REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P160/11

In the matter between:

MELINDA BOTHA **Applicant**

and

CCMA **First Respondent**

FEIZAL FATAAR N.O **Second Respondent**

NATIONAL HEALTH LABORATORY SERVICES **Third Respondent**

Heard: **19 February 2013**

Delivered: **22 February 2013**

Summary: Review of an award in instances where the Arbitrator found that the applicant was not dismissed exercised jurisdiction and reinstated her without back pay.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an application to review and set aside an award issued by the second respondent under the auspices of the first respondent. The strange feature of this application is that the award issued favours the applicant in the sense that she has been reinstated-a primary remedy in the LRA. I could not help it but to inquire from Le Roux appearing on behalf of the applicant why the applicant seeks to overturn a favourable award. Shockingly, I was informed that the applicant wished to have a ruling that she was dismissed so that she could benefit from the available reliefs of reinstatement with back pay and or maximum compensation. This did not make sense to me. I thought that employees approach dispute resolution bodies with one aim-to retain their jobs. Another strange feature is that the third respondent-the employer seeks to defend an award not favourable to it. Nonetheless, I am seized with the matter and have to deal with it with all its features.

[2] The second respondent concluded the arbitration by stating that the applicant, Melinda Botha, is reinstated on the same terms and conditions of employment not less favourable than those that existed as per the employment agreement entered into in October 2008. The applicant, Melinda Botha, must report for duty by no later than 1 March 2011. The applicant is not entitled to any back pay from 1 June 2010 until the date that she returns to work. As pointed out above, the applicant was rather surprisingly aggrieved by the award and launched this application. In turn, the third respondent opposes the application.

Background facts

[3] On 8 October 2008, the applicant and the third respondent entered into an agreement, in terms of which, the third respondent appointed the applicant with effect from 1 December 2008 until 31 May 2010 as a Medical Technologist (Student) in the Port Elizabeth Histopathology Laboratory. She was to report to Mrs Jenny Grewar, Manager,

Laboratory. In terms of clause 1.3 of the said agreement, the third respondent agreed to appoint the applicant automatically upon completion of the requirements for registration as a Medical Technologist with the HPCSA, including the passing of the Board Examination. The third respondent reserved the right to the placement of the applicant.

[4] During March 2010, the applicant completed the requirements for registration as a Medical Technologist. Around 29 March 2010 or thereabout, the third respondent approached the applicant with an employment agreement seeking to appoint her as a Medical Technologist in the Coastal Region, reporting to Ms Nomaqhiza. The applicant objected to this appointment on the basis that she and her fiancee are stationed in Port Elizabeth and cannot relocate to Mthatha-the Coastal Region. An attempt was made to persuade the applicant to accept the offer. On 7 May 2010, the applicant addressed a letter to the third respondent alluding to the fact that she was aware that her employment contract was expiring on 31 May 2010 and her rights were reserved.

[5] Come 31 May 2010, the applicant had still not accepted the offer of employment by signing the employment agreement. Owing to that, Grewar approached the applicant with a form headed 'Termination Notification'. The form was already completed, with the reason for termination as 'End of Contract'. The last working day was indicated on the form as 31 May 2010. The applicant refused to sign the form. On the same day, the applicant through T D Potgieter Attorneys, demanded her UI19 form and recorded that she was instructed to hand in her access card. It is apparent that around September 2010, the applicant found employment. It is also apparent that the third respondent sought to claim some money from the applicant for failing to honour the agreement. Until end of August 2010, there was exchange of letters from the applicant's attorneys and the third respondent regarding the claim and certificate of employment. There were threats of approaching the Labour Court to enforce rights in terms of the BCEA. In the meanwhile, on 22 June 2010, the applicant referred a dispute of an alleged unfair dismissal to the first

respondent. On 21 July 2010, the dispute was enrolled for Con/Arb. The third respondent objected to Con/Arb. On 21 July 2010, the disputes was conciliated. On 9 December 2010, the second respondent arbitrated the dispute. On 2 February 2011, she published her award.

Evaluation

[6] At the commencement of the matter, I enquired from both representatives, whether the court should treat the review as one of the so-called jurisdictional reviews, since the question whether the applicant was dismissed or not is a jurisdictional aspect? Both representatives answered in the affirmative. The test to be applied is whether on the facts objectively viewed, there was dismissal to a point that there was jurisdiction.[1] Strictly speaking, this is a matter where the second respondent accepted jurisdiction. However, the applicant challenges her finding that the applicant was not dismissed. In that regard, she found - given that the respondent had not dismissed the applicant and given that the applicant has not repudiated her contract, it is my view that the contract of employment is still effective and binding upon the parties. Ordinarily, I would have expected the third respondent to be aggrieved by this finding since its argument of repudiation was rejected. It is apparent that this finding was influenced by an interpretation of clause 1.3 of the agreement of 8 October 2008. She also found that reliance on a notification letter was unfounded and from the facts the applicant was not dismissed. It is this finding that the applicant contends is not borne out by the objective facts. It was on the strength of that that I inquired as alluded to above. I have to find that on the objective facts placed before the second respondent was she correct in answering the jurisdictional fact that the applicant was not dismissed.

[7] The objective facts are that on 31 May 2010, the third respondent asked the applicant to sign a termination notice. Logically, the applicant having refused to sign the termination notice, she was effectively refusing to

[1] See in this regard *SAPS v SSBC and Others* [2012] 33 ILJ 453 (LC) and the authorities cited therein.

terminate her employment. The notice states- 'I, the undersigned hereby tender my termination as employee of your department'. From her evidence at arbitration, the applicant left employment after the termination letter indicated that she repudiated the agreement. In her own version, the third respondent did not overtly mention to her that she was dismissed. Her state of mind was not that she did not want to carry on with the third respondent. A further objective fact is that on 29 March 2010, the applicant was effectively offered an appointment as a permanent employee. The agreement was only signed by the third respondent. The fact that it was only signed by the third respondent only does not render it not binding.

[8] I cannot find fault in the reasoning that the usage of the phrase extrapolated above, does not reflect an interpretation that the third respondent was terminating her services. I also find that nowhere in the notification is there a recordal that the third respondent was terminating her services. In view of the fact that the third respondent had wished the applicant to report at Mthata, the request to hand in her access card does not suggest that she was dismissed. If the handing meant dismissal, then it would have been incongruent for the third respondent to still wish to have her at its premises in Mthata. On 3 July 2010, the third respondent still called upon the applicant to honour her contract of employment. To the extent that the non repudiation finding has not been challenged, it is unnecessary to entertain any argument of whether repudiation leads to a dismissal or not. Le Roux relied heavily on the judgment of the LAC in *SACWU v Dyasi* [2001] BLLR 731 (LAC).

[9] This case does not apply in this matter. The second respondent was correct in concluding that since there was no evidence of an intention not to be bound by the employment agreement, there was no repudiation. That being so, the third respondent was not put to any election. On the facts of this case, there was not repudiation proper. What obtained was a simple refusal to report at a particular station. As correctly pointed out by Ram appearing for the third respondent the evidence points that the issue was place of reporting and nothing else. It was not a case of some

objectionable terms of an employment contract that will demonstrate any bad faith on the part of the third respondent.

[10] Although the second respondent did not disavow jurisdiction, I cannot find that on the objective facts, the fact that the applicant was not dismissed-a jurisdictional fact, is wrong on any basis. That brings me to the question of costs.

[11] As pointed out above, I find no logical basis for the applicant to have launched this application seeking to review what appears to be a favourable award. I would have expected the third respondent to have pursued a review application. In my view, the application was ill founded and ought not to have been launched. In my mind, what persuaded the applicant to launch the application, it seems she had hoped for a financial award. It is common cause that since September 2010, she found another employment. The award having been handed down in February 2011ordering reinstatement without financial benefit was of no value to her it seems. In terms of section 162 of the LRA, costs should be awarded on the basis of the law and fairness. In law a successful party ought to be reimbursed. The third respondent having being successful in opposing the application, I see no basis why in law, it should not be awarded costs. In fairness, the third respondent chose to live with what appears to have been a reviewable award. Having made that difficult choice in the light of the conduct of the applicant to refuse to sign a contract simply on the basis of the location, it will be unfair to have the third respondent mulcted with costs of an ill founded application.

Order

[12] In the results, I make the following order:

[13] The review application for review is dismissed with costs.

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Moshoana, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Attorney F Le Roux
	Of Francois Le Roux Attorneys, Port Elizabeth.
THIRD RESPONDENT:	ADV R RAM
	Instructed by Cliffe Dekker Hofmeyr Inc.