



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C789/14

In the matter between:

LAUREN HILL

Applicant

and

CCMA

First Respondent

Z. MADOTYENI N.O.

Second Respondent

UNIVERSITY OF CAPE TOWN

Third Respondent

Date heard: 3 June 2015

Delivered: 09 December 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed review application. The second respondent (the Commissioner) found that the applicant had not been dismissed by the third respondent (UCT).

[2] The applicant, a researcher-lecturer had, before the termination of her employment been in the in the employ of UCT for a period of seven years. On the 24 March 2013, while she was still in permanent employment but facing an internal hearing, she entered into an agreement with UCT. The Agreement defined 'termination date' as meaning "31 March 2014 or, if earlier, the date of commencement of Dr Hill of employment in a Funded Position."

[3] It included the following provisions:

"Resignation

4. Dr Hill hereby resigns her employment from UCT with effect from the Termination Date subject to the terms of this agreement.

Payment

5. Dr Hill will continue to be paid her ordinary remuneration and benefits until the Termination Date.

6. If the Termination Date is earlier than 31 March 2014 because Dr Hill has commenced employment in a Funded Position, Dr Hill shall be paid in a lump sum the balance of the costs to the University of her remuneration and benefits between the Termination Date and 31 March 2014."

[4] The following definitions in the agreement are also of relevance:

"the New Unit" shall means the proposed Critical Care Nutrition Research Unit in the Division of Critical Care within the Department, or such other unit as may be established arising from the Funding Proposal.

"Funded Position" shall mean an externally funded position created as a result of external funding obtained for Dr Hill."

“the Funding Proposal” shall mean the proposal prepared by Dr Hill for external funding for the New Unit, as may be amended, revised or replaced with a new funding proposal and approved by the Head of Department.”

- [5] The parties further agreed terms regarding possible further employment in a funded position thus:

“9. In the event that external funding is obtained for Dr Hill to work in the University, she shall be employed in the Funded Position with recognition of past service with UCT and without probation, but subject to all such conditions as may be specified in the external funding arrangement.

10. To the extent permitted by the external funding, Dr Hill’s remuneration and benefits in the Funded Position shall be no less favourable than at present, the intention of the parties being that Dr Hill shall be employed on terms and conditions ordinarily applicable to externally funded positions, but otherwise no less favourable than those under which she is currently employed.

11. UCT will in good faith consider any proposal for the establishment of the New Unit with all reasonable expedition with a view to completing the process ahead of 31 March 2014.

12. Approval of the New Unit will, subject to 11., follow the established internal procedures within the University and will be subject to any constraints placed upon the application of the funding by any donor.”

- [6] The final terms of the Agreement are headed “Full and Final Settlement” and read as follows:

“20. This agreement resolves, and is entered into in full and final settlement of, all and any claims or allegations between Dr Hill and the University relating to or arising from past grievances, conduct, capacity, performance, compatibility, unfair labour practice or victimisation, and whether such claims arise in contract, delict, statute or otherwise, but it does not preclude Dr Hill from lodging a claim for compensation in terms of the Compensation for Occupational Injuries and

Diseases Act in respect of any injury or incident in terms of that Act applicable to her.

21. This document contains the entire agreement between the parties in respect of the matters dealt with in it. Neither party has any claim or right of actions arising from any undertaking, representation or warranty not included in this document.

22. No agreement to vary, add to or cancel this agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties to the agreement.”

- [7] On the 21 February 2014 a letter of motivation for a fixed term employment contract for the applicant was sent to the Dean of the Faculty of Health Sciences from the Head: Division of Critical Care and the Head: Department of Surgery. It reads in part as follows:

“A legally binding settlement agreement was reached between Dr Lauren Hill and UCT, which obliges UCT in clauses 9 and 10, to further employ Dr Hill in the event that external funding is obtained to cover the costs of Dr Hill's remuneration and benefits at a level no less favourable than her current position.

At this point, the Division of Critical Care has secured the necessary financing in the form of donor funding to support the proposed COE package for Dr Hill, which is outlined below. The Division of Critical Care is strongly motivated to uphold the further employment of Dr Hill for reasons outlined below.”

- [8] The motivation attached a proposed job description, as well as letters from donors pledging funds to the UCT's division of Critical Care for their discretionary use. In a lengthy letter dated 26 March 2014 the Dean of the Medical School replied to the motivation letter (which reached him on the 11 March 2014), explaining that the proposal presented a number of difficulties, these premised on the following observation:

“2.1 First, although you have stated that the memorandum of agreement previously concluded with Dr Hill obliges the University to appoint Dr Hill in the event that external funding is obtained, that cannot be correct. The further

employment of Dr Hill can occur only pursuant to the creation of the position which is to be externally funded, and external funding for such a position can be secured only in terms of the established procedures within the University for doing so. I need not set out here all of the reasons why internal procedures must be followed to create positions and to secure funding, but I am sure that you will agree that this is so. The difficulty presented by your proposal to engage Dr Hill on a fixed term contract is that as far as I am aware neither of these steps has been followed.”

[9] The letter contains the following statement that: “I am unable at this stage to approve the appointment of Dr Hill on a fixed term contract on the terms proposed by you. If you wish me to consider this further I ask that you provide me with a copy of the external funding proposal submitted by you or Dr Hill together with full details of the response and any conditions proposed by the external funders secured for the proposed position, so that this may be considered further by the faculty. It is possible, though by no means certain, that this might mitigate some of the concerns that I have raised above and which militate against the proposal to engage Dr Hill on a further fixed term contract.”

[10] In a letter dated 27 March 2014, the Applicant wrote to the Dean as follows:

“1. Dr Joubert has forwarded to me a copy of your letter to him dated 26 March 2014 in the above regard. I am writing this as a matter of urgency since my Agreement with UCT expires on 31 March 2014.

2. That Agreement provided, inter alia as follows:

9. In the event that external funding is obtained for Dr Hill to work in the University, she shall be employed in the Funded Position with recognition of past service with UCT and without probation, but subject to all such conditions as may be specified in the external funding arrangement.

3. The Funded Position is simply an externally funded position created as a result of external funding obtained by me.

4. Clause 9 clearly creates an obligation to employ me if the funds are obtained.

5. The funds have been donated to the Department of Critical Care on an unconditional basis, as can be seen from the attached letters from Adcock Ingram, Nutricia and B.Braun Medical.

6. Funds donated on an unconditional basis do not require an internal faculty approval process. I verified this with the Faculty Accountant in a meeting early in 2014, who also indicated at that time that it is acceptable to receive a donation for a salary, and that donated funds do not require faculty approval since the faculty approval process is for the purpose of cost recovery on contracts between the university and external third parties. Cost recovery does not apply to donor funds. The letters of commitment say this (see attached), and are in line with what UCT Donations office indicated to me is required for incoming donations as opposed to contracts.

7. The reasons set out in your letter for failing to employ me in the Funded Position, are not relevant to the Agreement, and, in any event, are not valid. I need to reserve all my rights, including the right to respond in detail at the appropriate time and in the appropriate forum should that prove necessary.

8. The attached letters demonstrate that I have obtained the necessary funding.

9. Should you fail to comply with the obligation to employ me in terms of Clause 9, the University will be in material breach of the Agreement.

10. In the circumstances, I request you to reconsider your decision, and let me have your response by no later than 12 pm (noon) on Monday 31 March 2014, failing which I shall have no option but to assume that you abide by your decision. Naturally I reserve the right to respond accordingly.

11. I sincerely regret the necessity for the urgent time frame, and for having to write to you in this manner."

[11] In answer on the 31 March 2014, the Dean stated in a letter that he could not agree that the University was either obliged to or should appoint applicant for the further fixed period proposed. In a letter in reply, hand delivered on the same date,

the applicant claimed that the University had breached clause 9 of the Agreement and stated:

“6. I hereby accept the University’s repudiation of the Agreement and cancel the Agreement.

7. My indefinite term employment with the University, which was amended by the Agreement, therefore remains as it was on 24 March 2013, and I hereby continue to tender my services in terms thereof.”

[12] On the 1 April 2014, the Dean wrote a letter headed “Termination of Your Employment” stating inter alia that:

“The University does not agree that it has breached the agreement of 24 March 2013 or repudiated it. It also does not agree, even if it had done so, that you are entitled to cancel it. This was not intended by the parties, and you have accepted the University’s performance of various other obligations under the agreement thus far. In addition, even if you were entitled to cancel the agreement the University does not agree that this would have the consequence, as you claim, that your employment “remains as it was on 24 March 2013.”

Evaluation

[13] Mr Kantor for the applicant put up a myriad of arguments before the arbitrator and the court to submit that applicant was dismissed. In ‘heads’ of argument comprising some 83 pages he submitted inter alia that:

13.1 The agreement was void ab initio through material misrepresentation and a dismissal took place on the 1 April 2014;

13.2 alternatively the agreement was validly cancelled by the applicant due to the University’s material breach, and

13.3 either the Agreement was divisible from the original contract and the cancellation of the Agreement left the original agreement in place, which was terminated by the University, resulting in a dismissal;

13.4 or, alternatively, the agreement was indivisible from the original contract and the indivisible contract was terminated by the applicant, resulting in a constructive dismissal;

13.5 alternatively, the Agreement turned the employment contract into a fixed term contract, which expired on 31 March 2014, the applicant reasonably expected the University to renew it on the same or similar terms, and the University's failure to do so was a dismissal.

[14] It is trite that a party to an agreement who is faced with two inconsistent remedies must make an election between them and cannot both approbate and reprobate. A classic statement of this well-established principle of the law of contract is that of Innes CJ in *Bowditch v Peel and Magill* 1921 AD 561 at 572:

'A person who has been induced to contract by the material and fraudulent misrepresentation of the other party may either stand by the contract or claim rescission. . . . It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception and the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate.'

[15] Mr Kantor has relied on inconsistent contractual remedies in order to found his argument that the applicant was dismissed. He presented a similar case at the arbitration. He has not at any stage sought rescission of the Agreement. This prong of his approach is vague and embarrassing. In addition his submissions based on cancellation of the contract do not assist the applicant.

[16] In essence, Mr Kantor submits the cancellation of the Agreement was the trigger for a dismissal to arise in law. The arbitrator found that the applicant had resigned voluntarily. As he records in his Award:

"70. In fact her version had always been that she voluntarily concluded an agreement with the respondent that settled all disputes between them by resigning

in return for extended notice period, consideration of funding proposal and a possibility of a future fixed term contract of employment.”

- [17] The Agreement is unambiguous in stating that the “applicant hereby resigns”. The Agreement records inter alia under the heading “Grievances”:

“13. In May 2012 Prof Visser issued a report on stage 3 of a grievance brought against Dr Hill. In June 2012 a letter was sent to various persons by the Dean communicating certain findings in the report.

14. Dr Hill disputes the findings of Prof. Visser in the grievance reports and contends that she was prejudiced both by the findings and by the manner in which those findings were communicated. Her grounds for these contentions are set out in a letter from her legal representative dated 7 February 2013.

15. The parties have agreed that the conclusion of this agreement makes it unnecessary to resolve the competing contentions on these matters.”

- [18] The Agreement also contained a clause whereby UCT made a contribution to applicant's legal costs in respect of the previous disputes. This was an agreement of compromise in terms of which the applicant resigned her permanent employment effective from 31 March 2013. Pending the termination date, and from 1 April 2013, the Agreement provided that: “Dr Hill shall vacate her post in the Department of Human Biology and take up employment in the department, where she shall occupy a position, perform functions and report to a person to be determined by the Head of Department in consultation with the Dean.”

- [19] On the facts before the Commissioner, the applicant only sought to cancel the agreement on the 31 March 2014 i.e. once her resignation, in terms of the agreement, had already become effective. The various arguments proffered on her behalf that a ‘dismissal’ arose consequential on the purported cancellation must therefore fail.

- [20] The final in the series of alternative reasons supporting a purported dismissal listed by Mr Kantor was that the Agreement had converted her employment into a fixed term contract which applicant had a reasonable expectation would be

renewed. Here he returns to “blowing hot and cold” and dispensing with his claim that the contract was breached. In any event, the content of the Agreement bears of no such interpretation setting out as it does the conditions on which any future employment with UCT will be premised. These contemplate a funded position which she did not have during the currency of the Agreement, neither the same or similar conditions as that which pertained before the 31 March 2014.

[21] In view of the above, and whether applying the review test in jurisdictional matters¹ or the ‘reasonableness’ test, the Award is not susceptible to review. This brings me to the issue of costs. The University argued that the applicant had sought costs both at arbitration and on review and that her insistence on reopening matters that had been finalised by prior settlement was unreasonable. I do not find any reason that costs should not follow the result. In the premises, I make the following order:

Order

1. The application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

¹ See SA Rugby Players association & Ithers v SA Rugby (Pty) Ltd & Others (2008) 29 ILJ 2218 LAC

Appearances:

Applicant: Peter Kantor instructed by Dorrington Jessop Attorneys

Third Respondent: Bowman Giffillan Attorneys

LABOUR COURT