

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

DATE: 22/05/2009

CASE NO: 12677/08

REPORTABLE

In the matter between:

TSOANYANE: MPHO

PLAINTIFF

And

UNIVERSITY OF SOUTH AFRICA

DEFENDANT

JUDGMENT

MAVUNDLA, J.,

[1] In this case, the defendant applied for absolution from the instance and dismissal of the plaintiff's case with costs.

[2] The plaintiff issued simple summons claims from the defendant for payment of an amount of R449 634. 50 being alleged patrimonial loss or damages she suffered as the result of alleged breach of contract.

[3] After the plaintiff had completed her evidence in chief, she was dully cross examined. When she was about to be cross examined, Mr. Mkhize, counsel for the plaintiff, sought leave to have plaintiff's particulars of claim amended, as indicated herein below. This application was opposed. I have since granted such amendment.

[4] With the amendment having been taken out of the way, counsel for the plaintiff confirmed that there will be no witnesses for the plaintiff and that her case will be closed. Mr. Venter, counsel for the defendant, and then brought the application for absolution from the instance.

[5] The particulars of claim, as amended paragraphs 8 and 9, now read, *inter alia*, as follows:-

“7. But for the wrongful and / or unlawful breach of the employment contract by the Defendant to be referred more fully herein under the Plaintiff would have remained employed by the Defendant and rendered her services to the Defendant until she reached her retirement age of her 60 the birth day.

- 8 On or about July 15, 2005 the Defendant wrongfully and /or unlawfully breached the aforementioned contract of employment by and between the parties by terminating the said contract with immediate effect and, subsequently disallowing the Plaintiff to report for duty and ordering her out of the Defendant's premises.
- 9 On or about January 01, 2006 the [Plaintiff accepted the Defendant's breach of the aforesaid contract and cancelled the said contract, alternatively the Plaintiff hereby accepted the said breach and cancelled the said contract."

[6] In her particulars of claim, the Plaintiff has set out a breakdown of the amount of R449 634. 50 as follows:

- 3.1 uncapitalized basic salary of the plaintiff for the full year of 2006 would have been R123 000. 00 and her salary up to June 2007 would have been R61 500.00
- 3.2 The uncapitalized fringe benefits of the Plaintiff for the year of 2006 would have been R98 237. 00and her benefits up to June 2007 would have been R49 163. 50;
- 3.3 The uncapitalized housing allowance of the Plaintiff for the year 2006 would have been R11 738. 00 and her allowance up to June 2007 would have been R5869.00

3.4 The uncapitalized 23 days paid annual vacation annual vacation leave of the Plaintiff for the year 2006 would have been R20 125.00 and her vacation leave up to June 2007 would have earned her R10 062. 50: R30187.50b

PLAINTIFF'S CASE

[7] From the evidence, the case of the plaintiff is that she commenced working for the defendant in 1999, at that time her employment with the defendant had been through an employment agency. From the year 2000 she continued working for the defendant, but no longer through an agent. Her employment was a fixed-term contract which was renewable at the end of a particular period.

[8] She says that in January 2005 her fixed-term employment contract was converted to a permanent contract. The terms of this employment contract are contained in annexure "MT1" attached to the particulars of claim.¹

¹ Annexure "MT1" is a letter signed by Mr. JK Moloto, the Executive Director; Human Resources of UNISA, on 13 January 2005. These terms were accepted by the Plaintiff on 1 January 2005.

[9] The plaintiff was employed as Project Co-ordinator for a basic salary of R123, 000, 00 per annum on job grade 9 with the remuneration scale of R132, 796- R221, 327. There are various benefits, inter alia, housing assistance for an amount R11, 738.00 per annum, as well as leave and sick leave benefits.

[10] The plaintiff subsequently received a letter dated 20 April 2005² from the defendant, confirming the conversion from fixed-term to permanent appointment. The letter however advised that:

“It was subsequently discovered that errors were made and investigation into the matter was effected.” She was warned that her permanent employment might be affected, but the defendant would revert to her after completion of the investigation.

[11] The defendant further informed the plaintiff, per letter dated 30 May 2005, that there was certain information received from her Executive Dean, Prof Humphrey, which needs further discussion before a recommendation would be made to the

² Paginated page 5 of the bundle of documents.

Management Committee and that she would be informed of the final decision of the Committee.

- [12] The plaintiff subsequently received a letter dated 13 July 2005 from the defendant, informing her that the investigation reveals that the conversion of her fixed-term employment to permanent contract was as a result of an error and that therefore she will revert to her previous status of fixed-term contract, which is extended until 31 December 2005. She was also informed that her salary and benefits she was receiving as permanent employee would remain the same, and that she is given an option to continue to be a member of the Pension Fund, Group Insurance Scheme and Medical Aid for the duration of the extension. A scrutiny of this letter reveals that the plaintiff was also cautioned that the extension of her contract does not give rise to an expectation for permanence and that it will therefore not be renewed. The plaintiff was per this letter invited to confirm her acceptance in writing as well as her intention to continue with the benefits mentioned hereon above.

[13] The plaintiff's response and view is contained in the her letter dated 21 July 2005 and marked annexure F at paginated page 8, and reads, *inter alia*, as follows:

"It is my view that the University has created a reasonable expectation that I was appointed permanently. I find it difficult and unfair for my employer to inform me about errors that occurred during my permanent appointment after four months being a permanent employee. Furthermore your letter dated 13 July 2005 does not explain the errors made during that process (see annexure 40). Consequently, I feel that the employer is discriminating against me by not giving me all the information pertaining to my employment situation. I also feel that being an African woman from a disadvantaged community, the decision has a serious economic socio bearing.

I started working for UNISA (Technikon SA) on 1 November 2000 until 31 December 2004 as a contract employee; this could be confirmed by HR as they have the information in the system. Since I accepted the offer of permanence on 1 January 2005, I made big commitments and expenditure was raised. Therefore I do not accept the decision to convert my permanent appointment to a contract."

[14] 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?”.”

[15] The same principle is stated by the Appellate Court in *Oosthuizen v Standard General Versekeringsmaatskappy Bpk* 1981 (A) at 1035H-36A 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 (WLD) at 772F-G.

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

“[2]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, 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)."

[17] At this stage I need not concern my self with the credibility or otherwise of the evidence of the plaintiff, unless, of course, it is demonstrably clear that the plaintiff and or witnesses,(in casu there were no other witnesses either than the plaintiff) "palpably broke down under cross examination"³; vide also *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T) at 309D.

[18] The plaintiff bears the onus to prove that she has suffered damages and also the quantum thereof; vide Monument Art Co

³ Vide The SOUTH African LAW OF Evidence by DT Zeffertt page 165 where the learned authors cite Solomon in Siko v Zonsa 1908 TS 1013.

v Kenston Pharmacy (Pty)⁴ where Rose Innes AJ, as he then was, said:

“The *onus* rest upon plaintiff to prove not only that its goods have been damaged, but also the amount of the damages thereby sustained. I apply with respect the *dicta* of Muller A.J.A, as he then was, in Erasmus v Davis case at 19A where he said:

“It is for the plaintiff to establish not only that he has suffered damages but also the *quantum* thereof. Consequently it is for the plaintiff to show that the method which he employs is appropriate to the particular circumstances; in other words that the evidence produced by him establishes the *quantum* of the damage which he has suffered.”

...It is true that once a plaintiff has proved that damages, And once evidence has been adduced which constitutes prima facie proof of quantum of the damages sustained, then such prima facie proof may become proof on a preponderance of probability and the plaintiff will succeed in proving damages if on all evidence at the end there is nothing to refute plaintiff's case.” At page 118D-F Rose Innes AJ, as he then was continued to say: “....the court does not have to embark on conjecture in assessing damages where there is no factual

⁴ 1976 (2) SA (CPD) 111 at 120C-E

basis in evidence or, an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff which has failed to produce available evidence upon which an assessment of the loss could have been made. Mkwanazi.

[19] For the plaintiff to succeed in her claim, she must prove the following elements, vide *Gordon Lyod Page & Associates v Rivera & Another* (supra)

- (i) The contract;
- (ii) Breach of the contract; or repudiation of the contract;
- (iii) That she has suffered damages;
- (iv) A causal link between the breach and the alleged damages; and
- (v) That the loss was not too remote.

[20] It is common cause that there was an agreement, the terms of which was accepted by the plaintiff on 1 January 2005, vide paginated page 1 to 4 of the Joint Bundle of Documents (exhibit "MT1" of the particulars of claim, paginated pages 1-3 thereof).

[21] In respect of the second requirement, the plaintiff has conceded that she was informed that because of the error, she will revert to her original status and continue to receive all her benefits. According to the plaintiff, on 1 January 2006 she then cancelled the contract. Not every cancellation of a contract gives rise to a right to cancel, vide *Alfred McAlphine & Son v Transvaal Prov, Admin.* 1977 (4) SA 310 (TPD) at 347H.

[22] It is submitted on behalf of the defendant that the plaintiff is prevaricating as to what action or conduct on the part of the defendant constitutes the alleged breach. The plaintiff alleged that the unilateral cancellation was the change of employment on 13 July 2005 by reverting to the permanent employment contract of fixed term contract; alternatively the termination of the employment on 13 December 2005 alternatively both.

[23] It is further contended on behalf of the defendant that the alleged unilateral revision to the fixed term of contract is not a breach. The plaintiff was not given any new contract. He salary

and benefits remained the same. It is contended that she was given a notice of 5½ months that her contract of employment will terminate on 31 December 2005, and that such is not an unlawful act on the part of the defendant, because it is in accordance with section 37 of the Basic Conditions of Employment Act, N 75 of 1997.

- [24] Section 37 requires that in the case of a person who has been employed for more than a year or more, a contract of employment may only be terminated on notice of not less than four weeks, subsection (1)(c)(i). Where the employer has given a notice which is consonant with section 37, as is the case in casu, it cannot be said that the subsequent termination of service is unlawful, especially seen in the light of the fact that the defendant did give a notice which more than the four weeks required by s37 is. The plaintiff has conceded that the defendant has a right to terminate employment contract. Consequently, in my view, I conclude that there is merit in the submission made on behalf of the defendant that the plaintiff cannot succeed in proving the second requirement.

[25] The letter of 13 July 2005 (paginated page 7 of the joint bundle of documents) informed the defendant, *inter alia*, that she would continue to receive her salary and benefits. The plaintiff has conceded that she continued to receive he salary and benefits until the 31 December 2005. It is clear that she did not sustain any damages during the period July 2005 and 31 December 2005. Besides, she was also given, in my view, sufficient notice of termination of employment.

[26] In so far as the damages are concerned, I am of the view that the plaintiff has not established a prima facie case. I say so because, under cross examination the plaintiff has conceded that she continued to receive her salary and the benefits as reflected in the agreement. She further testified that after her departure from the defendant's employment in January 2006, she was gainfully employed thereafter. She said that she worked, *inter alia*, she worked for someone for eight months, and she worked Unisa Business School she cannot recall for how long, she worked for Home Affairs for an amount of

R10 900, 00. I am not detailing all the places she worked for and her salary in those respective places, including her current employment. It suffices to state that, I am of the view and find as such, the plaintiff has not laid a prima facie case showing that she suffered any damages after January 2006 consequent to her departure from the defendant's employment.

[27] Further, the plaintiff conceded under cross examination that in respect of leave days, she cannot claim money for any leave period she has not taken within a particular circle. She conceded that such leave days that have not be taken cannot be carried forward nor be exchanged for money. She was further unable to explain how the amount of R30 187. 50, amount of R147 490. 00 were computed.

[28] The plaintiff, under cross examination she conceded that she has taken her leave. She has also conceded that where an employee does not take her leave, such an employee cannot carry over the leave days she has not taken to the following

leave circle. In this regard, I bear in mind what was said by Rose Innes AJ in the Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) 118E:

“it is not competent for a Court to embark upon a conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made.”

[29] I am of the view that the plaintiff would not succeed in proving any quantum. I am consequently of the view that the plaintiff would not succeed in proving any quantum. I find it not necessary to interrogate the rest of the other requirements that she would have had to prove. I am consequently of the view that it would serve no purpose to permit this matter to continue beyond the stage it has reached.

[30] In the result absolution is granted with costs.

DATE OF HEARING : 14/ 04 / 2009

DATE OF JUDGMENT: 22 / 05/ 2009

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

PLAINTIFFS' ATT : MOTLANTE INCOPORATED

PLAINTIFFS' ADV : MR. MOTLANTE

DEFENDANT'S ATT : MAENETJA ATTORNEYS

DEFENDANT'S ADV : MR. E. VENTER