

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN

Reportable
Case No: C12/10

In the matter between:

DEON H DAVIDS

Applicant

and

BOLAND RUGBY (PTY) LTD

Respondent

Date of Hearing : 3 August 2011

Date of Judgment : 5 September 2011

JUDGMENT

GUSH J

1. The Applicant was employed by the respondent as head coach of its rugby team the Boland Cavaliers on 10 November 2008. The applicant's contract of employment was for a fixed term commencing on 1 November 2008 and was due to expire on 21 October 2012.

2. The applicant avers that his contract was "wrongfully and unlawfully repudiated by the respondent ... [which] repudiation has caused the applicant

damage and prejudice”¹ and referred a dispute to the Court in terms of section 77(3) of the Basic Conditions of Employment Act (BCEA).² In his statement of claim, the applicant seeks the following relief:

“2.1 an order directing that the contract appointing the applicant as head coach of the Boland Cavaliers be cancelled”³

2.2 an order directing that the respondent pay the balance of the contract which is to endure until 31 October 2012 in the amount of R1 190 000.00 together with interest thereon at the prescribed legal rate of interest”.⁴

3. When the matter was to be heard, the respondent raised a point *in limine* namely “whether the applicant had suffered any damages in consequence of any breach which it might prove and, if no damages have been suffered, whether applicant’s claim falls to be dismissed”.⁵ The parties agreed that the determination of the point raised by the respondent would, if successful or partially successful, dispose of the matter in its entirety or at least considerably shorten the proceedings and accordingly that it was appropriate that it be heard and determined first.

¹ Applicant’s statement of claim paragraphs 23 and 24.

² Act No. 75 of 1997.

³ Applicant’s statement of claim para 27.1.

⁴ Applicant’s statement of claim para 27.2.

⁵ “Agreed Facts For The Purpose Of Determining Issue Whether Applicant Has Suffered Damages” para 8.3.

4. In order to deal with the preliminary issue, the parties filed a statement of “AGREED FACTS FOR THE PURPOSE OF DETERMINING ISSUE WHETHER APPLICANT HAS SUFFERED DAMAGES”(sic).

5. The agreed facts were as follows:

5.1. “Respondent paid applicant the full monthly remuneration due to him in terms of the employment contract concluded on 10 November 2008 up until end May 2010.

5.2. The salary applicant would have earned in terms of clause 1.1 of the employment contract from June 2010 to 31 October 2012 amounts to R1 015 000.00.

5.3. In January 2010, applicant was employed as a consultant by the University of the Western Cape (UWC) and earned R20 000.00 during that month.

5.4. In the period February to March 2010, applicant continued to be employed by UWC at R22 800.00 a month, and accordingly earned R45 600.00 in those two months.

5.5. In the period April 2010 to February 2011, applicant was employed by UWC at R25 000.00 a month and earned R275 000.00 in that period.

5.6. From 1 March 2011 applicant has been employed by the Golden Lions Rugby Union in terms of a written contract of employment at a monthly salary of R52 500.00. The contract commenced on 1 March 2011 and is to endure until 31 October 2012. The amount the applicant will earn if he remains employed by the Golden Lions Rugby Union until 31 October 2012 will be R1 050 000.00.

5.7. The total amount earned from his employment with UWC and with the Golden Lions Rugby Union up to 31 October 2012 is the sum of R603 000.00, which is R412 000.00 less than the amount of R1 015 000.00 referred to in para [5.2] above.

5.8. This honourable court is asked to make a finding, having regard to the facts as set out in paragraphs [5.2] to [5.7] above, on the question of whether, in the event that applicant establishes that respondent breached the contract of employment as alleged in paragraph 23 of the statement of case:

5.8.1. The amount of R603 000.00 referred to in paragraph [7] above falls to be deducted from the amount claimed by applicant,

5.8.2. The further amounts to be earned by applicant from his employment with the Golden Lions in the period August 2011 to October 2012 should be taken into account in assessing whether applicant has suffered any damages and if so in what manner they are to be taken into account.

5.8.3. Applicant has suffered any damages in consequence of any breach which it might prove and if no damages have been suffered whether applicant's claim falls to be dismissed."

6. The respondent argued that the applicant was under a duty to take all reasonable steps to mitigate the loss caused by the respondent's alleged repudiation of his contract of employment and that on the strength of the agreed facts the applicant had mitigated any loss which he may have suffered should it be found that the respondent had breached the agreement and therefore as the applicant had not suffered any damages his claim should be dismissed.

7. The applicant's statement of claim seeks an order directing that the contract with the respondent be cancelled and for payment of the balance of the contract based on the averment that the respondent's alleged repudiation caused the applicant to suffer damages. The applicant avers that his damages are equal to the "balance of the contract which is to endure until 31 October 2012"⁶. The agreed facts however clarify this by stipulating that the amount the applicant is claiming is that which has not been paid to the applicant since the end of May 2010 and the amount claimed as damages is the amount that would have been paid to the applicant for the balance of the contract period.

8. The applicant has approached the Court in terms of section 77(3) of the BCEA and has accordingly confined his claim to a contractual claim for damages arising out of the contract of employment. The law relating to a "plaintiff's" obligation to mitigate his damages is clear. In *The Law of South Africa*⁷ the learned authors express the rule thus:

The first and fundamental rule is that the plaintiff must take all reasonable steps to mitigate the loss caused to the plaintiff by the defendant's wrongful act. The plaintiff cannot recover damages for losses which he or she could have avoided by taking steps reasonable in the circumstances of the case. ... The third rule is that, where the plaintiff has reduced his or her losses, the defendant is

⁶ Statement of claim para 27.2.

⁷ Joubert WA et al *The Law of South Africa* 2 ed vol 7 (Lexis Nexis Butterworths, Durban 2005).

liable only for the loss as lessened. ... This rule emphasises the purpose of a damages award, namely that it is strictly compensatory in nature.⁸ [footnote omitted]

9. In *Buthlezi v Municipal Demarcation Board*,⁹ the Labour Appeal Court followed the decision in *Myers v Abrahamson*¹⁰ where the court held that the “correct approach for computing damages for a premature dismissal” was as follows:

The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.¹¹

10. The respondent relied on the decision in the matter of *Toerien v Stellenbosch University*¹² as authority for the proposition that the respondent could not rely on the principle that the applicant was required to mitigate his damages and that his claim did fall to be reduced by the amount he had earned (and was due to earn) from his employment as set out in the statement of agreed facts.

⁸ Ibid at page 41 para 38 (a) and (c).

⁹ [2005] 2 BLLR 115 (LAC) at para20.

¹⁰ 1952 (3) SA 121 (C).

¹¹ Above no 9 at para 20 as cited in *Myers v Abrahamson* 1952 (3) SA 121 (C) page 127 D.

¹² 1996 (1) SA 197 (C).

11. The applicant's counsel, Ms Golden, suggested that the Court was obliged to follow the decision in *Toerien*¹³ unless it was convinced that that matter was wrongly decided. However, as is obvious from the *Toerien* judgment, the issue in question in that matter was a claim based on specific performance as opposed to the applicant's claim in this matter which is clearly expressed as a claim for the damages he averred he had suffered arising from the respondent's purported repudiation of his employment contract.

12. The court in the *Toerien* matter held *inter alia*

In my view, only such factors as are consonant with a claim for specific performance should be taken into account in deciding to what extent a creditor's claim stands to be reduced. One must be careful not to approach the claim as if it is one for damages.¹⁴ and "It was common cause between the parties that the applicant tendered his services and put them at the disposal of the respondent at all material times".¹⁵

13. Whilst the court in *Toerien* held further that:

"Whereas it may seem inequitable for the applicant to be remunerated 'twice' as it were, one must consider the other side of the coin as well. Why should the respondent, who is in breach of its obligations in terms of the contract of employment, benefit from that very breach? This would

¹³ Ibid.

¹⁴ Ibid at page 200 A-B.

¹⁵ Ibid at page 201H-I .

be contrary to the underlying principle that the employer's obligation to remunerate an employee is based on the availability of the employee's services and not for work actually done".¹⁶

it is abundantly clear from the statement of agreed facts that the applicant had secured alternative employment and in fact sought a directive from the Court cancelling the contract inter alia on the grounds that "it would be untenable in the circumstances ... to return as head coach of the Boland Cavaliers."¹⁷ The applicant most certainly had not at the time of his suspension nor was he now tendering his services.

14. The principle applicable to the circumstances of this matter, should it be established that the respondent repudiated the applicant's contract of employment, was enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*¹⁸ as follows:

The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and

¹⁶ Ibid at page 201H-I.

¹⁷ Statement of claim para 26.

¹⁸ (2007) 28 ILJ 2238 (LAC).

not to punish the employer. See M S M Brassey
Commentary on the Labour Relations Act A8-155; also
*Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC).*¹⁹

15. The applicant clearly has mitigated his damages. What remains to be considered, however is whether the future earnings to which the applicant is entitled in respect of that portion of the contract the applicant has secured with the Golden Lions Rugby Union which still has to run, amounts to mitigation of the of the applicant's claim for damages in respect of the balance of the period of the applicants contract.

16. The issue is simply that at this point when the enquiry is made as to whether the applicant has in fact mitigated his damages, the answer is that he has. He has secured a contract in terms of which he will earn in excess of the amount he would have earned from his contract with the respondent. There is nothing to suggest that the applicant's contract with the Golden Lions Rugby Union is tenuous and/or that the applicant continued employment is at risk. It is neither appropriate nor necessary to speculate on whether there exists a possibility that the applicant's contract with the Golden Lions Rugby Union might be cancelled before the end of October 2012.

17. In the circumstances, I am satisfied that as the applicant has mitigated his damages, the point *in limine* accordingly must succeed. Therefore, even in the

¹⁹ Ibid at para 30; see also *Rawlins vs Kemp T/A as Centralmed* [2011] 1 BLLR 9 (SCA).

event that it is proved that the respondent repudiated the contract, the applicant has not suffered any damages. At the outset, when the matter commenced, the parties agreed in submitting that the point *in limine* should be heard separately, that the outcome of the point if decided in favour of the respondent would dispose of the matter.

18. There is no reason in fairness why the costs should not follow the result.

19. In the circumstances therefore make the following order:

19.1. The applicant has not suffered damages and accordingly the applicant's claim is dismissed;

19.2. The applicant is to pay the respondent's costs

GUSH J

Appearances:

For the Applicant : Adv T Golden

Instructed by : Riley Inc

For the Respondent: Adv A Oosthuizen SC

Instructed by : Malherbe Hanekom Inc