IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **Case No: J1459/98**

In the matter between:

M R Kgaphola **Applicant**

and

University of the North **Respondent**

JUDGMENT

Stelzner AJ

[1] This is a ruling on a point *in limine* raised by the respondent in an application arising out of the alleged unfair constructive dismissal of the applicant. The matter came before the Labour Court for trial by way of a referral from the Director of the CCMA under the provisions of section 191(6) of the Labour Relations Act 66 of 1995 ("the 1995 Act"), in lieu of an arbitration under the auspices of the CCMA. Respondent's contention is that this court does not have jurisdiction to determine the dispute because the dispute arose prior to the commencement of the 1995 Act.

[2] There was some uncertainty as to whether the CCMA had made a ruling on the question of jurisdiction either at the time of conciliation or before. If it clearly had done so then the appropriate step may well have been for the respondent to take the CCMA on review. The parties were in agreement, however, that I ought to rule on the jurisdictional issue as if the matter had not been dealt with by the CCMA. It was also agreed that I consider and make a ruling on this aspect of the matter before

proceeding to hear the other preliminary issues (regarding condonation) or the merits.

[3] The following pertinent facts by way of background and / or relevant to the issue were all common cause. The applicant was appointed as a lecturer in Chemistry by the respondent at its Qwa-Qwa branch, with effect from 1 February 1994. The applicant gave notice of his resignation as an employee to the respondent on 30 September 1996, which notice was given in writing. The applicant's last day of work at the respondent was on 31 December 1996 when his contract of employment effectively terminated. In his letter of resignation the applicant complained at some length about the conduct of the respondent in dealing with various grievances which had been previously raised by the applicant. He made reference to alleged lack of ethical conduct by senior officials and leaders, bullying activities, individual and collective hypocrisy, the shameless flouting of professional boundaries and corruption. The term "constructive dismissal" was not used at all during the course of the letter of resignation, but the tone of the letter made it quite clear that the applicant regarded the conduct of the respondent as intolerable and had reached the conclusion that the people who ran the respondent were totally unwilling to listen to his complaints, by implication, that he had no alternative but to resign. Although the applicant worked out his notice period until 31 December 1996, it was common cause that no further dialogue or discussions took place between the applicant and the respondent during the notice period concerning the issues raised by the applicant or the basis of his resignation.

[4] Mr Meyer, who appeared on behalf of the applicant, sought to argue that regard should be had to the provisions of section 190 of the 1995 LRA in order to determine whether or not this dispute fell within the jurisdiction of the 1995 LRA. He submitted

that on either basis, namely, the date on which the contract of employment terminated or the date on which the employee left the service of the employer, 31 December 1996 would be relevant date in the circumstances of this matter. On his argument, it followed that there was jurisdcition.

[5] It is clear that one cannot have regard to the provisions of section 190 of the 1995 LRA in order to determine whether or not a dispute is justiciable under the provisions of the 1995 LRA. Instead one has to have regard to the Transitional Provisions of the 1995 LRA as set out in Item 21 of Schedule 7 thereto. This approach accords with the decision of the Labour Appeal Court in *Edgars Stores Limited v SACCAWU and another* [1998] 5 BLLR 447 (LAC).

[6] In the *Egdars Stores* decision (*supra*) the Labour Appeal Court held that in terms of items 21(1) and 22(1) of Schedule 7 of the 1995 Act, the Industrial Court is required to determine a dispute if:

the dispute was contemplated by the 1956 Labour Relations Act ("the 1956 Act");

the dispute arose prior to 11 November 1996;

the Industrial Court had jurisdiction to determine the dispute; and

proceedings had not been instituted prior to 11 November 1996 to determine the dispute.

[7] In the instant case, as in the *Edgars* case, it appears that the sole enquiry is whether the dismissal dispute (in this case the constructive dismissal dispute) arose prior to 11 November 1996 as all the other criteria for the Industrial Court to hear the matter are met.

[8] The Labour Appeal Court in the *Edgars* case held that by virtue of the provisions of

items 21 and 22 of Schedule 7 of the 1995 Act, the answer must be sought in the 1956 Act. In other words it would clearly be both inappropriate and wrong to have regard to the provisions of section 190 of the 1995 Act in order to decide whether or not the constructive dismissal dispute arose prior to 11 November 1996.

[9] The question of when a dismissal dispute can be said to have arisen under the provisions of the 1956 Act was considered in some detail by the Labour Appeal Court in the *Edgars* case. Under the provisions of section 43 of the 1956 Act, the term "dispute" meant "a dispute concerning an unfair labour practice". In terms of section 46(9) the Industrial Court had the power to determine "a dispute regarding an alleged unfair labour practice". For the purposes of the prescription of claims under both section 43 and section 46(9) the prescription period was calculated from the date the unfair labour practice was committed, not the date on which the parties declared a dispute concerning the unfair labour practice, and no distinction was drawn between the notion of a "dispute" and that of "an unfair labour practice". The crucial date was the date the cause of action (based on the unfair labour practice jurisdiction of the Industrial Court) arose. The relevant prescription periods were calculated from the date of dismissal, not the date that the parties declared a dispute regarding the dismissal, and, in turn, the date of dismissal constituted the date on which the alleged unfair labour practice was "introduced, commenced or ceased". Thus, concluded the Labour Appeal Court, a dismissal dispute arose on the date of dismissal. On the facts of the *Edgars* case, thus, the Labour Appeal Court concluded that the dispute concerning the unfair labour practice allegedly committed by the company in dismissing a number of its employees arose on the date that they were dismissed, not on the date that the internal appeal procedure had been exhausted, and when, as contended by the union, the dismissal became final. The analogy with the instant case would be that the dismissal occurred on the date that resignation was tendered,

not on the date that termination became effective (after the notice period had run its course).

[10] Indeed, Mr Coetsee, who appeared for the respondent in this matter, contended that in the constructive dismissal scenario of the instant case the date of the (constructive) dismissal is the date on which the applicant tendered his resignation, namely 30 September 1996. That is when his cause of action arose regardless of the fact that the resignation only took effect on 31 December 1996, particularly since nothing further happened in the intervening notice period. In the circumstances he argued that it would be artificial to say that the dispute only arose on 31 December 1996.

[11] I find myself in agreement with these submissions made on behalf of the respondent, particularly if one applies the reasoning of the Labour Appeal Court in the *Edgars* case. The applicant resigned on 30 September 1996 and as at that date all the facts on which his cause of action for alleged unfair constructive dismissal would be based were already in existence. As at that date he had a claim against the respondent which was one contemplated by the 1956 Act, in respect of which the Industrial Court had jurisdiction, and in respect of which proceedings had not been instituted. The claim ought to have been pursued in accordance with the provisions of the 1956 Act and not under the provisions of the 1995 Act, which, in the circumstances, is not applicable.

[12] I am fortified in my views by the reasoning in the decisions of *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & andere* [1999] 3 BLLR 276 (LC) and *Khutala Mining Services (Pty) Ltd v The CCMA* [1997] 6 BLLR 761 (LC). In the *Schreuders* case there were a number of stages to the process which culminated in

the dismissal of the applicant on 2 December 1996. At the earlier stages the dismissal was not final. The applicant was, for instance, invited during this period to make make representations concerning a fair severance package. In the *Khutala* case the dispute concerned the upgrading of the applicant's position. The possibility of this happening was kept open for a number of months and it was only on 15 November 1996, after the 1995 Act had come into operation, that it was unequivocally confirmed that the position would not be upgraded. That was when the dispute referred arose and accordingly the Labour Court held that the CCMA did have jurisdiction.

[13] In the instant case the preliminary steps which led up to the dispute all concerned the various grievances and complaints lodged by the applicant in the months preceding his resignation. After his resignation on 30 September 1996 (before the 1995 Act came into operation), no further events occurred which can be said to have created or altered the dispute which was referred to the CCMA. For these reasons I am of the view that the facts of this case are distinguishable from those of the *Schreuders* and the *Khutala* cases, while the reasoning applied in those cases accords with the reasoning which I have applied in the instant case. Hence, while applying the same reasoning I have come to a different conclusion on the facts, namely, that there is in this case an absence of jurisdiction.

[14] The respondent seeks costs in the event of success, and submits that it would accord with the requirements of law and fairness that costs be awarded in respondent's favour. Respondent does not pursue its prayer for a special costs order as contained in its pleadings. In support of the prayer for costs, respondent argued that the jurisdictional issue was raised by it at an early stage in the proceedings, that the applicant was therefore alive to the point and ought to have reconsidered his

position. The respondent submitted that there have been a number of decisions of this court and of the Labour Appeal Court dealing with the principles applicable to the issue, which should have made it sufficiently clear to the applicant that there was an absence of jurisdiction. Therefore, he ought not to have pursued the matter thereby causing the respondent to incur unnecessary costs.

[15] Mr Meyer, on behalf of the applicant, submits that even if I were to rule in favour of the respondent on the point *in limine* I ought to make no order as to costs because this is not a matter in which the applicant was acting frivolously or vexatiously. Indeed, it was submitted that it was entirely reasonable of the applicant in the circumstances to persist with his claim where, although it is not entirely clear whether or not the CCMA Commissioner made a ruling on the point, at the very least the CCMA appears to have tacitly accepted jurisdiction in the matter at the conciliation stage. The unsigned report of the Commissioner which I am led to believe was furnished to the applicant but not to the respondent at the time, would have created the impression in the applicant's mind that the CCMA was satisfied that it did have jurisdiction. Furthermore, it was submitted that the law on the applicable issues is not so clear that it ought to have been obvious that the provisions of the 1995 LRA did not apply. Mr Meyer indicated that despite diligent search he was unable to find any case dealing with this jurisdictional question in a constructive dismissal scenario. Mr Coetsee conceded that he had also not been able to come up with any such decision.

[16] An application of the requirements of the law would appear to suggest that costs ought to follow the cause in matters of this nature. However, there is no doubt that although the applicant has been shown to have been misguided as to the question of jurisdiction, there was no *mala fides* on his part. It is also true that the

issues in question and the applicable case law are not uncomplicated, a fact which appears to have been recognised by the Director of the CCMA in agreeing to refer this matter to the Labour Court in the first place. Furthermore, the parties were unable to point me to, nor I am aware of, a decision which is directly in point in having decided these issues in a constructive dismissal scenario.

[17] In the circumstances therefore, and although the respondent has been put to considerable expense in opposing this matter, I am of the view that the requirements of fairness are such that I should exercise my discretion against making a costs award in favour of the respondent.

[18] Consequently the order that I make is as follows:

The application is dismissed on the basis that the dispute arose prior to 11 November 1996 and, accordingly, this court does not have jurisdiction in respect thereof.

No order is made as to costs.

STELZNER AJ

Date of hearing :26 July 1999

Date of judgment :27 July 1999

For the applicant :Mr Meyer

Instructed by :Booysens, Du Preez and Boshoff Inc

For the Respondent :Mr Coetsee of :Stemmet and Coetsee Inc