

SOUTH AFRICA / JUDGMENT

Mbambi v Tyeks Security Services (4348/2019) [2023] ZAECMHC 32 (4 July 2023) [2023] ZAECMHC 32

COURT

Eastern Cape High Court, Mthatha

BEFORE

Notyesi

CASE / FILE NUMBER

4348/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MTHATHA)

Reportable

Case No: 4348/2019

Date heard: 24 May 2023

Date delivered: 4

July 2023

In the matter between:

MZOLISWA
MBAMBI
Plaintiff
and
TYEKS
SECURITY SERVICES
Defendant

JUDGMENT

Notyesi AJ

Introduction

[1] Mr Mzoliswa Mbambi of Tombo Administrative Area, Port St Johns, was employed by Tyeks Security Services as a security officer. He was dismissed from his employment, according to him, in June 2019. Consequent thereto, he instituted these proceedings against Tyeks Security Services seeking payment of damages in the sum of R408 825. According to him, prior to his dismissal, Tyeks Security Services had attempted to transfer him from his station at the Port St Johns Post Office and to place him at a certain bed and breakfast enterprise within Port St Johns.

[2] In these proceedings, Mr Mbambi is contending that his dismissal constituted an act of repudiation of his contract by Tyeks Security

Services and that he has accepted the repudiation. Mr Mbambi contended that, for his cause of action, he is relying on the Basic

Conditions of Employment Act[1] ('BCEA') and the repudiation of his contract.

[3] On the contrary, Tyeks Security Services raised a special plea. Tyeks Security Services contend that the High Court has no jurisdiction to adjudicate the dispute because the dispute falls exclusively within the jurisdiction of the Labour Court. Tyeks Security Services submitted that Mr Mbambi absconded from work and was thereafter referred for disciplinary proceedings. There is a dispute about the nature of the contract of employment between the parties. The precise terms of the contract have not been pleaded with clarity. It is also not clear whether Mr Mbambi was dismissed or whether his matter is subject to disciplinary processes.

Parties

[4] For the sake of convenience, the parties shall simply be referred to as the 'Plaintiff' (Mr Mbambi) and the 'Defendant' (Tyeks Security Services).

The issue

[5] By agreement of the parties, this Court has been asked to resolve the special plea, and therefore, the only issue is whether this Court has jurisdiction to entertain the dispute or whether the dispute falls within the exclusive jurisdiction of the Labour Court.

The pleadings

[6] In the amended particulars of claim, Mr Mbambi, in setting out his cause of action, averred as follows:

“(a) The cause of action took place within the area of jurisdiction of the above honourable court.

(b) On or about the 1st day of April 2019 and at Port St Johns the parties concluded a written fixed-term contract of employment (“the contract”) in terms of which Mr Mbambi was employed by the defendant as a security officer. The defendant refused to give Mr Mbambi a copy of the contract, despite several requests by Mr Mbambi to do so, consequently Mr Mbambi does not have in his possession, and is unable to annex a copy thereof hereto. In confirmation hereof an affidavit by Mr Mbambi’s attorney is annexed hereto marked “A”.

(c) The material express and tacit terms of the contract between the parties are, inter alia, as follows –

(c.i) That Mr Mbambi would render personal services to the defendant as a security officer stationed at South African Post Office, Port St Johns, (“hereinafter referred to as the site”);

(c.ii) That Mr Mbambi would be entitled to remuneration on a monthly basis as follows:

(c.ii.i) Basic salary of R3744.00

(c.ii.ii) Cleaning allowance of R31.00

(c.ii.iii) Area 3 premium R60.00

(c.ii.iv) Overtime at an hourly rate of 18.00 for overtime work reasonable performed from time to time;

(c.ii.v) Sunday pay at the rate of 1.6 times the normal rate for work performed on Sunday.

(c.iii) That the contract is specifically linked to a service agreement between the defendant and the South African Post Office for the provision of security and related services by the former to the latter;

(c.iv) That the contract would run for a period of five years with effect from 01 April 2019 up to and including 31 March 2025;

(c.v) That any party wishing to terminate the contract would have to give the other party a notice of the intended termination in accordance with the legal notice periods.

(d) Mr Mbambi commenced employment in terms of the basic conditions of employment Act 75 of 1997 and in terms of the conditions set out above on 01 April 2019 and at the site;

(e) The defendant has evinced a deliberate and unequivocal determination and intention to no longer be bound by the contract in one or more of the following material manner-

(e.i) On the 15th June 2019, without any notice and/or awful cause, it-

(e.i.i) Arbitrary prevented Mr Mbambi from continuing with his duties at the site, and replaced him with another security officer, thereby repudiating the contract;

(e.i.ii) Offered Mr Mbambi a new contract of employment in which he would be placed at a certain Bed & Breakfast enterprise in Port St Johns, which Mr Mbambi rejected;

(e.i.iii) It last paid Mr Mbambi his salary on 30 June 2019;

(e.i.iv) On the 18th July 2019 its Human Resource Manager, namely, one Mr Daniels, verbally informed Mr Mbambi's attorney, Mr Magoxo, that plaintiff was dismissed from employment in June 2019;

(f) By way of a letter dated 8th November 2019, addressed by Mr Mbambi's attorneys to the defendant Mr Mbambi elected to accept the repudiation, and terminated the contract between the parties. The aforesaid letter is annexed marked "B". Mr Mbambi submits that he relies on basic conditions of employment Act 75 of 1997 (as amended) and repudiation of a contract on his claim.

(g) As a result of the defendants aforesaid repudiation, Mr Mbambi suffered damages in the sum of R408 825 (four hundred and eight thousand eight hundred and twenty five rands) which represents past future remuneration payable to Mr Mbambi for the duration of the contract, calculated with effect from July 2019 up to and including March 2025."

[7] In response to Mr Mbambi's amended particulars of claim, Tyeks Security Services raised the special plea as follows–

"A. JURISDICTION

WHEREAS the Defendant pleads that this Honourable Court has no jurisdiction over this matter, as Mr Mbambi absconded from duty and no Disciplinary hearing has been scheduled yet in respect of the same.

AND WHEREAS this Honourable Court lacks jurisdiction to hear matters where an order is sought for matters where the Labour Court, Commission for Conciliation, mediation and Arbitration (CCMA) and Bargaining Councils have exclusive jurisdiction.

WHEREFORE the Defendant on this ground alone prays that the claim of Mr Mbambi be dismissed with costs."

The law on jurisdiction

[8] An assessment of jurisdiction must be based on the parties' pleadings as opposed to the substantive merits of the case.[2] When a court's jurisdiction is challenged, the court should base its conclusion on the pleadings, as they contain the legal basis of the claim under which Mr Mbambi had chosen to invoke the court's competence.[3]

[9] In the case of *Makhanya v University of Zululand*,[4] Nugent JA held–

“In general the high courts thus exercise the original authority of the state to resolve all disputes, of any kind, that are capable of being resolved by a resort to law, unless that authority has been assigned to another court. When a high court resolves a contractual claim it exercises that original jurisdiction. When it considers a claim for enforcement of a constitutional right it exercises that original jurisdiction. So too when it enforces a statutory right.

But the state might also create special courts to resolve disputes of a particular kind. Generally those will be disputes concerning the infringement of rights that are created by the particular statute that creates the special court (though that will not always be so). When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by (a) conferring power on the special court and simultaneously (b) excluding the ordinary power of the high court in such cases (it does that when “exclusive jurisdiction” is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the high court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the high courts). In the latter case the claim might be brought before either court.

In the present context exclusive jurisdiction to enforce LRA rights has been assigned to the Labour Forums. But in respect of the enforcement of both contractual and constitutional rights the high courts retain their original jurisdiction assigned to them by the Constitution. In both cases equivalent jurisdiction has been conferred upon the Labour Court to be exercised concurrently with the high courts.”

[10] In the case of *Chriwa v Transnet Ltd and Others*, [5] Ngcobo J referred to the judgment of O’Regan J in *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* [6]

[2001] ZACC 6; 2002

(2) SA 693 (cc) (2002 BCLR 113; (2002) 23 ILJ 81) and said the following–

“O’ Regan J, in writing for a unanimous court . . . held that section 157(1) had to be interpreted in the light of section 169 of the Constitution. That section permits constitutional matters to be assigned to courts other than the High Court, but they must be courts of equal status. O’ Regan J held that the Commission for Conciliation Mediation and Arbitration (CCMA) is not a court of equal status and that the review of CCMA decisions is not substitute for considering a matter afresh. Section 157

(1) of the LRA must, she concluded, insofar as it concerns constitutional matters, be read to refer only to matters assigned for initial considerations by the Labour Court.

This Court also found that:

“It is quite clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment... As there is no general jurisdiction afforded to the Labour Court in employment

matters, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations.”

The Court concluded that, absent a specific provision conferring jurisdiction of a constitutional matter on the Labour Court, the High Court enjoyed concurrent jurisdiction to decide constitutional matters, including administrative action claims.”

[11] Section 77 of the BCEA deals with jurisdiction, and it provides –

“(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where his Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.

(1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.

(2) The Labour Court may review the performance or purported performance of any function provided for in this Act or any act or omission of any person in terms of this Act on any grounds that are permissible in law.

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.

(5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.”

[12] In *Amalungelo Workers’ Union and Others v Philip Morris South Africa (Pty) Limited and Another*,^[7] it was held–

“The section tells us in unambiguous terms that the Labour Court has exclusive jurisdiction over matters arising from the Basic Conditions

Act. The only exception is in respect of where the Act itself provides otherwise. For example, section 77(3) stipulates that the

Labour Court enjoys concurrent jurisdiction with civil courts in matters concerning contracts of employment.”

[13] The proper approach to determine the application of section 77(3) of the BCEA was set out crisply in *National Prosecuting Authority v Public Servants Association on behalf of Meintjies & Others; Minister of Justice & Correctional*

Services & Another v Public Servants Association on behalf of Meintjies & Others,[8] where it was held–

“The notice of motion and founding affidavit has to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. In performing this exercise, substance must prevail over form and proper regard must be had to context.”

[14] It is also prudent to refer to the provisions of section 157 of the Labour Relations Act 66 of 1995 which provides–

“(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act, or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from–

- (a) employment and labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct of any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”

[15] Based on the above principles of jurisdiction, I will consider the contentions of the parties regarding the jurisdiction of this Court. Before dealing with the issue of jurisdiction, I find it apposite to first briefly set out the principles relating to repudiation of contracts. I do so because Mr Mbambi, in his particulars of claim, has alleged that he relies on the repudiation of the contract, in addition to the provisions of the BCEA. It is necessary to determine whether there was a repudiation of the contract or whether same is relevant.

Repudiation

[16] In *Dave Pretorius v Kenneth Bedwell*,[9] Mokgohloa JA held–

“It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract. Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise. Accordingly, prescription commences to run from that date.”

[17] Mr Mbambi, in his amended particulars of claim, had averred that on 18 July 2019, he was informed by the Human Resources Manager, Mr Daniels, that he was dismissed in June 2019. He then instituted these proceedings on 12 November 2019. In such circumstances, when Mr Mbambi instituted the action, he was no longer an employee of Tyeks Security Services. It, therefore, follows that Mr Mbambi's contract was not terminated, but rather he was dismissed as an employee.

[18] Whether the dismissal was lawful, unfair or otherwise is not an issue before this Court. For the same reasons, the Court has not been asked to determine the validity of the dismissal, and therefore, repudiation of the contract does not arise on these facts, even on the assumption that Mr Mbambi truly relies on a repudiation of the contract, and same has not been properly pleaded. The Court has no factual foundation to determine whether there was repudiation or not. I do find it startling, though, that Tyeks Security Services, in the special plea, suggests that the disciplinary hearing is yet to be scheduled in respect of Mr Mbambi's absconding from work. I think that such an allegation flies in the face of Mr Mbambi's allegation that he was dismissed in June 2019. For the reasons that there is either a pending disciplinary hearing or that Mr Mbambi was dismissed, the remedy for Mr Mbambi cannot be a repudiation of his contract. I do add that the allegation against Mr Mbambi, which remains undisputed, is that he absconded

from work and subjected to a disciplinary process.

Does this Court have jurisdiction?

[19] The special plea raised by Tyeks Security Services is that this Court has no jurisdiction. In these circumstances, the Court must assess the pleadings for the reasons that the Court should base its conclusion on Mr Mbambi's pleadings as they contain the legal basis of the claim under which he had chosen to invoke the Court's competence. As these are action proceedings, the assessment must be based on the particulars of claim. For the reasons that will soon become apparent, I quote the relevant parts of the amended particulars of claim.

[20] In paragraphs 7.1 to 7.3, Mr Mbambi makes these allegations–

“7.1 On the 15th June 2019, without any notice and/or awful cause, it–

7.1.1 Arbitrary prevented Mr Mbambi from continuing with his duties at the site, and replaced him with another security officer, thereby repudiating the contract;

7.1.2 Offered Mr Mbambi a new contract of employment in which he would be placed at a certain Bead & Breakfast enterprise in Port St Johns, which Mr Mbambi rejected;

7.2.3 It last paid Mr Mbambi his salary on 30 June 2019;

...

7.3 On the 18th July 2019 its Human Resource Manager, namely, one Mr Daniels, verbally informed Mr Mbambi's attorney, Mr Magoxo, that plaintiff was dismissed from employment in June 2019."

[21] On proper scrutiny of the allegations, the true nature of Mr Mbambi's complaint is his dismissal and the unfair labour practice by Tyeks Security Services. Tyeks Security Services, according to him, commenced by purportedly transferring him from his station at the Post Office and attempted to place him at a certain bed and breakfast enterprise. Mr Mbambi alleged that he was arbitrarily prevented from continuing with his duties and replaced with another security officer. On the other hand, Tyeks Security Services alleged that Mr Mbambi absconded from work, resulting in his matter being referred for disciplinary proceedings. Mr Mbambi has not

alleged in his particulars of claim that he, at any stage after his dismissal, tendered his services to Tyeks Security Services or availed himself. It is unlikely that a dismissed employee would remain in contract, for which he can claim repudiation, more so that the allegation against him is that he absconded from work.

[22] I hold the view that in these circumstances, Mr Mbambi's recourse should have been found on the remedies provided by the LRA and the BCEA. This is a matter in which the Labour Court and the Bargaining Council enjoy exclusive jurisdiction. I agree with the submission of Mr Mahambi that the High Court has no jurisdiction to entertain the matter. In *Chirwa v Transnet LTD and Others* para 96, the Court held that-

"In my view it could not have been the intention of the Legislature to allow an employee to raise what is essentially a labour dispute in terms of the Act as a constitutional matter under the provisions of s 157(2) of the Act. In my view it would run counter to the purpose and objects of the Act with which I have dealt earlier in this judgment. To conclude otherwise would mean that the High Court is effectively called upon to determine a right which has been given effect to and which is regulated by the Act. To hold otherwise would be to ignore the remainder of the provisions of the Act and would enable the astute litigant simply to bypass the whole conciliation and dispute resolution machinery created by the Act. This may give rise to 'forum shopping' simply because it is convenient to do so or because one of the parties failed to comply with the time limits laid down by the Act as contended by the first respondent in the present matter."

Conclusion

[23] I find that the High Court has no jurisdiction in respect of the dispute between Mr Mbambi and Tyeks Security Services. The matter falls exclusively within the jurisdiction of the Labour Court. It follows that the action should not be entertained for the reason that the Court has no jurisdiction. At the time of instituting the proceedings, Mr Mbambi, in his version, was already dismissed. Accordingly, no contractual rights and obligations existed between the parties. Accordingly, the action is not about the enforcement of a contract, nor constitutional rights or statutory obligations. The underlining cause of the dispute is the unfair labour practice.

Costs

[24] The general rule is that costs should follow the results unless there is good cause to depart. I will deviate from the general rule and decline Tyeks Security Services' costs of litigation. The plea is not a model of clarity. It is slovenly drafted and, in many respects, confusing. In general, the plea is argumentative. The special plea suggests that Mr Mbambi was charged and subjected to disciplinary proceedings for absconding from work. On the other hand, the Human Resource Manager of Tyeks Security Services informed Mr Mbambi that he was dismissed from work in June 2019. I may add that Tyeks Security Services' plea is fashioned in the form of an affidavit, which is not permissible. In this regard, I do quote from the plea. Paragraph 15 reads–

“AD PARAGRAPH 8

Contents of this paragraph are denied and Defendant submit that absconding does not amount to repudiation. I further submit that a letter was written to Plaintiff's Attorneys indicating Plaintiff's abscondment, but no response had since been forthcoming. It is Defendants submission that the dispute falls in the realm of Labour Relations Act and it is denied that Defendant repudiated the contract. It is Tyeks Security Services's submission that Mr Mbambi is not entitled to remuneration when he elected not to render his services and it is therefore denied that he suffered damages in the amount of

R334 362.”

[25] Paragraph 12 of the plea reads–

“AD PARAGRAPH 7.2

Contents of this paragraph are admitted and I submit that Mr Mbambi reported for duty, Plaintiff absconded thereafter and we sought him without success on several occasion until his Attorney approved our offices on or about July 2018.”

[26] On reading of Tyeks Security Services' entire plea, it is obvious that the plea was haphazardly and carelessly drawn. The plea is an excipiable one. For these reasons, I decline to award costs in favour of Tyeks Security Services. The result is that each party should bear its own costs.

Order

[27] In the result, the following order is made–

- (1) Plaintiff's action is dismissed;
- (2) Each party shall bear its own costs.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

Appearances Attorney for Plaintiff L Mthambo Attorneys for Plaintiff L Mthambo Attorneys
Mthatha Counsel for the Defendant Adv Mhambi Attorneys for the Defendant Mbulelo Qotoyi
Attorneys Mthatha

- [1] Basic Conditions of Employment Act 75 of 1997 (as amended).
- [2] Gcaba v Minister of Safety and Security & Others [2009] ZACC 26; 2010 (1) SA 238 (CC); [2009] 12 BLLR 1145 (CC) para 75.
- [3] Lewame v Fochem International (Pty) Ltd [2019] ZASCA 114 para 7.
- [4] Makhanya v University of Zululand [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 4 All SA 146 (SCA) paras 24-26.
- [5] Chriwa v Transnet Ltd and Others
[2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at 422E-423B.
- [6] Fredericks and Others v MEC for Education and Training Eastern Cape and Others
[2001] ZACC 6; 2002 (2) SA 693; 2002 (2) BCLR 113 paras 163-164.
- [7] Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and
Another
[2019] ZACC 45; 2020 (2) BCLR 125 (CC); [2020] 3 BLLR 225 (CC) para 20.
- [8] National Prosecuting Authority v Public Servants Association on behalf of Meintjies &
Others; Minister of Justice & Correctional
Services & Another v Public Servants Association on behalf of Meintjies & Others
[2021] ZASCA 160; 2022 (3) SA 409 (SCA); [2022] 1 All SA 353 (SCA) para 61.
- [9] Dave Pretorius v Kenneth Bedwell
[2022] ZASCA 4 para 10. See also Sandown Travel (Pty) Ltd v Cricket South Africa
[2012] ZAGPJHC 249; 2013 (2) SA 502 (GSJ) para 19.

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