THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO. J 867/15

In the matter between:

PHILLIPINE MATLOLE MAHASHA **Applicant**

And

BT INTERIOR DSGN (PTY) LTD **Respondent**
(REG: 2014/012806/07)
(PREVIOUSLY A CC WITH REG: 2008/022241/23)
AKA BT GROUP

Heard: 24 May 2018
Delivered: 08 June 2018

Summary: Entitlement to claim for damages under contract of employment subject to probation not proved. Application dismissed.

JUDGMENT

BALOYI AJ

Introduction

[1] A claim for damages arising out of termination of contract of employment forms the crux of the Applicant's case. The contract was according to the Applicant terminated with a period of 31 months remaining prior to its expiry date. The Applicant has approached this Court in pursuit of an order holding the Respondent

liable for payment of damages suffered equivalent to the income she would have earned had she worked throughout the contract period. Her claim was crafted as follows in the notice of motion:

> "1. That the Respondent is in breach of its contract with the Applicant;
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> 2. That the Respondent is directed to pay the Applicant the equivalent to 31 months' salary amounting to R502 665.00;
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> 3. That the costs of this application be paid by the Respondent;
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> 4. Further and/or alternative relief."

[2] It is of high importance to state at this point that the Applicant approached the Court by way of motion proceedings, which application was opposed and eventually set down for arguments. The matter was removed from the motion Court roll as per the order made by Van Niekerk J coupled with direction to have it enrolled on the trial roll. The parties proceeded with filing of pre-trial minute as directed and the papers filed took place of pleadings for purposes of Rule 6 of the Rules of the Labour Court.

[3] The facts of the matter are clearly set out in the three sets of affidavits which are by and large common cause. In the pre-trial minute the only two issues in dispute were captured as follows:

> "4.1. It is in dispute whether or not the Applicant has recourse to acclaim of damages after the unfair dismissal dispute was settled at the CCMA. (Sic)
>
> 4.2. It is in dispute that the Applicant has suffered damages And, if so, what the Quantum of the damages was."

[4] Consequently the Court is called upon to *determine whether the Applicant has suffered damages and, if so, what the quantum was for compensation in terms of section 77A (3) of the Basic Conditions of Employment Act*[1] *(BCEA*). It further deserves mention that soon after termination of the employment relationship between the parties, the Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and

[1] Act 75 of 1997.

Arbitration (CCMA). The parties subsequently reached settlement in terms of which the Respondent was to pay compensation equivalent to two months' remuneration to the Applicant. The Respondent complied with the agreement.

Factual Background

[5] The oral evidence coupled with what was already on record by way of affidavits revealed that the employment contract which is the subject matter of these proceedings was entered into on 05 January 2015 and was terminated on 08 February 2015. The Applicant was appointed as a Vegetation Project Manager, the duties attached to the position were primarily co-ordination of projects related to the control of vegetation in Eskom sites in Gauteng and technically to other provinces where the Respondent had dealings with Eskom. At the time of termination of the contract, the Applicant and her team of Horticulturists were undergoing training on core operational activities and familiarising themselves with relevant sites.

[6] The Respondent invoked clause 1.2 of the contract of employment when terminating the employment relationship between itself and the Applicant which reads as follows;

> "1.2 The EMPLOYEE is employed on a trial basis for the first 3 months of employment to determine whether the EMPLOYEE possesses the necessary skills, personality and motivation to do the tasks for which he is employed and whether the EMPLOYEE complies with the operational requirement for a fixed term position at the EMPLOYER. If after the trial the EMPLOYEE proves to the EMPLOYER that he complies with the requirements, he will be appointed without any notice on a 33 months contract with possible extension and rollovers."

[7] It was common cause that the clause made the fixed term employment contract of the Applicant subject to a three months' probation period. In the light of the settlement agreement reached at the CCMA the Respondent maintained that this Court lacks jurisdiction to adjudicate on claim for damages based on the very same termination. To put the relevant issues to perspective, it is thus important to place a look at the preamble of the settlement agreement entered into between the parties at the CCMA which reads as follows:

> "The undersigned parties record the settlement of their dispute in the following terms. By signing this agreement, the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content hereof. This agreement is in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payments due to the Applicant unless specifically excluded in paragraph 4 of this agreement."

[8] In defending the termination the Respondent made some allegations of misconduct against the Applicant which did not form part of the reasons contained in the letter of termination. The Respondent further attempted to use WhatsApp messages to demonstrate that the Applicant secured employment with City of Tshwane based on her remark that she was enjoying the City of Tshwane. Effectively nothing came out of this.

[9] The Respondent in arguments persisted with its jurisdictional point that the dispute had been disposed of before the CCMA on full and final basis. The Applicant's only recourse was to bring an application to set the settlement agreement aside. In support of this point Mr Tooka relied on *Goussard v Impala Platinum Ltd*[2]. The Applicant as a party bearing onus has failed to place evidence that had she been assessed at the end of the probation period, her employment was bound to be confirmed for a period of 31 months. Given that she had received her January salary and further payment equivalent to two months' remuneration, it should be accepted that she had earned what was due to her in respect of the probation period.

[10] The Applicant's reaction to the point raised by the Respondent was as argued by Mr klopper that the Applicant's finalized unfair dismissal claim has no relation with the present claim which is rested on the breach of contract. In support of her arguments, reliance was placed on *Johnson & Johnson v Chemical Workers' Industrial Union*[3] and again on *Fedlife Assurance Ltd v Wolfaardt*[4]. Since the Respondent did not afford the Applicant an opportunity to be assessed, termination of her contract before the end of the probation period coupled with its failure to proffer a cogent reason, the Respondent

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[2] (2012) 33 ILJ 2898 (LC)
[3] (1999) 20 ILJ 89 (LAC).
[4] [2002] 2 ALL SA295 (A).

should as such be found to be in breach of the contract. The Applicant should under the circumstances be awarded damages as prayed for.

The Jurisdictional Point.

[11] The terms settlement agreement were completed on the CCMA *pro forma* settlement agreement form. The insertion of the preamble referred to above certainly demonstrates that the CCMA was at all material times alive to the fact that parties do have other remedies on whatever dispute referred to it on the particular cause of action. The Respondent's reliance on the *Goussard* decision cannot be supported as the reasons for a finding of lack of jurisdiction were based on the pleading which happened to have been bad in law. In the matter in question the Applicant relegated the Court to a one stop shop for a relief under Labour Relations Act[5] (LRA) while asserting its rights under a common law breach of contract.

[12] In *Dial Tech CC v Hudson and Another*[6] the Court had in this respect this to say at paragraphs 63 and 64:

> "[63] Whilst the cause of action in both the constructive dismissal and the sexual harassment cases may arise from the same facts and circumstances, their remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and the EEA respectively.
>
> [64] In terms of the constructive dismissal, the matter is firstly, before reaching arbitration or adjudication, processed through conciliation in terms of s 135 of the LRA. If conciliation fails the employee is entitled to refer the matter to arbitration under the auspices of the CCMA or a bargaining council whichever is applicable. However, dismissal disputes, referred to conciliation in terms of s 187 of the LRA, are adjudicated by the Labour Court if conciliation fails."

[13] This principle has undeniably been developing back from the time of *Fedlife Assurance*[7]. I have no doubt that it is now a settled law in this regard. The Labour Appeal Court had

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[5] Act 66 of 1995 as amended.
[6] (2007) 28 ILJ 1237 (LC).

in *Gauteng Shared Services Centre v Ditsamai*[8] restated the position at paragraph 17 as follows:

> [17] When the relevant facts are set out thus, it is clear that the second case brought by respondent was predicated on an allegation of unfair discrimination as set in 6 of the EEA. This dispute requires a completely different determination to that which confronted the arbitrator, which turned on the fairness of an early termination of the contract. In the case based on the EEA, the court was required to make a determination as to whether there had been unfair discrimination in the refusal to appoint the respondent to a permanent position and the concomitant preferences given to other applicants who were of a different racial group."

[14] In this regard I do not wish to sit much on this point other than saying that this Court has jurisdiction to deal with the Applicant's claim for damages under the BCEA.

<u>The Applicant's entitlement to damages.</u>

[15] The crux of this matter as pointed above is rested on this point and further to what extent in terms of quantum. In *South African Football Association v Mangope*[9]. The Labour Appeal Court (LAC) unpacked what needs to be considered when the Court is confronted with a claim of this nature, the following was thus said in paragraphs 44 and 45:

> "[44] The standard in *Myers v Abramson* intimates that an employee will be entitled to his proven *actual* damages reduced by collateral benefits and other justifiable deductions. In an action for damages the onus of proving damages rests on the plaintiff. The mitigation rule requires the defendant to prove that the amount claimed by the plaintiff does not represent the true amount because of a failure to take reasonable steps to mitigate; the evidentiary burden shifts to that extent. There

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[7] Ibid.
[8] (2012) 33 ILJ 348 (LAC).
[9] (2013) 34 ILJ 311 (LAC).

remains nonetheless a duty on a plaintiff to prove the value of the prospective loss of the expectancy of income.

[45] In accordance with general principle, a plaintiff claiming damages for a prospective loss of future salary must adduce evidence enabling a fair approximation of the loss even though it is of uncertain predictability and exactitude. It is not competent for a court to embark upon conjecture or guesswork in assessing damages when there is inadequate factual basis in evidence. Moreover, allowance has to be made for the contingency or probability that the anticipated future loss may not in fact eventuate, at least not in its entirety, because the dismissed employee may obtain another job or source of income. There should be evidence as to the reasonable period it would take a person in the position of the respondent to obtain analogous employment. By similar token, any amount awarded as damages for future loss has to be discounted to current value. In other words, the value of the expectancy of future salary before and after the breach has to be determined in order to quantify damages. Where it is highly probable that the expectancy would have been realized but for the breach, the value of the expectancy will usually be the value of the expected income (the salary for the unexpired period) less amounts which reasonably might be earned (potential collateral and mitigated amounts), adjusted firstly by a contingency for the possibility of the entire loss not being realized, and discounted in addition for the advantage of the expectancy being accelerated or received earlier than it would have been."

[16] Turning on to this matter, the Applicant's case is rested on two issues namely, the termination of her contract on 08 February 2015 and that its termination before the end of probation period constituted a breach of contract. Secondly as a result of the breach, the Respondent should be held liable for payment of damages to the Applicant. Rightly or wrongly so, it is not in dispute that the termination was at the instances of the Respondent. Legally, the end of the probation period brings about one of the two results, that is, the employee's further employment is confirmed beyond the probation period or not confirmed. The pertinent question to be addressed is what informed the Applicant's claim for damages equivalent to 31 months' remuneration while the contract was terminated before the end of probation period. The response to this question can only be

found in the Applicant's case that is her ability to place evidence that she was bound to succeed in her assessment at the end of the probation period, to entitle her confirmation of appointment for a period of 31 months.

[17] Effectively the Applicant is faced with a task of establishing that she was indeed a party to a contract that was to run for 31 months prior to canvassing its breach and the remedies. To this end and based on what is placed before the Court which is indeed and by and large of common cause in this respect, the Applicant has not attempted to demonstrate this as her case was solely focused on the last day of the 31 months period without any certainty about the first. In essence it cannot be said that the Applicant is entitled to a claim for damages under a contract which its endurance was subject to successful completion of probation. This Court is siting with absence of evidence to the effect that the Applicant would have succeeded had the assessment been undertaken.

[18] As tapped from the LAC's position in the *Mangope* case, the Applicant if it was to be assumed that she had established a contractual right, a mere averment that damages to be awarded should be equivalent to the remuneration she would have earned for the period of 31 months, is lacking in terms of proof of such damages. I have taken note of Mr Klopper's submission that the Court should in determination of the amount of damages apply its discretion. No quantum was placed before this Court to represent her past damages as well as future damages. The averments that she had secured a new job in March 2018 were not backed by any evidence as to what extent does the new job mitigate the damages. This is a stage where nexus between the breach and the damages becomes of relevance.

[19] Based on the above I am disinclined to accept that the Applicant has made a case for the relief sought. The application stands to fail in this regard. I am of the view that this is not a matter which calls for costs to be awarded against the unsuccessful party as it will not be within the requirements of law and fairness.

[20] In the premises, the following order is made:

<u>Order</u>

1. The Application is dismissed.

2. There is no order as to costs.

M M Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr H Klopper of Henk Kloppers Attorneys

For the Respondent: Mr L Tooka of MS Molebaloa Attorneys