LABOUR APPEAL COURT

INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA3/16

In the matter between:

CHARLOTTE C MHLONGO **Appellant**

and

SOUTH AFRICAN REVENUE SERVICE **Respondent**

Heard: **29 November 2016**

Delivered: **16 February 2017**

Summary: Claim for specific performance for breach of contract in the form of reinstatement – employee alleging that employer suspending and then dismissing her without affording her an opportunity to make representation in terms of the disciplinary code – no need for an employer to hold a disciplinary hearing when employer's repeated attempts to contact employee unsuccessful.

Moreover, employee's relief academic because employee suspension overtaken by her dismissal. On dismissal no case made out on papers of a breach of contract. No purpose remitting matter to the Labour Court in light of its misdirection that it lacks jurisdiction to entertain employee's dispute.

Coram: Waglay JP, Coppin JA *et* Phatshoane AJA

JUDGMENT

WAGLAY JP

Introduction

[1] The appellant brought an application in the Labour Court in terms of Section 77 of the Basic Conditions of Employment Act, 75 of 1997, (BCEA) alleging that the respondent (her employer) had breached her contract of employment by first suspending and then dismissing her without complying with the terms of her contract. The relief the appellant sought were declaratory orders, and, in essence, an order of specific performance, i.e reinstatement.

Background

[2] The appellant was arrested at her workplace on 31 March 2009 on allegations of corruption. It was alleged that she demanded and accepted payments from prospective or fixed term contract employees to secure them employment with her employer.

[3] At the time of her arrest, the police were accompanied by one Seshoka her co-employee. According to the appellant, at the time of her arrest, Seshoka "grabbed" her two cell-phones, took possession of her access card to the employer's premises and the laptop issued to her by her employer. Seshoka also informed the appellant that she was suspended with immediate effect.

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[4] On 20 April 2009, the appellant consulted with her attorneys who wrote to her employer demanding written confirmation that she was suspended and reasons for such suspension. The letter records that at the time of her arrest, Seshoka had informed her that she was suspended and had confiscated her access card. The letter then adds that she has yet to receive written confirmation of her suspension and states that she was innocent of the charges preferred against her by the police. The appellant's attorneys received no response to this letter.

[5] About two months later, on 15 June 2009, appellant's attorneys addressed a further letter to the employer stating that the appellant had not received her salary for the month of June and made a demand for it.

[6] The employer responded to the appellant's attorneys (although the date on the letter indicates 10 December 2008, which was clearly wrong). The second paragraph of the letter states the following.

> *'Kindly note your client's services were terminated by SARS on 19 May 2009 after she failed to report for duty as per attached correspondence marked A and B. Unsuccessful attempts were made by HR to have the letters hand delivered at her place of residence after which the services of a Speed Service were procured to have the letters delivered. The letters were eventually delivered via a speed service, and proof of the said deliveries was furnished to SARS by the service provider'.*

[7] The letters referred to in the above paragraph called upon the appellant to immediately report for duty or inform the employer of her whereabouts and the reasons for her absence from work. The appellant avers that she never received the said letters.

[8] The appellant then launched the application, which is the subject of this appeal, seeking the following relief:

> *'a) Declaring the decision of the respondent to suspend and subsequently dismiss the applicant on the 19th May 2009 unlawful;*

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> *b) Declaring the failure by the respondent to follow its disciplinary code and procedure, a breach of the terms of the employment contract between the applicant and the respondent;*
>
> *c) The respondent be ordered to allow the applicant to return to work;*
>
> *d) The respondent be ordered to pay the applicant, her salary and all benefits from the 19th May 2009 to the date on which her salary and benefits are restored;*
>
> *e) The cost of this application.'*

[9] The basis for the relief sought was that the employer had:

i. Breached the Disciplinary Code of Conduct ("the Code") which applied to her; and

ii. Failed to give any prior notice of suspension and dismissal or give the appellant an opportunity to make representations before taking the decision to suspend and later dismiss her.

[10] The employer opposed the application. The employer denied that Seshoka "grabbed" or had taken the cell-phones from the appellant averring that the police had confiscated the phones, laptop and the access card. The employer also denied that the appellant was told that she was suspended. Furthermore, an unsigned memorandum dated 8 April 2009 (eight days after the appellant's arrest), prepared by Seshoka, was attached to the employer's replying papers, in terms of which the employer was requested to suspend the appellant.

[11] According to the employer, the appellant simply stayed away from work after her arrest. Adding that, three days after her arrest, on 3 April 2009, she faxed a medical certificate to her employer which stated that she was medically unfit to return to work until 8 April 2009. A further medical certificate was forwarded to the employer on 8 April 2009 which stated that she would be unfit to work until 17 April 2009.

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[12] The employer heard nothing further from the appellant save for the letter, dated 20 April 2009 from the appellants' attorneys, referred to earlier. The employer did not respond to this letter.

[13] On 8 May 2009, the employer wrote a letter to the appellant, stating the following:

> *'It has come to the attention of Management of this office that you have been absent from your place of work without permission and/or approved leave and/or having communicated to your team leader/manager since 20 April 2009 to date.*
>
> *You are requested to immediately report for duty, or to inform your team leader/manager of your whereabouts and the reason/s thereof as is required from you in terms of the SARS policy: Timely Reporting of Unexpected Absences.*
>
> *I wish to inform you that should you fail to report for duty or inform your team leader/manager of your whereabouts within 5 working days from the first day of your absence, SARS will immediately stop your remuneration and will terminate your employment contract with immediate effect.*
>
> *You are hereby instructed to report for duty or to contact your team leader/manager immediately.'*

[14] The above letter was followed 11 days later by another letter dated 19 May 2009 from the employer to the appellant, which said:

> *'You have failed to report for duty or to inform your team leader/manager of your whereabouts and the reason/s/therefore within the prescribed 5 working days from the first day of your absence as is required from you in terms of the SARS policy: Timely Reporting of Unexpected Absences.*
>
> *I wish to inform you that you have made yourself guilty of abscondment and/or desertion and your services will therefore be terminated with immediate effect.*
>
> *You have the right to appeal against the termination of service within 10 working days from the date of receipt of this letter following the Appeal procedure as provided for in terms of the Disciplinary Code and Procedure'.*

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[15] The employer confirmed that the letters were sent by Speed Services after delivery by hand and registered mail failed because there was no response at the residence of the appellant.

[16] The appellant was then dismissed on 19 May 2009.

[17] In its opposing papers, the employer denied that the Code, relied upon by the appellant applied, to her.

<u>The Labour Court</u>

[18] At the hearing of the matter, the appellant, from the bar, applied for the matter to be referred for oral evidence on the following grounds:

i) That since the application was launched, the appellant was acquitted of the criminal charges and wished to place this before court;

ii) That at least two material disputes of fact could not be resolved on the papers before the court: this related to:

a) The appellant's suspension; and,

b) Whether the Code, upon which the appellant relies, was applicable to her.

[19] The Labour Court, per Malan AJ, refused the application. It stated that: appellant's acquittal could not contribute to resolving the dispute before it and since the appellant was aware, even prior to launching her application, that her employer denied that she was suspended, the appellant could not ask for the matter to be referred for oral evidence to determine this. On the issue of whether the Code relied upon by the appellant was binding, the Labour Court was of the view that that issue could be resolved on the papers as they stood.

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[20] The appellant then immediately applied for a postponement of the hearing of the application. This was also refused.

[21] After the postponement was refused, the employer, from the bar, brought an application for the dismissal of the application on the grounds that the appellant's case, properly construed, was a case of unfair dismissal as contemplated in the Labour Relations Act, 66 of 1995, ("LRA") and, as such, the Labour Court, it said, had no jurisdiction to entertain the dispute. The Labour Court was persuaded by the submission and dismissed the application. It concluded that it did not have jurisdiction to entertain the dispute because, it said, the dispute was an unfair dismissal dispute that had to be referred to the Commission for Conciliation, Mediation and Arbitration for arbitration. The basis for this decision by the Labour Court appears to be its finding that the Code, relied upon by the appellant, did not apply to her and that she, consequently, had to proceed in terms of the LRA and not the BCEA.

The appeal

[22] The appellant sought and was granted leave to appeal by the Labour Court against the order dismissing the application on the grounds of lack of jurisdiction.

[23] At the commencement of the hearing of the appeal, the point was raised that even if this Court had to find that the Labour Court erred in concluding that the Code was not applicable, or that it erred in concluding that this was a dismissal dispute, as contemplated by the LRA, it would serve no purpose to refer the matter back to the Labour Court, because on the papers before the Labour Court, the appellant had failed to make out a case for a breach of contract.

[24] Perhaps it is appropriate here to deal with the application for a postponement of the appeal which was made by appellant's counsel, on her behalf, towards the end of his argument. The purpose of the application for postponement, according to counsel, was to petition this Court for leave to appeal against the Labour Court's refusal to grant leave to appeal against its decision to refer the matter for

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oral evidence. This Court refused the postponement. The leading of evidence to prove that the appellant was acquitted of the criminal charge, cannot assist her to prove that she was suspended.; She was aware that her suspension was disputed by the employer even before she launched her application and could not now seek to refer the determination of that fact to oral evidence. and, finally, there is no need to refer for oral evidence the applicability of the Code because, even if the Code is applicable, for reasons stated later in this judgment, it will be of no assistance to the appellant.

[25] The appellant's case is premised upon the Code, particularly clause 10.2, which provides:

> *'No employee may be dismissed, demoted or suspended without pay for misconduct, without being granted a formal disciplinary hearing as contemplated in this Disciplinary code and procedure unless the holding of a disciplinary hearing is made impossible by the employee by failing to attend the hearing for no valid reason, or the employee indicating clearly and unequivocally that he/she is not prepared to participate in the disciplinary hearing.'*

[26] For purposes of this judgment, I am prepared to accept that the Labour Court erred and that the Code, including the quoted clause, is applicable and is a term of the appellant's employment contract. But the clause is of no assistance to the appellant, because the evidence in this Court, with regard to the appellant's suspension, is mutually destructive. Since the appellant was seeking final relief in the Labour Court on motion, it is the respondent's (employer's) version which must be accepted when there is a genuine dispute of fact. All there is in the papers filed in the Labour Court, is the appellant's allegation that on the date and time of her arrest, she was told by Seshoka that she was suspended with immediate effect and that he confiscated her mobile phones, laptop and access card. These allegations are denied by her employer. The appellant's argument that no credence should be placed on the employer's evidence because it made no sense for the police to confiscate her access card, is without merit. There is no basis to come to this conclusion without any supporting facts. Her further

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argument that the employer's failure to respond to her attorneys' letter of 20 April 2009 made the employer's version improbable, as the employer sought to avoid dealing with the issues raised in the said letter, is again without any basis. There are no grounds upon which one can draw such an inference. The fact that there is no response to a letter does not make its contents valid, particularly when there is other evidence to show a contrary position.

[27] The employer points to the fact that if the appellant was in fact suspended on 31 March 2009 and not required to report for duty, she would not have provided medical certificates to the effect that she was unfit to report for work until 17 April 2009. Her explanation that the doctor had done this of his own volition is difficult to comprehend or accept. Furthermore, the fact that her employer wrote to her threatening her with dismissal if she did not return to work, and a report from Seshoka, eight days after she was arrested, calling on the employer to suspend the appellant, makes the employer's version far more probable. In the circumstances, the appellant will not be able to satisfy the Labour Court that she was indeed suspended.

[28] The *onus* is upon the appellant to satisfy the court about the fact she alleges to be correct. Here at best for the appellant, since there is no basis to reject either of the versions presented on affidavit, the appellant has failed to discharge her *onus*. Anyway, events have overtaken the need to deal with the issue of suspension. If breach of contract is established with respect to her suspension, she cannot get reinstatement for that reason, because she has since been dismissed for failing to return to work when she was required and was obliged to do so.

[29] Insofar as the appellant relies on the above quoted clause from the Code to claim that the employer breached the term of the agreement by dismissing her without giving her an opportunity to state her case, such reliance is also misconceived. How is an employer to give a notice about a misconduct hearing to an employee who fails to come to work or respond to a letter calling her to return to work, or

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explain why she is unable to do so? The employer in its correspondence called the appellant to return to work or explain why she remains absent under threat that she will be dismissed. The appellant failed to respond. The employer gives details on its attempts to serve the letters by hand and also that those entrusted to deliver the letters by hand spoke to neighbours etc. The employer then tried to serve the letters by registered post and finally utilised the services of Speed Service. As against this there is no explanation from the appellant. She does not state whether she was informed by her neighbours about her employer seeking her, or whether she received the registered mail slips at all, or whether she received the letters from Speed Services. There is no dispute that the address to which the correspondence was sent was correct. Other than for a bold one-liner that she did not receive the correspondence from the employer, there is no further explanation from her for that. In these circumstances the employer cannot be faulted for dismissing the appellant, particularly, since one of the terms that regulates their relationship provides:

> *'2.4.5 If an employee fails to advise the team leader or direct manager of his or her absence, and is absent for three (3) successive work days, the team leader or direct manager shall send a communication via registered mail to the employee's last known address or via other practical means e.g. hand-delivered notification, requesting the employee to return to work, simultaneously notifying the employee that failure to do so will result in dismissal.*
>
> *2.4.6 Should an employee be absent from work for five (5) consecutive work days without communicating his or her absence and the reasons thereof as described in this policy, the employee will be regarded as having absconded and his or her employment must summarily be terminated.'*

[30] The employer's dismissal of the appellant was thus in compliance with the above clause, but, this did not close the door to the appellant. She was entitled to appeal internally against that decision, but failed to do so, arguing that to appeal against the decision was futile as the horse had already bolted. Again, the

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appellant's submission in respect of appealing the decision is misconceived. An internal appeal in circumstances such as this would inevitably mean that the appellant would be required to explain her absence from work which must then be considered by the employer.

[31] The employer's action was in compliance with the agreement that regulated the employment relationship with the appellant and as such it cannot be said that it had in any way or form breached the agreement that regulated the relationship between them.

[32] In the circumstances, the appellant's claim that her suspension and subsequent dismissal was in breach of the agreement is without merit. Even if the Labour Court erred in finding that it had no jurisdiction to entertain this dispute, which it did, no purpose is served in setting aside that order and referring the matter back to the Labour Court.

[33] Finally, I need to add that the appellant's decision, to proceed in terms of the BCEA instead of proceeding in terms of the LRA is totally mystifying, but might well have been informed by poor legal advice. If she had proceeded in terms of the LRA she would not only have been entitled to claim what she sought in these proceedings on the basis of an unfair dismissal, but would have been engaged in a process where the test is that of fairness and where the onus of proving the fairness of the dismissal is on the employer. More mystifying is that the appellant proceeded by way of motion proceedings knowing full well that her principal submission would be disputed by the respondent; that the resulting dispute would be irresoluble on the papers, making the application highly susceptible to dismissal for that reason alone and thus making her application stillborn.

[34] Notwithstanding the above, I am of the view that this is a matter in which there should be no order as to costs.

[35] In the result, I make the following order.

The appeal is dismissed.

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Waglay JP

I agree

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Coppin JA

I agree

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Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT: Mr. R Maastenbroek

Instructed by Maponya Ledwaba Attorneys

FOR THE RESPONDENT: Mr L Kutumela

Instructed by Hogan Lovells Inc.

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