

SOUTH AFRICA / JUDGMENT

SAMWU obo Mabena v Maluti-A-Phufong Water SOC Ltd (J1051/19) [2020] ZALCJHB 256 (1 September 2020) [2020] ZALCJHB 256

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

J1051/19

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1051/19

In the matter

between:

SAMWU OBO MPH
MABENA
Applicant
and
MALUTI-A-PHUFONG WATER
SOC LTD
Respondent

Enrolled:

07 July 2020
Decided on the papers

Delivered:

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 01 September 2020.

Summary:

Contractual dispute – suspension of salary due to prolonged sick leave – an employee party claiming specific performance in terms of the reciprocal employment contract must first show compliance with her end of the bargain.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] This application is brought in terms of section 77A(3) of the Basic Conditions of Employment Act[1] (BCEA). The Applicant, South African Municipal Workers Union (SAMWU), acting on behalf of its member, Ms Mpho Mabena (Ms Mabena), seeks an order lifting the suspension imposed on her salary by the Respondent, Maluti-A-Phufong Water SOC Ltd (Maluti-A-Phufong Water), through its erstwhile Acting Chief Executive Officer (CEO), Ms Ramulondi, who was appointed by Council of the Maluti-A-Phufong Local Municipality (Municipality).
- [2] Maluti-A-Phufong Water is opposing the application and takes issue with some of the averments contained in Ms Mabena's replying affidavit and seeks that they be struck out. It is not necessary that I traverse this issue as it will be clear later in this judgment that nothing turns on these impugned averments.

Factual background

- [3] Ms Mabena was employed as Communication Officer by the Sedibeng Water with effect from 1 July 2001, which later became Maluti-A-Phufong

Water, an entity of Maluti-A-Phufong Local Municipality. In November 2005, her contract of employment was transferred to Maluti-A-Phufong

Water in terms of section 197 of the Labour Relations Act[2](LRA). She currently holds the position of Communications Manager since July 2006.

- [4] On 10 June 2018, she took ill and was admitted at Muelmed Medical Clinic in Pretoria for five days. She was discharged on 16 June 2018 but did not return to work as she was still sick. She was booked off sick until end of July 2018. On 6 August 2018, she was admitted at Busimed Hospital in Harrismith for about five days.
- [5] On 5 February 2019, the applicant consulted with the Neurologist who admitted her the following day in Medforum Medi-clinic, Pretoria for two weeks. She asserts that her doctor gave her a sick note which she allegedly dispatched to Maluti-A-Phufong Water. A Neurologist recommended that she be treated with an injection on a weekly basis and undergo physiotherapy until she could walk.
- [6] It is apparent from the papers before the Court that Ms Mabena has never recovered well enough to return to work. However, she is adamant that she had been submitting the necessary medical certificates booking her off. Maluti-A-Phufong Water continued paying her salary and benefits. However, on 10 January 2019, she was served with a notice to stop the payment of her salary due to absenteeism from work. The letter made reference to the collective agreement which directs employees to apply for written permission to be absent

from duty or submit medical certificates.

- [7] This is not the only letter where Ms Mabena was challenged about her prolonged absence from work. In fact, Ms Mabena concedes that there was another letter dated 9 October 2018, which advised her that her salary would be suspended pending the finalisation of disciplinary proceedings against her should she fail to comply with the relevant prescripts on leave of absence and account for all the period of her absence from work.
- [8] Ms Mabena takes issue only with the fact that in all the correspondence from Maluti-A-Phufong Water, she was never invited to make representations about the decision to suspend her salary. As such, she contends that Maluti-A-Phufong Water violated the audi alteram parterm principle.
- [9] Ms Mabena further contends that Maluti-A-Phufong Water breached her employment contract because the acting CEO did not have the powers to suspend her salary as it had no Board of Trustees and the Acting CEO was appointed by the Municipality. According to her, the Local Government: Municipal Systems Act[3] (Systems Act) does not make provision for the appointment of the Acting CEO, neither the Municipal Council has powers to appoint a CEO of an entity. Therefore, she submits that, since the Acting CEO did not have any vested powers in the management of Maluti-A-Phufong

Water the decision to suspend her salary was unlawful and invalid.

- [10] Maluti-A-Phufong Water vehemently opposes this application. It contends that Ms Mabena failed to prove a breach of contract and a relief of specific performance. The crux of its defence is that Ms Mabena failed to account for the whole period of her prolonged absence from work. There are periods where she failed to submit medical certificates booking her off. Still, it submits that even if there were medical certificates submitted, that would not assist her case because she had already exhausted her sick leave days.
- [11] In terms of the employment contract which incorporates the South African Local Government Association (SALGA) Collective Agreements, Ms Mabena is only entitled to 90 days' sick leave in a cycle of 36 months. Since she had been absent for a period of more than one year, she has exhausted her sick leave entitlement, and consequently no additional salary is due to her until she returns to work, it is further submitted.

Legal principles and application

- [12] For Ms Mabena to succeed in a claim for a final relief, she must show, firstly, that she has a clear right; that she has the contractual

right enforceable against Maluti-A-Phufong Water. Secondly, show an injury actually committed or reasonably apprehended; whether

Maluti-A-Phufong Water unlawfully infringed or threatened to infringe that right. Thirdly, show whether she has no adequate alternative

remedy to enforce the employment contract.[4]

[13] Ms Mabena's cause of action is grounded in the employment contract. In order to establish a clear right, she has to prove, on a balance of probabilities, facts which in terms of the substantive law establish the right relied on.[5]

[14] Firstly, Ms Mabena asserts that in terms of clause 6.1.2 of her employment contract, she is entitled to be paid her salary monthly in arrears into her bank account on the 23rd day of each month or a Friday before if the 23rd falls on the Saturday or Sunday or a day before if the 23rd falls on a public holiday. Maluti-A-Phufong Water breached her employment contract by suspending the payments of her salary since

January 2019.

[15] Ms Mabena does not dispute Maluti-A-Phufong Water's contention that she is not entitled to additional paid sick leave. It would seem that her main qualm is the fact that the decision to suspend her salary was not preceded by an opportunity to be heard. Strangely, Ms Mabena concedes that there were communications from Maluti-A-Phufong Water wherein she was warned about her prolonged absence from work and was given an opportunity to account, an opportunity she shunned.

[16] The very same contract that she seeks to enforce, states clearly that she is only entitled to 90 days within a cycle of 36 months. It is not disputed that she has been absent from work since May 2018, which is almost two years, if she is still on sick leave to date. It stands to reason that the 90 days of paid sick leave she was entitled to had long expired.

[17] Notwithstanding the clear limited contractual entitlement to a paid sick leave, Ms Mabena is persistent in her claim for specific performance. Her claims is premised on a misconstruction of clause 6.1.2 of her employment contract to mean that Maluti-A-Phufong Water's obligation to pay her salary extends even to circumstances where she fails to perform her part of the bargain.

[18] In *Mpanza and Another v Minister of Justice and Constitutional Development and Correctional Services and Others*,^[6] this Court, per Cele, J, dealing with reciprocal obligations in terms of an employment contract, referred with approval to the dictum in *Coin Security (Cape) v Vukani Guards and Allied Workers' Union*,^[7] where it was stated that:

'A contract of employment is a contract with reciprocal rights and obligations. The employee is under an obligation to work and the

employer is under an obligation to pay for his services. Just as the employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employer refuses to pay him wages which are due to him.'

[19] As correctly contended by Maluti-A-Phufong Water, it does not avail Ms Mabena to claim specific performance in terms of the employment contract, which gives rise to reciprocal obligations, when she patently failed to prove compliance with her end of the bargain; that is, to render her services.

[20] Notably, the Collective Agreement on Conditions of Service for the Free State Division of the SALGBC[8] provides as follows:

‘15.2. In respect of any sick leave cycle no employee shall be entitled to more than 130 working days sick leave on full pay.

15.3 On written application by an employee, who has exhausted his full paid sick leave and additional paid sick leave, annual vacation leave which he has to his credit may be granted to supplement sick leave or half or unpaid sick leave, provided that arrangements are made to maintain risk benefits.

15.4 An employee to whom the maximum period of full and half paid sick leave has been granted, may be granted unpaid sick leave for not more than 250 working days in any cycle, provided that the employer and employee comply with the provisions of applicable risk benefit policies relating to disability and provided further that where unpaid leave exceed 40 consecutive days the employee must be examined by a medical practitioner appointed by the employer. The costs of such examination shall be borne by the employer.’ (Emphasis added)

[21] To the extent that Ms Mabena’s employment contract incorporates the Collective Agreements of SALGBC, the above provisions constitute another impediment to the relief that she seeks.

[22] Secondly, Ms Mabena’s impugns the authority of the Acting CEO to effect the suspension of her salary. She asserts that the appointment of the Acting CEO is not sanctioned by the Systems Act and that the Municipal Council has no power to appoint a CEO of an entity. This contention is mooted despite the fact that Ms Mabena is not challenging the legality of the appointment of the Acting CEO.

[23] Ms Mabena’s contention in this regard is untenable in the light of the dictum in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*,[9] where it was held that until an administrative decision is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked. This dictum is commonly known as the ‘Oudekraal principle’ and have since received approbation by the Constitutional Court.[10] So, as long as the decision to appoint the Acting CEO is not set aside by proper process, it remains valid and effectual; and his

actions have legal and binding consequences.

Conclusion

[24] In the light of the above findings, Ms Mabena failed to show that she has a clear right for the grant of a final interdict and, as such, I do not have to consider the other rudiments of a final interdict. This, therefore, marks the end of the road in this litigation.

Costs

[25] Turning to the issue of costs, the circumstances of this case dictate that each party should pay its own costs.

[26] In the circumstances, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[1] Act 75 of 1997, as amended.

[2] Act 66 of 1995, as amended.

[3] Act 32 of 200, as amended.

[4] See: Setlogelo v Setlogelo 1914 AD 221 at 227.

[5] See: Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co 1961 (2) SA 505 (W) at 515.

[6] (2017) 38 ILJ 1675 (LC); [2017] 10 BLLR 1062 (LC) at paras 30 -32.

[7] 1989

(4) SA 234 (C); (1989) 10 ILJ 239 (C).

[8] Circular 1 of 2016.

[9] 2004

(6) SA 222 (SCA) at para 26.

[10] See: MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014

(3) SA 481 (CC); Merafong City v AngloGold Ashanti Ltd 2017

(2) SA 211 (CC); and Department of Transport and Others v Tasima (Pty) Ltd 2017

(2) SA 622 (CC).

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