

SOUTH AFRICA / JUDGMENT

Lehari v Mhlave Investment Holdings (Pty) Ltd (J2297/2008) [2011] ZALCJHB 50 (7 June 2011)

[2011] ZALCJHB 50

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J2297/2008

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Source record**Lehari Makhosi v MHLAVE****INVESTMENT HOLDINGS (PTY) LTD – Case No J2297/2008 –****Claim for salary for the notice period****and petrol expenses-Evidence-****resolving conflicting versions. Employee did not attend work after
resignation. - 2 June 2011****IN THE LABOUR COURT OF SOUTH****AFRICA****HELD****IN JOHANNESBURG****Reportable****Case No: J2297/2008**

In the matter between:

LEHARI MAKHOSI

.....Applicant

and

MHLAVE INVESTMENT HOLDINGS (PTY)

LTDRespondent

Date of Hearing : 18 March 2011

Date of Judgment : 07 June 2011

JUDGMENT

Molahlehi J

Introduction

The applicant in this matter claims payment of his outstanding salary together with other amounts from the respondent based on his oral contract of employment. In terms of the oral contract of employment concluded between the parties, the applicant was paid a monthly salary in the amount of R25 000, 00. The applicant was also entitled to receive in addition to his salary reimbursement for travelling on monthly bases.

Background facts

It is common cause that soon after his return from leave, the applicant submitted his resignation from his employ to the respondent. The applicant submitted his resignation on 24 June 2008. His last working day was the 31 July 2008.

The dispute between the parties arose from the fact that the applicant stopped working on 4 July

2008. It was for this reason that the respondent contended that it did not have to pay the applicant for the months of June and July. The respondent also contends that it was also not obliged to pay the applicant the traveling expenses for the month of April and May

2008. The other reason for refusing to pay the applicant according to the respondent was because according to it, the applicant had taken up an alternative employment with another employer.

The applicant on the other hand contends that after his resignation, he was informed by Mr Mabunda, the director of the respondent that it was not necessary for him to report for work during the notice period. The applicant contends that he is entitled to be paid R15 000, 00 (fifteen thousand) in respect of his June salary, less R10 000, 00 (ten thousand) which is less payment of R10 000,00 (ten thousand) he received. The other amounts which the applicant claims are for the payment of R2 445.95 (two thousand four hundred and forty five and ninety five cents) in respect of the travelling expenses for April and May 2008 and R25 000, 00 (twenty five thousand) in respect of the July salary.

The applicant testified on his own behalf and stated that he resigned to go and start his own business. After submitting his resignation, he reported for work for the first four days thereafter. On the fourth day, he was called to an office by Mr Mabunda who informed him that he saw no reason why the applicant should serve his notice period. He thereafter stopped attending work.

As concerning his duties and responsibilities, the applicant testified that he was responsible for developing strategies for the business of the respondent which involved a number of pharmacies. Because of the nature of his work, the applicant had to travel to the various pharmacies of the respondent. Because of this reason, the applicant was paid a travelling allowance. He recorded his traveling distances in a log book. The claim he submitted which is part of this claim relates to the travelling he did during the month of May.

Mr Mabunda testifying in support of the case of the respondent, stated that there was no replacement of the applicant between 24 June and end of July when the applicant was supposed to have been serving his notice. He further testified that he called the applicant on 4th June 2008 and enquired about his whereabouts. The applicant according to him simply indicated that he would revert back to him

which he never did.

Mr Mabunda disputes releasing the applicant from his duty to serve the notice and stated further that he could never have released him because of the nature of his work. And as concerning the travelling claim, Mr Mabunda contended that the claim was never brought to his attention. However he conceded that the travelling expenses for April would have been claimed in May and that the fact that he was not aware of the claim did not mean that the expense did not exist.

Evaluation and analysis

The issue in this matter turns around the question of whether the applicant was given permission by Mr Mabunda not to serve his notice period after his resignation. In this regard, the court is faced with two conflicting versions.

The version of the applicant as stated above is that he was given permission by Mr Mabunda not to serve his notice period. According to him, he had intended to serve his notice period and had expressed that desire in his letter of resignation where he inter alia states:

“My main thoughts are now to work towards wrapping up my current responsibilities and to hand over my responsibilities as smoothly as possible while serving my 30 days notice.”

The reason why the applicant did not fulfil the above undertaking was because Mr Mabunda told him that it was not necessary for him to serve the notice period. Mr Mabunda disputed ever having a meeting with the applicant where he told him that it was not necessary for him to serve his notice period. During cross examination of the applicant, it was put to him that the reason he did not attend at work was because he had found another employment and that a person who employed him or had business arrangements with him would be called to testify in that regard. The respondent never called such a person to the witness stand. The applicant disputed having absented himself because he had found another employment or was involved in a business transaction with one of the respondent's clients.

The assertion that the applicant did not go to work to serve his notice period has to be discarded the respondent having failed to lead evidence of the person who Mr Mabunda said told him that the applicant had approached him to do business with when the applicant was supposed to have reported for work.

The other point raised by the respondent in countering the applicant's claim is that Mr Mabunda called the applicant on 5 June 2008, to enquire about his whereabouts upon which the applicant responded by saying that he would revert back. It would appear that nothing further was discussed between the two of them regarding the absence of the applicant from work. The applicant denied ever receiving the telephone call from Mr Mabunda.

It is trite that the contract of employment does not terminate on the date the notice of termination is given but when the notice period expires.¹ This means that an employee who is serving a notice period is still subject to the discipline of the employer. The other principle is however that an employer is not obliged to pay an employee who does not attend work during the notice period unless arranged otherwise.

The onus in the present instance, based on the balance of probabilities, is on the applicant to show that an agreement was concluded with Mr Mabunda that he did not have to work during his notice period. The applicant in the present instance can succeed, if he was to show on the preponderance of probabilities that that his version as opposed to that of the respondent was true, accurate and for that reason acceptable. In arriving at the conclusion as to the accuracy and the truthfulness of the applicant's version, I have to weigh the assertion of the applicant that an arrangement was made with Mr Mabunda that he did not have to attend work during the notice period. In doing so, I have to take into account the balance of probabilities and the credibility of the respective witnesses of the parties. ²

It has already been indicated above that the case of the applicant is that an arrangement was made with the respondent that there was no need for him to serve the notice period. That arrangement did not include the non-payment of the salary of the applicant for that period.

The impression I made of the applicant is that whilst he was an honest witness, he was indeed a difficult witness. As I understand the principles of law, it does not necessarily follow that the credibility of a difficult witness has to be placed on a wooden

block to be chopped. Thus in addition to being satisfied with the credibility of the applicant, I am after evaluating the totality of the evidence submitted, satisfied that the applicant succeeded in discharging his onus of proving that his version is the more credible and acceptable version of what happened regarding the arrangement concerning the serving of the notice. It follows that I reject the version of the respondent as concerning what transpired as concerning the arrangement on the serving of the notice by the applicant. The version of the respondent is rejected on the basis that it was not probable and Mr Mabunda was not a satisfactory witness with regard to crucial aspects of facts relating to what happened with regard to the arrangement between him and the applicant. He simply denied that a meeting was ever held between him and the applicant and in seeking to counter that version, testified that he phoned the applicant and

asked him where he was. It is quite strange that an employer who takes issue with an employee who absented himself would without further inquiry accept when an employee says he will revert back. And when the employee does not revert back makes no follow up but simply waits for that employee to claim payment of the outstanding salary to rely on that telephone enquiry. There is also insufficient evidence to support that version.

It would appear that once confronted with the claim for monies due and owing to the applicant, the respondent resorted to making his case as it went along. The first issue is the telephone call which Mr Mabunda claims to have made and the second is that of seeking to explain why the applicant would not have been able to serve his notice period. In my view, Mr Mabunda fabricated the story about the allegation that the applicant had business commitment with one of the respondent's client, and that is the reason he did not attend work during the notice period.

I now turn to deal with the other amounts claimed by the applicant. Mr Mabunda conceded that the applicant was entitled to claim the petrol expenses and that the expenses for April would have been due in May. Mr Mabunda failed to show that the petrol claims as submitted by the applicant was fabricated and or incorrectly calculated. It thus follow that the applicant has successfully made out a case regarding his claim for the petrol expenses.

In light of the above I find that the applicant has made out a case that the respondent owes him the amounts claimed in his statement of case and the amounts are due to him. I see no reason in fairness and law why the costs should not follow the results including the wasted cost occasioned by the postponement on 10 March 2011.

Order

In the premises I make the following order:

The respondent is to pay the applicant R25 000, 00 being the amount due and owing in respect of the June 2008 salary.

The respondent is to pay the applicant R25 000, 00 being the applicant's owing and due in respect of the July 2008 salary.

The respondent is to pay the applicant R2 445.95 being the amount due and owing in respect of the applicant's petrol reimbursement for June 2008.

The respondent is to pay the above amounts at the rate of 15.5% *tempora morae*.

The respondent is to pay the applicant the costs of this suit including the costs occasion by the postponement of the matter on 10 March 2011

Appearances

For the Applicant : Adv F Bezuidenhout instructed by LJ De Jager Attorneys.

For the Respondent: :Mr Lesomo of Lesomo Attorneys.

1See SALSTAFF obo Bezuidenhout v Metrorail

[2001] BALR 926 (AMSA) at para6 and Lottering and Others v Stellenbosch Municipality [2010] 12 BLLR 1306(LC).

2The approach to be adopted when faced with conflicting and mutually destructive versions was considered in Stellenbosch Farmers' Winery Group Limited and another v Martell & Kie 2003

(1) SA 11 (SCA) at para 5. . See also National Employers' General Insurance CO Ltd v Jagers 1984

(4) SA 437 (E).

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