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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 968 / 2010

In the matter between:

OASIS GROUP HOLDINGS (PTY) LTD **Applicant**

and

EBRAHIM BARDIEN **Respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an urgent application heard on Sunday 31 October 2010. The applicant seeks an interim order declaring that the respondent's employment with it will not terminate at midnight tonight (ie the end of October 2010) and that his absence from work during his notice period be excluded from the computation of that notice period. In effect, the applicant seeks an order that the contract of employment is suspended while the respondent is incapable of performing his duties due to illness.

[2] Given the urgency of the matter and the nature of the relief sought, I will only give brief reasons for the order.

BACKGROUND FACTS

[3] The respondent is a chartered accountant employed by the applicant. In terms of his contract of employment, either party may terminate it on three calendar months' notice. The contract also provides for 30 days' sick leave during each cycle of 36 months of employment.

[4] The respondent resigned on 30 July 2010 and asked that his notice period be waived "…as my health has deteriorated substantially over the last few weeks." On the same day, he submitted a medical certificate diagnosing "depression and anxiety." Since then, and throughout the notice period of three months, he has not returned to work, submitting a series of medical certificates declaring him unfit to do so.

[5] Before his resignation, the respondent was confronted with allegations that he had advised one of the applicant's clients to bond her house and to invest the capital in volatile investments. When the market crashed, she lost hundreds of thousands of Rands.[1] It is important to note that the applicant is a financial services provider in terms of the Financial Advisory and Intermediate Services Act[2] ("the FAIS Act") and the respondent is a financial adviser. The respondent admitted his wrongdoing in an affidavit on 16 July 2010.[3]

[6] In his contract of employment, the respondent acknowledged that a copy of the Financial Services Board Notice 91 of 2003 was part of the contract and that he had read and understood it. That notice sets out the requirements of the Financial Services Board (FSB) relating to the "fit and proper requirements for Financial Service Providers".

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[1] At least one other instance of similar alleged misconduct has since come to light.

[2] Act 37 of 2002

[3] He subsequently claimed that he did so under duress. I need not decide on that issue for the purposes of this application.

[7] Applicant contends that it is obliged by law to take steps and to hold a disciplinary enquiry into the respondent's conduct; and, if necessary, to make disclosures to the FSB. The FAIS Act[4] provides that a Financial Services Provider must be satisfied that its representatives are competent to act and comply with the "fit and proper" requirements of the Act; and take steps to ensure that its representatives comply with the applicable codes of conduct and applicable laws. In the event of debarment of a representative, the FAIS Act provides that a provider (such as the applicant) must immediately take steps to ensure that the debarment does not prejudice the interests of clients and that any unconcluded business of the representative is properly concluded. It is for these reasons that it seeks the respondent's return to work once he is well enough to do so.

THE RELIEF SOUGHT

[8] Applicant seeks an order dispensing with the rules relating to time and manner of service and disposing of the matter as one of urgency.

[9] It then seeks a rule *nisi* calling upon the respondents to show cause on the return day why an order should not be granted in these terms:

9.1 Respondent's employment with applicant will not terminate at the end of October 2010 and to the extent that the respondent has been absent from the workplace in the period during which he was required to serve out his notice ('the period of absence'), such period of absence shall be excluded from the computation of the three month notice period stipulated by the applicant's contract of employment for the valid termination of his employment relationship with applicant by reason of resignation;

9.2 Respondent's termination of his employment contract will only take effect after he has tendered to perform service for a period of three months;

[4] Sections 13 and 14

9.3 Respondent is ordered to return to work by no later than 1 December 2010 unless he – in the professional opinion of [psychiatrist] Dr Teggin – is psychologically incapable of resuming employment on that date.

URGENCY

[10] Despite Mr *Rautenbach*'s protestations to the contrary, and despite the inconvenience of having to convene the court on a Sunday, I am satisfied that the matter is urgent.

[11] It is clear from the papers that the applicant has endeavoured throughout the period of three months to accommodate the respondent's illness in the hope that he would recover sufficiently to return to work and face a disciplinary hearing without the need to litigate. It is only on 28 October that the respondent agreed to see a second psychiatrist, at the applicant's insistence, the applicant having called into question the assessments of the respondent's psychiatrist.

[12] The three month notice period runs out tonight. Having failed to come to a resolution, I accept that the applicant had little option but to approach the court on an urgent basis to assert what it believes to be its rights.

THE APPLICABLE LEGAL PRINCIPLES

[13] The requirements for urgent interim relief are by now clear. It was summarised by Corbett J[5] in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*[6]and followed in numerous cases since then. These are:

13.1 That the right which is the subject matter of the main action and which [the applicant] seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

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[5] as he then was

[6] 1969 (2) SA 256 (C) 267 A-F

13.2 That, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

13.3 That the balance of convenience favours the granting of interim relief; and

13.4 That the applicant has no other satisfactory remedy.

[14] The balance of convenience only becomes relevant when a *prima facie* ground for an interdict has been established. [7]

[15] The applicant asserts its obligation to hold a disciplinary inquiry – and thus to prevent the respondent from leaving its employ until he physically returns to work and that has been done – because of its obligations under the FAIS Act.

[16] Section 14 of the FAIS Act places an obligation on financial services providers to ensure that their representatives are fit and proper when they render financial services on behalf of the providers. If a representative does not comply with the fit and proper requirements referred to in paragraphs (a) and (b) in section 8(1) of the FAIS Act read with the Determination of Fit and Proper Requirements for Financial Services Providers and Representatives, the provider must debar such person from rendering any further financial services and remove such debarred representatives from the register of representatives that the provider must maintain in terms of section 13(3) of the FAIS Act.

[17] The Registrar of Financial Services Providers has determined that the required notifications referred to in section 13(3)(a) of the FAIS Act must be submitted to the Registrar in writing in a format conforming to a prescribed form. That form contains the following provision:

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[7] see eg *SA Motor Racing Co Lth & ors v Peri-Urban Areas Health Board* 1955 (1) SA 334 (T) 339 A-H.

Attach all relevant documentation including, but not limited to-
(i) evidence and information supporting the reasons for debarment;
(ii) a copy of the service contract or mandate between FSP and debarred representative;
(iii) transcript of disciplinary hearing; and
(iv) forensic/investigation report (if any).

[18] In order to hold a disciplinary hearing, the applicant submits, the respondent has to return to work and face the music. This he has avoided over the past three months by maintaining that he suffers from depression and anxiety.

[19] Thus, the application – and the question of a *prima facie* right - is essentially based on a central legal contention, that is, where an employee has given notice to terminate the contract of employment, the notice period is suspended for as long as he is unable to tender his services due to illness.

[20] Under the common law, the position was clear. The servant must tender his services and if he cannot, due to illness, the employer (or "master", in the parlance of the day) need not pay him. In *Boyd v Stuttaford & Co*[8] Innes J said[9]:

"I come to the conclusion, therefore, that by our common law a servant or other employee cannot claim to be paid for a period during which he was prevented by ill-health from rendering service to his master."

[21] But that rather harsh operation of the law has been ameliorated by the statutory provisions of the Basic Conditions of Employment Act.[10] That Act now provides for a statutory regime of paid sick leave; and the contract of employment between the parties in this case mirrors it. In other words, up to a maximum of 30 days in a cycle of 36 months, and provided the employee has provided the employer with a valid medical certificate, he is

[8] 1910 AD 100

[9] at 120

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

entitled to be paid. And contrary to the applicant's submission that highly-paid employees (ie those earning more than the prescribed threshold) like the respondent are not covered by the provisions of the BCEA, the sections dealing with termination, notice periods and leave pay fall in chapters three and five of the BCEA, that cover all employees working more than 24 hours per month for an employer.

[22] Section 37(5) of the BCEA reads as follows:

"Notice of termination of a contract of employment given by an employer must –

(a) not be given during any period of leave to which the employee is entitled in terms of Chapter Three; and

(b) not run concurrently with any period of leave to which the employee is entitled in terms of Chapter Three, except sick leave".[11]

[23] It appears, therefore, that an employer may not give notice of termination to an employee who is on sick leave; but that notice may run during a period of sick leave.

[24] What if it is not the employer, but the employee who gives notice of termination, and then wishes to take sick leave (provided, of course, that it is legitimate)?

[25] One of the foremost commentators – and indeed, one of the drafters – of the BCEA interprets this provision as follows:

"Therefore, an employer may not give notice to an employee who is on sick leave; however, the employee taking sick leave does not interrupt the notice period."[12]

[26] It seems to me, then, that the respondent was entitled to take sick leave during his notice period. The question of the validity of the medical

[11] My underlining

[12] Paul Benjamin, "Basic Conditions of Employment Act 75 of 1997: Commentary" in Thompson & Benjamin *South African Labour Law* BB1-26.

certificates he submitted is not before me in these proceedings. Once he had exhausted his entitlement to paid sick leave, there is no obligation on the applicant to continue paying him his salary. But I do not agree that his contract of employment is suspended and has the effect that it should be extended beyond the termination date of 31 October 2010.

[27] The High Court has, in the past, ordered specific performance of employment contracts in exceptional circumstances.[13] But in those cases, the court was not faced with a position where the employee was incapable, because of illness, of fulfilling his contractual duties by physically tendering his services during the notice period. I do not interpret those cases to hold that the contract of employment is suspended for the duration of the employee's illness during the notice period.

[28] It would have been preferable for the applicant to have convened a disciplinary hearing while his contract of employment was extant and for the respondent to have attended it. But the absence of such a hearing does not preclude the applicant from continuing with its investigation and fulfilling its duties under the FAIS Act. It cannot, in my view, extend the contract of employment beyond its termination date where the employee has given the requisite notice in terms of the contract. He has, on the face of the medical certificates provided, not refused to tender his services, but has been unable to do so due to illness.

CONCLUSION

[29] The applicant has not, in my view, made out a case for the urgent relief sought. Both parties have asked for costs to follow the result. I see no reason in law or fairness to deviate from that request.

[30] The application is dismissed with costs.

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[13] *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 (5) SA 67 (C); (2002) 23 *ILJ* 2001 (C); *Nationwide Airlines (Pty) Ltd v Roediger & another* (2006) 27 *ILJ* 1469 (W).

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ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

CAPE TOWN

Date of hearing:	31 October 2010
Date of judgment:	1 November 2010
For the applicants:	Adv Colin Kahanovitz SC
Instructed by:	Ebrahims Inc
For the respondent:	Adv Frans Rautenbach
Instructed by:	Cheadle Thompson & Haysom