

SOUTH AFRICA / JUDGMENT

Black Affairs Administration Board, Western Cape and Another v Mthiya (25/84) [1985] ZASCA 85 (16 September 1985)

[1985] ZASCA 85

COURT

Supreme Court of Appeal

BEFORE

Jansen, Kotzé, Botha, Van Heerden, Hefer

CASE / FILE NUMBER

25/84

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Case no 25/84

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BLACK AFFAIRS ADMINISTRATION BOARD, WESTERN CAPE

and

MUNICIPAL LABOUR OFFICER, LANGA

- and -

MDANWENI ELLIOT MTHIYA

JANSEN JA.

M C

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between

BLACK AFFAIRS ADMINISTRATION BOARD,

WESTERN CAPE First Appellant

MUNICIPAL LABOUR OFFICER, LANGA Second Appellant

MDANWENI ELLIOT MTHIYA Respondent

Coram: JANSEN, KOTZÉ, BOTHA, VAN HEERDEN, HEFER JJA.

Heard: 19 February 1985. Delivered: 16 September 1985.

JUDGMENT

2. JANSSEN JA :-The respondent successfully applied in the Cape of Good Hope Provincial Division for an order against the first appellant declaring that he was entitled in terms of sec 10(1)(b) of Act 25 of 1945 to remain in the prescribed area of the Cape Peninsula and directing the second appellant to endorse his reference book to that effect. The appellants appeal against these orders by leave of this Court. The facts are fully set out in the judgment of the Court a quo (per TEBBUTT J) reported at 1983(3) SA 455(C). They need not be repeated.

The main issue is whether three absences of

the /

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the respondent from the prescribed area, viz for

periods of approximately 6 months, 4 months and 8 months

respectively, disqualified the respondent from invoking sec 10(1)(b) of the Act. This entails an examination of the concept of continuity postulated by the Legislature in this sub-section. The English and Afrikaans texts read as follows :-

"10(1) No Black shall remain for more than seventy-two hours in a prescribed area unless he produces proof in the manner prescribed that -

(a)

- (b) he has worked continuously in such area for one employer for a period of not less than ten years or has lawfully resided continuously in such area for a period of not less than fifteen years, and has thereafter continued to reside in

such /

4.

such area and is not employed outside such area and has not during either period or there= after been sentenced to a fine not exceeding five hundred rand or to imprisonment for a period exceeding six months; or

"10(1) Geen Swarte mag langer dan twee-en-sewentig uur in 'n voorgeskrewe gebied bly nie, tensy hy bewys op die voorgeskrewe wyse lewer dat -

- (b) hy in daardie gebied vir eenwerkgewer vir 'n onafgebroketydperk van minstens tien jaargewerk het of wettiglik in daardie gebied woonagtig was vir 'n onafgebroke tydperk van minstens vyftien jaar, en daarna aangehou het om in daardie gebied te woon en nie buite daardie gebied werksaam is nie en nie

gedurende /

5.

gedurende enige van beide tyd= perke of daarna veroordeel is tot 'n boete van meer as vyfhonderd rand of tot gevangenisstraf vir 'n tydperk van meer as ses maande nie; of

A salient feature is that the English text relates the concept of continuity specifically to "work" and "reside" whereas the Afrikaans text relates it to "tydperk". However, it would seem that for present purposes nothing turns on this (cf *R v Silinga* 1957(3) SA 354(A) 359 F). From the wording of the sub-section in relation to "work" it is clear that two elements are involved:

- (a) the actual doing of work within the prescribed area and (b) a contract of employment in terms of which the

work /

6. work is done. As to continuity, the emphasis falls on the work and not on the contract (*Oos-Randse Administrasieraad v Rikhoto*, 1983(3) SA 595(A), 607 B-C). There is therefore no requirement that the work should be done in terms of one single contract extending over the whole period: consecutive contracts would suffice. In *Rikhoto* (at 608 C-D) it was, however, assumed (without deciding the point) that in the case of consecutive contracts not immediately following upon each other there should at least be an uninterrupted relationship of employment (" 'n deurlopende diensverhouding") throughout and that such relationship could be constituted by a "gemeenskaplike bedoeling dat die respondent

tussen /

7. tussen twee tydperke van n jaar elk, waarin hy aktief vir die maatskappy gewerk het en na verwagting

weer sou werk, teen betaling van sy normale loon

op 'n aantal weke van rus geregtig sou wees (609G-H)."

In principle there would appear to be little difference,

in this context, between the short, paid leave

postulated and leave that is long and unpaid. The

common basic element is the agreement that the employee

will in the future be entitled to resume his work for

the same employer.

Counsel /

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Counsel for the appellant advanced two main contentions. The first was that during the three absences in question no uninterrupted relationship of employment existed but only "a loose understanding" that the respondent would be re-engaged upon his return to Cape Town.

In his founding affidavit the respondent alleged that on each occasion he was granted long leave by his employer, and this was borne out by a supporting affidavit made by his employer's manager. Although the precise duration of the respondent's absence was not determined when leave was granted, the probable inference is that in terms of each arrangement the respondent would have been entitled and obliged to resume his activities as an employee on the completion of his personal business in the Transkei.

Hence / 9. Hence it cannot be accepted that the arrangements amounted to no more than loose understandings. There is, however, some merit in counsel's submission that it does not appear clearly whether it was intended that the preceding contractual relationship would continue or would come to an end (subject to a binding agreement that it would be reinstated at a future date). From the point of view of both the respondent and his employer the precise nature and effect of the arrangements would have been immaterial unless, of course, the respondent's pension and other benefits fell to be calculated with reference to the duration of his employment. It will therefore be assumed in favour of the appellant that during the respondent's three absences there did not exist a contractual relationship/..

10.

relationship of employment.

As already stated, the question whether the concept of continuous work presupposes an uninterrupted relationship of employment was left open in *Rikotho*. But once it is accepted, as was done in *Rikotho*, that

the emphasis falls on the employee's activities and not on the contract between him and his employer, it needs but a small step to hold that such an uninterrupted relationship is not required by sec 10(1)(b). If a contract of employment is lawfully terminated on the last day of a month but the employee re-engaged on the very next day, it can surely not be said that merely because of the lack of a contractual relationship between the termination of the one contract and the inception of the next the employee has not worked continuously for his employer.

Nor /

11.

Nor does it matter in principle whether the break between the two contracts lasted for less or more than a day, although the duration thereof obviously has an important bearing on the requirement of continuity. Take the case where two employees were employed by the same employer for a period in excess of ten years. As regards both A and B the contract of employment provided that in the event of illness the employer would be entitled to terminate it after an absence from work for a period exceeding one month. A and B fell ill on the same day. After a month it appeared to the employer that A would recuperate shortly but that B's indisposition would continue for an indeterminate period. He consequently terminated B's employment. As it happened, both reported fit for

12.. work at the end of the second month when B was re-employed. In the light of the judgment in *Rikotho* it is clear that A's absence over a period of two months did not in itself interrupt the continuity of his work for the purposes of sec 10(1)(b). And having regard to the intention of the legislature as set out in *R v Silinga*, supra, at 360, and in *Rikotho*, it would be anomalous to accept that B would not have been entitled to invoke the provisions of the sub-section merely because in his case there did not exist an uninterrupted relationship of employment. When all is said and done, the fact remains that from a practical point of view it is impossible to draw a meaningful distinction between their employment records in regard to their physical activities as employees.

in / 13.

In *Rikotho* (at 608 A) it was held that the

continuity required by sec 10(1)(b) is not absolute:

an employee could have worked "continuously" despite

physical absence through e.g. illness or the taking of leave.

Hence literal continuity is not required. But clearly it cannot be suggested that absences of whatever length of time and for whatever reason would always fail to break the continuity of work. To formulate precise criteria for determining whether or not in a particular case there has been continuity as required by the sub-section, is, however, neither desirable nor indeed possible. It is a question of degree and the answer to it must be found in the facts of each case. Important considerations would be whether during a period of absence from work there existed a continued contractual relationship of employment, or whether not with=

standing /

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standing a break in the relationship it was agreed that the employee would be re-engaged at a future date. And in most cases it will also be necessary to have regard to factors such as the reasonableness or otherwise of the cause and length of each absence.

Counsel's second main contention was that, whether or not there existed an uninterrupted contractual relationship of employment during the respondent's absences,

the length of each absence was such that there was not the required degree of continuity of the respondent's activities as employee. However, as appears from what has been said above, the duration of an absence from work is not necessarily decisive. At first blush the third absence of some eight months appears to be a formidable obstacle in the way of conclusion that there was nonetheless the required

continuity / 15. continuity of work, but a salient factor is that on the occasion in question, as indeed also on the other two occasions, it was agreed that the respondent would be reemployed on the completion of his personal business. In view of this feature, and the other circumstances surrounding the respondent's three absences from his place of work which are fully described in the reported judgment of the court a quo, I do not think that those absences can be regarded as having been unreasonable in respect of cause or duration. Consequently they cannot be said to have interrupted, in the sense outlined above, the continuity of the respondent's activities as employee.

In / 16.

In my view the Court a quo correctly held that the respondent is entitled to relief in terms of sec 10(1)(b) of the Act "as he has worked continuously for one employer for a period of not less than ten years" in the prescribed area. it is unnecessary to express any opinion in respect of the further question whether the respondent "has lawfully resided continuously in such area for a period of not less than fifteen years". The appeal is dismissed with costs, such costs to include the costs of the applications for leave to appeal to the Court a quo and to this Court and the costs of two counsel.

E.L. JANSBN JA.

KOTZÉ JA)

BOTHA JA) concur. VAN HEERDEN JA) HEFER JA)

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