THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: J3340-2012

In the matter between:

MASIYE ROSE **Applicant**

and

THE MEC FOR EDUCATION: MPUMALANGA **Respondent**

Heard: **4 January 2013**

Delivered: **7 January 2013**

Summary: Urgent application- claim for unpaid salary- alternative remedy available in the form of a claim under section 77(1) of the BCEA.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an urgent application which initially was set before this Court on 20 December 2012, but was postponed to January 2013, to afford the applicant the opportunity to properly serve on all the respondents. The applicant seeks an order declaring the non-payment of the salaries by the respondent to be

declared unlawful and further that the respondent be ordered to effect payment of the outstanding salaries within 24 hours of the order sought.

[2] In its answering affidavit, the respondent contended that all other employees except for the applicant, Ms Masiye were not properly before the Court. The applicant's counsel conceded to the point and withdrew the names of all the other employees. Accordingly, the matter now concerns only the applicant, Ms Masiye, who will in this judgment be referred to as, "the applicant"

Background facts

[3] The applicant and the deponent to the founding affidavit, is a Principal HR Officer, employed as such by the respondent, at one of its district in Mpumalanga.

[4] The applicant contends in her founding affidavit that during September 2011, the respondent informed employees through a letter that Bohlabela district office where they were all stationed was to relocate from the former Hoxani College in Bushbuckridge to the former Mapulaneng College of Education, which is a distance of about 40 km.

[5] It is common cause that the employees were no happy with the plan to relocate the offices from where they were to another place. As a result of this the matter was discussed with the union, NEHAWU and also at the bargaining council.

[6] According to the applicant, the matter was resolved at the bargaining council on the basis that the consultation process regarding the relocation would start a fresh.

[7] It appears common cause that at some stage the office in Mapulaneng were inspected by the department of Labour and declared not suitable for office use. It further appears that it was for this reason also that the applicant and other employees refused to move to the Mapulaneng offices.

[8] The applicant says that during December 2012, there was a rumour circulating at the workplace that certain employees are likely not to receive

their salaries. The rumour was confirmed by their checking on the Persal salary system. The applicant contends further that they did not know the reason for the non-payment of their salaries and enquiries with the respondent produced no results.

[9] The applicant contends in her replying affidavit that she cannot be said to have absconded as at all material times, the respondent was aware and had engaged with the union regarding the issue in dispute. It was submitted that up until August 2012, the respondent was aware that the applicant was reporting at Hoxani and further that she recorded in her work activity book throughout the period.

[10] It is common cause that the respondent relocated its offices to Mapulaneng and that the decision to relocate was taken by the Executive Council of the Province. The respondent further concedes that the employees were not happy with the relocation but the problem was resolved through consultation in particular with the representative union. According to the respondent out about 54 employees only 23 did not accept the relocation.

[11] The respondent further conceded that the department of Labour did issue a prohibition regarding the new building to which the employees were to be relocated to but the problem was addressed after the department of public works addressed the issues which had been raised by the department of Labour.

[12] According to the respondent, the applicant has refused to relocate to the new building and has also failed to attend at their work stations. The respondent contends that the applicant and other employees have absented themselves without reason and their employment was for that reason terminated by the operation of the law.

[13] It was also argued that reliance on the provisions of section 17 (5) of the Public Service Act (the Act), was an afterthought on the part of the respondent, more particularly when regard is had to the fact that the respondent did not in its answering papers provide the specific day when the 30 days' time frame as required by the Act commenced. It was for this reason,

that it was argued that the court should interrogate the basis of the respondent's claim that the applicant's contract was terminated by operation of the law.

[14] The other reason for seeking to persuade the court to interrogate the alleged termination of the employment relationship was that the respondent acted inconsistently in that one of the employees who continue to report at Hoxani continued despite this to receive his salary.

[15] The respondent on the other hand argued that there was no basis for seeking an order reinstating the salary of the applicant because the employment of the applicant was terminated by operation of the law as provided for in section 17(5) of the Act. The respondent relied on the provisions of section 17(5) on the basis that the applicant failed to report for duty at Mapulaneng and that the termination of her employment was not done earlier because the respondent was still awaiting a report on the matter.

[16] It is trite that section 17 (5) of the Act, provides for termination of employment by operation of the law. The issue is not, as was argued on behalf of the applicant, that of absconding in the technical sense. Therefore, the issue of whether the state as an employer was aware of the whereabouts of the applicant in terms of the provisions of section 17 (5) of the Act is irrelevant. The essential requirement, to sustain a case of termination of an employment by operation of the law as provided for in the Act is whether the employee was absent without authority of the employer for a period of more than 30 days.

[17] It was accepted on behalf of the applicant that in light of all the papers before the court that the matter should be considered on the basis of a final and not an interim order as prayed for in the notice of motion. It follows that the test to apply is that of determining whether the applicant has in her papers satisfied the requirements of the final interdict, which entails showing that: (a) she has a clear right, (b) there is interference with that right, and (c) there is no other remedy available.

[18] In arriving at the conclusion at the end of this judgment, I do so with some disquiet. In this regard there appears to be, *prima facie* serious questions to

be answered by the respondent concerning the termination of the employment of the applicant. I do not however, considering the application of the principles of the law, believe that it would be proper to interrogate the lawfulness of the termination on the basis of the papers before me. It would seem to me that a proper cause of action upon which the lawfulness of the termination of the applicant's employment could be determined is review, where all the factual issues relating to the dispute can be properly ventilated. It needs to also be pointed out, that *prima facie* it does not appear also that the conduct of the applicant is beyond reproach.

[19] In my view, this matter essentially turns around the consideration of whether the applicant has alternative remedy to address her complaint. It is trite that an application brought on an urgent basis should fail if the applicant fails to show that there is no satisfactory remedy available that addresses his or her dispute.[1] The principle governing this requirement is set out in *Minister of Law and Order v Committee of the Church Summit,*[2] , as follows:

> 'Concerning the alternative remedy, the Courts have determined that it must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and also grant similar protection to a party…
> Generally and applicant will not obtain an interdict if he can be awarded adequate compensation or amends by way of damages.'

[20] Turning to the case in the present instance, there is a well-established common law principle that in an employment relationship, the duty of an employee is to render services, and on the other hand the duty of an employer is to pay wages for services rendered. It would ordinarily follow that failure by an employer to pay wages when they are due, amount to breach of contract. In that case, the options available to an employee whose wages have not been paid, is either to accept such a breach and terminate the employment relationship or by holding the employer to the terms of the contract and claim the outstanding wages. The claim for unpaid wages could

[1] See Prest in *The Law and Practice of Interdicts* at page 45.
[2] 1994 (3) SA 89 (BGD) at 99F-G.

be launched in either the civil court or the Labour Court in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997.

[21] In the present instance, the applicant has adequate remedy which she may obtain by either approaching the civil court or the Labour court in terms of section 77 (1) of the Basic Conditions of Employment Act. It is for this reason that I am of the view that the applicant's application stands to fail.

Costs

[22] It would not be fair to allow costs to follow the results in the circumstances of this case. In the first instance, there are serious questions which the respondent has to answer in relation to its reliance on the provisions of section 17 (5) of the Act. The other point relates to the manner in which the respondent dealt with this matter in general. The respondent, despite the engagement with the trade union and for that matter also the applicant, only disclosed that it was relying on the provisions of section 17(5), once it had received the papers instituting these proceedings. This has to be understood in the context where the respondent contends that the termination occurred during April 2012.

Order

[23] In the premises, the applicant's application is dismissed with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:	Dolf Mosona Attorneys
FOR THE RESPONDENT:	Adv Matlejoane
	Instructed by the State Attorney