



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA

PORT ELIZABETH

JUDGMENT

Case no: P01/12

In the matter between:

R ABDULLAH

Applicant

and

KOUGA MUNICIPALITY

First Respondent

SIDNEY FADI

Second Respondent

Heard: 30 January 2012

Delivered: 02 February 2012

Summary: Contempt application dismissed – dismissal following upliftment of suspension – fixed term contract – unlawful termination – specific performance declined

JUDGMENT

LAGRANGE, J

Introduction

- 1] This is an urgent application anticipating the return day of an interim order issued by my colleague Lallie J, on 12 January 2012, seeking confirmation of the rule. The applicant also applies for an order declaring the respondents in contempt of the interim order, with a prayer for ancillary relief should a finding of contempt be made, which the interim order anticipated as a possibility. In addition, the applicant seeks to set aside the alleged unlawful termination of his services on 16 January 2012.

Background

- 2] When the interim order was handed down the applicant was still employed as the chief financial officer of Kouga Municipality, the first respondent. However, by that time he had been suspended for approximately 10 months and he approached the court for an order uplifting his suspension. Judge Lallie issued the following order on an interim basis and set down for final determination on the return day being 2 February 2012:

"2.1. declaring the Applicant's continued suspension unlawful for want of compliance with the law in general and Local Government Disciplinary Regulations for Senior Managers, 2010 in particular;

2.2. directing that the suspension be uplifted on the ground that the Respondents are prohibited in the circumstances from suspending the applicant for longer than three months;

2.3. directing the Respondents to permit the Applicant to resume work with immediate effect and to allow him to exercise his contractual duties without hindrance, unless there is some lawful reason for doing otherwise;

2.4. restraining the Respondents from suspending the Applicant again for any reason related to the purported reasons for which he has been suspended;

2.5. granting the Applicant leave to approach the above Honourable Court on the same papers, as supplemented to the extent necessary, for an order convicting the Respondents of contempt of court should they fail to comply with orders contemplated in 2.3 and 2.4 above..."

- 3] Neither party mentions whether or not the applicant did return to work consequent to obtaining this relief. In any event, on 16 January 2012, two working days after the interim order was issued, the municipality gave the applicant a letter, the material portion of which reads:

"Termination of Fixed Term Contract

Kouga municipality has decided to terminate your fixed term contract that expires on 30 June 2012 and to pay the remainder of this contract, together with all leave due to you.

Kouga municipality withdraws all allegations of misconduct and uplifts your suspension with immediate effect. The records of Kouga municipality shall be purged of all allegations of misconduct (and poor work performance or incapacity if applicable).

The motivation for this decision is the fact that Kouga municipality Council has lost all trust in the past senior management of Kouga municipality, as it managed the municipality from receiving a clear audit report to the brink of insolvency.

Given your position of CFO, council cannot continue with this relationship.

Should you believe that there are any other monies due to you, you are invited to bring it to our attention and we shall consider the same.

The termination shall be with immediate effect and you are not required to report for duty..."

The applicant's claim of unlawful termination

- 4] The applicant alleges that his dismissal was in breach of his contract of employment and he is entitled to have the termination nullified and resume his duties. He claims that the contract must endure unless there is lawful cause for its earlier termination and that by expunging all references in the councils records to the applicant's misconduct or poor work performance the respondents implicitly acknowledge there is no lawful cause for terminating his employment. Because the termination itself amounts to a repudiation of his contract because it is in breach of the employers

fundamental obligation not to terminate the contract without lawful cause, the applicant in effect claims that he is entitled to insist on specific performance of his contract in the form of a revocation of the unlawful dismissal. The applicant also claims that the failure to follow a proper procedure before terminating his services is also in breach of his contract.

- 5] The municipality retorts that in tendering to pay the applicant the balance of his remuneration for the unexpired portion of his contract it was not acting in breach of the contract that was fulfilling all its obligations as an employer towards him. It contended that the applicant had no contractual right to perform his duties in the sense of a so-called "right to work". The employer explains that on the applicant's return to work it faced the prospect of pursuing costly and time-consuming disciplinary procedures, while potentially exposing itself to another potential bout of financial mismanagement of the kind it had experienced prior to the applicant's suspension. It decided that it would make more practical sense to relieve the applicant of his duties and pay him out the balance of his contract without making any finding of culpability or incompetence on his part and without alleging the same.
- 6] In explaining the reasons for its decision the respondent municipality relies on a simple statement that it had lost any confidence in the previous management team members, one of whom was the applicant, given the deterioration of the municipal finances during their tenure. In undertaking to wipe out the record of any misconduct or poor performance on the part of the applicant, the respondent was effectively eschewing any reliance on misconduct or poor performance as reasons for his dismissal and sought to rely on a loss of confidence *per se* as the reason for terminating the contract. The respondent sought in argument to persuade the court that the mere existence of such a lack of confidence, detached from any claim that the applicant's conduct or performance was the cause thereof, constituted sufficient grounds for the lawful termination of the contract.

7] The relevant passages of the applicants contract of employment read:

"11. Termination

11.1 this agreement will terminate –

11.1.1 automatically on expiry of the term referred to in 3.2, subject to any extension or renewal in terms of 3.3.

11.1.2 and the director finances instance, if the director finance gives the municipality ones month's notice of termination in writing.

11.1.3 at the municipality's instance, if the municipality terminates the director finances employment for reasons relating to the director finances conduct, capacity, performance, or the operational requirements of the municipality or for any other reason recognised by law as sufficient, on one calendar month's notice of termination in writing.

11.2 the municipality will be entitled to summarily terminate the director finances employment contract for any sufficient reason recognised by law which, in the alia, may include the following:..."

(emphasis added)

The remainder of paragraph 11.2 lists an assortment of different types of misconduct. Further, clause 13.1 of the contract reads:

"13.1 This agreement, together with the disciplinary, grievance and retrenchment procedures, as adopted by the municipality from time to time, shall at all times be subject to the provisions of the Structures Act, Systems Act, the Labour Relations Act, as amended and the Basic Conditions of Employment Act, as amended, their successors and any other laws may be applicable from time to time."

8] The applicant does not specifically allege that the municipality had

adopted the disciplinary regulations contained in the Local Government: Disciplinary Regulations for Senior Managers, 2010, but claims that those regulations do apply to him. He specifically refers to provisions in those regulations stipulating the procedures to be followed in the case of misconduct and poor performance. In its answering affidavit the respondent specifically disputed the incorporation of this code into the applicant's contract of employment and the applicant does not take this matter further in his reply. It may well be that the regulations are applicable to him, but he did not plead that his termination was unlawful in the sense that the respondent acted *ultra vires* the regulations in dismissing him without following any of the procedures.

- 9] The municipality terminated the applicant services summarily. It studiously avoided any reliance on allegations of misconduct, but plumped for a "loss of trust" as justification for the termination. It is of course trite law that a relationship of trust is fundamental to the employment relationship. But if the trust relationship has broken down, without assigning the blame for that breakdown to the employee, is an employer entitled to terminate the employment relationship summarily?
- 10] Counsel for the respondent placed much reliance on the case of ***Masetlha v President of the Republic of South Africa and another* 2008 (1) SA 566 (CC)**, which dealt with the suspension and subsequent termination of the employment of the head and director-general of the National Intelligence Agency. The dismissal arose from the President's unilateral amendment of the appellant's term of office so that it expired nearly two years earlier than it should have. The premature termination of the appellant's employment was also accompanied by an offer to place the applicant in the same financial position he would have been in had his contract of service run its full course.¹ On the facts of that matter, the Constitutional Court held that the ordinary principles of contract would apply to termination. Therefore, the majority of the court reasoned, the employment relationship "... may not be terminated as a matter of contract before the expiry of the period unless there is material breach of the

¹ At 585, [50]

contract by the employee."² (emphasis added). It must also be mentioned that the court also held in *Masetlha* that the dispute was "...not merely about a breach or wrongful termination of an employment contract. It is rather about whether public authority has been exercised in a constitutionally valid manner."

- 11] The Constitutional Court dealt with the review application in *Masetlha* as a review of executive action. In that context Moseneke DCJ, for the majority of the court, said :

"[82] Reverting to the present case, I agree with the High Court that ordinarily a dismissal of a head of an intelligence service on the basis of irretrievable loss of trust on the part of his principal, in this case the President, would not be arbitrary or irrational. Of course, the facts in a particular case may demonstrate irrationality, arbitrariness or bad faith on the part of the person who makes the dismissal decision. In this case, nothing suggests that the President acted arbitrarily or without sufficient reason.

....

[88] Although it is clear that there has been a breakdown in trust, that alone is not a sufficient ground to justify a unilateral termination of a contract of employment. It must however be said that the irretrievable breach of trust will be relevant for purposes of remedy. The ordinary remedies for breach of contract are either reinstatement or full payment of benefits for the remaining period of the contract. 46 In my view, even if the contract of employment were terminated unlawfully, Mr Masetlha would not be entitled to reinstatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded here because of the special relationship of trust that should exist between the head of the Agency and the President.

...

[91] As we have observed earlier, when a fixed-term contract of

employment is terminated the applicant may claim reinstatement or full payment of benefits for the remaining period of the contract. It is however plain that, in the context of this case, the reinstatement of Mr Masetlha would be inappropriate. To the extent that the mainstay of his claim is to be reinstated as director-general of the Agency, his claim must fail. From that must follow that Mr Masetlha's residual or alternative remedy is full payment of salary, allowances and benefits of his post for the remaining period of his contract.”³

(emphasis added and footnotes omitted)

- 12] Thus, although the President’s dismissal of Masetlha was not reviewable as executive action, it did not detract from the fact that from a contractual perspective the mere existence of a breakdown of trust, which I accept *in casu* was common cause, was not sufficient to warrant the unilateral termination of the contract. However, what the decision in *Masetlha* also highlights is that where such a breakdown exists, the discretionary remedy of specific performance in the form of reinstatement is unlikely to be granted, and the employee’s remedy will be confined to payment of the balance of his contractual remuneration.⁴ I am satisfied that a right to work has not been established as a feature of the applicant’s employment relationship with the respondent, so this is not a consideration in determining an appropriate remedy in this case.

Contempt of the interim order

- 13] The applicant argues that his dismissal was merely a ruse to avoid the interim order uplifting his suspension and that the purported termination of

3 At 595-7

4 See also the unreported decision of Revelas J in ***F P Dennis v Kouga Municipality (Eastern Cape High Court, case no 644/2011 dated 30/09/11)*** in which the court reviewed the contractual remedies available to an employee and reaffirmed an employee’s entitlement to claim specific performance for a breach of contract in the form of reinstatement for an unlawful dismissal.

his contract was nothing more than a continuation of his unlawful suspension in another guise, both actions having the same consequence namely to deprive the applicant of his "right to render service in terms of his contract" until the date of its expiry.

- 14] It might well be the case, as counsel for the applicant contended, that the strategy of dismissal was a cynical response to the order uplifting his suspension. However, even though both the suspension and the termination have the effect of keeping the applicant away from the workplace, it is wrong in law to conclude that the respondent's act of dismissal might have been in contempt of the interim order. Stripped of the regulatory procedures governing suspension of senior municipal officials like the applicant, suspension on pay is a measure an employer is entitled to impose if it does not want to make use of the employees services, unless the employee is engaged in the type of occupation which might entail a right to perform work. In any event, suspension can only take place in the context of an ongoing employment relationship. Conversely, upliftment of a suspension can only be enforced in a continuing employment relationship. If the relationship is terminated for whatever reason no suspension can continue, nor can an upliftment of a suspension persist. Suspension and the remedies for unlawful suspension are logically contingent on the continuity of the employment relationship.
- 15] When Lallie J, handed down the interim order, she did so in the context of an employment relationship which still existed. The fact that the applicant was subsequently dismissed would constitute a lawful reason for not permitting him to exercise his contractual duties as contemplated in the second part of the order.
- 16] Accordingly, although the respondent has achieved a similar practical effect of removing the applicant from the workplace by terminating his services instead of suspending him, the act of termination was not an act in breach of the interim order, but one that had the effect of rendering it legally inoperative. Contempt of the court's interim order does not arise as

an issue.

Urgency

- 17] The respondent had from late on 17 January until 23 January to prepare its answering affidavit. Although the applicant may be criticised for not setting up timetable for responses with reference to the return date on 2 February 2012, which was close enough to 30 January 2012, when it set the matter down, I think sufficient time was given to the respondent to prepare its response as its comprehensive affidavit and heads of argument demonstrate. In a matter where a party is seeking specific performance of a contract of employment in a context where he had just been reinstated after a long absence from work, I believe it was sufficiently important for him to approach the court as a matter of urgency in an effort to assert his primary remedy of setting aside the unlawful termination.

Conclusion

- 18] In summary, I conclude that:

18.1 the respondent did not act in contempt of the interim order uplifting the applicant's suspension, when it summarily terminated his employment on 16 January 2012, and

18.2 the summary termination of the applicant's services was an unlawful, but given the breakdown of trust an order of reinstatement would not be appropriate and his remedy should be confined to his contractual damages.

Costs

- 19] The applicant was partially successful, even though the primary remedy he sought was declined. In the circumstances, it seems appropriate that each party should pay its own costs.



Order

20] In the circumstances, the following order is made:

20.1 The contempt application is dismissed.

20.2 The Applicant's dismissal is declared unlawful and the first respondent is ordered to pay the applicant's remuneration up and until the expiry of his temporary contract of employment, within 10 days of the date of this order;

20.3 Each party is to pay its own costs.

—  _____

R LAGRANGE

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: J G Grogan

instructed by Wikus Van Rensburg Attorneys

FIRST AND SECOND

RESPONDENTS:

R G Buchanan SC assisted by P N Kroon

Instructed by Joubert Galpin Searle