

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

CASE NO. P250/98

In the matter between

JACOBUS PETRUS LOMBARD

Applicant

and

COMMISSIONER NONKOSI MHLANTLA

1st Respondent

ABSA BANK LIMITED

2nd Respondent

JUDGMENT

GON, AJ

1. This application is brought in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 to review the decision by the first respondent to grant condonation for the late filing of a referral to the Commission for Conciliation, Mediation and Arbitration for conciliation.
2. The second respondent's first submission was that the employment was terminated by agreement between the parties and that there was no dismissal. In this case, neither this court nor the CCMA has jurisdiction to consider an alleged dispute that arises from an agreement to terminate employment in the absence of a dismissal.
3. The enquiry into the condonation decision only becomes relevant if I find that there was a dismissal. This question then falls to be determined first.
4. The applicant argued that a dismissal occurred which was confirmed on appeal. Thereafter the parties agreed that it be recorded as resignation in order to keep the applicant's personnel (and personal) record clean and to obtain more favourable pension benefits.

5. The second respondent argued that the dismissal of 3 December 1997 was revoked when the applicant's employment was terminated by agreement on 21 January 1998.

6. The second respondent further argued that, despite the lack of jurisdiction mentioned above, the applicant failed to attack the validity of the agreement which reflects poorly on the prospects of success in arbitration and consequently in the application.

7. In his founding affidavit the applicant alleged that the second respondent, after the applicant's appeal was turned down, gave him the option of resignation. Either he resigns or he is dismissed. He repeats that "If I did not resign I would be dismissed. This was clear. **The resignation option was given to me after I suggested and I only suggested it after my dismissal was confirmed.**"

8. The applicant prevaricates. Within the same paragraph, he implies that he was given an ultimatum by the second respondent implying he was constructively dismissed. Immediately thereafter he concedes that he suggested resignation after his dismissal was confirmed. He cannot have it both ways.

9. In its submissions to the first respondent on condonation, the second respondent sets out the sequence of events, stating that the applicant and his union representative approached the chairperson (of the appeal hearing) with a request to resign instead of remaining dismissed which was agreed to by the second respondent with effect from 21 January 1998. This statement is supported by a affidavit, which appears to be unintentionally not properly sworn, by Ncedisa Phakama Maqoma who was a consultant to the second respondent at the time of these events.

10. Ms. Maqoma stated that after the applicant's appeal, his union representative, Charmaine Olsen, asked her (Ms. Maqoma) if she would ask the appeal chairman, Deon le Roux, if he would not rather accept a resignation from the applicant, or otherwise "take this case further to the CCMA. This would prevent a reflection of a record of discipline so that he could find a job easier as it is difficult now for a white male to find employment". Ms. Maqoma notes further that the applicant was not forced to resign and that he was present when his representative made the request. Her affidavit was made on 7 May 1998.

11. The above evidence is completely at one with the applicant's grudging admission in his founding affidavit that the request to resign was his and not an ultimatum by the second respondent.

12. I return to the applicant's argument that agreement was only intended to keep his record clean and to obtain better pension benefits, that it was never intended to revoke the dismissal.

13. I do not agree. It cannot be that the dismissal remains but the resignation is recorded just for effect. The very act of keeping a personal record clean means that in the event of any potential employer of the applicant's seeking the reasons for the termination of his employment, the second respondent would be obliged to state that he resigned. It could not say that in fact he had been dismissed but it was agreed he could resign for appearances sake. This would defeat the purpose of the agreement and it would amount to a breach of the agreement.

14. Accordingly I agree with the second respondent. The parties relationship was ultimately terminated on an agreed basis that the applicant resign, the dismissal having been revoked.

15. Accordingly this court has no jurisdiction to hear this matter. The application is dismissed with costs.

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S GON

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 4 March 1999

Date of judgment: 12 March 1999

For the Applicant: Mr. Hornigold of Angus Hornigold
Attorneys

For the Respondent:
Gihwala &

Mr. H S Coetzee of Hofmeyr Herbst
Cluver Inc