



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 1034/2010

In the matter between:

FIKILE MOTAUNG

Applicant

and

WITS UNIVERSITY (SCHOOL OF EDUCATION)

Respondent

Considered In Chambers.

Delivered on: 14 April 2014

JUDGMENT

TLHOTLHALEMAJE AJ

Introduction:

- [1] The Applicant brought a claim in terms of which she had sought an order that the Respondent had committed a breach of contract. The Applicant further sought payment equivalent to 48 months' salary. That claim, following a successful application for absolution from the instance was dismissed in a judgement handed down on 25 October 2013. The Applicant has since filed an application for leave to appeal, which the Respondent had opposed.

The legal framework in respect of applications for leave to appeal:

- [2] In considering whether to grant or refuse leave to appeal, the question a court has to answer is whether there are reasonable prospects that another court may come to a different conclusion. In *Minister of Safety and Security and Another v Madyibi*¹, Petse, ADJP considered the approach in this regard as follows;

“In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto”.

Grounds for appeal and evaluation:

- [3] The Applicant listed twenty (20) grounds upon which the application for leave to appeal is based. These grounds mainly pertain to factual findings made, and as correctly pointed out by the Respondent, were not grouped into categories of leave to appeal in any discernible order. There is a repetition in some of the grounds, and there is no substantiation in others. Notwithstanding these difficulties and for the sake of completeness I will state all of these grounds, and deal with each individually or collectively where appropriate.
- [4] The crisp issue before the court was whether the Applicant was entitled to the relief she sought in circumstances where her fixed term contract was prematurely terminated, and where she had unreasonably rejected the Respondent’s offer to reinstate the contract unconditionally and to make good on all payment due to her for the period that she was unemployed having. This offer was made after the applicant had initiated court proceedings.

¹ (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

[5] **Ground 1, 2 and 3:**

5.1 *"The court erred in not recognizing the applicant's right's to accept or reject the offer as offers can be rejected or accepted".*

5.2 *"The court disregarded the provisions of the LRS as the employee has a right to choose to return to an employer and no conditions are attached to such right".*

5.3 *"The court erred in not recognizing that by claiming damages despite the offer on the table, the employee accepted the repudiation of her employment contract and she chose not to hold the employer to the contract".*

Ground 13: *"Applicant cannot be forced to return to an employer she was not happy with when her contract was terminated and the court erred in finding for the respondent in this regard".*

Ground 14: *"The court erred in finding that the applicant failed to mitigate on the basis of her refusal to accept the respondent's offer".*

Ground 15: *"The court failed to take into account that more than two months had elapsed before the respondent made the offer and the court erred in finding that this was a reasonable time"*

Ground 17: *"The court erred in not finding that the offer made by the respondent was just to save face and to avoid having to pay for the remainder of the applicant's contract."*

Ground 18: *Whether or not the offer was made in good faith is neither here nor there as the applicant made here election not to return to the respondent.*
(Sic)

[7] In response, the Respondent's contention was that the court did not err as there is no suggestion that the Applicant could not, as a matter of law, reject the offer made to her by the Respondent to return to work. The issue that arose from the election according to the Respondent is whether the

Respondent would be entitled to any damages as a result of the Applicant's election, and whether the election was reasonable in the circumstances.

- [8] The Respondent placed reliance on *Technicon SA v Mojela and others*², which in turn relied on *Mkonto v Ford and others*³ for the principle that a refusal of an offer of unconditional reinstatement must be reasonable. The Respondent reiterated that the Applicant's refusal of the unconditional offer of reinstatement was to keep alive a claim of contractual damages which would allowed her, if successful, to claim payment of the balance of the contractual period without having to tender any services.
- [9] In Mkhonto, Conradie JA lamented the fact that in that case, the Applicant not only failed to proffer any reason for having refused the offer of reinstatement but that her evidence concerning the reinstatement offer, the only factual issue in the case, was patently false⁴. In this case, at paragraph 35 of the judgment I expressed similar sentiments by pointing out that the Applicant had out-rightly and unreasonably rejected the offer that would have placed her in exactly the same position she would have been but for the premature termination of the contract, and further expressed the view that the choices she made were to be exercised reasonably, which she had failed to do. Reliance in this regard was placed on *Dr. DC Kemp t/a Centralmed v Rawlins*⁵. That decision was confirmed by the Supreme Court of Appeal⁶. In the light of these decisions, I fail to appreciate how any other court may come to a different conclusion on this issue.

Ground 4: *"The court erred in not taking into account the admissions made by the respondent that the contract was terminated prematurely as a result of failure in its Human resources framework."*

Ground 16: *"The court erred in not taking into account that when the Human Resources found that applicant was still on their system after the contract was*

² (2013) JOL 11390 (LC)

³ [2000] BLLR 786 (LAC)

⁴ [at para 12].

⁵ [2009] 11 BLLR (LAC).

⁶ *DR B M Rawlins v DR D C Kemp t/a Centralmed*. Case No: 483/09

terminated on 30 September 2010, the respondent took no action to rectify its mistake”.

- [10] In my view, this ground is baseless in that this factor was taken into account, and it was pointed out that the Respondent immediately apologised and made the offer to the Applicant to return to work.

Ground 5: *“The court erred in not finding that the termination was deliberate, although the respondent might have shown remorse later, as the respondent acted through Prof Adler when applicant was appointed and who should have known that the contract was for five years and the applicant had no reason to believe what Prof Adler did was not sanctioned by the respondent”.*

- [11] I fail to appreciate how in ground 4 it can be said that the court erred in not taking into account the admissions made that the contract was terminated pre-maturely, and yet in the same breath it is alleged that the court also erred in not finding that the termination was deliberate, although the Respondent might have shown remorse at a later stage. This ground is merely spurious and ill-conceived. At no stage was it suggested or evidence led that Prof Adler acted on her own in advising the Applicant that her contract was to be terminated. There was further no evidence to indicate that Prof Adler had not acted in good faith in her belief that the contract should be terminated.

Ground 6: *“The court erred in finding that there was insufficient evidence upon which a reasonable man may find for the applicant.”*

- [12] This ground is vague and it is not clear as to which aspect of the judgment the applicant is really attacking. If a claimant fails to make out a case to support her claim, absolution from the instance should follow where there are grounds supporting such an application. The Applicant had in this case failed to make out a case to justify the granting of the relief she sought.

Ground 7: *“The court erred in not finding that the conduct of the respondent during the termination was descriptive of conduct heralding non or mal-performance on the part of the respondent”.*

- [13] In circumstances where the Respondent had become aware of its error, and where it had sought to immediately remedy the error, I fail to appreciate how such conduct can be said to be descriptive of non- or mal-performance on its part. There was no suggestion that the Respondent had not made its offer in good faith, and that aspect was sufficiently dealt with in the judgement at paragraphs 24, 31 and 36.

Ground 8: *“The court erred in finding that up to the stage when the respondent held a farewell for the applicant it just had an intention to terminate the employment contract”.*

- [14] At paragraph 27 of the judgment I had stated that “...In the face of conflicting messages from the respondent, it is apparent that even though there was intention to prematurely terminate the contract, that intention cannot be said to be deliberate, unequivocal and descriptive of conduct heralding non-or mal-performance on its part....”

Ground 9: *“The court erred in finding fault with applicant for not raising a complaint or grievance after she was informed of the termination.”*

Ground 10: *“The court erred in concluding that the applicant was obliged to bring the termination to the respondent’s attention and to put the respondent on terms”.*

- [15] I again fail to appreciate how it can be said that the court erred when there is a responsibility on an employee to bring any unfairness she endured to the attention of the employer instead of simply running to court. In this regard, I had pointed out that the court process is not there for the taking, and it is indeed incumbent upon an employee to raise grievances if she was of the view that she was being unfairly treated.

Ground 11: *Whether or not intention was deliberate is neither here nor there, what remained was whether or not the respondent’s actions were deliberate, applicant suffered damages and the court erred in finding for the respondent and allowing the respondent an excuse in this regard.”*

- [16] This ground appears to be a repetition and was dealt with under paragraph 13 of this judgment as above. Furthermore, rather than place the Respondent on terms, the Applicant simply and unreasonably rejected the offer of reinstatement.

Ground 12: *“The court erred in finding that the applicant did not make an election to accept repudiation as the repudiation of the offer evidence such an election”.*

- [17] This ground is equally flawed in that it was up to the Applicant to make an election and convey same to the Respondent, instead of simply persisting with litigation.

Ground 19: *“The honourable court erred in ordering costs to be paid by the applicant, after the applicant had been wronged and is a victim of unlawful termination of a fixed terms contract”.* (Sic)

- [18] An order of costs was made having taken due regard to considerations of law and fairness, and I exercised my judicial discretion in that regard.

Conclusion:

- [19] Having reflected dispassionately upon the decision sought to be appealed, and further having considered all of the grounds advanced by the Applicant in this regard, on the whole, I am satisfied that she has failed to establish any basis upon which another court could or may come to a different conclusion. There are no reasonable prospects on either the facts of this case or in law that the Labour Appeal Court may come to a different conclusion. To this end, there is further no reason in law or fairness why a cost order should not again follow in respect of this application.

Order:

- i. The application for leave to appeal is dismissed with costs

Tlhotlhemaje AJ

LABOUR COURT