

SOUTH AFRICA / JUDGMENT

**Morgan v Central University of
Technology, Free State (J244/2011) [2012]
ZALCJHB 85; [2013] 1 BLLR 52 (LC);
(2013) 34 ILJ 938 (LC) (28 August 2012)
[2012] ZALCJHB 85**

COURT

Labour Court Johannesburg

BEFORE

Daniels AJ

CASE / FILE NUMBER

J244/2011

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J244/2011

In the matter between:

NICHOLAS ISMAEL MORGANApplicant

and

CENTRAL UNIVERSITY OF TECHNOLOGY, FREE STATERespondent

Heard: 06 July 2012

Delivered: 28 August 2012

Summary: Contractual damages for breach of contract- Contract of employment stipulates termination of employment upon three months notice-Employer terminates employment without notice-Employee entitled to damages equivalent to three months remuneration as he cannot prove damages beyond the notice period.

DANIELS AJ

This is an application brought in terms of section 77(3) of the Basic Conditions of Employment Act as amended (the BCEA).¹

The applicant alleges that his fixed term contract of employment was unlawfully terminated by his employer, the respondent, and he seeks contractual damages resulting from such breach. The applicant seeks damages in the amount of R4 396 031,04 being the equivalent of 48 months' salary which he would have earned but for the alleged unlawful termination of his contract, alternatively he seeks damages in the amount of R274 751.94 being the equivalent of 3 months' salary in lieu of three calendar months' notice of termination of employment.

Material facts

The applicant was employed by the respondent as its deputy vice-chancellor: resources and operations, with effect from 1 January 2010 in accordance with a written employment contract. His employment contract provided for its automatic termination five years later, on 31 December 2014. In addition, the applicant's employment was subject to a one year probation period.

The applicant lodged an unfair dismissal claim with the Commission for Conciliation, Mediation and Arbitration (the CCMA). The court was informed, at the outset, that those proceedings had been postponed pending the outcome of these proceedings.

Clauses 5, 12 and 13 of the applicant's employment contract are relevant and are therefore quoted in full below:

'Probation

5.1 In accordance with the relevant CUT policy, a probation period of 1 year shall apply. This includes a mid-term review after 6 months from the date of assumption of duty.

5.2 If the probation period proves unsuccessful, the employee shall undergo the relevant process as determined by the Conditions of Service.

5.3 The clauses above notwithstanding, CUT reserves the right to terminate the contract at any other time during the probation period, should the circumstances so suggest. In such cases, due procedure, the rule of law and Conditions of Service as may be applicable shall apply.

Termination of employment

12.1 This contract shall terminate automatically on the end date as stipulated above and with written notice from CUT of 1 (one) calendar month only as a reminder of the automatic termination.

12.2 Either party may terminate this contract with 3 calendar month's written notice to that effect. Should CUT terminate this contract, it shall be done in accordance with the principles of substantive and procedural law.

12.3 Notwithstanding the above provisions, either party may terminate this contract within (sic) 72 hours notice during the first 4 weeks of employment.

12.4 Employment can also be terminated on statutory grounds of misconduct, medical unfitness, operational requirements or incompetence.

12.5 In cases where an employee does not adhere to the contractual notice periods as stipulated above, CUT shall hold back the salary of the employee (up to a maximum of the required notice period) or any other monies payable to the employee and also reserves the right to take any such actions, legal or otherwise to remedy such breach of contract and/or to recover any monies owed by the employee to CUT.

13. Resolutive Condition

13.1 Should any information supplied by the employee in the employee's application for employment be found to be incorrect or false, this contract may be terminated in accordance with the disciplinary procedure as determined by CUT Council and/or in terms of any other remedy applicable by law.'

On 20 December 2010, the respondent gave the applicant written notice of the termination of his employment, to take effect from 31 December 2010. Prima facie the reason for termination of the applicant's contract relates to his performance during his probation period, but I am not required to decide this issue.

The parties'

submissions

It is noteworthy that the applicant alleges only that the respondent has breached his employment contract by failing to give him three calendar months notice of termination, provided for in clause 12.2. The applicant does not allege that the respondent breached his contract by failing to comply with any other procedural obligations (contained in the contract) relating to his probation or that the respondent was not entitled to cancel the contract for reasons relating to his performance. Presumably these issues will be raised and determined by the CCMA.

Counsel for the applicant Mr. Snyman argued, among other things, that the applicant was denied three calendar months notice of termination but, because the employment contract was for a fixed period, the applicant is entitled to damages equivalent to the remaining period of the fixed term. In support of this proposition, he relied on *Mangope v South African Football Association*² where the learned Judge said the following:

'...damages in an unlawful termination of an employment contract is calculated on the basis of what would have been due to the employee for the unexpired period of the contract less whatever amount he or she may have received after the termination of the contract, constituting mitigation of his or her damages.'

The Mangope case is distinguishable. There the applicant challenged his dismissal because the employer failed to comply with its obligations, relating to the applicant's performance, during the probation period (which obligations were set out in the contract). In casu, the applicant says that his employment contract was not properly terminated only because the respondent failed to give him the required notice.

Our courts have held that where an employment contract provides for the termination of the contract by notice, the measure of damages is the loss of salary for the notice period.³ Indeed, this must be so where the harm allegedly suffered by the employee relates to the employer's giving inadequate notice or its failure to give notice at all. In addition, contractual damages must arise from and be related to the breach of contract. In any event, even if this is incorrect, the applicant has failed to prove any damages beyond the notice period.

It is trite that plaintiffs have a duty to mitigate their damages. In *Myers v Abrahamson*,⁴ the court held that the plaintiff was entitled to damages '...less any sum he earned or could reasonably have earned during such latter period in similar employment.' Respondent contends that applicant had failed to tender any evidence that he had taken steps to mitigate his damages. In his replying affidavit, applicant states that he was in the process of finalizing his future employment at the University of the Free State. Applicant does not however tender any evidence as to the commencement date of such employment or the remuneration attached to it. What is clear, however, is that the applicant was unemployed following his dismissal, at least until 23 March 2011 when he deposed to his replying affidavit.

The applicant tenders his services to respondent and, under oath, states that he does not accept respondent's repudiation of his contract. However, engaging in alternative employment is incompatible with an election to abide by the contract.⁵ Instead, it evidences an election by the applicant to accept the respondent's repudiation of his contract and mitigate his damages.

Counsel for respondent, Mr. Grobler contends that the applicant was prevented from seeking relief in this Court, on the basis of contract, because the 'LRA constitutes a complete package and affords employees all the protection they require by means of its unfair dismissal jurisdiction'. This argument cannot be sustained, in light of the authorities and the provisions of the Labour Relations Act 66 of 1995 (the LRA) itself.⁶

Mr. Grobler relied on *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) for the aforementioned proposition. *McKenzie* is distinguishable on the facts and, in any event, that court did not find that employees could not simultaneously challenge the fairness of their dismissal under the LRA together with a claim for breach of contract under the BCEA. In *McKenzie*, the plaintiff claimed damages (arising from an alleged breach of contract) because his dismissal was without "just cause". The plaintiff contended that his employment contract provided, expressly or impliedly, that he may only be dismissed with "just cause". The court found that the contract contained no such provision and there was no need to develop the common law so as to import constitutional protection against unfair dismissals into the common law of employment.

Mr. Grobler submitted that the applicant could not be seen as a permanent employee because his services were terminated during the course of his probation period. He argued that confirmation of the applicant's employment following probation was a necessary condition for the continued existence of the contract beyond the probation period. This submission only assists the respondent insofar the applicant claims damages calculated on the outstanding period of the fixed term contract.

Mr. Grobler submits further that the three month notice period is not applicable to the termination of employment during the probation period. His argument is based on the fact that clause 5, which pertains to the probation period, does not provide for the giving of notice in the event of termination. This submission is explored in detail below.

Analysis and findings

The applicant must prove the following to succeed⁷:

The existence of a contract;

Breach of the contract or repudiation of the contract;

He has suffered damages;

A causal link between the breach and the alleged damages; and

That the loss was not too remote.

The issues raised in paragraph 17 are examined below. But first the legal principles pertaining to the interpretation of contracts must be set out. Where there is ambiguity or vagueness, contracts must be interpreted in order to ascertain the common intention of the parties.⁸ The intention of the parties is to be sought in the language they used to express themselves in the contract and the meaning of words should be understood in their context. Where words used are ambiguous, a court will lean toward an interpretation that is equitable and does not give an advantage to one party over the other.⁹

Before continuing, it should be borne in mind that the employment contract specifically permitted the respondent to terminate it on the basis of misconduct, medical unfitness, operational requirements or incompetence. This is not the same state of affairs the court dealt with in *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC) where the court was prepared to award compensation for the balance of the period of the contract, subject to the date when the applicant secured alternative employment.

Taking the above factors into account, I find that, properly interpreted, the employment contract required the respondent to give applicant, in the present circumstances, no less than three months notice of the termination of his contract. The following factors are germane:

The language used in the contract as well as its context lends itself to the above mentioned interpretation. Clause 12.2 of the contract makes provision for three months written notice of termination and it is not limited to any particular factual scenario. Clause 12.2 must therefore be understood to apply to all instances other than those specifically provided for, such as: (i) notice of termination at the end of the contract, which is specifically provided for in clause 12.1, or (ii) notice during the first four weeks of employment which is specifically provided for in clause 12.3.

Clause 12 must be read in light of the background facts, including the statutory framework. Section 37 of the BCEA requires, among other things, employers to give employees notice of termination of their employment except where a collective agreement provides otherwise or for “any cause recognized by law”.

The interpretation of clause 12.2, read with clause 12.3, contended for by the respondent is nonsensical. Why would notice be required during the first four weeks of employment (also part of the probation period) but not for the remainder of the probation period?

The purpose of the notice period is, among other things, to afford employees an opportunity to secure alternative employment following their dismissal. The interpretation of the contract contended for by the respondent offends the ordinary rules of interpretation as well as the principles of equity.

In assessing the quantum of damages to the applicant:

I find that, for the reasons set out above, there is no basis to award damages to the applicant in excess of the notice period. The applicant’s conduct in taking up alternative employment is inconsistent with a continued tender of his services to respondent – for the balance of the contract.

I have taken into account the fact that the applicant secured alternative employment at some point after 23 March 2011 and he cannot demonstrate harm beyond the notice period.

I have taken into account the notice actually given by the respondent.

The applicant was entitled to three calendar months notice of termination. A calendar month must 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 that same month. Had the respondent given notice at the end of December 2010, or on the first day of January 2011, the notice period would have expired at the end of March 2011. Given that the applicant deposed to his replying affidavit on 23 March 2011, he has failed to prove any damages after that date.

In the premises, I find that the applicant was entitled to three calendar months written notice of his termination and the respondent acted unlawfully in giving him shorter notice. The applicant is therefore entitled to damages in the amount of R204 399, 67 - being the equivalent of his salary for three months less the salary he would have earned during the period of the notice actually given and less his salary for the last week of March 2011. There is no reason why costs should not follow the result. In the premises, I make the following order:

The respondent is ordered to pay the applicant R204 399, 67 within 14 days of this order;

The respondent is ordered to pay the applicant's party and party costs.

Daniels AJ

APPEARANCES:

FOR THE APPLICANT: Advocate Snyman

Instructed by Horn & Van Rensburg Attorneys

FOR THE RESPONDENT: Adv Grobler

Instructed by Phatshoane Henny Inc

1No 75 of 1997.

2[2011] 4 BLLR 391 at 398 G.

3Parry v Astral Operations Ltd [2005] ZALC 15; [2005] 10 BLLR 989 (LC) at 1008, National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration (2007) 28 ILJ 1223 (LAC) at 1229 C-E, Harper v Morgan Guarantee Trust Co of New York, Johannesburg and Another 2004 (3) SA (W) 253 at 258 D-G

4 1952

(3) SA 121 (C) at 127.

5Myers v Abrahamson (supra) at 128

6In Parry v Astral Operations [2005] ZALC 15; [2005] 10 BLLR 989 (LC) the court awarded compensation for the unfair dismissal of the applicant as well as damages arising from the respondent's breach of the Basic Conditions of Employment Act, 1997. In Fedlife Assurance v Wolfaardt 2002 (1) SA 49 (SCA) the court made it clear that the provisions of the LRA do not limit common law rights to enforce contractual rights. Furthermore, section 195 of the LRA provides that 'An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.'

7Tsoanyane v University of South Africa (2009) 30 ILJ 2669 at 2675.

8Jonnes v Anglo-African Shipping Co (1936) Ltd 1972 (2) SA 827 (A) at 834.

9Van der Merwe et al Contract: General Principles (Juta, 2007 3rd Ed) at 307; In Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at 276 the court stated that "it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of

ubuntu. It emphasizes the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.

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