

SOUTH AFRICA / JUDGMENT

Zulu v Mbombela Housing Association (41676/13) [2016] ZAGPPHC 78 (5 February 2016) [2016] ZAGPPHC 78

COURT

North Gauteng High Court, Pretoria

BEFORE

S. A. M. Baqwa

CASE / FILE NUMBER

41676/13

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

CASE NO: 41676/13

DATE: 5/2/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

In the matter between:

BHEKUYISE ABSANIA
ZULU Plaintiff
and
MBOMBELA HOUSING
ASSOCIATION Defendant

JUDGMENT

Baqwa J

- [1] The plaintiff herein is Bhekuyise Absania Zulu an adult male of [...], Ka Nyamazane, and the defendant is the Mbombela Housing Association, a public institution of corner Brown and Paul Kruger streets, Nelspruit.
- [2] This is an action for the payment of monies outstanding to the plaintiff for the period the plaintiff served as an employee of the defendant from 2007 to 31 May 2011 when he resigned.
- [3] The plaintiff was employed as a general manager and in that capacity was the highest ranking official subject to the authority of the Board.
- [4] At the time of his resignation these were sums of money owing to him in respect of accrued leave, pension deducted from his salary but not paid over to the pension fund, retirement annuity premiums deducted but not transmitted to Metropolitan Life and salary underpayment.
- [5] After his resignation the defendant engaged the services of an independent consultant, one George Luputa to assess whether there were any monies due to the plaintiff and the quantity thereof.
- [6] Mr Luputa duly compiled a report which he entitled the termination package and which has been the pivotal point on which this case has revolved.

Pleadings

- [7] The pleadings encapsulate a claim of these monies which the plaintiff avers are due to him and which the defendant by and large denies.
- [8] The plaintiff averred initially that the defendant owed him the sum of R489 230.00 of which R47 865.21 has since been paid leaving a balance of R441 364.79.
- [9] The defendant admits that an amount was paid to the plaintiff but further states that amounts of R15 000.00 and R40 000.00 were also paid as outstanding salary. The plaintiff admits these amounts but submits that they were not part of the termination package but were merely ex gratia payments.

The Issues

- [10] What this court has to determine therefore is whether there were outstanding monies payable to the plaintiff and if so, the quantum thereof.

The Evidence

- [11] The plaintiff testified regarding matters which are in the main common cause namely:

11.1 That he was employed by the defendant from 2007 to May 2011. He testified that even though he was offered a contract of employment in 2007 this remained unsigned as they were negotiating terms which were acceptable to him. A written contract was therefore only signed on 25 March 2010. He was however given a letter of employment.

11.2 What was also common cause was the fact of his resignation in May 2011 as he was then to become a councillor of the Mbombela Municipal Council.

[12] The plaintiff also testified about his termination package which was compiled by the independent consultant commissioned by the Board and presented to the Board by means of a power point presentation in his presence.

[13] The plaintiff also presented the evidence of the independent consultant. His evidence was about the termination package which took him about five months to compile.

[14] It is pertinent to capture the executive summary of the presentation he made to the Board which is as follows:

“Executive Summary

Chairperson of the Board, this is a summarised version of the termination package for the outgoing General Manager of the Association.

According to the record submitted to my office, in the last 4 years the General that the manager served the association, he never took his leave, resulting in leave accumulation of 84 days in line with the contract that stipulate the general manager is entitled to 24 days per annum.

Upon termination of employment, it is a requirement that leave days accrual should be paid out.

Leave days

84 Days leave accrual 152,136

Pension

Chairperson, I further take notice, that from December, 2009, the Association was deducting pension from the General Manager, which was not submitted to the pension fund.

161,331

Retirement Annuity

The General Manager also took a retirement annuity with metropolitan life to the value of R1 583 per month, which was being deducted from his salary but not paid to the fund.

30,077

Underpayment 145,686

Reference is drawn from annexure A, when the General Manager Salary was revised by the Board and approved as an underpayment.

Based on the scenario highlighted above, the association owes the General Manager, upon verifying the HR policies of the association an amount

489,230

Recommendation

Chairperson, I recommend that the final decision on how the outstanding amount should be paid should be discussed by your office and the outgoing General Manager, and please let my office be aware of the decision taken.”

- [15] According to Mr Luputa the leave days were calculated on the basis of leave days not taken by the plaintiff. He further testified that the underpayment was due to the delayed finalisation of the employment contract which was only signed on 25 March 2010 and also due to a 6% increase approved by the Board that was not implemented.
- [16] The termination package was according to this witness submitted to the Board of the defendant during or about May – June
2011. It was approved and signed at that meeting by the persons whose signatures appear on the signatories’ page of the termination package appearing as page 19 in Exhibit “A”. More particularly the signatures of the chairperson of the Board, Mr Chirwa, the then additional member of the Board and current CEO of the defendant, Mr Mathebula, the plaintiff and Mr Luputa.
- [17] A former Board member and chairperson of the Finance Committee Mr Alex Nkosi also testified on behalf of the plaintiff. He confirmed that the termination package compiled by Mr Luputa was submitted to the Board in May – June 2011. He also confirmed that Mr Luputa presented the termination package at the defendant’s Board meeting and that it was approved and signed as already stated above.
- [18] He further testified that the underpayment resulted from the late finalisation of the employment contract and remuneration increase that was not implemented. He further stated that he was aware of the SARS and pension payments not being paid over as resolved by the Board. Mr Nkosi further stated that even though the Board had approved the termination package, the acting General Manager had to communicate with the plaintiff regarding payment thereof.
- [19] The defendant called two witnesses, namely, M. E. Mathebula who is the current CEO and a former Board member and Mr Chirwa, the current chairperson of the Board.

- [20] Mr Mathebula testified that he was an additional member of the Board during the plaintiff's tenure and that he was appointed as acting General Manager after the plaintiff's resignation. Later he was appointed as General Manager and later the title changed to CEO of the defendant. His duties include, inter alia, ensuring the proper financial management of the defendant, implementation of the defendant's policies and attending to transfer payments to entities such as SARS and the pension fund.
- [21] He is aware of the termination package which was compiled by Mr Luputa and presented to the Board but he denies that the package was approved by the Board. When referred to the page containing his signature which was part of Mr Luputa's executive summary he stated that it should not be accepted in the absence of a date. He however admitted his own signature even though he was unable to explain how it got appended on that document.
- [22] According to Mr Mathebula, the Board did not approve the termination package and the Board instructed him instead to submit it to Stabilis, external auditors of the defendant.
- [23] He admitted payments of amounts of R15 000.00 and R40 000.00 which were paid to the plaintiff on 20 December 2011 as "ex gratia" payments. He further stated that according to him those were provisional payments even though explicitly excluded from the termination package.
- [24] He confirmed that the amount of R47 865.21 paid to the plaintiff was part of the underpayment and as such part of the termination package. He further elucidated that the payment was as per instruction or advice of the external auditors.
- [25] Mr Chirwa testified that he has been a member of the Board initially as deputy chairperson since 2001. He was later appointed a chairperson, a position which he currently still holds.
- [26] Mr Chirwa stated that he is aware of the termination package but according to him this was never approved by the Board. He acknowledged his signature on page 19 of exhibit "A" but could not say what it was except for its reference to a termination package. He was adamant that upon a proper reading of page 21 of exhibit "A" it is clear that the termination package was never approved.
- [27] Mr Chirwa admitted that the termination package was presented by Mr Luputa during about May – June 2011.

Evaluation

- [28] Mr Boshoff for the plaintiff submits that the plaintiff has proved its case on a balance of probabilities. It is correct as submitted by counsel for the defendant, Mr Luvuno that a pivotal point in deciding all the issues in this case is whether the termination package presented to the Board during May – June 2011 was approved or not.
- [29] He further submits and I accept that the versions presented by the parties, save for the facts which are common cause; are mutually exclusive.

- [30] He also submits and I accept that the decision of this court is not made easier by the submission of documents which are open to different interpretations.
- [31] It is trite law that the onus is on the plaintiff to prove his case and equally trite that the defendant bears evidentiary burden of rebuttal.
- [32] From the evidence presented it is common cause that the termination package was compiled by Mr Luputa, an independent consultant who had been employed by the defendant to execute different tasks such as the adjustment of their tax tables and running their payroll from time to time over a number of years. He had also been requested to compile termination packages by the defendant on no less than two occasions.
- [33] Upon acceptance that the termination package was approved by the Board, I do not deem it necessary to analyse the different heads which comprise the termination package but if such approval is not accepted it would be necessary to analyse the contents of the termination package individually.
- [34] The claim with regard to the pension fund has been abandoned by the plaintiff during the course of this trial and does not therefore need to be considered further in this judgment.
- [35] It is trite law that the test to be applied in civil trials is proof on a balance of probabilities.
- [36] It is a well-known principle of good corporate governance, that an organisation such as the defendant which has a Board as part of its governing structures ought not only to have structured meetings of the Board but that such meetings should be minuted.
- [37] Despite this well-known principle, neither the plaintiff saw it necessary to have such minutes discovered in terms of Rule 35 of the Uniform Rules of Court nor did the defendant see it fit in terms of the fiduciary duties of its Board members, whom it called to testify to provide the relevant minutes as part of its case or testimony.
- [38] This has resulted in witnesses embarking into a speculative arena of trying to recollect dates and events from memory regarding the facts of this case thus putting this court into the invidious position of having to work with the bare minimum of evidence.
- [39] Be that as it may, what I have before me is the testimony of the plaintiff, who as stated is the former General Manager of the defendant, the testimony of the former Board member and chairman of the Finance Committee and that of an independent consultant who had been extensively utilised in its operations by the defendant.
- [40] This is against the evidence of the chairman of the Board and the then additional member of the Board and current CEO.
- [41] The defendants' denial of Board approval is made with reference to page 21 of exhibit "A" which is a payment document authored by Mr Mathebula, the then acting General Manager.

- [42] I have had to juxtapose this document with the termination package as signed by the parties mentioned in page 19 of exhibit “A”. Regarding the testimony of Mr Luputa, the plaintiff and Mr Nkosi, I found their testimony credible in that regard. Even the chairman, Mr Chirwa did not contest that the font in page 19 was consistent with the font from page 1 of exhibit “A”. In other words one could infer that the document was consistent.
- [43] As against this there are aspects on which I do not find Mr Mathebula’s evidence credible. For example, he testifies that the payments in exhibit “A” page 21 were ex gratia and this is confirmed in that document yet at the same time testifies that these were provisional payments regarding the termination package. This same postulate has even been included in the defendant’s plea. This is factually and legally not tenable. In my view, these payments are a tangible admission by the defendant that more was owed to the plaintiff even if one were to accept that the amount of R47 865.21 was paid at the suggestion of their external auditors.
- [44] To therefore suggest that the ex gratia payment should be accepted by the plaintiff as having been a provisional payment and that that was all that was owing to him is factually and legally untenable especially in the light of their exclusion from the termination package by the specific wording of exhibit “A” page 21.
- [45] It has been argued that the words “pending the professional handling of my termination package which presently remains unresolved” is proof that that package was not approved by the Board. As long as the package remained unpaid after Board approval, it was an unresolved matter. Moreover, from an evidential point of view, to override evidence given by the chairman of the Finance Committee and others because of a document authored by a former additional board member ex post facto the board meeting would be inappropriate.
- [46] I cannot fathom how the plaintiff could conduct a scheme in which he could swindle not just the defendant but also the board which is a structure that operates through meetings and keeps records of its meetings, by suggesting that they resolved to approve his termination package after a presentation by an independent consultant who had been commissioned by them to give input regarding the plaintiff’s termination package.
- [47] On a conspectus of all the pleadings, the evidence and submissions by counsel, I have come to the conclusion that the plaintiff has proved his case on a balance of probabilities.
- [48] In the result I make the following order:

Judgment is granted in the plaintiff’s favour as follows:

- 1) Payment of the amount of R280 033.79 to the plaintiff.
- 2) Interest on the above amount at the rate of 15.5% per annum as from 4 September 2012;
- 3) That the defendants pay costs of this action on an attorney and client scale which costs shall include the costs of counsel.

S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:

2-4 February 2016

Delivered on:

5 February 2016

For the Plaintiff: Advocate G. M. Boshoff

Instructed by: Eunanda Fourie Incorporated

For the Defendant: Advocate J. Luvuno

Instructed by: Nomaswazi Shabangu Attorneys

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