

SOUTH AFRICA / JUDGMENT

Metal Industries Benefit Funds Administrator v Myburgh (JS854/13) [2017] ZALCJHB 317 (29 August 2017) [2017] ZALCJHB 317

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JS854/13

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Of

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THE

LABOUR COURT OF SOUTH AFRICA,

HELD

AT JOHANNESBURG

Case No: JS

854/13

In

the matter between:

METAL

INDUSTRIES BENEFIT FUNDS ADMINISTRATOR

Applicant

and

BRANHAM MYBURGH

Respondent

Heard:

14 August 2017

Delivered:

29 August 2017

Summary:

(Default judgement-contractual damages - contract terminable on conclusion of work – employee resigning during course of the contract - determination of damages)
DEFAULT

JUDGMENT

LAGRANGE J

Introduction

- [1] This has been an unopposed matter since the inception of proceedings and there was no appearance for the respondent on the date of the hearing.
- [2] The respondent was employed in terms of his contract dated 1 March 2013 as “a fixed term employee... for the purpose of MIBFA distributing the pension and Provident fund surplus as contemplated by the pension funds act, 1956.” The duration of the contract was to be determined by the occurrence of an event rather than a predetermined date. Thus clause 3.1 of the contract provided that “... once the surplus has been distributed (i.e. the event) your employment with the applicant will automatically terminate.”
- [3] Before the work contemplated in the contract had been completed and therefore before the event which would have ended the contract had occurred, the respondent resigned from the applicant on 1 July 2013 in a letter dated 26 June 2013 which was only submitted to the applicant on 28 June 2013.
- [4] The respondent had been recruited through an agency to which the applicant had paid an agency fee in the amount of R 15,916.57.

Following the abrupt resignation of the respondent, the applicant employed a replacement through the same agency on or about 17 July 2013 and paid a similar agency fee for that service amounting to R 15,914.40.

- [5] The applicant accepted the respondent’s breach of the contract and now seeks damages incurred as a result of the respondent’s

failure to fulfil his obligation to continue working until the fund surplus had been distributed. Initially, the applicant identified

these damages as comprising the original agency fee incurred in recruiting the respondent and the additional fee incurred in obtaining a replacement when he resigned on short notice. Initially, the applicant appeared to concede that the initial recruitment fee was incurred prior to the breach and it was only the second recruitment fee, which it incurred as an additional cost as a result of the respondent’s breach. In written heads submitted later, it pursued the contention that the respondent was also liable to it for his original recruitment costs.

- [6] In *Air Traffic and Navigation Services v Esterhuizen*[1], the SCA stated:

“[17] A contract of employment is generally entered into for a fixed period or

for an indefinite period. Where no date has been fixed upon which the contract will terminate, it will continue indefinitely until terminated or will be terminable by either party on the giving of notice.[2]

In such a contract, resignation is a unilateral act permitted by the specific terms of the contract for bringing the contract to an end.[3] When the contract is for a fixed period, none of the parties has the right to terminate the contract prior to the expiry of the fixed period.[4]

Cheadle AJ in *Lottering v Stellenbosch Municipality* [5] endorsed this principle in the following terms:

‘If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.’[6]

And later,

‘In a fixed term contract, a notice to bring the contract to an early end is a repudiation because it does not in itself constitute a contractually permissible act of termination. Being a repudiation, the employer has an election to hold the employee to the contract or to accept the repudiation and cancel the contract.’[7]

This court has held that a premature termination of a fixed term contract of employment gives rise to a claim for damages for breach of contract.[8]

(original footnotes-footnote numbering altered)

Consequently, it follows that in this instance, where no provision was made for giving notice, that the respondent’s resignation prior to the happening of the resolutive event that would have brought an end to the contract amounts to a breach.

[7] Ordinarily, under a fixed term contract, the employee could be held liable for the value of the outstanding services he failed to render, subject of course to the employer’s duty to mitigate the damage caused by inter alia employing somebody else, which is what the applicant did in this case.[9] The only damages claimed in this instance are the expended recruitment fees, and accordingly it is not necessary to consider if

the respondent is liable for any other damages.

[8] Clearly, there is a direct connection between the respondent terminating his services and the applicant having to replace him. In my view, it would have been reasonably within the contemplation of both parties that the applicant would have recruited his replacement in the same manner he was engaged and that this would have attracted an additional recruitment fee. As such, this was a cost the respondent ought to have realised the applicant would bear in replacing him. In effect, it meant that the original fee it had paid to recruit him had to be paid twice. However, the original fee is one which the applicant had already incurred as an expense on the assumption that it would secure an employee for the duration of the

contract. That was not a cost which it sought to recover from the applicant, or which he had agreed to reimburse the applicant for in the event he breached the contract. Hypothetically, even if he had agreed to repay it in the event that he prematurely terminated his employment, it is difficult to see how the respondent would have been able to persuade a court that it suffered a loss when it had to expend the amount refunded, in recruiting his replacement. The amount he would have been undertaken to pay the applicant would have placed it in the same position as it would have been if he had not prematurely terminated his employment, leaving aside the question of other damage it may have suffered by any work interruption caused by his termination. I mention this conjectural situation merely to demonstrate that it is difficult to see how the applicant can justify its claim to recover both the initial recruitment fee and the recruitment fee it paid for the respondent's replacement. It is only the second recruitment fee which is an expense which can reasonably be attributed to the respondent's breach.

- [9] In the circumstances, I am satisfied that the respondent is liable to the applicant for the unnecessary expense caused by his premature termination.
- [10] The applicant has not sought an order of costs as the matter is unopposed, but in passing, it should be mentioned that if a cost order had been warranted, the court would have been compelled to consider if it would be appropriate that the High Court scale of costs should apply, given that the value of the amount claimed falls well within the Magistrate's Court jurisdiction.

Order

- [1] The respondent is liable to the applicant for damages arising from his breach of contract in the amount equivalent to the recruitment fee paid by the applicant for his replacement, namely R 15,914.30.
- [2] The respondent is also liable to the applicant for payment of interest on the above amount at the prescribed rate of interest, namely 15.5 % per annum for the period 29 July 2013 until 31 July 2014 and 9 % per annum thereafter.
- [3] Both the amounts must be paid by the respondent within 15 days of receipt of this judgment.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

I I Mahomed of Hogan Lovells (SA) Inc.

RESPONDENT:

No appearance.

- [1] (668/2013) [2014] ZASCA 138 (25 September 2014)
- [2] See generally M J D Wallis Labour and Employment Law para 33 at 5-10; Tiopaizi v Bulawayo Municipality 1923 AD 317; Lawsa 2 ed Vol 13 Part 1 para 94
- [3] Lottering & others v Stellenbosch Municipality (2010) 19 LC and 12 BLLR 1306 (LC); 2923 (LC) (7 May 2010) para 20; Rustenburg Town Council v Minister of Labour & others 1942 TPD 220; Potgietersrust Hospital Board v Simons 1943 TPD 269 at 274; Rosebank Television & Appliances Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T) at 302.
- [4] Lawsa para 94.
- [5] Supra
- [6] Paragraph 14.
- [7] Paragraph 20
- [8] Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA) para 18.
- [9] See SA Football Association v Mangope (2013) 34 ILJ 311 (LAC) at 332, paras
- [43] and [44].

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