THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J1393/14

In the matter between:

ERM SOUTHERN AFRICA (PTY) LTD Applicant

and

NKOBI, N Respondent

Date heard: 21 April 2015

Delivered: 30 September 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an unopposed application for default judgment in which the applicant claims:

> "Payment of the amount of R52 546.40 (together with interest on the amount claimed at the rate of 15,5%, per annum calculated from 6 January 2014 to date of payment).
>
> Payment of the amount of R72 340.00 (together with interest on the amount claimed at the rate of 15,5% per annum calculated from 6 January 2014 to date of payment)"

[2] The aforesaid damages are claimed on the basis of an obligation contained in a bursary contract (which amount to the monies paid out by the applicant to assist him in completing his studies).The material terms of the said contract (as well as a further bursary contract signed for 2013) are set out in the statement of claim are as follows:

> "1. The bursary was awarded for an uninterrupted study period towards the Respondent's post graduate studies tenable at the University of the Witwatersrand for registration to study during 2012.
>
> 2. The bursary covered the registration fees, accommodation plus tuition fees up to a maximum of R52 546.40 which was payable to the University of the Witwatersrand.
>
> 3. It was a term of the bursary contact that should the Respondent fail the year of study or failed to obtain an average of 55% in respect of the subjects covered by the degree, then the Respondent shall automatically forfeit the bursary and will be obliged to repay the Applicant the full cost of the bursary in terms of Clause 3 of the bursary contract for 2012, unless otherwise agreed by the Applicant.
>
> 4. The contract further provided that should the bursary be discontinued in terms of clause 5 of that contract or should the Applicant cancel the contract for any reason whatsoever, then the total bursary amount advanced shall become due and payable to the Applicant.
>
> 5. The bursary contract further provided that the Respondent (at that time the bursary holder) will be expected to do vacation practical work laid down by the University of Witwatersrand and that such vacation work will have to be done with the Applicant."

[3] The contract expressly provided as follows:

> "11.1 On successful completion of your degree, ERM may offer you employment. It is a condition of the award of a Bursary that you will accept the offer of employment within 10(ten) days of the offer and will remain in the service of the company for a period of at least 12 (twelve) months from the date of the commencement of the employment."

[4] The parties entered into the above contract and a further similar one on about March 2013, in terms of which the amount to be paid for fees and accommodation was an amount of R72 340.00

[5] In January 2014, the parties entered into a fixed term contract of employment with effect from 6 January 2014 in terms of which the respondent was to be paid as an intern for a period of approximately 2 years. It is this contract which the respondent has breached and the applicant avers that this breach is the direct causal link to the damages claimed. The Applicant submits that the aim and intention of the fixed term contract of employment is to ensure that the financial investment made by it results in the amounts being "worked off" by the respondent whilst in the service of the applicant for the period of two years.

[6] The claim is pleaded in terms of section 77(3) of the BCEA i.e. that:

> "(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

[7] In **Rand Water v Stoop & another**[1] the LAC was concerned with the question as to whether the Labour Court had jurisdiction to entertain a counterclaim by an employer for damages for breach of contract by dismissed employees in terms of section 77(3) read with section 77A(e) of Basic Conditions of Employment Act 75 of 1997. It found that it did have concurrent jurisdiction with civil courts in any matter concerning a contract of employment and that the court was empowered to order specific performance or award damages.

[8] In as for as the meaning to be imputed to the phrase "any matter concerning a contract of employment" the LAC per Waglay JP held as follows:

> "[38] A teleological approach to interpretation of the BCEA is clearly appropriate, but this approach does not and cannot licence an Alice in Wonderland interpretation. Words must mean what they ordinarily mean not what we want them to mean: *S v Zuma & others; National Coalition*

[1] (2013) 34 ILJ 576 (LAC)

for Gay & Lesbian Equality & others v Minister of Home Affairs & others; Daniels v Campbell & others; Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others; and Hoffmann v SA Airways.

[39] I am satisfied that s 77(3) read with s 77A(e) favours an interpretation bringing within its ambit the type of claim instituted by the appellant in this matter as:

39.1 The word 'concurrent' in s 77(3) places the Labour Court in exactly the same position as the High Court with the same powers and authority in relation to matters concerning a contract of employment.

39.2 The last part of s 77(3) provides the Labour Court with jurisdiction irrespective of whether any basic condition of employment constitutes a term of the employment contract. This demonstrates that the Labour Court has jurisdiction over any claim as long as it involves a contract of employment.

39.3 The words 'concerning a contract of employment' mean about or in connection with an employment contract. The pleaded claim clearly falls within this categorization.

39.4 The words 'any matter' in s 77(3) are broad and the literal interpretation does not limit the claims, in relation to a contract of employment, to a specific category. Damages, both liquid and illiquid, are included."

[9] The claim as pleaded in the default application before me, is in respect of a breach of the fixed term contract of employment, and <u>not</u> of the bursary agreements. Applicant pleads as follows:

"DAMAGES AND BREACH CAUSED BY THE RESPONDENT

42 The Respondent was paid a bursary in terms of the first bursary contract dated 4 April 2012 which covered the fees averred herein in the amount of R52 546.40 which is due and owing to the Applicant.

43 The similar obligation attaches itself to the bursary contract dated 5 March 2013 where the Respondent was advanced fees in the amount of R72 340.00.

44 The aim and intention of the fixed term contract of employment is to ensure that the financial investment made by the Applicant towards the Respondent, which amounts are reflected in paragraphs 42 and 43 above, results in the amounts being "worked off" by the Respondent whilst in the service of the Applicant for the period of two years.

45 Differently put, the Applicant would in the ordinary sense of bursary funding, pay for the tuition an associated ancillary study costs of the Respondent where after the Respondent contractually agrees to work back, so to speak, the amount provided in this manner.

46 On the Respondent's version, he does not have intention to perform in terms of the subsequent fixed term contract of employment. Accordingly the Applicant has suffered damages in perpetuity in the amount of 124 886.40 (one hundred and twenty four thousand eight hundred and eighty six rand and forty cents).

47 Further general damages are caused by the Respondent which damages entail financial prejudice of the Applicant as the Applicant is now forced to incur unnecessary and additional administrative expenses, including expenses of employing legal assistance to assert its right in terms of the wilful breach of contract committed by the Respondent.

48 Had the Respondent not perpetrated a material breach in terms of his fixed term contract of employment, the Applicant would not have incurred and accrued unnecessary expenses.

49 The Applicant accordingly seeks to hold the Respondent liable to the amount of R124 885.40.

50. As indicated above, despite proper demand being made, alternatively a demand made hereby, the Respondent has failed and/or refused to either:

(1) comply with the express provisions of his fixed term contract of employment and report for duty, in the alternative

(ii) to pay the amount to the applicant."

[10] A look at the fixed term contract of employment, on which this claim is based reveals no mention at all of the bursary agreements. In addition, it provides

that either party can terminate the employment contract on notice i.e. in the following clause:

> "in the event that the (sic) either party wishes to terminate this contract for reasons other than the completion of the project or termination of the contract between ERM and the client, that party shall give the other party 4 (weeks) written notice of such termination"`

[11] In terms of their drafting, there is a total disjuncture between the bursary contracts and the fixed term contract of employment. One presumes that applicant has not pleaded the breach of the bursary contracts in an effort to bring this matter under section 77(3) of the BCEA without facing the hurdle of whether the bursary agreements 'concern a contract of employment'. In these circumstances, I cannot find a nexus between the breach of the fixed term employment contract and the damages claimed herein. For the above reasons, the application cannot be granted.

[12] I therefore make the following order:

<u>Order</u>

1. The application for default judgment is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

<u>Appearances</u>:

For the Applicant: Advocate F. Venter

Instructed by: Celeste Allan Attorney