

SOUTH AFRICA / JUDGMENT

South African Music Rights Organisation Ltd v Mphatsoe (J595/08) [2009] ZALCJHB 104 (23 March 2009) [2009] ZALCJHB 104

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J595/08

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IN

THE LABOUR COURT OF SOUTH AFRICA

HELD

AT JOHANNESBURG

REPORTABLE

CASE

NO. J 595/08

In

the matter between:

SOUTH
AFRICAN MUSIC RIGHTS
ORGANISATION
LTD
Applicant
and
D.M.
MPHATSOE
Respondent

JUDGMENT

VAN NIEKERK J

- [1] The applicant (SAMRO) applies in terms of section 77(3) of the BCEA for orders declaring that the respondent's notice of termination of employment given on 8 January 2008 was ineffective to terminate his contract of employment, that the contract terminated on 29 February 2008, and that the respondent breached the contract when he ceased work on 8 February 2008, thereby failing to work until the expiry of the notice period. SAMRO also claims damages from the respondent for the breach of contract that it alleges.
- [2] The factual circumstances that give rise to this application are not contentious. SAMRO employed the respondent during September 2006 as an accounts executive. Paragraph 13 of the respondent's letter of appointment provides that notice of termination of employment for permanent staff is "one calendar month, in writing from the part of Management, or staff member".
- [3] When the respondent returned from leave on 8 January 2008, he handed a letter, purporting to be a notice of his intention to terminate his employment contract, to SAMRO's human resources manager. The second paragraph of the letter reads:
- "I hereby give notice of termination of my employment with Southern African Music Rights Organization ("SAMRO") with effect from 31 January 2008.*
- [4] For reasons that are not apparent, SAMRO did not take kindly to the respondent's resignation. It advised the respondent that his notice of termination of employment did not comply with his employment contract, because the notice required by the contract was to run from the first day of a month to expire on the last day of the same month. SAMRO did not contend that the notice given by the respondent was invalid - it advised the respondent that the notice given on 8 January became effective on 1 February 2008, to expire on 29 February 2008.
- [5] The respondent disputed this interpretation of his contract. He conceded that the notice period initiated by his letter dated 8 January did not expire on 31 January, but contended that the calendar month's notice that he was required to give expired on 8 February 2008. SAMRO rejected this interpretation and insisted that the respondent work until 29 February, being the end of the calendar month of February. The respondent ceased working for SAMRO on 8 February 2008.
- [6] The first issue raised in this application is the meaning of "calendar month" and whether the respondent gave a

calendar month's notice to terminate his employment. The second is the calculation of the quantum of damages, if any, suffered by SAMRO consequent on any breach of contract committed by the respondent.

- [7] The respondent, who appeared on his own behalf, submitted that the words “calendar month” did not necessarily require that notice runs from the first day of a month to the last day of the same month. He submitted that a calendar month means that notice could be given on any day of the month, to run until the same day but one of the following month. He was entitled, on this basis, to give notice on 8 January, to expire on 7 February. In support of this submission, the respondent referred to the Interpretation Act, 33 of 1957. The Act defines a “month” as a “calendar month”. The respondent also relies on Devenish Interpretation of Statutes (Juta & Co) to submit that a calendar month need not necessarily run from the beginning of a month. Finally, the respondent relies on section 1 of the BCEA, which defines a “month” as a calendar month, but without any indication that a calendar month necessarily runs from the first day of a month to the last day of the same month, and s 37 of the Act, which entitles a party to a contract of employment to terminate an employment contract on not less than four weeks’ notice if the employee has been employed for a year or more.
- [8] Mr. Mahlangu, who appeared for SAMRO, submitted that the requirement of a calendar month’s notice required notice to be given to take effect on the first day of a month, and to expire on the last day. In support of this submission, Mr. Mahlangu relied on the principle established by *Tiopaizi v Bulawayo Municipality* 1923 AD 317, where the Appellate Division held that except in the case of “domestic or menial servants”, and in the absence of agreement or custom to the contrary, a monthly contract for an indefinite period requires a month’s notice, to expire at the

end of a month.[1] The rule in *Tiopaizi* was confirmed, he submitted, in *Honono v Willowvale Bantu School Board* 1961 (4) SA 408 (C), and in *Stocks and Stocks Holdings v Mphelo* 1996 (2) SA 864 (T).

- [9] In *Stocks and Stocks*, the High Court considered the interpretation of a contract that provided that after the conclusion of the probationary period, “this contract shall continue for an indefinite period and shall then be subject to termination on one calendar month’s written notice by either party”. The employer gave notice of termination on 13 October, stating that the contract of employment would terminate on 15 November. Botha J reviewed the case law dealing with notice periods in leases and contracts of employment. In *Fulton v Nunn* 1904 TS 123, the court held that the period of notice in the case of a monthly lease must expire at the end of the month, a month being a calendar

month. This principle was extended to employment contracts in *Pemberton NO v Kessel* 1905 TS 174, where the court held that notice of termination of employment, where it was to run with a monthly period, had to be given at the end of the preceding month. *Tiopaizi* reaffirmed this rule, with the gloss that notice given on the first day of the month to expire on the last day, was valid. This position was affirmed in *Honono’s* case. The court concluded by stating:

*“The rationale for the rule in *Fulton v Nunn and Pemberton NO v Kessel* is still good in our time. Leases and service contracts are commonly entered into with effect from the beginning of a calendar month. Vacancies arise at the end of the month. In that way the practice of filling them at the beginning of the month is perpetuated. It is therefore clear that the period of notice had to expire at the end of a calendar month, in this case the month of November.”[2]*

[10] Finally, Mr. Mahlangu also relied on *Edgars Consolidated Stores Ltd v Federal Council of Retail and Allied Workers union* (2004) 25 ILJ 1051 (LAC) where the LAC, it was submitted, had followed Honono’s case.

[11] There is no merit in the respondent’s submissions, based, as they are, on rules of statutory interpretation rather than the interpretation of the contract to which he was a party. In relation to s 37 of the BCEA, that section fixes a minimum period of notice. Parties are free to contract, as they have done in this instance, for a more favourable term, and will be held to that term. But the authorities referred to by SAMRO are equally unpersuasive. *Stocks and Stocks* is the only clear authority for the proposition that when a contract requires a calendar month’s notice, notice is effective from the first day of the month and expires on the last. I have my doubts as to whether this proposition is capable of elevation

to the level of principle. First, the judgments reviewed in *Stocks and Stocks*, many of which are traditionally relied on to support the interpretation for which SAMRO contends, do not directly concern the interpretation of a term in a contract of employment that requires a calendar month’s notice. Rather, they are concerned with what might constitute reasonable notice in circumstances where a contract provides for tenancy or employment for an indefinite

duration, in circumstances where the rent or remuneration respectively is paid on a monthly basis. Secondly, at the level of purpose and policy, the assumption in *Stocks and Stocks* that the dictates of the labour market are such that employers fill vacancies on the first day of a month thus requiring notice periods to expire on the last, is tenuous, to say the least.

[12] Similarly, the *Edgars* judgment provides no support for Mr. Mahlangu’s submission. A careful scrutiny of the judgment reveals that in that case the Court assumed for the purposes of argument that a recognition agreement requiring three months’ notice of termination meant three calendar months in the sense that notice commenced running on the first day of a month. The Court was not required to decide whether valid notice could be given on a day other than the first day of a month, nor did it make any decision to that effect.

[13] The proper approach, in my view, is that expressed by Comrie AJA in his brief concurring judgment in *Edgars*. Comrie AJA observed that a month or a calendar month does not necessarily begin on the first day of the month any more than a calendar year necessarily begins on 1 January. What is necessary is to ascertain the intention of the parties by way of interpretation,

an exercise in which the language and nature of the contract is relevant.[3] This approach avoids the application of mechanical and possibly arbitrary rules to the variety of circumstances that inevitably manifest themselves when employment is terminated, and enjoins a court to focus primarily on the terms of the contract between the parties.

[14] Words used in contracts should not be interpreted in isolation, rather than in the light of the contract read as a whole.[4] When a word is used in one part of a contract, there is a presumption that the same word, used elsewhere in the contract, bears the same meaning. [5] Where that word is qualified by an adjective, it seems to me that if the actual or potential effect of the qualifier is to modify the word's meaning, then it must be presumed that the parties intended that the meaning, as modified, be applied. Another significant indicator of the intended effect of a qualifier is the context in which the word and its qualifier are used. A word unqualified used consistently in one context, and then used elsewhere, in a different context, with a qualifier, would normally be a strong indication that the qualifier ought to be accorded significance. In the present instance, the parties use the term "month" with some frequency, and the term "calendar month" only in relation to the notice required to terminate the contract. Clause 1.2, for example, requires SAMRO to pay emoluments "monthly in arrears". Clause 1.3 establishes a probationary period of "six months". Pension and medical aid contributions are to be deducted on a "monthly basis" (clauses 4 and 5). Bonuses are pro rated to the number of "months worked" in the first year of service (clause 7). The use of the adjective "calendar" in the context of those provisions of the contract regulating termination of employment indicates that the parties attached some significance to the distinction between a "month" and a "calendar month", and that they intended a specific, separate meaning in each case. Those instances where the word "month"

is used is consistent with the interpretation that the month referred to need not necessarily run from the beginning of a month. By using the term "calendar month" in the termination clause, the parties obviously intended a meaning that in the circumstances can only be the meaning for which SAMRO contends. It follows that the respondent was obliged to give notice of termination of his employment so as to take effect on the first day of a month and run to the last, and that he breached his employment contract when he failed or refused to work until 29 February 2008.

[15] I turn now to SAMRO's claim for damages consequent on the respondent's breach of contract in the form of his failure to give the required notice. Wallis points out that the circumstances in which an employer would seek to recover damages from an employee for a breach by the employee of the employment contract must be extremely limited, although in principle an employer is entitled to recover any loss that it suffers consequent on such breach.[6] In these proceedings, the respondent claims the amount of R13 642.84, being the value of services that SAMRO alleges the respondent would have provided had he worked after 8 February 2008, less the value of the services he rendered to SAMRO from 1 to 8 February

2008. The net amount claimed is R5457.12.

- [16] SAMRO contends that the respondent's cessation of work "caused the applicant damages" in the sum referred to above, calculated as it is based on equating the value of services lost with the remuneration that the respondent would have earned had he remained in SAMRO's employment until 28 February.
- [17] The view that a wrongful termination of employment be it at the instance of the employer or, as in this case, by the employee, is remediable only because of its prematurity (i.e. the denial of the promised period of notice or fixed term of employment) may have its roots in the now repealed 1983 BCEA. Section 14(4)(b) of that Act provided that an employee could avoid working an agreed notice period provided that the employee paid the employer a sum equivalent to the remuneration that would have been earned during the notice period[7]. As Mark Freedland points out in his seminal work *The Personal Contract of Employment*,[8] and for the moment viewing the application of the rule from the perspective of a breach by an employer, this approach reflects a conclusion that the purpose of damages for wrongful dismissal is only to protect a worker's interest in remuneration and benefits for the denied period of notice or unexpired fixed term, and that the quantification is to be conducted on the assumption that the worker's pecuniary losses are limited to that remuneration and those benefits.[9] While this approach has a particular procedural and remedial context, it appears to remain the dominant approach of English law (see *Johnson v Unisys Ltd* [2001] UKHL 13; [2001] ICR 480 (HL)).
- [18] In the present matter, SAMRO proffers no proof of any damages that it suffered consequent on the respondent having ceased work prematurely. The deponent to the founding affidavit, SAMRO's general manager: legal and governance services, says only the following:

The respondent's cessation of working for the applicant caused the applicant damages in the amount of R13 642.84 (being the value of the services he would have provided to SAMRO had he worked after 8 February 2008. The value of the services the respondent rendered from 1 to 8 February is R5 457.12. Accordingly, the respondent is indebted to the applicant in the amount of R8 185.12 (after setting off the amount of R13 642.84 against R5 457.12).

- [19] This formulation of SAMRO's claim for damages begs a number of questions. First, there is no logical basis on which to assume that SAMRO's losses are necessarily limited to the remuneration and benefits that the respondent would have earned in a denied period of notice. When he resigned, the respondent may, for example, have been teetering on the brink of redundancy, making no significant contribution to SAMRO's business operations. In these circumstances, to have been relieved of the obligation to pay the respondent's salary for the balance of the notice period would be a benefit rather than a burden - there is little likelihood of any pecuniary loss in these circumstances. On the other hand, the respondent may have been an employee with rare and highly sought after skills, necessitating the engagement at a premium of a similarly skilled temporary employee. I see no reason why the application of the general rule would not entitle SAMRO in those circumstances to recover its losses, even though they may exceed what the respondent would have been paid had he worked his full notice period. These examples can be taken further - what if the

respondent had been instrumental in securing a business transaction from which SAMRO would benefit by a substantial commission, and had breached his contract to commence work for a competitor in circumstances where the competitor stands to benefit instead? Surely SAMRO in those circumstances ought to have a claim for damages against the respondent beyond what the limited damages rule provides? These are difficult questions of law and policy, particularly in the light of the recent judgments of the Supreme Court of Appeal that recognise a mutual contractual obligation of fair dealing between employer and employee (see, for example, *Old Mutual Life Assurance Co SA Ltd v Gumbi*

[2007] 8 BLLR 699 (SCA) and *Boxer Superstores Mthatha v Mbenya* (2007) 28 ILJ 2209 (SCA).^[10]

The introduction of a contractual right to fair dealing in the employment relationship calls into question the assumption that the purpose of damages for breach of an employment contract is simply to protect the aggrieved party's interest in a denied period of notice, or the unexpired portion of a fixed term contract. Breaches of mutual obligations of trust and confidence are unlikely to be remedied by an approach to the assessment of damages for breach of an employment contract such as that for which SAMRO contends. Happily, in the present matter, I need venture no further than SAMRO's founding affidavit and the obvious conclusion that it fails to establish any factual foundation on which its claim for damages might be assessed. In short, SAMRO has failed to establish any loss consequent on the respondent's breach of contract. For that reason, SAMRO's claim for damages must fail.

I accordingly make the following order:

1. The respondent breached his contract of employment by failing to work until 29 February 2008.
2. The applicant is to pay the respondent his remuneration for the period 1 to 8 February 2008, being the sum of R5457.12.
3. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of Hearing: 04 December 2008

Date of judgment: 23 March 2009

Appearances:

For the applicant: Mr Mahlangu from Cheadle Thompson and Haysom Inc.

For the Respondent: In person

[1] Scoble, in his discussion on reasonable notice in the case of monthly paid employees, describes what he terms the "sharp

distinction in law” between a common law servant on the one hand and a domestic or labouring servant on the other. In the former case, the servant was entitled to a calendar months’ notice, being notice that was effective from the first day of a month to the last. Therefore, for example, notice given on 17 December would not expire until 31 January. (See Scoble *The Law of Master and Servant* Butterworths, 1956, at p. 315). See Paul Benjamin’s article “The Contract of Employment and Domestic Workers”

(1980) 1 ILJ 187 at 191, in which the author reviews the history of the exception applied to domestic workers and argues cogently for its demise)

[2] At 869B

[3] At 1060C-D.

[4] *Young v Liberty Life Association* 1991(2) SA 246 (W).

[5] *Kellaway Principles of Legal Interpretation, Statutes, Contracts and Wills* (Lexis Nexis, 1995, at 437.

[6] *Wallis Labour and Employment Law* at 6-15.

[7] In *NEWU v CCMA & others* [2007] ZALAC 3 (13 March 2007), at Paragraph 16, the Labour Appeal Court observed: “Where the employee has resigned without giving notice in circumstances where he was obliged to give notice, usually the employer does not even sue the employee for damages which in law he would be entitled to do and the damages would be the equivalent of the notice pay. However, if an employer wants to sue an employee in such a situation, he does have a right to do so both at common law and in terms of the BCEA. Employers hardly use even this right.”

[8] Oxford University Press, Oxford, 2003.

[9] *Freedland*, at 362. *Freedland* refers to this as the “limited damages rule”.

[10] See especially paragraph 9 of the latter judgment, where the Court was obviously alive to the tensions created by capped awards of compensation under the LRA and the prospect of a more open-ended claim for contractual damages at common law.

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