



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO.: JR 384/2010

In the matter between:

NOKENG TSA TAEMANE MUNICIPALITY

Applicant

and

DAVID LOUW

Respondent

Delivered: 21 January 2016 (In Chambers)

RULING: APPLICATION FOR LEAVE TO APPEAL

SNIDER AJ

- [1] The first ground of appeal in this matter relates to my finding in relation to a condonation application brought by the first respondent herein relating to the late filing of the record in the matter. In terms of section 173(1) of the Labour

Relations Act¹ (‘the LRA’) subject to the constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction to hear and determine all appeals against the final judgments and the final orders of the Labour Court. (My underlining). An order in respect of a condonation application is clearly not such a judgment or order.²

- [2] Accordingly, the applicant cannot be granted leave to appeal on this ground.
- [3] The applicant for leave to appeal takes issue with my interpretation of the letter in response to which the first respondent in the application for leave to appeal resigned. For the sake of convenience the wording is repeated –

‘Our client’s further instructions are that in the event of your client not tendering his resignation aforesaid the disciplinary will go ahead in full force. Then, and in that event our client considers to proceed to institute criminal proceedings against your client and / or bringing civil action to recover whatever financial losses your client has caused our client or both actions. Accordingly and against the set out above client therefore rejects your client’s offer’.

- [4] I cannot but continue to be of the view that the contents of the above paragraph are a threat and that the first respondent legitimately had no reasonable option but to resign from his employment given this very real threat. This is simply not the typical situation where an employee resigns in the face of a disciplinary enquiry. The letter and its contents cannot just be wished away by the applicant. The threat of making a criminal complaint and/or instituting civil proceedings is a serious one; especially when it is blatantly used to secure a resignation.
- [5] A reasonable person would, objectively, be materially concerned with being threatened in this matter.
- [6] The juxtaposition of the resignation and the threat is clearly what offends.

¹ Act 66 of 1995 (as amended)

The applicant was not simply making its position known; that is a wrong interpretation of the letter.

- [7] If this were the case, the information would have been provided in isolation, alternatively the applicant would simply have gone ahead with the criminal or civil suits.
- [7] Effectively the applicant was, *inter alia*, offering to not report what it apparently regarded as a crime, in return for the first respondent's resignation. This, to my mind, is wholly unacceptable conduct. It is distasteful and would have had a significant impact on the reasonable person in the position of the first respondent.
- [8] I cannot come to the conclusion that the first respondent deliberately waited until 12 October 2008. I do not understand what impact this could have on the matter.
- [9] I am of the view that the award of three months compensation is a fair reflection of the facts of the matter.
- [10] In respect of costs I am of the view that having made such a threat against one of its employees which led to this litigation the, applicant is liable for the costs.
- [11] The fact that the applicant was prepared to extract a resignation on the back of a threat of a civil suit and / or criminal prosecution, in the mind of the first respondent, could not have boded well in relation to the disciplinary proceedings.
- [12] It is quite clear from the letter that the applicant was prepared to take measures beyond the disciplinary enquiry to ensure the applicant's departure. He therefore could objectively have harboured concerns about the fairness of the disciplinary process.

² *Mafikeng and Others v JAC Pallets Africa CC and Others* (2010) 31 ILJ 686 (LC)

[13] I disagree entirely that the first respondent “*did not lead one shred of evidence to support his claim of constructive dismissal*” as contended by the application. The applicant makes reference to the transcript of the proceedings.³ I refer the applicant to another section of the transcript that clearly constitutes such evidence.⁴

[14] The threat made by the applicant was not an idle one and demonstrated a definite attitude and intention on the part of the applicant. To suggest that it is a reasonable alternative for an employee to carry on in an employment relationship with an employer who is willing to conduct itself in this way is incorrect. There was simply no reasonable alternative to resignation. To continue in his employment would have exposed him, on the strength of the threat made, whether legitimately on the part of the applicant or not, to the risk of being criminally investigated and civilly sued. This is not a tolerable situation that an employee should be exposed to.

[15] The applicant has, with respect, misconstrued the judgment. The question is not whether the applicant had a legitimate criminal complaint or valid civil cause of action against the first respondent. The threat was made quite independently of the existence of same. It is in these circumstances that the first respondent perceived a level of malevolence and foul play on the part of the applicant which caused him to resign.

[16] I remain of the view that any reasonable person would harbour a legitimate fear of a criminal complaint being laid against him and / or a civil suit being brought against him.

[17] Our law reports are replete with instances of people who are falsely accused and wrongly sued.

[18] It is a reasonable and legitimate fear in the circumstances.

³ Page 19 line 3

⁴ Page 18

[19] The applicant makes the submission, in favour of the application for leave to appeal, that the first respondent resigned because he sought to avoid possible criminal or civil lawsuits. This is exactly the issue. The fear of such conduct was engendered in him by applicant's letter.

[20] As far as the chronology of the matter is concerned, there was no untoward conduct of the part of the first respondent. I refer in this regard to my judgment in the matter⁵ the long delay set out therein, and the fact that the applicant alleged his constructive dismissal on the same day as the applicant's letter, containing the threat, was received.

[21] In light of the above, I am of the view that there is no reasonable prospect that another court may come to a different decision.

[22] Accordingly, I make the following order –

- 1.1. The application for leave to appeal is dismissed; and
- 1.2. The applicant is to pay the first respondent's costs.

SNIDER, A J

Acting Judge of the Labour Court of South Africa

⁵ Paragraph [19] on page 5.