REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 376/2012

In the matter between:

Deon DU RANDT **Applicant**

and

ULTRAMAT SOUTH AFRICA (PTY) LTD **First Respondent**

IAN SCHWARTZ **Second Respondent**

Heard: **29 January 2013**

Delivered: **15 February 2013**

Summary: Alleged unilateral change to terms and conditions of employment – application to reinstate terms and conditions. Unfair labour practice – demotion – alternative remedy to refer unfair labour practice dispute to CCMA. Application dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant is a single employee. He alleges that the respondent unilaterally varied his terms and conditions of employment. He referred a dispute to the CCMA in terms of s 64(4) of the LRA[1]; but he cannot strike. What is his remedy?

Background facts

[2] The applicant is employed with the first respondent, Ultramat South Africa (Pty) Ltd, as its regional manager for the Western Cape. He is also a shareholder and former director of Ultramat. The second respondent, Ian Schwartz, is its sole remaining director and its largest shareholder. It is unclear why the applicant has sought to cite the second respondent in his personal capacity. Du Randt says in his founding affidavit that he did so "as I believe that his citation as a second respondent will ensure that the matter receives the appropriate attention." That is no basis in law to join an individual as a party to legal proceedings.

[3] The applicant was initially based in Gauteng. His wife was offered a job in Cape Town and Ultramat agreed that he could move to Cape Town to accompany her. The parties agreed that he would work from home. Ultramat would pay him a monthly allowance on top his salary to set up a home office and to pay for telephone and ADSL lines.

[4] The applicant started working from home in Tokai on this basis in July 2008. Ultramat eventually established an office in Edgemead. Towards the end of 2011, Ultramat formed the view that it was too costly to maintain that office and to contribute to the costs of Du Randt keeping a home office and working from home. Schwartz, the sole director, decided to reduce Ultramat's losses in the Western Cape and to transfer its administrative functions to the head office in Johannesburg. Schwartz instructed the applicant to start working from the Edgemead office and instructed him to report for duty there. The applicant refused.

[1] Labour Realtions Act 66 of 1995.

[5] The applicant also alleges that Schwarz removed the financial management of Ultramat from his control. The applicant, as the financial manager, had oversight of Ultramat's finances. The respondents say that the applicant mismanaged those finances, and that contributed to the decision to move the finance function to Johannesburg. They wanted the applicant to concentrate on sales.

[6] On 14 December 2011 the respondents passed the following resolution:

> "It was resolved by the directors of Ultramat that as from 1 January 2012 the Ultramat home office of D du Randt in Cape Town will no longer operate. Mr du Randt will be based in the Ultramat premises in Edgemead.
>
> Mr du Randt will be afforded the opportunity to purchase any of the fixed fittings belonging to Ultramat in his home office, at their depreciated value as at 31 December 2011. This amount may be debited from his loan account if he so wishes, subject to the general provisions of the shareholders' agreement covering shareholder loans."

[7] Schwarz telephoned Du Randt and informed him accordingly. The outcome of the conversation was inconclusive.

[8] On 19 January 2012, Schwarz sent Du Randt an email, stating *inter alia:*

> "I have been giving the issue of your sales role in Cape Town further consideration since our conversation in December. I've come to the conclusion that, as I had first decided, it would probably be in Ultramat's best interests if the premises were to be consolidated, you were to work from the depot in Edgemead and the home office were to be closed."

[9] On 28 February 2012, the respondents' attorneys, Mahons, sent a letter to Du Randt's attorneys, Herold Gie, setting out the history and instructing him to report for duty in Edgemead by 3 March 2012. He did not.

[10] Ultramat viewed the applicant's refusal to report to the Edgemead office as "desertion" and stopped paying him, asserting that he is refusing to tender his services.

[11] On 15 February 2012 the applicant's attorneys, Herold Gie, addressed a letter to the respondents under the heading:

"UNFAIR LABOUR PRACTICE AND OBJECTION TO AMENDMENT OF EMPLOYMENT STATUS OF D DU RANDT".

[12] In the letter, the applicant's attorney referred to Schwarz's email of 19 January 2012. He asserted that Du Randt's proposed position in terms of the email would be "a significant and material downgrade in responsibilities and authority, and restructuring of income prospects." He continued:

> "We advise that unilateral actions of yourself [*sic*], Mr I Schwarz, in altering or amending, or attempting to alter or amend the employment status of our client constitutes not only a breach of the shareholders' agreement, but constitutes an 'unfair labour practice' in terms of section 186(2)(a) of the Labour Relations Act, 1995 (hereinafter referred to as 'unfair labour practice')."

[13] After quoting section 186(2)(a) of the LRA, the applicant's attorney went on to say:

> "We advise that the above is unacceptable, and our instructions are to defend same [*sic*] vehemently, including the applying for an interdict to prevent the current Board from enforcing the provisions of the abovementioned e-mail and to declare such actions as 'unfair labour practice'."
>
> After asking for an undertaking by 27 February 2012 that Du Randt's "current position of employment and such status as is enjoyed for the past five years shall remain in place", the attorney concluded:
>
> "Should you fail, refuse or neglect to respond on or before the abovementioned date, our client will have no other choice than to proceed to the High Court to obtain an interdict against the Board decision, and to apply for the Labour Court for an Order in terms of the 186(2)(a) [*sic*] of the LRA declaring the action as 'unfair labour practice', which includes compensation in the amount of 12 (twelve) months [*sic*] salary, the legal cost occasioned thereby to be for your account."

[14] It is not clear on what basis the applicant's attorney advised him that he could approach this Court for relief in terms of s 186(2)(a) of the LRA. Unfair labour practice disputes arising from s 186(2)(a) of the LRA must be

referred to the CCMA for conciliation and, if necessary, arbitration.[2] This Court has no jurisdiction to entertain referrals in terms of s 186(2)(a).

[15] The respondents' attorneys, Mahons, responded on 28 February 2012. They denied that Du Randt had been demoted; recorded that his refusal to report for duty in Edgemead was viewed as the failure to obey a lawful instruction, alternatively desertion; and added:

> "We wish to place on record that our client does not wish to damage its relationship with your client and to the extent that he believes that he is demoted then he is invited to make submissions a to why he believes that his status has been changed, which submissions our client will consider, failing which we are confident you will advise your client on his rights to refer a dispute to the CCMA."

[16] The applicant did not take up this invitation. Instead, despite the threat to refer an unfair labour practice dispute to this Court (which would in any event have been an irregular step), the applicant – assisted by Herold Gie -- referred a dispute to the CCMA in terms of s 64(4) of the LRA on 5 March 2012, alleging a unilateral change to his terms and conditions of employment. Conciliation failed and on 28 March 2012 the commissioner issued a certificate recording that the dispute remained unresolved. Apparently because the applicant had referred a dispute in terms of s 64 of the LRA, the commissioner ticked the box "strike/lockout" on the *pro forma* CCMA certificate under the heading, "If this dispute remains unresolved, it can be referred to [strike/lockout]".

[17] The applicant, apparently acting on legal advice that he could not strike, brought an urgent application on 21 May 2012, asking for an interim order in the following terms:

17.1 "That first and second respondents be directed to reinstate applicant's terms and conditions of employment in full and retrospective to the end of January 2012 as set out in Annexure A to the Notice of Motion;

[2] LRA s 191(1)(a).

17.2 Directing that first and second respondents pay to applicant all amounts due in terms of the terms and conditions of employment as set out in Annexure A hereto;

17.3 First and second respondents are interdicted from unilaterally amending applicant's terms and conditions of employment."

[18] The applicant did not pursue the application for urgent interim relief. Instead, the matter was eventually set down for hearing on the opposed motion roll on 29 January 2013 as an opposed application for final relief. In essence, the applicant seeks specific performance and interdictory relief.

Relief sought

[19] The applicant now seeks the following (final) relief:

19.1 Directing the respondents to reinstate his terms and conditions in full;

19.2 Directing the respondents to pay him all amounts due to him in terms of those conditions of employment; and

19.3 An interdict preventing the respondents from further unilaterally amending his terms and conditions of employment.

Evaluation / Analysis

[20] The respondent relies on an express, tacit or implied agreement that the applicant would continue working from home only as long as that was in the interests of Ultramat and that it was not agreed to be a permanent arrangement.

[21] That assertion raises a number of disputes of fact. However, it is not necessary, in my view, to refer the dispute to oral evidence. That is because the applicant has not met the requirements for final relief. I will deal with those requirements, as set out in *Setlogelo v Setlogelo.*[3]

[3] 1914 AD 221.

A clear right?

[22] The employee has a clear right to remuneration in terms of his contract of employment. The question that arises is whether he has continued to tender his services in terms of that contract of employment.

[23] This dispute, like so many others before this Court, highlights once again the importance of clear written agreements. No such agreement exists between the parties. They agree that the employee was initially entitled to work from home and that Ultramat would contribute to the costs of a home office; what is not clear, is whether that arrangement was meant to endure in perpetuity.

[24] This material dispute cannot be resolved on the papers. If this were the only issue on which the matter could be decided, it would have to be referred to oral evidence in terms of rule 7(7)(b). But the applicant faces an insurmountable difficulty, even if the Court were to accept that there appears to be a continuing invasion of his rights. I turn to that element.

Alternative remedy

[25] The applicant has asserted that he was subjected to an unfair labour practice. If that is so, he has a clear alternative remedy, i.e. to refer an unfair labour practice dispute to the CCMA.

[26] As things stand, the applicant did refer a dispute to the CCMA, but he did so in terms of s 64(4) instead of s 186(2)(a) of the LRA. Section 64 sets out the prerequisites for a protected strike. Subsection (4) then provides for interim relief in these circumstances:

> "Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) –
>
> (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
>
> (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions that applied before the change."

[27] The difficulty that the employee faced when conciliation failed, is that the relief envisaged for employees and trade unions in those circumstances is strike action. Counsel for both parties appeared to be *ad idem* that a single employee cannot strike, but neither of them could cite any authority for that proposition. Yet such authority does exist. In *Schoeman v Samsung Electronics SA (Pty) Ltd*[4] Landman J held that an individual employee cannot strike. And I agree with the view of the learned authors in *Labour Law through the Cases*[5] that the contrary view expressed in *Co-operative Worker Association v Petroleum Oil & Gas Co-operative of SA*[6] is not consistent with the characterisation of "strike" as "concerted" action.

[28] In these circumstances, a single employee would normally still have the remedy of specific performance available to him. But in this case, the employee – advised and assisted by his attorneys – clearly nailed his colours to the mast of an unfair labour practice in terms of s 186(1)(a) of the LRA. He asserted that he had been demoted. Given that assertion, he has an alternative remedy, i.e. to refer an unfair labour practice dispute to the CCMA in terms of s 191(1)(a) of the LRA. He has not exhausted that alternative remedy.

Conclusion

[29] For these reasons, the applicant has not satisfied the requirements for final relief.

[30] Both parties asked for punitive costs. I do not agree that it would be appropriate. Costs should follow the result, to be taxed on a party and party scale.

Order

[31] The application is dismissed with costs.

[4] [1997] 10 BLLR 1364 (LC) at 1367.

[5] Du Toit et al, *Labour Law through the Cases* (LexisNexis) Issue 18 at LRA 9-25.

[6] [2007] 1 BLLR 55 (LC) para [23].

_____

Steenkamp J

APPEARANCES

APPLICANT:	G Oliver Instructed by Herold Gie, Cape Town.
RESPONDENTS:	MA Lennox Instructed by Mahons Attorneys, Johannesburg.