

SOUTH AFRICA / JUDGMENT

Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others (JR848/13) [2016] ZALCJHB 42 (8 February 2016) [2016] ZALCJHB 42

COURT

Labour Court Johannesburg

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

JR848/13

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR848/13

In the matter between:

TADYN TADING CC t/a TADYN CONSULTING SERVICES Applicant and YVONNE STEINER First Respondent

JOSEPH WILSON THEE N.O

Second Respondent

CCMA

Third Respondent

Date heard: 5 August 2015

Delivered: 8 February 2016

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number GAJB 32999-12. The applicant applied for condonation for the late filing of the record in terms of Rule 7A(8). The award sought to be reviewed found that first respondent had been dismissed, and that the dismissal was procedurally and substantively unfair. The Commissioner awarded her an amount of R204,000.00 representing 3 months

compensation.

- [2] It was common cause that Steiner was employed by the applicant in terms of a written contract of employment dated 7 November 2011 as a Strategic Business Analyst. The commencement date of the contract was 7 November 2011 and termination date 31 July 2012. It was extended by agreement to 31 January 2013.
- [3] Steiner was placed by the applicant at its client First National Bank (FNB) and she performed her services at FNB. She was told to leave the premises of FNB on the 22 November 2012 following a restructuring by FNB of its operations. FNB had informed applicant that Steiner's services were no longer required.
- [4] In his award the Commissioner records Steiner's evidence inter alia as follows:

"The respondent owes her a total amount outstanding of R68,000. Matroos had never raised any questions about her absence from work or when she had asked for the UI-19 form to claim unemployment insurance. She is unemployed and has no income and had no success with work applications. She is married with dependents and her husband is self-employed. Her employment had caused economic strain on her family and they had to borrow money from family members to survive.

During cross-examination Steiner testified the following. She earned a salary of R68,000, 00 per month based on a rate of R380,00 per hour. She asked that her outstanding salary be paid out until her contract formally expires plus her statutory monies."

- [5] The arbitrator further recorded that:

"It is further common cause that the respondent had not orally or in writing terminated the applicant's contract of employment.

Despite this being the case the applicant had not reported for duty nor did the respondent made (sic) any effort to enforce the contractual obligations.....

The applicant admitted that the respondent had not in any expressive way terminated her contract of employment. She had assumed that her contract had terminated and that her employer had not intervened.

The Basic Conditions of Employment Act (BCEA) requires that notice of termination of an employment contract must be in writing. It was not disputed by the respondent and therefore is abundantly clear that the respondent had not complied with this provision.

It is trite law that a verbal termination of a contract will not be recognised as a dismissal. In my view any reasonable person would have used the opportunity to correct any misunderstanding. The respondent had ignored all the issues and failed to make any

interventions in this regard. It is generally acceptable that an employee can only claim unemployed insurance by completing a U 19 form if a dismissal had occurred.

In my view the respondent's conduct had created an inference that the applicant was dismissed....."

[6] The applicant pleads that there was no basis to find that Steiner had been dismissed. It was submitted on behalf of Steiner that while the award is "not in every respect a model of clarity, the Second Respondent's finding as to a dismissal is not one that a reasonable arbitrator could not reach on all the material facts before the arbitrator".

[7] The review test on the existence of a dismissal is not "reasonableness" but whether on the facts before the Commissioner his finding was correct.[1] On Steiner's own version, she did not tender her services to applicant after FNB ended the contract as far as her services were concerned. She assumed her employment was at an end and asked for her UIF forms to be signed. In a letter to Steiner's attorneys on the 7 December 2012 it was stated by applicant's employer's organisation that:

"Your client was been (sic) initially employed on a temporary contract basis which expired on 31 July 2012. As a result of an initial

project not being finalised the contract was renewed/rolled over for a further period of 6 months, such renewal/roll over was by mutual agreement.

We would record that the new agreed termination date is 31 January 2012. Your client is and has always been employed by our member and will continue to be employed until the agreed contract termination date."

[8] The reply to this from Steiner's attorneys of record dated 11 December 2012 included the following paragraph:

"No further purpose would be served in debating this matter by way of correspondence. Your client's contentions are wholly

disingenuous and our client will now proceed to enforce her rights in law."

[9] Under cross-examination, Steiner confirmed she that she knew her contract was to end on the 31 January 2013. She was also asked why after the applicant's letter of the 7th December, she did not return to work. She stated that "I was advised by my attorney that I shouldn't go back to work."

[10] Steiner could have tendered her services on receipt of the 7 December 2012 letter and would have been entitled to her monthly remuneration up until the termination of her fixed term contract. She elected instead to refer an unfair dismissal dispute to the CCMA. She did not allege an expectation of renewal of the fixed term contract at arbitration. There was no evidence before the Commissioner to support the legal conclusion that a dismissal had taken place, given the definition of same in section 186 (a) – (f) of the LRA[2]. This is even the case on Steiner's own version before him.

[11] I note in passing that the Commissioner made an error of law in dealing with “verbal termination of employment”. What the BCEA provides in section 37 which has the title ‘termination of employment’, is inter alia for employees to be given notice in writing (unless they are illiterate) about the termination of their employment, with the proviso in subsection (6) thereof that:

“(6) Nothing in this section affects the right-

- (a) of a dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the Labour Relations Act, 1995, or any other law; and
- (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.”

[12] Steiner had only wanted to be paid the remuneration owed to her and any statutory entitlements. Unfortunately she embarked on the wrong path in seeking a remedy. I do not consider that she should be mulcted in costs for defending the award. Given the merits in this matter the application for condonation is granted. I make the following order:

Order

1. Condonation is granted for the late filing of the record.
2. The award under case number GAJB 32999-12 is reviewed and set aside and substituted as follows:

“2.1 The termination of the employment relationship between Tadyn Trading CC t/a Tadyn Consulting services and Yvonne Steiner did not constitute a dismissal.”

3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant:

Ross Atcheson of Lee and McAdam Attorneys

Third Respondent: Advocate Jennings

Instructed by: Wright Rose Innes Inc

[1] SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Union & another

(2008) 29 ILJ 2218 (LAC)

[2] (1) 'Dismissal' means that- (a) an employer has terminated employment with or without notice; (b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer- (i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee; (c) an employer refused to allow an employee to resume work after she- (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or (ii) (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or (e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or (f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those

provided by the old employer.

[2] (1) 'Dismissal' means that-

- (a) an employer has terminated employment with or without notice;
- (b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-
 - (i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
 - (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;
- (c) an employer refused to allow an employee to resume work after she-
 - (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or
 - (ii)
- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or

- (f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those

provided by the old employer.

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Prepared on 12 October 2026 · Esheria