



ARBITRATION AWARD

Panelist: JOSEPH MPHAPHULI

Case No: PSHS887-13/14

Date of Award: 23 August 2014

In the matter between:

S.P Ndlovu

Applicant

And

Department of Special Development – Mpumalanga

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The hearing took place at the Respondent's offices situated in Witbank on Thursday 14 August 2014. The hearing was conducted in terms of Section 191 of the Labour Relations Act 66/1995.
2. Mr. Elvis Nkosi, Manager Labour Relations appeared on behalf of the Respondent. The Applicant was represented by Mr. David Lebethe, legal practitioner.
3. The matter was determined on written submissions filed following the sitting where common cause issues were identified. Parties agreed to forward written submissions by 22 August 2014.

ISSUE IN DISPUTE

4. I had to determine whether the Applicant was dismissed or not, if so, whether the dismissal was fair or not and the appropriate remedy, if any.

BACKGROUND TO THE DISPUTE

5. The Applicant commenced employment on 03 June 2013. The Applicant served in the capacity of social work supervisor grade 1 at an annual rate of R 257 256.00.
6. The Applicant sought reinstatement in the event of a favourable outcome.

COMMON CAUSE ISSUES

7. The Applicant tendered resignation in writing on 15 August 2013. The resignation was with immediate effect and without a notice period to be served.

APPLICANT'S SUBMISSION

8. The essence of the Applicant's submission was that the Applicant's resignation was not voluntary. Further that the Applicant was entitled in law to revoke the resignation. Finally that the Respondent's failure to communicate its acceptance of the Applicant's resignation prior to revocation caused the acceptance to be of no force and effect.
9. As far as the Applicant was concerned the Applicant was entitled to revoke her resignation which the Applicant did and the Respondent was duty bound to accept the revocation.
10. To support her case the Applicant made extensive reference to case law but only submitted one full text of a decided case, a Labour Appeal Court decision one should add.

RESPONDENT'S SUBMISSION

11. The salient features of the Respondent's case were that the Applicant's resignation took place within a context. The context was that the Applicant was faced with a serious charge the definite outcome of which would have been a dismissal. The Applicant resorted to resigning her position on realising that dismissal was imminent.

12. The Respondent remained resolute that there existed no dismissal and that the Applicant was the orchestrator of her own exit.

ANALYSIS OF SUBMISSIONS

13. The pivotal issue forming the subject of the dispute was whether the Applicant was dismissed or not.

14. The Labour Relations Act 66/1995 made express provision in terms of Section 192 (1) that where the existence of a dismissal is in dispute, the onus to establish its existence rests with the party alleging its existence.

15. If the alleging or referring party fails to prove its existence the matter cannot be taken any further.

16. Undisputed documentary evidence was that the Applicant secured employment under false pretext.

17. This appeared from the employment application form completed by the Applicant. In response to a question, namely, "Have you ever been convicted of a criminal offence or been dismissed from employment", the Applicant's answer was "NO".

18. Under the caption "DECLARATION" the employment application form states

"I declare that all information provided... is complete and correct to the best of my knowledge. I understand that any false information supplied could lead to my application being disqualified or my discharge. "

19. It was also undisputed that the Respondent confronted the Applicant on the false representation in the application form as the Respondent's investigations proved that the Applicant was previously dismissed in the public service.

20. The Respondent had further pointed out to the Applicant that the fact that she misrepresented facts on the application form was a dismissable offence.

21. To this end the Respondent intended serving the Applicant charges for a disciplinary enquiry. It was at this point that the Applicant tendered a letter resigning her position, at least this was the Respondent's view.

22. According to the Applicant Party was cajoled to resign her position or face a disciplinary hearing where dismissal was a guaranteed outcome.
23. It is a foregone conclusion that the Applicant's services would have been terminated if a disciplinary enquiry materialised.
24. The fact that the Applicant resigned her position to circumvent the consequences of a pending enquiry did not make her resignation a forced resignation.
25. The Applicant fully appreciated the consequences of her letter of resignation and acted with such appreciation.
26. Factually speaking the Applicant's last day at work was 15 August 2013 when she resigned with immediate effect. The revocation of the resignation of 22 August 2013 was accordingly superfluous and irrelevant and of no legal consequence.
27. The case law so referred to by the Applicant in particular the LAC decision of Amazwi Power Products (Pty) Ltd v Turnbuilt did not address the question of the acceptance of a resignation in employment relations. At issue in the case referred to was resignation from a directorship as opposed to being an employee.
28. It is also worth noting that there was no question about the revocation of the resignation.
29. Other cases referred to by the Applicant were in the form of extracts which were equally not helpful and did not advance the cause of the Applicant.
30. Even if it was to be found that the Respondent should have accepted the withdrawal of the resignation, it cannot be denied that this act would not have meant that the Respondent waived its right to dismiss the Applicant for a grave misconduct.
31. It is my conclusion that the Applicant resigned her position, the resignation was aimed at avoiding a dismissal and the argument in respect of acceptance of the revocation was a distraction.

AWARD

32. There was no dismissal, alternatively the Applicant failed to prove its existence.

33. I dismiss the application.

A handwritten signature in black ink, appearing to read 'Joseph Mphaphuli', is written in a cursive style.

Panelist: **Joseph Mphaphuli**