



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Case No: C 147/15

In the matter between:

J I DU PREEZ

Applicant

and

**SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL ('SALGBC')**

First Respondent

COMMISSIONER I BOTHA (N.O.)

Second Respondent

EDEN DISTRICT MUNICIPALITY

Third Respondent

Heard: 23 March 2017

Delivered: 29 March 2017

Summary: (Review – jurisdictional ruling – employment status – employment subject to suspensive condition – suspensive condition incapable of being invoked to withdraw offer of employment which had been accepted even if it could be invoked to terminate employment – employment relationship established)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant seeks to review a jurisdictional ruling by the second respondent in which she held he was not an employee.

[2] In essence, the applicant had applied for a job as a buyer in October 2013. On the application form he signed an undertaking which read:

"I hereby declare that the information given on this form is true and correct. I accept that, in the event of my application been successful, any information to the contrary will lead to immediate dismissal.

(emphasis added)

[3] The applicant attended interviews and was found to be the most suitable candidate and was made an offer of employment on 16th September 2014. He was asked to indicate by 23 September 2014 whether he accepted the offer of employment and to indicate when he could start. The substantive portion of the letter of 16 September read:

"RE: OFFER OF EMPLOYMENT: BUYER (GEORGE)

Your job interview dated 11 September 2014 regarding the above refers.

An offer of employment as buyer in George is hereby formally offered and once you have accepted the offer, a formal employment contract specifying all the terms and conditions of employment will be entered into.

Your remuneration package is based on a grade 4 municipality which is currently 14611.12 per annum (1st notch) of a TASK grade 9 salary.

Please *indicate in writing* before or on Tuesday, 23 September 2014 at 12 H00 AM of your acceptance/non-acceptance of the offer of employment. If you accept our job offer you can please indicate on which date you can start. Please sign the letter at the bottom and send it back to me.

...

pp GW LOUW

MUNICIPAL MANAGER”

(emphasis added)

The applicant indicated at the foot of the letter that he accepted the offer and that he could start on 13 October 2014.

- [4] However on 10 October 2014, before he started working and before he concluded that written employment contract, he was asked to submit proof of the references in his previously submitted employment history because it did not correspond with certain details of his job title. He was also asked to provide the reason a previous employment had been terminated. It subsequently transpired that he had not been employed as the Head of Supply Chain Management in George Hospital, as represented on his application, but as an administrative officer. Further, his previous termination was the result of his dismissal and not a labour dispute as he claimed. He was asked to submit proof of his references within seven days of the letter which also stated:

“Failure to submit the requested documents will unfortunately lead to the withdrawal [of] the initial job offer.”

- [5] In a subsequent letter dated 28th October 2014 headed “WITHDRAWN: OFFER OF EMPLOYMENT: BUYER (GEORGE)”, the municipal manager confirmed that details received from George Hospital confirmed the discrepancies in the details he had provided. The letter then continued:

“The application form you signed on 22 October 2013 was as follows: ‘I hereby declare that the information given on this form is true and correct. I accept that, in the event of my application being successful, any information to the contrary will lead to immediate dismissal.’

Due to your dishonesty the job offer is hereby finally withdrawn.”

- [6] Although the arbitrator considered a number of other features of the evidence, including several concessions made by the applicant about his employment status, the determination of employment status and dismissal

is an objective determination and the reasonableness of the arbitrator's ruling is not the issue in a review of a jurisdictional ruling.¹ The only issue is whether the ruling is correct.

- [7] While it is true that recognising the existence of an employment relationship might not always depend on the conclusion of a contract recognised at common law as valid and enforceable², in this instance the applicant argues that his employment status was confirmed when he signed the letter of 16 September accepting the offer of employment. In other words the applicant considers that the employment relationship was established in the conventional manner by his acceptance of the offer. The municipality in essence agrees that the employment relationship was based on a contractual agreement, but the agreement that the applicant would be employed contained a suspensive condition which allowed it to withdraw the offer of employment before he started working if undertakings he had made about the information he provided in his job application turned out to be incorrect.
- [8] On a consideration of the evidence, I am satisfied that the applicant's employment was subject to a suspensive condition in terms of which, if it was established that information given in his application was not accurate, the employer was entitled to terminate his employment even if he had been employed. Of course, that would still mean that he was employed before the contract was terminated. However, the municipality's letter of 28 October did not purport to terminate his employment but to withdraw the offer of employment. The question then arises is whether the offer of employment itself was subject to a suspensive condition, which would permit the municipality to withdraw the offer of employment even after it had been accepted by the applicant.
- [9] It is certainly an appealing argument that because the contract itself could be terminated after its conclusion if representations made by the applicant turned out to be inaccurate then, *a fortiori*, the municipality was also

¹ See *Fidelity Cash Management Service v Commission E for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC) at 996.

² See e.g. *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 at 391 A-C

entitled to withdraw the offer itself before the applicant had started work and signed the formal contract. Initially, I was inclined to adopt this approach but the sequence of events and the wording of the suspensive condition make this approach untenable for the reasons below.

[10] The difficulty this argument presents is that, the offer was not withdrawn before the applicant had formally accepted it and it would appear that in invoking the suspensive condition contained in the application form, the municipality could only have done so on the basis that the applicant had been employed as a buyer. That provision clearly envisaged a situation where the application for employment had been successful and the applicant had consequently been employed. I have little doubt on the facts as they appear that the municipality would have been contractually entitled to invoke the suspensive condition but that contractual entitlement was the right to terminate an appointment which had already been made. In my view, it would be an artificial reading of the factual situation to suggest that the parties had not agreed on the applicant's appointment and that the termination in terms of the suspensive condition was the termination of an appointment not the withdrawal of a still pending offer of employment. It would also be an interpretation of the suspensive condition which the language of that provision would have to be severely strained to sustain.

[11] I am mindful of the point made by the arbitrator that the applicant made a number of concessions which do suggest that he believed that the municipality was entitled to "withdraw the offer of employment" even if he had accepted it. However, these concessions for the most part were obviously ones that could not bind the arbitrator in the interpretation of the plain language of the provision in question and necessarily entail accepting the legal opinion of the applicant on such matters.

[12] In the circumstances, I am inclined to agree with the applicant that it was his employment which was terminated, even though he had not started to render services. The Labour Appeal Court has held that common sense, justice and the values of the Constitution would be best served by extending the literal construction of the definition of an employee in section

213 of the to include someone who had concluded a contract of employment which would commence at a future date.³

- [13] In the circumstances, it is difficult to avoid the conclusion that when the municipality purportedly withdrew the offer of employment it was in fact terminating an existing employment relationship and therefore dismissing the applicant as an employee in accordance with the suspensive condition he had agreed to in his job application. Consequently, I must set aside the jurisdictional ruling of the arbitrator and remit the matter back to determine the fairness of the applicant's dismissal.
- [14] It may well be that the applicant's success in this review application will be something of a pyrrhic victory in the context of establishing his overall prospects of proving an unfair dismissal, given some of the evidence given in the jurisdictional hearing, but that is a matter for the second stage of the arbitration process which may now take place.

Order

- [15] The jurisdictional ruling of the second respondent issued on 22 February 2015 is reviewed and set aside and substituted with a finding that the applicant was an employee of the third respondent and accordingly the *in limine* point is dismissed.
- [16] The applicant's unfair dismissal case is remitted back to the first respondent for a hearing on the merits of its case before an arbitrator other than the second respondent.
- [17] The third respondent must pay the applicant's costs.

Lagrange J
Judge of the Labour Court of South Africa

³ *Wyeth SA (Pty) Ltd v Manqele & others* (2005) 26 ILJ 749 (LAC) at 764, para [45].

APPEARANCES

APPLICANT: D M Nyathi instructed by Francois Van Zyl
Attorneys c/o Emarie Scheepers

THIRD RESPONDENT: L W Ackermann instructed by Villiers Inc.
(George)

LABOUR COURT