IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C657/2009

In the matter between:

MAMOTSHABO SARAH MOLOTO

Applicant

and

CITY OF CAPE TOWN

Respondent

–

JUDGMENT

–

FRANCIS J

Introduction

1. The applicant brought a claim for damages in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) after her contract of employment was terminated by the respondent. She is not seeking specific performance but only damages. The respondent's defence is that the contract of employment was terminated lawfully in that it had given the applicant a month's notice of termination in terms of the contract of employment.

Background facts

2. The applicant was initially employed by the respondent in a permanent capacity as Director: IDP on 1 April 2002. Following restructuring within the respondent, she was employed as the respondent's Director: Citizen Relationship Management on a five-year fixed-term contract, terminating on 31 March 2010. On or about 27 June 2007 her fixed term contract was by agreement, varied to an indefinite period of employment. Her contract of employment was terminated with effect from 31 March 2010 by the respondent who gave her a month's notice. She then instituted these proceedings. The matter was initially enrolled for a hearing on 5 May 2010. Evidence was heard on the first day for about an hour when the matter was postponed to 6 May 2010. Because more discovery had to take place, the matter was postponed to 20 September 2010.

3. On 18 August 2010 the applicant was handed a with prejudice letter in terms of which she was given notice in terms of section 37(1) and offered notice pay in terms of section 38 of the BCEA. The respondent also tendered to pay her remuneration for the period between 1 April 2010 and 31 August 2010 and accrued leave pay. The tender was open for acceptance until close of business on 25 August 2010. The tender was not accepted by the applicant. The matter did not proceed on 20 September 2010 because the applicant had secured new attorneys to represent her. The matter was eventually re-enrolled for a hearing on 8 November 2010. On that day, the respondent brought a rule 11 application read with rule 33(4) of the High Court Rules. The application was opposed by the applicant. After hearing arguments I refused to grant the order prayed for. Because of this, the parties met and concluded an agreement which resulted in the proceedings being shortened considerably. They agreed that no evidence would be led. It is therefore not necessary to set out the

evidence led previously and all the issues raised in the pleadings and pre-trial minute.

Analysis of the evidence and arguments raised

4. On 9 November 2008, the parties concluded the following agreement:

"For the purposes of the above Labour Court proceedings only, the parties have agreed on the following:

1. Respondent accepts that, in or about 27 June 2007, Applicant's fixed-term contract was, by agreement, varied to an indefinite period contract of employment.

2. Applicant abandons her claim for specific performance and confines her claim to one of damages for breach of contract arising from an alleged wrongful termination of that contract on 31 March 2010.

3. Without prejudice to the Applicant's right to contend that the Respondent was not legally entitled to give the Applicant notice terminating her contract of employment, the standard notice period applicable to the Respondent's employees, including the Applicant, is four weeks.

4. The Respondent gave more than one month's prior notice of its intention to terminate the Applicant's contract of employment with effect from 31 March 2010.

5. Annexure 14E to the Respondent's Response (and the cheque referred to therein) was sent to the Applicant and received by her on or about 18 August 2010.

6. The sum tendered in the aforementioned cheque constituted one month's remuneration.

7. Neither party shall lead any further evidence".

27.5 Further and/or alternative relief".

5. The issues that arise for determination are as follows:

5.1 Whether the respondent has breached the contract of employment. The applicant contends that the respondent has breached the contract of employment by having given her notice of termination. The respondent contends that the contract of employment was terminated lawfully in that she was given notice.

5.2 Whether the applicant is entitled to any damages.

6. The applicant's claim is a contractual one. It is founded in common law and is brought in terms of section 77 (3) of the BCEA. She is not seeking specific performance but damages arising from the breach of contract arising from an alleged wrongful termination of contract on 31 March 2010. The issue of unfairness does not arise in this instance. It will only arise in a statutory claim brought in terms of the Labour Relations Act 66 of 1995 (the LRA). Her union had referred an unfair dismissal dispute to the relevant Bargaining Council but withdrew it.

7. In terms of the agreement referred to in paragraph 4 above, the respondent has accepted that the applicant's fixed term contract was by agreement varied to an indefinite period contract of employment. The question that arises is whether the respondent can terminate an indefinite contract of employment by giving a month's written notice. In terms of the common law, an indefinite contract of employment will endure indefinitely and is terminable by either party on the giving of reasonable

notice. In this regard see *Tiopaizi v Bulawayo Municipality* 1923 AD 317. Such contracts are said to run from period to period, either daily, weekly, monthly or annualy, depending on the period provided in the contract for the calculation and payment of remuneration. An indefinite contract of employment may be terminated by both parties if they give reasonable notice of termination. The BCEA requires that four week's notice of termination be given for a monthly paid employee. The parties agreed that in the present case the standard notice period applicable to respondent's employees including the applicant is four weeks.

8. The applicant contended that the respondent was not legally entitled to give her notice of terminating her contract of employment. It could not terminate the contract and when it purported to do so, breached the contract of employment. The notice to terminate could only be lawful if it was for a probable cause. The contract of employment could not be terminated without any good cause. The giving of the notice to terminate may have consequences. The respondent by having given notice of cancellation, repudiated the contract and must pay her damages. Notice pay is not damages. There was an implied term in the contract of employment that there would be fair dealing. The relationship between the parties is one of trust and confidence and at common law conduct clearly inconsistent with it may lead to a cancellation of the contract. Contrary conduct constituted breach. In this case, the applicant elected not to cancel the contract and the first price would have been to hold the respondent to contract but this option was not open to her. The applicant relied on *Council for Scientific & Industrial Research v Fijen* 1996 (2) SA (1) (A); (1996) 17 ILJ 18 (A).

9. The following appears in *Council for Scientific & Industrial Research vs Fijen* at page

20 paragraphs B - D:

"It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent' party to cancel the agreement. On this basis our law is the same as that of English law, namely that in every contract of employment there is a duty that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. This duty may be breached without the intention to repudiate the contract. It is sufficient if the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. A reciprocal duty also rests on the employee. However, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from naturalia contractus."

10. The above decision was followed in a number of cases. However the issue of implied term in a contract of employment in common law was rejected in *S A Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA). The following appears in the judgment:

"58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.

[33] I find myself in respectful agreement with this reasoning. I would add to it that there is the further bar in South Africa that the legislation in question has

been enacted in order to give effect to a constitutionally protected right and therefore the court must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied terms in contracts of employment. I am also fortified in that conclusion by the fact that it reflects an approach adopted in a number of other jurisdictions. In addition the Constitutional Court has already highlighted the fact that there is no need to employ such provisions into the contracts of employment because the LRA already includes the protection that is necessary. The passage I have in mind is the following:

> *[42] The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices'.*

[35] I do not think the decisions they refer to go as far as the writers suggest. While the Constitution guarantees to everyone 'the right to fair labour practices', and also call upon courts, when developing the common law, to 'promote the spirit, purport and objects of the Bill of Rights', it does not follow that courts are thereby enjoined to develop the common-law contract of

employment by simply incorporating in it the constitutional guarantee. Where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed. Indeed, to duplicate rights that exist by statute does no more than to create the 'jurisdictional quagmire' that is referred to by Tamara Cohen. As she rightly points out, the consequence is that the carefully crafted structure which those rights were legislatively created becomes superfluous.

[37] I share the view of Professor Halton Cheadle, whose role in the drafting of the LRA is well documented, that where, as here, the employees are protected by the LRA, s 8(3) of the Constitution does not warrant or require an importation from the realm of constitutionally protected labour rights into individual contracts of employment by way of an implied term. The LRA specifically gives effect to the constitutional right to fair labour practices and the consequent right not to be unfairly dismissed. Accordingly the constitutional basis for developing the common law of employment and thereby altering the contractual relationships is absent.

[55] I do not think that any of the cases I have referred to can be said to have decided authoritatively that the common law is to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices. It is uncontroversial that the LRA is intended to give effect to that constitutional right and I see no present call, certainly not in this case, for the common law to be developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act). The obiter dictum in Gumbi, which has been reiterated without elaboration,

and without apparent consideration of the matters that have been dealt with in this judgment, cannot be considered to be authoritative.

[56] In my view the interpretation given to the cases mentioned goes further than the judgments warrant and they provide no obstacle to the correctness of the analysis set out above. That analysis concludes that, insofar as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices. Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer. It is precisely similar attempts that in my view occasioned the recent jurisdictional debate in cases such as Chirwa, Makhanya and Gcaba."

11. Applicant's counsel has argued that the present facts were distinguishable from the *Mackenzie* matter. I do not agree. There is no substance in the applicant's submissions. The facts of this case are not distinguishable from those in *Mckenzie*. The position has changed after the *Mackenzie (supra)* judgment. The position might have been different if the parties had made provision for this in the contract of employment. What the applicant contended has not been pleaded in the pleadings. What was pleaded is that the respondent breached the contract of employment by having refused to employ her permanently. Contracts of employment are not subject to an implied term that an employee will not be unfairly dismissed unless it is

specifically agreed upon in the contract.

12. It is common cause that the applicant's fixed term contract was varied to an indefinite contract. The parties agreed that the standard notice period applicable to the respondent's employees, including the applicant is four weeks. Where an employer gives the requisite notice, the contract is lawfully terminated. There is no evidence before me that the contract of employment contains a clause limiting the right to dismiss. Since it is common cause that the respondent has given more than one month's prior notice of its intention to terminate the applicant's contract of employment with effect from 31 March 2010, the contract of employment was terminated lawfully. It becomes unnecessary to deal with the issue of damages.

13. This brings me to the rule 11 application. I had refused to grant the application and indicated that I would provide reasons for the order that I made. The respondent had sought an order directing that the following questions be determined separately and before hearing further evidence on the following on the other issues in dispute between the parties:

"*On the assumption (in favour of the applicant) that the contract between the parties was amended from being a fixed-term contract to a permanent contract (it being noted that this remains disputed by the Respondent); whether the notices of termination referred to in paragraphs 12A.2 and 12.A.3 of the amended Response (i.e. annexure 'R14.A.', 'R14B' read with R14C; and/or R14D lawfully terminated the contract; and/or whether the sending of Annexure R14E (referred to in paragraph 12.A.4 of the amended Response), together with the cheque which accompanied it, lawfully terminated the contract. In view of the answers above, whether*

reinstatement or specific performance is a legally competent contractual remedy which could be awarded to the applicant".

14. The respondent also indicated that it would if the application for the above relief was granted, thereafter apply on the same papers, duly amplified if need be, for orders declaring that the employment contract between the parties was lawfully terminated; directing the respondent to comply with its offer in terms of Rule 22A; dismissing the applicant's claim in the main proceedings and directing the applicant to pay the respondent's costs of the main proceedings incurred after 15 October 2010.

15. The rule 11 application was opposed by the applicant on two grounds. The first is that attorney MacRobert who deposed to the founding affidavit did not have *locus standi* in those proceedings. He is a legal representative of the respondent and not a party to the proceedings. He could therefore not depose to an affidavit on behalf of the respondent. He is not a councillor or an employee of the respondent and as a result could not act as if he is a party to this process. The second ground was that the application should fail since the application was made on an assumption.

16. The rule 11 application was dismissed primarily because it was based on an assumption. Decisions are taken by courts not on assumptions but on facts. Those facts are sometimes common cause or in dispute. It is then for the court to decide what the facts are. This Court may have granted the application if the parties had agreed that the applicant's placement was duly made in terms of the realignment process and that her fixed-term contract was varied to an indefinite contract of employment. Whilst it is trite that an application for an order under High Court rule

33(4) can be made any time up to the judgment, the court must be satisfied that it would be convenient to do so. I was not satisfied that it would have been convenient to do so. Even if I had granted the application, it would not have disposed of the matter since evidence still had to be led. It is also clear from the notice of the rule 11 application that the respondent would still have approached this court for the relief referred to in paragraph 14 above. Some issues that arose in the rule 11 application could have been dealt with at a pre-trial meeting.

17. It was for these reasons that I refused the rule 11 application.

18. The respondent has made a formal payment into Court. It sought an order that in the event the applicant refusing to accept the tender that she should not be entitled to the costs paid after it.

19. I do not believe that this is a matter where a cost order should be made in favour of any of the parties. Both parties sought costs against the other. The parties were at some stage miles apart as far as the issues are concerned. Real progress was made after this Court had dismissed the rule 11 application. Common sense prevailed and both parties were able to crystallise the real issues. Part of the issue in dispute was whether the applicant's fixed term contract was converted into an indefinite contract of employment. The respondent was not prepared to admit this. It will be fair and just not to award any costs.

20. In the circumstances I make the following order:

20.1 The application is dismissed.

20.2 There is no order as to costs.

_____

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	A P LAKA INSTRUCTED BY RAMUTLA AT LAW INC
FOR RESPONDENT	:	A FREUND SC INSTRUCTED BY HEROLD GIE ATTORNEYS
DATE OF HEARING	:	5 & 6 MAY 2020 AND 8 & 9 NOVEMBER 2010
DATE OF JUDGMENT	:	19 NOVEMBER 2010