**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**Reportable**

**CASE NO: JS 711/09**

In the matter between:

**IVAN SPIES** Applicant

AND

**MI-C3 HOLDINGS SA (Pty) Ltd** Respondent

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**JUDGMENT**

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**Molahlehi J**

## Introduction

[1] The applicant in this matter claims damages against the respondent for breach of his employment contract dated the 5th November 2008. The claim is brought in terms of s 77 (3) of the Basic Conditions of Employment Act 75 of 1997.

## Background facts

[2] It is common cause that the applicant who was employed as an IT engineering/ Implementation Specialist was employed on a one year fixed term contract by the respondent.

[3] As concerning the remuneration of the applicant the contract provides as follows:

*"An agreed out of country allowance will be paid for a three day spend out side of South Africa on rotation to Charan Nigeria."*

*"*As *concerning the,* ***Working condition****" the contract provides:*

- *"Your base office will be at MI-C3 offices at 309 15 Roads, Randjespark, Midrand.*
- *From time to time, we may require you to work at our customer site both internationally and locally.*
- *This position currently requires that the incumbent leave and work at our client's site in Nigeria for five weeks out of every ten weeks, through out the year the rotation is five weeks in Nigeria and five weeks in South Africa.*
- *The time in South Africa is made up as follows:*

  *- Four weeks rotational leave, rotational leave balance to be spent in the Midrand offices;*

  *-No additional annual leave is applicable.*

- *Rotational leave may be accumulated up to four weeks to allow for extended breaks."*

[4] On his return from Nigeria on the 9th February 2009, the applicant was informed by Mr Foster, the managing director of the respondent that he would

not be returning to Nigeria because he needed to attend training on version 6 of MI-C3.

[5] On 3rd March 2009, Foster addressed a letter to the applicant in which he confirmed a discussion he had with him on the same day. The letter reads as follows:

> *"**Dear Ivan:***
>
> ***Change of Remuneration***
>
> *I hereby confirm our discussion of 13h00 on the 30th March 2009, wherein the discussion we informed you that we need you to spend a minimum of six months in the office in Midrand, familiarising yourself with M1-C3 version 6 (Technical Implementation, End User as well as from Business Perspective) and Office Protocols in order to support our Clients in the Professional way in which they have become our customs.*
>
> *We will review the situation after six months period, and agree the way forward.*
>
> *We would like to emphasis that this is an offer for your consideration and as agreed with Madeleine you will give us your feed back on Thursday, before close of business.*
>
> *Should you agree to accept this offer, your monthly total Costs to Company will be revised and agreed as shown in the following remuneration table.*

***REMUNERATION***

*This position will carry a tax structured salary as follows:*

*Monthly salary until the transfer to out of country rotation (Costs to Company); R19 000.00*

***Salary Review***

*Performance reviews are conducted every six months. Salary reviews are usually conducted on an annual basis, but this does not automatically constitute a change in a salary."*

[6] The applicant rejected the proposed changes to his contract on the same day and there he stated inter alia that:

*"1. I have kept considered the offer contained in your letter of 3rd March 2009 but I am unable to accept it for the following reasons:*

*1.1 It materially changes my existing contract of employment in so far as my salary and working conditions are concerned. My salary will be reduced by 50% and I will lose tax benefits that I currently enjoy. This is not an option for me.*

*1.2 I will be expected to relocate to Johannesburg and this will be extremely difficult and costly for me.*

*1.3 I was originally employed in 2004 to work in Nigeria and accepted that I will be travelling out of South African as a condition of my employment. This new offer will mean that a condition of my employment will be removed and this is unacceptable to me.*

*1.4 As far as I understand my situation with effect from 1 November 2008 I was employed on a fixed term basis and this contract will expire at the end of October 2009. The terms and conditions of my employment are clearly set out in the contract and the parties are bound by its terms unless there is a mutual agreement to change the contract. I am not in a position to accept the new offer."*

It is further stated in the same letter that:

*1.5 "Should you wish to discuss the matter referred to in this letter in more details please revert to me as soon as possible? In the mean time I will assume that my current contract remains in place. I will also like to remind you that I was supposed to leave for Nigeria on Sunday the 8th of March 2009."*

[7] A further meeting between the parties regarding the changes in the terms of conditions of employment of the applicant was held on the 18th March 2009. The purpose of the meeting as stated in the minutes was:

*"To discuss the employment contract following the change in the rotation schedule; S Ivan is no longer working in Nigeria and is required to undergo training on version 6; at the SPAM offices.*

[8] After noting that the applicant had done well in terms of his performance for the company Mr Scott, the director of the respondent, indicated that the applicant needs to come back to South Africa for training. He further indicated that the applicant had breached his contract in that he had not spent one week at the office as stipulated in the contract. This is the period when the applicant was absent due to ill health.

[9] The applicant stated in the same meeting that he required to be paid his US$300.00 per month if he was to return to South Africa. In response to this Scott who is referred to as "Glen" in the minuted, is recorded in the minutes as having said:

> ***"Glen** stated that this could not be done, and they would have to re-negotiate the contract or terminate. As we are coming up to month end, Ivan should have been paid and both parties need to consider their option. Glen indicated that Ivan was free to consult with Mauren who is an independent party.*

[10] It is further recorded in the minutes that:

> *"**Glen** stated that he would be paid as a monthly employee- the other option is to come up with the number of – as he has given good service and he can get another job. The company could put a package together and give him a fair option."*

[11] On the 24th March 2010, the applicant addressed an email to Scott indicating essentially that he was not willing to accept a unilateral change to his terms and

conditions of employment, and insisted that the respondent should honour the contract.

[12] Forster respondent to the above email in a letter dated 30th March 2009, wherein he stated the following:

> "*Dear Ivan*
>
> *Your email dated 30th March 2009 (sent by email on the 29 March 2009) referrers.*
>
> *We state for the record that the Company has in good faith attempted to consult with you regarding your employment contract; it is a material fact that you require additional training (time period of 3 - 6 months is an estimate and would be dependent on your skills and abilities).*
>
> *During this period of training you are required to work in the Midrand office. However you have continued to state that you will only work in the Midrand office if you receive the amount which was paid to you when you were out of the country. This is considered unreasonable and is not something that the Company can agree to.*
>
> *It would appear that at no point did you have any intent to return to work and to enter into consultations in good faith; we place on record that the Company has already paid for a return air ticket on 19 March 2009. Notwithstanding these facts; in the meeting held on 19 March 2009 the company indicated its willingness to table an offer for your*

*consideration; we are therefore prepared to offer you a settlement of one month's salary (as per the letter dated 03 March 2009) R19 000.00 as a voluntary severance package. The offer is valid until close of business 31 March 2009.*

*Should you elect not to take up this offer, you will be required to return to work as previously communicated, with immediate effect and no latter than the 01April 2009."*

[13] The applicant responded to the above letter on the same day and indicated that he was not willing to report for work because no agreement has been reached regarding the changes in the terms and conditions of the employment contract. The applicant in the letter specifically pointed out that the respondent was in breach of his contract in that the respondent has changed the working conditions and the salary structure.

[14] Thereafter the applicant referred a dispute to the CCMA concerning breach of contract. The CCMA issued the certificate of outcome indicating that the dispute between the parties concerned an alleged demotion in terms of s 186 (2) (a) of the LRA.

[15] The issues for determination by this court are set out in the pre-trial minutes as follows:

*"5.1 whether or not the contract of the respondent is tantamount to the material breach of the employment contract of the applicant.*

*5.2 in the event that the court find that the conduct of the respondent in deed falls foul of the relevant material provisions of the contract, the particular relief which the court is called upon to decide falls within the relief claimed by the applicant.*

*5.3 In the event the Honourable court finding that there is no violation so far as the applicant claims, the respondent prays that the application be dismissed with costs."*

[16] In the statement of case the applicant states the relief he seeks in the following terms:

*"28.1 an order that the respondent comply with the terms of the contract;*

*28.2 an order that the respondent pay the respondent the applicant his ordinary salary agreed upon during the applicant's period of training in the Republic;*

*28.3 an order that the respondent pay the applicants salary from the 8th March 2009 on an ordinary basis until the automatic termination based on the contract…."*

In the heads of argument the applicant indicates that he only persists with the prayer 28.3, 28.4 and 28.5 of the statement of claim.

[17] The applicant in his testimony contended that there was really no need to train him on version 6 as it operates in the same way as version 4 which he was familiar with. He further testified that another employee who had no previous

training on version 6 was sent to Nigeria. The applicant did however concede during cross examination that training was imperative to assist him in carrying out his duties. He also did not deny that another employee did undertake training before returning to Nigeria.

[18] As concerning mitigation of damages the applicant testified that he obtained employment as a tourist guide but had to pay an amount of R30 000.00 for training.

[19] Forster testified for the respondent and indicated in evidence in chief that the contract did not guarantee the applicant any number of days working in Nigeria. According to him the numbers of days in Nigeria were subject to change.

[20] As concerning the issue of version 6 Foster testified that it was an operating system demanded by the client and to ensure a smooth operation implication it was necessary for the applicant to undergo training. And as concerning payment, he testified that the applicant could have been paid R19 000.00 for the duration of the training and thereafter he would go to Nigeria.

[21] Foster conceded during cross examination that the only possible inference that can be drawn from the second bullet point under the heading *"Working Conditions"* of the contract is that the replacement of the applicant was to be at the client and not at the head office of the respondent. He further conceded that the contract:

- provided for employment of the applicant on a rotational basis;

- that the applicant was suppose to have returned to Nigeria on the 8th March 2008;
- that the applicant was told he could not go to Nigeria unless he undertook the training;
- that it was made impossible for the applicant to revert to Nigeria in performance of his contract
- that there is no provision in the contract allowing the respondent to arbitrarily amend the provisions of the contract;
- the applicant never agreed to the changes of his contract;
- that the respondent instructed the applicant to report for training when he was suppose to be Nigeria.

**Arguments and submissions by the parties**

[22] The respondent argued, correctly so, that the onus to show breach of contract was on the applicant. The respondent further submitted that by agreeing to be paid only on those days that he would be in Nigeria assumed the risk that if for some reason he was not able to travel to Nigeria he would not be remunerated. In this respect the respondent argued that the supervening event that made it impossible for the applicant to be in Nigeria was the instruction by the client that version 6 be implemented. In essence the respondent's argument was that there was no guarantee in the contract that the applicant would be paid for those days that he did not work in Nigeria.

[23] The respondent further argued that in as far as mitigation of damages is concerned, in the event the court was to find that there was a breach of contract, no damages should be awarded. According to the respondent the applicant is not entitled to damages because for three months he attended a training course in tourism which took him out the labour market. According to the respondent the applicant could have mitigated his damages by attending the training which he was required to attend. It was further argued that the applicant could have accepted the R19000.00 offered to him and thereafter claimed the short fall in the salary.

**Evaluation**

[24] It would seem to me that even if the applicant had attended the training as was required by the respondent the dispute between the parties would still have not gone away. In essence the issue between the parties in this matter relates to the repudiation of the contract employment by the respondent.

[25] The test for determining repudiation which entitles the aggrieved part a cancellation was set out in summarized form in *Street v Dublin 1961 (2) SA 4 (W),* which was subsequently approved and followed by the Appellant Division in the cases of *Inrybelange (EDMS) BPK v Pretorius 1966 (2) SA 416 (A) and Van Rooiyan v Minister Van Opebarae Werke and Gmenskapsbou 1978 (2) SA 834 (A).* Stork Williamson J in the *Dublin* matter stated the test as follows:

*"The test as to whether conduct amounts to such repudiation [as justifies cancellation] is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound."*

[26] In *Data Color International (Pty) Ltd v Inter Market (Pty) Ltd 2001 (SA) 284 (SCA),* at 294 the court in dealing with the issue of repudiation had the following to say:

*"Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such notional reasonable person would conclude that proper performance [in accordance with the true interpretation of the agreement] will not be forthcoming….*

*The conduct from which the inference of impending non – or mal performance is to be drawn must be clear cut an unequivocal, i.e. not equally consistent with any other fusible hypothesis. Repudiation, it has often been stated, is "a serious matter"…. Requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather that to disregard the contractual commitments- not likely to be presumed."*

[27] In *Member of the Executive Council, Department of Health, Eastern Cape v Oddendall and Other (2009) 30 ILJ 293 (LC),* the court held that a repudiation or breach of contract will arise where a party to a contract renounce his

intention to perform the contract or repudiates it before the time for the performance. A brief explanation of the concept of "repudiation" can be found in the case of *Nash v Golden Dumps (Pty) Ltd 1985 (3) SA 1 (A)* at 22 D- F, a case quoted with approval in the *Oddendall's* case. In that case the court explains the concept of repudiation as follows:

> *" 57 Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct that deliberate and unequivocally intention no longer to be bound by the contract, he is said to "repudiate" the contract… where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated…"*

[28] In the *Oddendall* matter, Basson J following the decision in *Data Color International,* held that repudiation of a contract is breach in itself. The authorities are in agreement that the test for determining whether repudiation has occurred is not subjective but objective.

[29] In the present instance, it is clear, even on the version of the respondent, that the respondent had repudiated the contract by indicating that the applicant would not be paid the salary stated in the contract of employment being the US$ 300, 00 per day. There is nothing in the contract that made payment of the salary of the applicant conditional to the needs or the dictates of the respondent's client.

The contract stated very clearly that the applicant would be paid a salary equivalent to US$ 300, 00 and that that salary would be earned by the applicant working on a rotational basis in terms of which he would for a certain period be in Nigeria and the other in South Africa.

[30] Turing to the issue of mitigation of damages, I have indicated earlier that the respondent contended that the applicant is not entitled to damages because he instead of looking for work he went for training in the tourism industry. This argument is unsustainable. The applicant testified that because he went for training in the tourism industry and had to pay thirty thousand for it because he could not find work in the IT industry. I also do not agree with the respondent that the applicant could have accepted the R19 000.00 offered to him and then later claim the balance of his salary. The applicant in refusing to accept the R19 000.00 offered exercised his legal right of rescinding the contract and claiming damages arising from the repudiation of the contract by the respondent.

[31] I see no reason why in law and fairness why costs should not follow the result.

[32] In the premises I make the following order:

1. The respondent is to pay the applicant's salary from the 8th March 2009 on an ordinary basis until the automatic termination day of the contract being the 31st October 2009.

2. The respondent is to pay the costs of the trial including the costs of one counsel.

**Molahlehi J**

Date of Hearing : 10th April 2010

Date of Judgment : 28 July 2010

**Appearances**

For the Applicant : Adv F Venter

Instructed by : Gael Barrable Attorneys

For the Respondent: Adv L Hutchinson

Instructed by : Fluxmans Inc