



REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA5/2013

In the matter between:

MELINDA BOTHA

Appellant

and

THE COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER FEIZAL N.O.

Second Respondent

NATIONAL HEALTH LABORATORY SERVICE

Third Respondent

Heard: 26 August 2014

Delivered: 12 December 2014

Summary: Review of arbitration award- parties entering into a fixed terms training contract paid by the employer in terms of which employee will be placed by the employer into a permanent position after successful completion of the training and being registered as a medical technologist - employee completing board exams and registering as medical technologist- employee refusing to sign permanent contract – employer accepting repudiation of contract and claiming repayment- employee referring unfair dismissal dispute to the CCMA - commissioner finding that employee not dismissed and no repudiation of contract – award for appellant to return to work. Labour Court setting aside award- Appeal - evidence showing that employee not dismissed- commissioner award reasonable – labour Court's judgment set aside. Appeal dismissed.

Coram: Waglay JP, Murphy et Dlodlo AJJA

JUDGMENT

DLODLO AJA

Introduction

- [1] This is an appeal with leave of this Court against the judgment of the Labour Court (Moshwana AJ reported as *Botha v Commission for Conciliation Mediation and Arbitration and Others* [2013] 8 BLLR 756 (LC)) dismissing with costs the review application brought by the Appellant. The Second Respondent found that the Appellant was not dismissed and that the Appellant should return to work (calling this an order of reinstatement) and ordering the employer to pay the Appellant from the date she so returns.
- [2] The Appellant sought to have the award reviewed by the Labour Court seeking that the Labour Court substitutes the award with an order to the effect that she was unfairly dismissed and granting her the relief of reinstatement alternatively compensation. Before dealing with the issues in this appeal, the background to the dispute should be set out in order to provide an understanding of what led to the present dispute.

Background

- [3] The Appellant was employed as a student technologist in Port Elizabeth branch by the Third Respondent on a fixed term training agreement. The agreement constitutes a fixed term contract for the period 8 October 2008 to 31 May 2010. In terms of the said agreement, the Appellant was to be trained while completing the Board Examination and thereafter to register as a Medical Technologist with the Health Profession Council of South Africa. Once registered, the Third Respondent undertook to appoint the Appellant into a permanent position at a place of its (Third Respondent) choice. Reciprocally, if the Appellant fails to take up the permanent appointment and serve the Third Respondent for no less than 18 months she will have to repay

the Third Respondent the costs of the training in an amount which was quantified to about R120 000.00.

- [4] During March 2010, the Appellant duly completed the requirements for registration as a Medical Technologist. Pursuant to the training agreement, the Third Respondent approached the Appellant to sign the permanent employment agreement. In terms of the permanent employment agreement, the Appellant was placed at Mthatha. The Appellant refused to sign the agreement without giving any reasons for such refusal. After requests from the Third Respondent to provide reasons for such refusal, the Appellant on 7 March 2010, addressed a letter to the former indicating therein that her rights were reserved and that she was aware that her fixed term contract would expire on 31 May 2010. The relevant part of the letter reads as follows:

‘...Relocation

I refer to your insistence that I must write a letter. My rights are reserved regarding your insistence. I am aware of the terms and conditions of my fixed term contract expiring on the 31st May 2010. My rights are also reserved in this regard.

[Signed]’

- [5] Other correspondence was also forwarded by the Appellant’s attorney restating that the Appellant was aware that her fixed term contract was coming to an end on 31 May 2010. As the Appellant had not signed the permanent employment agreement by 31 May 2010, the Third Respondent issued the Appellant with a notice of termination of employment. The letter indicated that the termination was an “end of contract” termination but also stated the reason for termination to be “repudiation of the contract”. The appellant was also requested to return her access card. The Appellant refused to sign the termination notice and through her attorneys acknowledged that her contract expired on 31 May 2010 but denied that she had repudiated the agreement.

- [6] Subsequent to this letter, the Third Respondent wrote another letter dated 3 June 2010 requesting repayment of R120 000.00 it had paid for the

Appellant's training on the grounds that she had refused to accept the permanent employment offer made to her. In the letter she was again called upon to honour the terms of the agreement. It said *inter alia*: "...while the company cannot prevent you from leaving, you are kindly requested to fully honour your contract of employment."

- [7] The Appellant nevertheless was of the view that she was dismissed and referred an unfair dismissal dispute to the First Respondent for conciliation and arbitration. The Second Respondent identified two issues for determination: (i) whether the Appellant was dismissed by the Third Respondent and (ii) if so, whether the dismissal was fair. In arriving at the decision that the Appellant was not dismissed, the commissioner reasoned that the notice did not constitute a termination of service as argued by the Appellant. He further stated that:

'Nowhere on the said document does it reflect that the respondent has terminated her services...Likewise the request by the [third] respondent for the [appellant] to hand in her access card, does not mean that an inference can be drawn that her services were terminated. Her fixed term contract came to an end and she had to commence work in Mthatha. You cannot use the said access card in Mthatha. What makes my conclusion on whether or not the applicant was not dismissed, even stronger, is that the [third respondent], in its letter dated 3 June 2010, clearly requests that the applicant had to fully honour her contract employment. I do not know for what(sic) reason, the [appellant] continued to rely upon the Notification letter, which reliance was clearly misfounded. At no stage can it be inferred and/or implied that the [third respondent] had terminated her contract of employment. From above, it is my conclusion that the [appellant] was not dismissed by the [third respondent].'

- [8] The arbitrator correctly found that there was no dismissal but a termination of a fixed term contract through the effluxion of the time. The commissioner then, perhaps unnecessary, went on to deal with the repudiation of the contract and found that the Appellant had not repudiated her contract, as she had no intention to do so, because she wanted to work for the Third Respondent but not just in Mthatha.

- [9] The commissioner's conclusion in ordering the "re-instatement" of the appellant was therefore influenced by his finding that there was no repudiation of the contract of employment. He stated that "given that the [third respondent] had not dismissed the [appellant], and given that the [appellant] has not repudiated her contract, it is my view that the contract of employment is still effective and binding upon the parties." The Labour Court upheld the commissioner's finding.

Discussion

- [10] On appeal, the issue was formulated thus: in terms of the agreement concluded between the Third Respondent and the Appellant, the Appellant, having met the requirement to be permanently appointed in April 2010, she was automatically appointed on a permanent basis from that time alternatively automatically appointed as and from 1 June 2010 but the letter ("termination notice") dismissed her from her employment, hence she is entitled to a finding that she was dismissed and the dismissal was unfair. This argument is based on clause 3 of the said agreement. It is instructive to note what clauses 1 to 3 of the agreement record. These clauses read as follows:

'1. APPOINTMENT OF EMPLOYEE

1.1 With effect from 01 December 2008 until 31 May 2010 the NHLS appoints the employee as Medical Technologist (Student), Pay Zone TB3 in the Port Elizabeth, Histopathology Laboratory, Coastal Branch (Cost Centre 21002) reporting to Mrs Jenny Grewar, Manager, Laboratory.

1.2 Student appointments are for a period of eighteen (18) months. It is expected during this time that the employee pass the relevant Board examination.

1.3 On completion of the requirements for registration as a Medical Technologist with the HPCSA (including passing the Board Exam) the employee shall automatically be appointed in a permanent position on condition that the employee continues to work for the NHLS as a Medical Technologist for a further period of eighteen (18) months following permanent appointment. The employer reserves the right to the placement of the

employee. For the purposes of this agreement student medical technologist training is deemed to be worth R125 570.00 irrespective of the time spent in training, the sum of which shall be worked off over a full eighteen month period (18 months). Should the employee complete the first full twelve months of this period, the employee's indebtedness to the NHLS shall be reduced to 25% of the full amount owing. Should the employee not complete the eighteen (18 month post-registration working requirement, the employee shall pay back to the NHLS the amount owing in a single lump sum prior to registration. The employer may at its discretion cancel the indebtedness of the employee, at any time.'

[11] It is self-evident that the agreement is a fixed term contract of employment employing the Appellant as a student medical technologist for the period ending 31 May 2010. At the end of that period, if the Appellant failed to qualify as a medical technologist, the contract would terminate with no further obligations between the parties. On the other hand, if the Appellant qualified, then at the end of the contract period, the employer was obliged to offer her a position (as a qualified medical technologist) for not less than 18 months at a place of its choice and the Appellant was obliged to render her services as a qualified medical technologist for a period of not less than 18 months at the place required by the Third Respondent. If the Third Respondent failed to offer the Appellant such a position, he would not be entitled to claim the money expended in training the Appellant. If the Appellant refused the employment offered by the Third Respondent, she would be liable to repay the liquidated amount set out in the agreement.

[12] When the employer offered the Appellant a permanent position in Mthatha, it was complying with its side of the bargain. The Appellant refused this offer without providing any reasons for such refusal. A request for reasons, as mentioned was met with disdainful response that "my rights are reserved". What could the employer do in such circumstances? It did not have to tell the Appellant that her student contract came to an end on 31 May 2010. The Appellant and her lawyer were aware of that. Her claim that since the agreement speaks of automatic employment on qualifying she had in fact attained permanent status prior to 31 May 2010 flies in the face of what was

clearly understood by all parties and more importantly in the context of the agreement is clear: only once the Appellant qualified as a qualified medical technologist would the question of appointment arise, this would take effect after her fixed terms contract came to an end, and this appointment was subject to the Third Respondent “placing” her.

[13] Once the Appellant refused to accept the offer no contract of employment came into existence hence there can be no dismissal. The Appellant now seeks to argue that once she refused to accept the offer, it was incumbent on the employer to hold an enquiry to establish the reason for such refusal and address the concerns that the Appellant may have had. How is the employer to do this? The employer knows of no reasons why the Appellant rejected its offer. It asked for reasons which the Appellant refused to give and only for the first time during arbitration proceedings did it come to light that it was because she did not want to leave Port Elizabeth due to her fiancé’s work commitments. An employer cannot deal with an issue that is not brought to its attention. Accordingly, I see no reason why the employer had to hold an enquiry which in any event the Appellant by her refusal to disclose her issue to the employer, had no intention for the employer to deal with.

[14] In the result, the finding by the commissioner, that the Appellant was not dismissed, was in fact correct. There is also no reason for the order of reinstatement (which is a meaningless adjunct).

Order

[15] In the result I make the following order:

- (a) The Appeal is dismissed;
- (b) The Labour Court’s judgment is reviewed and replaced with the following order:
“The review application is dismissed with costs.”

Dlodlo AJA

I agree

Waglay JP

I agree

Murphy AJA

APPEARANCES:

FOR THE APPELLANT:

Adv F Le Roux

Instructed by Theo Potgieter of Potgieter
Attorneys

FOR THE THIRD RESPONDENT:

Adv R Ram

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