

SOUTH AFRICA / JUDGMENT

Swanepoel v KPMG Services (Pty) Ltd (J494/19) [2021] ZALCJHB 457; (2022) 43 ILJ 656 (LC) (13 December 2021) [2021] ZALCJHB 457

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

J494/19

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J494/19

In the matter between-

SWANEPOEL, ANDRE PIETER Applicant

and

KPMG SERVICES (PTY) LTD Respondent

Heard: 25 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour

Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 December 2021.

Summary: UIF UI-19 form – the applicant seeks an order compelling the respondent to record retrenchment as a reason for the termination of his contract of employment as opposed to involuntary resignation or mutual separation, the true reason – misrepresentation of facts in the UI-19 form is a criminal offence in terms of UIA.

JUDGMENT

NKUTHA-NKONTWANA, J

[1] In this application the applicant seeks an order in the following terms:

‘1. That the Respondent be compelled to amend the Applicant’s UI-19 form, Insurance Claim form and all other necessary documents to reflect the reason for the termination of employment with the Respondent to be ‘retrenchment’;

2. That the Respondent be compelled to amend the Applicant’s UI-19 form, Insurance Claim form al all other necessary documents to reflect the reason this Honourable Court deems appropriate for the termination of employment with the Respondent;

3. Ordering the Respondent to pay the costs of this application in the event of opposition;

4. Further and/or alternative relief.’ [1]

[2] The facts in this matter are mostly common course. The applicant was employed by the respondent as Senior Manager within the Internal Audit Risk and Compliance Service with effect from 16 November 2015. It would seem that there were performance issues that were raised with the applicant in a meeting of 14 November 2017. The applicant was given an option to resign or to be subjected to a disciplinary process. He asserts that he was not prepared to resign because he wanted to claim from the Unemployment Insurance Fund (UIF) and/or his personal insurance.

[3] On 15 November 2017, the parties concluded settlement agreement to terminate their employment relationship on mutual basis effective from 30 November 2017. The respondent issued the applicant with a certificate of service and the UIF’s UI-19 form and the reason for the termination of employment recorded therein is ‘involuntary resignation’.

[4] In these proceedings, the applicant seeks this Court’s intervention to compel the respondent to classify his dismissal as a retrenchment and accordingly amend, inter alia, the UI-19 form, his private insurance claim form, and service certificate. Alternatively, that this Court should determine the exact reason for the termination of his employment.

[5] The pertinent clauses of the settlement agreement read as follows:[2]

‘1. Introduction

1.2 The parties have reached an agreement on the Employee’s departure from the Firm on the terms of this agreement, the last day will be 30 November 2017.

...

5. Certificate of Service

The Company shall provide the Employee with a certificate of service stipulating the period for which he was employed by the Company and the capacity he was employed at the date of the termination of [his] employment.

6. Full and final settlement

- a. The payment to be made to the employee and the benefits to be afforded to the employee in terms of this agreement are in full and final settlement of all and any claims of any nature whatsoever that the employee has or may have against the Company, its holding Company or directors arising out of his employment with the Company or the termination hereof and whether such claims arise in contract, delict, statute, or otherwise.
- b. In particular, and without derogating from generality of the foregoing, the Employee will have no claim against the Company in terms of the Labour Relations Act and/or The Basic Conditions of Employment Act.'

[6] The applicant asserts that he was advised by an official at the Department of Labour when he was claiming UIF the reason stated by the respondent in the UI-19 form, i.e. involuntary resignation, was not a recognised reason in terms of Unemployment Insurance Act[3] (UIA). In the same breath, he was advised also that the settlement agreement is imprecise about the reason for termination of his

contract of employment. Consequently, he had to request the respondent to amend the UI- 19 form to state a recognised reason, but

to no avail. Hence this application.

[7] In terms of section 16(1)(a) of the UIA, an unemployed contributor is entitled to unemployment benefits if the reason for the unemployment is:

'(i) the termination of the contributor's contract of employment by the employer of that contributor or the ending of a fixed term contract,

(ii) the dismissal of the contributor, as defined by section 186 of the Labour Relations Act, 1995 (Act No. 66 of 1995), or

(iii) insolvency in terms of the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936)...

[8] The respondent concedes that the reason stated in the UI-19 form and service certificate is not the incorrect reflection of the terms of the settlement agreement. Yet, it denies that it retrenched or constructively dismissed the applicant. Instead, it asserts, when properly construed, the settlement agreement constitutes a termination of the applicant's contract of employment on mutual basis and settled, in full and final, all the claims that may have arising from the contract of employment.

[9] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,^[4] the Supreme Court of Appeal (SCA) set out a proper approach to the interpretation of written documents, including contracts, stating

that:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular

provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[10] I have outlined the contextual circumstances that led to the conclusion of the settlement agreement. The scope and purpose of the settlement agreement are not only determined on the basis of that background and context but the words used by the parties are equally important.[5] The introductory clause of the settlement agreement clearly states that the parties reached a consensus on the applicant’s

departure. It is common cause that mutual separation was an option chosen by the applicant instead of facing a disciplinary enquiry on allegations of poor performance. As such, in the light of this context, the only sensible construction to be accorded to the words used in the settlement agreement is that the applicants contract of employment terminated on mutual basis and in full and final settlement of all obligations any claims that may have arisen, particularly in terms of the Labour Relations Act[6] (LRA) and Basic Conditions of Employment Act[7] (BCEA).

[11] It is also interesting that the applicant does not impugn the settlement agreement. Notwithstanding the concession that the parties concluded an enforceable agreement that settled their dispute in full and final, the applicant strangely persist with the assertion that the reason for the termination of his contract of employment is retrenchment; alternatively, a constructive dismissal, disguised as a settlement agreement. This contention patently untenable as the applicant opted for a mutual separation in order to avoid a disciplinary action.[8]

[12] I note that the respondent is prepared to rectify the error in the UI-19 form to reflect that the applicant’s contract of employment terminated on mutual basis in terms of the settlement agreement. In fact, the applicant’s private insurance claim form reflect same. The applicant, on the other hand, insists that the respondent must state retrenchment as the reason for the termination of his employment contract or any other reason that would enable him to claim the unemployment benefits.

[13] There are two hurdles confronting the applicant. Firstly, the jurisdiction of the Labour Court is regulated by section 66 of the UIA which provides that: ‘Unless this Act provides otherwise, the Labour Court has jurisdiction in respect of all matters in terms of this Act, except in respect of an offence in terms of this Act’. While section 64 of UIA provides that:

‘(1) No person may-

- (a) knowingly make a statement or cause a statement to be made which is materially false or which results in an incorrect payment of benefits in an application for benefits in terms of this Act;
- (b) wilfully make any false entry on a contributor’s record card or any other book, record or document relating to either a contributor’s employment history or to a contributor’s claim for benefits; or
- (c) contravene, or refuse or fail to fully comply with any provision of this Act or of any regulation or notice issued in terms of this Act.

(2) Any person who contravenes subsection (1)(a), (b) or (c) is guilty of an offence.

[14] Given my finding that the applicant’s contract of employment terminated on mutual basis in terms of the settlement agreement, the recordal of ‘involuntary resignation’ in the UI-19 form obviously constitutes a false entry in terms of section 64(1)(b) and a criminal offence in terms of section 64(2) of UIA. As mentioned above, this Court lacks jurisdiction to deal with criminal offences in terms UIA.

[15] Secondly, even if this Court does have general jurisdiction in terms of section 66 of UIA, the relief sought by the applicant to compel the respondent to record the reason for the termination of his contract of employment as retrenchment or any other reason other than mutual separation in terms of the settlement agreement is fallacious. In essence, the applicant seeks an order directing the respondent to lie about the reason for the termination of his contract of employment in order to enable him to claim UIF benefits and in turn commit an offence in terms of section 64(1)(a) of the UIA. The applicant’s counsel prudently conceded that this claim is flawed.

[16] All things considered, the applicant’s contract of employment terminated on mutual basis in terms of the settlement agreement. As such, the applicant’s claim must fail as it is ill-conceived and unjustified.

[17] Turning to the issue of costs, the circumstances of this case dictate that each party should pay its own costs.

[18] In the circumstances, I make the following order.

Order

1. The application is dismissed.

2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate

C Malan

Instructed by: Crawford

Legal Practitioners

For the respondents: Mr B Bleazard of Brain Bleazard Attorneys

[1] See: Notice of Motion, pages 1-2.

[2] See: Annexure 'C' to the founding affidavit, page 18.

[3] Act 62 of 2001, as amended.

[4]

[2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[5] See: South African Football Association v Fli-Afrika Travel (Pty) Limited [2020] ZASCA 4; [2020] 2 All SA 403 (SCA) at paras 45-46.

[6][6] Act 66 of 1995, as amended.

[7] Act 75 of 1997, as amended.

[8] See: Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another

[2016] ZACC 33; (2016) 37 ILJ 2723 (CC); 2016 (12) BCLR 1515 (CC);

[2017] 1 BLLR 1 (CC) at para 24

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