THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 928/20

In the matter between:

MTHOBISI VUSUMUZI MTHIMKHULU **Applicant**

and

STANDARD BANK OF SOUTH AFRICA **Respondent**

Heard: **15 September 2020 (Due to the Covid-19 lockdown, this matter was heard *via* video conferencing and the parties agreed thereto)**

Delivered: **18 September 2020 (Due to Covid19 lockdown, this judgment was handed down electronically by sending a copy through email and the date of delivery shall be deemed to be 18th September 2020)**

Summary: Urgent application to set aside an alleged unlawful dismissal because at the time it was announced, the applicant had already terminated employment – resigned. Although the Court was not satisfied that the matter is urgent it entertained the application. This Court lacks jurisdiction to set aside a dismissal on the grounds of it being unlawful. The Labour Relations Act, No. 66 of 1995, empowers this Court to only entertain alleged unfair dismissals – the unfair dismissal dispute must first be referred to conciliation – failing which this Court and other dispute resolution bodies lack jurisdiction to

entertain the dispute. Held: (1) The application is dismissed. (2) The applicant to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The applicant before me is an aspirant advocate. He is hoping to practice as an advocate in the not so distant future. However, he takes a view that should this Court not grant him the relief he is seeking, his aspirations will be discomfited, which discomfit would be in breach of his constitutionally guaranteed rights. The chime of this application is the announcement of a sanction of dismissal after a finding of guilt in a disciplinary enquiry.

[2] The important legal question is whether an employee who has been found guilty of a serious offence may avoid the ultimate sanction of dismissal by resigning before an employer announces the sanction? The applicant before me takes a view that being the first man on the ball, the respondent forfeits the right to tackle and play the ball. In this judgment, the Court shall consider its jurisdictional powers to entertain the matter.

[3] The application is brought on an urgent basis primarily because the applicant is due on 18 September 2020 to undergo an interview to become a pupil in the year 2021. Thus, he seeks the blemish of him having been dismissed removed before the interview. The application is opposed by the respondent.

Background facts

[4] Given the narrow basis upon which this application rotates, it is unnecessary to punctiliously recount all the facts in this matter. To a large degree, the relevant

facts are common cause between the parties. It suffices to mention that Mothobisi Vusumuzi Mthimkhulu (Mthimkhulu) was employed by the Standard Bank South Africa (the Bank) with effect from 1 June 2016.

[5] Whilst so employed allegations surfaced that during the period February 2020 and May 2020 he misconducted himself in a grossly dishonest and fraudulent manner. Resultantly, he was arraigned before a disciplinary enquiry on 17 August 2020. On 19 August 2020, Mr Grant Sheen in his capacity as the chairperson of the disciplinary enquiry returned a guilty finding against Mthimkhulu. He afforded him and the Bank an opportunity to present mitigating and extenuating factors before he could determine an appropriate sanction.

[6] Niftily on 21 August 2020[1], Mthimkhulu announced his resignation as an employee with immediate effect. Upon receipt of the resignation the Bank sought to hold Mthimkhulu to the terms of his employment contract to serve a 30 days' notice period. On 24 August 2020, a sanction dismissing Mthimkhulu from the Bank's employ was announced. This is the announcement that broke the camel's back. Mthimkhulu resisted the announcement of the sanction on the basis that the Bank did not have jurisdiction over him anymore. He demanded that the Bank must abandon and nullify the dismissal before close of business on 1 September 2020. The demand was rebuffed by the Bank. The rebuff ignited Mthimkhulu to launch the present application.

Evaluation

[7] This Court is not satisfied that this matter is urgent. However, since hearing a matter on an urgent basis involves an exercise of discretion, given the apparent importance of this matter I exercise my discretion and hear this matter as one of urgency. All this simply means that one foot is in the door. I am however not persuaded that this Court has jurisdiction over this matter. However, before I address the issue of jurisdiction, I find it behovely to pertinently address the important issue spotted in this matter.

[1] This happened to be a Friday.

The legal effect of a resignation before the announcement of a sanction of dismissal

[8] I have no doubt in my mind that the resignation by Mthimkhulu is nothing but a stratagem. He knew very well that the inevitable consequences would be a sanction of dismissal. An employee who resigns in the face of a disciplinary enquiry cannot claim constructive dismissal. What Mthimkhulu did was an attempt to be the first man on the ball. Having done so he argues that the Bank cannot tackle the ball away from him. Of course, it is not too difficult to observe that the resignation was nothing but a beguiler.

[9] Nonetheless, the law is clear that a resignation is a unilateral act, which does not require acceptance by the employer for it to be effective. The critical question remains that of whether the termination had taken effect or not? This issue troubled the Constitutional Court *albeit* in a different context in the matter of *Toyota South Africa Motors (Pty) Ltd v CCMA and others*[2]*.* The majority judgment penned by Nkabinde J chose not to decide the issue as it was not raised in different *fora* that the dispute travelled.

[10] The minority judgment by Zondo J and the separate but concurring with the majority judgment by Wallis AJ dealt with the issue. I am inclined to agree with the minority judgment on this issue of the effect of resignation prior to dismissal. Zondo J concluded that since a valid resignation is incapable of being withdrawn, an employer has no right to discipline once resignation has taken effect.

[11] However, what sets this matter apart is that the discipline had taken place and what remained was the announcement of a sanction. What Zondo J was referring to based on the facts in *Toyota* was the holding of an enquiry against the employee. Mokhotla tendered a resignation shortly after he was served with a notice to attend a disciplinary hearing. Despite that Toyota proceeded to hold a hearing against him. I take a view that the power to discipline in the context of *Toyota* does not equate to the power to announce the outcome of a

[2] (2016) 37 ILJ 313 (CC).

disciplinary process. In this matter what was announced was the outcome of the disciplinary enquiry which was completed for all intents and purposes. When disciplinary steps were taken against Mthimkhulu, he had not resigned. The tactical resignation of Mthimkhulu has no legal effect in this instance. In *Mzotsho v Standard Bank of South Africa (Pty) Ltd*[3], my sister Whitcher J dealt with an instance where an employee resigned immediately upon being given a notice to attend a disciplinary hearing. She concluded that the contractual power to discipline remained. This conclusion is at odds with the reasoning of the minority in *Toyota*. I have already indicated above that I am in agreement with the reasoning of the minority. I however, as it shall be demonstrated below, am in agreement with the reasoning employed by my sister to reach the conclusion she ultimately reached. I specifically agree that the answer lies in the legal principles of contract.

[12] An employee who is contractually obliged to serve a notice period, repudiates[4] a contract when he or she does not serve the notice period. In law an aggrieved party has as a right in response to repudiation to accept the repudiation and make an election either to cancel and sue for damages or seek specific performance[5]. It is clear from the undisputed facts of this matter that in an email addressed to Mthimkhulu on 24 August 2020 the Bank did not elect to cancel the employment contract despite the repudiation. The bank stated the following:

> "In response to your purported resignation, we wish to bring to your attention that in terms of your contract of employment, you are required to serve 30-day notice therefore your resignation letter does not immediately terminate your obligations in terms of the contractual agreement between you and the Bank"

[13] The above is a clear statement that the contract of employment was not cancelled by the Bank despite the repudiation by Mthimkhulu. The election to

---

[3] Case J2436-18 delivered on 24 July 2018

[4] See: *Naidoo and Another v Standard Bank Ltd and Another* [2019] 9 BLLR 934 (LC).

[5] See *Primat v Nelson Mandela Bay Municipality* 2017 (5) SA 420 (SCA).

cancel lies with the aggrieved party and not the aggressor. The Bank as an aggrieved party elected to keep the contract alive. Therefore, I part ways with my sister Nkutha-Nkontwana J when she held in *Naidoo and Another v Standard Bank SA Ltd and Another*[6] that an employer may not proceed with a disciplinary hearing without first approaching the court for an order for specific performance. What obtains is an election. The correct legal position may be summed up as being, where one party to a contract, without lawful grounds indicates to the other party an unequivocal intention no longer to be bound by the contract, that party is said to repudiate the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If s/he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated[7]. An aggrieved/innocent party by making an election not to rescind as a party to the contract keeps the contract alive. Should the aggressor persist with the repudiation the aggrieved may approach a Court of law on the strength of the same contract to compel the aggressor to comply with its contractual obligation. What keeps the contract alive is not an order for specific performance but an election by the aggrieved party[8]. Specific remedy is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such as to complete performance of the contract. It is a remedy and not a right, whereas, an election is a right available to an innocent party.

[14] I agree with the submission by Redding SC, appearing for the respondent that the fundamental principle is that the breach does not end the contract. The innocent party may choose to end the contract and it will be that election which ends the contract. To the extent that Mthimkhulu argues that by 24

[6] [2019] 9 BLLR 934 (LC).

[7] See *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A); *Steward Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); *Denmark Productions Ltd v Boscobel Productions* [1969] 1 QB 699 and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

[8] See: *Solidarity and others v Eskom Holdings Ltd* (2008) 29 ILJ 1450 (LAC) and *NUMSA obo King and others V BMW SA (Pty) Ltd* [2020] ZALCJHB 115 (11 March 2020) and the authorities cited therein.

August 2020 when the sanction was announced the contract of employment had ended, such an argument is rejected.

[15] In conclusion I state that the Bank was still entitled to tackle the ball since it elected to keep the playing field – the contract of employment – alive or open for play. Therefore, the answer to the important question is that the resignation before the announcement of a sanction of dismissal has no legal effect. I now turn to the issue of the jurisdiction of this Court.

Jurisdiction of the Labour Court to set aside a dismissal.

[16] The Labour Court is a creature of a statute. It derives its jurisdictional power from the Labour Relations Act[9] (LRA) and other legislations that gives it powers. In his founding papers Mthimkhulu contends that because the issue in dispute arises from employer and employee relationship; that the cause of action arose within the area of jurisdiction of this Court; and that the respondent runs its businesses within the territorial jurisdiction of this Court, the Labour Court has the necessary jurisdiction to set aside the dismissal sanction. I am unable to agree with this contention.

[17] As a point of departure not every dispute involving an employer and an employee resides within the jurisdiction of the Labour Court. Section 157 (1) of the LRA is perspicuous. This Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or in terms of any other law are to be determined by the Labour Court. Nowhere in the LRA is it stated that the Labour Court is empowered to determine the setting aside of a dismissal. However, in terms of the LRA, this Court has powers to determine the fairness of certain types of dismissals. Of momentousness is that the Labour Court can only do so once a dispute has been subjected to a conciliation process[10]. Significantly, this dismissal which Mthimkhulu wishes this Court to set aside has not been subjected to a conciliatory process. This Court lacks jurisdiction

[9] No. 66 of 1995, as amended.

[10] See *September and others v CMI Business Enterprise CC* [2018] 5 BLLR 431 (CC).

to entertain a dismissal dispute if it has not been referred to conciliation as required by the LRA.

[18] What befell Mthimkhulu is a dismissal within the meaning of section 186 of the LRA read with section 213. In terms of the LRA where a dismissal is for reasons of misconduct, as it is the case for Mthimkhulu, the fairness of that dismissal is justiciable at the CCMA. To the extent that Mthimkhulu alleges that his dismissal is unlawful because contractually the respondent has no powers to dismiss him, this Court per Van Niekerk J in *Lt General Shezi v SAPS and others*[11] had the following to say:

> "[12] The effect of this judgment [*Steenkamp v Edcon*] is that when an applicant alleges that a dismissal is unlawful (as opposed to unfair), there is no remedy under the LRA and this court has no jurisdiction to make any determination of unlawfulness."

[19] I fully agree and had an occasion to say so myself in *Singhala v Ernst & Young Inc and another*[12]. Therefore, the conclusion I reach is that this Court lacks jurisdiction and the application falls to be dismissed for want of jurisdiction. There is nothing to prevent Mthimkhulu, in order to remove the stain on his name, as he so fervently wish to, to challenge the fairness of his dismissal at the correct forum. As in *Singhala*, the claim of Mthimkhulu does not even fall under the jurisdiction of this Court under section 77 (3) of the Basic Conditions of Employment Act[13]. In any event such a section and case has not been pleaded.

[20] For all the above reasons, the application falls to be dismissed with costs.

Costs

[11] Case J852/2020 delivered on 15 September 2020
[12] [2019] 40 ILJ 1083 (LC).
[13] No. 75 of 1997.

[21] With regards to costs I take the approach taken by the Constitutional Court[14]. There is no longer an employer and employee relationship between Mthimkhulu and the Bank and as such costs must follow the results.

[22] In the results, I make the following order:

Order

1. The application is dismissed.
2. The applicant is to pay the costs of this application.

G. N. Moshoana

Judge of the Labour Court of South Africa

[14] See in this regard: *AMCU and Others v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation) and Others* 2020 (7) BCLR 779 (CC).

Appearances:

For the Applicant:	Advocate S Vobi with him Advocate L Msomi.
Instructed by:	Mtumtum Inc Attorneys, Johannesburg
For the Respondent:	Advocate A Redding SC
Instructed by:	Mervyn Taback Inc, Houghton.