IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

CASE NO: D740/04

In the matter between:

YOURIY PETROV VELINOV Applicant

and

UNIVERSITY OF KWAZULU-NATAL First Respondent

AUBREY NGCOBO N.O. Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

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J U D G M E N T

G.O. VAN NIEKERK AJ

[1] This application is for the review of an arbitration award made by the Second Respondent in terms of which he upheld two points *in limine* raised by the First Respondent in a dispute pertaining to an alleged unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act, 1995 (LRA). For the sake of clarity I will refer to the Applicant as Professor Velinov and the First Respondent as the University.

[2] Professor Velinov was previously employed as an associate professor in the Computer Science Department of the University in Pietermaritzburg. In July 2003 the University advertised the vacant position of chair in computer science and subsequently it also advertised the position of professor in computer science. Professor Velinov submitted an application for the first post that is, chair in computer science. On 2 December 2003, he was interviewed for the position and on 6 December he was telephonically informed that his application had not been successful. On 8 December 2003 Professor Velinov tendered his resignation in a letter stating *inter alia*,

"The whole process of handling my application was peculiar from the very beginning but the appointment of a person with apparently lower qualification, from outside, with no knowledge of our department and its problems shows me that academic merits (sic) *are of no value to the leaders and representatives of the Faculty of Science."*

[3] The University accepted the tendered resignation but Professor Velinov attempted to retract it on 3 February 2004, without success. On 26 March 2004 Professor Velinov referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) which he summarised as follows:

"Unfair selection proces (sic) *of application for a post at "Full Professor" level as a result of which a considerably weaker person was appointed."*

[4] On 29 April 2004 a certificate of non-resolution of the dispute was issued in terms of section 191(5) and on 30 June 2004 Professor Velinov's employment with the University came to an end with the effluxion of the notice period he was obliged to give the University when he resigned.

[5] When the dispute came before the Commissioner in the CCMA, the University raised the following legal points *in limine*. Firstly, that the Commissioner did not have jurisdiction to entertain the dispute on the ground that the referral of the dispute had been made outside of the 90 day period prescribed for the referral of unfair labour practices in terms of section 191(1)(b). Secondly, in the light of Professor Velinov's resignation, it was not competent for him to seek relief in respect of an alleged unfair labour practice. Thirdly, there was no merit in the referral as no application had been made for the post in respect of which he claimed he had suffered unfair treatment.

[6] The Commissioner upheld the first two points in favour of the University and in regard to the third point, made no finding as a dispute of fact exists as to whether it was necessary for application to be made for both positions or whether it would suffice for an application to be made in respect of the position of Chair only in which case the application would be considered to be in respect of the other position as well.

[7] In the application before me, Mr Chadwick, who appeared for the University, argued that the Commissioner was correct in his findings on the points *in limine*. I will deal with each of the two points whereafter I will consider whether the award is reviewable.

[8] As far as the jurisdictional point is concerned, it is now settled law that the Commission acquires jurisdiction to arbitrate a dispute after a certificate of non-resolution has been issued (see *Fidelity Guard Holdings (Pty) Ltd v Epstein N.O. & Others* [2000] 12 BLLR 1389 (LAC)). The Court found in this case that even if the dispute is referred late, the Commission retains jurisdiction, provided a certificate of "non-resolution" has been issued. It went on to find that the only way in which a defective certificate can be challenged is by way of review.

[9] Mr Chadwick submitted on behalf of the University that the 90 day period referred to in section 191(1)(b) expired on 8 March 2004 and that in the absence of condonation for the late referral of the dispute, the Commissioner was correct in holding that he did not have jurisdiction to resolve the dispute. Mr Chadwick, however, accepted that the Commissioner had issued a certificate of non-resolution in terms of section 191(5) but contended that the amendment of section 191(1)(b) introduced an additional jurisdictional pre-requisite because unlike section 191 before its amendment, a referral in the case of a dismissal must be made within 30 days and in the case of an unfair labour practice, must be made within 90 days. In order to better demonstrate

the differences between section 191 prior to its amendment and section 191 after its amendment, I quote the relevant sections here below.

[10] Prior to its amendment in 2002, section 191(1) read as follows:-

> *"(1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within thirty days of the date of dismissal to –*
>
> *(a) a council, if the parties to the dispute fall within the registered scope of that council; or*
>
> *(b) the Commission, if no council has jurisdiction."*

[11] Section 191(1) now reads as follows:-

> *"1(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –*
>
> *i) a council, if the parties to the dispute fall within the registered scope of that council; or*
>
> *ii) the Commission if no council has jurisdiction.*
>
> *b) A referral in terms of paragraph (a) must be made within –*
>
> *i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;*

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence." (my underlining)

[12] I should point out that neither sub-section (2) concerning condonation nor sub-section (5) concerning the certification of a dispute was amended, save by the introduction in sub-section (5) of sub-section (a)(iv) which provides for the arbitration of a dispute concerning an unfair labour practice. The only substantive amendment to section 191(1) concerns the referral of unfair labour practice disputes. The basic structure of section 191(1) therefore remains the same.

[13] Mr Chadwick submitted that because the amended section 191(1) provides that a dispute must be referred within the time limits provided, this places an obligation upon a Commissioner arbitrating a dispute to enquire whether the dispute was timeously referred and if not, whether the late referral may be condoned. In support of this contention he referred me to Rule 22 for the Conduct of Proceedings before the CCMA published on 10 October 2003. This rule reads as follows:-

"If during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Commission has jurisdiction to arbitrate the dispute."

[14] I do not agree that the *Fidelity Guards Holdings* case is distinguishable because of the amendment or that the amendment read with Rule 22 introduces a new jurisdictional pre-requisite. I consider that the principle remains the same and that as long as the certificate of outcome has not been set aside, the Commission retains jurisdiction. It is the setting aside of the certificate of outcome that would render the Commission without jurisdiction to arbitrate (see paragraph 12 of the *Fidelity Guardings Holdings* decision (*supra*) at 1393 H – 1394 A). In my view, Rule 22 does not assist the University as it has limited application in circumstances such as those that arose in *SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 211 (LC). In any event, the Rules of the CCMA constitute subordinate legislation which cannot be used to interpret the provisions of the LRA (see *Chemical Workers' Industrial Union v Price's Candles SA (Pty) Ltd* (1994) 15 ILJ 852 (IC) at 861 B – C).

[15] I now turn to consider the second point *in limine* which is to the effect that because Professor Velinov resigned, he could not avail himself of the unfair labour practice provisions contained in section 185. In this regard it must be borne in mind that after Professor Velinov's resignation was accepted, he referred a dispute in terms of section 191 to the Commission which he characterised as an unfair labour practice. This dispute concerned his non-appointment to the vacant positions, the very reason he resigned from his

employment. It was submitted on behalf of the University that although Professor Velinov's resignation only became effective at the end of June 2004, he could nonetheless not avail himself of the provisions prohibiting unfair labour practices. It was submitted that these provisions are only intended for the benefit of employees who are engaged in on-going relationships with employers. In support of this contention I was referred to *Sithole v Nogwaza N.O. & Others* [1999] 12 BLLR 1348 (LC), specifically at paragraphs 44 and 45.

[16] I do not accept that an employee whose employment has been terminated either by resignation or otherwise, but who continues to work out his or her notice period, does not enjoy the protection of the provisions of the LRA and particularly the unfair labour practice provisions contained in Chapter VIII. This would not only be contrary to section 186(2) which, in defining an *"unfair labour practice"*, does not distinguish between different categories of employees but it is also contrary to the definition of *"employee"* in section 213. It is also contrary to the principle that despite termination of employment, employees have rights in the wider "ongoing employment relationship" (see *National Automobile & Allied Workers' Union v Borg-Warner SA (Pty) Ltd* 1994(3) SA 15 (A) at 25 E – I)

[17] *Sithole*'s case does not support the University. While it is true that the Court found that the Commission lacked jurisdiction to entertain disputes concerning alleged unfair conduct by an employer committed after termination of the

employment relationship, in this case the employment relationship did not terminate until the end of the notice period on 30 June 2004. Professor Velinov remained an employee until that date and was accordingly entitled to the protection against unfair labour practices contained in Chapter VIII of the LRA.

[18] Finally, the approach that I take to the Commissioner's ruling on the abovementioned points *in limine* is that his reasoning process is not only wrong but is so flawed to the extent that the conclusion may be drawn that he committed a gross irregularity. See in this regard *Goldfields Investment Limited & Another v City Council of Johannesburg & Another* 1938 TPD 551 at 560 and *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC) at 351 F – 352 B.

[19] I make the following order:-

[a] that the arbitration award delivered by the Second Respondent on 20 June 2004 be reviewed and set aside;

[b] the matter is remitted to the Commission for arbitration;

[c] the First Respondent is ordered to pay the Applicant's costs.

G O VAN NIEKERK AJ

Appearances:	For the Applicant	-	D P Crampton
	Instructed By	-	Tomlinson Mnguni James
	For the Respondent	-	Mr A I J Chadwick from Shepstone & Wylie

Date of Judgment: 26 October 2005