

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 4027/2022

Matter heard on: 31 January 2023

Judgement delivered on: 07 February 2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3)REVISED

In the matter between: -

BULUMKO NELANA

Applicant

and

INTERIM CHAIRPERSON OF THE BOARD:

1st Respondent

**BUFFALO CITY METROPOLITAN
DEVELOPMENT AGENCY BOARD**

**BUFFALO CITY METROPOLITAN
DEVELOPMENT AGENCY SOC LIMITED**

2nd Respondent

SPEAKER OF THE COUNCIL:

3rd Respondent

BUFFALO CITY METROPOLITAN MUNICIPALITY

**EXECUTIVE MAYOR: BUFFALO CITY
METROPOLITAN MUNICIPALITY**

4th Respondent

**BUFFALO CITY
METROPOLITAN MUNICIPALITY**

5th Respondent

NOEL VAN WYK

6th Respondent

NOLITHA PIETERSEN

7th Respondent

MANDILAKHE DILIMA

8th Respondent

MXOLISI SIBAM

9th Respondent

NOBANTU SAKUBE-NDEVU

10th Respondent

SILINDILE TONI

11th Respondent

ANDISIWE KUMBACA

12th Respondent

Summary: Law of Contract – courts may refuse to enforce a term of a contract on the basis that is mala fide, unfair or unreasonable and therefore contrary to public policy – held that the mala fide enforcement of a contractual term to undermine the efficacy of a court order is against public policy.

JUDGMENT

SMITH J:

[1] The applicant brought urgent proceedings on 31 January 2023 for an order suspending the decision of the second respondent, namely the Buffalo City Metropolitan Development Agency (the Agency), taken on 25 January 2023, to terminate his employment and remove him from his position as Chief Executive Officer (CEO) of the Agency. The relief is sought pending a final review of the impugned decision in terms of Part B of the notice of motion.

[2] The chairperson of the Agency's Interim Board was cited as the first respondent, the Buffalo City Metropolitan Municipality, as well as its Speaker and Executive Mayor were cited as third, fourth and fifth respondents respectively, and the sixth to eleventh respondents were cited in their capacities as members of the

Agency's Interim Board. Only the first and second respondents opposed the interim relief.

[3] The material facts are relatively straightforward, uncomplicated and largely undisputed. Although the application was brought on drastically truncated time periods, it was opposed and the parties filed relatively comprehensive heads of argument, given the time available.

[4] The relevant facts are as follows. On 24 January 2023, Bloem J granted an order, inter alia, suspending the decision of the Agency to suspend the applicant, pending the finalization of the review application. That order entitled the applicant to return to work forthwith.

[5] The applicant's feeling of elation at his reinstatement was, however, short-lived. Having been warned by a friend that the Agency did not intend to allow him to resume his duties as CEO and was planning a scheme to get rid of him, he instructed his attorneys to write to the Agency to inform it that he would be reporting for work by 9h00 on 26 January 2023. His attorneys duly dispatched the letter to the Agency's attorneys during the morning of 25 January 2023. In addition to declaring his intention to return to work, his attorneys also, amongst others, sought an undertaking that the Agency will comply with the letter and spirit of Bloem J's order.

[6] To his surprise the Agency's attorneys replied almost immediately, and berated him for not having reported for work earlier that day, i.e. 25 January. They stated that he 'should have been at work as of early today', and that he did not require any 'undertaking for him to execute or enforce his order'.

[7] They moreover lamented that: 'His bosses, our client, do not know where he is. He has signed no leave form and indeed, no leave has been granted to him. At this stage, our client views his absence from work as being absent without leave.'

[8] The letter furthermore stated that he was expected back at work and required him to confirm that he would indeed be reporting for work on that day. In conclusion,

they said that his request for an undertaking 'is nothing but a failed (sic) attempt' at justifying his absence from work.

[9] Armed with this unambiguous assertion that he was required urgently to return to work, he confidently arrived at the office at 12h00 on the 25th of January. Upon enquiring about the whereabouts of the relevant functionaries who would have enabled access to his office and other tools of trade, he was informed that they were all at a strategic planning meeting at the Blue Lagoon Hotel. He immediately drove to the hotel and arrived there at about 13h00.

[10] There he was told that Ms Pietersen, the chairperson of the Agency's Interim Board, wanted to meet with him virtually. He was then showed into an empty boardroom and told that the meeting would start at 14h00. He was later joined by the Acting Company Secretary of the Agency and one Mr van Wyk, who had been appointed as Acting CEO after his suspension. Ms Pietersen eventually only joined the Microsoft Teams meeting at about 15h00. She told him that the Agency's Board had met at 07h00 that morning and decided to terminate his contract of employment summarily. She also told him that Mr van Wyk would give him the letter of termination. Mr van Wyk then produced the document from his bag and handed it to him.

[11] The relevant portions of that letter read as follows:

'1. The Board of Directors of the Buffalo City Metropolitan Development Agency ("Agency") has resolved to terminate your appointment as Chief Executive Officer on 2 weeks' notice. You are not required to work out your notice period and will be paid two weeks' remuneration in lieu of notice.

2. Your last working day is today, 25 January 2023, when you will be required to collect all your belongings and return the Agency's belongings, including your access keys.'

[12] It is common cause that in terminating the applicant's employment, the Agency relied on the following clause in his employment contract:

‘An employment contract of an employee may be terminated only on notice of:

(a) two weeks, if the employee has been employed for six months or less;’

[13] Before I consider the central issue which falls for decision in this matter – namely whether I am entitled to interfere with the Agency’s contractual right to terminate on notice without providing any reasons – I need first to deal with the preliminary issues relating to urgency, the balance of convenience, a *prima facie* right, and availability of adequate alternative remedies. When Bloem J granted the order I referred to earlier, he gave an *ex tempore* judgment in which he dealt comprehensively with those issues. I have had the opportunity of perusing the transcribed version of his judgment and I am satisfied that his findings in respect of those issues are still germane to this case. In that application the applicant has relied on substantially the same factual matrix which he has advanced in his founding papers in this matter. The judgment was delivered the day before the impugned decision was taken and Bloem J’s findings in respect of the above mentioned issues therefore remain very much apposite to this case. I respectfully associate myself fully with the reasons provided by the learned judge for his finding that the facts put up by the applicant establish that the matter is urgent, that the balance of convenience is with the applicant, that he has established a *prima facie* right and that there is no other satisfactory remedy available to him.

[14] Mr *Tsele*, who together with Mr *Cohen*, appeared for the applicant, argued that the impugned decision to terminate his employment in terms of the contract is reviewable since it was maliciously taken by a public body and with the sole purpose of undermining the efficacy of Bloem J’s order. He also pointed to the fact that the Agency has brought a counter-application in the proceedings before Bloem J for an order declaring his employment contract unlawful. In addition, the validity of the appointment of the Agency’s Interim Board is also still *sub judice* in that application and the fifth respondent (the municipality) has conceded that the applicant’s challenge in this regard is well-founded. It is therefore inevitable such an order will issue in due course, or so the argument went.

[15] To my mind, the undisputed facts compel the inference that the decision to terminate the applicant's employment contract was taken in calculated haste and with the sole purpose of undermining the efficacy of Bloem J's order. The respondents have made no attempt to place any facts before me to refute the compelling inference that the decision was not bona fide. Instead they relied only on their contractual right to terminate on two weeks' *notice*. They thus seek sanctuary in the principle of *pacta sunt servanda*, asserting that they were entitled to terminate on a 'no fault basis' by giving him two weeks' notice having to provide any reasons. Their counsel, Mr *Bodlani* SC, (appearing with Mr *Salukazana* and Ms *Nxazonke-Mashiya*) argued that the court is accordingly not entitled to question the motive behind the Agency's decision to enforce a term of the contract. He submitted that in terms of the aforementioned principle, contracting parties are bound to honour obligations that have been freely and voluntarily undertaken. The Court should therefore be loath to interfere with the Agency's contractual right to enforce a term of the agreement, no matter of how severe the consequences might be for the applicant.

[16] In order to obtain interim relief the applicant must also show that there are reasonable prospects that he will succeed with the final relief. The central issue which therefore falls for decision is whether the court may refuse to enforce a term of the contract on the basis that it is mala fide, unfair or unreasonable and therefore contrary to public policy.

[17] The Constitutional Court has authoritatively pronounced on this issue in *Beadicia 231 CC and Others v Trustees of the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC). The Court held that abstract values such as good faith, fairness or reasonableness do not provide a free-standing basis on which courts may interfere with contractual relationships. They do, however, have relevance in the application of contract law when the question arises as to whether a contractual provision or the enforcement thereof would be against public policy.

[18] The Court also emphasized that 'in our new constitutional era, the principle of *pacta sunt servanda* is not the only, nor the most important principle, informing the judicial control of contacts' and that there is no basis for elevating the principle above

other constitutional rights. If the enforcement of a contractual term will implicate a number of constitutional rights, 'a careful balancing act' is required to determine whether it will offend public policy. (at para 87)

[19] In *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA), the Supreme Court of Appeal enunciated the following important principles that govern judicial control of contracts:

- (i) Public policy demands that contracts freely and voluntarily entered into must be honoured.
- (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy.
- (iii) Where a contract is not prima facie invalid but its enforcement in particular circumstances is, a court will not enforce it.
- (iv) The party who attacks the contract or its enforcement bears the onus of establishing the facts.
- (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds.
- (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

[20] The facts of this case are indeed unique in the sense that it is seldom that one is faced with such a brazen abuse of a contractual provision designed to undermine a court order. As mentioned earlier, the Agency was unable to proffer any reasonable explanation to rebut the compelling inference that the impugned decision

was primarily aimed at undoing the consequences of Bloem J's order. The letter from the Agency's attorneys the morning after the order was granted was clearly aimed at luring the applicant to the Agency's office under false pretences. By that time the decision to terminate the contract had already been taken, yet no mention was made of it. Instead the applicant was misled into believing that the Agency was intent on complying with the order, only to be summarily dismissed a few hours later. And all of this happened in circumstances where the appointment of the Agency's Interim Board had been challenged and the municipality had conceded that the board members may have been improperly appointed. The undue hasty and sneaky manner in which the decision was taken compels only one inference, namely that the main and mala fide objective was to emasculate Bloem J's order. There can be little doubt that the public mores will be offended by such a brazenly malicious enforcement of a contractual provision aimed at undermining the efficacy of a court order.

[21] Although the Constitutional Court in *Beadicia* (supra) has cited the abovementioned excerpt from *Pridwin* with approval, Theron J has cautioned that the caveat that the power to invalidate or not enforce contractual provisions should be used sparingly, should not deter courts from exercising their duty to infuse public policy with constitutional values. The learned judge also said that the notion that there must be substantial and incontrovertible harm to the public before the power can be exercised, is alien to our law.

[22] I am therefore satisfied that the applicant has established that the enforcement of the contractual term which allows for termination of the applicant's employment contract without notice, will be against public policy. He is accordingly entitled to the interim relief sought in the notice of motion.

[23] In the result the following order issues:

- 1) Dispensing with the normal time limits and services provided for in the Uniform Rules of Court, and directing that the application may be brought on an urgent basis in terms of Rule 6 (12).

2) Declaring that the decision of 25 January 2023 by the second respondent's Interim Board to terminate the applicant's contract of employment and to remove him from his position as Chief Executive Officer, is suspended pending the final determination of Part B of the notice of motion.

3) Declaring that the Interim Board may not suspend or dismiss the applicant from his position as Chief Executive Officer pursuant to the contract of employment dated 1 October 2022, pending the final determination of the relief sought in Part B of the notice of motion and the applications brought under case number 4023/2023, on any basis other than pursuant to bona fide disciplinary proceedings in which due process, including, but not limited to the principles of natural justice, is complied with.

4) Directing that Part B of the notice of motion shall be heard together with the applications brought under case number 4027/2022.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants	:	Adv. M. Tsele
:		Adv. E. Cohen
	:	Nandi Bulubula Inc.
		C/o Cloete & Company
		112A High Street
		MAKHANDA
Counsel for the Respondents	:	Adv. A. Bodlani SC
		Adv. M. Salukazana &
		Adv. Z. Nxazonke- Mashiya
	:	Sakhela Inc.
		C/o Yokwana Attorneys
		10 New Street

MAKHANDA