



**INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO.229/2015**

In the matter between:

**GOODMAN DLAMINI**

**Applicant**

**And**

**FINANCIAL SERVICES**

**REGULATORY AUTHORITY**

**Respondent**

**Neutral citation:** Goodman Dlamini vs Financial Services  
Regulatory Authority (229/2015) [2017] SZIC  
20 (2017)

**Coram:** MAZIBUKO J,  
(Sitting with A.Nkambule & M.Mtetwa  
Nominated Members of the Court)

**Last Heard:** 9<sup>th</sup> March 2017

**Delivered** 27<sup>th</sup> March 2017

*Summary: 1) Contract of employment. When is a contract of employment concluded? Applicant received written offer of employment. Applicant accepted offer of employment by signing it and delivering same to Respondent.*

*Held: Contract came to existence the day the employee (offerree) communicated to the employer (offeror) his acceptance of the offer.*

*2) Withdrawal of an offer of employment. An offer can be withdrawn before acceptance. Once an offer is accepted a contract comes into existence. Once a contract is concluded it is no longer open to the offeror to withdraw the offer.*

*Held: Purported withdrawal of an offer by employer is null and void since by then the offer had already been accepted.*

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# JUDGMENT

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1. The Respondent is Financial Services Regulatory Authority, a body corporate with power to sue and be sued established in terms of the Financial Services Regulatory Authority Act No. 2/2010. The answering affidavit is deposed to by Ms Gugu Makhanya who is Respondent's General Manager: Finance and Corporate Services. There is also a supporting affidavit of Makhosazana Dlamini who is Respondent's Senior Financial Accountant.
2. Sometime early February 2015 the Respondent placed an advertisement in a newspaper that circulates daily in Swaziland. The Respondent advertised a job for a Human Resources and Corporate Services Manager. On the 16<sup>th</sup> February 2015 the Applicant applied for that position in writing and an interview followed shortly thereafter.
3. According to the Applicant, on the 28<sup>th</sup> April 2015 he was informed through his mobile phone by the General Manager- Finance and

Corporate services (Ms Gugu Makhanya) that his application for employment was successful. The Applicant was further informed that a letter of offer would soon be sent. He was advised that if he accepted the terms and conditions of employment as contained in the said letter of offer, he should communicate his acceptance by signing the same letter and return it to the Respondent. The letter of offer had a provision for acceptance.

4. Ms Makhanya has stated that she sent the Applicant a letter of offer on the 15<sup>th</sup> May 2015 and not the 28<sup>th</sup> April 2015. Ms Makhanya was only challenging the date the letter was dispatched but confirmed the remaining contents of the Applicant's allegation. The letter of offer is attached to the founding affidavit and is marked GD1. It appears the Applicant made an error regarding the date of the telephonic conversation with Ms Makhanya. This error does not however affect the real issues in this application.

5. According to the Applicant he accepted the offer on the 18<sup>th</sup> May 2015 by signing and also completing the wording in the blank spaces as provided in the letter of offer. The Applicant stated that he then

delivered the letter at the Respondent's office the same day. A copy of a duly accepted offer is attached to the answering affidavit and is marked GM4. The Applicant added that he had also given notice of resignation to his then employer which is dated 17<sup>th</sup> May 2015 and is marked annexure GD2. The Applicant explained that he felt the need to give his employer his notice of resignation as early as possible in order to give the employer sufficient time to find a replacement. This point is further dealt with later in this judgment.

6. Annexure GM 4 is a detailed contract of employment which the Respondent concluded with the Applicant. It is proper that the contract be reproduced.

*"15 May 2015*

*Mr. Goodman S. Dlamini*

*P.O. Box 4*

*Piggs Peak*

*Dear Mr. Dlamini,*

*LETTER OF OFFER – HR AND CORPORATE SERVICES  
MANAGER*

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*Your application dated 16 February 2015 refers.*

*We are pleased to notify you that your application for the position of HR and Corporate Services Manager was successful. This position reports to the General Manager: Finance and Corporate Services.*

*Your monthly remuneration for this position is as follows:*

- *Total annual package: E753,153.60*

<i>Basic Salary</i>	<i>E40, 000.00</i>
<i>Housing allowance (20%)</i>	<i>8,000.00</i>
<i>Employer provident fund (15%)</i>	<i>6,000.00</i>
<i>Medical aid (75% employer contribution)</i>	
<i>-Imphilo advanced option)</i>	<i>3,885.00</i>
<i>13<sup>th</sup> cheques (40,000/12months)</i>	<i>3,333.34</i>
<i>Cellphone Allowance</i>	<i>1,500.00</i>
<i>Medical top up cover</i>	<i>44.46</i>

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62, 762.80

- *Medical aid contribution: 75% employer and 25% employee on Momentum Advanced option;*
- *Provident Fund:15% employer and 7.5% employee calculated on your basic salary;*
- *Uniform allowance of E6,840.00(VAT inclusive), once every two years;*
- *24 hours personal accident cover;*
- *Subsidized car loan and housing loan at 5%;*
- *Life assurance cover - 3 x annual salary*
- *Disability cover (lump sum) - 3 x annual salary*
- *Funeral benefits*
  - *Member - 20.000*
  - *Spouse - 20.000*
  - *Children*
    - *Age 14-21 - 10,000*
    - *Aged 6-13 - 5, 000*
    - *Aged 1 – 5 - 2, 500*

- *0-11 months and  
Stillborn - 2,500.*

*As you are aware, the office of the FSRA is responsible for the supervision and regulation of the non-bank financial services industries. The main objective for the supervision of these institutions is to ensure adequate protection of users of financial services, reduction of financial crime and reduction of systemic risk.*

*In order to accomplish these objectives, the FSRA should at all times maintain high standards of Corporate Governance, including hiring staff with high level of integrity. In light of the above, if you should accept this offer, in addition to conducting a character and work ethics background check with references provided by you, we would like for you to provide us with the following information:*

- *Credit report from accredited Bureau (such as ITC).*
- *Police clearance report*

- *A statement disclosing any ownership in any institution regulated by the Financial Services Regulatory Authority as well as directorship on the Boards of these institutions.*

*We believe that this will be an ideal opportunity for you as a professional to contribute to the strengthening of an organization of high importance. We will be pleased if you accept the offer.*

*Should you accept the offer, kindly sign the space below and return this letter to us. Once we have received the additional information, we will provide you with an employment contract and job description.*

*We hope you will find the above in order. However, should you require clarity on anything or have questions, please call us anytime.*

*Yours truly*

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*Sandile Dlamini*

**CHIEF EXECUTIVER OFFICER**

I, Goodman S. Dlamini hereby accept the above offer with the terms set out.

Signed at Swd Plantation at this 18<sup>th</sup> day of May 2015

[Signature endorsed]  
Signature of employee

[Signature endorsed]  
signature of witness”

(Record pages 36 - 37)

7. The Applicant filed an application in Court in which he seeks an order on the following terms:

“1. That an order be and is hereby issued compelling the Respondent to comply with the contract of employment entered into between itself and the Applicant herein during or around the 18<sup>th</sup> May 2015;

*ALTERNATIVELY;*

1. That an order as[sic] be and is hereby issued declaring that the Applicant is an employee of the Respondent in terms of section 35 of the Employment

*Act, 1980 following the contract of employment entered into by the parties herein or around the 18<sup>th</sup> May 2015.[sic]*

2. *Costs of application.*

3. *Further and/or alternative relief.”*

(Record page 1-2)

8. The question before Court is whether or not there was a valid withdrawal of the offer of employment. It appears in annexure GM4 that the offer was signed by the Applicant on the 18<sup>th</sup> May 2015. The Applicant stated that he personally hand delivered the ‘*Letter of Acceptance*’ at the Respondent’s office on the 18<sup>th</sup> May 2015 to the receptionist. He further explained to the receptionist that the document he (Applicant) was handing over- was a ‘*Letter of Acceptance*’. Extracts of the Applicant’s evidence read as follows:

8.1 “9. *Indeed around the 15<sup>th</sup> May 2015, I received a written*

*letter offering me employment. This letter was sent to me by the Respondent through electronic mail. I*

*proceeded to accept the offer on the 18<sup>th</sup> May 2015 by endorsing the offices physically on the same date. The letter of offer and acceptance thereof is attached hereto and marked “GDI”*

(Record page 7)

8.2 “12 *As indicated herein, I endorsed my signature on the space provided in the letter and duly returned the letter to the Respondent as at the 18<sup>th</sup> May 2015. I personally went to the Respondent’s offices at 2<sup>nd</sup> Floor, Ingcamu Building in Mbabane, where I dropped the letter of acceptance at the reception area and indicated to the lady I found thereat that it was an acceptance letter.”*

(Record page 8)

9. The Respondent has denied that the letter of Acceptance was delivered on it on the 18<sup>th</sup> May 2015. According to the Respondent that letter was delivered on the 20<sup>th</sup> May 2015. Extracts of the Respondent’s evidence read as follows:

9.1 *“14 On 20<sup>th</sup> May and at approximately 11:48 am, the applicant caused to be delivered to the respondent a signed acceptance of the offer of employment. A copy of the purported acceptance is annexed hereto marked “GM4”. The purported acceptance indicates that the applicant accepted the offer on Monday 18<sup>th</sup> May but only communicated such acceptance to the respondent on 20<sup>th</sup> May.”*

(Record page 22)

9.2 *I also refer the Honourable Court to annexure “GM3”[GM4], which clearly indicates that the purported acceptance was communicated to the respondent on Wednesday 20<sup>th</sup> May at 11:48 am. This is the date on which the acceptance was delivered to the respondent.”*

(Record page 25)

10. The contention is particularly on the date and manner of delivery of the ‘*Letter of Acceptance*’ annexure GM4. The Court has noted

that the Respondent has not denied certain aspects of the Applicant's

evidence which are pertinent to the issue. In particular the Respondent has not denied that:

10.1 The Applicant personally delivered the said letter (annexure GM4) at the Respondent's office to the receptionist, and that

10.2 The receptionist was further told by the Applicant that the document she was receiving was a '*Letter of Acceptance*'.

The above – stated allegations have not been denied in the affidavits that had been filed by the Respondent's representatives.

They are accordingly taken to be admitted.

11. The Respondent has referred to its office stamp which the Respondent stamped on annexure GM4, particularly the portion designated for acceptance of the offer. The imprint caused by the stamp provides that the document in question was received on the

20<sup>th</sup> May 2015 at 11:48am by a person who signs his/her name as “ZM”. The stamp has a provision for a date, time and signature of the person who is meant to receive the document in question. The details have been written in manuscript for instance, the date, time and signature of the recipient.

12. Ms Gugu Makhanya has presented the stamp in her affidavit in order to prove the truth of its contents viz-

12.1 that the Respondent received annexure GM4 on the 20<sup>th</sup> May 2015 at 11:48am, and

12.2 that annexure GM4 was delivered to the Respondent’s employee who signed his/her name as ‘ZM’.

A crucial extract of the affidavit of Ms Makhanya appears in paragraphs 9.1 and 9.2 above.

13. Ms Gugu Makhanya does not claim that she was present when the Applicant delivered annexure GM4 to the Respondent. She therefore has no personal knowledge of the date, time and circumstances under which annexure GM4 was delivered to the

Respondent. Ms Gugu Makhanya does not claim that she is the Respondent's employee who affixed the stamp and/or provided the details in annexure GM4 – that are written in manuscript. In other words Ms Gugu Makhanya's evidence is that annexure GM4 was delivered on the Respondent on the 20<sup>th</sup> May 2015 because the stamp says so. Ms Makhanya is relying on information that has been provided in the stamp by another person whose evidence is not before Court. The alleged 'ZM' has not filed a supporting affidavit. The allegation made by Ms Gugu Makhanya in her affidavit are hearsay. The general rule is that hearsay evidence is inadmissible as stated by authorities.

13.1 *“Oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of matters stated ...”*

HOFFMAN LH and ZEFFERTT: The South African Law of Evidence, 4<sup>th</sup> ed, Butterworths, 1988. ISBN 0 409 03325 1 at page 124.

13.2. *“Hearsay evidence is evidence of statements made by persons not called as witnesses which are tendered for the*

*purpose of proving the truth of what is contained in the statement; ...”*

Per Watermeyer J, in ESTATE DE WET vs DE WET 1924 CPD 1924 at page 343.

On the strength of the above – cited authorities the allegation made by Ms Gugu Makhanya regarding the date and time of delivery of annexure GM4 to the Respondent is inadmissible.

14. The Court has noted that the Respondent has not denied that it had a receptionist who signed his/her name as ‘ZM’. Ms Gugu Makhanya’s affidavit indicates that the said ‘ZM’ is known to the Respondent and has authority to receive service of documents on behalf of the Respondent. That receptionist who is identified as ‘ZM’ has not denied the Applicant’s allegation that on the 18<sup>th</sup> May 2015 he/she received delivery on behalf of the Respondent of annexure GM4 from the Applicant. The Applicant’s evidence regarding delivery of annexure GM4 is uncontroverted and is accordingly acceptable.

15. Ms Gugu Makhanya explained in her affidavit the reason she sought to withdraw the offer of employment which had been made to the Applicant. She testified as follows: in her affidavit.

*“The recruitment was carried out through a recruitment agency KPMG Advisory Swaziland (Pty) Limited. The position of Human Resources and Corporate Services Manager was to report to me.*

*7 The recruitment agency shortlisted five candidates and further ranked them in accordance with their interview scores. The applicant was ranked third.*

*At the conclusion of the recruitment process, an offer was made to the first ranked candidate who regrettably turned down the position as she was not happy with the package.*

*8. An error then occurred, when an offer was made to the applicant instead of the second best candidate.”*

(Underlining added)

(Record page 20-21)

16. The evidence of Ms Makhanya reveals that the Respondent outsourced the exercise to recruit the potential Human Resources and Corporate Services manager to an agency. That agency namely: KPMG Advisory Swaziland (Pty) Ltd, carried out its mandate to completion. A shortlist of five (5) candidates was forwarded to the Respondent. Thereafter the Respondent began the process of employing the said manager - duly guided by the shortlist that the KPMG agency had provided. Ms Makhanya represented the Respondent in offering employment to the selected candidate who had been placed in first position. That candidate allegedly turned down the Respondent's offer of employment on the basis that she was not pleased with the package that had been offered. According to Ms Makhanya she proceeded to make an offer of employment to the candidate who had been placed in second position.

17. According to Ms Makhanya she made an error in offering employment to the Applicant who was placed in third position. Ms Makhanya stated that she erroneously thought that the Applicant was in second position. In the course of argument the Respondent's counsel applied to Court to hand – over bar, a report from KPMG agency in order to support the Respondent's case. The Respondent's intention was to refer to the contents of the report in order to prove that the KPMG agency had ranked the Applicant in third position among the candidates that had been shortlisted. The Applicant's counsel opposed the Respondent's application.

18. The Applicant raised two (2) grounds for opposing the filing of the KPMG report in the manner proposed by the Respondent. Firstly, the Applicant complained that the report had been prepared by KPMG agency and not the Respondent. That report is therefore hearsay and is accordingly inadmissible to prove the truth of its contents.

19. The portions of the affidavit of Ms Makhanya which have been reproduced above and underlined emphasize the point that the recruitment of suitable candidates for the said position was done by KPMG agency who presented their finished work to the Respondent in a report form. Ms Makhanya received from KPMG agency a duly completed report and was not part of the KPMG agency that carried out the recruitment exercise. Ms Makhanya as well as the Respondent relied on the contents of the KPMG report in order to determine which of the candidates had been ranked first, second or third. Ms Makhanya is therefore stating before Court that the Applicant had been ranked in third position because the KPMG report says so. Ms Makhanya is not the author of the report. The Applicant was legally justified in objecting to the filing of the KPMG report in the manner proposed by the Respondent.

20. The second ground of objection is that the KPMG report had not been filed in Court with the answering affidavit. The Applicant

could not therefore respond to the report when drafting his replying affidavit.

21. The Respondent admitted that the KPMG report was not among the opposing papers that they had filed in Court. The omission was both deliberate and strategic. According to the Respondent the KPMG report contains highly sensitive and therefore confidential information. If the report had been filed with the opposing papers there was risk of it landing in the wrong hands and subsequently in public domain. There are third parties (whose names appear in the report) whose reputation would be tarnished if the contents of the report were read by members of the public. In order to protect the interests of those third parties the Respondent refrained from filing the said report.

22. There is no doubt that the Respondent considered the KPMG report an important document in support of its defence – hence the Respondent’s attempt to hand in the said report over bar. There are rules that regulate the filing of supporting documents, as well as any other form of evidence, in Court. The Respondent, just like

any other litigant, has a duty to obey the rules and also comply with Court procedure regarding filing of supporting documents.

22.1 Rule 6(12) of the High Court rules provides that:

*“Any person opposing the grant of an order sought in the notice of motion shall:*

*a) ...*

*b) within fourteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents;”*

(Underlining added)

22.2 In Rule 28(a) of the Industrial Court rules, it is provided that the High Court rules are *mutatis mutandis* applicable at the Industrial Court.

22.3 The aforementioned rule 6(12) makes it mandatory for a respondent who decides to file an answering affidavit to simultaneously file with that affidavit any relevant document that the respondent may need to use in Court. In

motion proceedings, a litigant who refrains from filing a document that it considers relevant to its case or defence, is actually denying itself a chance to use that document in its argument.

22.4 It was open to the Respondent to file in Court – together with its answering affidavit, any of the documents it considered relevant including the KPMG report. Where necessary, the Respondent could then apply to Court for an order that would protect such documents as it may consider sensitive; from the public eye. After hearing both parties – the Court would then be in a position to exercise its discretion on the matter.

22.5 The Respondent's argument is that since it had mentioned the KPMG report in its answering affidavit, there was no need to further file the actual report with the answering affidavit. The Respondent's stratagem was to hold on to the report until it was the Respondent's turn to present its argument in Court. That would be a convenient time for the Respondent to release the report both to the Applicant

and the Court. The Respondent would then refer to the contents of the report in support of its argument.

22.6 That thinking on the part of the Respondent is wrong for two (2) reasons.

22.6.1 Since the Respondent had filed an answering affidavit and omitted to concurrently file the KPMG report, that omission denied the Applicant his legal right to critically examine the report and address its contents in the replying affidavit. The Applicant could not have challenged a report in his replying affidavit which he is not in possession of.

22.6.2 When the Applicant's counsel presented his initial argument before Court, he was ignorant of the contents of the report. The Applicant was accordingly denied his legal right to address the contents of the report in his initial argument – as assisted by counsel.

22.7 The manner the Respondent proposed to file the report was prejudicial and unfair to the Applicant. The Respondent's conduct amounted to taking the Applicant by surprise. The reason the justice system has – established rules and clearly – define procedure regarding filing of documents in Court as well as presenting argument before Court is to prevent and condemn ambush litigation.

22.8 The Applicant was justified in objecting to the manner the Respondent proposed to file the KPMG report.

22.9 The Court ruled in favour of the Applicant. The manner the Respondent proposed to hand-in the KPMG report was irregular as well as prejudicial to the Applicant and it would (if allowed), have resulted in a miscarriage of justice. There was no application filed before Court to condone that irregularity.

22.10 If the proposed filing of the KPMG report had not failed for being in breach of the rule against hearsay evidence, it would have failed for being in breach of Rule 6(12) which

rule sets out an established Court procedure regarding filing of documents in Court.

23. Thereafter the argument moved in another direction, the question was: whether or not the parties concluded a contract of employment at the time of delivery of the letter of acceptance (annexure GM4). The Court has already made a finding that the Respondent's offer dated 15<sup>th</sup> May 2015 was accepted by the Applicant on the 18<sup>th</sup> May 2015. The acceptance was also communicated to the Respondent on the 18<sup>th</sup> May 2015.
24. On the 19<sup>th</sup> May 2015 Ms Gugu Makhanya sent the Applicant an email in which she purported to withdraw the letter of offer dated 15<sup>th</sup> May 2015 (annexure GM1). The email is marked GM 2 and reads thus:

*“Subject: Withdrawal of Letter of Offer*

*Hi Goodman,*

*I have no better way of communicating this.*

*Soon after sending you the letter of offer, we realised that we have selected you in error. The interview report from our recruitment consultants indicates that another candidate fared better than you.*

*So in the spirit of recruitment fairness, sadly I have to notify you that FSRA is withdrawing the letter of offer emailed to you on Friday 15 May 2015.*

*Any inconvenience is regretted.*

*Kind regards*

*Gugu Makhanya”*

(Record page 33)

25. A contract comes into existence when an offer by one party is accepted by the other. A simple and yet helpful definition of a contract is provided by Solomon J in WATERMEYER vs MURRAY 1911 AD 61 at page 70, when he states that.

*“For every contract consist of an offer made by one party and accepted by the other.”*

A contract came into existence between the Applicant and the Respondent on the 18<sup>th</sup> May 2015 when the Applicant communicated to the Respondent his acceptance of the offer. The terms and conditions of that contract are contained in the document itself (annexure GM4) which is reproduced in paragraph 6 above.

26. The Respondent's argument is that it withdrew its offer on the 19<sup>th</sup> May 2015 and therefore there is no contract between itself and the Applicant. As aforesaid the Court has already determined that a contract came into existence between the parties on the 18<sup>th</sup> May 2015. The Respondent's subsequent withdrawal of its offer had no legal effect. When a contract is formed the ingredients thereof, for instance, offer and acceptance, cease to exist as individual elements as they have become blended together inextricably to form a new entity called – contract. Since the offer has ceased to exist (when the contract came into existence) it is no longer open to the offeror to withdraw it.

27. The Respondent argued further that the offer (annexure GM1) is subject to certain conditions which have not been satisfied by both parties. A portion of the offer reads thus:

*“In order to accomplish these objectives, the FSRA should at all times maintain high standards of Corporate Governance, including hiring staff with high level of integrity. In light of the above, if you should accept this offer, in addition to conducting a character and work ethics background check with references provided by you, we would like for you to provide us with the following information:*

- *Credit report from accredited Bureau (such as ITC)*
- *Police clearance report*
- *A statement disclosing any ownership in any institution regulated by the Financial Services Regulatory Authority as well as directorship on the Boards of these institutions.”*

According to the Respondent a contract of employment between itself and the Applicant could only come into existence once the

conditions mentioned in the offer are satisfied. The Respondent stated that since receipt of the *'Acceptance Letter'* it had not conducted a background search on the Applicant's character and work ethics. The Applicant has also not provided a credit report, police report as well as a statement disclosing his ownership of shares and/or directorship in boards of organization that are regulated by the Respondent. The Respondent added that a contract of employment between itself and the Applicant could not be concluded in light of the conditions that are outstanding. In reply, the Applicant argued that the Respondent's purported withdrawal of the offer interfered with the process of furnishing the requisite security documents. In other words the Applicant is saying he would have complied with his obligation had the Respondent not served a purported withdrawal of the offer.

28. The Respondent's latter argument is clearly unfair and improper. Neither in the letters written to the Applicant nor the answering affidavit did the Respondent call upon the Applicant to provide the requisite security documents. The Respondent cannot therefore be

heard to complain that the Applicant has failed to meet the conditions in the contract when infact the Respondent, by its conduct, denied the Applicant an opportunity to comply. The Applicant was told a day after he accepted the offer that, that offer had since been withdrawn. Between the day the offer was accepted and the day of the purported withdrawal of the offer, the Applicant could not reasonably be expected to have met the said conditions.

29. The contract did not stipulate a time limit within which the parties were required to comply. That meant that the principle of: reasonable time for performance – applied. Regarding the filing of security documents the Applicant is in the same position he was in immediately after accepting the offer. The Applicant as well as the Respondent, has reasonable time to comply with the conditions.

30. Another item of defence which the Respondent raised was that:

*“The applicant did not become an employee of the respondent. He never tendered performance; he never*

*worked and did not accept the offer before the withdrawal.”*

(Underlining added)

(Record page 28)

30.1 The Respondent’s allegation that the Applicant ‘...*never tendered performance*’ and that “... *he never worked*” is incorrect, misleading and unfair. When the Applicant signed and delivered the ‘*Letter of Acceptance*’ he was thereby communicating his willingness and readiness to work for the Respondent. The Respondent did not inform the Applicant of the day the latter was to begin work nor did they give him access to both the work-tools and the workplace. The Respondent failed to do what is expected of an employer who has engaged a new employee.

30.2 When Ms Gugu Makhanya sent the Applicant her purported withdrawal of the offer, she did not simultaneously or subsequently invite the Applicant to begin work or to tender performance. On the contrary Ms Gugu Makhanya was fiercely opposed to the idea of the

Applicant joining the Respondent as an employee, instead she preferred another candidate.

30.3 When the Applicant received the letter in which Ms Gugu Makhanya purported to withdraw the offer, he immediately challenged that letter by writing another (annexure GM5). The Applicant's conduct and the contents of annexure GM5 indicated an intention to uphold and comply with the contract (annexure GM4), Ms Gugu Makhanya is not being honest with the Court in the evidence that she gave in this instance. Her evidence is self-contradictory.

30.4 The question; how and when did the Applicant accept the offer has already been dealt with in the preceding paragraphs and the Court has decided that issue.

31. The Respondent pointed out further that there are material disputes of fact in this matter which cannot be resolved on the affidavits, instead oral evidence should be led on the issues in dispute.

31.1 The Respondent referred to the supporting affidavit of Makhosazana Dlamini where it reads as follows:

“4. *In particular, I wish to confirm that in the morning hours on Monday 18<sup>th</sup> May 2015, I received a telephone call from the applicant, requesting for a copy of the contract of employment, so that he could consider it before deciding on whether or not to accept the offer of employment. I indicated to the applicant that I would forward his request to the substantive general manager Ms Gugu Makhanya.*

5 *Later in the afternoon of the same day, the applicant again called to enquire whether I had been able to obtain a copy of the contract, to which I replied to the negative. I explained that he will have to wait for Ms Makhanya to return to the office the following Monday, 25 May 2015, since I did not have access to the contract.”*

(Record page 40)

31.2 The Applicant replied as follows to the affidavit of Makhosazana Dlamini:

*“9 I have noted the averments contained herein and I admit that I had a conversation with one MAKHOSAZANA DLAMINI on the 18<sup>th</sup> May 2015 and enquired as to when we can sign a full contract. On the same date, namely the 18<sup>th</sup> May 2015, I submitted my letter of acceptance at the reception area of the Respondent and I explained the purpose of the letter to the lady I found at the reception area at that time.”*

(Record page 49)

32. The Court does not see any serious or material dispute of fact between the Applicant’s version and that of Ms Makhosazana Dlamini, concerning the events of the 18<sup>th</sup> May 2015 particularly the telephone conversation.

32.1 Ms Dlamini has stated that she received a telephone call twice on the 18<sup>th</sup> May 2015 from the Applicant who inquired about a proposed draft contract. The

Applicant allegedly desired to read the draft contract before deciding on the offer (annexure GM1). The draft contract was not available at that time.

32.2 The Applicant admitted that he called Ms Dlamini concerning the draft contract. The Applicant inquired when the parties could sign that draft contract hence the Applicant was eager to have access to it.

32.3 There is no dispute between the version of the Applicant and that of Ms Makhosazana Dlamini concerning their telephonic discussion of the 18<sup>th</sup> May 2015. It is however correct to say that each of the parties has concentrated on different details of that conversation, When they drafted their respective affidavits. But neither witness is disputing the version of the other. The fact that the Applicant inquired about a draft contract did not preclude him from signing the offer (annexure GM1) and thereafter

deliver it to the Respondent the same day of the telephonic discussion.

33. The principal issue before Court is whether or not the Applicant communicated acceptance of the offer to the Respondent on the 18<sup>th</sup> May 2015. As aforesaid, the Court has already decided that issue in the Applicant's favour. The conversation that took place between the Applicant and Ms Dlamini does not affect the issue before Court. Ms Dlamini does not dispute the Applicant's evidence that on the 18<sup>th</sup> May 2015 the Applicant delivered a '*Letter of Acceptance*' at the Respondent's workplace to the receptionist. Ms Dlamini does not say that it was impossible for the Applicant to deliver a duly signed acceptance letter to the Respondent on the 18<sup>th</sup> May 2015. The evidence of Ms Dlamini does not therefore raise a material dispute of fact. The issue before Court is capable of being resolved on the affidavits and it has been resolved.

34. The alleged dispute of the fact does not exist as a fact but it is a trick that has been designed by Ms Gugu Makhanya to achieve her own goal. Ms Gugu Makhanya has falsified the evidence of Ms

Makhosazana Dlamini in order to create an impression that a material dispute of fact exists in this matter.

34.1 An extract of the evidence of Ms Gugu Makhanya which the Applicant finds objectionable read thus:

*“Second, the applicant had clearly indicated to Makhosazana Dlamini, that he would not accept the offer until such time as he had seen the contract of employment.”*

34.2 The statement that is attributed to Ms Makhosazana Dlamini by Ms Gugu Makhanya is totally different from the actual affidavit of Makhosazana Dlamini. In her affidavit Ms Makhosazana Dlamini did not say that: the Applicant said *“he would not accept the offer until such time as he had seen the contract of employment.”* This latter statement has been invented by Ms Gugu Makhanya cunningly with an intention to deceive the Court. The said extract is not part of the evidence of Ms Makhosazana Dlamini.

34.3 The Respondent's argument that there are material disputes of fact in this matter; has no substance and it is accordingly dismissed.

35. There is nothing wrong in an employee accepting an offer of employment a day after resigning from his previous employer. The Applicant's relationship with his previous employer does not affect the contract that was concluded between the parties on the 18<sup>th</sup> May 2015. The Applicant's previous employer has not denied that the Applicant tendered his resignation. The Respondent's complaint concerning the Applicant's relationship with his previous employer has no relevance in the application before Court and it is accordingly dismissed.

36. The Applicant succeeds in this application and is entitled to be awarded costs. A considerable amount of work has been done and costs have been incurred by the Applicant in prosecuting this claim. The principle that costs follow the event, applies in this case.

Wherefore the Court orders as follows:

- 36.1 A contract of employment was concluded between the Applicant and the Respondent on the 18<sup>th</sup> May 2015 in terms of annexure GM4 to the application.
- 36.2 The Respondent is directed to comply with that contract with effect from the date of this judgment.
- 36.3 The Respondent is further directed to pay costs of suit.



Members agreed

D. MAZIBUKO  
INDUSTRIAL COURT-JUDGE

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