Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D1066/2012

In the matter between:

T J RADEBE	**Applicant**
and	
MEC: HEALTH EASTERN CAPE	**First Respondent**
MEC: HEALTH KWAZULU-NATAL	**Second Respondent**
PUBLIC HEALTH & SOCIAL DEVELOPEMENT	
SECTORAL BARGAINING COUNCIL	**Third Respondent**
SILAS RAMUSHOWANA	**Fourth Respondent**

Heard: 5 June 2014

Delivered: 5 June 2014

Summary: Review of award regarding dismissal by erstwhile employer consequent to transfer of employees to new employer

---

JUDGMENT

GUSH J

[1] The applicant in this matter was employed by the first respondent as Chief Executive Officer of the Umzimkulu hospital cluster. Pursuant to the operation of the legislation referred to below the applicant was transferred from the employ of the first respondent to the employ of the second respondent on 1 March 2006. The reason for the transfer was as a result of a change to the borders of the provinces of KwaZulu-Natal and the Eastern Cape.

[2] On 26 August 2006 the applicant was accused of misconduct by the first respondent. The alleged misconduct was that the applicant had failed to comply with a lawful instruction relating to a pre-audit and/or internal control instituted by the applicant, which misconduct allegedly occurred "during early 2006".

[3] The first respondent (the applicant's erstwhile employer) conducted a disciplinary enquiry during 2007, found the applicant guilty and dismissed the applicant on 18 August 2007.

[4] The applicant's appeal against the dismissal was dismissed and a dispute regarding her dismissal was referred to the third respondent. At the commencement of the arbitration the applicant challenged, *in limine*, her dismissal on the grounds that at the time thereof she was an employee of the second respondent, that the first respondent was not her employer and the dismissal was "... thus invalid and of no force and effect".

[5] The basis of the applicants *in limine* challenge to her dismissal is that she had been transferred from the first respondent to the second respondent by virtue of the provisions of the Constitutional Twelfth Amendment Act 2005 read with the Cross Boundary Municipality Laws Repeal and Related Matters Act 23 of 2005. Accordingly it was averred by the applicant that she was no longer employed by the first respondent at the time when she was notified of the disciplinary enquiry and at the time of the holding of the disciplinary enquiry and her dismissal.

[6] The Constitution Twelfth Amendment Act of 2005 was promulgated in order to, *inter-alia*; re-determine the geographical areas of the Eastern Cape Province and KwaZulu-Natal.

[7] Pursuant thereto the Cross Boundary Municipalities Law Repeal and Related Matters Act 23 of 2005 (the Act) was promulgated to provide for the "consequential matters as a result of the realignment" of these provinces. Because the Act had the effect of relocating certain areas from one province and another this act contained, in section 5 thereof, "transitional arrangements regarding the transfer of provincial functions, assets and liabilities". The date of commencement of the Act was as with the Constitution Amendment Act (sections 2 – 4) 1 March 2006.

[8] Section 5 of the Act provides:

> (1) Where a particular area is relocated from one province (the releasing province) to another province (the receiving province) at the commencement of sections 2 to 4 of the Constitution Twelfth Amendment Act of 2005-
>
> (a) any function exercised or service delivered by the provincial government of the releasing province in the area in question must, subject to subsections (2) and (3), be exercised or delivered by the provincial government of the receiving province; and
>
> (b) any asset, right, obligation, duty or liability associated or connected with the exercise of such function or the delivery of such service vests in the provincial government of the receiving province.
>
> (2) The provincial government of the releasing province and the provincial government of the receiving **province may before the commencement of sections 2 to 4 of the Constitution Twelfth Amendment Act of 2005 6 enter into an implementation protocol in terms of section 35 of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005),** in **order to provide for-**
>
> (a) the provincial government of the releasing province to continue exercising a function or delivering a service on an agency basis in the area in question; or
>
> **(b) the transfer of staff in accordance with applicable labour law from the provincial government of the releasing province to the provincial government of the receiving province.**

(3) (a) **If an agreement on the content of an implementation protocol envisaged in subsection (2) cannot be reached before the commencement of sections 2 to 4 of the Constitution Twelfth Amendment Act of 2005 7, the matter must be referred to the National Council of Provinces.**

(b) The National Council of Provinces is mandated to assist the provincial governments concerned in any manner necessary in order to reach agreement **within two months after the commencement of sections 2 to 4 of the Constitution Twelfth Amendment Act of 2005 8.**

(c) If no agreement is reached within the period referred to in paragraph (b), subsection (1) applies without any exception.

(d) **Where a matter has been referred to the National Council of Provinces as provided for in paragraph (a), the provincial government of the releasing province must continue to exercise any relevant function and deliver any relevant service in the area in question during the two month period referred to in paragraph (b).**

(4) Where an implementation protocol has been concluded as provided for in subsections (2) and (3), the President's Co-ordinating Council referred to in section 6 of the Intergovernmental Relations Framework Act, 2005, must co-ordinate the implementation of the protocol in question.

(my emphasis)

[9] The act regulating the implementation protocol is the Intergovernmental Relations Framework Act, 2005. During argument Mr Simoyi conceded that the first and second respondents had not entered into an implementation protocol as provided for by the legislation.

[10] The references to such an agreement or at least what was averred to be an agency agreement, in paragraph 10 of the answering affidavit was not correct. The agreement headed “Memorandum of Agreement” between the provincial Departments of Health of the Eastern Cape and KwaZulu-Natal respectively (first and second respondents) and annexed to the pleadings did not as averred constitute an agreement that the outstanding disciplinary issues would be resolved by being finalised by the first respondent prior to the applicant being transferred to the second respondent.

[11] The only document that mentions such an issue is a progress report attached to the answering affidavit (annexure B) that simply records that such a decision was taken. This document does not constitute an implementation protocol and takes the issue no further.

[12] It was common cause between the parties that at the time of the alleged misconduct the applicant was an employee of the first respondent and at the time of her dismissal the applicant was an employee the second respondent.

[13] The applicant had argued at the commencement of the arbitration that:

a. Before the commencement of sections 2 to 4 of the Constitution Twelfth Amendment Act of 2005 6 the first and second respondents had not entered into an implementation protocol in terms of section 35 of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005) The employee On 26 October 2006 as set out in section 5(2)(b) of the Cross Boundary Municipalities Law Repeal and Related Matters Act;

b. that the absence of an agreement had not been referred to the National Council of Provinces as required by section 3(a) and (b) and that accordingly the transfer of the staff took effect from the the date on which the two act in question came into effect. (Section 3(c)).

c. In the circumstances therefor at the time the disciplinary notice was handed to the applicant, and at the time of her dismissal, she was an employee of the second respondent and accordingly could not be dismissed by the first respondent.

[14] In response thereto, at the arbitration, the first respondent averred that the first and second respondents had entered into an agreement on 25 April 2006 in terms of which agreement it is recorded that the premiers of the Eastern Cape and KwaZulu Natal had concluded a memorandum of understanding declaring inter-alia the intention to give effect to the provisions

of the legislation. The first respondent suggested that the first and second respondents had by virtue of this agreement purportedly agreed that the releasing province would continue to exercise on an agency basis the control of the staff. What the agreement however contains is simply a reference to the provisions of the Cross Boundary Municipalities Law Repeal and Related Matters Act.

[15] The respondents' averments are clearly incorrect and cannot be sustained. The respondents had not complied with the legislation. The so-called agreement did not provide for the continuation of the function of an agency basis. More importantly it did constitute an agreement that is contemplated by the Act.

[16] It is abundantly clear from the papers that the time of her dismissal by the first respondent the applicant was not an employee of the first respondent but was an employee of the second respondent and accordingly in the absence of any binding regulation or agreement the first respondent had no right to terminate the applicant's employment with the second respondent.

[17] The applicant in the review application based its review of the 4th respondents award on this fact and argued that the ruling of the 4th respondent that "from the evidence before me I am satisfied that the first respondent had authority to discipline and dismiss the applicant", is reviewable and should be set aside.

[18] The meaning of dismissal set out in section 186(1) of the Labour Relations Act (LRA) as "an employer has terminated the contract of employment..."

[19] It is trite that in order to adjudicate a dispute relating to an unfair dismissal it is necessary for the arbitrator not only to apply the onus as set out in section 192 of the LRA with regard to the existence of a dismissal but in order to do so identify who the employer was.

[20] In the circumstances of this matter the issue raised, *in limine*, at the arbitration was in essence that there was no dismissal in that the first respondent had purported to dismiss the applicant in circumstances where

the first respondent was no longer the applicant's employer. The first and second respondents had given effect to this decision by ceasing to pay the applicant her salary. This clearly entitled the applicant to refer the matter to the third respondent and for the applicant to dispute the validity of her dismissal.

[21] The situation in summary is thus:

a. The applicant was employed by the first respondent and was transferred by operation of law pursuant to the promulgation of the legislation referred to above to the second respondent on 1 March 2006 on which date she became an employee of the second respondent.

b. Despite not being an employee of the first respondent at the time the applicant was accused of misconduct and disciplined (dismissed) by the first respondent.

c. The first and second respondents had not concluded any agreements that entitled the first respondent to deal with the applicant as an employee either in the first instance or as an agent for the second respondent.

[22] In her notice of motion the applicant seeks only that the award of the fourth respondent issued under the auspices of the third respondent be reviewed and set aside and corrected with a finding that the first respondent local authority dismissed the applicant with the applicant was not an employee of the first respondent at the time of the dismissal.

[23] The applicant argued that the effect of setting aside the award and determining that the 1st respondent was not entitled to dismiss the applicant would have the effect of reinstating the applicant to the employer of the second respondent. This issue was not specifically addressed by either party in the pleadings and is accordingly not necessary for me to deal with it save to say that in the circumstances the applicant has at all material times

remained in the employ of the 2nd respondent. The first respondents dismissal amounted to a nullity.

[24] The second respondent does not oppose the applicants application, confirms such “averments made regarding the second respondent” and recorded that it would abide the decision of the court.

[25] As far as costs are concerned there is no reason in law or fairness why the cost should not follow the result.

[26] I am satisfied that in the absence of any lawful basis upon which the first respondent could either discipline or dismiss the applicant in circumstances where it was common cause between the respondents and the applicant that the applicant was not the time an employee of the first respondent that the decision to dismiss is of no force and effect. The applicant in the alternative prayer is that the ruling be reviewed set aside and referred back to be considered de novo. I do not see that any purpose will be served by referring the matter back to the third respondent.

[27] I am satisfied however that as the 2nd respondent appears to have reacted to the applicant’s so-called dismissal by the 1st respondent it is necessary and expedient to set aside the 4th respondent’s award.

[28] For the reasons set out above I make the following order:

a. The arbitration award of the fourth respondent, issued under the auspices of the third respondent, dated 1 September 2012 is reviewed, set aside, corrected and substituted with an order that the first respondent lacked authority to dismiss the applicant as she was not an employee of the first respondent at the time of the dismissal.

b. The first respondent is ordered to pay the applicants costs.

_____

D H Gush

Judge of the labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:	Adv C Nel
	Instructed by Austen Smith Attorneys
FOR THE FIRST RESPONDENT:	Adv Simoyi
	Instructed by State Attorney East London