

SOUTH AFRICA / JUDGMENT

De Beer v Minister of Safety and Security/Police and Another (P720/10) [2011] ZALCPE 7; (2011) 32 ILJ 2506 (LC) (23 May 2011) [2011] ZALCPE 7

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

P720/10

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IN

THE LABOUR COURT OF SOUTH AFRICA

(HELD

IN PORT ELIZABETH)

CASE

NO:P720/10

In

the matter between:

MATTHEUS

ANDRIES DE BEER Applicant

And

THE

MINISTER OF SAFETY

AND

SECURITY / POLICE First

Respondent

PROVINCIAL

COMMISSIONER

EASTERN

CAPE: M S LANDU Second

Respondent

JUDGMENT**LALLIE AJ**

- [1] This application was brought on a semi urgent basis. It was set down for 20 January 2011 when it was removed from the roll and heard on 3 March 2011. The applicant is seeking an order setting aside the termination of his services, reinstating him in his full salary, benefits and emoluments with interest, back dated as from 1 December 2009 pending the finalisation of his application for reinstatement and application for medical boarding.

FACTUAL**BACKGROUND**

- [2] The applicant joined the South African Police Service (SAPS) on 15 December 1980. In January 1993 the applicant started experiencing medical problems. Between January 1993 and 19 July 2007 he was treated for a number of ailments including Post Traumatic Stress Disorder (PTSD).
- [3] From 3 to 17 March 2009 the applicant was booked off sick for stress by a general practitioner. Dr Taylor, a Specialist Psychiatrist booked the applicant off sick from 17 March 2009 for PTSD and Major Depression. The applicant was thereafter booked off sick continuously until his contract of employment was terminated on 8 June 2010 after 30 years' service.
- [4] On 22 July 2009 Abram Greyling (Greyling), a Brigadier in the SAPS and the Chairperson of the Cluster Absenteeism Management Committee wrote a letter which was served on the applicant on 24 July 2009. The following is highlighted in the letter:
- 4.1 The applicant had been absent from work without approved leave of absence for an unreasonably long period of time and his conduct constituted misconduct;
- 4.2 The applicant had to report for duty within 2 days of the receipt of the letter;
- 4.3 The applicant had to make representations within 5 working days as to why his leave should not be treated as leave without pay. Failure to report for duty or make representations would lead to the suspension of his salary.
- [5] The applicant's only response to the letter was an application for a month's vacation leave which was granted.
- [6] The applicant alleges that he completed an application for ill-health retirement on 27 July 2009 and 2 applications for temporary incapacity leave (TIL), one on 3 September 2009 and the other on 11 October 2009 which he submitted to Colonel Booysen, the Commander of organised Crime in Port Elizabeth. The respondents denied that the applications were presented to Collonel Booysen.

- [7] On 17 September 2009 Greyling wrote a letter similar to the one he had forwarded to the applicant on 26 July 2009 informing him again that should he not resume his duties within 2 days of the letter or make representations within 5 working days as to why his absence should not be treated as leave without pay, his salary would be suspended. The letter was served on the applicant on 23 September 2009.
- [8] The applicant did not respond to the letter and his salary was suspended at the end of November 2009. On 1 June 2010 the applicant received a notice of intended termination of his contract of employment. The reason given by the second respondent for the intended action was the applicant's failure to discharge his duties owing to his absence from work. At the time the notice was written the applicant had been absent from work for 201 working days. The second respondent also asked the applicant to provide him with reasons why his contract of employment should not be regarded as terminated.
- [9] On 8 June 2010 the applicant made representations as to why his contract of employment should not be regarded as terminated. The applicant further submitted that by 9 June 2010 his application for ill-health retirement had been presented to Booysen's office. The allegation is denied by the respondents. A copy of the application is attached to the founding affidavit. It was signed by the applicant and Booysen on 9 June 2010.
- [10] On 11 July 2010 the applicant received a notice of the termination of his contract of employment with immediate effect on the grounds that his continuous unauthorized absence was unacceptable and unreasonable. In response the applicant made further representations to the second

respondent on 23 September 2010 in which the applicant's attorneys sought the applicant's immediate reinstatement with full salary to allow him to apply for medical boarding. All the TIL and ill-health retirement applications the applicant referred to in the founding affidavit formed part of the representations. On 30 September 2010 the second respondent informed the applicant's attorneys that he stood by his decision terminating the applicant's contract of employment.

URGENCY

- [11] Counsel for the respondents challenged the urgency of this application. He argued that this application should be struck off the roll with costs on the grounds of lack of urgency. He submitted that in addition to financial hardship or loss of income, the applicant had to show exceptional circumstances before interim relief can be granted. In support of his argument he referred to the case of *Democratic Nurses Organisation of SA & another v Director General, Department of Health & others* (2009) 30 ILJ 1845 (LC).
- [12] Counsel for the applicant insisted that this application is urgent. He relied on the decision in *Harley v Bacarac Trading 39 (Pty) Ltd*

[2009] JOL 23489 (LC) in which the court expressed that it has a wide discretion to determine the urgency with which applications should or should not be treated.

[13] In his contention that this application is one of urgency the applicant relied on loss of income, depleted savings and that his health will suffer as he will not afford medication. I am persuaded that the applicants' financial exigencies and the need for medication are sufficient to justify this application being heard as one of urgency.

JURISDICTION

[14] Counsel for the respondents argued that this court lacks jurisdiction over this dispute as it relates to an unfair dismissal. He sought to rely on section 191 (1)

(a) of the Labour Relations Act 66 of 1995 (the LRA) in arguing that the Safety and Security Sectoral Bargaining Council (SSSBC) has the necessary jurisdiction. He further argued that this court lacks jurisdiction over the applicant's claim for the payment of his salary from 1 December 2009 to the date of the termination of his services as it has no jurisdiction over claims for non-payment of salaries.

[15] Counsel for the applicant emphasised in his supplementary heads of argument that at this stage the applicant is merely requesting interim relief.

[16] The argument that the SSSBC has the necessary jurisdiction to determine interim reinstatement is incorrect. While it is correct that Section 191 (1)

(a) has endowed the SSSBC with jurisdiction over dismissal disputes and the relief it may grant when determining such disputes, the nature of the applicant's claim is different. He is not seeking an order reinstating him on the grounds that he was dismissed unfairly. He seeks to be reinstated in his full salary, benefits and emoluments with interest at the legal rate backdated from 1 December 2009, pending the finalisation of his application for reinstatement and for ill-health retirement. The applicant therefore intends challenging his alleged unfair dismissal in future proceedings.

[17] The SSSBC is a creature of the LRA. It has no inherent jurisdiction and can only exercise powers bestowed on it by enabling legislation. No piece of legislation has bestowed on the SSSBC jurisdiction to grant interim relief.

[18] Section 158 (1) (a) of the LRA gives the Labour Court jurisdiction to make any appropriate order including the grant of urgent interim relief. In *Botha and Another v the Department of Education, Arts, Culture and Sports, Northern Province Government and 3 others*

(1999) 20 ILJ 2590 (LC) the Court confirmed the question to be asked to determine whether the Labour Court has jurisdiction to adjudicate a matter. The question is:

"... whether or not there are provisions, either in the Act or in any other law, which may say such a matter may be determined by the Labour Court. If the answer is that there are such provisions, then this court has jurisdiction."

[19] Although later decisions to determine the Labour Court's jurisdiction have been couched differently, they have not altered the above decision. The Labour Court's jurisdiction to grant interim relief in respect of disputes which are still to be determined through arbitration has been confirmed time and again. In this regard see *Jiba v Minister of Justice and Constitutional Development & others*

[2005] ZALC 15; [2009] 10 BLLR 989 (LC) and *Legal Aid Board v Jordaan* 2007 (3) SA 327 (SCA).

[20] Disputes emanating from non-payment of remuneration are governed by the Basic Conditions of Employment Act 75 of 1997 (the BCEA) section 77 (1) of which grants the Labour Court exclusive jurisdiction over all matters in terms of the BCEA. In *Botha and Another v The Department of Education, Arts, Culture & Sport, Northern Province and 3 others* (supra) the Labour Court confirmed its jurisdiction over a dispute involving the termination of payment of a portion of the applicant's

salary.

[21] For these reasons the point in limine raised by the respondents regarding the jurisdiction of the Labour Court to determine the application for interim relief is dismissed.

APPLICATION TO STRIKE OUT

[22] The respondents lodged an application to strike out paragraphs 14.9 to 14.14 and paragraph 37 with its annexure, marked annexure TBD 17 of the applicant's replying affidavit on the grounds that they raise new issues and are irrelevant.

[23] Counsel for the respondents argued that the dispute regarding General Mfazi (Mfazi) which is referred to in paragraphs 14.9 to 14.14 of the applicant's replying affidavit relates to a transfer and its resolution involves the grievance procedure. The current matter involves a dismissal and its resolution procedure excludes the grievance procedure but requires an employee to refer the dispute directly to the SSSBC within 30 days from the date of dismissal.

[24] In his argument that paragraph 37 and annexure TBD 17 of the applicant's replying affidavit constitute new issues, Counsel for the respondents sought to rely on the principle that the necessary allegations the applicant relies on must appear in his founding affidavit as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. He added that there was no reason for the evidence not to form part of the founding affidavit as it was available.

[25] Counsel for the Applicant argued that paragraph 14 of the applicant's replying affidavit is in reply to the jurisdictional point which was raised by the respondents in the answering affidavit. Paragraphs 14.9 to 14.14 have been included to illustrate the manner in which the first respondent, as employer, deals with internal disputes lodged in terms of the Grievance Management Regulations.

- [26] Paragraph 37 and annexure TBD 17, so it was argued on behalf of the applicant, is in response to paragraph 33 of the answering affidavit in which the respondent denied that the applicant was exposed to work-related traumatic incidents. The applicant has referred to work-related traumatic incidents in his founding affidavit. Paragraphs 14.9 to 14.14 and 37 and annexure TBD 17 are relevant, amplify the founding affidavit and the respondents will suffer no prejudice by a refusal of the application.
- [27] It is trite that an applicant must stand or fall by his or her founding affidavit. The applicant is therefore not permitted to introduce new matter in the replying affidavit. The courts strike out such new matter. New matter may be allowed in the absence of prejudice and in circumstances where the new matter amplifies and enlarges upon the case made out by the applicant in the founding affidavit. In this regard see *Union Finance Holdings Ltd v IS Mirk Office Machines II (Pty) Ltd* 2001 (4) SA 842 (T) in an unreported case of *Nondwedwe Kama and others v Nombulelo Anoria Kama and another* (case number 1357/20050 of the Eastern Cape High Court).
- [28] In paragraph 14.9 to 14.14 the applicant is replying to the respondents' allegation in paragraph 6.3 of the answering affidavit in which the respondents allege that this court lacks jurisdiction to determine this dispute on the grounds that the applicant seeks to enforce Resolution 7 of
2000. The respondents further allege that in terms of section 24 of the LRA only the CCMA or bargaining councils have the necessary jurisdiction to enforce collective agreements.
- [29] In paragraphs 14.9 to 14.14 of the replying affidavit the applicant uses Mfazi's case to illustrate the failure of SAPS to co-operate in internal resolution of disputes involving its employees leading to inordinate delays. He further alleges that if a case involving a high ranking officer as Mfazi is delayed his will be delayed even further. Mfazi's dispute arises from his transfer and its resolution involves the internal grievance procedure. The allegations in paragraph 6.3 of the answering affidavit have nothing to do with either a transfer or the internal grievance procedure of the SAPS as a SAPS employee seeking to enforce Resolution 7 of 2000 needs to refer his or her dispute to the bargaining council. Paragraphs 14.9 to 14.14 are irrelevant and do not amplify the case made out by the applicant in the founding affidavit. They prejudice the respondents in that they portray SAPS as an employer which ignores its employees' problems. They are therefore struck out.
- [30] In paragraph 37 and annexure TBD 17 of the replying affidavit the applicant is dealing with the allegation in paragraph 33 of the answering affidavit in which the respondents deny that the applicant was exposed to traumatic work related incidents. The respondents also denied that the applicant brought such incidents to the attention of the respondents. In paragraphs 37 and annexure TBD 17 the applicant provides proof of the incidents and how they were brought to the respondents' attention. Paragraph 37 and annexure TBD 17 are a direct response to allegations made in the answering affidavit. They also have an effect of amplifying the founding affidavit. It is in the replying affidavit that applicants deal with

issues raised in the answering affidavit. Striking out paragraph 37 and annexure TBD 17 will defeat the purpose of filing a replying affidavit.

- [31] The application to strike out paragraph 14.9 to 14.14 of the applicant's replying affidavit is granted and the application to strike out paragraph 37 with annexure TBD 17 of the same affidavit is denied.

INTERIM RELIEF

- [32] For an application for interim relief to be granted the applicant must prove a prima facie right open to some doubt, irreparable harm, balance of convenience in his or her favour and absence of any other satisfactory remedy. In this regard see: *Sitlogelo v Sitlogelo* 1914 AD 221, *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C) and *Kotze v Minister of Health* 1996 (3) BCLR 417 (T).
- [33] In proving a prima facie right, the applicant is required to prove a prima facie right to the final relief he will seek. The approach to adopt to determine the existence of a prima facie right is laid down in *Webster v Mitchell* 1948 (1) SA 1189 (W) and modified in *Gool v Minister of Justice* 1995 (2) 682 (C) and is consistently applied in the Labour Court. It requires a consideration of the facts set out by the applicant

together with any facts set out by the respondent which the applicant cannot dispute and a decision whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial.

- [34] I will firstly consider whether the applicant has proved a prima facie right open to some doubt.
- [35] The undisputed facts which are set out in the applicant's affidavit are that the applicant started having health problems in January 1993. From 3 March to 17 March 2009 he was on sick leave. From 17 March 2009 to the date of the termination of his contract of employment, the applicant did not perform his duties owing to ill-health. On 1 June 2010 he received a notice of intended termination of his services for his failure to report for duty. He was given an opportunity to make representations as to why his contract should not be terminated which he duly made. He received a letter of the termination of his contract of employment on 8 July 2010.
- [36] The applicant construes the termination of his contract of employment as an unfair dismissal. In terms of section 191 (1) (a) and (b) of the LRA the applicant should have referred his alleged unfair dismissal dispute to the SSSBC within 30 days from 8 July
2010. Section 191(1) and (2) of the LRA grants the SSSBC powers to condone the late referral of dismissal disputes on good cause shown. For the applicant to be successful in his alleged unfair dismissal dispute he must first clear the condonation hurdle. Although in their letter dated 8 June 2010 the applicant's attorneys have states that the applicant's dismissal would be vehemently opposed, no reasons have been given in the founding affidavit for the

applicant's failure to challenge his alleged unfair dismissal. The applicant has laid no factual foundation to satisfy this court that he will clear the hurdle of condonation when seeking relief for his alleged unfair dismissal dispute.

- [37] The applicant attempted to rely on the representations he made in the letter written by his attorneys date 6 September 2010. The representations contain his TIL and ill-health retirement applications. The letter was presented to the second respondent about 2 months after the termination of the applicant's contract of employment. No valid reasons were given by or on behalf of the applicant why such representations were not made before his contract of employment was terminated. The applicant cannot rely on events which took place about 2 months after the termination of his contract to prove that the termination constituted an unfair dismissal.
- [38] The applicant sought to rely on the case of *Mooi v SAPS* [2007] JOL 20274 (PSCBC) which can be differentiated from the present mainly because the applicant in the *Mooi* case made his application for incapacity leave during the subsistence of his contract of employment. Also in *Urquhart v Compensation Commissioner* 2006 (1) SA 75 the application was made at the correct time.
- [39] The applicant seeks an order reinstating him in full salary, benefits and emoluments from 1 December 2009. It is common cause that on 1 December 2009 the applicant was already on unauthorised sick leave. In an unreported case of *Clendennen v Minister of Safety and Security and others* (case number D 667/05), it was held that in the absence of any evidence that the applicant was granted leave of absence on full pay, the applicant was not entitled to remuneration and benefits. This principle was echoed in a number of cases including *Spies v National Commissioner of SAPS and others* [2008] JOL 21525 and *Van Rensburg & others v Minister of Safety and Security*
- [2009] 4 BLLR 400 (LC).
- [40] In *Chelley v National Commissioner of SAPS* 2006 ILJ 765 (T) the court also confirmed that in the absence of a right arising either from a contract, collective agreement or a statute there is no right to remuneration for the period of absence due to ill-health. The applicant failed to disclose the basis of his entitlement to remuneration during the time he was absent from work owing to ill-health. He also failed to disclose how Resolution 7 of 2000 and National Instruction 2 / 2004 entitled him to remuneration during that period.
- [41] The applicant did not prove that he should prima facie be successful in his alleged unfair dismissal dispute.
- [42] With regard to whether the applicant should prima facie be successful in his application for ill-health retirement it must be noted that paragraph 7.6 (a) of Resolution 7 of 2000 provides as follows:

“Employees who, as a result of their work, suffer occupational injuries or contract occupational diseases shall be granted occupational injury and disease leave for the duration of the period they cannot work.”

[43] Paragraph 4(6) of National Instruction 2/2004 provides as follows:

“(a) An employee who sustains an occupational injury, or who contracts an occupational disease is entitled to occupational injury and disease leave with full pay, from the time that he or she becomes unable to work-

Until he or she can resume his or her own work; or Until he or she is discharged from the Service after an enquiry as contemplated in section 34 of the Act.

(b) An employee who is absent from work due to an alleged occupational injury, or an occupational disease, must complete and submit the documents required for temporary incapacity leave and the documents must be referred to the health risk manager for verification and validation of the period of absence”.

[44] A proper reading of Resolution 7 of 2000 and National Instruction 2 / 2004 requires employees to apply for ill-health retirement before their contracts of employment are terminated. The procedure for ill-health retirement involves applying for TILL and an employee can be required to apply for leave during the subsistence of his or her contract of employment and not thereafter. Although the applicant alleges that he made TIL applications on 3 September and 11 October 2009 the inherent probabilities of this case are that he did not. He only attached those applications to the submissions he made to the respondents on 23 September 2010, about two months after his contract had been terminated. Had the applicant applied for TIL in 2009 he would have enforced his entitlement through Resolution 7 of 2000 long before his contract was terminated.

[45] For these reasons, I find that on the papers before me, the applicant has failed to prove that he should obtain final relief in his application for ill-health retirement and in his unfair dismissal dispute. He has therefore failed to prove a prima facie right open to some doubt.

[46] It was submitted for the applicant that he will suffer irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted as he will be financially ruined and unable to afford medication, a situation which will lead to increased anxiety, depression and distress.

[47] The applicant has himself to blame for the financial difficulties he will suffer should this application be unsuccessful because he failed to take the necessary steps to have his salary reinstated after it was suspended at the end of November 2009. He elected to live without a salary from December 2009 and being in financial ruins is a direct consequence of his election. He may therefore may not rely on it prove irreparable harm. Should the applicant eventually secure success with retrospective effect at arbitration any harm resulting from the refusal of this application will be repaired.

- [48] I agree with counsel for applicant that the applicant will suffer prejudice which the respondents will not should this application be granted. However, the applicant is responsible for his own prejudice and can therefore not use it as a defence.
- [49] The submission made on behalf of the applicant that there is no other adequate remedy available to him is correct. Neither the CCMA nor bargaining councils have jurisdiction to grant interim relief. Section 158 (1) (a) (i) of the LRA has granted such jurisdiction to the Labour Court.
- [50] For these reasons, on the papers before me the applicant has failed to make out a case for the grant of interim relief. The application must accordingly fail. There is no reason why costs should not follow the result.

[51] I make the following order:

The application is dismissed with costs.

Date of hearing: 3 March 2011

Date of judgment: 23 May 2011

Appearances:

For applicant: Adv Pienaar SC

Instructed by: Gouws Attorneys

For first and

Second respondents: Adv Gqamana

Instructed by : The State Attorney

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