IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR231/09

In the matter between:

YANDISA NONGENA	Applicant
AND	
M ALI N.O	1ST Respondent
CCMA	2ND Respondent
ABSA GROUP LIMITED	3RD Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] The initial relief which the applicant sought in this matter concerned the review of the first respondent's (the commissioner) ruling in terms of which the condonation of the late filling of the applicant's unfair dismissal dispute was refused. That matter has progressively grown to include several other applications like the Constitutional challenges to the limitation to the right of access to dispute resolution mechanism imposed by the time frames provided for in the Labour Relations Act 66 of 1995 and the Employment Equity Act 55 of 1998(the EEA). The applicant also seeks to challenge the Constitutionality or otherwise of the provision of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

[2] In a separate notice of motion the applicant seeks to have s 5 (3) of the PEPUDA declared unconstitutional. The applicant contends that the PEPUDA is unconstitutional because it precludes employees from utilising the provisions in an unfair discrimination matters arising or related to work place issues.

[3] The applicant has also filed an amendment to the notice of motion dated 21st December 2009 in terms of which he seeks the following relief:

> *"The issues which the court has to consider are the following:*
>
> 1. *The condonation for the late filling of this review application;*
> 2. *The review of the condonation ruling of the commissioner;*
> 3. *Does the court jurisdiction to determine the constitutionality or otherwise of the PEPUDA;*

Can the court accede to the applicants request to grant relief sought for the first time and introduced in the heads of argument.

The constitutionality issues

[4] I deal firstly with the issue of the constitutionality of those sections of the various legislation which the applicant contends are unconstitutional for if found to be indeed unconstitutional then the issue of the lateness of the referral of the unfair dismissal dispute would then fall away. In that case the need to apply for condonation for the late filing of the unfair dismissal dispute would have not been necessary. A different consideration arises if it is found that the constitutionality of those sections cannot be questioned.

PEPUDA

[5] The Labour Court is a creature of statute and thus its jurisdiction is confined to the four corners of that statute. The Labour Court derives its jurisdiction from the provisions of s157 of the LRA. Section 157(2) provides:

> "(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) any dispute over the constitutionally of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
>
> (c) the application of any law for the administration of which the Minister is responsible."

Section 5(3) PEPUDA provides:

> "*This Act does not apply to any person to whom and to the extent which Employment Equity Act 55 of 1998 applies."*

[6] It is thus clear from the above section that the jurisdiction of the court is only limited to deal with those matters related to employment or labour relations. Employment equity issues are excluded from the operations of PEPUDA. In other words

discrimination disputes related to workplace are not covered by PEPUDA. I have already earlier indicated that in terms of s157 of the LRA the Labour Court's jurisdiction is limited to dealing only with those disputes that fall within the provisions of the EEA only. Accordingly this court does not have jurisdiction to deal with matters that arise under the provisions of PEPUDA.

The EEA and LRA

[7] In as far as the LRA is concerned the applicant challenges the following sections as the being unconstitutional: s 191 (1) (b) (i), s 191 (1) (b) (ii) and s 194 (4).

[8] The relevant parts of s191 of the LRA for the purpose of the point raised by the applicant provides:

> (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 within 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."

[9] As concerning the EEA the applicant challenges sections 10 (2) and 50 (2) thereof as being unconstitutional because they provide time limits within which dispute has to be referred for resolution to the appropriate dispute resolution mechanism. Section 10(2) of the EEA provides:

> *"Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination."*

And section 50(2) of the EEA gives the Labour Court the power to make appropriate orders as to compensation and damages arising from discrimination at the workplace. As I understand the complaint of the applicant the issue in terms of this section arises from the extent and the power given to the court in determining the award in compensation or damages to be made.

[10] The applicant in his submission relied on a number of authorities including case most of which are considered below.

[11] The essence of the challenge to the above sections is based on the contention that the sections limits the rights of access to the court or the CCMA in contravention of section 34 of the Constitution by prescribing the time limit within which an employee has to refer a dispute to either the court or the CCMA.

[12] The reasons for providing the time limits within which disputes must be dealt with must be understood in the contexts of the objectives of the LRA. The objective of the LRA is to provide a mechanism for effective and speedy resolution of disputes. In this respect the Constitutional Court in National *Education and Allied Union v UCT 2003 (3) SA 1 (CC),* at paragraph 31 had the following to say:

> *"By their nature labour disputes must be resolved expeditiously and brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily.*

[13] The practice of providing for time limits within which legal actions or claims are to be instituted is well established phenomena in the South African Law. The issue of importance, value and the need for the legislative time limits for instituting legal claims received attention in the *Minister of Agriculture and Home Affairs v C J Rance (Pty) Ltd 2010 (4) SA 109 (SCA).* In that case the court quoted with approval what was said by the Constitutional court in *Mohlomi v The Minister of Defence 1997 (1) SA124 (CC), p*age 124 paragraph 11, where the court had the following to say:

> *"Rules that limit the time during which litigation may be lounged are common in our legal system as well as many others. In ordinate delays in litigating damage the interest of justice. They protect the disputes over the right and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactory on cases that have gone stale. By then witnesses*

may no longer be available to testify. The memories of once whose testimony can still be obtained may have faded and became unreliable. The documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.

[14] Before expressing the above view, Didcot J looked at the various cases which in some way shared the sentiments of the applicant about the impact that time frames imposed by legislation for instituting litigation has on the right of access to the courts. In this respect the Learned Judge in the middle of paragraph 9 of his judgment had the following to say:

> *". . . Over the years some Judges have drawn attention, even so, to the adverse effect on claimants of requirements like those. Innes JA described them in Benning v Union Government (Minister of Finance) 6 as '(c)onditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law'. One was thought by Watermeyer J in Gibbons v Cape Divisional Council 7 to be 'a very drastic provision' and 'a very serious infringement of the rights of individuals'. 8 In Avex Air (Pty) Ltd v Borough of Vryheid 9 Botha JA spoke in the selfsame vein of another '(h)ampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts'. And Corbett CJ echoed that comment in Administrator, Transvaal, and Others v Traub and Others 10 when he observed that the provision then in question 'undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts."*

[15] In *Mhlomi* the plaintiff challenged the constitutionality of s113(1) of the Defence Act 44 of 1957 which a period of 6 (six) moths within which litigation may be instituted against the state. The plaintiff contended that this section was in contravention of s22 of the Constitution. Section 22 provides:

> *"Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."*

[16] After the above sentiments which as indicated were expressed by other courts and which the Learned Judge himself seems to have shared, went on in the same paragraph to, in a way emphasise the point he had made in the paragraph quoted with approval in *Minister of Agriculture and Home Affairs,* to say

"Yet, given its obviously useful and apparently legitimate purpose, I would have felt disinclined to rate the condition precedent set by s 113(1) as one intrinsically repugnant to s 22 had that stood alone or been accompanied by a lot more latitude than the subsection allowed in the time fixed for the start of the ensuing action and consequently for compliance with it a month earlier. For the obstacle to the litigation which it presented would then have been seldom difficult to surmount."

The same approach was adopted in a case involving time limits imposed by the provisions of a contract between the parties. In *Barkhuizen v Napier 2007 (5) SA 323 (CC),* the insurance policy provided under the heading "**CLAIMS PROCEDURE AND REQUIREMENTS"** that:

"5.2.5 If we reject liability for any claim under this Policy we will be released from liability unless summons is served . . . within 90 days of repudiation."

The Constitutional Court in that case upheld the decision of the Supreme Court of Appeal, that clause prescribing time period within which insured required to issue summons in an event of insurer's repudiating liability on claim was not unconstitutional. See *Barkhuizen v Napier 2006 (4) SA 1 (SCA) and Brummer v Minister of Social Development 2009 (6) SA 323.*

The other case which the applicant relied on in support of his case is the case of Brummer *v Minister of Social Development 2009 (6) SA 323 (CC).* The Constitutional Court in that case found as unconstitutional the provisions of s78 (2) of the Promotion to Access of Information Act 2 of 2000 to be unconstitutional because it regarded the 30 (thirty) days within which a requester of information had to lodge an application with the court if denied access to information. However, the Court replaced the 30 (thirty) days with 180 (hundred and eighty) days. This case in my view did not turn on the principle that time bar to launching litigation was unconstitutional. The principle which the Court enunciated was that inadequate time frame for allowing the institution of litigation may be unconstitutional. In confirming its previous decision on the matter the Court had the following to say:

"47 This Court has on at least four occasions considered the constitutionality of time bar provisions, as these provisions are sometimes called. On three of those occasions, the Court considered statutory provisions containing a time limit and, in the fourth case it considered a clause in an insurance contract containing a time bar.

48 The principles that emerge from these cases are these: Time bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. The "enquiry turns wholly on estimations of degree." Whether a time bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time bar is not necessarily decisive.

49 It follows from the above that not all statutory provisions that limit the time during which litigation may be launched fall foul of the right to seek judicial redress. Each provision must therefore be "scrutinised to see whether its own particular range and terms are compatible with the right which [section 34] bestows on everyone" to seek judicial redress The question therefore is whether the 30 day limit in section 78(2) allows a requestor an adequate and fair opportunity to bring an application to court against a decision on an internal appeal. This provision does not say, but I think the case must be approached on the footing, that the period of 30 days is calculated from the date when the requestor has notice of the decision of the internal appeal. The sufficiency or adequacy of the opportunity which the 30 day limit affords the requestor to exercise the right of access to court must be determined in the light of the steps that a requestor who has been unsuccessful in an internal appeal would have to take before launching an application in court."

[17] The other issue raised by the applicant concerns as indicated above the constitutionality of 194(4) of the LRA. It seems to me convenient to quote the full and relevant text of s194 of the LRA. It seems to me that the relevant section for the purpose of the applicant's case would be s194 (1) because his case is based on the complaint about the fairness of his dismissal. Be that as it may the finding of the constitutionality of subsection (4) would also have a direct bearing on subsection (1) of the section. Section 194 reads as follows:

" (1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(3) . . .

(4) The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration."

[18] The answer to the issue raised by the applicant as concerning the constitutionality of the provisions of s194 of the LRA can be found in what was said by the Supreme Court of Appeal in the case of FEDLIFE Assurance Ltd v Wolfaardt (2001) 22 ILJ 2407 (SCA), where it was held that:

" [13] The clear purpose of the legislature when it introduced a remedy against unfair dismissal in 1979 was to supplement the common-law rights of an employee whose employment might be lawfully terminated at the will of the employer (whether upon notice or summarily for breach). It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.

[14] That position was perhaps ameliorated with the adoption of the interim Constitution in 1994 which guaranteed to every person the right to fair labour practices in s 27(1) and rendered invalid any law inconsistent with its terms (which has been repeated in the present Constitution). Thus it might be that an implied right not to be unfairly dismissed was imported into the common-law employment relationship by s 27(1) of the interim Constitution (and now by s 23(1) of the present Constitution) even before the 1995 Act was enacted.

[15] *However there can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment. Thus irrespective of whether the 1995 Act was declaratory of rights that had their source in the interim Constitution or whether it created substantive rights itself, the I question is whether it simultaneously deprived employees of their pre-existing common-law right to enforce such contracts, thereby confining them to the remedies for 'unlawful dismissal' as provided for in the 1995 Act.*

[16] *In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law and a fortiori, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication (Stadsraad van Pretoria v Van Wyk 1973 (2) SA 779 (A) at 784D-H). While the advent of the Constitution, and s 39(2) in particular, has not had the effect of prohibiting entirely the use of the presumption against legislative alteration of the existing law (whether common law or statute) when interpreting a statute which is less than clear, it nevertheless limits its field of application. The same is true of the presumption against the deprivation of existing rights. To illustrate: where a statute is ambiguous as to whether or not an existing law or right has been repealed, abolished or altered and the existing law or right is not in harmony with 'the spirit, purport and objects of the Bill of Rights' there would appear to be no justification for invoking any such presumption. But where the existing law or right is not unharmonious the presumption will still find application. The continued existence of the common-law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed-term contracts of employment is not in conflict with the spirit,*

purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case.

[17] The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so."

[19] It is thus clear from the above that s194 of the LRA does not deprive an employee the right to claim for damages that he or she may have suffered due to the unlawful termination of his or her contract. However, his or her remedy in that instance would rest in the common law and not the LRA. In other words a dismissed employee has an election to approach this court on the basis of the provisions of s77 of the Basic Conditions of Employment of 1997 if he or she wishes to claim damages and in terms of the LRA if the claim is for unfair dismissal. In the present instanced the applicant elected to utilise the provisions of the LRA and thus imposing the limitation on the possible compensation he could receive if he was successful.

[20] It is accordingly my view that the applicant has failed to make out a case for declaring as unconstitutional the sections of the pieces of legislation referred to in his applications. Having arrived at this conclusion I now proceed to deal with the issue of condonation for the late filing of the review application.

Application for condonation: review application

[21] In the present matter the applicant has again filed his review application outside the six week period required by the s145 of the LRA. On his version he received the commissioner's ruling during December 2007 but only filed the application in October 2008. In the application for condonation for the late filing of the review application the applicant in his founding affidavit says that his attorney was surprised when he received a ruling from the CCMA saying that the condonation application has being refused.

[22] In his supporting affidavit the applicant deals with the reasons for the delay in filling the review application in three short paragraphs. The first reason is stated as being due to the confusing that arose between him and his attorney. It was because of that confusion that he terminated his instructions to those attorneys. The other reason is stated as follows :

". . . as I am in London, it took me a lot of time until October 2008 to find another attorney who help me to continue with this litigation. This was primary

because many attorneys I get details over the internet only served employers and unions. Furthermore, I was facing huge financial difficulties after having paid my University fees (ten thousand five hundred pounds) and other financial obligation and it was not easy to find attorneys that were willing to negotiate on fees. Furthermore, some attorneys could not understand a case without talking to Mr Dube, who was with the previous attorneys. Subsequently, I instructed Attorneys Lisiyane and Associates however, our relationship could not carry on due to disagreement on fees, at this stage I had paid in excess of hundred thousand in legal fees.

It was only after learning in January 2009 that Mr Dube, whom I believe we have a special understanding, had opened up his own practice that I approached and negotiated that he continues with this litigation. The main other reasons being that he is very knowledgeable with the facts of the case and how much I have spend to date even before the case is brought to this Honourable Court."

The principles governing condonation

[23] It is generally accepted that in a condonation application the applicant seeks an indulgence of the court for his or her non compliance with the time frame set out in the law or in the rules. In order for the court to exercise its judicial discretion of granting condonation the applicant must satisfy certain factors.

[24] In exercising its discretion whether or not to grant condonation for the late filing of the review application the factor which the court takes into account are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frames; (c) bona fide defence or prospects of success in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice (see *Foster v Stewart Scott Inc* (1997) 18 *ILJ* 367 (LAC) and *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (AD). It is trite that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay. In order to succeed in an application for condonation the applicant has to show

good cause by giving a reasonable and a satisfactory explanation. The two factors that are significant in weighing whether or not condonation should be granted are, prospects of success and the explanation for the delay in filing the review application. It is important to note that not that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. See *Malane v Santam Insurence.*

[25] In my view the applicant's application for condonation in the present instance stands to be dismissed because the period from the time that the applicant received the ruling of the commissioner to the time he filed this review application is excessive and the reasons for the lateness are unsatisfactory and unacceptable. The prospects of success are also nonexistent. The prospects of success turn on the manner in which the contract was terminated. I deal later with the manner in which the contract was terminated later in this judgment.

[26] The case of the applicant would still be unsustainable even if for whatever reason an indulgence was to be given for the late filling of the review application.

[27] The applicant's case is unsustainable because the commissioner having applied the principles of law governing consideration of an application for condonation arrived at the conclusion which in my view cannot be said to be unreasonable. The commissioner in refusing to grant the condonation for the late referral of the dispute reasoned as followed:

> *"1.1 The application is more that 80 days late;*
>
> *1.2 The applicant is a literate person who should be able to seek proper opinion;*
>
> *1.3 The affidavit is unacceptable as it is not properly signed by a South African Lawyer.*
>
> *1.4 Even if I accept the affidavit, the applicant had resigned on his own free will and therefore the prospects of success are nil.*
>
> *1.5 The applicant did not refer the dispute as constructive dismissal."*

[28] It is clear from the reading of the commissioner's ruling that the two factors that strongly influenced his decision were the period of the delay and the prospects of succeeding if the matter was to proceed to arbitration. The period of 89 (eighty) days delay is clearly regarded as been excessive. As concerning the prospects of success the commissioner say that there exist no prospects of success because the applicant resigned. This finding cannot be faulted for unreasonableness if regard is had to the evidence which the applicant has put forward in support of his case.

[29] The applicant in his condonation application under the heading "prospects of success," says the following:

> *"This is a complex legal matter for it involves law of contract, labour law and other areas of law*
>
> *At the centre of the dispute is the interpretation of a contract. Having heard the legal opinion of (sic) from my friend's one is confident that my contractual rights were violated*
>
> *Moreover, the legal procedures on dealing with dismissals were not followed, thereby further prejudicing me. My attorneys have indicated this.*
>
> *Going back to the kind of support I received from ABSA and comparing with practice and policy leaves questions that needs to be raised. Those questions are not only on practice but also on role of company policy which is supposed to guide in certain matters. In my case, it was said the policy did not provide despite the wording of the policy that indicated my qualifying for a proper support. The best platform to raise these questions is our court of law or other dispute independent resolution mechanism.*
>
> *I instructed my attorneys to seek senior counsel's opinion from Adv Dumisa Ntsebenza, and accordingly advised us to summit to CCMA and further assured me that this is indeed a complex matter that our courts need to hear and attend to. I take to his counsel that seriously and I am sure that there are number of people in our country who do."*

[30] It would appear from reading the various documents which the applicant had placed before this court that the commissioner inferred that the applicant resigned from his employment. It would appear from the said documents that it does not seem that the inference drawn by the commissioner was unreasonable. The commissioner found that the applicant did not have prospects of success because he resigned.

Principles regarding resignation

[31] The test to determined whether a person has resigned or not is well summarised by Van Niekerk J in *Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477 (LC),* when he says:

> *"A resignation is a unilateral termination of a contract of employment by the employee. The courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention."* See also *FIJEN v Council for Science & Industrial Research (1994) 15 ILJ 759 (LAC)*.

[32] The facts from which it can be inferred that the applicant resigned starts from the time the third respondent gave the applicant permission to go and study for a master degree in London. In terms of the permission the applicant was not required to perform his duties as a project infrastructure consultant of the third respondent. He was however required to resume his duties with the applicant on completion of his studies. The third respondent further undertook to continue paying the applicant's salary whilst studying in London. The third respondent further undertook to fund and supports the applicant in his application for a visa allowing him to work whilst he is in London. The letter setting out these conditions and dated the 14th September further states:

> *"**7 Work Experience***
>
> *You're permitted to work whilst in London studying and I have effected an introduction to Nick Salisbury at Barclays in London should you wish to have unpaid work experience with Barclays.*
>
> *During University holidays we will expect you to work at ABSA. We reserve the right not to allow you to work during the holiday periods if you have found work in London with a competitor company. If you have found work with a competitor that would prevent ABSA allowing you to work for ABSA will not pay your flights to South Africa outlined in clause 8 above.*

[33] On the 14 February 2007, the applicant concluded an employment contract with IKB Dutshe Industries Bank AG- London. The contract of employment which was signed by the applicant provides the following at paragraph 2 thereof:

> *"**2 APPOINTMENT AND DURATION***
>
> *(1) The Company shall employ the Executive and the Executive shall serve the Company on a full time basis as a Manager in Project Finance on a terms set out in this agreement (the "**Appointment")**. A Job description setting out the objectives and the duties of the Appointment is attached herein as Schedule.*
>
> (2) *The Appointment shall take effect on the first April 2007 (the **"Commencement Date")**."*

[34] On the 21st March 2007 the applicant addressed a letter to the third respondent wherein amongst others he stated the following:

> *"I have been offered employment at IKB Dushe Industry Bank AG ("IKB") under the Infrastructure Finance Team and due to start on the 2nd of April. This is certainly exiting and a great relief to me as I will be getting international wholesale banking experience which is an important part of my*

development- sadly not from the Group. I still hope the remaining discussions I am due to have with the BarCap will lead fruition."

[35] The first respondent replied in a letter dated 28 March 2007 which reads as follows:

"REQUEST FOR VARIATION OF A CONTRACT

We thank you for your letter dated 21 March 2007.

We advice that ABSA Capital does not agree with your proposals to vary the agreement dated 14th September 2006. In this respect we do not agree to suspend the operation of your employment and to allow you to take up employment with another employer during the study period.

We do not agree with your interpretation that the terms of the agreement entitle you to take up employment with another employer during the study period. The agreement clearly states that during the study period of your remain an employee of ABSA Capital. Should you elect to take up employment with another employer, in this case IKB Deutshe Industry Bank AG ("IKB"), you will be required to resign from your employment with ABSA Capital."

[36] The applicant challenged the contents of the above letter and in his reply on the same day amongst other things said the following:

"Clause 7 of my contract with ABSA Capital clearly states that I am free to work in London. It further says, should I wish to get unpaid work I can work at Barclays, but my choice to do so does not preclude me to get employment elsewhere. Clause 8 goes on and says that if I should work for the competitor, then ABSA reserves the right to refuse to employ me during holidays.

Clearly, therefore, from the contract side I am free to work wherever I wish to work."

[37] The third respondent addressed a letter to the applicant dated 2nd April 2007 which reads as follows:

*"**REQUEST FOR VARIATION CONTRACT***

We refer to your letter of 30th March 2007. You have made a request for the terms of your contract to be varied. The fact that we are not in agreement concerning the interpretation of the contract does not alter the fact that it is merely a request. ABSA Capital has dully considered your request and is of the view that it would be entirely unreasonable to expect ABSA Capital to exceed to it. Your request is therefore declined."

[38] It is apparent from the above that the alleged unfair dismissal and unfair discrimination arose because of the interpretation that the applicant placed on his

employment contract with the third respondent. His contention is that the employment contract permitted him to take permanent employment with another employer whilst he was in London. It is on the basis of this that he contends that the third respondent breached and repudiated his employment contract resulting in the unfair dismissal and unfair discrimination claim.

[39] The case of the third respondent which in my view is correct is that the applicant took permanent employment in London with the competitor and thus left the employment on his own accord.

[40] In the light of the above I am of the view that the applicant has failed to make out a case that he was dismissed by the respondent.

The costs

[41] The third respondent has prayed for punitive costs against the applicant. In general this court has adopted a policy that discourages granting costs against individual litigants. This policy is informed by the consideration that granting of costs against individual litigants may limit the access to court in that individual would be discouraged from asserting their rights for fear that ultimately costs would be granted against them.

[42] In terms of s162 of the LRA, the court has the power to make an order as to costs based on the requirements of law and fairness.

[43] In present instance taking into account the policy consideration and the provisions of s 162 of the LRA, the question I have to answer is whether it would be fair to order the applicant to pay the costs of the suit and more particularly on a punitive scale. In my view the facts and the circumstances of this case indicates very clearly that it would be unfair and an injustice would be perpetuated if the third respondent was made to carry the burden of legal the costs incurred as a result of having to defend an action which the applicant on his own version ought not to have been instituted.

[44] The applicant says he received legal opinion that advised him that there were no merits in instituting these proceedings. In this respect he states in one of the documents he attached to his papers that:

> *"8.9.7 The advice from Adv Ntsebeza that the Applicant should not litigate against the Third Respondent as this would be a costly exercise and that the Applicant should not write emails (sic) raises two ethical issues…"*

[45] In these circumstances it would be unfair, in my view, if the respondent was made to carry the unnecessary burden of the costs occasioned by a person who was advised a senior counsel that he had no prospects of succeeding in his plan to institute this litigation. It would however be unfair to impose punitive costs on the applicant.

[46] In the light of the above the following order is made:

1. All the applications brought by the applicant concerning the constitutionality of those provisions of Labour Relations Act, Employment Equity Act Equality and Protection and Prevention of Unfair Discrimination Act are dismissed.

2. The applicant's application for the condonation of the late filing of the reviewed application is dismissed.
3. The application to review the ruling issued by the second respondent is dismissed.
4. The applicant is to pay the respondents the costs of this suit.

Molahlehi J

Date of Hearing : 06 June 2010

Date of Judgment : 8th December 2010

Appearances

For the Applicant : Mr Yandisa Nongena appeared in person

For the Respondent: Mr Patel

Instructed by : Deneys Reitz