

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 972/10

In the matter between:

FEZILE EDWARD MAKIWANE

Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

1ST Respondent

**THE SOUTH AFRICAN SOCIAL SECURITY
AGENCY**

2ND Respondent

JUDGMENT

LAGRANGE, J

1. The Applicant is seeking an order preventing the First Respondent ('the Minister') from appointing a permanent Chief Executive Officer of the Second Respondent ('the Agency'), pending the outcome of review proceedings setting aside his own suspension as CEO of the Agency by the Minister; his subsequent alleged constructive dismissal on 28 January 2010, and the institution of disciplinary proceedings against him by the Minister in terms of which the Minister expressly terminated his employment with the Agency.

2. The Applicant was employed on a three year contract by the former Minister of Social Development, Dr Z Skweyiya on 15 May 2005 as the CEO of the Agency. This was subsequently extended by a further two years, which would in the ordinary course of events have ended on 14 May 2010. In terms of the contract, clause 5(2) provided that

“5.1 The Employer shall in writing confer with the Employer at least two months prior to the expiry of the term contemplated in clause 1 (supra) whether she/he proposes to retain the Employee in service for any extended period not exceeding five years (60 calendar months), or not. If the Employee is so informed of such intention to retain him/her in service for an extended term, she/he shall in writing inform the Employer, within one calendar month from the date of that communication, of her/his acceptance or not of such extended employment.

5.2 In the event that agreement is reached that the Employee shall enter into a further Contract on termination or completion of her/his Contract, the continued service of the Employee will be recognized under the new Contract, so as to avoid any break of service and any accrued or *pro rata* entitlement will be carried forward into the new Contract.

5.3 Should the Employer not renew the Contract period beyond the initial period as stated in Clause 1 above, the Employee shall be entitled to the pension and other benefits linked to the specific section of the Act which is utilized.”

(emphasis added)

3. In terms of the above provisions, the Applicant was entitled to receive the communication about the Minister’s intentions on or about 15 March 2010.
4. Minister Skweyiya was replaced by the current Minister, Mrs B Molewa, in May 2009. On 13 July 2009 the Applicant was placed on ‘special leave’ following allegations made by the new Minister that he had committed

misconduct in relation to certain reconstruction and development funds. There is a dispute whether the Applicant was coerced to accept his placement on 'special leave', but the resolution of that dispute is a matter for the intended review proceedings.

5. Initially the period of 'special leave' was supposed to be four months, but when the Applicant indicated his intention to return to work in mid-November 2009, the Minister extended the period indefinitely pending the outcome of investigations being carried out by a Special Investigation Unit ('SIU').
6. In mid-December 2009, the Applicant was asked to respond to a so-called "Penultimate Report", which concerned property acquisitions. The report had been completed more than a year earlier and several months before the commencement of the Applicant's 'special leave'. The Applicant responded to the report in writing but received no feedback from the Minister to his response.
7. The Applicant says that by the end of January 2009 he was 'at his wits end' as he had been suspended for six and a half months, had responded to allegations against him and still was not being allowed to return to work, despite what he believed to be the absence of any good reason to prolong his 'special leave'. The Applicant then resigned on 28 January 2010, but claims he did so in circumstances where the employer had made his position intolerable.
8. The Minister failed to respond to him directly. Instead he was advised of a disciplinary enquiry to take place on 17 February 2010. From newspaper reports he gathered that the Minister had not accepted his resignation on the basis that his contract required him to serve three months notice. The Applicant adopted the view that since he had already been constructively dismissed, any subsequent disciplinary enquiry was pointless and he need not attend.

9. He was later advised on 8 April 2010, that he had been found guilty on all charges against him and the Minister had decided to implement the presiding officer's recommendation to dismiss him.
10. On 21 April 2010, the Applicant's attorneys wrote to the Minister demanding the withdrawal of his suspension; the reversal of the Minister's decision to dismiss him on 8 April 2010 and to reinstate him, and to give effect to her obligation to confer with him in terms of clause 5.1 of his employment contract. The Minister requested an extension of time to respond until 14 May 2010, and the Applicant agreed to this but on the condition that the Minister would not appoint a new CEO until she had resolved her position *vis-à-vis* the undertakings he sought from her. She was required to furnish her acceptance of the condition by 5 May 2010.
11. The Applicant brought the application on an urgent basis because he fears the failure of the Minister to give undertakings about not appointing another CEO means this might happen at any time and, if it did, his right to confer with the Minister on the possible extension of his contract would be rendered nugatory.
12. In the Respondent's answering papers, the Minister asserts that she has the right to appoint a new CEO at any time, though she also makes it clear that such a process 'must follow a transparent process' which entails advertisements, short-listing and interviews.
13. I have a difficulty with the Applicant's claim from the perspective of urgency. It seems to me on a proper construction of the provisions of clause 5 of the Applicant's contract of employment, that the Applicant's right to be advised of the Minister's intentions arose on or about 15 March 2010. He only sought to assert that right by way of an urgent interdict on 14 May 2010, after raising it in mid-April 2010. In my view the Applicant ought to have asserted his right of conferring at the appropriate time and brought matters to a head then.

14. Even if I am incorrect in finding that the matter should have been dealt with on an urgent basis much earlier, and if it might still be competent to consider his application on an urgent basis now based on a fear that a new CEO's appointment could be imminent, the fact that there is as yet no evidence that the recruitment process has commenced would make it difficult to consider the application on an urgent basis.
15. In view of my findings on urgency it is unnecessary for me to consider the merits of the substantive claims made about the alleged unlawfulness of the Minister's actions since July 2009

Order

16. In the circumstances,
 - a. The application is dismissed for lack of urgency, and
 - b. The Applicant must pay the Respondents' costs.



ROBERT LAGRANGE
JUDGE
LABOUR COURT

Date of Hearing: 21 May 2010

Date of Judgment: 24 May 2010

Appearances

For the Applicant:

T Bruinders, SC

Instructed by Webber Wentzel Bowens

For the Respondent:

D Ntsebetza, SC assisted by W R Mokhare

Instructed by Maseremule Inc.