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EMPLOYMENT

Swanepoel v KPMG Services (Pty) Ltd (J494/19) [2021] ZALCJHB 457 (13 December 2021)

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Termination of the employment relationship in terms of the UI-19

by Bankey Sono, Director and Neo Sewela, Candidate Attorney

1. Very often employers and employees conclude settlement agreements mutually terminating the employment relationship between the parties. After this, employers are faced with the burning question "what is precisely reason for the termination of the employment relationship in terms of the UI-19 form (especially as the UI-19 form does not provide for the mutual termination of the employment relationship/mutual separation as one of the valid reasons for termination of the employees employment for the employee to lodge a claim in terms of the Unemployment Insurance Fund ("**UIF**).
2. In this matter, the Employee was employed by his erstwhile Employer as a Senior Manager within its Internal Audit Risk and Compliance Service. Close to two years after his employment, and in a meeting, performance issues were raised with the Employee and he was given the option to either resign or be subjected to a disciplinary process for his poor performance. According to the Employee, he was not prepared to resign as he wanted to claim from the UIF and/or his personal insurance. With the latter in mind, the Parties then concluded a settlement agreement mutually agreeing to the termination of the employment relationship (the "**Settlement Agreement**"). As with most terminations, the Employer issued the Employee with a certificate of service and the UI-19 form recording that the reason for the termination of the employment relationship as "involuntary resignation". While lodging his UIF claim the Employee asserts that he was advised by an official at the Department of Labour that "involuntary resignation" was not recognized as a reason in the UI-19 form and further that the Settlement Agreement was not clear as to the reason for the termination of his employment contract. Consequently, the Employee approached the Employer requesting that it amend the recordal to reflect the termination of his employment relationship as a retrenchment, but the Employer refused. The Employee then approached the Labour Court for relief.
3. Before the Labour Court, the Employee sought an order *inter alia* compelling the Employer to amend the UI-19 form to categorize the reason for the termination of the employment relationship as a retrenchment instead of an "involuntary resignation" or alternatively that the Court should determine the precise reason for the termination of his employment.
4. The Court began its analysis by interpreting the terms of the Settlement Agreement and found that the introductory clause of the Settlement Agreement made it clear that the parties had reached a common conclusion to terminate the employment relationship and thus the employment relationship was terminated on a mutual basis and in full and final settlement of all obligations. The Court then went on to examine the Employee's persistent claim that the reason for his dismissal should be amended to a retrenchment or constructive dismissal despite the Settlement Agreement being blatantly clear. The Court dismissed the Employee's request as "*patently untenable*" as it was clear that the parties had opted for a mutual separation.
5. The Court noted that the Employer was prepared to rectify the UI-19 form to reflect that the employment relationship was terminated on a mutual basis pursuant to the Settlement Agreement. However, it could not allow the reason for the dismissal to be reflected as a "retrenchment", as sought by the Employee because (i) section 64(1)(a) of the Unemployment Insurance Act (the "**UIA**") (which piece of legislation governs the UIF) makes it a criminal offence for someone to knowingly make or cause to be made a statement which is materially false and (ii) recording any reason other than mutual separation, on the current facts, "*is fallacious*" and the application was dismissed.

6. While the conclusion reached by the Court cannot be flawed, Employers are still left in limbo as to how instances of "*mutual separation*", as a reason for the termination of the employment relationship, ought to be dealt with in the UI-19 form particularly as the current version of the UI-19 form does not make provision for the recordal of "*mutual separation*" as a reason and Employers run the risk of being held criminally liable in terms of section 64 of the UIA. This is further exacerbated by the fact that the officials in the Department of Labour themselves do not precisely know how this issue ought to be dealt with resulting, unfortunately, in conflicting advice.
7. The best course of action would ideally be for the Department of Labour to amend the current UI-19 form to expressly provide for "*mutual separation*" as a reason for the termination of an employee's employment.



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