

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION - MTHATHA**

CASE NO. : CA 32/19

Heard on: 23 August 2019

Date delivered: 17 September 2019

In the matter between:

**RED ALERT CLEANING AND SECURITY
SERVICES**

Appellant

And

BABALWA MQEDLANA AND OTHERS

Respondents

JUDGMENT

MAJIKI J

[1] On 26 June 2018, sixty four respondents approached the court *a quo* on an urgent basis, seeking an order of specific performance against the appellant. The respondents had been in the employment of that appellant. They did not render services from 2 March 2018. They left their work station in the campuses of Walter Sisulu University (WSU) due to protests by the students and members of National Education, Health and Allied Workers Union (NEHAWU). I will refer to those as members of the university community. On 6 December 2018 they obtained an order, directing the appellant to pay their salaries for the months of March 2018 to May 2018. With the leave of the court *a quo*, the appellant now appeals against the said order.

[2] The grounds of the appeal summarily are that the court *a quo*:

- failed to consider that the appellant had no sufficient time to apply its mind to the issues in the application to be in a position to provide an answer to the issues with the requisite precision;
- erred in failing to consider the principle of mutual obligations that there is no obligation to pay a salary to an employee who has failed to render services under the contract of employment.
- erred by failing to consider the confirmatory affidavits to the answering affidavit.
- erred by failing to consider that the respondents were served with notices advising them of what the consequences of their failure to render services in terms of the contract would be; and finally
- erred by finding that the dispute did not relate to payment or non-payment of salaries. According to the appellant, there was a dispute as to the obligation of the appellant to make payment.

[3] It is common cause that the respondents, in terms of the contract of employment with the appellant were, placed at WSU by the appellant in order to render security services. In return they were to receive a monthly salary of R3 000.00. On 2 March 2018 they were chased away by the members of the university community who were protesting on campus. They then left due to threats made and fearing for their safety.

[4] It is in dispute as to whether the respondents ever tendered their services after 2 March 2018. It is also in dispute as to whether the respondents had been given notice by the appellant prior to the stopping of their salaries. The appellant avers that it issued the notice about the consequence of dismissal if the respondents continued to stay away from work. The respondents in return aver that they never received any notice from the appellant.

[5] The court *a quo* in refusing that the matter be referred for the hearing of oral evidence found that there were no disputes on the issue of payment or non-payment of salaries.

[6] The issue on appeal is whether the respondents were entitled to the relief for specific performance. In determining that, the court has to establish whether the respondents had tendered their services in terms of their contract of employment with the appellant. Further, if they tendered their services, but due to circumstances, they still could not work, whether the appellant was entitled to withhold payment of the respondents' salaries.

[7] During the hearing of the appeal Mr Bodlani counsel for the appellant, submitted that in order to establish the above, this court has to have regard to what the respondents had averred were the terms of their contract with the appellant. It was furthermore submitted that this court must have regard to the averments by the appellant and evaluate the areas of dispute in the parties' facts.

[8] Mr Bodlani correctly conceded that, if in the evaluation of the dispute, the issue of the tender to render services is concluded in favour of the respondents, the appeal should fail. He also conceded that the respondents were justified in leaving their work stations on 2 March 2018, when they were being threatened and chased away by striking members of the university community. For that day, their conduct is not to be viewed as amounting to failure to render services in terms of the contract of employment.

[9] With regard to their alleged tendering of services, the respondents averred that on 5 March 2018, the week following the one when they were chased away, they reported for duty. They alleged that there was a protest once more, they were pelted with stones and threatened by striking members of the university community. The mass action continued for a week which deterred them from rendering services. They reported what happened to their onsite supervisors so that the supervisors could report same to the management of the appellant.

[10] On 12 March 2018 they again reported for work. They found Fidelity security guards at the gate. The said guards had a list reflecting the respondents' names and restrained the respondents from entering the university premises. The guards told the respondents that the appellant's manager, Ms Lynette Rheeder, instructed them not to allow the respondents entry to the university premises pending the respondents facing a charge of going away without leave (AWOL).

[11] On the week of 26 March 2018 the respondents went to the appellant's offices in Mthatha. They were to seek clarity as to the state of affairs, in the light of the above hindrances upon their attempting to render their services. Ms Rheeder advised that the matter was handled at the appellant's head offices in East London and that the respondents would be advised of progress.

[12] After they did not receive their salaries on 30 March 2018, they returned to the appellant's offices in Mthatha. They again went to Ms Rheeder to find out about the non-payment of their salaries as well as to the issue of returning to work. She said they must elect a representative from their ranks, to make written representations as to why the respondents had failed to go to work. Indeed, the thirty seventh respondent did so on the respondents' behalf.

[13] For the entire month of April, they would go to the appellant's offices in Mthatha and were always told that they would receive notification about the payment of their salaries and the fate of their employment. Again they received no salaries for the month of April. Further, they received neither a response to the representations they made nor advice about their salaries via short message system (SMS) from the appellant.

[14] They attended a disciplinary hearing on 22 May 2018. The judgment was handed down on 7 June 2018, dismissing them without any pronouncement on the outstanding salaries.

[15] According to the appellant, the respondents were sent a message via SMS. The message and the respondents' telephone numbers are attached to the answering affidavit as annexure B-1. Reading:

"To Red Alert staff striking in Mthatha:

Please do not take part in strikes without receiving permission from CCMA. If the CCMA has not given permission, it is unprotected, and we will follow the steps set out in our internal disciplinary process. This may include dismissing striking staff. Please report any acts of intimidation to supervisors."

The email creating the bulk SMS is dated 6 March 2018.

Another SMS from the appellant to the respondents, marked as Annexure B2, is attached to an email dated 16 March 2018 which reads as follows:

"You must write a statement confirming that you want to return to work and the reasons for your absence during the strike. If you were intimidated, write who intimidated you and who you reported it to. Fax statement: 086 679 1325 and your application will be considered individually and feedback again".

According to the appellant the respondents did not adhere to the request. Most of the same respondents were dismissed in 2018 and reinstated. They ought to have known the consequences of not reporting for duty.

[16] The appellant initially disputed that the respondents were at work on 2 March. It alleged that none of them signed the attendance register, and that they also did not report to the university office of appellant that they were unable to work due to the strike.

[17] The appellant averred further that during the week of 5 March 2018 the respondents were noticed forming part of the strike. They never reported for duty. The supervisors were able to attend to their duties at the same campus. After 5 March 2018 the strike was not continuous. There were sporadic protests which would not have hindered the respondents from performing their duties. They never tendered their services and again they never signed the attendance register. It is denied that on 28 March 2018 they attended the offices of the appellant. Even if they did, that was after three (3) weeks of the

commencement of the strike which strike was long over. Some of the respondents made individual representations not through an elected member at the instance of Ms Rheeder, as the respondents allege.

[18] Finally, the appellant is of the view that none of the respondents tendered or rendered services during the period in question and would therefore not be entitled to remuneration.

[19] According to Mr Bodlani the main and the relevant terms of the agreement between the parties are:

- that the respondents shall offer their services to the appellant, tender and avail themselves as servants of the appellant; and
- that the appellant shall pay the respondents their monthly salaries on every last day of the month.

[20] Mr Bodlani also referred to an extract from Workplace Law by John Grogan, (tenth edition), page 17. With regard to the duties of employees the learned author states:

“The main contractual obligation of employees is to place their personal services at their employer’s disposal. ... Under both common law and statutes, employees who do not tender service are not entitled to wages, irrespective of the reason for their non-tender. Conversely, an employee who does tender service but is prevented by the employer from working is entitled to be paid”.

[21] Mr Bodlani submitted that there would have been no need to hold a hearing before withholding a salary when an employee has not tendered his services. Even if the respondents were at work on 2 March 2019 and because they had no choice, they had to flee for their safety, there could be no basis for them not to render services on the remaining days. The respondents made a choice not to go to work since the strike was sporadic after 5 March 2019. Further, if there were any circumstances that prevented them from working, those were not at the instance of the appellant. The contract with the appellant did not provide that they would be entitled to payment of salaries in

circumstances where they could not perform their duties due to other supervening factors which are not caused by the employer.

[22] Mr Notyesi, attorney for the respondents, submitted that the person who deposed to the answering affidavit did not have personal information on the crucial aspects of this case. He also did not allege that the averments are within his personal knowledge. He further submitted that the respondents felt unsafe and the appellant could not ensure that the environment was safe for them to continue working.

[23] Mr Emile Mouton who deposed to the answering affidavit addressed the aspects that relate to whether the respondents tendered their services. At paragraph 13, with regard to the week of 5 March 2018, he says:

“The supervisors noticed some of the applicants being in the crowd forming part of the strike. ... [T]he supervisors of the applicants still attended Walter Sisulu University and attended to their duties. ... In fact, after 5 March there were only sporadic protests which would not have hindered the applicants from doing their work”.

In relation to the week of 12 March 2018 he stated “up to the week of 12 March 2018 none of the applicants attended work or signed any attendance register.”

[24] Mr Mouton denied the respondents’ assertion relating to the specific times when the respondents said they attended the office of Ms Rheeder. However, he says nothing about the respondents’ averment that they went to the appellant’s offices to clarify issues as they always tendered their services to work. Further, reference was made to an attendance register that was not signed by the respondents. He said that it shows that indeed the respondents were not at work. However, the said register has not been attached to his answering affidavit.

[25] A closer consideration of the appellant’s answering reveals problems for its case. It is not stated who of the supervisors saw the respondents on the 5

March 2018. There are no confirmatory affidavits from the specific supervisors to whom the answering affidavit referred to. The register that the respondents were supposed to sign and is said they did not sign, is not attached to Mr Mouton's answering affidavit. He stated that he is conducting business in Sunnyridge, East London. He did not state how he knew that the strike was sporadic. He ought to have stated on what days of the period in question he was able to state that there was no strike and how he ascertained that information. Only then would the court be able to distinguish those days and make a determination as to whether the appellant was justified in refusing to pay the respondents for those days.

[26] I consider the concession made that the respondents were at work on 2 March as having been correctly made. If the appellant's case is that the register was not signed by the respondent even on 2 March 2018, when they were admittedly at work, I do not find the said signing system to be reliable. I would not be able to attach much weight to the issue of the attendance register even if it was part of the papers.

[27] With regard to the notices allegedly sent to the respondents, even if they were received, they are silent about the consequences of the respondents' dismissal. The dismissal eventuated after the hearing. No payment of salaries is claimed for the period after that ruling. The issue of dismissal was correctly pursued through another legal dispensation, the Commission for Conciliation Mediation and Arbitration (CCMA).

[28] I agree with the contention that the court *a quo* ought to have considered that there was a dispute around the issue of whether the non-payment of salaries was justified. Necessarily the court *a quo* would have had to first determine if there was a dispute on the main issue, that of the tender for services.

[29] I do not find the objections by the respondents to Mr Mouton's affidavit that it contains hearsay evidence to be technical. The application was initially filed on 12 June 2018 as being urgent. Submissions were only heard on 6

December 218. I agree with the respondents that leave could have been sought to file proper confirmatory affidavits before or after the filing of the respondents' replying affidavits. In my view, the two affidavits that were sought to be filed in support of the answering affidavits were correctly rejected by the court *a quo*. Above the issue of whether a male or female deponent presented themselves to the commissioner of oaths, when the *jurat* refers to a gender different to that of the deponent. Even if one is generous and accepts that the reference to the contents of a founding instead of an answering affidavit was an error, Ms Rheeder specifically confirmed the contents leading to the strike on 2 March 2018. She mentioned nothing about attempts by the respondents to report for duty, post the events of 2 March 2018. Her affidavit would therefore not be of any consequence on the material aspects. Ms Mqana merely said she is a supervisor, and that she confirmed the contents that relate to her. Nowhere did the answering affidavit mention her name, also she did not say she is one of the supervisors referred to in the answering affidavits the further issue relates to what is being sought to be confirmed.

[30] Having undertaken the above exercise, I am of the view that, in the light of the problems highlighted with the appellants' answering affidavit, there cannot be any genuine dispute of fact on the material aspects that require determination. In particular, I am unable to conclude that the issue of whether the respondents tendered their services was effectively contested by the appellant.

[31] In my view, the respondents tendered their services. They were prevented from continuing with their duties by circumstances, which included their not being safe from the striking members of the university community, together with the fact that they were advised not to return to work pending the hearing of disciplinary proceedings. The evidence establishes that during the launch of the strike the environment was not safe for the respondents. They had to leave the site. Consequently, the appellant would not have been entitled to withhold the respondents' salaries.

[32] In conclusion, the court *a quo* was correct, still, in granting the relief sought by the respondents.

In the result,

The appeal is hereby dismissed with costs.

B MAJIKI

Judge of the High Court

G H BLOEM

I agree

G H BLOEM

Judge of the High Court

A DA SILVA

I agree

A DA SILVA

Acting Judge of the High Court

Counsel for the appellants : Advocate A Bodlani

Instructed by : Messrs SPF Attorneys
27 Blakeway Road
MTHATHA

Counsel for the respondents : Mr M Notyesi

Instructed by : Messrs Mvuzo Notyesi Incorporated

14 Durham Street
MTHATHA