REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: J808/13

In the matter between:

LISEBO LERATO PEARL RAMABULANA **Applicant**

and

PILANSBERG PLATINUM MINES **Respondent**

Heard: **29 January 2015**

Delivered: **12 June 2015**

Summary: Contract – termination of employment contract - right to a pre-dismissal hearing - specific performance in the form of reinstatement

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JUDGMENT

WHITCHER, J

Introduction

[1] The applicant was employed as a SED manager by the respondent on 5 November 2007, but dismissed on 31 January 2013.

[2] Clause 6.1 of the applicant's contract of employment reads:

> 'Subject to compliance with the Employer's Disciplinary Code and Procedure, any party may terminate this contract by giving at least one month's notice to the other party, provided that the provisions of schedule 8 to the Labour Relations Act, 1995, will apply to any dismissal of the employee; and the employer shall be entitled to summarily dismiss the employee for any sufficient reason acceptable in law.'

[3] Clause 11.3 reads:

> 'The parties agree that the employee shall be subject to the employer's Disciplinary Code and Procedure which is contained in a separate document, but which shall be deemed to form part of this Agreement.'

[4] The Disciplinary Code and Procedure in question provides, *inter alia,* that in all cases of alleged misconduct, the employer undertakes to abide by the provisions of Schedule 8 to the Labour Relations Act, 1995 and that in certain cases such as serious misconduct involving alleged fraud or dishonesty, leading to a breakdown of the trust between employer and employer, a formal disciplinary enquiry will be held and conducted by a chairperson who will make a decision regarding the guilt or innocence of the employee.

[5] The applicant launched an application in terms of section 77(3) of the Basic Conditions of Employment Act, 1997 in order to claim specific performance, alternatively damages as a result of the respondent's alleged unlawful termination of her employment contract.

[6] In her application, the applicant alleges that her contract of employment was terminated unlawfully for two reasons, namely the respondent did not have a valid and/or acceptable reason in law to terminate her

employment contract, and the respondent failed to conduct a disciplinary hearing and/or failed to give her an opportunity to make representations prior to taking the decision to terminate her contract.

[7] However, before this court, the applicant restricted the issue to be decided to the alleged procedural irregularities in her dismissal and to a claim for specific performance.

[8] In her heads of argument, the applicant described the issue to be decided by the Court as follows:

> 'Whether the respondent committed a breach of the terms and conditions of the applicant's employment by dismissing the applicant from work without affording the applicant a pre-dismissal hearing or an opportunity to be heard?'

[9] Regarding the relief she seeks, she submitted that:

> 'Once a prima facie right to a fair dismissal inquiry has been established by the applicant then the applicant's contractual rights have been breached. The only proper cause of action is to set aside the termination and to direct the respondent to continue with the contract of employment on the same terms and conditions as existed.'

[10] The respondent does not dispute that the applicant's contract of employment affords her a distinct contractual right to a pre-dismissal hearing. The respondent opposes the application on the basis that the applicant was given a hearing relevant to the context in which the need to terminate her services arose and, even if the Court finds that the respondent is in breach of the procedural prescripts of the applicant's contract prior to the termination, an order for specific performance is not an appropriate remedy in the circumstances of this case.

<u>The applicant's version in her founding affidavit</u>

[11] On 12 May 2012, the respondent instructed the applicant to leave work and go home. The respondent told her it was for her own safety because

the local community was not pleased with the manner in which she was performing her duties.

[12] On 31 May 2012, she was summoned to a meeting with the respondent's Human Resources Manager and General Manager. In that meeting, discussions centred on allegations that she was causing harm to the company and must therefore decide on the quickest and least painful way to part ways with the respondent. The allegations were not substantiated by the managers.

[13] On 27 July 2012, the respondent furnished her with a document entitled "Severance and Settlement Agreement" in which the respondent proposed that she agree to the termination of her employment "for operational reasons" and to a severance package equivalent to three months remuneration, plus leave pay. She declined to sign the document because she did not agree with the terms of the proposed agreement.

[14] The applicant then received a letter from the respondent on 14 January 2013 wherein the respondent stated that the reason her services were discontinued was purely on the basis of the local community's request for her to discontinue her company work within the community.

[15] The applicant did not refer to the full contents of the attached letter which reads as follows:

> 'I refer to the consultations held with yourself during the course of last year to discuss your continued employment in the company in light of the Community's request for you to discontinue your company work within the community. We last held a meeting with yourself and your representative on the 1 October 2012 in an endeavour to resolve the matter. We stressed that we were unable to resolve with the Community their concerns about your presence and we were not prepared to allow or insist that you continue such work for your own safety and the Company's interests within the Community. At such a meeting we made a reasonable proposal to resolve this matter in terms of a Severance and Settlement Agreement the terms of which were made known to you. We requested that you consider our proposal. Contact was again made

> with you during November 2012 to request your attendance at a meeting on 21 November 2012 which you did not attend. You subsequently phoned my offices on 23 November 2012 to state that you were not prepared to attend any further meetings. On 30 November 2012 we received a response through your representative requiring that we pay you an amount equivalent to 5 years remuneration. The company is not able or prepared to entertain such demands. You have remained on full pay since you were sent home on 17 May 2012 whilst we have endeavoured to resolve this matter. Regrettably we cannot allow the status quo regarding your continued employment to continue any further and need to resolve the matter finally by the 31 January 2013.'

[16] When she received this letter, the applicant consulted an attorney who wrote to the respondent on 28 January and 1 February 2013.

[17] In the letter of 28 January 2013, her attorney noted that the tone of the letter of 14 January 2013 suggested an intention by the respondent to terminate the applicant's employment contract and contended that the termination would constitute a breach of the applicant's employment contract. The attorney, however, stated that the applicant "concurs" with the respondent's proposal to have the matter amicably resolved by the 31 January 2013 and suggested the parties meet to do so. The respondent did not respond to this letter.

[18] In the letter of 1 February 2013, the applicant's attorney noted that the applicant's salary for January 2013 had not been paid and contended that this act was tantamount to unlawful repudiation of the applicant's employment contract which the applicant does not accept.

[19] The respondent responded as follows:

> 'Ms Ramabulana's service was terminated on 31 January 2013 due to operational reasons. PPM will pay to Ms Rambulana the prescribed statutory amounts as defined in the LRA. The fact that she did not receive her remuneration for the month of January was an administrative error which has been rectified.'

<u>The respondent's version</u>

[20] The respondent operates within the Bakgatla Ba Kgafela Region and community near Rustenburg. The local community are material shareholders and stakeholders in the respondent. Access to the region and production activities are subject to the good relationship between the respondent and the local community.

[21] During May 2012, the local community "became severely aggrieved as a result of the fact that it felt that the local youths were not given preference when posts became available at the respondent's mine. The community leaders accused the applicant of selling proof of residence and jobs to individuals that were not members of the local community. The local community insisted that the applicant could not be trusted in the capacity in which she was employed and that as a result her services must be terminated."

[22] On 12 May 2012, it was decided that in order to ensure the applicant's safety it would be better for her to stay at home. In addition, taking into account the effect of the serious nature of the allegations against her, the respondent deemed it appropriate to immediately "relieve her of her duties".

[23] The parties met on 31 May, 27 July and 1 October 2012. In these meetings, the allegations against her and their effect on all the parties' relationships were explained to the applicant. She was told that her services were discontinued because the local community had demanded her dismissal and the respondent was unable to resolve with the community the concerns raised by the community. It was suggested to her that it would be appropriate in these circumstances to discuss an amicable separation between the parties. In this regard the respondent proposed the "Severance and Settlement Agreement".

[24] The underlying reasons for an agreement of mutual separation between the parties were never contested by the applicant in these meetings or in any correspondence prior to her dismissal. The applicant was at all times amenable to the mutual separation between the parties. Her only concern related to the amount that she would be paid as a severance

package. As long as the respondent was willing to pay the applicant the amounts she demanded, she was willing to terminate her services with the respondent.

[25] The respondent attached email correspondence dated 30 November 2012 from a person purporting to be the applicant's representative. In the email, the representative refers to meetings held between the parties, a wish by the applicant for the matter to be settled as much as the respondent and a proposed severance package of five years' remuneration.

[26] During November 2012, the applicant was requested to attend a meeting at the respondent's premises on 21 November but she failed to do so. In the letter of 14 January 2013, she was told the issue needed to be resolved finally by 31 January 2013 and invited to attend a meeting on 21 January 2013. She failed to attend. The respondent then terminated her contract on 31 January 2013 due to "operational reasons".

The applicant's reply

[27] The Applicant, of course, denies the allegations proferred against her by the community, but contends that in any event the respondent's version confirms that her employment contract was terminated based on allegations of misconduct and that no disciplinary hearing was conducted in respect of these allegations.

[28] Moreover, her relationship with the local community is a factual question which had to be determined in a properly constituted disciplinary hearing and by adducing evidence.

[29] The applicant avers that the respondent cannot formulate an opinion by itself regarding the allegations and her relationship with the community and then terminate her employment contract without affording her an opportunity to respond to these issues.

[30] The meetings she attended and the proposals she submitted are of no legal significance because they were aimed at settlement of the matter.

They did not constitute a pre-dismissal hearing in any form. However, to the extent that they are relevant, she points out that she offered to meet the respondent before 31 January 2013 but the respondent did not respond even though they set the 31st January 2013 as the deadline for the resolution of the matter.

Analysis

[31] The applicant's case rests on a breach of contract constituted by the alleged failure by the respondent to give her an appropriate pre-dismissal hearing and her right to enforce that obligation.

[32] In my view, the reason for the termination of the applicant's employment is central to the determination of whether there was breach of contract constituted by the alleged failure by the respondent to give the applicant an appropriate pre-dismissal hearing.

[33] In this regard, the respondent hedges. The respondent denies that the reference to "operational reasons" in their correspondence equates to operational requirements as envisaged by section 189 of the LRA. The respondent contends that the operational reasons referred to at all times related to the fact that the respondent terminated her employment to ensure her safety and because the allegations made against her involve serious acts of dishonesty with the resulting breakdown of the relationship of trust between the respondent and the applicant and between the applicant and the community.

[34] The respondent correctly contended that South African Labour law recognises as a class of acceptable dismissal, a dismissal as a result of pressure on an employer from third parties. In this regard, the respondent referred to the Labour Appeal Court judgments in *Lebowa Platinum Mines Ltd v Hill*[1] and *Mnguni v Imperial Truck Systems Pty) Ltd t/a Imperial Distribution*[2] and Grogan who wrote that:

[1] (1998) 19 *ILJ* 1112 (LAC).
[2] (2002) 23 *ILJ* 492 (LAC).

> 'Such situations are more akin to classic dismissals for operation requirements than dismissals for incompatibility, because the tension arising from the employer's continued presence cannot alleviate even if the employees concerned adapt their conduct.'[3]

[35] An issue before this court is then whether the cause of the applicant's dismissal was unrelated to misconduct, specifically, the respondent's response to operational pressures created by a third party's unhappiness with the applicant and/or concerns for the applicant's safety.

[36] The enquiry into the reason for a dismissal is an objective one and entails applying the principles of causation.[4] There is little doubt that, absent allegations of misconduct against the applicant being brought to the respondent's attention, she would not have been dismissed. Misconduct allegations are thus, factually, the cause of her dismissal.

[37] In determining the subsequent issue of the legal cause of dismissal, the LAC suggested that:

> '… the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases.'

[38] In my view, the most probable cause, indeed the dominant and principle cause of the applicant's dismissal, were the allegations of misconduct made against her. This is apparent even on the respondent's version. As early as 12 May 2012, the respondent considered these allegations to be of such a serious nature that it deemed it appropriate to immediately "relieve her of her duties". The respondent also references the breakdown in the trust relationship with the applicant as having been caused by the serious allegations of dishonesty made against her. This is classically the conceptual landscape of misconduct.

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[3] Dismissal, 2010 Edition 454.
[4] See: *Kroukam v SA Airlink (Pty) Limited* (2005) 266 *ILJ* 2153 (LAC).

[39] The issue of the applicant's safety is logically a secondary issue. There is nothing on the respondent's version to indicate that 'the local community' were so irrationally and implacably opposed to the applicant's employment that it did not matter to them whether she was truly guilty of the misconduct they alleged and that they would likely harm her whatever a formal disciplinary hearing found. The respondent's papers are particularly light on the nature and scope of any threats made against the applicant by this third party.

[40] For policy reasons too, any wrong-doing on the part of an employee should be assessed before recourse is had to dismissal for incapacity or operational reasons at the instance of a third party. This is because providing an employee an opportunity to answer allegations of misconduct might, in properly ventilating the facts, reverse the insistence of a third party that the employee's contract be terminated. If the respondent had dismissed the employee principally to ensure her own safety, and not because it gave credence to the allegations of misconduct, one would have expected much more detail about the precise nature of the threats against her, the names of the community leaders who made them, and what specific steps the respondent took to dissuade 'the community' from adopting a threatening attitude towards their employee. Similarly, if the principal reason for the dismissal was to preserve the local community's goodwill for operational reasons, one would expect far greater detail about how exactly the applicant's continued employment was realistically expected to impact on the respondent's business. The respondent provided only rather bald allegations, verging on caricature that the applicant's safety and the respondent's financial interests were at risk from an irate 'local community'.

[41] In my view, the dominant and most plausible reasoning behind the applicant's dismissal is that it was for alleged misconduct. This situates the case squarely within the parameters of the Disciplinary Code and Procedure which is incorporated into the applicant's contract as a term and condition of employment. This contract provides that in *all* cases of

alleged misconduct, the employer undertakes to abide by the provisions of Schedule 8 to the Labour Relations Act, 1995 and that in certain cases such as serious misconduct involving *alleged* fraud or dishonesty, *leading to a breakdown of the trust between employer and employer*, a formal disciplinary enquiry will be held and conducted by a chairperson who will make a decision regarding the guilt or innocence of the employee.

[42] It is common cause that the respondent did not hold a formal disciplinary hearing.

[43] The applicant had a contractual right to such a hearing and I am not persuaded that her conduct in pursuing a financial settlement as an alternative to going through a formal hearing constituted either a waiver of her right to that hearing or that the content of such discussions constituted the formal disciplinary hearing contemplated in her contract.

[44] I do not fault the respondent for pursuing a mutually agreed separation from the employee. In circumstances, where it gave some credence to the serious allegations against the applicant and where the local community demanded the employee's dismissal, this was a legitimate option, if only to minimise the complexity of running a formal hearing.

[45] The fact that the applicant was amenable to and engaged in this process until the respondent rejected her high demands of R5 million as a separation package is not legally significant. She was in a relatively strong bargaining position because, in the absence of a negotiated agreement, the applicant could still insist on and pursue the disciplinary hearing route. The respondent found itself in this position not because of the applicant's intractability but because it had bound itself, in its contract with her, to provide the applicant with a contractual right to a disciplinary hearing where misconduct was alleged.

[46] The only 'agreement' the applicant reached during the settlement discussions was when her attorney stated that the applicant "concurs" with the respondent's proposal to have the matter amicably resolved by

31 January. When no agreement was reached on this date, her right to a formal disciplinary hearing remained intact.

[47] Even on the respondent's own version, the interactions between the respondent and applicant between May 2012 and 31 January 2013 did not, in my view, constitute a formal hearing nor a waiver of her right to a hearing.

[48] It is true that labour law has introduced a certain flexibility in the enforcement of employment contracts. This is done to advance fairness, a concept which often comes down to balancing the interests of parties. With the preamble to the LRA in mind, one appreciates how a certain flexibility in the strict enforcement of employment contracts can, in particular circumstances, advance labour peace, social justice and economic development. However, if an employer, to the benefit of an employee, literally contracts out of the fairness jurisdiction, it has presumably accepted the risks that this entails. One of these risks is that the employer's acts or omissions which in labour law would merely constitute procedural unfairness could now constitute breach of contract depending on how the matter is pleaded. One effect of this is that the more circumscribed and balanced statutory remedies prescribed by the LRA, for example, for failing to provide an employee with a disciplinary hearing are foregone for stricter and more far-reaching contract law remedies.

[49] A well-developed set of legal principles underpin contract law, specifically the conditions under which a contract may be terminated, and these are not lightly to be tampered with.

[50] When parties contract on specific contractual terms, they bind themselves to honour and perform their respective obligations in terms of that contract. Each party is entitled to expect that the other party has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term of the agreement. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had

overlooked certain things. This is simply because the employer is free not to enter into an agreement. He takes the risk that he might have a need to dismiss the employee in circumstances or in a manner not catered for in the agreement.[5]

[51] Not to hold the respondent to the contract law obligations it voluntarily and lawfully imported into an employment relationship would introduce a grave level of uncertainty into a range of similar commercial arrangements.

The right to specific performance

[52] Specific performance is performance of that which the parties agreed to in the contract. Section 77A (e) of the BCEA specifically empowers this Court to grant specific performance.

[53] 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.[6]

[5] See: *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC).
[6] See: *Thompson v Pullinger* (1894) 1 OR 298; *National Union of Textile Workers and Others v Stag Packing (Pty) Ltd and Another* 1982 (4) SA 151 (T); *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C); *Ngubeni v The National Youth Development Agency* J2322/13 dated 21 October 2013.

[55] Wallis wrote that in considering this question the issue of whether the employer had cause good to dismiss (or the fairness of the dismissal) does not play a part. He further opined that the view of some early cases that, even where there was a contractual right to a hearing a breach of this right did not invalidate the dismissal and there can be no order for specific performance was incorrect.[7]

[56] The respondent contended that specific performance is not appropriate in the circumstance of this case because, in its view, the facts establish the existence of a breakdown of trust. The respondent referred to case of *Abdullah v Kouga Municipality*[8] in which Lagrange J held that the decision in the Constitutional Court judgment of *Masetlha v President of the Republic of South Africa and another*[9] highlights that where a breakdown of trust exists, the discretionary remedy of specific performance in the form of reinstatement is unlikely to be granted.

[57] The present matter is distinguishable from *Masetlha* in that the breakdown of trust between the President of South Africa and his head of intelligence was common cause. The applicant has made no such admission. In addition, the Constitutional Court took cognisance of the very "the special relationship of trust" that must exist between a principal and his agent in the relationship at stake in *Masetlha*. While even a hint of doubt can bedevil a relationship of that sensitivity, the same intensities of trust are not plausibly at stake in this case, nor did the respondent claim that they were.

[58] In *Abdullah*, Lagrange J found that where a breakdown in trust exists such as in *Masetlha*, "the discretionary remedy of specific performance in the form of reinstatement is unlikely to be granted, and the employee's remedy will be confined to payment of the balance of his contractual remuneration".

[7] Labour and Employment Law 38.
[8] (2012) 5 BLLR 425 (LC).
[9] 2008 (1) SA 566 (CC).

[59] *Abdullah* too is distinguishable from the facts *in casu* in that in *Abdullah* the employer's averred loss of confidence in the employee, although detached from any claim of misconduct or poor performance, still had an objective and reasonable foundation. The employee, a Chief Financial Officer, while not assigned the blame for the breakdown of trust, was nevertheless part of a top management team that had steered the municipality to near insolvency. This was the reason the court did not order the remedy, effectively, of reinstatement.

[60] In contrast to *Abdullah*, the respondent has not claimed that any objective facts exist that would reasonably justify its loss of trust in the applicant. If these facts existed, they would not be difficult to find in the circumstances of this case. For example, were any persons not residing in the area from which labour was supposed to be drawn hired during the applicant's tenure?

[61] As I understand the respondent's arguments, the seriousness of the allegations made by the community constitute the primary basis for the alleged breakdown of trust. If so, this implicitly contradicts the respondent's claim that the dismissal was not for misconduct. Be that as it may, the mere existence of completely untested allegations conveyed to the employer by a third party, cannot be a legally acceptable basis for claiming that an employment relationship has broken down. To hold otherwise, would allow the primary relief of specific performance to be dodged with entirely subjective, second-hand, perhaps even contrived claims of distrust.

[62] I thus see no reason why the applicant should not be granted the order. The respondent essentially formed an opinion that there is a breakdown of trust on the mere untested allegations of the 'local community'. The respondent has not established that the applicant's reinstatement should pose any particular hardship to the respondent. The respondent has the remedy of a disciplinary hearing open to it to establish dismissable conduct.

[63] In the meantime, the applicant has been branded as corrupt and dishonest in the absence of a formal hearing to determine the accuracy of these allegations. This is precisely the situation that the inclusion of a contractual right to a hearing was meant to prevent.

Order

[64] In light of the findings above, the following order is made:

(a) It is declared that the decision by the respondent to terminate the applicant's employment from 31 January 2013 is a breach of clauses 6.1 and 11.3 of the applicant's contract of employment.

(b) The termination of employment is set aside, and the applicant is reinstated in the respondent's employ.

(c) The respondent is ordered to pay the applicant's salary and benefits from 31 January 2013 to the date on which her employment, salary and benefits are restored.

(d) The respondent is ordered to pay the costs of this application.

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Whitcher, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: M S Mphahlele

Instructed by: Chosane Attorneys

For the Respondent: C Goosen

Instructed by: MacIntosh Cross & Farquharson