the parties to that

agreement, unless the agreement itself provides otherwise.

(4) Any party to the arbitration agreement may apply to the Labour Court at any time to vary or set aside that agreement, which the Court may do on good cause.

(5) (a) If any party to an arbitration agreement commences proceedings in the Labour Court against any other party to that agreement about any matter that the parties agreed to refer to arbitration, any party to those proceedings may ask the Court-

(i) to stay those proceedings and refer the dispute to arbitration; or

(ii) with the consent of the parties and where it is expedient to do so, continue with the proceedings with the Court acting as arbitrator, in which case the Court may only make an order corresponding to the award that an arbitrator could have made.

(b) If the Court is satisfied that there is sufficient reason for the dispute to be referred to arbitration in accordance with the arbitration agreement, the Court may stay those proceedings, on any conditions."

(emphasis added)

7] The significance of the emphasised portions will be addressed later when the two special pleas are analysed.

8] After concluding the agreement, the applicant then referred his dispute

to the CCMA for arbitration. In his request for arbitration of 15 March 2005, he identified the issues in dispute as being firstly, his unfair dismissal and secondly, unfair discrimination. The relief he sought was reinstatement to the date of his purported dismissal at the end of his three month employment period.

9] From this point, matters began to unwind somewhat. When the arbitration hearing convened on 12 October 2005, much time was spent in wrangling between Mr Moyo and Mr Jones, the employer's attorney, over the production of documents by the employer and the payment of a witness fee to one of the firm's employees, whom Mr Moyo had subpoenaed. The arbitrator eventually made a ruling on the matter. He decided that in terms of Rule 37 of the CCMA rules Mr Moyo had to pay the witness fees and travelling costs of the witness in question.

10] The employer then raised a principled objection to the matter proceeding. In the parties' efforts to conclude a pre-arbitration agreement Mr Moyo sought to include a claim that his dismissal was unfair based on discrimination as part of the dispute which would be arbitrated. Jones argued that the CCMA did not have jurisdiction to arbitrate over an automatically unfair dismissal claim, because the

agreement the parties had reached to submit the dispute to arbitration under the CCMA only envisaged a dispute over unfair discrimination under the EEA, and not a dispute over an automatically unfair dismissal on account of unfair discrimination under the LRA.¹

^{11]} The employer also sought to rely in part on the fact that the certificate of outcome issued by the CCMA commissioner at the conciliation hearing also described the dispute as one under the EEA. The employer argued that the ambit of the dispute as described in the certificate might limit what could be dealt with by the CCMA in arbitration. Mr Moyo, for his part, suggested that he had not fully understood the limited scope of the dispute described in the agreement and in the certificate.

^{12]} In an attachment to the draft arbitration agreement, Mr Moyo described the issues the arbitrator would be required to decide. The first four paragraphs read as follows:

"MY STORY – ISSUES IN DISPUTE

1. I experienced an automatic unfair dismissal according to the LRA number 66 of 1995, section 187 (f) in that Execujet unfairly discriminated

¹ Section 10(1) of the EEA specifically excludes unfair dismissal disputes based on unfair discrimination from the ambit of disputes that can be dealt with under that Act. The mechanisms for resolving such disputes are set out in the provisions of Chapter VIII of the LRA.

against me directly and indirectly because of my sex, race, language, culture, political opinion, conscience and belief.

2. My attempt to address the above discriminatory practices by Execujet's management, which attempts were documented by the Cecilia Hatting also makes my dismissal an Automatically Unfair one because I had taken action against the employer by exercising a right conferred by the LRA Act 3 66 of 1995. A violation of section 187 (d)(i) and (ii) of the same act.

3. Execujet further violated section 187 (c) of the Labour Relations Act 66 of 1995 by compelling me to accept that unfair discriminatory practices indulged in by their management were fair and acceptable.

4. To prove that Execujet unfairly discriminated against me in my point #(1) I have subpoenaed the letters of appointment of CVs payslips and IRP5 forms of Mariska Raath, Annelise Bra and Cindy Robertson, people who were employed in the same capacity I was also employed in. The discrepancies in the terms of employment remuneration, qualifications and experience will prove beyond doubt that I was discriminated against. I have also subpoenaed Marian Muller's documents because she was appointed to the vacancy I was not even considered for interview despite the fact that I applied for the same and was already and Execujet employee. I was also and only male and black person in the Department with 8 white Afrikaans speaking females."

^{13]} Jones submitted that this demonstrated that the alleged discrimination claim was only incidental to proving that Mr Moyo's dismissal was automatically unfair and the CCMA accordingly did not have jurisdiction to arbitrate this dispute. When Mr Moyo was asked for his views on this

characterisation of the matter, he agreed that his alleged dismissal was a result of the discrimination. As he put it: "*What came first was the discrimination. What came last was the automatic unfair dismissal.*" However, he clearly saw discrimination as central to the dispute and the dismissal as flowing from it. When the Commissioner asked him whether he was saying that the unfair discrimination in terms of chapter 2 of the Employment Equity Act led to his dismissal, he confirmed that it was the discrimination that came first and the dismissal was the final straw. He then proceeded to elaborate also on the respondent's failure to consider him for positions which became available, any one of which was exactly the same as the one he was fulfilling during his contract. Further discussion ensued between the arbitrator, Jones and Mr Moyo about the nature of Mr Moyo's dispute concerning whether he had been employed on a fixed term contract or on probation.

^{14]} The final discussion between them concerned the options available to the parties in taking the dispute forward. The arbitrator pointed out that, in his view, it was still possible for the parties to agree that Mr Moyo could submit his claim for automatically unfair dismissal based on discrimination to arbitration under the auspices of the CCMA. This suggestion did not appeal to the respondent and no such agreement was reached. The arbitrator then proceeded to make a ruling on the

question on whether or not the CCMA had jurisdiction to arbitrate the dispute.

^{15]} Essentially, the arbitrator adopted the view that the agreement reached by the parties did not encompass Mr Moyo's claim of an automatically unfair dismissal based on unfair discrimination. He further reasoned that, unless the parties had agreed in terms of section 141 of the LRA to allow the CCMA to determine the claim of automatically unfair dismissal by consent, he had no jurisdiction to hear a dispute concerning a claim of automatically unfair dismissal. Consequently, he held that he could not arbitrate the dispute before him.

Labour court proceedings

^{16]} Following the arbitrator's ruling on 12 October 2005, Mr Moyo sought to review and set aside the arbitrator's ruling. The matter came before Judge Ngcamu AJ, who dismissed the application on 13 December 2006. Mr Moyo never took this further, and consequently the arbitrator's ruling still stood.

^{17]} A few days later after the review application was dismissed, the

applicant filed an application for condonation for the referral of a dispute to the labour court, which he described as:

"... a dispute of unfair discrimination in terms of the Employment Equity Act 55 of 1998, in which I claim the respondent discriminated against me between 15 September 2004 and 31 December 2004, while I was employed by as an Accounts Administrator on a temporary contract, in terms of the conditions, terms of employment and remuneration that were offered to me compared to other employees of the respondent to employed in the same capacity as me. The respondent further discriminated against me by declining to interview me for (2) two full-time employment opportunities that materialised while I was thus employed, one of which was the very same job and I was really doing on a temporary contract, after having been successful through (2) two job interviews. The respondent did not discipline me for incapacity or misconduct during the whole period I was its temporary employee."

(emphasis added)

^{18]} Quite apart from the fact that no dispute had been referred to this court, in the form of a statement of case in terms of Rule 6 of the Labour Court rules, the so-called condonation application was incomplete, lacking as it did a founding affidavit. This was supplied by Mr Moyo, a month later,

in January 2007. In his explanation for the lateness of the purported referral of the dispute, Mr Moyo stated the following:

"(5) The dispute was first referred to the CCMA on 3 January 2005 and was not arbitrated until 12 October 2005 when the CCMA found it did not have jurisdiction to arbitrate same.

(6) I applied for a review of the CCMA's ruling on 25 after 2005 because the respondent and I had signed an agreement as per the provisions of section 52 (3) (d) of the Employment Equity Act 55 1998 in terms of which we consented to the CCMA jurisdiction.

(7) My review application was only held on 13 December 2006 and was not successful."

19] It is clear that the dispute which Mr Moyo intended to refer to the labour court at this stage was the dispute which the parties had previously agreed to submit to arbitration under the auspices of the CCMA on 3 February 2005, namely a dispute which dealt only with unfair discrimination arising in the course of Mr Moyo's three-month employment with the respondent and its failure to appoint him to one of two available positions. There is no suggestion in the supposed condonation application that Mr Moyo was attempting or intending to refer the dispute over his alleged automatically unfair dismissal to the labour court.

20] On 14 February 2007, the condonation application was set down on an unopposed basis before Judge Tlaetsi AJ, as he then was, even though Execujet had filed a notice of opposition on 22 January 2007. It would appear that the respondent's opposition was not brought to the attention of the court and the learned judge granted the condonation application."

21] The next step in this epic was that the matter was set down for trial before Judge Molahlehi on 21 June 2007. The learned judge dismissed the matter. He found that Mr Moyo had relied on the original review application as if it was the referral of his unfair discrimination case to the labour court for adjudication, and the applicant had not made a proper referral in the form of a statement of case under Rule 6 of the Labour Court rules.

22] Mr Moyo then applied for leave to appeal against the dismissal of his case. The application for leave to appeal was set down for hearing on 13 March 2008 and was dismissed because the applicant did not appear at court. Mr Moyo next applied to rescind the default dismissal of his application for leave to appeal. He claimed that the notice of set down had not reached him in time. On 11 June 2008, his application for rescission then came before Cele J, who duly rescinded the judgment dismissing his application for leave to appeal.

23] A delay then occurred in rescheduling a date for hearing the application for leave to appeal, as the file had not been returned to Molahlehi J after the rescission application. Between the rescission application and the date when the matter was re-enrolled, Mr Moyo also approached the Judicial Services Commission and the Judge President of the Labour Court for assistance in the prosecution of his claim. He also sought the recusal of Judge Molahlehi in the forthcoming leave to appeal application. In the end, Mr Moyo then abandoned his application for the honourable judge's recusal and withdrew his application for leave to appeal. Judge Molahlehi then directed him to file his statement of case within 21 days of the date of the order issued by him on 24 June 2010, and confirmed Mr Moyo's abandonment of the application for leave to appeal and the recusal application.

24] It is useful to recap where matters stood at this point. Because the applicant had withdrawn his application for leave to appeal against the previous order made by Judge Molahlehi on 27 June 2007, that order was still stood, meaning that no proper referral of his unfair discrimination case to the labour court had been made. Hence Molahlehi J had directed the applicant to file a proper referral, which he then did on 12 July 2010 within the time stipulated in the order.

^{25]} The applicant's statement of claim is confined to his dispute concerning the respondent's alleged unfair treatment of him during his three-month employment in relation to his remuneration, and the respondent's failure to employ him in two vacancies which became available. It is therefore clear that in this referral the applicant is not seeking the adjudication of his dismissal dispute. In its reply, the respondent pleaded a defence to both claims and also raised two special pleas, to which I now turn.

The special pleas

Lack of jurisdiction: no condonation granted for the late referral

The respondent refers back to the fact that the dispute which was referred to the CCMA was unresolved on 3 February 2005, but the applicant only finally filed a statement of case referring the matter to the labour court on or about 13 July 2010. In the absence of condonation for the late referral being granted, the respondent submitted that the court lacked jurisdiction to hear the matter. Mr Moyo's response was that he had previously obtained condonation for the late referral of his claim from Tlaletsi AJ in 2007.

^{26]} e. This presents a conundrum, because a year later Molahlehi J found that no referral had been made. By relying on the ruling of Tlaletsi AJ, the applicant is effectively saying he was granted condonation for the late filing of a referral

which had yet to be made

27] The first two factors that are normally considered in deciding if a matter should be condoned, are the length of the delay and the reasons for the delay.² It is logically impossible for Tlaletsi, AJ to have considered a referral which had not yet been made. The learned judge could only have believed he was considering a referral which had already been made. At that time the only matter that had been referred to court by the applicant was the applicant's review application, which had been dismissed.

28] The only conclusion that can be drawn is that Tlaletsi AJ was not advised that the condonation application was opposed, nor was he told that no proper referral had in fact been made. In the circumstances, the condonation ruling made by the learned judge was clearly made in error and cannot be accepted as a condonation of the proper referral which the applicant only made in July 2010, after being directed to do so by Molahlehi J.

29] As an alternative to relying on the condonation ruling by Tlaletsi AJ, the applicant argued that Molahlehi J's direction that he must file his

2 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D, Holmes, JA identified the factors normally considered in deciding applications for condonation thus: "*Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case.*"

statement of case, effectively meant he did not have to apply for condonation, because it was implicit in that direction that its late filing was effectively condoned. It might well be the case that the fact that the applicant was directed to file a statement of case might be a factor to be considered in weighing up an application to condone the late referral. Nevertheless, it must be remembered that the judge's direction was issued after confirming that no referral had been made by mid-2010 and the applicant was ordered to serve a referral before the matter could proceed. If Molahlehi J had intended to condone any referral made he would have specifically said so, though that would still have been irregular because until the referral was actually made, like Tlaletsi AJ, he would not have known what period of delay he was being asked to condone because the date of referral could not be known in advance.

30] Given all these considerations Molahlehi J could no more have granted condonation than Tlaletsi AJ could have and there is no evidence that he even purported to do so. Accordingly, I am satisfied that if the applicant wished to pursue his claim of unfair discrimination in the labour court he ought to have applied for condonation. However, this finding assumes that the applicant is in the correct forum, which will be discussed further below.

Waiver of the right to have the unfair discrimination claim determined

31] The respondent's second objection is that when the arbitration of the unfair discrimination case came before the arbitrator on 12 October 2005, the the applicant abandoned that case and decided to proceed with a new case relating to his allegedly automatically unfair dismissal. In turn this led to the Commissioner dismissing the dispute.

32] Firstly, the Commissioner did not dismiss the dispute, but found that he did not have jurisdiction to hear a dispute which *included* a claim of automatically unfair dismissal, in the absence of the parties agreeing to give him consent to arbitrate that dispute under section 141 of the LRA.

33] The respondent argues that, by attempting to include his dispute over an automatically unfair dismissal in the arbitration of his unfair discrimination claim, the applicant had waived his right to pursue the unfair discrimination claim.

The basic principles to sustain a defence of waiver of rights were set out in the Appellate Division decision in ***Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA)***:

"[15] Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it. The right in question in the instant case is the statutory provision specifically accorded to the Fund to avert claims which are out of time.

'It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms.'

(SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A) at 49G - H.)

[16] The test to determine intention to waive has been said to be objective (cf Palmer v Poulter 1983 (4) SA 11 (T) at 20C - 21A; Multilateral Motor Vehicle Accidents Fund v Meyerowitz 1995 (1) SA 23 (C) at 26H - 27G; Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1996 (2) SA 537 (C) at 543A - 544D). That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations (cf Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd 1983 (3) SA 619 (A) at 634H - 635D; Botha (now Griessel) and Another v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) at 792B - E); secondly, that mental reservations, not communicated, are of no legal consequence (Mutual Life Insurance Co of New York v Ingle 1910 TS 540 at 550); and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the

perspective of the latter's notional alter ego , the reasonable person standing in his shoes.

[17] The third aspect has not yet been finally settled by this Court, or so it would seem (cf Thomas v Henry and Another [1985 \(3\) SA 889 \(A\)](#) at 896G - 898C). What the one party now says he then intended and what his opposite number now says he then believed may still be relevant (Thomas v Henry and Another (supra at 898A - C)), although not necessarily conclusive. The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver (Martin v De Kock [1948 \(2\) SA 719 \(A\)](#) at 732 - 3). With those two qualifications I propose, in this judgment, to apply the test of the notional alter ego.

[18] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists. A complication may arise where a person's outward manifestations of intention are intrinsically contradictory, as for instance where one telefax indicates an intention to waive and another, perhaps as a result of a typographical error, does not. That problem does not arise in this case and consequently need not be discussed “³

^{34]} In the context of this case, Mr Moyo may have sought to extend his dispute under arbitration to include his automatically unfair dismissal claim, but it is difficult to see on what basis he can be said to have

waived his right to pursue his claim for unfair discrimination when he did so. At that time he was pursuing it as part and parcel of the same claim. He took the arbitrator on review to have the ruling declining jurisdiction over the unfair dismissal portion of the claim reversed. All of this was still consistent with pursuing his claim to have his unfair discrimination claim determined by arbitration. It is understandable when he was rebuffed in this attempt that he then adopted the course of action of referring the original, more limited, dispute to this court instead of to arbitration.

^{35]} However, it is not this action which the respondent argues constituted a waiver, but his earlier one of trying to expand his claim. Nevertheless, the provisions of section 141(3) militate against a waiver of the right to rely on the arbitration agreement, based simply on the conduct of the party who allegedly waived its right. That provision makes it clear that the agreement in question may only be terminated on the *written* consent of both parties, unless the agreement provides otherwise. In this instance, no written agreement to terminate the agreement was concluded and therefore the agreement remains in effect by virtue of the provisions of section 141(3).

^{36]} Accordingly, the special plea based on waiver must fail.

The effect of the arbitration agreement

37] However, this special plea unavoidably raises another problem with the applicant trying to pursue his unfair discrimination claim in the labour court, quite apart from not obtaining condonation for the late referral. Mr Moyo and the employer are still bound by the provisions of the agreement concluded on 3 February 2005, by virtue of the section 141(3).

38] This court cannot simply abrogate that agreement. The only appropriate course of action in the circumstances is to refer the applicant's unfair discrimination claim to the CCMA to be arbitrated by it as intended by that agreement. It is clear that the court is in the position envisaged by section 141(5)(b), namely where neither party has asked the matter to be referred to arbitration nor have parties consented for the court to hear the matter as if it were arbitrating the dispute. In the circumstances, I do not believe the court can assume jurisdiction in this matter, and the matter will be referred back for arbitration under the auspices of the CCMA where it should have been dealt with in the first place, subject to a few directions to try and expedite matters.

39] It is unfortunate that matters have taken so long to reach this point.

However, the fact that matters have taken this roundabout course is a consequence of the changes in strategy adopted by the applicant as well as his non-adherence to basic procedural requirements of the dispute resolution process of the LRA and the Rules of the Labour Court.

Costs

40] Ordinarily because the respondent is successful with at least one of its *in limine* objections it might have some expectation of being awarded its wasted costs. However, the matter should not have been enrolled for trial given the nature of the *in limine* points which had to be determined. Those objections were clearly the ones that could be determined on the pleadings and did not require evidence: they should have been set down on the opposed motion roll for determination, instead of occupying two days on the court roll. Because it was not enrolled for determination in the motion court, two days which might have been allocated to another matter that could have run were wasted. In the circumstances, no costs will be awarded.

Order

4.1] In the light of the analysis above it is ordered that

- a) In view of the arbitration agreement concluded between the parties on 3 February 2005, to which section 141 of the LRA and section 10 of the EEA applies, the proceedings of the Labour Court in this matter are stayed and the dispute is referred to the CCMA for arbitration pursuant to the said agreement.
- b) The pre-trial minute concluded by the parties shall serve as a pre-arbitration minute for the purposes of the arbitration.
- c) The Director of the CCMA must enrol the matter for arbitration.


R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 02 June 2011

Date of judgment: 30 August 2011

Attendance:

For the Applicant: In person

For the Respondent: W Hutchinson instructed by Kirschmann Attorneys

LABOUR COURT