



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JR 2159/09

In the matter between:

SAMWU obo HLONIPHO MM

Applicant

and

SALGBC

First Respondent

MATLALA N.O

Second Respondent

EKURHULENI METRO

Third Respondent

Heard: 29 January 2013

Delivered: 22 March 2013

Summary: Review of a jurisdictional ruling where the second respondent dismissed the applicant's claim on the basis that the applicant failed to establish the existence of a dismissal

JUDGMENT

MOSHOANA, AJ

Introduction

- [1] This is an application to review and set aside an award issued by the second respondent acting under the auspices of the first respondent.
- [2] The second respondent found that Hlonipho failed to establish the existence of a dismissal and dismissed her claim with costs.

Background facts

- [3] During 1996, Hlonipho was employed as a Head of the Health Department of the defunct Alberton Municipality. Following the amalgamation of the various municipalities in the region to form the third respondent, Hlonipho was deployed to manage the HIV and AIDS unit of the third respondent.
- [4] Following decisions of the Local Labour Forum, Hlonipho was not satisfied with her working conditions and lodged a grievance against Dr Mashazi and Mrs. Botha. Hlonipho lodged a grievance on 10 July 2007 alleging victimization and intimidation into agreeing with changes that are still being sorted out by the office of DCM Mr. Sibeko. This grievance was not resolved internally and was referred to the Bargaining Council. On 3 September 2007, Hlonipho completed an internal form indicating that she requested to take an early retirement. Both Dr Mashazi and Mrs. Botha signed the form. On 4 September 2007, Hlonipho sought to withdraw the early retirement form. Botha sought to escalate the request to the Executive Director and requested the personal outstanding matters raised by Hlonipho. Hlonipho obliged. With no response, Hlonipho continued with her normal duties.
- [5] On 25 September 2007, the due date for salaries, Hlonipho was not paid a salary. She was advised that her request to withdraw her application was not approved. On 4 October 2007, Dr Mashazi formally informed Hlonipho that her withdrawal was turned down. Instead her request was upheld for early retirement. She attempted to meet with the relevant officials in order to discuss the withdrawal but to no avail. On 6 October

2007, she found her office locked. She also received a letter confirming that her last day of work was 28 September 2007 and that she should return the properties of the third respondent and removed her personal belongings from the office.

- [6] She referred a dispute of alleged unfair dismissal to the first respondent. At arbitration, the third respondent challenged the jurisdiction of the first respondent. On 18 February 2009, Commissioner Serero issued a ruling to the effect that the first respondent had jurisdiction to entertain the dispute.
- [7] On 23 March 2009, the dispute was again enrolled for arbitration. There the second respondent was to decide whether the third respondent's refusal to accept the withdrawal of Hlonipho's application for early retirement constituted a dismissal. If he finds that there was dismissal, then he must determine the fairness thereof. Having listened to evidence, he came to the conclusion that Hlonipho was not dismissed. Aggrieved thereby, the applicant launched this application on behalf of Hlonipho. The application is duly opposed by the third respondent.

Evaluation

- [8] The question whether an employee has been dismissed is a jurisdictional fact. In other words if there is no dismissal as a fact, the first respondent had no arbitral powers in terms of the LRA. Generally speaking a public authority is obliged to determine the scope of its own powers before it can act. In doing so it cannot finally determine its competence, because if it wrongly decided that it had jurisdiction, its decision may be reviewed on objectively justiciable grounds. The determination of the existence of a jurisdictional fact is left to the public authority to determine. The nature and the extent of judicial review will depend on whether the determination was left to its subjective discretion in terms of the empowering statute or whether the determination had to be made on the objective grounds. See *SACCAWU v Specialty Stores Ltd.*¹

¹ [1998] 4 BLLR 352 (LAC).

[9] In SACCAWU, the LAC found that where the public authority has decided that a state of affairs existed, the question is whether, the repository of power decided that it did subjectively. In the matter before me, the repository of power-second respondent decided that the state of affairs did not exist. In that regard it is necessary for this court to enquire whether, objectively, dismissal existed. (See *Pinetown Town Council v President of the Industrial Court and others*² quoted with approval in *Shell SA Energy (Pty) Ltd v NBCCI* case number JA 42/10 delivered on 12 December 2012.

Was Hlonipho dismissed on the objective facts?

[10] In determining this question sight out not be lost that this court is exercising review powers and is not having the same benefit as the second respondent. It deals *with the matter on the basis of* assessing objective facts for itself to decide whether the second respondent was wrong or right in concluding that the jurisdictional fact exist or not. The same material properly placed before the second respondent will guide the court.

[11] In terms of section 192 of the LRA, the onus to establish whether a dismissal existed lies on an employee. In this case, it was the duty of Hlonipho to establish by way of evidence whether she was dismissed. Dismissal as a fact ought to exist before the power to enquire into its fairness. Section 186 provides a meaning of dismissal. There are six instances where it could be found that dismissal occurred within the meaning of the section. Those are, 1 when the employer overtly terminate a contract of employment, 2 when an employee reasonably expects renewal and it does not happen, 3 when an employer refuses resumption of work after maternity leave, 4 when an employer refuses to re-employ another, 5 when an employee terminated because of intolerable employment (constructive dismissal) and 6 when employee terminated after transfer with less favourable conditions.

² 1984 (3) SA 173 (N)

- [12] In the matter before me, there is a contention that the first instance occurred alternatively the fourth instance-constructive dismissal. Starting with the first instance, I must be able to find that the third respondent overtly terminated the employment contract or not. The contention of the applicant being that Hlonipho having being allowed to work until 4 October 2007, she was dismissed when her office was locked and was told to return the properties of the third respondent. In that manner, so the contention went, Hlonipho was dismissed.
- [13] This contention seems to be oblivious of what happened on 3 September 2007. On this day, Hlonipho signed a form, which was titled: 'Resignation/Termination Form. The reason she provided for resignation was retirement. The effect of this in law is that she was herself terminating her employment. A resignation is a unilateral act and it requires no acceptance by the employer. In such instances, where an employee resigns, there is no dismissal.
- [14] The question that remains is whether Hlonipho resigned voluntarily or not? That brings into the picture the fourth instance referred to above. The objective facts suggest amongst others that the reason for resignation was mentioned by Hlonipho as retirement. On the termination form she repeated the reason twice. Firstly by putting a cross on a particular block and writing the reason on a column requiring the reason for resignation. On 4 September 2007, when she sought to withdraw, she did not attempt to give any other reason for her resignation. Her evidence at arbitration on this score was as follows: 'On that, the previous days there was so much pressure I had attended meetings where, meetings with staff members that I felt I lacked authority over because they now had to deal with operational issues, to deal with the executive director, deal with the member of mayoral committee and I really felt really, really felt hurt and I just felt like I wanted to go and also made me feel so bad was that my issues were not addressed instead of them being addressed things were continuing in a way that was affecting me emotionally. I had discussed these issues with my children at home and they felt that it is affecting my health; my health status and my children insisted that I

should continue with the case. When I left home I was going to contact the union so that we can proceed with the follow-up of the cases but when I got to the office and that morning I got an email from the office of the director Ms. Botha, and I just lost it. I downloaded a form and just said I cannot handle it anymore. I filled the form, took it to her office very early in the morning and requested her to sign for me.'

- [15] From her evidence above, it is apparent that what made her to 'loose it' was the email from Ms. Botha. There is no evidence pointed to me where that email occurred and what says that made Hlonipho to loose it. However her evidence in this application is that: 'On or about 3 September 2007 after I discovered that Mrs. Botha had addressed staff in my absence about the details of my grievances and the fact that certain of my responsibilities had been removed from me and handed to one of my subordinates, I became extremely upset and emotional and felt that I could no longer handle my working situation. As a result, I completed an internal form indicating that I wished to take early retirement. I took the form to both Mrs. Botha and Dr Mashazi who both signed the form.'
- [16] From this evidence, she decided to complete the form because of her discovery that her grievance was discussed and that responsibilities were removed. In her cross-examination at arbitration she testified that for her refusal to accept her withdrawal amounts to a dismissal. She confirmed that the resignation form referred to P62 in the record, terminated the employment relationship.
- [17] On the other hand the evidence of Botha at arbitration was that she just handed the form on the day unexpectedly. She was not challenged on this score.
- [18] It is patently clear to me that Hlonipho overreacted and was not constructively dismissed. In any event her case was not that she was but her case was that refusal to accept a withdrawal amounts to dismissal. In terms of section 186, it does not. For a dismissal to obtain in the fourth instance referred to above, the employer must make continued

employment intolerable for the employee. The test is an objective one. This is not a resignation in the heat of a moment. Hlonipho took time to download the form; completed it and hand delivered it to Mrs. Botha. This in my view was a calculated move given her own evidence that there were unresolved issues.

- [19] In the circumstances I accept that Hlonipho on the objective facts was not constructively dismissed within the meaning of section 186. I cannot accept that the actions of the third respondent refusing her access to her office and ordering her to return the possessions amounted to a dismissal. At that time, Hlonipho herself had terminated the employment relationship. The fact that, whilst her attempt to withdraw her resignation was being considered, she continued with her work does not detract from the fact that she terminated her employment. As proof that the third respondent did not recognise her reporting as a normal one she was not paid on the payday.

Order

- [20] In the results, I make the following order:

1. The application for review is dismissed with costs.

Moshoana, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate FA Boda

Instructed by: Cheadle Thompson & Haysom, Braamfontein

For the Third Respondent: Attorney S Masina of Tshiqi Zebediela Incorporated,
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LABOUR COURT