IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C517/2018

In the matter between

MARK MICHAEL COETZEE **Applicant**

and

THE ZEITZ MOCAA FOUNDATION TRUST
(TRUST NO: IT000844/2015(c) **First Respondent**

THE TRUSTEES FOR THE TIME BEING OF THE
ZEITZ MOCAA FOUNDATION TRUST **2nd to 5th Respondents**

Heard: 8 June 2018
Delivered: 14 June 2018

Summary: An employer has an election as to whether or not to accept an employee's resignation and hold her to her notice period and to discipline such employee during the notice period.

JUDGMENT

RABKIN-NAICKER J

[1] This is an urgent application in which the applicant seeks the following relief:

"2. Declaring the disciplinary process instituted by the First Respondent against the Applicant on 15 May 2018 to be unlawful, invalid and of no force and effect; alternatively

3. Interdicting and restraining the Respondents from continuing and finalising the disciplinary process instituted against the Applicant in his capacity as employee of the First Respondent, which process was initiated on 15 May 2018 in the light of the Applicant's resignation from employment with immediate effect on 16 May 2018, alternatively 25 May 2018;

4. Declaring that the Respondent had no jurisdiction to discipline and interdicting the Respondents from continuing with the disciplinary investigation/disciplinary process after 16 May 2018, alternatively 25 May 2018, following the Applicant's unequivocal and immediate resignation without notice;

5. Insofar as the Respondents may have continued with the disciplinary process instituted on 15 May 2018 against the Applicant, declaring that any disciplinary procedure or process taken (alternatively disciplinary process being finalised) after 16 May 2018, alternatively 25 May 2018, be declared null and void and accordingly be set aside.

6. That the Respondents be ordered to pay the Applicant's costs of the application, on the scale as between attorney-and-own client, the one paying the others to be absolved."

[2] The applicant was invited to make written representations in respect of allegations of serious misconduct in his capacity as Executive Director and Head

Curator of the Zeitz Museum of Contemporary Art Africa. The invitation was made by means of a letter dated 15 May 2018. Clause 2 and 3 of the letter reads as follows:

"2. The allegations are set out herein-below. In compiling your response(s), you may be assisted by a legal representative of your choice. Be advised that the Trust shall not be convening a formal disciplinary hearing. This letter and the invitation for you to respond hereto constitutes your opportunity to be heard which is in line with the relevant provisions of the Labour Relations Act, 1995 as read with your conditions of employment and the Company's Disciplinary Code.

3. Your response to these allegations is required by no later than 12h00 on Tuesday 29 May 2018. In the event that you fail to respond by this deadline, the Trust shall proceed to determine the allegations against you and to impose an appropriate sanction."

Applicable legal principles

[3] The submissions in regard to the legal principles applicable to the dispute are set out on behalf of the respondents are as follows:

3.1 An employee is entitled to resign with immediate effect only in the case of a preceding material breach of contract by the employer, which is not pleaded, much less proven, here;

3.2 Statutorily and contractually, the Applicant is bound to give at least four weeks' notice of his resignation, which period the parties have agreed expires on 22 June 2018, in the event that this application fails;

3.3 If an employee wrongfully purports to resign on no notice, the employer remains entitled to exercise its contractual rights during a notice period;

3.4 During an employee's notice period, there is no legal impediment to the prosecution of disciplinary proceedings and, if warranted, the subsequent dismissal of an employee for misconduct.

[4] In **Vodacom (Pty) Ltd v Motsa and Another**[1] the Court per Van Niekerk J stated the following:

" [19] The principles that regulate a resignation are well established. Resignation is a unilateral act (see Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477 (LC) (LC J799/08; 14 January 2009)). When an employee gives the required notice, the contract terminates at the end of the notice period. When an employee leaves his or her employment without giving the required period of notice, the employee breaches the contract. Ordinary contractual rules dictate that the employer may hold the employee to the contract and seek an order of specific performance requiring the employee to serve the period of notice. Alternatively, the employer may elect to accept the employee's repudiation, cancel the contract and claim damages. Of course, it is always open to the parties to terminate an employment contract on agreed terms and for either of them to waive whatever rights they might otherwise have enjoyed."

[5] The above statement is a correct reflection of the law. Reference was made to the case of **Mtati v KPMG Services (Pty) Ltd** [2] in submission before me. This judgment has recently been overturned on appeal on the basis, (as far as can be gleaned from the LAC ex tempore order) that the dispute before the Labour Court was moot. In as far as that judgment was in conflict with the summary of the law above, it is no longer persuasive. There is no need for the Court to deal with the facts and law applied in that case. However, for clarity of the legal position, that an employee's contract of employment comes to an end only once his resignation takes effect at the end of his notice period, the following obiter dictum of Zondo J (as he then was) in his dissenting judgment in **Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others**[3] is set out:

[1] 2016 (3) SA 116 (LC)
[2] (2017) 38 ILJ 1362

[3] (2016) 37 ILJ 313 (CC). The issue was not a contentious one in both judgments in the matter.

"[144] Since an employee has no right of withdrawing a valid and lawful resignation once it has been communicated to the employer except with the consent of the employer, this means that as at the date of his dismissal, Mr Makhotla was bound to leave Toyota's employ on 31 March 2011. As already indicated, Mr Makhotla was dismissed a few days before his resignation would take effect. One can, therefore, say that the dismissal interrupted the resignation. That is why we cannot say that Mr Makhotla's employment with Toyota came to an end as a result of his resignation. We say that it came to an end as a result of his dismissal on 24 March 2011."

The Applicant's case

[6] The Court has to determine whether on the papers before me, the employer elected to hold the applicant to a notice period as it claims in this matter. The founding papers set out the following material allegations:

6.1 That at a meeting on the 15 of May 2018 the applicant was handed the invitation to make written representations and given a document entitled "precautionary suspension from employment";

6.2 That the next day at a meeting, on 16 May 2016, he informed the first respondent that he wanted to tender his immediate resignation since: "I didn't want to hurt anyone or the First Respondent." He did not do so in writing but an agreed statement was discussed with his employer to be given to the press.

6.3 In terms of the agreed statement, the first respondent announced to the press that: "an enquiry into Mr Coetzee's professional conduct has been initiated by the trustees. Mr Coetzee has since tendered his resignation."

6.4 That in the eyes of the world, he had resigned with immediate effect and that should have been the end of the matter.

6.5 That it appeared to him that certain of the Trustees were hell-bent on proceeding with the allegations against him and instructed his attorney to get confirmation in writing that “it is indeed your view that our client has resigned from your service and is therefore not employed by you”.

6.6 The employer’s response through its attorneys of record was, as recorded in correspondence dated 22 May 2018 and annexed to the founding affidavit, that: “As matters presently stand, based on the facts as recorded above, our client regards your client as having resigned with effect from 16 May 2018, subject to four weeks’ notice as provided for in terms of law.”

[7] The replying papers reiterate the applicant’s averment in his founding papers that he resigned with immediate effect and in addition, annex his pay slips, including that of May 2018 which reflects his employment termination date as 16 May 2018 and the ‘ordinary’ days worked as 16 (sixteen). The applicant is coy as to when he asked for his payslips, he avers that he did so ‘recently’. However, the email requesting his May payslip annexed as “R10” to the replying papers was dated 1 June 2018 and reads as follows:

“Dear Nazeer

I am unable to access my payslip for May as it is sent to the Zeitz MOCAA email.

Could you please send my May payslip in the format attached.

It would also be helpful if you could send me March and April as well for my records.

Thank you for your help.

Best regards

Mike”

[8] I note that the email reflects that a format was attached for the financial department to use to capture the May payslip. That attachment is not annexed to the replying affidavit.

[9] The replying affidavit elicited an application for the filing of a "supplementary answering affidavit" by the respondents in material part dealing with the payslips.

[10] I declined to admit the said affidavit based on the relevant authorities which were succinctly set out **Porterstraat 69 Eiendomme v P A Venter**[4] in which the Court stated:

> "In terms of the decisions in Mkwanazi v Van der Merwe and Another 1970 (1) SA 609 (A) at 626A - G and in Barclays Western Bank Ltd v Gunas and Another 1981 (3) SA 91 (D) at 95C - 96E the relevant considerations in such an application are:
>
> (i) The reason why the evidence was not led timeously.
>
> (ii) The degree of materiality of the evidence.
>
> (iii) The possibility that it may have been shaped to 'relieve the pinch of the shoe'.
>
> (iv) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.
>
> (v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been heard and, before judgment is delivered, plaintiff asks for leave to lead further evidence, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the Court.
>
> (vi) The 'healing balm' of an appropriate order as to costs.
>
> (vii) The general need for finality in judicial proceedings.
>
> (viii) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client."

[11] In my view, the application was a classic case of trying to "relieve the pinch of the shoe"[5]. In any event, the defence put up by the respondents in the supplementary affidavit in regard to the payslips was not a dispute of fact, but a legal defence which could not have been decided on these papers.

Respondents' Case

[4] 2000(4) SA 598 CPD @617 B-F

[12] The answering papers allege that at no stage did the employer agree that the applicant's resignation would have immediate effect or waive the Trust's right to notice and that this was explained to the applicant on the 16 May 2018. In effect the respondents' case is that they hold Coetzee to at least 4 weeks' notice period being the statutory minimum. It is stated in answer that at no stage did the applicant say he was resigning with immediate effect. The answering affidavit also refers to and annexes an unsigned employment agreement between the parties. It is averred that although the employment agreement was never signed "its terms reflect what was agreed between us and its terms have been implemented by both parties to date."

[13] The said contract contains a "Resignation Clause" which reads "The Employee may resign from his employment with the Trust at any time on giving not less than 6 (six) months prior written notice to the Trust." Much was made in submission of the difference between this clause and the four week notice period given to the applicant. However, nothing would preclude the respondents from waiving a large part of the notice period. In any event, the parties have agreed that should this application not succeed, the notice period would come to an end on 22 June 2018.

[14] The material issue in dispute in this application is whether the respondents in fact accepted the immediate resignation of the applicant on 16 May 2016. The respondents have admitted the content of the statement issued by the Museum on the 16 May 2018. The statement reads that applicant "had tendered his resignation" and <u>not</u> that he had resigned. The deponent to the answering affidavit, deals with the meeting of the 16 May 2018 as follows:

"A follow-up meeting was held between myself, Zeitz and Coetzee the following morning, Wednesday, 16 May 2018. During this meeting, Coetzee stated that he intended to resign. At no stage did he state or indicate that his resignation was to be with immediate effect or without notice. In fact it was specifically discussed that the Trust would be continuing with an investigation into the allegations. We

repeatedly encouraged Coetzee to seek legal advice and to respond to the allegations contained in the Notice."

[15] The first respondent thus unequivocally denies that the tendered resignation was agreed by the Trust or the Trustees. In addition, the answering papers aver the following:

"It is also striking that the letter sent by Coetzee's attorneys of record on 21 May 2018, annexed to the founding affidavit as Annexure "F", seeks clarification from the Trust as to whether it regarded Coetzee as having resigned. Notably, the letter fails to allege that Coetzee had in fact already resigned, much less that he had already done so with immediate effect."

Evaluation

[16] It is trite that an application for final relief stands to be decided on the principles as set out in **Plascon Evans**[6] that

"…where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H)."[7]

[17] On respondent's version then, the Court is bound to find that the tender of notice was not accepted as an immediate resignation. The applicant's replying papers, in which he attaches the May pay slip to bolster his case regarding the end date of his employment, do not come to his assistance. This is because on his own

[6] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634H – I applied
[7] at 634H – I

version he sent a ‘format’ to the Finance Department for the May pay slip to be drafted.

[18] Mr Bekker for the applicant made a number of submissions regarding the disciplinary procedure being used by the respondents. However, these issues must be dealt with, if necessary, at a later stage. It would not be proper for this Court to comment on them at this juncture. Nor is it necessary or relevant to delve into the charges of serious misconduct against the applicant.

[19] In sum, the applicant has not made out a case for the relief he seeks in the Notice of Motion. I note that if his application is dismissed, as it stands to be, the parties have agreed that his notice period comes to an end on the 22 June 2018. In as far as costs are concerned, I am not inclined to make a costs order. The application was not frivolous and was considered urgent by both parties. Indeed it seemed to me that both parties welcomes a consideration of the matter by the Court.

[20] In the result, I make the following order:

Order

1. The application is dismissed.

2. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: W.P. Bekker instructed by Gildenhuys Malatji Incorporated Attorneys

Respondents : Alex Freund SC with Karla Saller instructed by CDH