REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 226/16

In the matter between:

Pieter Wynand CONRADIE Applicant

and

VAAL UNIVERSITY OF TECHNOLOGY Respondent

Heard: 18 October 2017

Delivered: 5 December 2017

SUMMARY: BCEA s 77(3) – Claim for damages for breach of employment contract.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Dr Pieter Conradie, claims damages from the respondent, the Vaal University of Technology, based on a breach of his employment contract. It is based on s 77(3) of the Basic Conditions of Employment Act.[1]

[2] I informed the parties that I would hand down judgment on 21 November 2017. They requested that it be delayed for two weeks while they pursued settlement discussions. It is for that reason that the judgment is only being handed down on 5 December 2017.

Background facts

[3] Dr Conradie was a lecturer in the University's Information and Communication Technology Department. In January 2015 he was potentially exposed to the Human Immunodefiency Virus (HIV) after an accident. He sought medical treatment in the form of Post-Exposure Prophylaxis (PEP) and was put on Anti-Retroviral (ARV) treatment. He was put on sick leave from 28 January to 7 February 2015. He returned to work at the VUT campus in Vanderbijlpark (Gauteng) on 9 and 10 February but his physical and mental state was deteriorating. He applied for and was granted annual leave for the period 11 February to 6 March 2015. He handed over his supervisory duties to a colleague and went to his parental home in Worcester (Western Cape) to recuperate.

[4] While in Worcester Dr Conradie's condition did not improve. He applied for three months' unpaid leave. The University would be closed during July. He anticipated returning to work on 1 August 2015. He did not receive any formal response to his request for unpaid leave but the University continued to pay his salary for March and April 2015.

[5] At the end of July 2015 a representative of the University telephoned Dr Conradie in Worcester and asked for his telefax number. On 3 August 2015 he received a "pension payout form" by fax. He was puzzled as he had not resigned, nor had he been dismissed. He started to recover.

[1] Act 75 of 1997 (the BCEA).

Between 11 August 2015 and 8 February 2016 he sent ten letters to the University, requesting the Vice Chancellor, Prof Dzvimbo, and the Principal, Prof Mothlana, to confirm when he should return to work. He also provided the University with his cellular phone number. He did not receive any response. And in its answering affidavit, the University does not deny that Professors Dzvimbo and Mothlana received all ten letters.

[6] Having received no response to any of his letters the employee was at a loss to know whether his services had been terminated, and if so, when. He eventually launched this application.

[7] The University responds in its answering affidavit that it had sent a fax to the employee on 18 September 2015 asking him to return to work on 21 September 2015. But he never received the fax.

[8] The University also relies on a notice to attend a disciplinary hearing dated 21 October 2015. That letter, it alleges, was sent to fax number *6918215200233475569. But he never received it. In fact, the transmission report attached to the letter and to the University's answering affidavit shows quite clearly: "Failed". Yet the University did not follow up and try to contact Dr Conradie telephonically. Instead, it went ahead with the hearing in his absence – without contacting him again - on 29 October 2015. (This despite having phoned him in July 2015 to fax – successfully – a pension withdrawal notification to him). It dismissed him on 10 November 2015.

[9] The University also says that it delivered the letter to Dr Conradie's home address; but that address is not the one in Worcester that is reflected in his contract of employment. And, as Dr Conradie points out, the University knew that he was recuperating at home in Worcester – its representative phoned him there to ascertain that he had received the earlier letter including the pension payout form.

[10] The University says that it faxed a dismissal letter to the employee on 10 December 2015 (although it is dated 20 November 2015). He says he did not receive that letter either.

[11] Having received no response to any of his letters, Dr Conradie referred two disputes to the CCMA on 8 February and 9 March 2016, but he was unable to stipulate any date of dismissal. He eventually launched this application on 16 May 2016, having abandoned the CCMA referrals.

Relief sought

[12] Dr Conradie seeks payment of his monthly salary for the period 1 September 2015 – the date from which he tendered his services to return to work – until 10 November 2015 – the date of his dismissal.[2]

[13] He also seeks payment of his outstanding leave pay and three months' notice pay, being the notice period stipulated in his contract of employment.

[14] Initially, he also sought an order directing the University to provide him with a certificate of service – something that it had not done, four months after his dismissal. When the matter was heard a year later, Dr Conradie informed the Court that he did eventually obtain the standard form UI 19 certificate from the Department of Labour seven months later. That prayer has thus become moot.

Evaluation

[15] The claim is one concerning a contract of employment, as contemplated by s 77(3) of the BCEA. As the LAC pointed out in *South African Football Association v Mangope*[3] , a case where the employee sued SAFA in the Labour Court by way of application proceedings for damages and an order declaring the appellant's decision to terminate his contract of employment unlawful and in breach of contract:

> "The application was made in terms of section 77(3) of the Basic Conditions of Employment Act ("the BCEA"), which provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic

[2] He initially claimed damages for the period until 10 December 2015 – the date when he became aware of his dismissal – but conceded in argument that the actual date of dismissal was the relevant date.

[3] (2013) 34 *ILJ* 311 (LAC) par 2.

> condition of employment constitutes a term of that contract. Section 77A(e) of the BCEA empowers the Labour Court to make 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, an award of damages or an award of compensation. With the introduction of these provisions the Labour Court acquired jurisdiction to determine issues related not only to the fairness of a dismissal but also whether a dismissal is a wrongful repudiation in breach of contract. Where it determines that such a breach has occurred it may make any determination that it considers reasonable, and is thus not restricted to the common law remedies of specific performance or damages."

[16] In *Mangope*, the LAC held that the decision of the employer to terminate the employee's contract was in breach of contract and unlawful, and it ordered damages. That is the main relief that Dr Conradie seeks in this case.

[17] Mr *Lecoge*, for the University, argued that it cannot be held liable for breach of the employment contract: in fact, Dr Conradie repudiated the contract by deserting his workplace without informing the University of his whereabouts.

[18] The difficulty with this submission is that the University must have been aware of his whereabouts: it telephoned him twice in Worcester and sent him the "pension payout form" to the fax number in Worcester that he provided. His home address as indicated on the first page of his contract of employment is also the address in Worcester.

[19] The employee, on the other hand, sent the Vice Chancellor and the Principal at least ten letters inquiring when he should return to work. It is so, as Mr *Lecoge* submitted, that there is a reciprocal obligation on an employee to tender his services;[4] but in this case, Dr Conradie did tender his services – albeit not by reporting at work in person (1500 km away from where he was recuperating), but by addressing ten letters to his

[4] Cf *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A).

employer, tendering his services, and inquiring when he should report. Yet the University never responded.

[20] The University relies on a "letter of abscondment" that it sent to the employee on 18 September 2015 by fax. He says he did not receive it. On the probabilities – even taking into account that this application was brought in motion proceedings on affidavit, and applying the rule in *Plascon-Evans*[5] -- it is unlikely that Dr Conradie received the University's fax of 18 September 2015, given that he continued to seek clarity from the University when he should return to work.

[21] The same considerations apply to the notice of the disciplinary hearing that the University alleges it sent to the employee on 21 October 2015. Given his earlier attempts to ascertain from the University when he should report for duty, it is highly improbable that he would simply have ignored such a notice (had a received it) and that he would not have attended a disciplinary hearing that might well have – as it did – resulted in his dismissal. And in any event, the University's own transmission report puts it beyond doubt that the fax was not successfully transmitted.

[22] The applicant is entitled to damages equivalent to his salary for the period from the time that he tendered his services (1 September 2015) until his date of dismissal (10 November 2015).

[23] He also claimed three months' notice pay; but he was summarily dismissed. He is not entitled to notice pay in terms of his contract of employment, that deals with termination on notice.

[24] Neither can the applicant's claim for outstanding leave pay succeed. By the time he was dismissed, he had exhausted his leave entitlement.

<u>Conclusion</u>

[25] The applicant is entitled to damages for breach of contract, equivalent to the period 1 September to 10 November 2015, in other words two months and ten days. Calculated on his monthly remuneration of R23 345, 83, that is equivalent to (R23 345, 83 x 2 + R7 781, 94) = R 54 473, 60.

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[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[26] As Dr Conradie represented himself, he is not entitled to legal costs.

Order

The respondent, Vaal University of Technology, is ordered to pay the applicant, Dr Pieter Wynand Conradie, damages in the amount of R 54 473, 60 within 30 days of this order, together with interest thereon from date of judgment to date of payment.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person.

RESPONDENT: M B Lecoge

Instructed by O'Connell attorneys (Randburg).