



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

NOT REPORTABLE

Case No: P 356/11

In the matter between:

DEBORAH GLEN PYKE

APPLICANT

And

BENSURE MANAGEMENT SERVICES (PTY) LTD

FIRST RESPONDENT

FINANCIAL SERVICES BOARD

SECOND RESPONDENT

Date Heard: 01 November 2012

Date Delivered: 16 July 2013

Summary: An applicant may not seek a final interdict restraining a respondent from committing an unfair labour practice. The appropriate approach is to seek an interim interdict pending the finalisation of the unfair labour practice dispute at the CCMA.

JUDGMENT

LALLIE, J

- [1] The first respondent operates in the business of under writing funeral schemes. Part of its business is to administer the under writing of funeral schemes of funeral parlours. It employed the applicant as its Port

Elizabeth branch manager in May 2004. Before taking up employment with the first respondent, the applicant was employed by Safricam which conducts business in the same industry as the first respondent. When the applicant moved from Safricam to the first respondent more than half of her clients followed her.

- [2] During 1 to 4 April 2011 seven funeral parlours which were clients of the first respondent with whom the applicant worked terminated their relationship with the first respondent and moved their business to an entity called KGA. These parlours constituted about 85% of the premiums the applicant received. They were also part of the group of parlours which had followed her from Safricam. On 11 April 2011 the applicant informed Chis Cunningham-Moorat, the executive chairman of the first respondent (the chairman) via e-mail of their cancellations. The chairman expressed his suspicion that the applicant had a hand in the cancellations. In addition Nick-Cunningham-Moorat, Director: Commercial and Operations (the Director) of the first respondent required control over the bank accounts the applicant was administering as well as the internet access details to the accounts. He also sought the applicant to return the claims' float which was in her possession. The first respondent further required the applicant to provide it with all the membership data.
- [3] The first respondent's conduct stripped the applicant of her main duties and the cancellations of the parlours reduced her earnings considerably making it impossible for her to continue working for the respondent. The applicant informed the first respondent that she construed the first respondent's conduct as a repudiation of her contract of employment which she accepted thereby terminating the contract. The first respondent denied having repudiated the contract and accused the applicant of having breached the contract and conniving actively with the first respondent's clients who had cancelled their business to take it to another business in which she would be involved. On 4 May 2011 the applicant received a letter from Amanda Blackbeard, the first respondent's operations Director (the Operations Director) informing her to continue working. The applicant tendered her resignation and gave a month's notice which ran from 9 May to 9 June 2011.

- [4] On 23 May 2011 the applicant was suspended from work with immediate effect on full pay pending a disciplinary enquiry to be held in Port Elizabeth on a date and time to be advised. On 25 May 2011 the parties agreed that the applicant would deliver on the same day, the first respondent's assets in her possession at its Old Mutual Building office in Port Elizabeth. The disciplinary enquiry was not held and the applicant did not receive her salary for May 2011.
- [5] The applicant was registered as a representative in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAISA) by Bonrisk. On 26 May 2011 the first respondent debarred the applicant in terms of section 14 of the FAISA. The debarment was supported by a statement of the first respondent's head of the legal department Ryna Van Niekerk (Van Niekerk). The reason provided for the applicant's debarment was that she did not comply with the fit and proper requirement of the FAISA, particularly honesty and integrity and that she had contravened the provisions of the FAISA. The debarment is published in the second respondent's website. The debarment has a detrimental effect on the future registration of the applicant as a representative of a financial service provider. It prevented the applicant from earning an income and damaged her reputation.
- [6] The applicant submitted that the debarment constituted an unfair labour practice. In this application she seeks an order in the following terms:
- 6.1 *'Setting aside the debarment of the applicant in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002.*
- 6.2 *Interdicting and prohibiting the first respondent from publishing to the second respondent or any third party that the Applicant is not a fit and proper person as intended in the Financial Advisory and Intermediary Services Act 37 of 2002.*
- 6.3 *Ordering the second respondent to remove all record of the debarment of the applicant from its web site and its record'.*

- [7] This application is opposed by the first respondent, firstly the respondent alleged that this Court lacks the necessary jurisdiction to determine this application on the grounds that the second respondents' head office is in Pretoria. The situation of the second respondents head office does not determine this Court's jurisdiction over this application. The respondent's submission is therefore ill founded and without merit.
- [8] Another ground the first respondent sought to rely on in its argument that this Court lacks jurisdiction over this dispute is that the debarment arises out of its obligation in terms of the FAISA and that the alleged defamation of the applicant's character does not arise out of her employment with the respondent.
- [9] In the notice of motion, the applicant has clearly stated that she seeks an interdict. In her founding affidavit she has submitted that her debarment constitutes an unfair labour practice. It is not for the first respondent to define the dispute the applicant should have referred. Section 158 (1) (ii) of the LRA grants this court jurisdiction to determine an application for an interdict against the respondent. It is for the court to decide whether the applicant has made out a case for the grant of the interdict.
- [10] The first respondent submitted that the document used to debar the applicant reflected that the party debarring her is Bonrisk (Pty) Ltd, an associate of the first respondent. It has an interest in the relief sought by the applicant and her failure to join it constitutes reason for the dismissal of this application. The first respondent's submission is not supported by the document it sought to rely on. The document reflects the debarring party as Bonrisk. It has the same address, telephone and fax number as the first respondent and the contact person at the debarring FSP is Van Niekerk, the head of the first respondent's legal department. There is no indication in the document that Bonrisk is legal person which can be sued. The applicant's omission to join Bonrisk as a party is therefore not fatal to her case.
- [11] The first respondent further submitted that this application stands to be dismissed owing to the dispute of fact which was foreseen by the applicant. I disagree, any dispute of fact in this matter can be dealt with in

terms of the decision in *Plascon-Evans-Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹.

- [12] The applicant submitted that she was referring an unfair labour practice dispute to the CCMA where she will be seeking, inter alia, compensation for the debarment. In *MEC for Education v Gradwell*² it was held that a dispute concerning unfair labour practice must be referred to the CCMA or a bargaining council for conciliation and arbitration in terms of section 191 (1) LRA. When the unfair labour practice involves a reasonable apprehension of irreparable harm the appropriate remedy will be to seek an order granting urgent relief pending the outcome of the unfair labour practice proceedings.
- [13] As the applicant has identified the debarment as an unfair labour practice, it is the CCMA that can set the debarment aside after making a determination whether it constitutes an unfair labour practice. This court may not usurp the function of the CCMA and set aside the debarment. The applicant pleaded that the first respondent committed an unfair labour practice, and that she has referred the unfair labour practice dispute of being debarred to the CCMA. In addition, she should have sought an order interdicting the unfair labour practice pending the finalization of unfair labour dispute and make all the averments for the grant of the interdict. She did not do so.
- [14] The prayers the applicant seeks constitute final relief which may not be granted in the light of her unfair labour practice dispute. The first prayer can be granted by the CCMA after determining the unfair labour practice dispute and prayers 2 and 3 regarding interdicting the first respondent from publishing to the second respondent and any third party that the applicant is not fit and proper in terms of the FAISA and an order for the removal of all the records of the debarment of the applicant from its website record are ancillary to the relief for the unfair labour practice. Section 194 (4) of the LRA grants arbitrators determining unfair labour practice disputes very wide powers regarding relief they may grant.

¹ [1984] (3) SA 623 A.

² [2012] 8 BLLR 747 (LAC).

[15] The applicant has failed to make out a case for the grant of an interdict pending the finalisation of the unfair labour practice dispute at the CCMA. I could find no reason for costs not to follow the result.

[16] In the premises the following order is made.

15.1 The application is dismissed with costs.

LALLIE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Advocate Nieker
	Instructed by :Vlok Attorneys
For the first Respondent:	Mr Hood
	Of MJ Hood and Associates

LABOUR COURT