

SOUTH AFRICA / JUDGMENT

Dumakude v Nedbank Group (J2383/19) [2022] ZALCJHB 40 (7 March 2022)

[2022] ZALCJHB 40**COURT**

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

J2383/19

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case No:** J2383/19**In the matter between:** BONGANI VUYO
DUMAKUDE
Applicant
and
NEDBANK GROUP
Respondent**Heard:** 15 February
2022 and on papers**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down are deemed to be 07 March 2022

JUDGMENT

MAKHURA, AJ

Introduction

- [1] On 18 December 2019, the applicant, Mr Bongani Vuyo Dumakude, launched an application to declare that his dismissal by the respondent on 19 June 2019 was unlawful and ordering the respondent to remove his name from the RED listing. RED is an acronym for Register of Dishonest and Dismissed Employees and is a central database register established as a central point of reference of employees in the banking industry and closely aligned stakeholders.
- [2] The applicant does not pursue the first declaratory relief but persists with the second relief that the respondent be ordered to remove him on the RED listing.

Background facts

- [3] After being charged with allegations of dishonesty and called to attend a disciplinary hearing on 18 June 2019, the applicant resigned, with immediate effect in the middle of the disciplinary hearing. On the same day, the respondent informed him that his resignation was in breach of his contract of employment as he was required to provide a 30 days' notice of resignation. Nothing further was said as to whether his resignation with immediate effect (i.e. without notice) was accepted or rejected.
- [4] On 19 June 2019, the respondent issued a letter of termination of employment. In addition to terminating his employment, the letter also informed the applicant as follows:
- 'Please note that your name will be listed on REDS register and that should you have been in a FAIS affected role the FSB will be advised of your debarment.'
- [5] Aggrieved by the decision, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the "CCMA"). The matter was set down for arbitration on 8 October 2019. At the commencement of arbitration proceedings, the respondent raised a point in limine that the CCMA had no jurisdiction on account that the applicant was not dismissed but resigned.
- [6] On 18 October 2019, the CCMA issued a ruling upholding the respondent's jurisdictional point. The current proceedings were launched on 18 December 2019.
- [7] Following service of the application, the respondent's attorneys wrote to the applicant's attorneys and stated, inter alia that:

'2.1 Regarding prayer 1 of your client's notice of motion – "an order declaring that the dismissal of the applicant dated 19 June 2019, pursuant to the disciplinary hearing that took place on the 18th June 2019, be declared unlawful"

2.2 Our client accepts Commissioner Moloi finding that in light of the Naidoo and another v Standard Bank SA Ltd and another (J1177/19)

(2019) ZALCJHB judgment, your client's dismissal was null and void and our client withdraws the letter of termination issued to your client on 19 June 2019 for the purposes of the Labour Relations Act 66 of 1995.

2.3 Regarding prayer 2, of your client's notice of motion – “an order declaring that the Applicant be removed from “REDS LISTING” on the basis that he had tendered his resignation with immediate effect”

2.4 Labour Court does not have jurisdiction over “REDS LISTING” as they do not arise out of the employment relationship.’ (Own emphasis)

[8] It is common cause, from the stance taken by the respondent at the CCMA and the contents of the above letter, that it accepted that the applicant's resignation with immediate effect terminated the employment relationship immediately on 18 June 2019.

[9] At the commencement of the hearing of this matter on 15 February 2022, the applicant stated that he no longer pursues the first prayer in terms of his notice of motion, being that of declaring his dismissal unlawful.

[10] The respondent continued with its stance that this Court has no jurisdiction to order the removal of the applicant from RED listing. Its argument is that if the applicant wants to challenge the listing, he must approach the appropriate tribunal or the High Court.

The pleadings and arguments

[11] In his founding affidavit, the applicant did not plead any basis upon which the Labour Court has jurisdiction over the matter. Having been notified by the respondent that the jurisdiction of this Court is disputed, the applicant did not file any supplementary papers to plead the issue. The respondent filed an answering affidavit and raised a jurisdictional point as follows:

‘6.1. ...it is submitted that this Honourable Court does not have jurisdiction to order the removal of the Applicant on “RED LISTING”.

6.2. If the Applicant wishes to challenge his listing on REDS, he must refer the dispute to the appropriate forum such as the appropriate tribunal or the High Court.

6.3. Simply, the LRA does not extend this Honourable Court's powers [to] REDS listing...’

[12] The respondent argued that the RED's process is regulated by the Financial Sector Regulation Act (FSR Act)[1]. In this regard, it relies on section 219 of the FSR Act. This section establishes a tribunal whose duties include the reconsideration and removal of individuals from REDs and section 230(1)(a) which provides that an individual affected by the decision to list him on RED may apply to the tribunal for reconsideration of the decision. Section 230(1)(b) sets out the period within which such an application for reconsideration

should be made after the reasons were provided to the individual or on good cause shown.

[13] The respondent also argues that the decision to list the applicant on RED was a post termination of employment RED enquiry. Whether or not there was such an enquiry after 18 June 2019 that led to the applicant's listing on RED is not for this Court to decide. I pause to say that if the dismissal is a nullity, as the respondent accepts, and there was no separate hearing or the applicant was never called to a hearing post the termination of employment to deal with a RED enquiry, I cannot fathom the basis upon which the applicant's name should remain listed on RED. However, this issue can only be determined if this Court has jurisdiction over this matter.

[14] In its supplementary heads, the respondent referred to the "Banking Association South Africa Agreement to Participate in the Central Database Register of Dishonest and Dismissed Employees (RED)" (the "Agreement"), which contained "Guidelines for the use of the RED system". The Agreement provides that in the event that a dismissed employee is successful in an appeal or review, or in CCMA or Labour Court proceedings or concludes a settlement agreement:

'...resulting in the guilty finding related to dishonest conduct and/or the dismissal being overturned, and/or where a formal request for removal is processed by the Banking Association South Africa ("BASA"), the name of the person in question will be removed from the database by BASA...'

[15] Clause 2 of Annexure 1 sets out procedural guidelines in respect of RED. Participating parties such as the respondent are required and agree to follow certain guidelines. The respondent is required and has agreed to follow these guidelines:

'2.1 Ensure that disciplinary proceedings and/or post termination of employment RED proceedings are concluded, and retain applicable records for the required listing period.

2.2 ...include consent to listing in their condition of employment. Consent should cover both the listing and any subsequent reference checking.

2.3 Participating entities must adopt the RED Guidelines as a formal internal policy and must communicate the existence of the policy and its contents to staff. It is recommended that the scope of the RED listing as described in paragraph 1 above should be included in the policy and employment contracts where possible.'

[16] In his replying affidavit, presumably with reference to the Agreement or the contract of employment (which was omitted in the founding and replying affidavits and the terms of which were not pleaded), the applicant pleaded that:

'The issue of REDS LISTING is an integral part of the terms and conditions of employees in the banking and financial sector.

RED LISTING therefore cannot be separated from the contract of employment of the Applicant with the Respondent as it is an arrangement that is further cemented in the Collective Agreement the banks as well as SASBRO.’

Jurisdiction

[17] It is trite that the Labour Court does not enjoy general jurisdiction. Its jurisdiction is derived from section 157 of the Labour Relations Act.[2] Section 157 provides:

‘(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations;

(b) ...’

[18] The applicant has pleaded that this Court has “jurisdiction to entertain disputes pertaining to REDS”. He argues further in his replying affidavit that the RED is an integral part of his contract of employment. However, he does not specifically plead any term of his contract of employment and does not attach same.

[19] He also relies on section 77(3) of the Basic Conditions of Employment Act[3], which provides that this Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of that contract. Again, the applicant does not plead any term of the contract nor any breach thereof.

20] To the extent that application is brought in terms of section 77(3) of the BCEA, the applicant has failed dismally in his attempt to show that the relief he claims falls within the realm of this Court. This, in my view, is fatal to his case.

[21] I was referred to the judgment of *Muthusamy v Nedbank Ltd*[4] (*Muthusamy*). The facts of that case are very similar to the current case, except that the employee in that case, sought to interdict the employer from proceeding with a post termination RED enquiry and placing his name on RED and that after resigning, he filed a constructive dismissal dispute. The Court declined to entertain the matter and held that it had no jurisdiction.

[22] The FSR Act provides for a procedure for employees to be removed from RED. That Act does not confer jurisdiction to this Court. I am therefore not persuaded that this Court has jurisdiction and am inclined to agree with the respondent that this Court has no jurisdiction. Accordingly, this application should fail on this basis and the respondent’s second point in limine should be upheld.

[23] In the premises, I make the following order

Order

1. The respondent's second point in limine is upheld.
2. The application is dismissed for lack of jurisdiction.
3. There is no order as to costs.

M. Makhura

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Bongani Luthuli of Tumbo Scott Inc.

For the Respondent:

Cliffe Dekker Hofmeyr Inc.

[1] Act No. 9 of 2017, as amended.

[2] Act no. 66 of 1995, as amended.

[3] Act no. 75 of 1997.

[4]

(2010) 31 ILJ 1453 (LC).

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