

SOUTH AFRICA / JUDGMENT

Kobrin v Periscopic Masingita (Pty) Ltd and Others (JS990/15) [2016]

ZALCJHB 543 (21 October 2016)

[2016] ZALCJHB 543

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS990/15

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, HELD AT JOHANNESBURG

JUDGMENT

Not reportable

Case no: JS 990/15

In the matter between:

MARC KOBRIN Applicant And PERISCOPIC MASINGITA (PTY) LTD First Respondent HIRE WISE INVESTMENTS (PTY) LTD T/A PERISCOPIC MASINGITA Second Respondent PERISCOPIC PROPERTY MANAGEMENT (PTY) LTD Third Respondent

Heard: 20 October 2016

Delivered: 21 October 2016

VAN NIEKERK J

- [1] This is a claim for payment in lieu of notice, referred to this court in terms of s 77(3) of the Basic Conditions of Employment Act. The material facts are not in dispute. The applicant was retrenched by the first respondent. He was given notice of termination of employment on 5 November 2015. The letter confirmed that the first respondent had taken a decision to retrench the applicant with effect from 4 December 2015, and that that would be his last working day.
- [2] The applicant signed a letter of appointment on 30 July 2013. Clause 5 of the letter reads as follows:

5. Notice and Termination of Employment

5.1 This agreement may be terminated by either party giving the other party at least one calendar month's written notice of such termination.

5.2 The company will be entitled to terminate your employment with or without notice (as may be applicable) for any reason recognised as sufficient in law.

[3] On 4 October 2013 the parties concluded a memorandum of agreement of employment. Clause 14 of that agreement reads as follows:

14. TERMINATION OF SERVICE

Irrespective of the period of engagement, either party may terminate this agreement by way of 1(one) calendar months written notice to the other party. This shall not prevent the employer to summarily dismiss the employee in appropriate circumstances.

[4] The applicant contends that his right to a calendar months' notice had the consequence that notice could only be effective from the first day of December 2015 and that he was in consequence entitled to be paid for the whole of that month, less the amount that he had been paid for the period 1-4 December 2015. In the applicant's statement of case, he records that the first respondent's

refusal to pay the remuneration demanded constituted a breach of his contract, which he accepted. The claim is one for the amount of R31 156 -13, being, as I have indicated, damages comprising the difference between the applicant's monthly basic salary and the amount he contends he ought to have been paid for the month of December 2015, less the amount paid for the first four days of that month.

[5] The applicable legal principles are well-established. In *SA Music Rights Organisation Ltd v Mphatsoe* (2009) 30 ILJ 2482 (LC), the court held that in circumstances with the parties had used the term 'month' and 'calendar month' with some frequency, this was an indication that some significance ought to be attached to the distinction. In the present instance, by using the term 'calendar month' in relation to the termination clause, it seems to me that the parties obviously intended that notice of termination of employment was to take effect on the first day of the month and to run to the last. (See also *Morgan v Central University of Technology, Free State* (2013) 34 ILJ 938 (LC) where the court held that in circumstances where an applicant was entitled to 3 calendar months' notice of termination, a calendar month ought to be given its ordinary grammatical meaning, namely a period beginning on the first day of a particular month and ending on the last day of the same month.

[6] I do not understand the first respondent to dispute this principle or its application. What the first respondent contends is that regardless of any contractual term regulating the period of notice, it resolved on 4 November 2015 to summarily terminate the applicant's employment with effect from 4 December 2015. Accordingly, on 4 November 2015, the first respondent furnished the applicant with written notice recording that his employment would be

summarily terminated with effect from 4 December 2015. Specifically, the first respondent contends that it was entitled to summarily terminate the applicant's employment 'in appropriate circumstances' (see clause 14 of the memorandum of agreement of employment) and that a termination on account of reasons related to the first respondent's operational requirements was such an appropriate circumstance. In the alternative, the first respondent contends that it was entitled to terminate the applicant's employment on a date as determined, as envisaged by s 189 of the LRA, without any further notice period to be afforded to the applicant.

- [7] There are at least two difficulties with the applicant's contentions in relation to the right summarily to terminate the

applicant's employment. The first is that in contractual terms, a summary termination is lawful if and only if the employee party has engaged in conduct that amounts to a repudiation of the contract or commits a material breach of a vital term of the contract. In the present instance, the termination of employment was by definition a no-fault termination. On the first respondent's own version, the applicant did not repudiate or commit any breach of any term of the contract, let alone any material breach. The second difficulty is that the first respondent, on its own version, gave notice on 4 November 2015 of the termination of the applicant's contract on 4 December 2015, i.e. a month's notice, as opposed to a calendar months' notice. It borders on the disingenuous to suggest that in these circumstances, the first respondent resolved to summarily terminate the applicant's employment with effect from 4 December 2015. The concepts of summary termination and termination on notice are mutually exclusive; a summary termination is a termination without notice. The giving of a month's notice (or any notice at all) is inimical to a summary termination of employment. The notice of termination of employment delivered to the applicant on 4 November 2015 makes clear in paragraph 3.2 that the applicant would be paid the sum of R36 920.00 on 27 November 2015 being 'Notice pay (5 Nov- 4 Des)' (sic) and further confirmed that 'Friday 4 December 2015 will be your last working day'. I fail to appreciate how it can be said that in these circumstances, the first respondent summarily terminated the applicant's employment contract. The first respondent, on its own version, clearly gave notice of termination of the contract.

- [8] In so far as the first respondent relies on its right to summarily dismiss the applicant 'in appropriate circumstances' as provided in clause 14 above, this provision does no more than preserve the first respondent's right to terminate the contract summarily (i.e. without notice) for any cause recognised by law as sufficient. In other words, it is no more than an affirmation of the right established by paragraph 5 of the letter of appointment and of its rights at common law. 'Appropriate circumstances' do not extend to the redundancy of an employee; what is clearly contemplated by the provision in question is conduct by the employee that amounts to a repudiation of the contract or a material breach of a vital term. There is thus no merit in any of the first respondent's defences to the applicant's claim and the applicant is entitled to the relief that he seeks.

[9] In relation to costs, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The applicant seeks costs on a punitive scale. It is not disputed that the short payment of notice was drawn to the first respondent's attention as early as 10 November 2015, and that the first respondent refused to meet the applicant's claim. The applicant was forced to come to court to claim what is clearly his due. While I give the first respondent the benefit of the doubt and accept that the opposition to these proceedings may not have been mala fide, the defence to the applicant's claim is clearly without merit and was misguided, to say the least. There is no reason why the applicant should be out of pocket by having to incur the expenses necessary to assert his right to the notice to which he was entitled. In my view, he should be indemnified to the fullest possible extent.

I make the following order:

1. The first respondent is ordered to pay the applicant the sum of R31 156. 13 within seven days of the date of this judgment, together with interest a tempore morae at the applicable rate.
2. The respondents, jointly and severally, the one paying the other to be absolved, are to pay the costs of these proceedings on the scale as between attorney and client.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

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