

SOUTH AFRICA / JUDGMENT

Jesse v Mason (J1406/14) [2014] ZALCJHB 268 (16 July 2014)

[2014] ZALCJHB 268

COURT

Labour Court Johannesburg

BEFORE

Shai

CASE / FILE NUMBER

J1406/14

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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Not Reportable

J 1406/14

In the matter between

DAVID ISRAEL BEN JESSE

Applicant

and

THOMAS EDGECOMBE MASON

Respondent

ID NO: [.....]

Heard: 12 June 2014

Delivered: In Chambers (16 July 2014)

REASONS

FOR JUDGEMENT

SHAI AJ

Introduction

[1] On 26th June 2014 I issued an order in the following terms:

“It is ordered that:

1. This application is enrolled as an urgent application dispensing with all the forms and service provided for in the rules of court.
2. Condonation is granted to the Applicant for any non-compliance with the rules.
3. The Respondent is ordered to pay Applicant’s April 2014 salary of R50,000,00 without deduction and due and owing to him in terms of paragraphs 35 and 36 of the employment contract.
4. Each party to pay its costs.
5. Reasons will follow in due course”.

[2] Following hereunder are the reasons for the above order.

[3] This is an urgent application by the Applicant in terms of which he prayed for an order as outlined above in paragraph 1 (prayer 1-4). The application was opposed.

The

Facts

[4] The Applicant and the Respondent were going into a joint venture in terms of which the former would be given a 49% shareholding in the company if the latter came to fruition. The name of its company is ‘Metson At Home (Proprietary) Limited’.

[5] At the time the parties were in the process of putting the Meltson At Home in Production stage, the parties entered into an employment contract in their personal capacities. It is in dispute as to the purpose of entering such a contract in the manner they did at that stage.

[6] The applicant contended that the employment contract was entered into after the Respondent reneged on the initial agreement that he will be a shareholder but that he should now work for him for a year first before he can be a shareholder as aforesaid.

[7] On the other hand the Respondent contended that at the time the parties entered into the contract of employment he was acting as an agent of the Metson at Home and that the latter was in fact the employer.

[8] Paragraph 35 of the said contract of employment provides as follows:

“The ‘employee’ net salary which Tom Mason unequivocally undertakes to pay without deduction will be R50,000,00 per month(fifty thousand South African rand per mensum) payable expressly by electronic transfer on or before the last working day of each and every month or the Friday preceding the same if such Friday fails prior to the last of the relevant month.”

- [9] At page 1 of the contract of the employment as contained at page 29 of the paginated index it is clear that the Respondent was entering into the said contract in representative capacity, thus representing Metson at Home PTY LTD. In addition to that, the respondent and Metson at Home PTY LTD are referred to as 'hereinafter referred to jointly and severally as employer'.
- [10] On the 28th February 2014 the Respondent went to South America and only returned on or about the 24th March 2014.
- [11] The Applicant contended that he never stopped working and was applauded on 3 separable occasions by the Respondent.
- [12] On the 31 March 2014 the Applicant was paid as per his employment contract.
- [13] It is common cause that in the period preceding the 31 March 2014, the Applicant made certain allegations against the Respondent at the Department of Agriculture which included:
- defrauding the department of Agriculture & RSA farmers
 - that he contravened Fertilisers Farm Feeds Agricultural Remedies and Stock Feeds Agricultural Remedies and Stock Remedies Act No.36 of 1947
- that he repudiated his contract and by secret mail stopped all procurements and production.
- [14] The Respondent denied all the above allegations and qualified them as spurious allegations.
- [15] The Applicant lodged a grievance against the Respondent regarding the above. The Respondent's response to them is that when he arranged a meeting for the purpose of dealing with the grievance the Applicant promptly booked off sick.
- [16] It appears that as a result of the issues outlined in the above paragraphs, the Respondent suspended the Applicant from duty with effect from 31 March 2014, pending a disciplinary hearing.(See Annexure DIBBJ K)
- [17] The suspension was uplifted on the 23 April 2014. (See Annexure DIBJ L)
- [18] On the 30th April 2014 the Applicant was not paid as expected. The Applicant contended that as a result of this he tendered his resignation on the 2 May 2014.
- [19] Subsequently to the resignation the Applicant referred a constructive dismissal dispute to the CCMA which at the time of the hearing was pending. The Applicant contended that in his referral to the CCMA the issue of payment of salary was not an issue to be decided on, whereas the Respondent contended it was.

[20] The Applicant contended that his salary remains unpaid and this constituted punitive measures prohibited by Labour Relations Act. He contended further that he has a right to his salary. On the other hand the Respondent is of the view that the Applicant is not entitled to his April 2014 and that he has not shown that he is entitled to his salary for April 2014. I will deal with the Respondent's reason in this respect when I deal with whether the Applicant is entitled to the salary or not.

[21] The matter is opposed on a number of fronts, namely:

- a) identity of the employer
- b) various matters pending
- c) res judicator
- d) lis pendes
- e) abuse of the court process
- f) the Application is not urgent

Urgency

[22] I will deal with the issue of urgency before I deal with the merits of the matter.

[23] The Applicant contended that the matter is urgent as it relates to unpaid salary, that he faces eviction, that he remains unemployed and hence lives in absolute poverty.

[24] On the other hand the Respondent denies that the Applicant is living in poverty and sites the intellectual property to the value of R10m and the settlement that the Applicant is alleged to have extracted from Agron Moos Rivier and Rosdy Farms. These however appear to be mere allegations rather than actual facts.

[25] I have noted that the Applicant received a letter marked DIBJA, which is a notice of an intended eviction for none payment of rent for his accommodation.

[26] It was also contended for the Respondent that the same matter was struck off the roll in Johannesburg High Court for lack of urgency. The above letter was issued on the 4 June 2014 although it is not clear as to when it was received by the Applicant. What is clear, however, is that it was issued after the said court order.

[27] It was also argued for the Respondent that the matter is not urgent on the basis that since that order it took the applicant 5 weeks to file the current application.

[28] My view is that the issuance of this letter makes the matter even more urgent. The letter according to me serves as an intervening

factor which made the matter more urgent.

[29] The issue of a payment of a salary was regarded as an urgent matter in a number of cases.

[30] With regard to this the Court in the case of *Harley v Bacarac Trading 39 PTY LTD* (J 2543/08) [2008] ZALC 160; [2009] 6 BLLR 534 (LC); (2009) 30 IJL 2085 LC (9 December 2008) said the following:

“In support of his submission on this point, Mr van der Merwe made reference to a number of cases, including SACCWU v Shoprite Checkers (PTY) Limited, 1997 (10) BLLR 1360 (LC), Hultzer v Standard Bank of South Africa, 1999(8) BLLR 809 LC, and University of the Western Cape, Academic Staff Union & Others v University of Western Cape, 1999(2) ILJ 1300(LC).

The principle established in these cases is one that inclines this court to avoid granting what amounts to status quo relief in unfair dismissal disputes pending a final determination of the dispute by the appropriate dispute resolution body. None of these cases, it seems to me, establishes that financial hardships and loss of income can never be grounds for urgency. If an Applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if the Applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its merits. A more recent indication of the approach to be adopted is to be found in the case of *Hospice & Another v MEC for Health, Gauteng Provincial Government*, 2008(9) BLLR 861 (LC). In that case, Basson J, held that an employee was entitled to urgent relief in circumstances where her employer had unilaterally

terminated her salary in breach of the Basic Conditions of Employment Act, and where she had not been given an opportunity to make

representations before her remuneration was stopped.”

[31] In the case of *Dr Samatha Naidoo v Careways Group PTY LTD and Another* J945/13, Molahlehi cited the following paragraph from the case of *Hospersa and Another v MEC for Health, Gauteng Provincial Government* 2008 (9) BLLR 861 (LC) with approval:

“An employee has a common law right to be paid her salary. If, through the default on the part of the employee, his or her services are not rendered, this must be diminished in proportion to the time, during which the services were not rendered. This position is however, different, where the employee’s inability to perform her duties is her employer’s doing. In terms of common law, the unilateral suspension of an employee also does not relieve the employer of the duty to pay the employee. It is also accepted in our Labour Law that an employer may not suspend an employee without pay and they can only do so if they have contracted to that effect.”

[32] Taking into the afore-going, the threat of eviction and the difficulties with the Applicant’s health situation, and continuing unemployment of the Applicant I determine that the application is urgent and must be treated as such.

The Merits

[33] The requirements for obtaining a final order were outlined in the well-known case of Setlogelo v. Setlogelo 1914 AD 221 at 227 as follows:

“The requisites for the right to claim an interdict are well known: a clear right, injury actually committed or reasonably apprehended, and the absence of a similar protection by any other ordinary remedy.”

[34] It is common cause that the employee was an employee at the time he resigned. He was paid his salary for March 2014. His salary for April 2014 was not paid and remains unpaid. He therefore has a right to payment of his April 2014 salary. I say this for the following reasons. The employee was suspended from duty on the 31 March 2014, which suspension was uplifted on the 23rd April 2014 and was ordered to report for duty on the 24th April 2014.

[35] Paragraph 2 of the suspending letter (Annexure DIBJK) at page 60 of the paginated index reads thus:

“During the period leading to the hearing you will not communicate with any Metson staff or do anything on behalf of or representing Metson at Home. You may also not contact Metson clients. You may not attend the Metson premises at 99 Sophia Street, Fairland (Head Office) or Plant at Inanda.”

[36] Having said what he said above the Respondent cannot be heard to say the Applicant has not proved the right to that salary, just as he says in his papers. It is generally accepted in our Labour Law that when an employer suspends an employee that shall be with pay unless the contrary is agreed upon. The authorities cited above at paragraphs 30 and 31 above are instructive in this regard. This is so as far as the period from 1st April to 23rd April 2014 is concerned.

[37] In respect of the remaining days of April 2014, thus from the 24th to the 30th (5 days), the Applicant must have reported for work. He did not do so.

[38] It is common cause between the parties that the Applicant was booked sick off for these days. What is however in dispute is whether he was sick or not. The Respondent doubts whether the Applicant was sick. It seems the Applicant was avoiding having his lodged grievance dealt with, according to the Respondent. According to the Respondent this is strengthened by the letter issued by Dr. Mostert contained at page 161 of the paginated Index to the following effect: “I hereby retract all previous statements made by myself related to the above mentioned patient, excluding the sick notes.”

[39] It is not clear as to which statement the said doctor is referring to, however, what is clear is that the sick notes that he issued to the Applicant remain valid. Other than this there is no evidence or indication that the sick notes are invalid.

[40] This is one of the issues the Respondent contended in his papers that constitute factual disputes that need to be resolved by evidence.

[41] In respect of the resolution of factual disputes the Court in the case of Plascon Evans Paints Limited v. van Riebeck Paints (PTY)Limited, [1984] ZASCA 51,1984(3) SA 623(A) said the following:

“It is correct that wherein proceedings on notice of motion, dispute of fact had arisen on the affidavits, a final order, whether it be an interdict or some other relief, may be granted if those facts appeared in the applicant’s affidavit, which had been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the court to give such final relief on the papers before it, is however, not confined to such a situation. In certain instances, the denial by the Respondent of a fact alleged by the Applicant, may not be such as to raise a real genuine or bona fide dispute of fact.

Moreover, there may be exceptions to this general rule that, as for example where the allegations or denials of the Respondent are so farfetched or clearly untenable, the court is justified in rejecting them merely on the papers. If in such a case, the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under rule 659 of the uniform rules of court, and the court is justified as to the inherent credibility of the Applicant’s factual averment, he may proceed on the basis of correctness thereof and include this fact amongst those upon which he determines whether the Applicant is entitled to the final relief which he seeks.”

[42] Before the court there is one set of opinions constituted by the Applicant’s doctors who contended in the sick notes that he was sick. There is no other contra opinion presented by the Respondent pointing to a different set of facts. On this basis I determine that there is no genuine factual dispute. Instead we have allegations or denials that are devoid of any medical backing that can be said to raise a genuine dispute of fact.

[43] On this basis I determine that the Applicant was entitled to pay for the remainder of the days, thus 24th -30 April as well.

In terms of the contract of employment entered into between the two as it appears at paragraph 35 of the said contract the Respondent

undertook to pay the employee a salary of R50,000,00 without deductions on the date specified in that paragraph. He is bound by

this clause and cannot therefore deduct the said amount. This does not mean that he does not have a remedy. The normal relevant civil remedies are available to him.

Who must pay the Applicant?

[44] The Respondent opposes the relief sought also on the basis that the correct employer was not identified. It is true that in the contract of employment the Applicant and the Respondent, the latter signed as a representative or agent of the employer, ‘Meltson at Home (PTY) Ltd’. However, as I said in paragraph 9 above and indeed as it appears at page 1 of the said contract both Metson at Home (PTY) LTd and the Respondent are jointly and severally liable as an employer. The effect of this is that they are both liable jointly and severally, the

one paying the other being absolved. The respondent therefore cannot escape liability on this basis.

[45] In addition to the above and at paragraph 35 of the contract of employment at page 35 of the paginated index it is written thus:

“The ‘employee’ net salary which Tom Mason, unequivocally undertakes to pay without deduction will be R50,000,00 per month, (fifty thousand South African per mesum) payable expressly by electronic transfer on or before the last working day each and every month or the Friday preceding the same if such Friday falls prior to the last day of the relevant month.”

This to me appears to be assumption and acceptance of personal liability beyond representative capacity and in line with joint and several liabilities.

[46] In line with the above I find no fault with the citation and the liability of the Respondent for the payment of the Applicant's

April 2014 salary.

[47] From the papers it is clear that the April 2014 salary of the Applicant has not been paid and it is further clear that the

Respondent is not prepared to pay the said salary. The second requisite of *Setlogelo v. Setlogelo*, being ‘that an injury actually committed’ or reasonably apprehended has therefore been satisfied.

[48] That brings me to the third requirement: absence of a similar protection by any other ordinary remedy. The Applicant gave a picture of difficulties that he is experiencing relating to none payment of his rent (eviction) and his medical conditions. He needed urgent payment of his salary to be able to manage the above situation. The Respondent has contended that since the Applicant has referred the issue of dismissal to the CCMA and indicated in his referral that one of the issues to be given attention is the payment of his salary the Applicant has an alternative and adequate remedy.

[49] Although it may be known when matter may be heard, it cannot be said with any certainty as to when that matter will be finalised. In any event such a remedy cannot be equated with an urgent relief as in this case. The employee is faced with eviction for none payment of rent and health conditions that need to be properly managed. The remedy of arbitration cannot be fast tracked in the manner urgent relief may be to ensure urgent attention to these issues. I therefore find that the Applicant does not have an alternative and adequate remedy at this stage other than urgent relief he seeks.

[50] I do not find any merit in the argument that the application amounts to abuse of court process and the fact that the issue of dismissal is pending before the CCMA and therefore he must wait for that process to wind up.

[51] The other argument raised against the application is that of res judicata. This arises from the same dispute the Applicant filed with the Johannesburg High Court. It is common cause between parties that that matter was struck off the roll and not dismissed. So as it stands the matter was not finalised. I therefore find no merit in this argument.

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

Repeat the same order as it appears in para 1.

Shai AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Breytenbach Mostert Skosana Attorneys

For the Respondent: David Israel Ben Jesse

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