

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO. 936/2012

KHOLEKA JONI

PLAINTIFF

And

KEI FRESH PRODUCE MARKET

DEFENDANT

JUDGMENT

DAWOOD J

1. The Plaintiff herein instituted action against the Defendant claiming damages arising out of an alleged unlawful termination of a fixed term contract.
2. The Plaintiff's averment were to the effect that *inter alia*:
 - a) The parties concluded a written fixed term contract of employment effective from 01 July 2010 for a period of 5 (five) years and terminating on 30th June 2015.

- b) The Defendant breached the fixed term of contract by wrongfully and unlawfully terminating the same on 30 November 2011.
 - c) As a result of the Defendant's wrongful and unlawful termination of the fixed term contract, the Plaintiff has suffered damages in the sum of R213 937 – 15 which the Defendant has despite demand failed to pay.
3. The Defendant admits:
- a) That the parties entered into a written contract of employment on the 26th May 2010.
 - b) That the Plaintiff would be employed for a fixed term of five (5) years for the period 01 July 2010 to 30 June 2015 subject to the terms and conditions embodied in the agreement.
 - c) That it was an express term of the agreement that:
 - i) Either party was entitled to terminate the agreement on not less than one calendar month's written notice given to the other party.
 - ii) Notwithstanding anything to the contrary the agreement may be terminated on any grounds recognized in law to be sufficient.
 - d) That the agreement was terminated by the Defendant by giving the Plaintiff one calendar month's written notice and leave of absence from work for the month of October 2011, and paid her one month's salary in lieu of the notice pay.
 - e) That the termination of employment constituted a valid ground as contemplated in paragraph 10.2 of the employment contract and consequently the termination of the Plaintiff employment was not unlawful.
 - f) Alternatively:

- i) The agreement between the parties was terminated by the Defendant in a due process of retrenchment due to the Defendant operational requirements.
 - ii) The retrenchment of the Plaintiff for operational requirements constitutes a ground of termination recognized in law sufficient as contemplated in paragraph 10.3 of the employment agreement and consequently the termination of the Plaintiff employment was not unlawful.
- 4. The Plaintiff, *albeit* at a late stage applied for a separation of the merits from the quantum without any objection by the Defendant, and in the interest of justice the separation was granted. Accordingly a determination of the merits only will be made at this stage.
- 5. The Plaintiff testified in support of her claim *inter alia* as follows:
 - a) She confirmed the contents of the agreement and the fact that the terms thereof were explained to her.
 - b) She stated that the agreement should have lasted for 5 (five) years but it did not. She was given a retrenchment offer and then a letter indicating that it was a letter of dismissal or removal or firing.
 - c) The letter dated 26 August 2011 is headed 'Re: Voluntary Retrenchment package offer and stated that the offer was valid until 30th September 2011 and the notice month shall be October 2011.
 - d) The undated letter was headed Termination of Employment contract and stated that Kei Fresh Produce Market has been forced to restructure its operation and the position of general assistant has become redundant.
 - e) It was put to her in cross examination *inter alia* that her position has been terminated due to new operational requirements with effect from 1st November 2011.

- f) She stated that Kei Fresh Produce could terminate her contract of employment on one (1) month notice provided they gave her the whole package. They did not give her pay for the five (5) year contract and that is how she understood the agreement.
6. The Plaintiff closed her case after her testimony and the Defendant sought absolution from the instance on the following basis:
- a) That it was a fixed term contract but in terms of section 37 (1) (c) of the Basic Conditions of Employment *inter alia* a notice period of 4 weeks needed to be given as minimum notice period and this was done.
- b) He argued that the Plaintiff was simply entitled to her notice period and this was given and she received all that she was entitled to.
7. The Plaintiff argued that a fixed term contract cannot be terminated prior to the expiration of the term specified therein and relied on the common law position as set out *inter alia* in:
- a) *Buthelezi v Municipal Demarcation Board*¹
- b) *Nomaza Nkopane and Others v Independent Electoral Commission*².
8. The Defendant in reply referred this court to the case of *Morgan v Central University of Technology, Free State*³ in support of the proposition that where the fixed term of contract provides for termination it can be terminated by giving the requisite notice provided for in the agreement.
9. The issue to be determined herein is:
- i) Whether or not the Defendant has satisfied the requirements for the granting of absolution considering the arguments advanced in other words, whether or not the Plaintiff has failed to make out a *prima facie* case that she is entitled to relief on the basis that the contract she

¹ [2005] 2 LLR 115 (LAC).

² [2007] 2 BLLR 146 (LC).

³ [2013] 1 BLLR 52 (LC).

concluded is only terminable upon expiration of the 5 (five) year period.

10. Applicable legal principles in respect of application for absolution from the instance.

a) Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another*⁴ stated at paragraph 2 as follows:

“The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

“. . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T)).”

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G-38A; Schmidt Bewysreg 4th ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” (Gascoyne loc cit) - a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice.”⁵

⁴ (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A) (31 August 2000)

⁵ Id. at par 2.

b) In *Septoo v City of Johannesburg*⁶ at paragraph 15 it was held:

“The test for absolution from the instance sought at the close of the Plaintiff’s case is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably, to such evidence could or might (not should or ought to) find for the Plaintiff” (see Municipality of Christiana v Victor 1908 TS1117; Van Rensburg v Reid 1958 (2) 1958 (2) 249 E; and De Wet v Western Bank Ltd 1977 (2) SA 1033 (W)).⁷

c) In *Tsoanyane v University of South Africa*⁸ it was held at paragraphs 14 - 16:

“The applicable principle in an absolution stage has been enunciated in the Gascoyne v Paul & Hunter 1917 TPD 171 at 173, a case that has been followed in many other subsequent cases, as follows:

“At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but close his case immediately, the question for the Court would be, “Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?”. ”

The same principle is stated by the Appellate Court in Oosthuizen v Standard General Versekeringsmaatskappy Bpk 1981 (1) SA 1032(A) at 1035H-1036A as follows:

“If at the end of the plaintiff’s case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution.” Where there is only one defendant, as in casu, at the close of the case for the plaintiff, “it can be fairly inferred that ...the Court has heard all the evidence which is available against the defendant, any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff. That being so it is considered unnecessary in the interest of justice to allow the case to continue any longer if, the plaintiff has closed his case, there is no prima facie case against the defendant; vide Putter v Provincial Insurance Co Ltd and Another 1963 (4) SA 771 (W) at 772F-G.

In Gordon Lyod Page & Associates v Rivera & Another 2001 (1) SA 88 (SCA) at p92 para [2] where the Court said that:

“The test for absolution to be applied by a trial court at the end of the plaintiff’s case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

‘...(W)hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court,

⁶ (2018) 39 ILJ 580 (LAC)

⁷ *Id.* at par 15

⁸ (12677/08) [2009] ZAGPPHC 83; (2009) 30 ILJ 2669 (GNP) (22 May 2009)

applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff Gascoyne and Hunter 1971 (TPD) 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA307 (T).)

This implies that a plaintiff has to make out a prima facie case—in the sense that there is evidence relating to all the elements of the claim—to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). ”⁹

d) In the commentary to Rule 39 (6) absolution from the instance Erasmus *et al* stated:

*“Where a Plaintiff’s case depends upon the interpretation of a document, the court ought to refuse absolution unless the interpretation contended for by the Plaintiff is not a reasonably possible interpretation ”.*¹⁰

11. Application of the legal position to the facts of this case.

a) In this case it is common cause that the agreement was for a fixed term basis and commenced on 01 July 2010 and ends 30 June 2015 (five year contract) clause 1.2 of the agreement headed fixed contract employment as a general assistant.

b) It is also common cause that paragraph 10 of the agreement provided for termination of employment in particular paragraph 10.2 and 10.3 reads as follows:

“Paragraph 10.2

After the probationary period you or Kei Fresh Produce Market will be entitled to terminate this contract on not less than one calendar month’s written notice given to the other party.

Paragraph 10.3

Notwithstanding anything to the contrary, this agreement may be summarily terminated on any grounds recognized in law as sufficient.”

c) It is trite law that a fixed term contract cannot be terminated in the absence of a repudiation or a material breach of contract by the other party in terms of the common law. However even in the case of

⁹ Id.at paras 14 - 16

¹⁰ See Botha v Minister Vann Lande 1967 (1) SA 72 (A); De Klerk v Absa Bank Ltd 2003 ALLSA 651 (SCA).

*Buthelezi*¹¹ referred to by the Plaintiff's counsel at paragraph 9 Jafta AJA stated that the exception was where the terms provide for such termination emphasizing the parties legitimate right to contractual freedom at paragraph 9:

*"The first question that arises in the present matter is whether the respondent was entitled to terminate the employment contract between it and the appellant when it cancelled it. There is no doubt that at common law a party to a fixed – term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is **no right to terminate such contract even on notice unless its terms provide for such termination**. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate of a fixed – term contract of employment prematurely in the absence of a material breach of such contract by the other party...."*¹²

d) In *Morgan supra* at paragraph 19 it was held

*"It should be borne in mind that the employment contract **specifically permitted the Respondent to terminate on the basis of misconduct**, medical unfitness, operational requirements or incompetence. This is not **the same state of affairs the court dealt with in Buthelezi v Municipal Demarcation Board (2004) 25 ILJ 2317 (LAC)** where the court was prepared to award compensation for the balance of the period of the contract, subject to the date when the applicant secured alternative employment"*

e) I accept that if no termination clause was present the right of termination would be restricted in terms of the common law but there is a termination clause present here that is set out in clear and unambiguous terms.

¹¹ *Buthelezi* (note 1 above) at par 9

¹² *Id.* at par 9

f) In *Lottering v Stellenbosch Municipality*¹³ Cheadle AJ held at page 4 as follows:

*“If the contract is for a fixed term, the contract may **only** be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation”*.¹⁴ (my emphasis)

g) In this case the agreement specifically provided for termination on **one calendar months’ notice**.

h) There was a notice of termination served on the Plaintiff, the notice for termination is undated but the Plaintiff has not raised the fact that this notice did not comply with the terms set out in the agreement or failed to constitute a one calendar months’ notice.

i) There was no restriction placed on the grounds upon which the contract could be terminated.

j) The Defendant in this case provided the Plaintiff with the reasons for termination being that of operational requirements.

k) It is clear that in this agreement there was no closed lists of grounds upon which an agreement could be terminated by giving one month’s notice.

l) Clause 10.2 of the agreement cannot be restrictively interpreted to exclude the possibility of retrenchment and is indeed wide enough to cover this situation such inclusion would not be against public policy.

m) The implementation of the terms of the clause in this instance is not unjust or inequitable. (If indeed this court would be able to go into those grounds).

n) Clause 10.3 of the agreement is not applicable to this situation as it speaks about summary termination which would in all likelihood deal

¹³ (2010) 19 LC and 12 BLLR 1306 (LC); See also *Metal Industries Benefit Funds Administration v Banham Myburg* JS854113.

¹⁴ Id. at page 4

with instances of gross misconduct or material breaches of the agreement that warrant immediate termination thereof.

12.The Plaintiff has unfortunately failed to demonstrate a *prima facie* right to the relief sought. She has failed to demonstrate that her contract was wrongfully and unlawfully terminated. The agreement was lawfully terminated in accordance with the provisions of the agreement.

13.The Defendant has correctly argued for absolution from the instance. The interpretation contended for by the Plaintiff, having regard to the *ipsimma verba* (actual wording) of the agreement, is not a reasonably possible interpretation having regard to the clear and unambiguous termination provisions incorporated in paragraph 10.2 of the agreement.

14.I am accordingly of the view that it would serve no purpose to allow the matter to go any further and that this is a matter that warrants the grant of the order of absolution from the instance.

15.The Plaintiff legitimately believed that she was entitled to payment for the full duration of the fixed term contract and she was also advised of the same. She was not vexatious in litigating and I believe this is a case where she should not be mulcted in an adverse costs order being granted against her especially in circumstances where she is unemployed, and has been since the lawful termination of her contract of employment.

16.I accordingly make the following order:

- a) Absolution from the instance is granted.
- b) Each party to pay her/it's own costs.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

30 JULY 2018

JUDGMENT DELIVERED:

14 AUGUST 2018

FOR THE PLAINTIFF:

MR JOZANA

PLAINTIFF'S ATTORNEYS:

B. MAKADE INC

NO 7 IDK BUILDING

92 SUTHERLAND STR

MTHATHA

FOR THE DEFENDANT:

MR HOBBS

DEFENDANT'S ATTORNEYS:

MPETO & ASS

26 MADEIRA STR

MTHATHA