IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 85/18

In the matter between:

THE STANDARD OF BANK OF SOUTH AFRICA LIMITED **Appellant**

and

NOMBULELO CYNTHIA CHILOANE **Respondent**

Heard: **05 November 2020**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Labour Appeal Court website and release to SAFLII, Juta and Lexis Nexis. The time and date for hand down is deemed to be 10 December 2020.'

Summary: *Discipline—Right of employer to discipline employee for misconduct within the employee's notice period—Resignation with immediate effect having no effect when disciplinary hearing takes place within the notice period*

Resignation—Resignation with immediate effect not terminating employment relationship when contract stipulates a notice period unless the other parties waive or do not seek to enforce it.

Resignation—In the absence of contractual stipulation of a notice period, Basic Condition of Employment Act taking effect.

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Coram: Waglay JP, Coppin JA and Savage AJA

JUDGMENT

WAGLAY JP

[1] Once again the Labour Court was confronted with the issue of whether an employee can by a letter of resignation immediately end his/her relationship with his/her employer irrespective of the contractual or statutory provisions which provide for notice to be given before termination can take effect.

[2] This judgment like the others on this issue raises the rights of employers and employees in respect of discipline where an employee resigns in the face of disciplinary charges.

[3] In this matter, the employee (respondent in this appeal) was given notice to attend a disciplinary hearing. The employee was said to have cashed a cheque without following proper procedures. It later transpired that the cashed cheque was fraudulent, which caused the employer a loss of just under R30 000.00.

[4] On the day that the employee received the notice to attend the disciplinary hearing, she handed her superior, Ms Matlhajoa, her letter of resignation. The letter stated that she was tendering her “resignation with immediate effect”. Matlhajoa accepted the letter and informed her that she would speak to the Human Resource official as she did not know what should be done about the letter.

[5] Matlhajoa consulted with the Human Resource official and was told that the employee was required to serve a four week notice period as provided in her contract of employment. Matlhajoa informed the employee that she would have to serve her notice period and since she was on suspension, she

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needed only to phone her employer every day. The disciplinary hearing was set to continue as it was within the employee's notice period.

[6] Various correspondences were exchanged between the employee's attorneys and the employer (the appellant) between 4 June, the date on which she handed in her letter of resignation, and the date of the hearing which was scheduled for 11 June 2018. The employee took the view that her letter of "resignation with immediate effect" ended the employment relationship and as such, the employer was not entitled to proceed with the disciplinary hearing.

[7] On 11 June 2018, the employee and her attorney presented themselves at the disciplinary hearing and argued against its continuation on the ground of an absence of an employment relationship. The chairperson presiding rejected the argument and decided to proceed with the hearing. At this point, the employee and her attorney left the hearing and the hearing proceeded in the employee's absence.

[8] The employee was found to have committed the misconduct with which she was charged and the sanction of summary dismissal was imposed. This was then communicated to the employee.

[9] Some two weeks after the employee was informed about her dismissal, she brought an urgent application to the Labour Court seeking: (i) an order declaring the decision to "dismiss her pursuant to a disciplinary hearing null and void"; (ii) interdicting and restraining the employer from enlisting her name on the Banking Association of South Africa's central database "the Register for Employees Dishonesty System" (REDS) and (iii) costs.

[10] The employer opposed the application on various grounds, *inter alia*: that the employee's letter of resignation was not valid because it did not give four weeks' notice of her resignation as was required in terms of her contract of employment.

[11] The Labour Court (Cele J) held that once an employee hands in her resignation indicating that the resignation is with immediate effect, the employment relationship comes to an immediate end and the employer has

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no right to insist that the employee serves his/her notice period. The Labour Court went on to declare the employee's dismissal pursuant to the disciplinary hearing "null and void".

[12] The Labour Court made no comment on the interdict and restraint sought by the employee, nor did it grant that prayer. It also made no order as to costs.

[13] This matter comes before this Court with the leave of the Labour Court. As a starting point, it again needs to be emphasised that employment relationships are governed by contract or statutes or, in most cases, both. So if an employer and its employee do not expressly agree for either of them to give the other notice to terminate their relationship, the Basic Conditions of Employment Act ("BCEA")[1] provides that they do so.

[14] It is common cause that the employer and employee had agreed that one would give the other four weeks' notice of termination of their employment contract. In these circumstances, for the employer or the employee to lawfully terminate their employment relationship, one had to give the other four weeks' notice. The party receiving the notice of termination which does not comply with the agreed notice period may, however, agree to forgo that term of the agreement. Where there is no agreement unless it is expressly stated that there is no need to serve the four weeks notice, it has to be complied with in terms of the contract..

[15] The argument that where an employee gives notice of termination by way of resigning with immediate effect, such an employee cannot be compelled to continue working for the employer because resignation is a valid unilateral act that comes into effect on the date the employee dictates that it will come to an end is misconceived.

[16] An agreement between the parties that in the event of either terminating their relationship, they must give four weeks' notice has meaning. It requires, in express terms, that one party must give the other four weeks' notice unless, as stated earlier, the party receiving the notice of termination does not seek to

[1] 75 of 1997.

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enforce that term of the agreement. The notice term remains valid and binding and where no such term is agreed upon the parties are still required to give such notice as provided for in the BCEA.[2]

[17] The Labour Court, in coming to the decision it did, followed a number of judgments handed down by it. Perhaps the leading judgment may be seen to be that of *Lottering & others v Stellenbosch Municipality*[3] (*Lottering*) where the court said:

> '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 either to accept the repudiatory breach or terminate the contract summarily or to hold the employee to the contract.
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> It follows that the act of termination is a unilateral act permitted by the contract. The fact that the notice period is not in compliance with the contract and accordingly a breach does not mean that that breach should reach backwards and contaminate the act of termination. In my view, the act of resignation (the communication of the decision to terminate) is not a breach or a repudiation of the contract but an exercise of a right conferred by the contract. It is a legal act and its consequences for the date of termination are determined by the contract, not what might be stated in the notice.'[4]

[18] *Lottering* and the judgments that follow similar arguments are clearly wrong. Where termination of employment is in breach of a contractual term which requires the giving of notice or, absent such term, where termination of employment is in breach of the BCEA unless there is an acceptance by the party receiving the non-compliant notice of termination, the terms of the

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[2] Sec 37 provides that:
(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than:
(a) one week, if the employee has been employed for six months or less;
(b) two weeks, if the employee has been employed for more than six months but not more than one year;
(c) four weeks, if the employee
(i) has been employed for one year or more; or
(ii) is a farm worker or domestic worker who has been employed for more than six months.

[3] (2010) 31 ILJ 2923 (LC).

[4] At paras 18-19.

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contract or the statute remain valid and binding. This is so "*since repudiation terminates the contract only if the innocent party (here the employer) elects not to act on it."*[5]

[19] As counsel for the appellant properly stated, resignation that is not in compliance with contractual notice requirements does not validly terminate the contract of employment unilaterally; it is only the resignation that complies with notice requirements that serves unilaterally to terminate the contract.

[20] It is also argued that in the matter of *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others*[6] (*Toyota*), the Constitutional Court held that notwithstanding the absence of notice, an employee's resignation served to unilaterally terminate the contract of employment thus depriving the employer of the power to discipline an errant employee. That is not so. The only comment on this issue made in the *Toyota* matter was in the minority judgment of Zondo J (as he then was) where, in dealing with the jurisdiction of the CCMA to arbitrate a dismissal dispute he stated that where an employee hands in a letter of resignation which is to come in to effect at some future date (after the notice period has expired) the employer is entitled to discipline the employee within that notice period and if the employee is dismissed consequent upon the disciplinary hearing before the expiry of the notice period the CCMA has jurisdiction to entertain a dismissal dispute. However, the relief that the CCMA is competent to give is limited to: (i) compensation in the amount that the employee would have received from the date of dismissal to the date when the resignation would have come into effect, or (ii) reinstatement from the date of dismissal to the date when the resignation would have come into effect, because they could be no employer employee relationship between the parties once the notice period had come to an end.

[21] Similarly in the matter of *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[7] it was said:

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[5] See Brassey Commentary on the LRA at A8-26.
[6] (2016) 37 ILJ 313 (CC)
[7] (2016) 37 ILJ 564 (CC)

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> 'Except where summary dismissal is warranted, the unilateral act of the employer in terminating the contract, whether by notice or other conduct, does not without more bring an end to the contract of employment. The same applies to an employee who gives short notice in violation of the contract: he or she may be obliged to serve out the notice period. In neither case does the unlawful repudiation of the contract have to be accepted by the other party.
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> It is this common-law location of the statute as a whole that the language of s 189A invokes. The same applies to the BCEA. Under that statute, it is well accepted that a dismissal on short notice is not effective to terminate the contract of employment. When either employer or employee seeks to terminate, the BCEA requires that each give notice in terms of s 37. If either party does not, the contract of employment continues to subsist, affording both employee and employer a range of statutory remedies to enforce it.'[8]

[22] In the circumstances, where a contract prescribes a period of notice the party withdrawing from the contractor or resigning is obliged to give notice for the period prescribed in the contract. The contract and the reciprocal obligations contained in it only terminate or *take effect* when the specified period runs out. Alternatively, absent a contractual term the parties are bound to the notice period provided in the BCEA.

[23] In this matter, the employee's narration that her resignation was with "immediate effect" was of no consequence because it did not comply with the contract which governed her relationship with her employer and the employer was thus correct to read into the resignation a four week notice period within which period it was free to proceed with the disciplinary hearing.

[24] The decision of the Labour Court is thus liable to be set aside.

[25] On the issue of seeking an interdict and restraining the employer from enlisting the employee's name on REDS. The employee continued with this prayer even after receiving papers stating that her name would not go on REDS, because, and as she was aware she was neither charged nor was she found to have committed any misconduct which amounted to dishonesty. It is

[8] At paras 65 and 68.

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not clear why no costs order was considered against the employee. In any event, I see no need to intervene.

[26] With regards to the costs of this appeal, it is only because the matter was unopposed that there is no order as to costs.

[27] In the result, the following order is made:

(i) The appeal succeeds;

(ii) The order of the Labour Court is set aside and substituted with the following:

"The application is dismissed".

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Waglay JP

I agree

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Coppin JA

I agree

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Savage AJA

APPEARANCES:

FOR THE APPELLANT: Adv. A Myburg

Instructed by Mervyn Taback Inc

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No appearances for the respondent

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