

IN THE LABOUR COURT IN JOHANNESBURG

CASE NUMBER: JS435/23

In the matter between:

MAMANKOANE TABANE

APPLICANT

and

RAILWAY SAFETY REGULATOR

RESPONDENT

Hearing date: 22 March 2024

Judgment date: 8 May 2024

Summary: The employee was dismissed for poor performance at the end of a probation period whilst employed on a 5 year fixed term contract. Two years later she referred a breach of contract claim to the Labour Court in terms of s 77(3) of the BCEA. The employer gave notice of an exception that her cause of action, properly construed was a probation dispute arising from the LRA and the Labour Court had no jurisdiction to entertain the matter as the CCMA was the appropriate forum and arbitration the appropriate dispute resolution process. In light of the 2021 Constitutional Court decision in *Baloyi v Public Protector and others*, and as applied in 2024 by the Labour Appeal Court in *PRASA v Ngoye* the exception was dismissed. The court found that it had jurisdiction to hear a claim of breach of contract from facts pertaining to a dispute about probation.

Judgment

Introduction

1. Ms Tabane (the “employee” / the “Applicant”) entered into a five year fixed term contract with the Railway Safety Regulator (the “employer” / the “Respondent”) for the period 3 August 2020 to 3 August 2025. Ms Tabane was appointed as the

Executive Manager: Legal Services and the Company Secretary to the Board. Her cost to company remuneration was R 1 543 675.00 per annum.

2. Included in the contract of employment was a probation clause which reads, *“The employee will serve the probationary period of six months, during which period her skills, general attitude, quality of work and suitability for continued employment will be assessed. The result of the employee’s assessment and what it translates to, will be communicated to the employee in writing at the end of the probation period.”*¹

3. Towards the end of the probation period (January 2021) the Board resolved that sections of the probation policy were not complied with during the employee’s probation, and that her period of probation be extended by 3 months.²

4. The then acting CEO Mr Selaledi refused to assess the employee on the basis of a monitoring and evaluation supervision form in line with the probation policy, insisting that the employee sign a performance agreement and be assessed in those terms.

5. The employee alleges that the employer failed to:

- 5.1. ensure that there was a mid term probation review;
- 5.2. identify performance standards as required by the probation policy;
- 5.3. identify performance shortcomings and give the employee an opportunity to address them; and
- 5.4. used the wrong instrument for assessment.

6. The Railway Safety Regulator dismissed the employee in mid 2021 (after various litigation skirmishes ventilated in the Labour Court) for poor performance.

Litigation

¹ Clause 4, pg 18 of the Pleadings

² Statement of Claim, pg 4

7. On 13 July 2023 the employee approached the Labour Court for relief, by filing a Statement of Claim.

8. The employee sets out the background summarised above and claims that the employer has breached her contract of employment, in particular by breaching the probation policy. She submits that as a result of the breach she has suffered damages which are quantified as follows:

8.1. Loss of income over 4 years (the remainder of the contract) to the value of R 6 250 700.00; and

8.2. General damages for impairment of her career to the value of R5 million.

9. The employee seeks R11 250 700.00 from the Railway Safety Regulator plus interest, as well as costs.

10. The employee submits that the Labour Court has jurisdiction to hear the matter by virtue of section 77(3), read with section 77A(e) of the Basic Conditions of Employment Act, 1997 (the "BCEA").

11. On 3 August 2023 the Railway Safety Regulator filed a notice of exception on the basis that the Statement of Claim does not disclose a cause of action; and that the Statement of Claim is vague and embarrassing.

12. The notice reads,

"An alleged breach of the probation policy and the probation clause in the contract of employment does not constitute an actionable claim upon which the Labour Court retains jurisdiction in terms of section 77(3) or section 77A(e) of the BCEA

'An alleged breach of the probation policy, and or probation clause in an employment contract is actionable in accordance with the provisions of the Labour Relations Act, read with schedule 8...'³

³ Paragraphs 5 and 6, pg 27 of the Pleadings.

13. The employer delivered the exception on 15 March 2024, (although this pleading was signed on 6 December 2023).

14. Various litigation steps were taken over time.⁴ I have though focussed on the key issue before me which is whether or not the employee has disclosed a cause of action justiciable in the Labour Court. It is to this issue that I now turn.

Jurisdiction in the Labour Court

15. The jurisdiction of the Labour Court is set out in section 157 of the Labour Relations Act 1995. Subsection 1 reads, *“Subject to the Constitution and section 173⁵, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in all matters that elsewhere in terms of this Act, or in terms of any other law are to be determined by the Labour Court.*

16. Provisions in the LRA dealing with probation are set out in section 186(2)(a) under the Unfair Labour Practice (“ULP”) provisions, and in item 8 of the Code of Good Practice: Dismissal. A dispute about the dismissal of an employee for reasons relating to probation must be referred to the CCMA (or a bargaining council) for conciliation, and if the dispute remains unresolved to the CCMA (or a bargaining council) for arbitration. The relevant sections in the LRA are sections 186 (2)(a), 191 (1); 191(4); 191 (5)(a)(iv); 191 (5)(A)(a) and (b).

⁴ The Applicant notified the court that the period for delivering an exception expired on 22 August 2023

On 10 October the Applicant served a notice of bar calling on the defendant to file its statement of response or exception within 5 days, They did not

On 12 October the Railway Safety Regulator gave notice of an irregular step on the basis that the notice of exception had not been determined.

The Applicant argued that the Respondent has become barred from filing the exception on 18 October 2023.

29 November 2023 the Applicant filed an application for default judgment.

⁵ Jurisdiction of the Labour Appeal Court

17. According to section 157(5) the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA or any employment law requires the dispute to be resolved through arbitration.

18. The employer argues that a dispute about probation gives rise to a cause of action founded in the LRA and not the BCEA. Probation disputes fall under the ULP provisions of the LRA. Similarly dismissal disputes following probation fall under the unfair dismissal provisions of the LRA. The dispute resolution process envisaged in the LRA is conciliation followed by arbitration at the CCMA (or a bargaining council). It is therefore the CCMA which in the ordinary course would have jurisdiction over the dispute between the parties. The Labour Court does not have jurisdiction as a court of first instance to deal with probation related disputes. This view is strengthened by section 157 (5) of the LRA. However the analysis does not end there.

19. I am cognizant of the fact that the employee has framed her claim as one of breach of contract, arguing that the probation clause and probation policy constituted part of the contract of employment, that the employer breached her contract, and that she is therefore entitled to pursue a damages claim against the employer in the Labour Court by virtue of section 77(3) read with 77A(e) of the BCEA. Whilst that position is arguable, so too is the employer's: the forum which has jurisdiction over the matter would in the ordinary course be the CCMA as the heart of the dispute concerns the termination of the employee's employment following an assessment of her performance whilst on probation.

20. It appears that the employee has sought to circumvent the selected procedures laid down in the Labour Relations Act in favour of direct access to the Labour Court by virtue of section 77(3) of the BCEA. She has avoided the prescription periods of 30 days for a referral of an unfair dismissal; or 90 days for an ULP dispute; and she has avoided the CCMA's conciliation and arbitration processes.

21. I have considered the recent Constitutional Court decision in *Baloyi v Public Protector and others*⁶ which deals with a dispute concerning the termination of an executive's five year fixed term contract of employment just three months after the end of her six month probation period. The Constitutional Court considered jurisdictional issues pertaining to the High Court and the Labour Court for alleged breaches of contracts of employment. The Constitutional Court found that both the High Court and Labour Court had jurisdiction over such claims.⁷ The court found too that more than one cause of action may flow from the termination of a contract of employment and a litigant could choose which cause of action to pursue. Paragraph 41 reads, "*The termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, and a claim for enforcement of a right that does not emanate from the LRA (for example a contractual claim)*".

22. Recently in the Labour Appeal Court in *PRASA v Ngoye*⁸, Waglay JP comments that "*While the CCMA has exclusive jurisdiction to enforce LRA rights this was not the case with other rights such as contractual rights.*"⁹ Waglay JP refers too to the Constitutional Court decision in *Steenkamp and Others v Edcon Limited*¹⁰ and comments, "...*Edcon suggested that employees are not precluded from pursuing claim emanating from dismissals in a manner other than that provided for in the LRA...where the law permits forum shopping; a litigant cannot be denied relief just because it is engaged in forum shopping.*" Later on Waglay JP writes, "...*if non-compliance with the LRA is not relied on, an employee may pursue a contractual claim if a contractual remedy is sought.*"¹¹

23. I concur with Waglay JPs analysis that
 "...*litigants are now easily able to jettison the LRA rights afforded to them in favour of having their dispute adjudicated as a contractual claim or one based on*

⁶ [2021] 4 BLLR 325 (CC)

⁷ Paragraph 31

⁸ JA 78 / 21

⁹ Paragraph 10

¹⁰ 2016 (3) BCLR 311 (CC)

¹¹ Paragraph 19

unlawfulness. This despite the fact that the dispute would never have arisen if it were not for the dismissal or the ULP.”¹²

24. As mentioned earlier the Respondent has excepted to the Applicant's particulars of claim. An exception is a legal objection intended to address a defect inherent in the other party's pleadings. Whilst it is arguable that the employee's claim of a breach of contract as a cause of action is simply a cloak for an LRA related probation dispute, she is entitled to proceed as she has claimed. The employer's exception therefore cannot be sustained.

25. I am uncomfortably but respectfully bound by the decision and reasoning of the Constitutional Court in *Baloyi*, and as such must find that Ms Tabane may approach the Labour Court to hear her breach of contract claim. Section 77(3) of the BCEA gives her that right as does recent jurisprudence on the matter.

26. In the circumstances I make the following order:

Order

27. The Respondent's exception is dismissed

28. The Respondent is to file its response within 10 court days of receipt of this judgment.

29. No order as to costs.

Norton AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv Skosana SC

¹² Paragraph 26

LB Nwamba Attorneys

For the Respondent:

Adv Mokhare SC

Moja Sibiya Attorneys

LABOUR COURT