

SOUTH AFRICA / JUDGMENT

Tabane v Railway Safety Regulator and Others (J173/2021) [2023] ZALCJHB 76 (24 March 2023) [2023] ZALCJHB 76

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J173/2021

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FLYNOTES:

CONTRACTUAL DAMAGES AND MOTION PROCEEDINGS

LABOUR

– Contract – Damages – Amount that would have
been paid had breach not been committed – Motion
proceedings

– Damages claimed not liquidated damages – Applicant
must prove that she actually suffered damage
as a result of the

breach of contract – Proof of actual damages suffered, the
obligation to mitigate and proof of causation
are matters that

inevitably lend themselves to be determined by way of trial.

The

Labour Court of South Africa, Johannesburg

Not

Reportable

Case

No: J 173/2021

In

the matter between:

MAMANKOANE

BERNADETТА TABANE Applicant

and

THE

RAILWAY SAFETY REGULATOR

First

Respondent

THE

BOARD OF DIRECTORS: THE
RAILWAY SAFETY REGULATOR
Second
Respondent
THE

CHAIRPERSON OF THE BOARD: THE
RAILWAY SAFETY REGULATOR
Third
Respondent
THE
CHIEF EXECUTIVE OFFICER
THE
RAILWAY SAFETY REGULATOR
Forth
Respondent

Heard: 23 March 2023

Delivered: 24 March 2023
(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 24 March 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The present application has its roots in an urgent application filed on 15 July 2021, in which the applicant sought, among other things, an interdict against the respondents from taking any decision on her probation and/or the termination of her employment. It is not apparent to me why an application as a matter of urgency has been allowed to remain in limbo for the protracted period that it has. In November 2022, more than a year after the filing of the application, the applicant filed a notice of intention to amend her notice of motion, together with a supplementary affidavit. The respondents objected to the proposed amendment. The applicant seeks the leave of this court to amend her notice of motion in the terms proposed.
- [2] The proposed amendment relates primarily to the relief sought by the applicant. The applicant has abandoned the interdictory relief initially claimed, and avers that the 'adjustment of the remedy from specific performance to damages has been rendered necessary and inescapable...'. The applicant seeks a declaratory order that the respondents committed a breach of contract by terminating her employment in 15 July 2021, and an order that the first respondent pay her the amount to which she would otherwise have been paid had the breach not been committed, an amount of R6 250 700.

- [3] The material facts are not in dispute. The applicant was engaged by the first respondent on 1 August 2020, on a five year fixed-term contract. Applicant's appointment was subject to a probationary period of six months. On 29 January 2021, the applicant was advised that her appointment would not be confirmed. On 8 March 2021, this court granted judgment in favour of the applicant in effect finding that the first respondent had breached the probation policy and that the applicant's probation be extended for three months. This extension was effected from 16 April 2021 to 15 July 2021. During May 2021, the first respondent's board resolved that the applicants post to be split into two positions. The consequence of that decision was that the applicant's position was downgraded, with no prejudice to her salary. The applicant signed a performance agreement during June 2021, and assessments were conducted by a panel appointed for this purpose.
- [4] As I have noted, on 15 July 2021, the applicant delivered an application for an interdict seeking relief related to what she anticipated would be a termination of her employment. Amongst the orders sought was an order directing the respondents to confirm the applicant's position in the post to which she had being appointed in terms of her employment contract. On the same evening, the applicant was advised that her employment had not been confirmed, nor her probation extended.
- [5] In the supplementary affidavit filed in respect of these proceedings, the applicant contends that the respondents have committed a breach of contract on a number of grounds. For present purposes, what is significant is that the applicant no longer seeks what amounts to an order for specific performance. The applicant now records that she has accepted the first respondent's repudiation of her contract of employment, cancelled the contract and elected to claim damages. The applicant records that the damages she now claims comprise her contractual annual salary for the remainder of her contract period.
- [6] The respondents filed a notice of objection to the applicant's notice of intention to amend, on the basis that the proposed amendment introduces a completely new cause of action, one not foreshadowed in the original notice of motion. In particular, the applicant submits that the proposed amendment seeks to circumvent the provisions of the Rules of this court pertaining to the issuing
- of legal process. The applicant disputes this, contending that the cause of action contained in the proposed amendment was not only foreshadowed but was expressly sought in her original papers, and that the cause of action, namely breach of contract, remains the same and that the applicant seeks to do no more than adjust the remedy sought from specific performance to damages.
- [7] The general principles regarding amendment to pleadings or encapsulated in the statement by Watermeyer J in *Moolman v Estate Moolman* 1927 CPD 27 at 29:

‘...the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or such an amendment would cause an injustice to the other side which cannot be compensated by costs, when other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which is sought to be amended was filed.

(See also *Sibiya v SA Police Service* (2022) 43 ILJ 1805 (LAC)).

- [5] The party seeking an amendment bears the onus of showing that it has made bona fide and that there is an absence of prejudice. The granting or refusal of an amendment to a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all relevant facts and circumstances. Ordinarily, the court will refuse an application for an amendment where the pleading sought to be amended would be excipiable (see *Cross v Ferreira* 1950 (3) SA 443), or which would introduce a new cause of action or claim, or where there is some other good cause for not allowing the amendment.
- [6] This begs the question of what is meant by a ‘cause of action’. A cause of action has been defined to mean ‘every fact which it would be necessary for a plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’ (*McKenzie v Farmers’ Cooperative Meat Industries Ltd* 1922 AD 16 at 23). Put another way, a cause of action is ‘the factual basis/set of material facts that beget the plaintiff’s legal right to action. The material facts which the plaintiff in the present case has to prove to support his right to judgment...’ (see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A)).
- [7] Even if I accept the submission that the cause of action is a breach of the applicant’s employment contract and that she seeks to achieve no more than elect an alternative remedy, the fact remains that these are motion proceedings, which were opposed on the basis of the relief sought in the original notice of motion. I raised with counsel whether it was appropriate that in a matter that had its origins in an urgent application filed more than a year ago, it was competent for the applicant now to seek contractual damages by way of piggy-backing on the pending application.
- [8] It is trite that to recover contractual damages the plaintiff must prove that he or she suffered damages, as a consequence of the breach, that there is a causal nexus between the damages suffered and the breach, and also the quantum claimed. To the extent that counsel for the applicant submitted that the damages claimed in the amended notice of motion constituted liquidated damages and that the quantum could thus be determined by way of motion proceedings, this is manifestly not the case. In *Toyota SA Motors (Pty) Ltd v Nzuzo & another* (2020) 41 ILJ 908 (LAC), the Judge President had occasion to say the following:
- [10] Finally, I need to add that it appears to have become fashionable for dismissed employees to come to the Labour Court in terms of the BCEA and came breach of contract seeking either specific performance or damages. I do not know the reason that has given rise to this, but

the risk associated with claims made in terms of the BCEA, as in this matter before this court, is enormous. Firstly, unlike in the LRA the claimant must prove an unlawful breach and not unfairness for the termination of the employment; next in terms of the LRA reinstatement is generally compulsory when a dismissal is found to be substantially unfair, specific performance consequent upon a breach is not, and generally it is a discretionary relief. In an action in terms of s 77, if the employees are able to prove a breach by the employer the only amount s/he will receive is the loss s/he has proved to have suffered as damages. How s/he must also show that s/he has tried to mitigate the damages etc. there is no way s/he can receive damages equal to the amount they would have earned from the date of the breach to the date that they would eventually have retired! This absurd prayer which is so regular seems to take leave of the basic rule that one is ordered damages that are proved not what you would have been paid had you remained in your employ till retirement.

- [9] Similarly, and more recently, in *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana* (2019) 40 ILJ 2723 (LAC), the Judge President said:

With regard to damages, as I said earlier, there was a duty upon the respondent to prove the quantum of damages – to submit on damages in the amount that she would in until her retirement is tightly misconceived. Damages in a breach of contract needs to be proofed, she failed to prove any, nor does she allege that she has been out of work from the date of her employment being terminated. In the circumstances, had the respondent proved the breach, she would not in law be entitled to any relief.

- [10] By extension, in the event that the first respondent is found to have breached the applicant's contract, it does not necessarily follow that she is entitled to damages in the amount of the remuneration she would have earned, calculated over the balance of the contract. The applicant must prove that she actually suffered damage as a result of the breach of contract. The first respondent is entitled, for example, to establish that the applicant failed to take reasonable steps to mitigate her loss.
- [11] The Rules of the Labour Court, unlike those of the High Court, do not generally contemplate that an election to be made between proceeding by way of motion and action, depending on the reasonable foreseeability of a material dispute the fact. The rules of this court are prescriptive. Rules 6 and 7 dictate the form of proceedings, dependent on the nature of the referral to the court or the application that is filed. Where a litigant invokes this court's jurisdiction under section 77(3), the Rules do not prescribe which procedure is to be followed. To the extent that counsel for the applicant referred to footnote 22 to Rule 7, which provides that if a material dispute the fact is not reasonably foreseen, an application in terms of section 84 of the Act concerning the interpretation or application of part C of Chapter 10, it may be initiated in terms of Rule 7. Footnote 8 to Rule 6 provides that similar proceedings may be initiated in terms of that Rule if a material dispute the fact is foreseen. Neither of these provisions, on which the applicant's counsel relied, assists the applicant. Part C establishes statutory

protections against acts of discrimination and victimisation by employers, neither of which are of any relevance in the present

circumstances.

- [12] In the absence of any prescription on the process by which, for the purposes of section 77(3) a matter concerning a contract of employment is to be determined, it seems to me that the approach adopted in the High Court has merit. In other words, where this court's concurrent jurisdiction is invoked and where no material dispute of fact is reasonably foreseeable, a litigant is not precluded from approaching this court in terms of Rule 7. Indeed, this court regularly hears and determines contractual disputes by way of motion proceedings, and regularly grants what amounts to orders for specific performance. (For example, disputes concerning the application of restraint and confidentiality undertakings in the contracts of employment.) But it is difficult to appreciate how a claim for contractual damages can be adjudicated in the same way. The proof of actual damages suffered, the obligation to mitigate and proof of causation are matters that inevitably lend themselves to be determined by way of trial.
- [13] The present case is no exception. To succeed in her claim, it is incumbent on the applicant to produce evidence to establish the damages that she has suffered, the extent to which she has been able to mitigate those damages (for example, by obtaining alternative employment), and the causal link between those damages and what she alleges to be a breach of contract on the part of the first respondent. The respondents are entitled to challenge that evidence. Motion proceedings are not suited to the determination of disputes of fact, which invariably and inevitably arise in this context.
- [14] In summary, even if I accept that the amendment that the applicant seeks to effect to the notice of motion does not introduce a new cause of action, for the reasons stated above, I am not persuaded that motion proceedings are appropriate, at least not in this instance, to determine the existence and quantum of contractual damages. For that reason, I am not persuaded that I should exercise a discretion in favour of the applicant and allow the amendment. The application to amend thus stands to be dismissed.
- [15] In relation to costs, this is a matter in which the court's concurrent jurisdiction has been invoked. In *Baise v Mainzo Asset Management (Pty) Ltd* (2019) 40 ILJ 1987 (LAC), the Labour Appeal Court held that whether a matter is to be treated as a civil claim, the regime for costs is that, absent special considerations, costs ought to follow the result. In other words, section 162, which empowers this court to make orders for costs according to the requirements of the law and fairness, does not apply. No special considerations have been raised in the present instance.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv T Skosana SC

Instructed by: Dima Mashego Attorneys

For the respondent: Adv W Mokhare SC

Instructed by: Moja Sibiya Attorneys

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