

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: J 56/2011

In the matter between:

ROWENA CANDICE NAIDOO

Applicant

and

REACT SOLUTIONS (PTY) LTD

Respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

- [1] This is an urgent application in which the applicant (the employee), seeks an order that the respondent (the company) must pay her salary during her suspension pending a disciplinary enquiry.
- [2] Mr *Boda*, for the applicant, argued that the claim is one for specific performance of her employment contract, more particularly, an order compelling the company to pay her salary. Mr *Orr*, for the respondent, argued that the relief sought is in the nature of a *mandamus* and that she therefore has to satisfy the court that she meets the requirements for a final interdict. He also opposed the application on the grounds that it is not urgent; that this court has no jurisdiction to hear the dispute; and that the applicant has alternate remedies.

BACKGROUND FACTS

- [3] The employee is an office coordinator. She alleges that she was sexually harassed by the company's executive director, Jay Naicker, on two occasions in 2008. She wrote an e-mail to Naicker in January 2009 saying that his unwanted advances made her feel very uncomfortable. She requested him to restrict his contact with her to work related issues and added: "I trust that this e-mail does not provoke any discrimination or victimisation in the workplace as it is vital for us to establish the proper behaviour going forward."
- [4] The applicant further alleges that, in August 2009, Naicker felt jealous because she did not invite him to her birthday party and that he told her colleagues that this was a "career limiting move".
- [5] On 6 October 2010 the applicant was removed as a director of the company. She views this as a further example of victimisation. The company says that she was removed as a director because she had removed confidential information from the company without authorisation. I need not express a view on either of these allegations. The allegation of sexual harassment and victimisation is the subject of a CCMA arbitration set down for 3 February 2011. The allegation that she had removed confidential information is the subject of a disciplinary enquiry that is, at this stage, also scheduled for 3 February 2011.
- [6] On 9 November 2010 the applicant referred a sexual harassment dispute to the CCMA. That dispute is to be heard on 3 February 2011.
- [7] On 8 November 2010 the company issued a notice to the employee to attend a disciplinary hearing on 11 November 2010. She was suspended with pay pending the disciplinary hearing. Both parties instructed attorneys. They agreed to postpone the disciplinary enquiry and her attorneys recorded that the employee "will continue to be paid during the suspension which will remain in place pending discussions to be held between the parties and their legal representatives."

- [8] The settlement discussions were fruitless. The applicant was not paid her salary for the month of December by the due date, which was the 25th of each month, or by the first business day after 25 December 2010, which was 28 December 2010. She was eventually paid on 31 December 2010. There is a dispute whether this was after demand from the applicant's attorneys. What is not in dispute, is that her salary was not paid on the due date.
- [9] On 12 January 2011 the company informed the employee that a disciplinary enquiry would be held on 14 January 2011. Her attorneys asked for more time to prepare. The company's attorneys agreed.
- [10] On 14 January 2011 the company suspended the employee without pay. It did so because it formed the view that the employee "intended prolonging her period of paid suspension as long as possible". The company has now scheduled the disciplinary hearing for 3 February 2011. (It appears bloody-minded for the company to have scheduled the disciplinary hearing for the same day as the CCMA hearing; however, I am not seized with that dispute).
- [11] The applicant now seeks an order compelling the company to continue paying her salary whilst she is employed by it.

JURISDICTION

- [12] The applicant has coached the relief she seeks in the form of specific performance. She asserts her right to payment in terms of her contract of employment and the Basic Conditions of Employment Act.¹
- [13] Mr *Orr*, for the respondent, argued that the applicant essentially calls on the court to determine whether the conversion of her suspension from paid to unpaid is unfair. In so doing, he argues, the applicant expects the court to pronounce on an unfair labour practice. He argues that the Labour

¹ Act 75 Of 1997

Relations Act² confers exclusive jurisdiction on the CCMA to determine an unfair labour practice dispute.

[14] In terms of section 77 (3) of the BCEA:

"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

And in terms of section 77A(e) the Labour Court may make any appropriate order, including an order –

"making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation."

[15] I am satisfied that this court does have jurisdiction to consider the applicant's claim for specific performance. She locates her claim squarely within her contract of employment, which includes a clause dealing with the payment of remuneration and a general clause that the contract will be otherwise regulated by the BCEA. She specifically disavows any reliance on an unfair labour practice.

URGENCY

[16] Mr *Orr* pointed out that this court has held previously that financial loss does not create urgency.³ But that is not an immutable principle. Mr *Boda* has also referred to more recent authority that the court does have the power to deal with the non-payment of salary on an urgent basis.⁴ This is so especially in the event where it is the employer that prevents the employee from working. Also, as he has pointed out, there are exceptional features to this case. The applicant has made allegations of sexual harassment and victimisation. These allegations are to be considered by the CCMA on 3 February 2011. She considers the suspension without pay to be a perpetuation of this victimisation. Both parties have elected to engage the services of attorneys to assist them in the pending disciplinary

² Act 66 of 1995

³ *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC).

⁴ *HOSPERSA and another v MEC for Health, Gauteng Provincial Government* [2008] 9 BLLR 861 (LC).

enquiry. Her ability to continue instructing attorneys without being paid her salary will be severely hampered.

- [17] Given these exceptional circumstances, I consider it to be in the interests of justice to deal with the matter on an urgent basis.

CLEAR RIGHT

- [18] The applicant asserts that the company is acting unlawfully by failing to pay her salary. The non-payment is in breach of her contract of employment and in breach of the agreement concluded on 11 November 2010 between the parties' attorneys.

- [19] The applicant continues to tender their services pending her disciplinary hearing. It is the company that elected to suspend her. It complains that she is prolonging her period of suspension. But the company, through its attorneys, agreed to postpone the hearing set down for 14 January 2011. Having considered the request for a postponement to be unreasonable, it could have continued with the hearing and dealt with the objection there or at a later stage. Instead, it stopped paying its employee.

- [20] Under the common law, unilateral suspension does not relieve the employer of the duty to pay the employee. Neither does her contract of employment make provision for such a step. She continues to tender her services and is therefore entitled to her salary.⁵

- [21] I am therefore satisfied that the claim for specific performance should be granted.

- [22] Given my conclusion on this aspect, I need not deal with the requirements for an interdict, including the question whether the applicant would have an adequate alternative remedy by referring an unfair labour practice dispute to the CCMA.

⁵ Insofar as any authority is required for these principles, see, for example: *Hospersa (supra)* para [17]; *Myers v SA Railways & Harbours* 1924 AD 90C; *Mogothle v Premier of the Northwest Province* [2009] 30 ILJ 605 (LC), [2009] 4 BLLR 331 (LC).

COSTS

[23] The applicant seeks costs on an attorney and client scale. In my view, a punitive cost order is not warranted. However, there is no reason in law and fairness why costs should not follow the result.

ORDER

[24] I grant the following order:

- 24.1 The forms and manner of service provided for in the rules are dispensed with and the matter is disposed of as urgent.
- 24.2 The respondent is ordered to pay the applicant's salary during her suspension and her further continued employment.
- 24.3 The respondent is ordered to pay the applicant's costs.

ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

Date of hearing: 21 January 2011

Date of judgment: 24 January 2011

For the applicants: Adv FA Boda

Instructed by Saders attorneys

For the respondent: Adv C Orr

Instructed by Tilney Inc.