

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN PORT ELIZABETH)**

CASE NO: P115/08

In the matter between:

NEHAWU obo V N TUMANA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

ZOLA MADOTYENI N.O.

Second Respondent

**NEW HAVEN PROVINCIALY AIDED
HOSPITAL FOR THE CHRONIC SICK**

Third Respondent

JUDGMENT

LALLIE AJ:

[1] The applicant was employed by the third respondent until she was dismissed for misconduct. She referred an unfair dismissal dispute to the first respondent. The dispute was arbitrated by the second respondent who found the applicant's dismissal substantively unfair but procedurally fair and ordered the third respondent to pay the applicant compensation in the amount of R95401.00, the equivalent of her 4 months' remuneration.

[2] The applicant approached the Labour Court to have the arbitration

award of the second respondent reviewed and set aside. In addition it sought an order reinstating her retrospectively from the date of her dismissal, alternatively an order for the rehearing of the arbitration by an arbitrator of the first respondent other than the second respondent.

- [3] The third respondent lodged a cross-review application.
- [4] Because of the applicant's delay in prosecuting its review application it was directed to file an affidavit giving full reasons for the delay. He complied and the third respondent responded by moving an application for the dismissal of the applicant's review application.
- [5] The dismissal application was argued on 3 March 2011 and the applicant's application was dismissed with costs. On 7 March 2011 the applicant's attorney, Mr Maseti (Maseti) addressed the following letter to Mr Kirchmann (Kirchmann), the third respondent's attorney.

3 *"We confirm that this matter was finalised by the Labour Court on March 2011. We attach hereto the last page of the CCMA Arbitration Award which needs to be carried out by your client.*

We therefore call upon your good selves to instruct your client to process the payment of R95 401.00 to our client.

Kindly keep us posted with the processing of the payment".

- [6] On 28 July and 1 August 2011, the applicant filed its notice of application for leave to appeal. The application is opposed by the

third respondent on the grounds that by asking for payment in terms of the arbitration award, the applicant acquiesced in the judgement and the doctrine of peremption therefore applies.

- [7] The doctrine of peremption was enunciated in *Hlatshwayo v Mare & Deas* 1912 AD 242 as follows:

“...the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate.”

- [8] Applying the *Hlatshwayo* decision the Labour Appeal Court found as follows in *National Union of Metalworkers of SA & others v Fast Freeze* (1992) 13 ILJ 963 (LAC).

“If a party to a judgement acquiesces therein, either expressly or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be pre-empted, i.e. he cannot thereafter change his mind and note an appeal. Peremption is an example of the well known principle that one may not approbate and reprobate, or to use colloquial expressions, blow hot and cold, or have one’s cake and eat it”.

- [9] in *Jusayo v Mudau NO and 2 others* [2008] 7 BLLR 668 (LC) the court confirmed the relevance of the doctrine of peremption by finding that a party who offers to comply with an award unconditionally and unreservedly is precluded from seeking to review the award.

[10] In this case the applicant expressed its intention to challenge the arbitration award by launching a review application. However, 3 days after an order dismissing the applicant's claim owing to the delay in its prosecution was granted, Maseti addressed a letter to Kirchman telling him to instruct his client to comply with the arbitration award by paying the applicant the amount of R95401.00 the third respondent was ordered to pay by the second respondent. In the letter it is unequivocally stated that the matter was finalised by the Labour Court on 3 March 2011. By accepting that the matter was finalised on 3 March 2011 the applicant expressly communicated an intention not to contest the decision of 3 March 2011. Having accepted that the matter was finalised the applicant is precluded from changing its mind and seek to note an appeal. When a matter is finalised it comes to an end and many therefore not be pursued.

[11] The applicant's decision to inform the third respondent that the matter was finalised was voluntary. It is inconsistent with the intention to contest the court's decision. The applicant made its decision and communicated it to the third respondent. It is therefore precluded by the doctrine of preemption from applying for leave to appeal.

[12] The application for leave to appeal is therefore dismissed with costs.

Date of judgment: 29 September 2011

For Applicant: Mr Maseti of Maseti Incorporated

For the Respondents: Mr Kirchmann of Kirchmanns Inc