



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 3420/2009

In the matter between:

IRENE MATSIE LANGA

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL (MPUMALANGA)

First Respondent

COMMISSIONER RAYMOND HLONGWANE

Second Respondent

DR. J.S. MOROKA LOCAL MUNICIPALITY

Third Respondent

Heard: 16 October 2012

Delivered: 08 February 2013

Summary: Review application – employer withdrawing letter of employment prior to commencement date – employer requiring employee to fulfil a requirement not in the employment letter - employee claiming dismissal 7 months later – choosing a date not supported by evidence as dismissal date – the date when letter of employment formally withdrawn was the date of dismissal – employee ought to have filed for condonation for late referral of dispute.

JUDGMENT

BOQWANA AJ

Introduction

- [1] This is an application for the review and setting aside of an arbitration award issued by the second respondent ('the commissioner') on 04 November 2009 under case number MPD040901.
- [2] In his award the commissioner found that the applicant was neither employed nor dismissed by the third respondent and accordingly dismissed her application.

Background

- [3] The third respondent placed an advertisement for an Examiner of motor vehicle and Drivers licences ('Examiner'), for which the applicant applied.
- [4] One of the requirements in this advertisement was: 'At least one year experience as Examiner of vehicles and Testing Officer for driver's licences.'
- [5] The applicant attended an interview and was subsequently appointed as an Examiner upon receipt of a letter of appointment dated 05 July 2008. According to the letter appointment would be effective on 01 August 2008.
- [6] This letter attached a document providing additional information regarding the letter of appointment which was deemed to be an integral part of the appointment letter.
- [7] This document required the applicant to be in possession of certain documentation when reporting including 'original educational certificates claimed'.
- [8] On 28 July 2008 the applicant received a letter from the Acting Municipal Manager of the third respondent stating that her appointment to the position

was 'kept on hold pending finalization of further investigations around the background surrounding your training with the College, which still casts some doubts on aspects relating to the institution that sent you to the College. The letter of appointment served to you in this regard is officially withdrawn, pending the finalization of the matter cited above' (own underline)

- [9] In a letter dated 22 July 2008, M E Mogane ('Mogane'), Chief Licencing Officer) of Greater Marble Hall Municipality confirmed that the Applicant was sent to Boekenhout Traffic College for training as an examiner but was unfortunately not employed as she did not have a motor cycle drivers licence as required by Greater Marble Hall Municipality.
- [10] In a letter dated 14 August 2008 addressed to the Acting Municipal Manager of the third respondent the Municipal Manager of Greater Marble Hall Municipality stated that no person by the name of the applicant was ever employed or sent to any training by Greater Marble Hall Municipality, either as an intern or in any capacity. He further stated that the letter sent by Mogane purporting the contrary was incorrect.
- [11] In a letter dated 09 February 2009, the Acting Municipal Manager of the third respondent referred to a meeting held on 14 October 2008 and reminded the applicant that it was agreed that she must provide proof of previous employment from the Greater Marble Hall Municipality in order to enable the third respondent to finalise the matter. The third respondent requested the information to be provided within seven days failing which the matter will be put to rest by the Municipality.
- [12] The applicant responded with a letter dated 18 February 2009, stating that she was never formally employed by the Greater Marble Hall Municipality. She further stated that she never mentioned in her CV that she was an employee of Greater Marble Hall Municipality. She stated that she 'was offered a learnership for examiner at Boekenhoutkoof Traffic College in or around January 2006, which may be unique, unusual and eye brow raising to other institutions'. The content of her letter effectively confirmed contents of Mogane's earlier letter. She ended the letter by stating that she still

considered herself as an employee of the third respondent with effect from 01 August 2008.

Bargaining council proceedings

- [13] The applicant referred a dismissal dispute to the first respondent ('the bargaining council') on 01 April 2009 alleging that she was dismissed on 22 March 2009.
- [14] The dispute remained unresolved after conciliation and a certificate of non-resolution was issued on 06 May 2009.
- [15] The applicant referred the dispute on arbitration on 14 May 2009.
- [16] The matter was set down for hearing on 09 July 2009. Apparently a jurisdictional ruling was made pursuant to a point *in limine* raised by the third respondent that the dispute arose on 11 August 2008 (which submission the third respondent submits was made in error) when the applicant demanded re-instatement and accordingly it was referred outside the 30 day period. The applicant on the other hand contended that she was not terminated by the letter dated 28 July 2008, she became aware of the third respondent's intention to terminate her employment upon receipt of a letter dated 09 February 2009. She only considered her employment terminated when the third respondent failed to respond to her letter dated 18 February 2009. The commissioner ruled that the applicant was within her right to consider herself terminated on 22 March 2009 when the respondent failed to respond to her letter dated 18 February 2009 and accordingly the bargaining council had jurisdiction to arbitrate the dispute.
- [17] The matter was again set down for arbitration on 19 August 2009. The third respondent raised a further point *in limine* that the applicant had referred the dispute to an incorrect forum and accordingly the bargaining council lacked jurisdiction to arbitrate the dispute. The commissioner noted in his award that the third respondent had conceded the existence of an employment relationship and also conceded that this employment relationship was terminated. The commissioner rejected the third respondent's contention that

the dispute ought to have been referred to the CCMA. He further found that in view of the fact that employment relationship was not placed in dispute he was satisfied that the dispute was properly referred to the bargaining council.

Arbitration award

- [18] The matter was once again set down for arbitration on 28 September 2009. The issue to be decided by the commissioner was whether there was a dismissal. In short the commissioner found that the applicant failed to fulfil one of minimum requirements of the position she applied for, being to show that she had one year experience as Examiner of vehicles and Testing Officer for driver's licences. Accordingly the third respondent was within its rights to keep the appointment in abeyance until such time the applicant had complied with this minimum requirement.
- [19] The commissioner further held that it was clear from the evidence that the applicant was not interested in ensuring that she met this requirement to the satisfaction of the third respondent. According to the commissioner failure to meet this requirement constituted a repudiation of her contract of employment and/or nullified the offer made to her.
- [20] Based on that the commissioner found that no employment relationship existed and no dismissal took place.

Grounds for review

- [21] In short the applicant's grounds are that the commissioner did not apply his mind to the factual material properly before him and/or did not understand the evidence before him and that his reasons and conclusions are fatally flawed and not those a reasonable decision maker could reach.
- [22] The commissioner acted unreasonably, alternatively committed a gross irregularity, further alternatively exceeded his powers by revisiting the issue of the existence of an employment relationship after the issue had already been dealt with by him in the second jurisdictional ruling dated 01 September 2009, (albeit incidental thereto) and under circumstances where the existence of an

employment relationship was in any event not disputed by the third respondent during arbitration proceedings.

[23] The commissioner acted unreasonably, alternatively committed a gross irregularity by premising his finding on the existence of a dismissal in the absence of an employment relationship under circumstances where the existence of an employment relationship could and should no longer have been an issue for determination during arbitration proceedings.

[24] The commissioner's finding that the applicant was neither employed nor dismissed was unreasonable or he erred in making such a finding.

Third respondent's submissions

[25] The third respondent submits that the applicant was never dismissed but that her employment was withdrawn before it commenced due to her failure to submit documentation regarding her previous working experience allegedly with the Greater Marble Hall Municipality.

[26] The third respondent alleges that the applicant was required to submit the documentation prior to the commencement of her contract.

[27] The applicant did not take issue with the withdrawal of her alleged appointment on 28 July 2008, pending submission of the required documentation.

[28] In her referral documents she alleged that the dismissal date was 22 March 2009, if she had an issue with the withdrawal of appointment she would have referred the dispute shortly after 28 July 2008 (within 30 days). Instead the applicant went for a period of 9 months trying to satisfy the employment requirements. Without an application for condonation the bargaining council lacked jurisdiction. For all intents and purposes the applicant accepted the withdrawal (this is supported by her conduct) and since that withdrawal no further offer and acceptance was made.

[29] It was out of good faith that the respondent kept persuading her to provide it with the documentation as no further relationship existed after 28 July 2008.

- [30] The *onus* rests with the applicant to establish the employment relationship and in the absence of that relationship no dismissal would have occurred.
- [31] The present review proceedings are not as a result of the employment withdrawal of 28 July 2008 and therefore do not constitute the basis for the review of the arbitration award.
- [32] Since the accepted offer was not challenged it does not avail to the applicant to attempt to rely on the withdrawn offer to establish employment.
- [33] The applicant seeks to make out a case for a dismissal on 09 February 2009. This is inconsistent with the date placed in her referral form and her evidence on arbitration that she was dismissed on 22 March 2009.

Analysis

Test applicable

- [34] The test applicable in this case is not whether or not the decision of the commissioner is one that the reasonable decision maker could not reach, or whether the decision falls within the band of reasonable decisions. The test is whether the commissioner was correct in finding that the bargaining council had jurisdiction, objectively speaking.¹
- [35] Having regard to the above, the court is called upon to determine *de novo* whether an employment relationship existed having regard to the objective facts placed before it.²

Did employment relationship exist?

- [36] It is now trite that the definition of employee in section 213 of the Labour Relations Act³ ('the LRA') can be read to include a person who has concluded

¹ *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others, SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC) at paras 39 – 40 and

² In this regard see *Sanlam Insurance Life Insurance Limited v CCMA and Others* unreported judgment case number JA38/08 at para 17.

³ Act No. 66 of 1995

a contract of employment the commencement of which is deferred to a future date (such as in this case).⁴

[37] A contract of employment may be subject to a suspensive condition which means that the conditional employment will terminate upon non-fulfilment of that condition.⁵

[38] The third respondent conceded that there was no condition attached to the appointment letter. Its case is that there was a requirement placed in an advert that the applicant must have one year experience. The absence of that the indication that such a requirement was fulfilled from the applicant's CV's was seen by the third respondent as an oversight. They then requested her to furnish the third respondent with the said information prior to commencing with her employment. It is common cause that that requirement was not stipulated in the letter of appointment itself but was apparently communicated during the interview.

[39] The applicant was appointed despite her not having fulfilled this requirement and her letter of appointment did not incorporate it as condition. The third respondent's witnesses conceded during arbitration that an employment relationship had existed but what was being contended was that dismissal did not occur.

[40] Therefore it seems to be common cause to me that at some stage or at least prior to 28 July 2008 there was an employment relationship. I will therefore not go into too much detail on that issue. The letter of appointment did create the employment relationship between the applicant and the third respondent. The third respondent's contention is that after 28 July 2008 no employment relationship existed.

[41] In view of the employment relationship having being established by the letter of appointment, the applicant fell under the protection of the LRA and that meant that the relationship had to be governed by the provisions of the LRA. The third respondent was not permitted to simply withdraw the letter of

⁴ *Wyeth SA (Pty) Ltd v Manqele and Others* (2005) 26 ILJ 749 (LAC) at para 52.

⁵ *Phera v Education Labour Relations Council and Others* (2010) 31 ILJ 992 (LC) at para 25.

appointment without affording the applicant an opportunity to be heard as required by the law. Accordingly, if she lied about her experience or failed to provide information as required she should have been afforded a hearing before the withdrawal of her appointment. The fact that she had not yet commenced working is of no purpose. She was an employee at the time. The withdrawal of her employment on 28 July 2008 constituted dismissal in my view.

Date of dismissal

- [42] Having found that employment relationship existed, the important issue to determine is whether the applicant's failure to challenge her dismissal on 28 July 2008 has any bearing on the success of her case.
- [43] The third respondent contends that because the applicant failed to challenge the withdrawal shortly after 28 July 2008 she should be taken to have accepted it. She instead went along to try and fulfil the requirements. I cannot agree with that submission. I have not found any evidence supporting this view. If the applicant saw herself as an employee of the third respondent at that time (whether rightly or wrongly) she would feel obliged to co-operate with the requirements of the third respondent as her alleged employer.
- [44] The applicant however has some difficulty in that she does not allege to have been dismissed on 28 July 2008. She alleges that her date of dismissal was 22 March 2009 in her referral form and also based her view on the letter of 09 February 2009. The commissioner agreed that she was entitled to allege 22 March 2009. I could not find any basis for this particular date to be picked as a trigger. The letter of 09 February 2009 suggests that if no documentation is received within seven days then the third respondent would put the matter to bed. The applicant did not choose this date either. She picked 22 March 2009 as a date of dismissal. I found no evidence pointing to that specific 22 March 2009 date. This leads to one conclusion that the applicant was not dismissed on the date she alleges.

Condonation application

- [45] The applicant was dismissed on 28 July 2008 and therefore should have referred a dispute within 30 days of that date or apply for condonation when she referred the dispute to the bargaining council in 2009. In the absence of that condonation application the bargaining council lacked jurisdiction.
- [46] My finding therefore is that the commissioner was wrong in finding that no employment relationship existed. The applicant was however dismissed on 28 July 2008 and should have referred a dispute on that basis within 30 days of her dismissal or apply for condonation for the late filing of the referral when she referred the matter in 2009. There is no basis for the allegation that she was dismissed on 22 March 2009.
- [47] Whilst the arbitrator's award falls to be reviewed and set aside because of the commissioner's finding that no employment relationship existed, it would not make sense to remit the matter back to the bargaining council as a wrong date of dismissal was alleged by the applicant on the referral form and on evidence. As a consequence, no condonation application was filed for the late referral of the dispute. Having read the record of the bargaining council proceedings I have found that the condonation issue was raised by the third respondent.
- [48] I therefore make the following order:
1. The an arbitration award issued by the second respondent ('the commissioner') on 04 November 2009 under case number MPD040901 is reviewed and set aside;
 2. The matter is not remitted back to the bargaining council, because in the absence of the condonation application the bargaining council lacked jurisdiction to arbitrate the dispute.
 3. There is no order as to costs.

Boqwana AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:

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