THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J2828/14

Reportable

In the matter between:

SIPHOKAZI SOMI **Applicant**

and

OLD MUTUAL AFRICA HOLDINGS (PTY) LTD **Respondent**

Heard: **11 March 2015**

Delivered: **3 July 2015**

Summary: **Application for specific performance. Breach of contract the employer failing to issue a month's notice prior to the termination of employment contract. The employer failing to hold a performance enquiry prior to dismissal contrary to the requirements of the employment contract. The discretion of the Court to make an order of specific performance.**

JUDGMENT

MOLAHLEHI, J

Introduction

[1] Initially this matter came before this Court on an urgent basis. The first hearing of the matter was on 26 November 2014. The matter was then postponed on three occasions, the final hearing being on 11 March 2015.The applicant withdrew her urgent application after some debate regarding the issue of urgency. The withdrawal was in essence a removal of the matter from the urgent roll. The Court then directed that the matter be placed on the opposed motion roll with the direction that the Registrar should prioritise the enrolment thereof. The urgency having fallen away the matter had to be considered in the ordinary cause and thus had to be placed on the waiting list of matters to be set down for hearing. This means the matter would have received a date for a hearing next year, between March and June 2016.

[2] The matter was granted a preferential date not because it was still urgent but for the simple reason that I had already read the file and therefore placing it on the waiting list for enrolment on the general roll would have meant duplication of work for another Judge to read and prepare for the matter..

[3] The applicant seeks an order in the following terms:

> '2.1 Declaring the Applicant's dismissal on 12th November 2014 without notice and without such dismissal having been preceded by a performance enquiry, to be unlawful and invalid or null and void and for want of compliance with the contract of employment between the parties;
>
> 2.2 ORDERING AND DIRECTING the Respondent to reinstate the Applicant to her position as the Marketing Executive forthwith and to allow her to tender her services and perform her duties in terms of the contract of employment with effect from Thursday, 27th November 2014;

2.3 INTERDICTING AND DIRECTING the Respondent from engaging in any conduct or omission whatsoever which unlawfully interferes with, obstructs and/or prevents the Applicant from complying with her obligations in terms of your contract of employment;

2.4 Directing the Respondent to pay the Applicant's cost for this application calculated that the scheme is between an attorney and own client.'

[4] The essence of the applicant's case as will appear later in this judgment is that her employment contract was unlawfully terminated by the respondent without notice and also before the completion of her performance enquiry. Put in another way the applicant's case is that the respondent breached the employment contract in that she was not issued with the notice of termination and also that there was no basis to terminate the employment contract. As it appears from the prayers above, the applicant is seeking both a declaratory and specific performance order.

[5] The relief which the applicant seeks is final in nature. It follows therefore, that in order to succeed the applicant has to satisfy the requirements of a declaratory and interdictory relief. More importantly, in this regard the applicant has to show that she has a clear right to the relief sought and that has to be done by showing that the termination of the employment contract was unlawful or invalid.

[6] It should be noted that whilst the employment contract does incorporate the principles envisaged in the Labour Relations Act ("the LRA"),[1] the cause of action as formulated in the applicant's papers is not based on the unfair dismissal concept but rather on breach of that contract. It is also apparent from the applicant's papers that she did not accept the alleged breach of the contract but rather seeks to hold the respondent to it and thus have it enforce the provisions of the contract.

[1] Act number 66 of 1995.

[7] It should also be pointed out that some of the background facts set out below are not relevant to the determination of the applicant's claim. This will become apparent later in the judgment.

Background Facts

[8] The case of the applicant is that she attended a performance management meeting with her immediate supervisor, Mr Madzinga on 19 February 2014. The outcome of the meeting according to her was that there was an agreement regarding her performance scoring. She further states that her score was later changed by Mr Madzinga, with the motive of reflecting her as an inconsistent performer.

[9] The applicant further states that she was invited to a meeting on 05 May 2014, by Mr Padayachee, the acting HR manager where she was informed that there has been a restructuring of the division and that her position has been down-graded. She was told to either accept the down-grading or leave the organisation.

[10] She was later called to another meeting with Mr Madzinga on 13 May 2014, where she was told that the other option available to her was to remain in the organisation but that she would then be performance managed by him.

[11] Another meeting was held on 26 May 2014 where, according to the applicant she was told by Mr Madzinga that the leadership of the respondent had lost confidence in her and therefore preferred that she should leave.

[12] On 29 May 2014, the applicant transmitted an email to Mr Madzinga, wherein she expressed her concern that it appeared that her employment would be terminated at the meeting to be held the following day.

[13] At the meeting held on 29 May 2014, Mr Madzinga in the presence of Mr Padayachee accused the applicant of having failed to execute her duties in terms of the required standards and that the respondent has lost confidence in her abilities in that regard. He then proposed that the

applicant should consider either being placed under performance management or concluding a mutual separation.

[14] A performance enquiry was subsequently convened on 11 August 2014. Strangely this inquiry, it would appear, was conducted in an adversarial manner similar to what happen in a Court. After a short-cross examination by the applicant's attorney Mr Lebea, Mr Madzinga requested a short adjournment; for purposes of locating certain documents. The enquiry was then postponed to the week of 3 November 2014, because Mr Madzinga delayed in reverting to the proceedings after the postponement. Similar to Court proceedings the matter was postponed again, it would appear this time due to the unavailability of Mr Lebea.

[15] On 12 November 2014, the respondent addressed a letter to the applicant indicating amongst other things that:

> 'I note that you rejected several attempts to reach a mutually agreed separation, and also declined our offer of external mediation.
>
> Due to your attorney's error a postponement of the November 2 day session was requested at the last moment, which would have in all likelihood delayed the conclusion of this matter into Q1/2015-same 9 months after it started.
>
> OMAH requires a fully functioning Marketing Executive able to work at the right level of complexity as it moves into 2015 with this role being key to the success of the business plans and African expansion strategy.
>
> As Chief Operating Officer I have a duty and responsibility to balance the interest of the business, its customers and shareholders with those of an employee.
>
> To avoid the untenable situation OMAH now finds itself in I have decide to:
>
> - Stop the current Incapacity: Loss of confidence Enquiry, and instead to
> - Terminate your Employment on the basis of Incapacity, with immediate effect

Our HR Executive, Sipho Gumbi will facilitate your departure this morning and attend to payments due to you. He can also assist with arranging counselling via ICAS if that will assist you.

You obviously have the right to refer your termination to the CCMA within its time limit should you so choose'.

[16] It is common cause that the parties signed an employment contract during January 2012. The relevant clauses for the purposes of this judgement are clause 21.1 to 21.4 of the employment contract which read:

'21. Termination

21.1 This contract of employment may be terminated as follows:

21.1.1 By either party providing one month's notice to this effect, in writing, to the other party, subject to clause 22.3. Where such notice is provided:

21.1.1.1 The employer may, at its sole discretion, elect whether the employee should work during this period of notice. Notwithstanding this, the employer shall pay the employee for the months' notice irrespective of whether the employer has required him/her to work or not.

21.1.1.2 Should the employee give notice in terms of clause 22.1.1 and request that the employer waive the notice period, the employer may exercise its discretion in this regard. Should the employer agree to such waiver, the employee shall be paid only up to and including his/her last day of work.

21.1.2 …

21.1.3 By the employer on the basis of the grounds regarded as valid in the Labour Relations Act Number 66 of

1995, with or without the notice period as set out in clause

21.1.4 For any other lawful and fair reasons.

21.2 Without limiting the provisions of clause 22.1 above (inclusive of clauses to 22.1.4) the employer may, at any time during the currency of the contract of employment:

21.2.1 Summarily terminate this contract should the employee be guilty of misconduct which would entitle the Company in law and/or equity to summarily dismiss him/her;

21.2.2 Terminate this contact with notice should the employee not meet the employer's required performance standard;

21.2.3 Terminate this contact with notice on the basis of the employee's incapacity on the basis of ill health or injury.

21.2.4 Terminate this contract on the basis of the employer's and/or the Group's operational requirement;

21.2.5 Terminate this contract with or without notice on the basis of "FAIS" requirements as set out in clause 15, or a breach in terms of clause 16 of this contract (the Financial Intelligence Centre Act);

21.2.6 Terminate this contact summarily where the employee has committed a material breach of contract and/or for reasons recognised and accepted in law and equity as justifying summary termination of employment.

21.4 Notwithstanding the provisions of clauses 21.3, 22.3.1, 22.3.1 and 22.3.3 the employer may summarily terminate the contract for the reasons set out in clauses 21.1 and 21.2 above'.

[17] The other relevant clauses of the contract for the purposes of this judgement are clauses 12.2 and 12.3 of the contract which read as follows:

'12.2 The employee agrees to be bound by and observe such policies, standards and procedures as referred to in clause 13.1 which policies may be held in electronic form or otherwise.

12.3 By accepting employment with Old Mutual the employee accepts Old Mutual's Code of Conduct, comprising all Old Mutual's policies and guidelines, some of which are highlighted in the Addendum to this document'.

[18] The issue of poor work performance which is central to the applicant's claim of unlawful termination of the employment contract is dealt with by the policy on Incapacity-Poor Work Performance. The relevant part of the policy for the purposes of this judgement is found under the heading Performance Enquiry which reads as follows:

> 'A performance enquiry must be held prior to an employee being dismissed or receiving a final written warning for poor performance. It is noted that an employee may not be dismissed for poor performance in the absence of either a current written or final written warning. There are two exceptions to this general rule: (sic) when a pattern of poor performance – improvement – poor performance can be demonstrated and probationary employees'.

[19] It was contended on behalf of the respondent that there is nowhere in papers where the applicant seeks to compel the respondent to complete the performance enquiry nor does she seek notice before the termination decision.

[20] The respondent further argued that the applicant could not complain about breach of contract in relation to the notice pay because she was ultimately paid in that regard. It was also argued on behalf of the respondent that the applicant has an alternative remedy in the form of unfair dismissal claim. The other point made in relation to this is that, the applicant has disguised the unfair dismissal claim with a breach of contract.

Evaluation

[21] It is clear in my view that the cause of action in the present matter is based on breach of contract and accordingly conferring the power on this Court to entertain the matter in terms of section 77(3) of the Basic Conditions of Employment Act ("the BCEA").[2]

[22] It is well-established that the remedy of specific performance in the case of an alleged contractual breach of the employment contract is a separate remedy from the unfair dismissal remedy provided for in the LRA. The right not to be unlawfully dismissed in terms of the common law remained even after the introduction of the unfair dismissal concept by the LRA.

[23] In *Fedlife Assurance v Welfraardt,*[3] the court held that:

> '[13] The clear purpose of the legislature when it introduced a remedy against unfair dismissal in 1979 was to supplement the common law rights of an employee whose employment might be lawfully terminated at the will of the employer (whether upon notice or summarily for breach). It was to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair'.[4]

[24] It is well-established in law that an employee whose contract of employment has been unlawfully terminated by the employer has an election to either accept the breach of contract and sue for damages or enforce the contract. The remedy in the case where the employee enforces the contract in the face of a breach would generally be specific performance.

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[2] Act number 75 of 1997.
[3] 2002 (1) SA 49 (SCA).
[4] This approach was confirmed by the Constitutional Court in the case *Ngqukumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC). In that case the Constitutional Court states at footnote 30 of the judgment that the principle in Fedlife Assurance is in consonant with the provisions of s 39(3) of the Constitution which reads: The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. In the same footnote the Court quoted with approval what was said in *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167 where it was held: "As was stated in *R v Morris* 1 CCR 95 in a passage quoted with approval by Solomon J in *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823: 'It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law."

[25] In terms of s 77A (e) of the BCEA, the Court has the power to order specific performance.[5] It has generally been accepted that exercising that power, the Court has a discretion whether to grant or refuse an order for specific performance. In this regard, the Court in *Santos Professional Football Club (Pty) Ltd v Igesund and Another,*[6] found that the "practical consideration" which the Court *a quo* applied was not the test to apply in the exercise of the discretion of granting or refusing specific performance. The approach to adopt according to the Court is that:

> '… courts should be slow and cautious in not enforcing contracts. They should, in specific performance situations, only refused performance where a recognised hardship to the defaulting party is proved'.

[26] As indicated earlier, the respondent contends that the applicant should be denied the relief of specific performance, because she has an alternative remedy in the form of unfair dismissal and that she could obtain it through the CCMA. I do not agree and accordingly align myself with the approach adopted by Van Niekerk J in *Ngobeni v National Youth Development Agency,*[7] where the Learned Judge held that:

> '[21] In so far as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages. The balance of convenience dictates that the order sought should be granted - there is little inconvenience to the NYDA should it continue with and complete the disciplinary hearing; the result may well be the same. For Ngubeni, the effect of the NYDA's decision to terminate his employment at this stage is to deprive him of his employment and livelihood. Similarly, I am satisfied that Ngubeni will suffer irreparable harm should the application not be granted. He stands to suffer financially, and the

[5] Section 77A (e) of the BCEA reads as follows: "Subject to the provisions of this Act, the Labour court may make any appropriate order, including an order – (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, and award of damages or an award of compensation." Asian

[6] (2002) 23 *ILJ* 2001 (C) at 2014 H-I.

[7] (2014) 35 *ILJ* 1356 (LC).

high public profile of this matter (it is not specifically denied that much of the raising of this profile has been at the instance of the NYDA) has ensured that Ngubeni has been branded as corrupt and dishonest, with little prospect of alternative employment.'

[27] In *Ramabulana v Pilansberg Platinum Mines*, soon to be reported judgement under case number J808/13, Whitcher J, in dealing with the power of the Court to grant specific performance in terms of s 77A (e) of the BCEA held that:

> 'A conspectus of case law shows that where an employee has been dismissed the employee, in a contractual dispute, is not obliged to cancel the agreement and claim damages but is entitled to claim specific performance subject to the court's discretion to refuse to grant such an order. Specific performance is a primary and not a supplementary remedy. Courts in general should be slow and cautious in not enforcing contracts. Specific performance should be refused only where it would be inequitable in all the circumstances or where, from a change of circumstances or otherwise, it would be "unconscientious" to enforce a contract specifically. Each case must be judged in light of its own circumstances. The right of an applicant to specific performance of a contract, where the respondent is in a position to do so, is thus beyond doubt. The court's discretion not to provide this relief is exercised with reference to the facts as they exist when performance is claimed and not as they were when the contract was concluded'.

[28] In my view there is no doubt that the respondent in terminating the employment contract of the applicant in the manner it did failed to comply with its obligations as set out in the employment contract for the reasons set out below.

[29] In the first instance, the respondent had an obligation in terms of clause 21.1.1 of the employment contract to issue the applicant with one month's written notice of the intention to terminate the contract. It cannot be disputed from the reading of the letter of termination that the respondent failed to comply with the provisions of this clause and accordingly was in breach of the contract.

[30] The respondent's contention that it did subsequently pay the notice pay is not sustainable in the context where the applicant is claiming specific performance and not damages. The defence would probably have been sustainable had the applicant been claiming damages for the notice period. It is also apparent from the reading of clause 21.1.1 that the issue of notice payment arises "Where such notice is provided. In other words the payment of notice in terms of the employment contract arise only once the notice has been issued. There is no-where in the contract where it is stated that failure to issue the notice of termination can be remedied by payment.

[31] The provisions of clause 21.1.1 of the employment contract are very clear. The respondent had to give the applicant one month's notice in writing. The letter of termination issued by the respondent terminated the applicant's employment with immediate effect. In my view, the applicant is on this basis alone entitled to an order prayed for in the notice of motion.

[32] It is also apparent from the letter of termination that the respondent terminated the contract of employment on the basis of clause 21.2.2 of the employment contract. In this regard, the respondent terminated the employment contract on the basis of the alleged failure to meet the required standard of performance by the applicant.

[33] It has not been disputed that the respondent's policies, including the IR Policy and Procedure on Incapacity and Poor Work Performance have been incorporated into the applicant's employment contract in terms of clause 12 of the employment contract.

[34] In terms of the IR policy, the respondent was required to conduct an enquiry before dismissing the applicant on the ground of poor work performance. It is common cause that the respondent stopped the incapacity inquiry before it could be completed. This in essence means that no enquiry was held prior to the termination of the employment contract of the applicant. It also means that the applicant's employment contract was terminated in breach of the provisions of the employment contract read with the IR policy.

[35] The respondent contended in the alternative that it was entitled to terminate the applicant's employment contract under the provisions of clause 21.4 of the employment contract which provides that, "the employer can summarily terminate the contract…" In my view, this defence cannot be sustained with regard to the facts of this case. As should appear from the above discussion the dominant and clear reason for the termination of the applicant's contract which was done without notice, was on the basis of her poor work performance. It needs to be emphasised that this could only have been done by affording her the right to a hearing before the dismissal.

[36] Whilst it cannot be denied that there are disputes of facts in relation to the issue of the alleged poor work performance, those facts are not material to the determination of the real and genuine dispute between the parties.[8] The real dispute between the parties in this matter is whether the respondent unlawfully terminated the applicant's employment contract. On the facts as set out on the papers this court is accordingly able to resolve the question of whether or not the respondent had repudiated the applicant's employment contract by terminating it without firstly issuing her with a written notice and secondly by not affording her a proper and a full hearing prior to the termination of her employment.

[37] In light of the above discussion I am of the view that the applicant has made out a case for the relief of specific performance. It should be pointed out that in upholding the prayer for specific performance account, has been taken of the fact that there is no evidence on the papers to suggest that there has objectively been a breakdown in trust relationship between

[8] The approach to adopt when dealing with dispute of facts in motion proceedings is set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*Plascon-Evans*),1984 (3) SA 623 (A) at 634H-I. See also *Whitman t/a JA Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 at 375 where the Court in dealing with the same issue held: "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed". Of course in *Buffalo Freight Systems (Pty) Ltd v Castleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) continued against deciding probabilities in the face of conflicting facts appearing in affidavits.

the parties and also that specific performance would cause hardship on the respondent.

[38] The last issue for determination has to do with costs. The issue of costs is governed by the provisions of s 162 of the LRA which requires that consideration should be given to both the law and fairness when determining whether or not an order as to costs should be made.

[39] In law, the withdrawal of the urgent application by the applicant should mean that the applicant has been unsuccessful and thus liable for costs. In considering the aspect of fairness as provided for in s 162 of the LRA, it is my view that whilst the applicant may have failed in relation to urgency, the claim itself was not without merit. It would therefore not be fair to allow cost for the result in that regard and also the fact that the applicant is an individual who may in future be discouraged from asserting her right if costs were to be granted. It is therefore my view that each party is to pay its own costs in relation to the urgent application.

[40] In relation to the hearing of the matter on 11 March 2015, there seems to be no reason why costs should not follow the results.

Order

[41] In the premises, the following order is made:

1. The termination of the employment of the applicant by the respondent on 12 November 2014 is unlawful.
2. The termination of the employment of the applicant by the respondent is set aside, and the respondent is ordered to reinstate the applicant retrospective to the date of the unlawful termination.
3. The respondent is ordered to pay the applicant's salary and benefits from 12 November 2014 to the date of the reinstatement which is with immediate effect.
4. Each party is to pay its own costs in relation to the urgent application.
5. The respondent is to pay the applicant's the costs of the hearing of the matter on 11 March 2015.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. R. Venter

Instructed by: Lebea Attorneys

For the Respondent: Adv. F Malan

Instructed by: Bowman Gilfillan