THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: PR267/22

In the matter between:

LEWIS STORES (PTY) LTD Applicant

and

SACCAWU OBO LIHLE NGCAKU First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

BONGANI MTATI *N.O.* Third Respondent

Heard: 25 April 2024

Delivered: 26 April 2024 is deemed to be the date of delivery of this judgment.

Summary: Application to review arbitration award. Incorrect ruling in relation to jurisdictional issue. Award reviewed, set aside, and replaced.

JUDGMENT

DANIELS J

Introduction

1. This is a review application brought by the applicant, hereafter referred to as “the employer” or “Lewis”. The key issue in this matter was whether the employer dismissed the first respondent’s member, or whether she resigned. The first respondent’s member is hereafter referred to as “the employee”.

2. The applicant agreed to withdraw its opposition to the condonation application brought by the first respondent regarding the late filing of its answering affidavit. Condonation was granted for the late filing of the answering affidavit.

3. In chambers the parties clarified that the first respondent had earlier filed an answering affidavit, which was premature (filed in the absence of compliance with Rule 7A(8) by the applicant) and the applicant had filed a replying affidavit in response which was also premature. The parties had filed notices withdrawing the premature pleadings, and thereafter filed pleadings in the correct sequence. Although rather unusual, nothing would be gained from holding the parties to their earlier pleadings which were filed prematurely. The court permitted the parties to withdraw their earlier premature pleadings.

Material facts

4. Lewis employed the employee for several years, during which time she held several positions. Ultimately, the employee, who was facing disciplinary charges, and who had experienced difficulties with one of the managers, elected to resign.[1] In writing, the employee tendered her unconditional resignation, on 25 September 2020. In the notice of resignation, the employee tendered her immediate resignation, and she made no mention of the notice period.

5. Lewis paid the employee her full salary for the month of September 2020.

6. The applicant, wishing to finalize the disciplinary process against the employee, sent her a letter dated 28 September 2020 in which it stated, *inter alia*, that because of disciplinary process, it did not accept her immediate resignation. Thereafter, later that same day, a more detailed letter was sent to the employee explaining the terms and conditions of her suspension. These letters advised the employee that she would remain on paid suspension pending her disciplinary hearing.

7. On or about 29 September 2020, the employee was contacted to collect a charge sheet. The employee was charged with invoicing a customer for furniture that he had never purchased. The charge related to dishonesty, theft, and fraud.

[1] The first respondent confirmed that it had never claimed constructive dismissal, and it does not intend to do so now either.

8. The employee remained on paid suspension during October 2020, and she was paid her full salary for the month.

9. On 25 October 2020, exactly one month after the employee resigned, Lewis issued an exit form to the employee.

10. On 24 November 2020:

    10.1. Lewis' Branch Manager addressed a letter to the employee advising that the employer had accepted her resignation. The letter advised that, because no notice of resignation was given, the employer would deduct one month's salary from monies due to the employee. It appears that this letter did not come to the attention of the employee.

    10.2. Lewis addressed a further letter to the employee titled "Termination of Employment" dated 24 November 2020. In this letter, the employer indicated that the reason for her termination of her service was misconduct / theft / dishonesty. At the bottom of the letter was a handwritten note in which the employer recorded: "*Resigned because of misconduct and also I called Lihle several times and later promise to come and sign termination but never came*."

11. It is unclear whether one or both letters, issued on 24 November 2020, came to the attention of the employee. Lewis paid the first respondent her salary for the month of November 2020.

12. There was no contact between Lewis and the first respondent between December 2020 and 11 April 2021. The first respondent was not remunerated during this period.

13. On 11 April 2021, the first respondent addressed a letter to Lewis enquiring when her disciplinary hearing would be convened, and when she could expect her salary from the end of November 2020 until April 2021.

14. On 12 April 2021, Lewis sent a letter to first respondent advising her that the reason the employer did not initially accept her resignation was because it wished to finalise the disciplinary process. However, thereafter, the employer decided to accept the resignation and abandon the disciplinary process. In the circumstances, there would be no disciplinary hearing and she would receive no further remuneration.

Arbitration Award

15. At the start of the arbitration, the applicant raised a jurisdictional issue contending that the CCMA had no jurisdiction because there had been no dismissal. Lewis argued that the first respondent had resigned and had not been dismissed. The parties and the third respondent (hereafter "the arbitrator") agreed that the jurisdictional issue should be determined after all the evidence had been presented.

16. In his award, the arbitrator ruled that the third respondent had been dismissed. The arbitrator made this ruling on the basis that Lewis had issued to the first respondent a letter titled "Termination of Employment"

dated 24 November 2020 in which it recorded that she had been dismissed for misconduct viz theft, fraud, and dishonesty. The arbitrator found that the first respondent's dismissal was unfair because no disciplinary hearing had been held and no evidence presented about the alleged misconduct.

17. The arbitrator, in paragraphs 39 and 40 of the award, stated:

> *[39] Considering issue of resignation, I find that the applicant resigned and her resignation was not accepted by the respondent as testified by the applicant and corroborated by Mr Luphondo.*
>
> *[40] Considering re-acceptance of resignation by the respondent issued on the same date with termination letter, I reject that the respondent issued re-acceptance letter same date with the termination letter, as the re-acceptance letter was never delivered nor emailed to the applicant. Further, no strides were made to communicate with the applicant that it had since accepted the resignation. It was only communicated through email on 21 April 2021 after the applicant inquired from the respondent about her investigation progress report. In this instance, I accept that the applicant's employment terminated for misconduct."*
>
> (Own emphasis)

18. In essence, the arbitrator found that the first respondent was dismissed because Lewis had: (1) failed to inform her that it had accepted her

resignation, and (2) issued a letter in which it stated that she had been dismissed for misconduct.

Legal principles and analysis

19. The applicant contends that the arbitration award falls to be reviewed and set aside in that the jurisdictional ruling (that the employee had been dismissed) was wrong in law.

Jurisdictional ruling

20. In a review application, when the review relates to the question of jurisdiction of the CCMA, the test to be applied is not reasonableness but whether the CCMA made the correct decision on objectively justiciable grounds.[2]

21. The CCMA as a creature of statute, which is an administrative tribunal and not a court of law, cannot finally decide its own jurisdiction. It can only make a ruling for convenience. Whether the CCMA has jurisdiction in a particular dispute is a matter to be decided by the Labour Court. When the existence of the dismissal is in dispute, this goes to the jurisdiction of the CCMA.[3]

Consequences of resignation

[2] *Zeuna-Starker Bop (Pty) Ltd v NUMSA* (1999) 20 ILJ 108 (LAC) at para 6*; Fidelity Cash Management Service v CCMA and others* (2008) 29 ILJ 964 (LAC) at para 101

[3] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and others* (2008) 29 ILJ 2218 (LAC) paras 39 – 40

22. In *Sihlali Mafika v SABC Ltd*[4] this Court held as follows:

> "*A resignation is a unilateral termination of a contract of employment by the employee. The courts have held that the employee* must *evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention …. Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent …. In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it*."
>
> (Own emphasis)

23. The Court further held that: "*A resignation is established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention. The courts generally look for unambiguous, unequivocal words that amount to a resignation* …." (Own emphasis)

24. In *Lottering and Others v Stellenbosch Municipality*[5] the Labour Court summarised the common law as follows:

[4] (2010) 31 ILJ 1477 (LC) at para 11

[5] (2010) 31 ILJ 2923 (LC) at para 15.

"*The common-law rules relating to termination on notice by an employee can be summarized as follows:*

24.1. Notice of termination must be unequivocal,

24.2. Once communicated, a notice of termination cannot be withdrawn unless agreed,

24.3. *Termination on notice is a unilateral act - it does not require acceptance by the employer*". (Own emphasis)

25. In *CEPPWAWU and another v Glass Aluminium 2000 CC* the Labour Appeal Court (the "LAC") held that: "*Resignation brings the contract to an end if it is accepted by the employer* …." (own emphasis). In this respect, the LAC contradicted the previous authorities, and the common law.

26. More recently, in *Standard Bank of South Africa Ltd v Chiloane*[6] ("Chiloane") the LAC held:

[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 contract or the statute remain valid and binding. This is so* "*since repudiation*

[6] [2021] 4 BLLR 400 (LAC); (2021) 42 ILJ 863 (LAC) (10 December 2020)

terminates the contract only if the innocent party (here the employer) elects not to act on it."

…..

[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."

27. This court is, of course, bound by the precedent in *Chiloane*.

28. In this matter, both parties accepted that the notice of resignation of 25 September 2020, while unequivocal, failed to comply with the notice period and was therefore in breach of the employment contract and/or the Basic Conditions of Employment Act, 1997.

29. The arbitrator, wrongly, focussed primarily on the letter titled "Termination of Employment" and failed to consider the full conspectus of the evidence. The arbitrator failed to take into consideration that the employee was not

disciplined and dismissed for misconduct. This was a clear indication that the employer had resolved to accept the resignation, as the employer later confirmed.

30. It is true that the employer was sending mixed messages and created confusion, but what was clear was that the employer's initial disavowal of the notice of the resignation was for the purpose of conducting a disciplinary hearing, which ultimately it decided against. In essence, when the employer stated that it did not accept the resignation it was simply communicating that it did not accept the immediate resignation, and it was holding the employee to the notice period.

31. The statement by the LAC, in para [18] of *Chiloane*, that the terms of the contract or the statute remain valid and binding when a defective notice is given, does not have the effect of denying the resignation any force at all. That statement means only that the resignation *takes effect* after the notice period. This was clarified by the LAC in para [22].

32. Importantly, *Chiloane* did not overturn the principle that a notice of resignation cannot be unilaterally withdrawn by the employee. At court, the employee's representative confirmed that, at no stage, did the employee ever attempt to withdraw the notice of resignation. All that happened here was that the employer accepted the resignation but did so later.

33. In this matter, the employer held the employee to the notice period in her employment contract and terminated the contract on 25 October, when it

processed the exit form. That the employer erroneously paid the employee her salary for November 2020, does not have the effect of undoing the resignation.

34. In the circumstances, the arbitrator was wrong to find that there was a dismissal.

Conclusion

35. In the result, the arbitration award is reviewed and set aside. The arbitration award is replaced with a finding that the dismissal dispute is dismissed for lack of jurisdiction, there being no dismissal as contemplated in section 186 of the LRA.

R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. T Roode of the Edward Nathan Sonnenbergs Inc.
For the Respondent:	Mr. Qotoyi of the Mbulelo Qotoyi Attorneys