IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J1086/08

In the matter between:

LABOURNET PAYMENT SOLUTIONS

(PTY) LTD APPLICANT

AND

DANIEL FRANCOIS VOSLOO RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of rule 7 of the Rules of the Labour Court read with section 77 of the Basic Condition of Employment Act of 1997. In terms of this application the applicant claims damages from the alleged breach of the contract of employment, by the respondent in that he is alleged to have resigned without giving a proper notice.

[2] The applicant further claims that the respondent should be ordered to refund it the sum of R40 000.00 (fourty thousand Rand), being the agreed amount and quantum of the training of the respondent by the applicant, in the event of early termination of the employment contract.

Background facts

[3] The following facts are common cause: The parties entered into a fixed term employment contract on 25th July 2007 in terms of which the respondent was employed as a pay roll administrator as from the 30th July 2007 on a salary of R13 000.00 per month. The contract was to expire in October 2007. The contract further provided that the applicant would provide the respondent with in-house training in respect of relevant labour law, industrial relations and its practical application at the costs of R40 000.00.

[4] On the 5th October 2007, the respondent issued the applicant with a 30 (thirty) days notice of intention to terminate the contract of employment with the applicant. However, shortly thereafter he issued a further letter of resignation on the 9th October 2007. The applicant accepted the resignation as contained in the letter of the 5th October 2007.

[5] The issue between the parties arose in relation to the interpretation of the provisions of the contract and concerned in the main the period of notice of termination of the contract which the respondent ought according to the applicant to have given in the termination of his employment. The notice of termination of the contract is provided under both clauses 3 and 11 which respectively deal with *"TRAINING PERIOD"* and *"TERMINATION"* The relevant sub-clauses of clause 3 provides:

> *"3.3 For this training period, the employee will be regarded as being employed on a fixed term contract of employment, which will only*

endure for this training the employment of the employee shall automatically end as a matter of law terminate at the expiry of the training period, on the grounds that the term of this fixed term contract had been fulfilled.

3.4 Only if written notice is given at least 7 (seven) days prior to the expiry of the training period, this contract will be renewed, and will the employee's employment with the company continue on a permanent basis, on the terms as set out in this agreement.

3.5 Should the employee's employment be terminated by the company for any reason whatsoever during the training period, the company shall only be obliged to give the employee notice as prescribed by the Basic Conditions Employment Act from time to time."

[6] The relevant part of the contract for the purpose of this judgment under the heading *"TERMINATION"* provides:

"11.1 The employee's employment with the company may be terminated by him or by the company upon giving 1 (one) month's written notice to the other party concerned

11.2 . . .

11.3 The company shall, in order to advance and promote the training and experience of the employee, provide for the employee to attend extensive in-house training at the cost of the company, on all

relevant aspects of labour law, industrial relations and its practical application."

[7] The contract further provides for the recovery of the costs incurred by the employer in providing the in-house training of the employee at the termination of the employment. Clause 11.6.3 provides:

> *"11.6.3 The sum of R40 000.00 (fourty thousand rand) shall be immediately due, owing and payable by the employee to the company with effect from the date of termination of the employment of the employee with the company in the circumstances contemplated by clause 4.2 above . . ."*

[8] The case of the applicant in as far as the alleged breach of contract and the consequent damages it suffered is set out in the founding affidavit as follows:

> *"5.8 The actions of the respondent caused the applicant severe prejudice. The applicant was left with a situation that it was a payroll administrator short for several weeks, and the work had to be allocated to other administrators to the detriment of their existing work load, and attendances they already had, and to the prejudice of the applicant's clients.*
>
> *5.9 The work of payroll administrator requires detailed attention, and proper planning of such work, and such work load is scheduled well in advance. For this reason, and by law, proper notice is required.*

5.10 To find a suitable replacement payroll administrator, and to train such administrator to the extent of permitting that administrator to render services to clients of the applicant, will take at least a month. The applicant in the end was left without the services of a capable, administrator as a result of the breach of contract of the respondent, without prior notice, for about two months."

[9] Thus the essence of the applicant's case is that the breach of the employment contract by the respondent caused it damages. The applicant calculated its damages on the basis of a monthly salary which the respondent received. The applicant claims damages in the amount of R53 000.00 (fifty three thousand Rand), being an amount equivalent to respondent's monthly salary for the period of notice the respondent was required to give the applicant in terms of the contract. The respondent's monthly salary was R13 000.00.

[10] As concerning the refund for costs of the in-house training the applicant contends that the respondent agreed to serve the applicant for at least a year from date of signature of the employment contract and that in the event of the termination of the employment contract prior to the expiry of this period of one year, the sum of R40 000 would immediately be payable by the respondent to the applicant in terms of clause 11.6.3 of the contract of employment.

Evaluation

[11] The applicant contended that the respondent was compelled in terms of the agreement, to give it a 1 (one) month's notice of termination of his contract of

employment but failed to do so. As a result of this breach the applicant contends it suffered damages in the amount stated above. In support of its contention the applicant relied on the judgment of *National Entitlement Workers Union v Commission for Conciliation, Mediation and Arbitration & Others (2007) 28 ILJ 1223 (LAC),* where the Court held that:

> *"Where the employee has resigned without giving notice in circumstances where he was obliged to give notice, usually the employer does not even sue the employee for damages which in law he would be entitled to and the damages would be the equivalent of the notice pay. However, if an employer wants to sue an employee in such a situation, he does have a right to do so both at common law and in terms of the BCEA. Employers hardly use even this right."*

[12] The respondent on the other hand argued that the requirements of a three months notice which is provided for in paragraph 11 (eleven) of the employment contract only came into effect once she had acquired the status of a permanent employee on terms of clause 3.4 of the agreement. The respondent further argued that because he was still serving his 3 (three) months probationary period he was obliged to give a shorter notice of one week.

[13] Clause 11 of the employment agreement which requires 1 (one) month's notice has to be read with clause 3 (three) which in particular at clause 3.5 gives the applicant the power terminate the employment contract during the probationary period of the Basic Condition of Employment Act which is one weeks notice.

[14] Section 37(3) of the Basic Condition of Employment Act provides as follows:

> *"No agreement may require or permit an employee to give a period of notice longer than that required of the employer."*

[15] In my view the essence of the applicant's case is that it is entitled to give a shorter notice during the probationary period which was between July and October 2007. The employee on the other hand was not during that period entitled to a shorter period of one week but one month.

[16] I agree with the contention of the respondent that the provisions of section 37(1) of the Basic Condition of Employment Act applies to the provisions of clause 3.4 of the employment contract between the parties and therefore the respondent was entitled to terminate the contract during the probationary by giving 7 (seven) days notice.

[17] Turning to the facts of the case, it is common cause that the respondent initially served the applicant with the notice of intention of terminating the contract on 5th October 2007 and thereafter issued the second notice on the 9th October 2007. In the notice of the 9th October 2007, the respondent gave the applicant in essence 24 (twenty four) hours notice. That notice was shorter than 7 (seven), day's and therefore amounted to breach of the employment contract. The applicant was accordingly entitled as a matter of principle and law to claim for damages arising from the breach of the contract by the respondent.

[18] The next enquiry following the conclusion that the respondent had breached the contract of employment, is to determine the connection between the breach and

the damages the applicant suffered as result of the breach. This approach would apply assuming for argument sake it was to be accepted that the respondent was suppose to have given the applicant 1 (one) month's notice. In investigating the relationship between the breach of contract and the damages alleged to have been suffered by the applicant a two stage investigation is conducted to determine whether the damages were caused by the breach.

[19] The enquiry entails firstly determining the factual causation and then inquiring into legal causation. See RH Christie, *The Law of Contract in South Africa (5th Edition Butterworth) page 543.* The factual causation entails showing that "but-for" the breach the applicant would not have suffered the loss. The applicant is in this regard required to show no more than the probability that he or she would not have suffered loss but for failure by the respondent to comply with the terms of the contract by failing to give a proper notice.

[20] The second inquiry was enunciated *International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) at page 7001,* where the Court held that:

> *"The second inquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy play a part. This is sometimes called legal causation."*

[21] In the present instance in its founding papers the applicant does not take its case further than showing that the respondent has breached the employment contract.

The applicant based its claim on the argument that damages arose automatically from the breach by the respondent and the damages were equivalent to the period of notice calculated on a monthly salary of the employee. In this respect the applicant contended that it was prejudiced by the breach of contract and for several weeks it did not have a pay roll administrator. As indicated in the paragraph 5 of the applicant's founding affidavit, the case is not that it suffered damages in that it took a particular period to find a substitute for the respondent. The case of the applicant is that *"it will take at least a month"* to find another administrator.

[22] In *SA Music Rights Organization Ltd v Mphatsoe [2009] 7 BLLR 696 (LC),* the Court faced with a similar facts held that the employee's abandonment of the employment contract before the period constitutes breach contract, but that the employer was entitled to such damages as proved. In dealing with the issue of damages at paragraph 19 of the judgment Van Niekerk J had this to say:

> *"[19] This formulation of SAMRO's claim for damages begs a number of questions. First, there is no logical basis on which to assume that SAMRO's losses are necessarily limited to the remuneration and benefits that the respondent would have earned in a denied period of notice. When he resigned, the respondent may, for example, have been teetering on the brink of redundancy, making no significant contribution to SAMRO's business operations. In these circumstances, to have been relieved of the obligation to pay the respondent's salary for the balance of the notice period would be a*

benefit rather than a burden - there is little likelihood of any pecuniary loss in these circumstances. On the other hand, the respondent may have been an employee with rare and highly sought after skills, necessitating the engagement at a premium of a similarly skilled temporary employee. I see no reason why the application of the general rule would not entitle SAMRO in those circumstances to recover its losses, even though they may exceed what the respondent would have been paid had he worked his full notice period. These examples can be taken further - what if the respondent had been instrumental in securing a business transaction from which SAMRO would benefit by a substantial commission, and had breached his contract to commence work for a competitor in circumstances where the competitor stands to benefit instead? Surely SAMRO in those circumstances ought to have a claim for damages against the respondent beyond what the limited damages rule provides? These are difficult questions of law and policy, particularly in the light of the recent judgments of the Supreme Court of Appeal that recognise a mutual contractual obligation of fair dealing between employer and employee (see, for example, Old Mutual Life Assurance Co SA Ltd v Gumbi [2007] 8 BLLR 699 (SCA) and Boxer Superstores Mthatha v Mbenya (2007) 28 ILJ 2209 (SCA). The introduction of a contractual right to fair dealing in the employment relationship calls into question the

assumption that the purpose of damages for breach of an employment contract is simply to protect the aggrieved party's interest in a denied period of notice, or the unexpired portion of a fixed term contract. Breaches of mutual obligations of trust and confidence are unlikely to be remedied by an approach to the assessment of damages for breach of an employment contract such as that for which SAMRO contends. Happily, in the present matter, I need venture no further than SAMRO's founding affidavit and the obvious conclusion that it fails to establish any factual foundation on which its claim for damages might be assessed. In short, SAMRO has failed to establish any loss consequent on the respondent's breach of contract. For that reason, SAMRO's claim for damages must fail."

[23] In concluding on the issue of breach of the contract, I find that the applicant has failed to show the alleged loss it suffered (either because of failure to give a 30 or 7 seven days notice as the case may be) was as a result of the breach of the employment contract by the respondent. It is for this reason that I conclude that applicant's claim stand to fail.

The claim for the in-house training

[24] In my view there is a clear and genuine dispute of fact as to whether the applicant did provide the employee with the in-house training on labour law, industrial relations and its practical application or all aspects of its pay roll

administration and practical application thereof. This remains so even after seeking to resolve it through the test as set out in *Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) 623 (AD).* This claim should therefore be sent for oral evidence to determine whether or not the applicant did in fact provide training to the respondent as alleged.

[25] In the premises I make the following order:

(i) The applicant's claim arising from the breach of the contract of employment by the respondent is dismissed.

(ii) The claim regarding the payment of the in-house training is referred to oral evidence.

(iii) There is no order as to costs.

Molahlehi J

Date of Hearing : 23rd April 2009

Date of Judgment : 7th August 2009

Appearances

For the Applicant : Mr Sean Snyman of Snyman Attorneys

For the Respondent: Adv I Strydom

Instructed by : De Villiers Mojapelo Inc