



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 84/13

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Appellant

HLONIPHO MM

Second Appellant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

MATLALA L: N.O.

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third respondent

Heard: 10 September 2014

Delivered: 23 October 2014

Summary: Review of arbitration award. Employee applying for early retirement after unsuccessful lodging grievance against her superior- employee withdrawal of early retirement refused- employee contending her dismissal and that her superior not having authority to approve her application - evidence proving that superior had authority and had approved employee's early retirement application- commissioner dismissing employee claim and finding that employee

was not dismissed. Labour Court upholding commissioner's decision. Appeal dismissed with costs.

Coram: Musi JA et Murphy AJA et Setiloane AJA

JUDGMENT

MUSI JA

- [1] This is an appeal against the judgment of the Labour Court wherein it dismissed the appellants' review application. The appellants unsuccessfully applied for leave to appeal in the court *a quo*. A subsequent petition to this court was successful. The appeal is therefore with the leave of this Court.
- [2] The second appellant (Ms Hlonipho or the employee), who was a member of the first appellant (SAMWU or the Union), was employed by the third respondent (the Municipality) since 1996 in various capacities, culminating in her being appointed as the Executive Manager: Multi-Sectoral HIV and AIDS Unit. On 03 September 2007, she applied to terminate her service with the Municipality by way of early retirement. On 04 September 2007, she requested to withdraw the said application. Her application to withdraw was refused. She was not immediately informed about the refusal. On 25 September 2007, she noticed that she did not receive her monthly salary. Upon enquiring, she was informed on 25 September 2007 that the Executive Director: Health, Dr Mashazi, did not approve her application to withdraw her application. On 05 October 2007, the lock of her office door was changed and she found a letter attached to the door requesting her to vacate her office.
- [3] She referred an unfair dismissal dispute to the first respondent, the South African Local Government Bargaining Council (SALGBC). Conciliation was unsuccessful. She then referred the dispute to arbitration. The Municipality raised various points in *limine* to the effect that the SALGBC had no jurisdiction to arbitrate the dispute. On 18 February 2009, Commissioner Serero ruled that

the SALGBC had jurisdiction and therefore dismissed the points *in limine*. The second respondent (arbitrator) ultimately presided over the arbitration proceedings. He found that Ms Hlonipho failed to prove that she was dismissed. He therefore dismissed the claim. The appellants, being dissatisfied with the arbitrator's decision, applied unsuccessfully to the court *a quo* to review and set aside the decision. This appeal is against the dismissal of the review application.

- [4] The facts of this case are mostly common cause. Ms Hlonipho was initially employed by the Alberton Municipality as the Head of its Health Department. After the amalgamation of various municipalities in the East Rand to form the Municipality, she led the Municipality's HIV and AIDS Unit. She reported to Mr Sibeko, the Strategic Executive Director in the City Manager's Office.
- [5] On 13 June 2007, after an institutional review process, Ms Hlonipho was informed that it was resolved by the Municipality that her unit will resort under the Municipality's Health Department with effect from April 2007. She was also informed that with effect from 20 June 2007, she would have to report to the Director: Family Health, Mrs Botha.
- [6] She was dissatisfied with that decision. She lodged grievances against Dr Mashazi, the Executive Director: Health and Mrs Botha. The first grievance being on 08 June 2007 and the last on 08 October 2007. She was of the view that Dr Mashazi and Mrs Botha were making "unreasonable and unprocedural demands" and thereby victimizing her. Most of her grievances were considered by Mr Sibeko, the Deputy City Manager: Operations, at a properly constituted grievance hearing and rejected on 10 July 2007.
- [7] The grievances lodged after the ones that formed the subject matter of the 10 July 2007 report were not resolved. I pause to mention that these grievances were nothing but the old grievances recycled. She felt aggrieved that she did not receive a response from the Municipality in connection with her grievances

and referred a dispute to the SALGBC.

- [8] The strain of strife became unbearable and on 02 September 2007, she discussed her intention to resign with her son and nephew. They both convinced her not to resign.
- [9] According to her, the most important component of her responsibilities- that of being responsible to manage the AIDS Council- was taken away and given to a junior staff member in her unit. That fact, coupled with the fact that her grievances were not attended to made her feel despondent.
- [10] On 03 September 2007, she received an e-mail from Ms Botha, which according to her, was the last straw, and she decided to terminate her employment. She was very emotional and downloaded the termination form and completed it. She considered her options and opted to apply for early retirement rather than resignation. Her decision was informed by the fact that she qualified to apply for early retirement because she already reached the qualifying age of 55 years. She gave the form to Mrs Botha who asked her why she wanted to go. She told Mrs Botha that she (Botha) knew the reason and that it is the best option that she could take because she would not lose her benefits. She lodged another grievance on the same day.
- [11] After she submitted the form, she went to a shop steward. The shop steward advised her to withdraw the application for early retirement.
- [12] On 04 September 2007, she wrote a request to withdraw her application for early retirement to Dr Mashazi. She stated the following:

'I have not yet proceeded with the application for my early retirement to HRMD and Finance due to important personal outstanding matters that are delaying beyond my control. I will not retire at the end of September and request withdrawal of my application. As soon as the outstanding issues are sorted out, I will continue with the process and I will inform you in due course.'

[13] On the same day Mrs Botha requested her to provide her (Botha) with the details of the outstanding personal matters so that she could make a recommendation to Dr Mashazi. She responded by stating that the outstanding matters were her "financial planning matters". She heard nothing from Mrs Botha or Dr Mashazi.

[14] On 25 September 2007, she wanted to withdraw money and noticed that her salary was not paid into her bank account. On enquiring why her salary was not paid she was informed that payment will be effected on 30 September 2007 because her employment was terminated. She also went with a representative of the union to Mrs Botha to enquire about the salary debacle. Mrs Botha wrote her an email on 25 September 2007 at 14h15 informing her that:

'Your request to retract your request for early retirement has not been approved by the Executive Director of Health.'

In spite of this e-mail she continued to report for duty.

[15] On 02 October 2007, she wrote the following e-mail to Mrs Botha:

'I hereby request an update of the ED's response to my request for withdrawal of the request for early retirement after advise (sic) by Mr Hoffman on the 27th September 2007.'

[16] On 04 October 2007, Mr Hoffman wrote the following e-mail to the appellant:

'I think that you are aware that your ED did not accept your withdrawal as I saw the email referred to you by Annatjie (Mrs Botha) on behalf of the ED. My e-mail with the letter from Richard copied to your serve (sic) as further confirmation that your request for early retirement is upheld as per instruction from you (sic) ED. Please contact me should you need further clarity.'

[17] Mrs Botha testified, at the arbitration hearing, that the appellant reported to her. On 03 September 2007, the appellant entered her office and gave her the

request for early retirement form (the form). She did not expect the appellant's application and therefore asked her whether that is what she thought it was to which the appellant answered in the affirmative. The appellant told her that she "felt that she wants to take early retirement," and that she had personal matters that she wanted to attend to. She took the form and said "okay, I accept it," and signed it. She then requested the appellant to take the form to Dr Mashazi. When she was asked why she requested the appellant to take the form to Dr Mashazi she responded thus "because he (sic) is the accountable officer and she has got the delegated power to actually except (sic) a retirement or a resignation. I have not got it on my level." She asked the employee to give her a copy of the signed form, which she did. Later the same day, she wanted to give Dr Mashazi a copy of the form and the latter told her that she knew about it.

[18] Dr Mashazi testified that the form is a standard form that must be completed by the employee, the immediate supervisor and the Head of Department (HoD). She confirmed that she signed the form in her capacity as HoD of the Health Department.

[19] She testified that on 03 September 2007, Ms Hlonipho arrived at her office with the form, and handed it to her. She asked Ms Hlonipho whether she was sure of what she was doing. She said yes, she had reached the age of 55 and that she was going to look after her grandchildren. Dr Mashazi signed the form in the appellant's presence and said "Good luck in looking after your grandchildren" where after the appellant left her office.

[20] Dr Mashazi confirmed that she received Ms Hlonipho's request to withdraw the application for early retirement. Her evidence in this regard is as follows:

'Having accepted the retirement, that is sealed. When we received this retraction we referred the matter to HR and Legal Department to assist. They advised that the Executive Director is mandated to accept the withdrawal of her retirement and that decision was communicated (not to accept the withdrawal) to Maria on

25 September 2007.'

- [21] During cross-examination, she was asked "you said you were mandated to accept or refuse appointment or withdrawal of termination." Her answer was "Executive Director is mandated in terms of the systems of council". The following is recorded, in the transcript of the arbitration proceedings, as part of the cross-examination:

' Question: I am going to hand you dedicated powers and ask you to show us where in that bundle it is shown

Answer: Page 96

Question: I put it to you that it is not in there.

Answer: It is. If I can terminate, I can appoint.

Question: I put it to you that page 98 I can do that.

Answer: Termination of Maria's job was accepted or confirmed by the Deputy City manager and by myself and it was off. I can appoint or terminate from level 5 upwards as Executive Director. The HOD is the last person to sign the termination form...

Question: It is the applicant's case that you had no power to accept her termination.

Answer: I have the power. If I am not delegated to do that it will not be, it will not be processed, according to council processes or procedures.

Question: I put it to you in terms of the delegation of power you are not entitled to accept that termination

Answer: That is your opinion. In terms of council systems I am delegated as Executive Director.

Question: You said Mr Leybrandt, the Acting City Manager at the time accepted

the termination

Question (sic): we communicated with the City Manager, the withdrawal.'

During re-examination the following is recorded:

'Question: Who requested this report?

Answer: Mr Johan Leybrandt, Acting City Manager who requested this document.

Question: Did he communicate with you about this?

Answer: Mr Leybrandt? Yes. Let me shed. He said you may or may not accept. Acting City Manager was Mark Wilson. Mr Leybrandt was the Deputy City Manager. Mr Leybrandt was the Deputy City Manager...'

[22] The arbitrator had regard to section 186(1) of the Labour Relations Act 66 of 1995 (the Act) and concluded that a dismissal can only arise in six different situations.¹ He concluded that the appellant's claim was not based on any of the instances mentioned in the Act. He also considered constructive dismissal (Sec 186 (1)(e)) and concluded that this was not a case of constructive dismissal. He ruled that the appellant failed to prove the existence of a dismissal and consequently dismissed the claim.

[23] The court *a quo* also found that the appellant was not constructively dismissed. In respect of the contention that she was dismissed, the court *a quo* said the following:

"This contention seems to be oblivious of what happened on 03 September 2007. On this day, Hlonipho signed a form, which was titled Resignation/

¹ The relevant parts of section 186 read as follows: "(1) DISMISSAL means that –

- (a) An employer has terminated a contract of employment with or without notice;
- (e) An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee..."

Termination form. The reason she provided for resignation was retirement. The effect of this in law is that she was herself terminating her employment. A resignation is a unilateral act and it requires no acceptance by the employer. In such instances, where an employee resigns, there is no dismissal.'

- [24] The appellants submitted that the conduct of the Municipality amounted to a dismissal as contemplated in Section 186 (1)(a) of the Act. They contended that Dr Mashazi did not have the requisite authority to accept or approve Ms Hlonipho's request for early retirement and, secondly, that the acceptance of the request, should we find that Dr Mashazi had the requisite authority, was communicated, to her, after she had requested to withdraw her application.
- [25] Mr Maenetjie, on behalf of the appellants, argued that the evidence of Dr Mashazi to the effect that the termination was accepted or confirmed by the Deputy City Manager and herself was an indication that there was no proper acceptance or approval of the application to go on early retirement when the application was withdrawn. According to the appellants, there is no evidence as to when the Deputy City Manager confirmed or accepted the termination. Mr Masina, on behalf of the Municipality, submitted that there was indeed proper acceptance and communication.
- [26] In *Maada v Member of the Executive Council of the Northern Province for Finance and Expenditure and Another* (JA 34/01) [2003] ZALAC 2 (19 March 2007) at para [33] to [36] the following was said
- “[33]The general principle in our law is that an open offer – that is one which the offeror has not bound himself to keep open for a specified period – can be withdrawn at any time before it is accepted. A decision by the offeree to accept the offer does not constitute an acceptance of the offer if it has not yet been conveyed to the offeror. An acceptance must be communicated to the offeror for it to be effective.
- [35] Is there any difference between the acceptance of an offer and the approval

of the request or application within the context of this case? I see none. In my view in law it makes no difference that the special initiative referred to an “approval” of the request and not to an acceptance of an offer. In effect the appellant offered that he be discharged in return for the payment to him of a special severance package. The first respondent was entitled to accept or reject the offer. If he was happy with the offer, he could approve or accept it and, once that approval or acceptance had been conveyed to the appellant, the two parties would have had an agreement. If he was opposed to the appellant being discharged in terms of the special initiative, he could reject the request and there would have been no agreement.”

[27] I agree. I must however add that the acceptance or approval must be done by a person who has the necessary authority to do so and it must also be unconditional and unambiguous. See *Roberts v Martin* 2005 (4) SA 163 (C). The acceptance can be by an express act or implied by conduct that manifests an intention to be bound by the terms of the offer. The communication of the acceptance will be complete when it comes to the knowledge of the offeror. The communication of the acceptance, is among other factors, important as it determines the time when and place where the contract came into existence. Where the offeror indicated that the acceptance should be made and communicated in a particular manner, the acceptance must be done in accordance with the prescribed method. If no particular method of acceptance and communication is stipulated then any reasonable means of communication will suffice.

[28] The Labour Court correctly found that the issue before it was whether there was a dismissal. It was also alive to the fact that it fell on it to determine objectively whether a dismissal existed, because whether the SALGBC had jurisdiction or not was a matter for it to decide. It is trite that if there was no dismissal then the SALGBC would not have jurisdiction to entertain the dispute in terms of Section 191 of the Act. See *SA Rugby Players Association (SARPL) and others v SA Rugby (Pty) Limited and Others; SA Rugby Players Union and*

Another [2008] 9 BLLR 845 (LAC) at paragraphs [39] to [41].

- [29] It seems to me that the court *a quo* was wrong in categorising Ms Hlonipho's act of termination as a resignation in the conventional sense. Although early retirement and resignation involve a voluntary act on the part of the employee to leave the service of the employer, they operate differently.
- [30] One must understand and appreciate the difference between an application for early retirement and a resignation in order to properly resolve the dispute between these parties. I mention a few obvious differences.
- [31] Resignation can be tendered at any time by an employee but early retirement can only be sought after the employee has tendered a prescribed number of years of service and or attained a particular age. Resignation is generally a unilateral act requiring no permission from the employer, whereas early retirement is bilateral, requiring the assent of the employer. Another distinction is that an employee who resigned is normally denied retirement benefits but with early retirement the employee receives such benefits.
- [32] This being a case concerning an application for early retirement, the acceptance of the employer was required. It was therefore not an unilateral act which did not need the employer's consent, as the court *a quo* opined. The first question to consider is whether Dr Mashazi had the necessary authority to accept the offer for early retirement.
- [33] The arbitrator found that she did have the necessary authority. The arbitrator said the following in this regard:
- 'Dr Mashazi further confirmed that she had the authority to appoint and terminate contracts of employees in her department from level 5 upwards, that she discussed the withdrawal of Ms Hlonipho's retirement termination with the deputy city manager, was mandated to accept of (sic) reject it, and she elected to reject. I find the respondent's version to be more persuasive.'

[34] I find no fault with the arbitrator's reasoning and conclusion. The appellants attempted to dispute the arbitrator's conclusion with reference to what Dr Mashazi said during cross-examination. The appellants, grasping at straws, wanted to elevate an ambiguous, unclarified piece of evidence into the loadstar.

[35] It is profitable to repeat the relevant part of Dr Mashazi's evidence. She said:

'Termination of Maria's job was accepted or confirmed by the Deputy City Manager and myself and it was off. I can appoint and terminate from level 5 upwards as Executive Director. The HOD is the last person to sign the termination form.'

[36] It is not clear when the acceptance or confirmation by the Deputy City Manager occurred. The confirmation or acceptance by the Deputy City Manager is in any case irrelevant. It can only become relevant if it is showed that it was indeed a requirement for the acceptance of the offer to be binding. There was no such evidence. *Au contraire*, all the evidence indicated that Dr Mashazi had the necessary authority.

[37] Dr Mashazi said she had the necessary authority to approve the request. Mrs Botha expressly testified that Dr Mashazi had the necessary authority to do so. Her evidence was uncontroverted.

[39] Dr Mashazi's evidence was properly contextualized later during cross-examination when she was asked about her earlier evidence. Again it is beneficial to quote from the record:

'Question: You said Mr Leybrandt, the Acting City Manager at that time, accepted the termination

Question: (sic) we communicated with the City Manager, the withdrawal.'

[40] It is clear that the request for withdrawal and not the initial approval was discussed with the Acting City Manager. If there is still any doubt, during re-

examination she again testified that the withdrawal was discussed with Leybrandt and he said to her "You may or may not accept." In my view, it is clear that Dr Mashazi's evidence that it was confirmed or accepted by Leybrandt does not mean that Leybrandt's acceptance was a requirement. In its proper context, it only means that the application to withdraw the request was discussed with Leybrandt and he confirmed that she had the power to accept or reject it. There is no place on the route form for the City Manager or Acting City Manager to sign. If it was a requirement, one would have expected the form to provide for his/her signature.

- [41] Ms Hlonipho also knew that it was not necessary for the City Manager or Acting City Manager to approve the request. I say so because she took the form to Mrs Botha and Dr Mashazi to sign. She did not take it to the City Manager or Acting City Manager. In fact in her e-mail requesting the withdrawal of her application she expressly stated the following:

'I have not yet proceeded with the application for my early retirement to HRMD and Finance...'

- [42] She therefore knew that from Dr Mashazi it had to go to the Human Resource Management and Development (HRMD) and Finance sections.

- [43] Ms Hlonipho filed an affidavit resisting the Municipality's points *in limine* raised at the SALGBC. In paragraph 9 of her affidavit she stated the following:

'(the) respondent submitted a letter from the council containing the council's position regarding the process of early retirement at the council, a position which is not accepted by me as a comprehensive exposition of the issue.'

- [44] She attached a letter written on 15 August 2008 by M Mokaba the Municipality's Director: Provisioning and Maintenance to Khomotso Fambe of the Municipality's Legal and Administrative Services. The letter reads as follows:

‘ SUBJECT: POLICY ON EARLT RETIREMENT

1. This serves to confirm that council has no policy on early retirement.
2. Termination of service in respect of early retirement is subject to the provisions of the terms and conditions service, and the rules of the relevant pension of provident funds.
3. Notification of early retirement / resignation must be submitted by an employee to his/her direct supervisor for acknowledgement and then to the Head of Department for approval.
4. Then the letter will be forwarded to the relevant Human Resources and Finance Departments for processing.
5. The City Manager only deals with the termination of contract (sic) of Section 57 employees.’

[45] Ms Hlonipho stated that she did not accept this as a comprehensive exposition of the issue but she did not say in what sense. She also did not state that it was an incorrect exposition of the application process.

[46] All the evidence indicates that Dr Mashazi did indeed have the necessary authority to approve the appellant’s request for early retirement, and that she did, in fact, approve it. Did she communicate her approval to the appellant?

[47] Dr Mashazi’s testimony is clear and unambiguous. She signed the form in Ms Hlonipho’s presence and handed it to her. Ms Hlonipho went to her with the form. It can, therefore, be accepted that Ms Hlonipho had to have known that Dr Mashazi’s signature on the form and the handing over of the form signified acceptance and the communication of such acceptance.

[48] Dr Mashazi’s testified was that she enquired from Ms Hlonipho why she wanted to take early retirement and Ms Hlonipho said that she wanted to look after her grandchildren. When Dr Mashazi said “Good luck in looking after your

grandchildren,” the appellant must have known that the request had been approved. Dr Mashazi would not have wished her good luck if she refused the request.

- [49] Ms Hlonipho’s testimony demonstrates that she is very perceptive. Her highly developed insight into her problem would be commendable if it was harnessed for the right purpose. She realised that if she admitted to being in Dr Mashazi’s office on 03 September 2007, when the form was signed and handed over, that would spell the end of her assertion that there was no communication of the approval. She then decided to put distance between herself and Dr Mashazi. In order to achieve that, she testified that she left the form with Mrs Botha and that she did not know whether Mrs Botha took the form to Dr Mashazi. She testified as follows:

‘Arbitrator: I need clarity on something before I hand over for cross-examination. You handed in your application for early retirement.

Ms Hlonipho: The application was presented to Mrs Botha as gave to Mrs Botha (sic). I gave it straight to Mrs Botha because she wants (sic) to sign it and I suppose she sent () to Dr Mashazi, but I am not sure how far it had gone the following day when I submitted the withdrawal but I handed it to Mrs Botha.’

During her evidence-in-chief she testified that Mrs Botha said she will take the form to Dr Mashazi. This was never put to Mrs Botha, but strangely it was put to Dr Mashazi that she asked Hlonipho why she applied and she said “it was her grandchildren.” This could only have happened in Dr Mashazi’s office. This contradicts her testimony that she did not take the form to Dr Mashazi’s office.

- [50] I agree with the arbitrator that the version of the Municipality is more probable. The arbitrator correctly came to the conclusion that the appellants did not prove that Ms Hlonipho was dismissed. In my view there was an unambiguous, clear and instantaneous communication of the approval. The order of the court *a quo* should be upheld. The fairness or otherwise of the refusal to accept the

application to withdraw the request for early retirement need not be addressed in this judgment.

[51] The appellants drove a case based on blatant lies. Hlonipho knew that the request was accepted and communicated but in spite of that, she still litigated to this level. The law and fairness dictate that a cost order should be made in this matter. The parties were in any event also *ad idem* that costs should follow the result.

[52] I accordingly make the following order:

52.1. The appeal is dismissed.

52.2. The appellants are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

C J Musi JA

Murphy AJA and Setiloane AJA concurred.

APPEARANCES:

FOR THE APPELLANTS:

Mr Maenetjie SC

Instructed by Cheadle, Thompson &
Hayson Inc

FOR THE THIRD RESPONDENT:

Mr Masina

Instructed by: Tshingi Zebediela Inc

LABOUR APPEAL COURT