

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held in Manzini

SWMZ13/08

In the matter between;

JEAN-MARIE NIYIBIGIRA

Applicant

AND

LIVING WATERS SCHOOL

Respondent

CORAM;

ARBITRATOR : THULANI DLAMINI

FOR APPLICANT : M. SIMELANE

FOR RESPONDENT: S. ZIKALALA

RULING

1. Parties and Hearing

The Applicant in this matter is an adult male and former employee of the Respondent. The Respondent on the other hand is Living Waters School a private institution operated by the Church of Nazarene.

2. BACKGROUND OF DISPUTE.

A brief background of this dispute is that the Applicant alleges that his contract of employment with the Respondent was prematurely terminated and he now claims to have been unfairly terminated and wants to be compensated in that regard. The Respondent on the other hand denies that the contract was terminated prematurely and avers instead that it had run its course and as such contends that the Applicant is not entitled to any compensation whatsoever. The matter was referred to arbitration following a failed conciliation meeting. The Applicant delivered his evidence and further cross examined by the Respondent's representative. When the Applicant's representative closed the Applicant's case Zikalala for the Respondent moved an application for absolution from the instance. Hereunder is an outline of the application and the Applicant's answer thereto and my ruling.

3. ABSOLUTION FROM THE INSTANCE APPLICATION RESPONDENT'S ARGUMENT'S

At the close of the Applicant's case the Respondent's representative moved an application for absolution from the instance. His reason for moving such an application was that the Applicant's evidence is riddled

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with contradictory facts which he felt should be quashed and/or expunged. The contradictory facts, according to Zikalala, are based on the dates the contract of employment between the parties was entered into.

In his answer, the Applicant's representative stated, as a starting point, that the documentary and oral evidence as presented by the Applicant requires an answer from the Respondent. It was Simelane's contention that the test for absolution from the instance is whether a reasonable man would grant judgement in the Applicant's favour based on his evidence only? And in this case, he went on, the application was misconceived especially because the Applicant had established a case which requires an answer from the Respondent.

4. THE LAW APPLICABLE.

Perhaps as a starting point one needs to spell it out that the Conciliation, Mediation and Arbitration Commission, being an administrative and quasi judicial organ, does not have the powers and as such is incompetent to grant absolution from the instance. This has been pronounced in a number of decisions by the Judges of the Industrial Court in South Africa and in arbitration awards of the CCMA, see for instance the case of Chemical Workers Industrial Union o.b.o. Mthombeni v Amcos Cosmetics 1999 20 ILJ 2739.

Further to the aforementioned the law is that absolution from the instance can only be granted if the onus rests upon the plaintiff. If the onus rests upon the defendant there can never be an order for absolution from the instance at any stage of the proceedings. (See in

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this regard Arter v Burt 1922 AD 303). In this case the Applicant alleges that the Respondent unlawfully terminated his services. He has proved that he was an employee enjoying protection of the Employment Act. The onus is therefore on the employer to prove that he was not unfairly terminated. And clearly this is not a case where one can grant absolution from the instance.

5. RULING

In the circumstances the ruling I make is as follows;

- (I) The application for absolution from the instance is hereby dismissed.
- (II) The matter is to proceed to the Respondent's case on a date to be allocated by the Case Management Officer.

DATED AT MANZINI ON THIS 19th DAY OF JANUARY 2009.

THULANI DLAMINI CMAC COMMISSIONER

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