

SOUTH AFRICA / JUDGMENT

Mtati v KPMG Services (Pty) Ltd (J2277/16)
[2016] ZALCJHB 403; [2017] 3 BLLR 315 (LC);
(2017) 38 ILJ 1362 (LC) (18 October 2016)
[2016] ZALCJHB 403

COURT

Labour Court Johannesburg

BEFORE

Molahlehi E

CASE / FILE NUMBER

J2277/16

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J2277/16

In the matter between:

KALIPA MTATI Applicant and KPMG SERVICES (PTY) LTD Respondent
HEARD: 3 October 2016
DELIVERED: 18 October 2016

SUMMARY: Urgent interdict. The power of the employer to discipline an employee after resigning. First resignation- the employee undertake to serve the notice period. The second resignation- the employee resigning during the notice period without withdrawing the first resignation and the employer not waiving its rights in relation to the first resignation. The second resignation was with immediate effect. Court found that the chairperson of the disciplinary hearing did not have the power over the employee once she resigned before the expiry of the notice period. The ruling and the decision of the chairperson of the disciplinary hearing declared null and void and set aside.

MOLAHLEHI J

Introduction

- [1] This is an urgent application in terms of which the applicant seeks the order to interdict the first respondent from proceeding with the disciplinary hearing after her resignation.

The background facts

[2] The background facts in this matter are fairly common cause. The applicant terminated her employment contract, by resigning. She

submitted two letters of resignation to the respondent. The first letter was submitted after the first respondent informed her that it was conducting an investigation into certain allegations against her. The second letter was submitted after the first respondent had indicated to the employee that it would be commencing with the disciplinary proceedings against her. The first letter of resignation

was submitted on 5 September 2016. In that letter the applicant simply states;

"Please accept this letter as a notice of my resignation."

[3] In addition to being accused of conduct related to conflict of interest the employee was also accused of failing to disclose to the applicant her directorship in several companies which were in competition with the first respondent.

[4] It is common cause that the applicant denied all the allegations which were levelled against her.

[5] In response to the applicant's letter of resignation the first respondent addressed the letter dated 19 September 2016, to the applicant which reads as follows:

"Dear Kalipa

We refer to your letter of resignation dated 5 September, 2016 and confirm that you are currently in your notice period.

We have now concluded our investigation and confirm that you will shortly receive a notice to attend a Disciplinary Hearing. . ."

[6] The understanding of the applicant, as stated in her founding affidavit, was that the notice period would run for 5 September 2016 to 4 October 2016.

[7] The second letter of resignation by the applicant is dated 14 September

2016. The relevant parts of the letter for the purposes of this judgment reads as follows:

"1. It is with deep regret that I must inform you I am resigning from my employment with the KPMG with immediate effect."

[8] The first respondent disputed the validity of the second resignation letter by the applicant in a letter dated 27 September 2016. It contended in that letter that there was only one resignation. The first respondent also indicated that the disciplinary hearing would proceed on the 30 September 2016. The applicant was invited to make representation to the chairperson of the disciplinary enquiry on the 28 September 2016.

- [9] On 30 September 2016, at the disciplinary hearing the applicant raised the preliminary point concerning the jurisdiction of the chairperson of the disciplinary hearing to discipline her in light of her resignation. It was indicated to the chairperson that should she persist with the disciplinary hearing, the applicant would institute an urgent application to interdict her.
- [10] The applicant attended at the hearing with legal representative who was barred from participating in the hearing by the chairperson.

After the chairperson ruled that she had jurisdiction to entertain the matter and that she would be proceeding with the hearing, the applicant together with her legal representative left the hearing. The chairperson then proceeded with the hearing on the same day in the absence of the applicant. At the end of the hearing the chairperson found the applicant guilty as charged and then imposed

the sanction of summary dismissal. The dismissal was consequent to the finding by the chairperson that:

“You were grossly dishonest.

Your position of authority is an associate director.

You have significantly damaged the trust relationship with your employer.

You potentially have caused the reputational damage to the KPMG brand.”

Submissions

by the parties

- [11] Mr Venter, for the respondent argued based on the case of *Lottering v Stellenbosch Municipality*,^[1] that the resignation is a final unilateral termination of the employment contract and once the applicant had submitted the first resignation that was the end of the contract. This means that there was no longer a contract of employment once she resigned. It was further argued that the respondent never agreed to the second resignation and therefore it had no value or effect.
- [12] The other point raised on behalf of the first respondent is that the applicant's application is moot alternatively academic. This is based on the contention that there exists no public policy consideration for the court to intervene in the matter between the parties. The argument is based on the decision in the *National Employers Association of South Africa v Industry Bargaining Council and others*,^[2] where the court held that:

“[6] . . . A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract proposition of law.

- [7] In my view, the mootness of this appeal is plain. The interdictory relief sought is overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now academic.”
- [13] Mr Cassim for the applicant argued essentially that once it is found that the relationship was terminated by the resignation of the applicant then the respondent did not have the right to discipline her. It was on this basis that it was argued that the decision of the chairperson of the disciplinary hearing was null and void.

The legal principles

- [14] The broad principle governing the issue of the power of an employer to discipline an employee who had resigned from his or her employ, is set out in the minority judgment in *Toyota SA v The Commission for Conciliation Mediation and Arbitration and others*,^[3] the case which the applicant relied on in support of her case. The majority in that case dismissed the application for leave to appeal which means that they never considered the merits of the application. It is the minority judgment of Zondo J that dealt with the merits of the application and in this regard held that:

“[142] Another context of resignation is the normal resignation. Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer and that employer does not have jurisdiction over the employee anymore. Indeed, even the CCMA or the relevant bargaining council would have no jurisdiction to entertain a referral of a “dismissal” dispute in such a case because there would be no dismissal as envisaged in section 186 of the LRA. Therefore, if an employee who has validly resigned later refers an alleged unfair dismissal dispute to arbitration under the LRA and it is found that the employee had validly resigned and had not been dismissed, reinstatement would be incompetent.”

- [15] In summary the principle to discern from the above is that an employer has no authority or the power to discipline an employee who resigns from his or her employment once the resignation takes effect. In other words where the resignation is with immediate effect, the employer loses the right to discipline the employee, also with immediate effect.
- [16] The issue of resignation by an employee and its consequences to the power of the employer to discipline can be looked at from two perspectives. The one perspective is where the resignation is with immediate effect and the other is where the resignation is with an undertaking to serve the notice period. The consequences of resignation on notice is summarized by Cheadle AJ, as he then was, in the *Lottering* matter as follows:

“[14] In an indefinite contract, either party may terminate the contract on notice. A resignation in this context is simply the termination by the employee on notice. There does not have to be a specific provision to that effect, it is an inherent feature of an indefinite contract and if there is no agreed notice, the notice must be reasonable (provided that it is not less than the minimum notice prescribed in section 37 of the BCEA). If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it

is not an inherent feature of this kind of contract and accordingly requires specific stipulation.

[15] The common law rules relating to termination on notice by an employee can be summarised as follows:

15.1 Notice of termination must be unequivocal – Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 4 SA 809 (SCA) at 830E.

51.2 Once communicated, a notice of termination cannot be withdrawn unless agreed – Rustenberg Town Council v Minister of Labour 1942 TPD 220 and Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC).

5.3 Termination on notice is a unilateral act – it does not require acceptance by the employer – Wallis Labour and Employment Law para 33 at 5-10. This rule is disputed by the applicants in so far as it applies to notice not in compliance with the contract. The rule is accordingly dealt with more fully below.

15.4 Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires – SALSTAFF obo Bezuidenhout v Metrorail [2001] 9 BALR 926 (AMSA) at para [6].

15.5 If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay;

15.6 If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the the contract or to cancel it summarily and sue for damages – SA Music Rights Organisation v Mphatsoe [2009] 7 BLLR 696; and Nationwide Airlines (Pty) Ltd v Roediger & Another (2006) 27 ILJ 1469 (W).

15.7 If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month. – Honono v Willowvale Bantu School Board & Another 1961(4) SA 408 (A) at 414H – 415A. Since this articulation of the rule is contentious and its application was placed in dispute by the applicants, it too is dealt with more fully below.”

[17] At paragraph [18] of the judgment the Learned Judge had the following to say:

[18] Once given, the contractual terms dealing with the period of notice take effect. The failure to give proper notice is a breach of contract entitling the employer under the ordinary principles of law relating to breach to either to accept the repudiatory breach and terminate the contract summarily or to hold the employee to the contract. But in these circumstances, holding the employee to the contract would mean no more than requiring the employee to work out her notice. Grogan states this distinction succinctly in his reasons for his award in SALSTAFF obo Bezuidenhout v Metrorail [2001] 9 BALR 926 (AMSSA):

‘A resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period

stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the contract... The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation.”

[18] As concerning the issue of waiver which the respondent emphasized in relation to the effect of the second resignation the court in the Lottering case held that:

[36] ‘If notice is given and not waived, the contract terminates on the expiry of the notice. If the employer waives any part of notice, the contract terminates when the employee leaves work (i.e. at the commencement of the waived period).’

Evaluation and Analysis

[19] In relation to the issue of mootness I agree with Mr Cassim that the issue raised by the applicant is neither moot nor academic. The findings made by the chairperson of the disciplinary hearing, as it stands, has a direct and ongoing impact on the right of the applicant in relation to the power of the respondent to discipline her after she had resigned. In this regard the motive for disciplining is an issue that requires scrutiny by the court.

[20] The basic principle, as I understand it, is that the fact that an employee has given notice to terminate the employment contract does not take away the power of the employer to discipline him or her whilst serving the notice period. In other words if an employee is serving notice he or she is still subject to the authority and the power of the employer in as far as the employment relationship is concerned. Similarly, all the obligations that arise from the contract are still binding the employer during the notice period and this includes the duty to pay the salary of the employee.

[21] If an employer takes disciplinary action against the employee and dismisses him or her before the end of the notice period the employment relationship would be terminated. In those circumstances the termination will not be due to the resignation of the employee

but rather the dismissal for misconduct.

[22] The above principle, similarly, applies to the employee who has resigned. The principle that the employment contract continues to exist during the notice period means that the employee in the present matter was entitled to terminate the contract by way of the unilateral act of resignation in the middle of the notice period despite the fact that the respondent had accepted the first resignation. That right is not conditional on the view of the respondent. It therefore follows that the fact that the respondent had accepted the first resignation which included compliance with the requirements of the notice period has no bearing on the right of the employee to terminate the contract unilaterally before the end of

that period.

[23] There is no requirement in law that an employee who resigns on notice, which is then accepted by the employer, cannot resign with immediate effect during the notice period. In other words an employee who issues notice of intention to resign is not barred from resigning thereafter before the expiry of the notice period. In other words an employee in such a situation, need not seek the consent of the employer neither does he or she need to withdraw the initial resignation before doing so.

[24] In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent. This means that the termination of the employment contract with immediate effect took away the right of the first respondent to proceed with the disciplinary hearing against her. The powers of the employer to discipline an employee post the resignation is well illustrated by what is said in the decision of the Labour Appeal Court of Lesotho in the case of Mahamo v Nedbank Lesotho Limited,[4] where it is held that:

“Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance...Whilst the Respondent took every effort to ensure that the disciplinary hearing was procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the Applicant himself on 20th October

2000. . .”

[25] On the basis of the above discussion, it then means that at the time the chairperson, in the present matter, conducted the disciplinary

hearing against the applicant there was no employment contract between the parties and thus the respondent had no power to discipline her. The ruling of the chairperson of the disciplinary hearing that the respondent had jurisdiction to conduct disciplinary proceedings against the applicant and the subsequent decision to dismiss her is in law a nullity. It is not clear to me why the chairperson insisted in proceeding with the hearing after she was advised that the employee intended to challenge her decision. The fact that there was an urgent application filed with the court in the time is irrelevant in the circumstances of the case. She could have

postponed the matter or stood the matter and gave the applicant time within which she should present to her the court papers relating to the challenge of her ruling.

[26] It is for the above reasons that, I am of the view that the court in this matter is called upon to exercise its inherent jurisdiction and intervene even though on the face of it the relief sought by the applicant was that of interdicting the completed disciplinary

hearing. It would, not in my view, serve the interest of justice for the court to ignore the totality of the facts and the circumstances

of this case and simply adopt a technical approach in resolving the dispute between the two parties. This is based on the consideration

and the context where the chairperson proceeded with the hearing on the same day despite being advised by the applicant that she intended to challenge his decision in the court.

[27] In considering the facts and the circumstances of this matter I am satisfied with the explanation by the applicant as to why the matter need to be treated as one of urgency and why an urgent relief was required. Although, I am of the view that there is no reason not to allow the costs to follow the result, I do not believe that it would in circumstances of this case be fair to impose punitive costs.

Order

In the premises the following order is made:

1. The failure to comply with the time frames as provided for in the rules of the court by the applicant is condoned and the matter is treated as one of urgency.
2. The respondent had no jurisdiction to discipline the Applicant following her second letter of resignation.
3. The disciplinary hearing instituted by the First Respondent and chaired by the Second Respondent, which commenced on 30 September 2016 is declared null and void and is accordingly set aside.
4. The First Respondent is ordered to pay the applicant's costs.

Molahlehi E

Judge of the Labour Court, South Africa

Appearances:

For the Applicant: Adv Cassim SC

Instructed by: Knowles Husain and Landsay Attorneys

For the Respondent: Adv F Venter

Instructed by: Brian Bleazard Attorneys

[1]

(2010) 31 ILJ 2923 (LC).

[2]

(2015) 36 ILJ 2032 (LAC).

[3]

(2016) 37 ILJ 313 (CC).

[4] (2011) 9 LSLAC 9,

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