



REPUBLIC OF SOUTH AFRICA

Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: JS 622/12

In the matter between:

ZAKHELE ALEX TUMMY ZITHA

Applicant

and

**NATIONAL INSTITUTE FOR HIGHER
EDUCATION**

First Respondent

**MINISTER FOR HIGHER EDUCATION
AND TRAINING**

Second respondent

Heard: 11 June 2013

Delivered: 12 June 2013

Summary: (unfair retrenchment claim-in limine issues).

JUDGMENT

LAGRANGE, J**Introduction**

- [1] Mr Zitha, the applicant in the main matter, has referred a claim of unfair dismissal for operational reasons to court. The first respondent, the National Institute for Higher Education (Mpumulanga), raised three preliminary objections to the applicant's claim. The applicant also filed a notice of bar on the first respondent as it was late in filing its heads of argument, which were filed on the same day the notice of bar was received. Strictly speaking, the notice of bar was not a true notice of bar since it did not put the first respondent on terms to file the heads of argument failing which it could not be entitled to persist with its position in the matter. In any event, since the applicant had the benefit of the first respondent's heads since 3 June 2010, he has not been prejudiced in the preparation of his argument and I agreed to accept the heads of argument filed and to permit the first respondent to argue the preliminary issues.

Condonation

- [2] The applicant, an accountant, did not refer his unfair dismissal claim in the form of a statement of case as required by rule six of the labour court but filed by way of an affidavit. Although, the first respondent could have refused to respond to the applicant's claim until such time as he filed a statement of case which complied with the rule, it treated the affidavit as a statement of case and respondent thereto. Although it is debatable whether it needed to, given that the applicant had not complied with the the correct procedure himself, the first respondent applied for condonation for filing its answering affidavit 18 days after the 10 day period permitted in the rules for filing an answering statement. I am satisfied that in so far as condonation is necessary, the applicant's delay is not significant and that the applicant suffered no prejudice as a result of the delay. If anything, by not taking an immediate objection to the incorrect form of the applicant's referral, the first respondent did not rely on this to stall the process, but advanced the matter further. Furthermore, for the reasons set out in dealing with the merits of the first respondent's preliminary objections I am

satisfied that at least, in that respect, the first respondent has good prospects of success. In the circumstances the first respondent's late response is condoned.

Preliminary objections

Jurisdiction

- [3] The first issue is that, at the CCMA the applicant withdrew the dispute on which his current referral is based. According to the first respondent, the commission had advised that his dispute appeared to be one about the enforcement of a settlement agreement concluded on 18 October 2011 which was a matter the CCMA could not arbitrate over and that he should refer the matter to this court. In fact, what the applicant did was to refer an unfair retrenchment claim to this court and not an application to enforce the settlement agreement.
- [4] Since his purported referral was made only in July 2012, whereas the certificate of outcome was issued on 19 November 2011, even if his referral of an unfair dismissal claim could be entertained, it is late and the applicant has not applied for condonation for not filing the referral within 90 days of the date of the certificate of outcome.
- [5] Even if I give the applicant the benefit of the doubt regarding the withdrawal of his dispute, this court does not have jurisdiction over his unfair retrenchment claim in the absence of a condonation application, and accordingly, his claim ought to be dismissed on that ground alone.

Compromise

- [6] The applicant was dismissed on 14 June 2011 and a dispute over this dismissal was referred to the CCMA under case number MP 4301-11. That dispute was settled on 18 November 2011 on a full and final basis. In terms of the settlement it was agreed that his termination on 14 June 2011 would be deemed to be a termination for operational reasons. It was also agreed that he would be paid an ex-gratia amount of R353,000 and that the first respondent would not give any negative reference to potential employers of the applicant.

- [7] It became evident from the applicant's submissions in argument that the applicant considers that the settlement agreement has not been complied with by the first respondent in important respects. This tends to confirm the first respondent's version that the Commissioner advised the applicant that his dispute concerned the enforcement of a settlement agreement. There may well be merits in the applicant's claim for the enforcement of the settlement agreement, but as mentioned previously that is not the dispute which he referred to this court. Moreover, it is apparent that the settlement agreement did not lead to the applicant's re-employment by the first respondent, and the dispute over the fairness of his dismissal was brought to an end by the settlement agreement. The applicant cannot now revive a dispute over the fairness of his termination, that he can take the appropriate steps to enforce the settlement agreement.
- [8] Accordingly, I am satisfied this court does not have jurisdiction to entertain a dispute over the fairness of the applicant's dismissal by the first respondent was brought to an end when the settlement agreement was concluded. The applicant can still institute appropriate proceedings to enforce his award.

Costs

- [9] If the applicant had been legally represented, I would not have hesitated to make an adverse cost order against him. However, I accept that even though he is a professional person his confusion over the appropriate remedy he should pursue was not a result of him acting in bad faith.
- [10] Nonetheless, the outcome of these proceedings should serve as a caution to the applicant to follow the correct procedures in terms of the Labour Relations Act and the rules of this court should he embark on further litigation in this regard.

Order

- [11] The applicant's referral of his dispute over an alleged unfair dismissal for operational reasons is dismissed for lack of jurisdiction in the light of my findings above.

[12] No order is made as to costs .



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person

FIRST RESPONDENT: S Lancaster of Crafford Attorneys

LABOUR COURT