



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J841/24

In the matter between:

DIMAKATSO MDLULI

Applicant

and

NATIONAL HOUSING FINANCE CORPORATION

Respondent

Heard: 29 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives. The date and time for hand-down is deemed to be 02 December 2025.

JUDGMENT

MAKOELE, AJ

Introduction

- [1] This is an application in terms of section 77(3) of the Basic Conditions of the Employment Act¹ (BCEA) as amended, to declare that the Respondent has breached the employment contract that exists between the parties in that the Respondent has failed and/or refuses to pay the Applicant's salary after it is due and payable. The Applicant further requested the court to order the Respondent to pay the Applicant an amount of R56 666.67, a due and outstanding salary.
- [2] The Applicant argued that she is entitled, in terms of the employment contract, to a monthly salary that is due and payable on/before the last of each month.

Facts

- [3] On/about 31 May 2024 the Applicant fell ill, and her condition deteriorated to the extent that she took leave of absence. She kept the Respondent informed at all relevant times and submitted sick notes. While on sick leave, the Respondent informed her that she had exhausted her sick leave. She subsequently sent an email to the Respondent, following which she thought the issue had been resolved. However, the Respondent withheld her salary without further notice. According to the Applicant the withholding of the salary is invalid and in breach of her contract as it is not based on any law and/or policy. The Applicant went further to submit that the principle of '*no work, no pay*' is not applicable, as it is not by choice that she has not been at work. The Respondent, according to the Applicant should have conducted an incapacity inquiry into her capacity to perform her duties instead of withholding her salary.
- [4] The annexures attached are the Applicant's employment contract, clinical psychologist report dated 31 May 2024 booking the Applicant off from 03 June 2024 while awaiting admission to Vista Clinic, specialist physician note booking the Applicant off from 13 to 20 June 2024, psychiatric report dated 01 August

¹ Act 75 of 1997.

2024, email from the Respondent to the Applicant dated 04 July 2024, letter from the Applicant's attorneys to the Respondent dated 01 August 2024.

- [5] In its supplementary affidavit, the Applicant submitted that the communication between herself and the Respondent's Payroll Officer, Ms. Sebera Essop ("Sebera") created a legitimate expectation. The Applicant went on to submit that Sebera assisted her with claim forms and that after she (Sebera) received feedback from the insurer, she contacted the Payroll Officer. The feedback was that the claim would not be approved because of the required three-month waiting period. Sebera subsequently advised the Applicant that the Respondent would continue paying the Applicant's remuneration until such time that the insurance claim is approved and the Respondent would be reimbursed accordingly when the insurance claim pays out.
- [6] As for leave days, she had a total of 34 days left. However, the Respondent miscalculated her leave days. The Applicant disputed the calculation of her leave days. As for 31 May 2024 she had 26 leave days and eight vacation leave days, which in total were 34 days.
- [7] The Respondent, on the other hand, raised two points. Firstly, that the Applicant's submissions relating to the urgency of the matter must be ignored as the court has already ruled that the matter is not urgent. Secondly, the submissions on the application for leave to appeal should also be discarded as same was unsuccessful. The Respondent submitted that the legal question this court is called upon to decide on is whether the Applicant is entitled to payment of her salary for July 2024 in the amount of R55,666.67. Further, that there is no application before this Court to ask it to compel payment of salary for any other month either before or after this period. The Respondent argued that the Applicant cannot supplement this point in the replying papers as her case is framed solely in the founding papers, nothing more.
- [8] The Respondent submitted that section 23 of the BCEA states that an employer is absolved from the duty to pay the employee's remuneration for "sick leave"

contemplated in section 22, if they are absent from work for two straight days without producing a medical certificate. Secondly, under 5.4.8.13 of the National Housing Finance Corporation Code of Conduct (the code) an employee will be considered being absent without official leave if they are absent from work for five days without an official reason. The Applicant signed her employment contract and clause 9.2 states that the employee is entitled to 30 days of sick leave in a 36-month cycle, but within the first six months of employment, the employee shall only receive one day, for every 26 days worked. Clause 9.2.3 states that for any absence based on illness or injury, the employee must provide a medical certificate if the employee is absent for two straight days or on more than two occasions in an eight week period. The Applicant had not been at work since 31 May 2024. The Respondent further submitted that the employer is absolved from the duty to pay the employee's remuneration for sick leave contemplated in section 22, if they are absent from work for two straight days without producing a medical certificate.

Analysis

- [9] I cannot discard the entire application simply because this court ruled that the matter is not urgent. The court only ruled on urgency and in particular lack thereof of the matter. The founding affidavit has been subsequently supplemented.

Did the Respondent create a legitimate expectation?

- [10] The test of whether a person can rely on a claim of legitimate expectation of some future event occurring is objective.

- [11] In *Walele v City of Cape Town and Others*² the court remarked:

‘... In order to answer this question, it is necessary to look at the test formulated by the courts for determining the existence of legitimate expectation. The enquiry is primarily factual and the focus during this stage is on objective facts

² 2008 (6) SA 129 (CC) at para 38.

giving rise to the expectation. The aggrieved party's state of mind is irrelevant to the enquiry. Once the facts supporting an expectation are established, the enquiry moves to the second stage which is whether, in the circumstances of the case at hand, procedural fairness required a pre-decision hearing...'

[12] In *Jones v Commissioner for Mediation, Conciliation and Arbitration and Others*³ it was held that:

'... 'The appellants carried the onus to establish that they had a "reasonable expectation" that their contracts were to be renewed. They had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew ...'

[13] I therefore agree with the Respondent that the question is not whether the Applicant subjectively believed she would receive a salary but whether a reasonable employee in the same circumstances, viewed objectively, would have formed the same expectation. The duty of this court is to assess the factual circumstances and come to an equitable conclusion.

[14] The Applicant's supplementary papers read:

'..... the Respondent has created legitimate expectation in relation to payment of remuneration; and that the Respondent is ordered to effect payment of remuneration until approval of incapacity claim by the insurer.....'. There is no indication that the insurer would pay.

[15] The Applicant alleges that she thought the issue had been resolved, yet she does not explain how it was resolved and/or how she arrived at the assumption that the matter was resolved.

[16] The Applicant argued that the Respondent miscalculated her leave days yet there is no proof of that effect. In absence of same, I must accept that the leave was not miscalculated. In either of the three affidavits (founding, supplementary

³ (C709/2018) [2021] ZALCCT 10 (6 January 2021) at para 44.

and replying), is there any evidence that the Applicant produced a sick note or medical certificate for July 2024, the month in question.

- [17] The Applicant submitted the communication between the Applicant and Ms. Sebera Essop reads:

‘I was instructed by HR Personnel to liaise with the Payroll Officer (Ms. Essop) regarding incapacity remuneration insurance claim. However, the said annexure reads: ‘.....you might be eligible for income replacement benefit.....’

- [18] The Applicant has not demonstrated how the Respondent has created an expectation, let alone a legitimate one. Annexure “ESBC” that the Applicant referred does not, in anyway indicate that Mr. Essop committed to pay the salary until the insurance claim is approved. The annexure “WA” referred to by the Applicant is a screenshot of a WhatsApp with only dates and missed calls and a keypad. There is nothing on this annexure that assists the Applicant.

- [19] In its replying affidavit the Applicant submits that the Respondent may ‘*exercise an election to end the employment relationship*’⁴, the Applicant thereafter states⁵: ‘*my claim is not necessarily for the enforcement of the BCEA...*’ This is a clear contradiction of the founding affidavit as well as para 5 of the replying affidavit. Para 16 states that his claim is justified in terms of the BCEA. The Applicant’s founding papers read:

“the application is brought in terms of sections 77(3) read with section 77A(e) of the BCEA. The Applicant’s application is premised on the following prayers: that the Respondent is declared to have breached the employment contract that exists between the parties in that the Respondent has failed and/or refuses to pay the Applicant’s salary after it is due and payable; that the Respondent is ordered to pay the Applicant the amount of R56 666.67 which is due and outstanding salary the Respondent owes to the Applicant’.

⁴ At para 8 of the founding affidavit.

⁵ At para 10.2 of the founding affidavit.

[20] The Applicant also submitted that Sebera further indicated to her that according to ‘... *how they handle these situations, the Respondent would pay her remuneration and once insurance approves, the Respondent will be reimbursed accordingly...*’ None of the annexures that were submitted by the Applicant confirmed this submission.

[21] Having due consideration to the above, I find no basis for this application and therefore this application stands to fail.

Costs

[22] I have had regard to the requirements of the law and fairness in regard to an award of costs. Although both parties argued costs, I am of the view that it is not a matter where a cost order is appropriate.

[23] In the results the following order is made:

Order

1. The application is dismissed;
2. There is no order as to costs.

R. Makoele

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv. T. Nkosi

Instructed by : Matome Mametja Incorporated.

For the Fourth Respondent: Adv. C. James

Instructed by : Haasbroek & Boezaart Incorporated.

LABOUR COURT