

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 1694/17

In the matter between

**ALSON THEMBA NGWABE**

**Applicant**

and

**EDUCATION LABOUR RELATIONS COUNCIL**

**First Respondent**

**COMMISSIONER E.T NGOBENI N.O**

**Second Respondent**

**GAUTENG DEPARTMENT OF EDUCATION**

**Third Respondent**

**Heard: 16 July 2019**

**Order: 16 July 2019**

**Date of Reasons: 27 September 2019**

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**REASONS FOR ORDER**

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**SAUNDERS, AJ**

Introduction

- [1] This is an application to review and set aside a condonation ruling made by the second respondent on 12 July 2017. The application to review and set aside the condonation ruling appears to have been made on or about 16 August 2017. The matter was originally set down for hearing in this Court on 16 May 2019 and struck from the roll for non-appearance by the applicant. The applicant brought an application to re-enrol the matter which was granted and the matter came before the Court again on 16 July 2019. On this date there was no appearance by the applicant. Counsel appeared for the

respondent. The matter was dismissed with no order as to costs. The applicant seeks reasons for the Order.

[2] The applicant referred an unfair dismissal dispute to the first respondent 25 days late. The second respondent, acting under the auspices of the first respondent, found that the period of 25 days was not excessive and that the reasons for the delay were acceptable. However, the second respondent found that the prospects of success were poor as the applicant's referral was premature. The applicant was employed by the third respondent in terms of a fixed term contract at the time of his referral. On this basis, the condonation application for the late referral of the unfair dismissal dispute to the first respondent was dismissed.

[3] The applicant sought a review of this condonation ruling.

#### Factual background

[4] The applicant was employed by the third respondent into an emergency growth position. On the applicant's version, he was appointed on 3 February 2017 and dismissed for the first time on 18 April 2017. He was reinstated on the same day.<sup>1</sup> He had several other grievances which did not appear to be managed to his satisfaction which are set out in the founding affidavit but are irrelevant to this application. The applicant was removed from the emergency growth position into a different position and signed a fixed term contract due to expire on 30 June 2017. His salary was paid for April 2017, albeit late, May 2017 and June 2017. The applicant did not render his services for May and June 2017. The documentation attached by the applicant as annexures also appear to indicate that there was an overlapping employment contract for a one-month period of April 2017, which terminated on 30 April 2017.

[5] The third respondent sets out in answer that there are no grounds for review and therefore no review application for determination by the Court. Furthermore, the third respondent sets out that two contracts of employment

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<sup>1</sup> Founding Affidavit at para 5.

were entered into; the first for the period of February and March 2017 and the second for the period of April, May and June 2017.

- [6] The third respondent states that in April 2017 the applicant was transferred to a different school for the remainder of the contract, for which he failed to render his services. He then referred an unfair dismissal dispute on 13 June 2017, premised on events of April 2017 which led to his transfer. The third respondent argues that the applicant was employed at the time of his referral and up until 30 June 2017. Essentially there was no dismissal.

#### Parties' Submissions

- [7] The applicant was not present in court and did not offer any submissions in support of his case. Counsel for the third respondent was present in court. The founding papers do not make out any case for a review on any grounds. The founding papers allege no reviewable irregularities. The replying papers appear to be a partially edited working document of the answering papers and also fail to set out any reviewable irregularities. The heads of argument similarly do not highlight any misconduct or error on the part of the second respondent. However, it is clear that the matter turns on whether a dismissal took place.
- [8] The applicant sets out contradictory versions. He states that he was dismissed on 18 April 2017 and then reinstated on the same date. The applicant furthermore states that there was an additional contract which entitled him to continue with his duties until 30 June 2017. This accords with the version of the third respondent. He references a dismissal of 30 April 2017 but fails to support this dismissal with any additional evidence. The ruling which the applicant seeks to set aside, references a meeting of 3 May 2017 wherein the applicant was instructed to return to work to teach the learners but he refused to do so because he believed that his services had been terminated. No reasons to support this belief were advanced. He gives no version of this meeting in the founding affidavit.
- [9] The heads of argument filed by the applicant give further information that there was no transfer letter or documentation informing the applicant of the

transfer to another school, and the late payment of the April 2017 salary was indicative of the dismissal he had suffered. Furthermore, he states that he was instructed by an individual that his services would be officially terminated. This version is raised for the first time in the heads of argument.

### Reasoning/Merits

- [10] The review application sets out no grounds of review. It fails to mention any reviewable irregularity and the third respondent is correct to state that the applicant has failed to make out any case whatsoever.
- [11] That said, the applicant is acting without representation and it is in the interests of justice for this Court to consider whether or not an error is apparent from the finding of the second respondent.
- [12] The difficulty with this matter is that the applicant fails to set out, definitively, whether or not he was employed as at 13 June 2017 when he referred the dispute. His versions in the various affidavits highlight contradictions which are difficult to reconcile. What is common cause is that the applicant had a fixed term contract until 30 June 2017 and he was paid until the expiry of this contract. Annexure E to the founding affidavit references an instruction to report for duty which the applicant failed to heed. This accords with the version advanced by the third respondent and set out in the ruling. The third respondents' version is that the applicant was still employed and that it intended to pay him until the conclusion of his contract.
- [13] The second respondent, in considering these factors, correctly sets out that he is required to consider the degree of lateness, the reasons for the delay, the prospects of success and prejudice to be suffered by the applicant.
- [14] The second respondent then finds that the degree of lateness was not excessive and that the reasons for the delay were acceptable. Of importance, the second respondent finds that there are no prospects of success as the applicant was employed at the time of the referral.

[15] This conclusion, on the evidence presented, appears both reasonable and correct. This, coupled with the failure to set out any grounds for review or to articulate any complaints against the third respondent, renders the application defective. On this basis, the application for review must fail.

[16] In the circumstances, the following order is made:

Order

1. The Application is dismissed.
2. There is no order as to costs.

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S Saunders  
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:           None  
For the Respondent:       Advocate Nhlapo  
Instructed by:               State Attorney