



**THE LABOUR COURT OF SOUTH AFRICA,
HELD IN JOHANNESBURG**

Of interest to other judges

CASE NO: JS 458/09

In the matter between:

ELLENISE SEPTOO

Applicant

and

CITY OF JOHANNESBURG

Respondent

Heard: 4 June 2015

Delivered: 5 June 2015

Summary: (Absolution – evidence incompatible with claim for specific performance)

JUDGMENT

LAGRANGE, J

- [1] At the close of the applicant's case, the respondent applied for absolution from the instance. The relief sought by the applicant is an order declaring that the contract entered into between herself and the respondent in terms of which she was to be paid R 550,000 per annum is binding and enforceable against the respondent and

that she be remunerated in accordance with that contract. She also claimed further and alternative relief, though the nature of this relief was not specified.

- [2] At the commencement of proceedings, applicant's counsel submitted that this contract ('the first contract') had been cancelled. Counsel for the respondent confirmed that the case was simply a case in which the applicant sought specific performance of the contract and was not seeking damages. Under cross-examination, the applicant confirmed in her evidence that the first contract had been cancelled.
- [3] The respondent argues that the simple question raised by the evidence is how the applicant could pursue a claim for specific performance, in the form of payment of the remuneration stipulated in the first contract, if she agreed that contract had been cancelled. Applicant's counsel argued in reply that in asking for further or alternative relief, the applicant was still entitled on the pleadings to pursue her alternative claim for damages.
- [4] It is trite law that a party who seeks an order for specific performance of a contract is necessarily pursuing their claim on the basis that the contract exists at the time the claim is made and they are trying to enforce the obligations undertaken by the other party in terms of the contract. Such a party has decided not to treat the other party's alleged shortfall in performance as a repudiatory breach justifying the cancellation of the contract but is holding that party to its obligations to perform in terms of the contract and to remedy the breach. The alternative claim available to a party faced with a material failure to perform by the other contracting party is to accept the repudiatory breach as grounds for terminating the contract and to sue for contractual damages arising there from. The enforcement and cancellation of a contract are mutually exclusive choices in the sense that they cannot both be exercised simultaneously. That does not prevent a party from claiming cancellation of the contract and a claim for damages in the alternative to an order for specific performance in the event that a claim for specific performance does not succeed.¹

¹ See Christie, Law of Contract in South Africa, (sixth edition) at 562.

- [5] In this instance, there is nothing in the pleadings to suggest that in the event that the applicant failed to establish her claim for specific performance, she would exercise her right to cancel the agreement and seek damages in the alternative. Is it sufficient that her claim for relief includes a general claim for further and alternative relief? The difficulty I have with this proposition is that the thrust of the applicant's pleaded case is premised on the existence of an enforceable agreement, not on a cancelled one. On the existing pleadings, it cannot be said, given that the applicant now regards the agreement as cancelled, which is a fact incompatible with a claim for specific performance, that the respondent is nevertheless not entitled to absolution because an alternative *prima facie* claim for damages has been laid which calls for an answer.
- [6] The applicant sought to rely on a number of old authorities cited in Christie's Law of Contract of South Africa which might appear to suggest that a claim for damages as an alternative cause of action premised on the cancellation of the contract can be entertained simply on the basis of the existence of a prayer for further or alternative relief. However, closer scrutiny of the cases of **Norden v Rennie (1879) 9 Buch 155**; **Cohen v Shires, McHattie and King (1882) 1 K 41**; **Jacobsohn v Edwards and Ehrlich (1897) 4 OR 264** cited therein reveals that in those matters the award of damages under consideration was not premised on an alternative claim arising from the cancellation of the contract, but alternative relief in the form of damages because an order of specific performance to which the plaintiff was or might have been entitled to was not a feasible remedy. In none of those cases was the alternative relief in the form of damages premised on the underlying contract being cancelled.
- [7] The test for absolution has been expressed in the following terms:
- "When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence*

upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff.”²

- [8] In this instance, the applicant’s own claim that the contract on which the claim of specific performance is based has been cancelled is logically incompatible with a claim for such relief. Further, the alternative claim premised on such cancellation was never properly pleaded and in the absence of an amendment to the statement of claim the court is not able to entertain such a claim..
- [9] Accordingly, the application must succeed. On the question of costs, I am not persuaded that the applicant’s original claim was ill founded on the basis of the allegations as they appear in the pleadings or that respondent’s success in this application owes anything to the intrinsic merits of its defence of its non-payment of the applicant’s salary under the first contract. I do not think the interests of justice or law warrant a cost order in the respondent’s favour.

Order

- [10] The respondent is granted absolution from the instance in respect of the applicant’s claim for specific performance which is the only claim before the Court.
- [11] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court

² Erasmus: Superior Court Practice, RS 39, 2012 Rule-B1-p292A

Appearances:

For the Applicant: M Sibanda

Instructed by: JD Verster Labour Law Office

For the Respondent: H Viljoen

Instructed by: Mncedisi Ndlovu & Sedumedi Attorneys

LABOUR COURT