

SOUTH AFRICA / JUDGMENT

Khoza v Department of Economic Development (Gauteng) (J2326/09)

[2009] ZALC 231 (4 November 2009)

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COURT
Labour Court

BEFORE
Francis

CASE / FILE NUMBER
J2326/09

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: J2326/09

In the matter between:

KHOZA KEITH Applicant

and

DEPARTMENT OF ECONOMIC DEVELOPMENT (GAUTENG) Respondent

REASONS FOR ORDER MADE

FRANCIS J

1. On 28 October 2009 after I had heard arguments in an urgent application, I dismissed the application with costs and said to the parties that I would provide reasons for the order that I made. These are my reasons.
2. The applicant brought an urgent application for the following relief:
“1. Dispensing with the provisions of the Rules relating to times and manner of service referred to therein and dealing with the matter as one of urgency in terms of Rule 8 of the Rules for the conduct of proceedings in this Honourable Court.
2. Declaration that the Applicant’s appointment as CEO of the Liquor Agency remains in force until 1st of April 2011.
3. A declaration that the Consultancy Services Agreement did not supersede my appointment as CEO of the Liquor Agency;

4. A declaration that the termination of the Consultancy Agreement does not affect the applicant's as CEO of the Liquor

Agency;

5. That the Respondent be interdicted from interfering with my appointment as CEO of the Liquor Agency;
6. The Consultancy Service Agreement be declared invalid; and
7. Further and/ or alternative relief.
8. Costs.”
3. The applicant is the Chief Executive Officer (CEO) of the Liquor Agency located within the Department of Economic Development
- the respondent in this application.

4. A declaration that the termination of the Consultancy Agreement does not affect the applicant's as CEO of the Liquor

Agency;

5. That the Respondent be interdicted from interfering with my appointment as CEO of the Liquor Agency;
6. The Consultancy Service Agreement be declared invalid; and
7. Further and/ or alternative relief.
8. Costs.”
3. The applicant is the Chief Executive Officer (CEO) of the Liquor Agency located within the Department of Economic Development
- the respondent in this application.
4. On 26 March 2008 the applicant was appointed as CEO for a duration of three years effective from 1 April 2008 of the new Liquor Licence Agency by Paul Mashatile who was at the time the MEC for Finance and Economic Affairs. Before this appointment, the applicant was the CEO of GEDA. He was transferred from GEDA to the Liquor Agency in the same capacity as CEO. He was advised that his remuneration would remain at the same level as his package at GEDA subject to further negotiations with the head of the department of the respondent Mr Xaba and Mashatile. At the time of the applicant's transfer, the Liquor Agency did not have its own trading account. His salary was paid by GEDA for April and May
2008. Around June 2008, Xaba advised him that this arrangement was going to be terminated. The applicant raised a concern about how he was going to be paid because the Liquor Agency did not have its own trading account. Xaba informed him that the respondent would devise some means of rectifying the situation. A few weeks later, Xaba called him to

a meeting and produced a Consultancy Services Agreement (the consultancy contract) that he wanted him to sign. He refused to sign it because it was not in line with his appointment letter that he received from the MEC. He told Xaba that it was going to create irregularities with auditing because as a CEO, he could not be paid as a consultant, and that the consultancy contract limited his management functions. The consultancy contract was not signed and for the rest of 2008 his salary was paid directly by the respondent.

5. The issue of the consultancy contract resurfaced again during June 2009. The applicant was approached by Siphiwe Ngwenya, the deputy director general for the respondent and Xaba, to sign the consultancy contract. Ngwenya advised him that the consultancy

contract had to be signed purely for purposes of facilitating an audit. It had to be backdated to 1 April 2008 to account for the financial year of 2008. The applicant was aware that he was paid by the respondent directly and understood that the respondent had to account for the salary he was paid from April 2008 to April 2009. Ngwenya requested the applicant to assist him and the respondent because the respondent was going to receive a qualification during the auditing if there was no contract to facilitate the payment he received. He informed the applicant that the consultancy contract covered the past year, and that a proper contract was going to be drawn to cover the remaining two years of his appointment as the CEO. The applicant's concern was that his position as CEO of the Liquor Agency was being reduced to that of a mere consultant and his period of appointment was also reduced to one year. Ngwenya convinced him that the consultancy contract did not replace, alter, cancel or supersede his appointment as CEO of the Liquor Agency. He reassured him that he had nothing to worry about, and that his appointment as the CEO of the Liquor Agency was secured. The applicant then signed the consultancy contract.

6. On 27 August 2009, the applicant received a notice of termination of the consultancy contract. The notice stated that the consultancy contract was for a year, ending 31 March 2009, and that the respondent would continue to engage him on a month to month basis since 1 April 2009 to date. He was notified that the consultancy contract was terminated with effect from 1 September 2009 and that his notice period would end on 31 October 2009. The applicant immediately requested a meeting with Xaba who was serving his last days as the head of department of the respondent in August and was not available. A few weeks later after the acting head of department, Busi Mhaga was appointed, he requested a meeting with her. She promised to get back to him within a week, which she did not do. He left numerous messages for her at the office but she did not return his calls. He asked Ngwenya to facilitate a meeting with Mhaga and himself, but the meeting did not materialise.
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7. The applicant approached his attorneys of record for legal advice and assistance on 15 September 2009. A letter was sent by his attorneys to the respondent on 17 September 2009, informing the respondent that his appointment as CEO of the Liquor Agency was not superseded by the consultancy contract. Further that the termination of the consultancy contract could not and should not affect his appointment as the CEO of the Liquor Agency and that his letter of appointment as CEO remained applicable. The respondent did not respond to the letter. On or about 30 September 2009, his attorney made a follow up on the matter and was informed that the respondent did not receive the letter. His attorney then faxed a copy to the respondent on the same day.
8. On or about 6 October 2009, the applicant's attorney received a fax from Gildenhuys Lessing Malatji attorneys, confirming

that they were instructed by the respondent. They denied that the applicant was entitled to rely on the terms of the letter of appointment since the appointment was suspended by the consultancy contract. Given the tone of the letter, the applicant said that there was no point in him waiting for a meeting with Mhaga to discuss the notice of termination of the contract he had received

from the respondent. He instructed his attorneys to institute urgent legal proceedings against the respondent to interdict them

from terminating his appointment as CEO of the Liquor Board. His attorneys proceeded to draft the urgent application, but before they served the application on the respondent's attorneys, he received a call from Mhaga. She informed him that she was aware that he had engaged the services of his attorneys, and that legal proceedings against the respondent were pending. She requested a meeting with him on Friday, 16 October 2009, at 14h00. With the hope that the meeting was going to resolve the dispute over his appointment, he instructed his attorneys to serve the application after the meeting only if the dispute was not resolved.

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9. The meeting was held on Friday, 16 October 2009, at 14H00, at the respondent's offices, and was attended by Mhaga, the deputy director Siphiwe Ngwenya, chief financial officer Lawrence Mathebula and one representative from the legal section. The relevant issues were discussed, and Mhaga undertook to consult with the current MEC, and other relevant managers, and thereafter revert to him on or before Thursday 22 October 2009. Despite the undertaking, Mhaga did not revert to him until close of business on 22 October 2009. The applicant followed this up in the late evening on 22 October 2009, and was informed that the matter was still receiving their urgent attention and that she would revert to him as soon as possible. She did not revert to him and the applicant instructed his attorneys of record to proceed with an urgent application. The papers were served on the respondent's attorneys in Pretoria on 26 October 2009.
10. The applicant contended that Xaba and Ngwenya misrepresented to him that the consultancy contract was necessary for auditing

purposes, and to account for the salary he received during the 2008 financial year. He was misled into believing that the consultancy

contract did not alter, amend, cancel, or supersede his appointment as CEO of the Liquor agency. He would not have entered into the consultancy contract but for the misrepresentation. He would not have signed if he knew the truth. The consultancy contract was invalid on the basis of misrepresentation by Xaba and Ngwenya, which misrepresentation induced him to sign it. As a result of this, there is no contract between them and his letter of appointment as CEO remains applicable. The consultancy contract is silent on his appointment as CEO, and did not cancel, alter or supersede his appointment as CEO. He was appointed by the then MEC as a CEO and it is only the relevant MEC who can terminate his appointment, and not the head of department through a misleading contract. The notice of termination refers to the contract and seeks to terminate his services in terms of the contract only. It does not mention his position as CEO. The termination therefore does not and should not affect his position at the Liquor Agency as the CEO. The applicant said that he is seeking the relief because the respondent's attorneys have indicated that they were instructed that the consultancy contract supersedes his appointment as the CEO of the Liquor Agency. He can only assume that the respondent expects him to leave the Liquor Agency on 31 October 2009 as both the purported consultant and CEO.

11. The applicant contended that the matter was urgent. His notice of termination of contract ends on 31 October 2009. He has taken all reasonable steps to engage the respondent about their dispute to no avail. The respondent is adamant that his relations with the Liquor Agency, in whatever capacity, will be terminated on 31 October 2009.
12. The applicant contended that the respondent needed to be interdicted from terminating his appointment as the CEO in the manner that it seeks to do. He will be severely prejudiced if the respondent was allowed to fraudulently dismiss him without

compensation. For the remainder of his term as CEO of the Liquor Agency, he is entitled to compensation and benefits. He had to conclude that the respondent conducted itself in a manner it did to avoid paying out his dues for early termination of his appointment. This is a matter that needed to be addressed urgently, otherwise on 31 October 2009 he will be forced to walk away from his position as CEO without any compensation and benefits due to him.

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13. The application was opposed by the respondent without having filed opposing affidavits. It was opposed on the basis that the urgency was self created and that the applicant has adequate alternative remedies. The consultancy contract contains a dispute

resolution clause which provides for the matter to be arbitrated.

14. It is trite that should this Court find that the application is not urgent, it should strike the matter off and allow it to proceed in the ordinary manner. Urgent applications must comply with the provisions of rule 8 of the rules of this Court. Rule 8(2) requires the founding affidavit to contain reasons for urgency and why urgent relief is necessary and the reasons why the requirements of this rules were not complied with. The application does not comply with the provisions of rule 8(2). Save for stating that the application is urgent, no reasons are given why the application is urgent. The applicant's complaint is that he will not be compensated and be given the benefits due to him. The applicant does not contend that he will suffer extreme hardship if the application is not granted or that this is one of those exceptional cases where the Court should come to his assistance on an urgent basis.

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15. No purpose will be served to strike the matter from the roll for lack of urgency. It will only glogg the court role. The

application stands to be dismissed since the applicant has more than adequate remedies available at his disposal. He is seeking a declarator and interdictal relief that he can obtain if he were to refer his dismissal to either the Commission for Conciliation,

Mediation and Arbitration or to the relevant bargaining council should he be dismissed. He contends that he was employed on a fixed term contract that will expire on 31 March 2011. There are forums established in terms of the Labour Relations Act 66 of 1995 (the Act) to deal with such disputes. He has more than adequate remedies at his disposal which are set out in the Act. The issue in dispute can be dealt with by either a commissioner or arbitrator. Clause 16 of the

consultancy contract also makes provision for a dispute to be referred to arbitration should a dispute arise. The applicant has also not satisfied the requirements of an interdict.

16. The application stands to be dismissed. There is no reason in law and in equity why costs should not follow the result. The costs are limited to the employment of one counsel.
17. It was for these reasons that I dismissed the application with costs. FRANCIS J JUDGE OF THE LABOUR COURT OF SOUTH AFRICA FOR THE APPLICANT : A MOFOKENG INSTRUCTED BY KOIKANYANG ATTORNEYS FOR THE RESPONDENT : S REDDING SC WITH K TSATSAWANE INSTRUCTED BY GILDENHUYS LESSING MALATJI INC DATE OF HEARING : 28 OCTOBER 2009 DATE OF ORDER : 28 OCTOBER 2009 DATE OF REASONS : 4 NOVEMBER 2009
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JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : A MOFOKENG INSTRUCTED BY KOIKANYANG ATTORNEYS

FOR THE RESPONDENT : S REDDING SC WITH K TSATSAWANE INSTRUCTED BY GILDENHUYS LESSING MALATJI INC

DATE OF HEARING : 28 OCTOBER 2009

DATE OF ORDER : 28 OCTOBER 2009

DATE OF REASONS : 4 NOVEMBER 2009

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