IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO J783/10

Not reportable
Not of interest to other judges

In the matter between:

JACQUELINE KEET Applicant

and

JANSENS INCORPORATED Respondent

JUDGMENT

TIP AJ:

1. The applicant was employed as a candidate attorney by the respondent from 23 June 2008 until her resignation on 1 February 2010. She then joined Hennie Badenhorst, her attorney of record in this matter, who also appeared on her behalf in this matter. She claims that she is owed leave pay for 4.65 days, notice pay for four weeks and the return of R500.00 deducted from her salary payment for January 2010. Her total claim is for R5,623.55. The respondent resists this and has certain counterclaims. Various preliminary and interlocutory points have been raised as well as disputes about deadlines. All in all, these differences have generated an unjustifiable 407 pages of affidavits and annexures, with a supplementary bundle of 39 pages. I have little hesitation in describing the whole of this

litigation as an abuse of the process of this court. My adjudication of the issues follows.

2. The first point to be addressed concerns the jurisdiction of this court to entertain monetary claims which involve non-compliance with provisions of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"). I delivered a judgment on 12 November 2010 in the matter of *Makume v Hakinen Transport CC* and related matters (Case No. J33/10; Labour Court), in which I held that monetary claims could be brought before this court, subject to an appropriate order as to costs being made. In the present case, it is clear that the applicant's claim could have been referred to the Department of Labour or brought in the Small Claims Court, where no costs order would have ensued.

3. The second issue concerns the first point *in limine* raised by the respondent, being that the matter should have been referred to arbitration in terms of its employment contract with the applicant, clause 21.1 of which states that any dispute "*which arises out of the conclusion, interpretation, application, administration, breach or termination of this agreement ... shall, unless settled by conciliation or otherwise, be determined exclusively arbitration under the auspices of Ubuntu Dispute Settlement (Pty) Ltd ...*" In turn, the applicant seeks to avoid this clause by pointing out the co-directors of Jansens are the shareholders of Ubuntu and avers that it is therefore not independent. There may be some merit in that contention, although it must at the same time be noted that it does not follow from her apprehensions concerning Ubuntu that the arbitrator would not be impartial. Be that as it may, I do not consider myself bound to deal with the issue on that basis, since it seems to me that an arbitration clause of this kind must give way when the heart of the complaint is that the statutory requirements of the BCEA were not complied with. In the absence of a collective agreement to that effect, an employer could not prevent an employee from exercising his or her statutory right to lodge a complaint with a labour inspector by invoking compulsory arbitration. By the same token, I do not accept that it should

in the same way be able to stifle an election to proceed under section 77(3) of the Act. In any event, the respondent has mounted a set of counterclaims in this court (whether precautionary or not) and, having regard to the circumstances of this matter, it would certainly serve no party's interests for it to be referred to arbitration at this stage. The first point *in limine* is accordingly dismissed.

4. The second point *in limine* consists of a non-specific complaint that the founding affidavit lacks the necessary averments to sustain a cause of action under section 77(3). I am not satisfied that this adequately establishes a need for preliminary determination. Whether or not the applicant is entitled to relief will flow from an examination of the merits, set out below.

5. The third point *in limine* is that there is a factual dispute. I am likewise not of the view that this is a sufficient complaint in the context of this case. I will deal with factual issues below.

6. The counterclaims are as follows. The first is that the applicant has taken an excess of 29.02 days leave and that she has accordingly been unjustifiably enriched in an amount of R6,031.81. The second is that she carried out certain instructions in a negligent way and that the respondent has as a result suffered damages in the sum of R10,409.72. The third counterclaim concerned personal telephone calls made by the applicant from the respondent's office; it has been abandoned.

The leave issue

7. The applicant has set out a month-by-month analysis of the days (or part thereof) worked by her, spanning the full period of her employment. She has also put up the attendance registers over that period. On this basis she has calculated that 4.65 days are still due to her, for which she should now be remunerated in terms of section 40(b) of the BCEA. Those documents show that there were days when she was not at work

because her son was ill or because she was attending courses or examinations pursuant to her articles. Such days were not treated by her as leave taken since, she alleges in reply, her employer granted time off on such occasions. An example of this is to be found in the schedule for September 2008, which records five days off because her son was ill and then hospitalised. Those days were not taken into account for the purpose of the applicant's computation of her leave entitlement.

8. In its answering affidavit, the respondent has detailed every instance when the applicant was not at work, including every time that her son was ill, every time that she was doing a study course, every time that she took study leave and every time that she wrote an attorney's admission exam. On that basis, it arrives at the total of 29.02 days which it now seeks to claim for as constituting unjustified enrichment. In reply, the applicant has stated that all days in respect of her son being ill were given as a courtesy and that such days were not even dealt with under the family responsibility leave provisions. Similarly, she has stated that leave taken for study purposes was in keeping with the general practice of the respondent *vis-à-vis* all its learner employees and, further, were in accordance with the industry standard. The applicant says also that she was at no time requested to apply for leave in relation to such obligations, that there was no deduction from her normal annual leave cycle and that no suggestion of a dispute about any of such days was ever made to her before the institution of this counterclaim by the respondent.

9. It may well be that the applicant should be criticised for not more fully detailing these matters in her founding affidavit although, it may be noted, all the pertinent information was readily apparent from the annexures to it. At the same time, it is also so that the respondent was at liberty to seek leave to rebut her replying contentions through an additional affidavit. That was not done. Moreover, its catalogue of all the time taken off by the respondent embodies no indication whatsoever that she was at any time informed that such time would be subtracted from her ordinary leave entitlement or, indeed, that she had already taken more leave than her

gross leave quotient – and that she would be required to recompense her employer for the days now claimed by it.

10. The applicant pertinently poses the question why such complaints have been ventilated by the respondent only at the stage of its answering affidavit and counterclaim and not at the stage of the leave itself. On a balance of considerations, that appears to be a fair question, to which no satisfactory answer is to be found in the papers. In my view, the corollary is that I should find for the applicant in respect of her claim and, correspondingly, that I should dismiss the first counterclaim.

The notice pay claim

11. On 1 February 2010 the applicant submitted a letter of resignation which stated that the notice period would run to 3 March 2010. On the same day the respondent replied that the contract of articles concluded on 23 June 2008 had recently lapsed, seemingly in consequence of the applicant's pending admission as an attorney, and that negotiations had been under way with her regarding future service conditions as a professional assistant. On that basis it was said that notice of only one week was required, that the respondent did not require her to work that period and that she was to vacate her office immediately. The applicant did so.

12. The respondent hence contends that there was an offer by it that the applicant should waive the four-week notice period on the basis that she would be paid for only one week. That offer, it is further contended, was accepted by the applicant as demonstrated by the fact that she did not object to the terms of the respondent's letter and instead vacated her office pursuant to it. As outlined above, the respondent also contends that there was no contract of employment in place, given that the articles had lapsed and that no new contract had been concluded.

13. These contentions face various difficulties. In the first place, clause 22.1 of the employment contract, described as the Agreement for Service of Articles by Candidate Attorney provides that: "*No agreement varying, adding to, deleting from or cancelling this agreement shall be effective unless reduced to writing and signed by or on behalf of the Candidate Attorney and Principal-Employer.*" It is clear that no such written and signed agreement varying the notice pay provisions was entered into. The letter from the respondent of 1 February 2010 does not meet the requirements of this non-variation clause nor, plainly, can those requirements be held to have been satisfied where one party relies on the conduct of the other. These considerations must be weighed against the fact that clause 6.1 of the agreement expressly records that four weeks' notice will apply once the first twelve month period has been completed, such being the factual position.

14. Apart from these formal features of what should have taken place in order to properly found the respondent's position, it is far from apparent to me that I should find that the facts adequately establish that there was a binding waiver by the applicant in the sense that it should be found that when she obeyed her employer's instruction to vacate her office she at the same time clearly intended to waive her entitlement to claim notice of four weeks. Patently, her employer was keen to have her out of its office without delay. It does not follow from this that it could insist that this should be done on the basis that there should be an accompanying discount of its notice period liability from four weeks to one. Its position is not fortified by the terms of sections 37 and 38 of the BCEA. In this regard, it is significant that the respondent did not state in its letter of 1 February 2010 that a portion of the four weeks' notice that was due should be waived or that the employee should agree that her employer was not required to pay out that full period (as contemplated in section 38(2). Rather, it declared that the four weeks' notice period was not applicable and that it had been overtaken by a period of only one week, as envisaged in section 37(1)(a).

15. This latter aspect also presents a hurdle in the path of the respondent's contentions. Its statement that the contract of articles had lapsed is vague. No specific termination date has been given by it and none that corresponds with the respondent's letter of 1 February 2010 is to be found in the agreement itself. To the contrary, clause 4.1.1 thereof sets out a period of five continuous years, running from 23 June 2008 (as defined in clause 2.1). In any event, if the agreement had indeed come to an end shortly before 1 February 2010, then that would have required a definite act of termination, with the contractual (and statutory) notice pay provisions then coming into operation. Moreover, in terms of clause 22.2 a written and mutually signed agreement of cancellation would have been necessary.

16. However, even if the contract of articles had come to an end as alleged by the respondent, it is apparent from its letter of 1 February 2010 that no agreement had been concluded in terms of which the applicant was to take up a position as professional assistant. On the face of it, therefore, it is implicit in the case for the respondent that there was no employment contract in place at all as at 1 February 2010. In those circumstances, it is difficult to comprehend the basis for its statement that only one weeks' notice was due pursuant to section 37(1)(a) of the BCEA which is, of course, a provision which rests on the premise that a valid contract of employment had been in existence, but only for a period of six months or less.

17. Accordingly, it is my conclusion that the respondent has not shown that there was a lawful basis for it to reduce the applicable notice period from four weeks to one week. The applicant's claim in this regard must therefore be upheld.

The deduction of R500

18. An amount of R500 was deducted from the applicant's salary payment for January 2010. The reason for this step is contained in a letter signed by

Mr Jansen which is to the effect that the applicant had failed properly to carry out an instruction to attend to the preparation of certain documentation required for the taxation of a client's account. It is apparent from the terms of the letter that no disciplinary or other *audi alteram* process was carried out and that the letter at one and the same time set out the particulars of the complained of conduct, a conclusion that the applicant was guilty of negligence, followed by the imposition of a fine of R500 and a warning that any future misconduct would not be treated as leniently. The case for the respondent is further that the applicant had not as at 1 February 2010 raised any complaint about this measure against her and that she must therefore be treated as having accepted her employer's allegation of misconduct and the resultant fine.

19. The validity of a fine and deduction of this nature must be determined with reference to section 34 of the BCEA, which reads in part:

> "*(1) An employer may not make any deduction from an employee's remuneration unless—*
>
> *(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or*
>
> *(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.*
>
> *(2) A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if—*
>
> *(a) the loss or damage occurred in the course of employment and was due to the fault of the employee;*
>
> *(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;*
>
> *(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and*
>
> *(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.*"

20. Various of these provisions are applicable and, when related to the facts before me, the following are immediately apparent: (i) the R500 fine was not required or permitted in terms of a law, collective agreement, court

order or arbitration award; (ii) there is no suggestion that there is a disciplinary code which provides for a fine; (iii) although there was a meeting at which Mr Jansen discussed the introduction of a fine with candidate attorneys, it is clear that this did not meet the requirements of the Act; (iv) the applicant has not agreed in writing to the deduction and, equally, the deduction has not been specified in any agreement as a debt falling within the category of permissible deductibles; (v) the fine cannot be held to amount to a loss or damage sustained by the employer; and (vi) the requirement of a fair procedure has not been met.

21. It follows that the deduction was not lawfully made and that the applicant is entitled to payment of the withheld R500.

The counterclaims

22. I have already disposed of the counterclaim relating to the issue of leave days taken by the applicant. The remaining claim concerns an allegation that she caused a loss to the respondent of R10 409.72 arising from her management of an instruction from a client, Mr Pretorius, relating to his suspension by his employer. The applicant was to have appeared for him at a CCMA hearing on 8 September 2009 but failed to do so timeously, resulting in the referral being dismissed. It is further averred that she was instructed to prepare a rescission application but failed to do so. In consequence, the respondent alleges, Mr Pretorius cannot be held liable for the relevant professional fees and disbursements which amount to the sum claimed, plus interest. Rather, it is claimed, the applicant must be held accountable to the respondent for those charges.

23. Ordinarily, this court would not entertain a claim of this kind, which has as its essence the ground that the applicant performed her duties as an employee in a negligent manner. Whether the claim is formulated as a breach of the standard of care that is contractually required or whether it is formulated as one based in delict, this court lacks the jurisdiction to deal with it, just as it would not hear a claim against an employee for

causing damage to his employer's equipment of for causing financial loss through a poor business decision.

24. Mr Goldberg, for the respondent, relied on the principle of *compensatio* to overcome this difficulty. For the purpose of this judgment I will accept in his favour that the amount claimed is a fully liquidated one and, apart from the question of the applicant's liability for it, that it is otherwise ripe for set-off. I will further approach this aspect of the matter on the basis that it would be both permissible and convenient for me to assume jurisdiction in respect of this counterclaim, pursuant to the *causae continentia* rule, in order to fully adjudicate the disputes between the parties.

25. The respondent lodged this counterclaim as a 'precautionary' step so that it should be dealt with if I held that this court had jurisdiction over the applicant's claims despite the arbitration provision. Having done so, the usual criteria must be applied concerning proceedings that have been brought on affidavit. In particular, the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) is applicable, namely that the admitted facts in the founding affidavit together with those deposed to in the answering affidavit (unless they are plainly not credible) should form the basis for a determination of whether or not the relief sought should be sustained.

26. Thus examined, the papers show that the applicant had enquired from a co-employee about the CCMA address in Rustenburg. She went there but the address was incorrect whereupon she phoned her office, obtained the correct address and requested that the CCMA office be advised that she would be a little late. She was then told that this had been done and that the commissioner would be informed. However, when she arrived at the arbitration venue, the referral had already been dismissed. The respondent is critical of this explanation and points out that the correct address was on the notice of set-down which the applicant had in the file. That is a fair criticism but it is not enough to justify a finding that the

applicant has advanced a false version. Indeed, on any account, it is clear that she went to the CCMA office in Rustenburg but arrived there late.

27. There is a difference between the parties on the events upon the applicant's return from Rustenburg. According to the respondent, the applicant reported the dismissal of the referral to Mr Schöltz, a director of the respondent, who instructed her to prepare a rescission application. It is further said that this instruction was repeated on 18 September 2009, this time by her principal Mr Jansen. The applicant, on the other hand, states that she reported directly to Mr Jansen on 8 September 2009 and advised him at the same time that Mr Pretorius had not given proper instructions, since he had in fact been dismissed and not merely suspended. Mr Jansen, she says, then told her to hand the file to Ms Schöltz, another candidate attorney, in order to obtain the relevant documentation from the employer so that the true facts could be established before proceeding with a rescission application.

28. In its replying affidavit, the respondent has enlarged its version of the events. This includes the statement that Mr Schöltz had during the week after 8 September 2009 regularly followed up the instruction that the applicant was to prepare a rescission application and was on each occasion told that it was being attended to. It is also said that the fact that Mr Pretorius had been dismissed came to the attention of Ms Schöltz on or about 28 September 2009 when she was perusing papers in a different dispute. It was thereafter that Mr Jansen enquired from the applicant what the status was of the rescission application. Mr Jansen thereupon said that enquiries should be made as to whether Mr Pretorius had been dismissed and that Ms Schöltz could assist if necessary with an appropriate letter. Mr Jansen repeats that on 18 September 2009 he gave an instruction to bring an application for rescission as a matter of urgency. He adds that he was then unaware that Mr Schöltz had already done so. That might be thought to be somewhat curious, since it was Mr Schöltz who had instructed the applicant to attend to the matter in the first

place. I also find it strange that there was no further or meaningful follow up concerning the rescission application. In terms of the CCMA rules it should have been brought by 22 September 2009. Plainly, it had not been, nor was it ever lodged.

29. In these circumstances, I do not intend to make specific and detailed findings about what took place during the period following upon 8 September 2009. Albeit in relation to different dates, it is common to the versions of both parties that Mr Pretorius had evidently not given full instructions to the respondent and that the important information that he had been dismissed was not communicated. It is also common to both versions that no rescission application was brought and, on the probabilities, that this was related to the lack of dependable information about the status and true character of Mr Pretorius's dispute. On the applicant's version this was the position as from 8 September 2009; on the respondent's version this became apparent only later in that month. Either way, I am not satisfied that these facts can support a conclusion of negligence on the applicant's part in the context of a claim for damages.

30. More particularly, I am not satisfied that the element of wrongfulness should be found by me to have been established by the respondent. In general, I know of no policy perspective that favours monetary actions by employers against employees whose work performance is considered to have been below the requisite standard or, even, negligent. That would ordinarily be the province of performance counselling or, if warranted, disciplinary action. The undesirable nature of claims of this kind is underlined by the circumstances of this case. An important consideration is that the applicant was at the time a candidate attorney, with the corollary that her work had to be closely supervised by her principal. In that context, I find it extraordinary that after an initial flurry of instructions about a rescission application, neither Mr Jansen nor Mr Schöltz did anything purposeful to ensure that such application had indeed been prepared and, moreover, that it had been assembled in a satisfactory form. Both those directors were well aware of the pertinent deadline,

reference to which has been made in the respondent's affidavits. It lay within their power to take such steps as were necessary to see to it that the application was indeed instituted. Instead, it is clear that neither of them did anything further about it, at any time.

31. In this regard, it is noteworthy that the statement of fees and disbursements which founds the claim against the applicant contains no entry at all between 8 September 2009 and 7 May 2010. On the latter date there was a consultation with Mr Pretorius – this being several months after the departure of the applicant. This is a perspective that bears on the issue of wrongfulness. It also, it may be noted, bears on the issue of causation. As I have noted, it fell within the range of duty and competence of the directors to see to it that a rescission application was indeed filed timeously or, if delayed, that there was an appropriate application for condonation. It can hardly be acceptable that they should have done nothing adequate to bring about that outcome but that they should nevertheless be permitted to institute a damages claim many months later against a candidate attorney for whose performance they were both ultimately and contemporaneously responsible. This aspect of the matter is all the more striking in that no action whatsoever was taken against the applicant at the time. Instead, it is in my view clear that the counterclaim has been formulated as an afterthought in an attempt to secure a set-off. It is an attempt that is both unfortunate and unsound.

32. In the result, this counterclaim is dismissed.

Incidental applications and costs

33. The respondent's answering affidavit to the main application was served on 12 May 2010, being two days late. It had delivered a notice of intention to oppose on 4 May 2010. On 12 May the applicant faxed a letter to the respondent pointing out that there was no condonation application. It also stated that the application had already been indexed, paginated and placed on the unopposed roll for hearing, this having been

done on 11 May 2010. Consistently with the regrettable manner in which this litigation has been conducted, that step had evidently been taken without any prior communication with the respondent. The letter went on to require that the respondent was either to tender the wasted costs or to bring a formal condonation application. The latter was done on 20 May 2010. A notice of intention to oppose the condonation was served on the same day, although no opposing papers were filed. Nevertheless, this condonation issue on its own generated a further 65 pages of affidavits and annexures, which a bare minimum of professional collegiality could largely have avoided.

34. It was then the applicant's turn to be out of time. She should have filed her answering affidavit to the counterclaim by 26 May 2010. She hadn't. On the following day the respondent delivered an application in terms of rule 12 for an order directing her to do so and in the event of her failing to comply with such order that she would be barred from doing so. Communication between the parties ensued. This resulted in an agreement that the parties would mutually condone the late filing of each set of answering affidavits, that the rule 12 application would be withdrawn and that the applicant would pay the taxed costs thereof. This was duly done. In the meantime, the applicant filed on 4 June 2010. Of course, it needs to be said that the question of condonation lies with this court and not with the parties. A party may elect not to oppose a condonation application, but it cannot 'grant' condonation. In the result, there appears to be no application for the condonation of the late filing of the applicant's answering affidavit to the counterclaim. It would, however, be pedantic in the circumstances of this case for me to make anything of it at this stage. In neither instance was there a delay of real consequence and the relevant circumstances have been described. Condonation is hence granted in respect of the late delivery of both sets of answering affidavits. There is no reason for me to disturb the agreement struck between the parties in respect of costs. Even if there had been no such agreement, I would not have made an order of costs in respect of the respondent's condonation application.

35. On 15 June 2010 the respondent filed a notice of motion seeking the striking out of numerous paragraphs of the applicant's replying and answering affidavit filed on 4 June. The striking out was not pursued in argument and no order is made in respect of it.

36. The applicant's heads of argument were due on 24 August 2010. On that day a letter was faxed to the respondent advising it that there had been power failure interruptions but that they would be served by close of business on the following day. There was no reaction to this letter. The heads were faxed to the respondent on 25 August 2010 between 16h44 and 16h46. In another demonstration of a failure of collegiality, a rule 12 application was faxed by the respondent between 17h00 and 17h01. On the following day this application was withdrawn, it having been agreed that the costs thereof would be costs in the cause.

37. Overall, the conclusion of this matter is that the applicant has succeeded with her claims and the respondent has failed with its counterclaims. It is also so that this is not a case where costs are to follow the result. As set out earlier in this judgment, each of the applicant's claims as well as their aggregate total fall below the jurisdictional ceiling of the Small Claims Court. In the course of his argument, Mr Badenhorst indicated that the applicant did not seek costs, only disbursements. I am disinclined to entertain a differential of that kind. Section 37 of the Small Claims Courts Act places clear limitations on the categories of costs that might there be awarded. In this case, the only one that could be brought to bear would encompass the prescribed cost for the issue of the initial application. I am not prepared in this court to make an order for that sum, but prefer to follow the more general approach adopted by Van Niekerk J in *Fourie v Stanford Driving School and 34 related cases* (Labour Court case number J2218/08, 23 September 2010). As to the costs incurred by the respondent, there is no warrant for any order in its favour. At the same time, there is no reason to disallow interest on the sum awarded.

Order

38. I make the following order:

1 The respondent is directed to pay the applicant the amount of R5,623.55.

2 The respondent is directed to pay interest on the said amount, calculated at the rate of 15,5% per annum from 1 February 2010 to the date of payment.

3 There is no order as to costs.

K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	1 OCTOBER 2010
DATE OF JUDGMENT:	1 FEBRUARY 2011
FOR APPLICANT:	MR BADENHORST Of Hennie Badenhorst Attorney
FOR RESPONDENT:	MR GOLDBERG Of Jansens Incorporated