

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: J2752-09

In the matter between:

KWENA DARIUS MANGOPE

Applicant

and

SOUTH AFRICAN FOOTBALL

ASSOCIATION

Respondent

Judgment

Molahlehi J

Introduction

[1] The applicant in this matter seeks an order in the following terms :

“Declaring the decision by the Respondent to terminate the Applicant's contract of employment on 23 November 2009 unlawful;

Declaring that the unilateral termination of the contract of employment by the

Respondent amounts to a breach of contract”

The application is brought in terms of s77 (3) of the Basic Conditions of

Employment Act, No. 75 of 1997 ("the BCEA")¹ and the common law of contract. It is important to note as will appear later that the applicant's cause action is not based on the unfair dismissal concept as envisaged in the Labour Relations Act 66 of 1995 ("the LRA")²

- [2] The applicant accuses respondent of having breached the terms and conditions of their 3 (years) fixed term contract of employment.
- [3] In terms of the relief, the applicant seeks contractual damages equivalent to the remainder of the period of the contract as at the point at which the respondent terminated it.
- [4] The respondent opposed the application and contended that the termination occurred prior to the expiry of the probationary period including the consequent poor work performance on the part of the applicant for that reason it was entitled to terminate the contract.
- [5] The respondent further contended that the matter ought not to be determined on the basis of motion proceedings but rather be referred to oral evidence because of the number of disputes of facts that exist between the versions of the parties.

Background

- [6] It is common cause that the parties entered into a fixed term employment

¹ In terms of s 77 (3) of the BCEA the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

² In terms of s185 of the LRA every employee has the right not to be unfairly dismissed and or subjected to unfair labour practice. The word dismissal is defined in s186 of the LRA to mean '*termination of a contract of employment with or without notice.*' In the broader consideration of this case, the other aspects of the definition,

contract which was for a period of 3 (three) years, commencing during August 2009 and ending during July 2012. The essential terms and condition of the contract for the purpose of this judgment are contained in clause 5 of the contract of employment which makes provision for a probationary period of three (3) months calculated from the date of the assumption of duties by the applicant. It is clear from the reading of the employment contract that the purpose of probation is to provide the respondent an opportunity to evaluate the performance of the applicant before it confirms the appointment. The agreed salary of the applicant for the period of the employment contract was R720 000,00, being the total cost to employer per annum.

The case of the applicant

- [7] The applicant says states that somewhere the end of October or the beginning of November 2009, he was approached by Ms. Coetzee, the Human Resources Manager of the respondent, who handed him a letter extending the probationary period for another month until the end of November. And when he enquired as to why the period was being extended he was told that it was because he was expected to have served the full uninterrupted period of 3 (three) months. The applicant says he was told his period was interrupted by those days when he was off due to ill-health.
- [8] According to the applicant he was required to take the letter to Mr.

seems irrelevant assuming this case was lodged as an unfair dismissal claim.

Raymond Hack, the respondent's Chief Executive Officer ("the CEO") to confirm that he was agreeable to the extension of the probation period. The applicant says he handed the letter to Mr. Hack who indicated that he was satisfied with the performance of the applicant and the extension of the probation period.

- [9] The applicant contends that the respondent in terminating his employment breached the employment contract for the following reasons:

70.1. *"Prior to the unlawful termination of my contract of employment, the Respondent ought to have properly evaluated and considered my work performance, compatibility and overall conduct, which was not done by the Respondent;*

70.2. *I was not given reasonable evaluation, instruction, training, guidance or counseling during the course of the probationary period;*

70.3. *In fact, Hack has often told me that he was happy with my performance;*

70.4. *Prior to the termination of my contract of employment I was at no stage given an opportunity to make representations regarding the alleged unsatisfactory performance of my duties;*

70.5. *It is an implied term of the contract of employment that*

the Respondent prior to terminating my contract, should have given me the opportunity to make representations regarding the baseless allegations made against me.”

[10] The other basis upon which the applicant challenges the termination of his employment contract is that the respondent did not in doing so comply with the principle of fair dealing as required by law. In this respect the applicant says the following:

72. *“This doctrine of fair dealing binds all employers and confers on all employees a right to enforce their right to fair dealing.*

73. *This right to fair dealing exists independently of statutory protection against unfair dismissal and unfair labour practice.*

74. *I aver that the Respondent has breached my contractual right to fair dealing by unilaterally terminating my contract of employment without affording me the opportunity to make representations prior to terminating my services.*

75. *Before my contract of employment was unlawfully terminated by the Respondent I was entitled to be evaluated and informed of my poor performance during the subsistence of the probationary period to give me an opportunity to improve. In any event, I deny that my performance justifies a dismissal*

because I rendered my services satisfactorily and to the best of my abilities in the circumstances.”

[11] The applicant says the first time he heard about complaints which could impact on his contract of employment was on 23rd November 2009, when he was presented with the letter of termination. The termination of the employment contract could not have been objectively and properly been made in the absence of affording him an opportunity to make representation.

[12] The applicant contends that he suffered damages due to loss of income and loss of earnings arising from the unlawful termination of the employment contract by the respondent. He says the damages he suffered as a result amounts to the total sum of R1 860 000.00 (one million eight hundred and sixty thousand rand).

The case of the respondent

[13] The case of the respondent is that this matter cannot be resolved by way of motion proceedings due to the disputes of facts that have arisen from both parties' papers. The respondent summarizes the dispute of facts in its heads of argument as follows:

“2.2.1 The reason for the extension of the probationary period is in dispute. The reason furnished by the Respondent is clearly more probable than that proffered by the Applicant. In any

event, the Applicant agreed to the extension of his probationary period;

2.2.2 The Respondent contends that the Applicant was a senior employee and was required to carry out his duties with "absolute diligence, effectiveness and precision". During October 2009, the Applicant was advised of the shortcomings in his performance and afforded a further opportunity of assessing his performance;

2.2.3 The Applicant's performance fell dismally short of what was required as illustrated during the International Football friendly match between South Africa and Serbia. The Applicant was responsible for ensuring that proper security and safety measures were in place;

2.2.4 During certain International fixtures which were undertaken by the Respondent, the Applicant did not have the necessary information, statistics and data at his disposal to provide critical and important advice on security arrangements. Hence the letter of complaint from the Northern Cape Executive Committee Member, Mr J J Koopman;

2.2.5 During an International friendly match between South Africa and the Senior National Teams in Port Elizabeth on 14

November 2009, the Applicant was unwilling to be placed in the venue's operational centre where the entire nucleus and control of security is required to be undertaken. Endeavours had to be made to establish the Applicant's whereabouts and very often, the information which was provided was incorrect. Inadequate and improper arrangements had been made to ensure that refreshments and catering facilities were made available. This obligation fell upon the Applicant;

2.2.6 During the fixture between the respective Senior National Teams of South Africa and Jamaica, the Applicant was requested to provide proper and adequate feedback on all security issues at the stadium. It appears to be common cause that all the Applicant had to say was that everything was in order. He was in no position to provide statistics, data, numbers and important information relating to security. He was unable to grasp the importance of the task at hand;

2.2.7 The Applicant failed to ensure the timeous provision of security services which resulted in the intervention of the Local Organising Committee of the World Cup;

2.2.8 *The excuses proffered by the Applicant were viewed by the Respondent as being unacceptable. The Respondent's dissatisfaction with the Applicant's performance was reinforced by complaints received from the Divisional Commissioner Policing of the South African Police Services;*

2.2.9 *The extension of the Applicant's probationary period did not have the desired effect. He failed to redeem himself or demonstrate that he was capable of fulfilling his tasks in a proper and acceptable manner;*

2.2.10 *The Applicant was afforded a sufficient opportunity to make representations on the issues raised. His response amounted to nothing more than a flimsy and frivolous excuse which, under the circumstances, was unacceptable and inspired little confidence in his abilities. He had at his disposal, all the resources that were required to ensure the safety and security of the participants.”*

[14] Mr. Hutchinson, for the respondent argued that the other reason for the alleged disputes of facts was that he would have liked to cross examine the applicant on what did he do about the complaints which were made about his work. He

emphasized in his submission that before a determination can be made concerning the fairness of the dismissal of an employee serving a probationary period the court will have to have regard to item 8 of the Code of Good Practice: Dismissal. In terms of item 8 of the Code in making a decision about fairness of a dismissal of an employee for poor work performance during or on expiry of a probationary period it ought to be accepted that the reasons for the dismissal may be less compelling than would be in dismissal effected after the completion of the probationary period.

- [15] In the context of arguing that the concept of fairness is applicable in the present matter Mr. Hutchinson argued that seniority and experience are important factors in the assessment of the standard of performance of an employee. It was argued that because the applicant was appointed on the attributes of his experience and skill, the respondent was on the basis of the complaints received about his performance entitled to terminate the employment contract as it did. Mr. Hutchinson concluded his argument by saying that the dispute was whether or not the applicant was competent.

The contract of employment

- [16] The relevant provisions of the contract of employment for the purposes of this judgment is clause 5 which provides as follows:

“5 PROBATIONARY PERIOD

5.1 Prior to the Employee's employment being confirmed, the

Employee will be required to serve a period of probation of three (3) months calculated with effect from the effective date;

- 5.2 *The purpose of there (sic) probation is to provide the Association an opportunity evaluate the Employee's performance before confirming his appointment and although there period of probation is not used for the purposes of depriving the Employee of the status of permanent employment, it is of particular significance that proper evaluation and consideration be given to the Employee's performance, compatibility and overall conduct;*
- 5.3 *To extent that it is necessary, the Employee will be given reasonable evaluation, instruction, training, guidance or counseling in order to allow the Employee to render satisfactory service during the course of the probationary period. The extent thereof there will depend upon the seniority and remuneration of the Employee;*
- 5.4 *Should the Association determine that the Employee's performance is below standard, the Association will advise the Employee of any aspects in respect of which it considers the Employee to be failing to meet the required performance standards and the conclusion of the*

probationary period either dismiss the Employee or extend the probationary period, as the case may be;

5.5 *The period of probation may only be extended for a reason that relates to the purpose of probation and the Association will only dismiss an Employee or extend the probationary period after the Employee has made representation, duly assisted by a fellow Employee if need be.”*

Legal principles

[17] In general the remedies of an employee whose employment contract has been terminated by an employer can be found in either the concept of breach of contract under the common law or unfair dismissal concept under the LRA.

[18] In terms of the LRA an employee who claims unfair dismissal has to show that there was a dismissal and once that has been established the employer has to show that the dismissal was for a fair reason. Although, as the authorities have stated, the need for fairness in the termination of employment as set out in the LRA, has softened the harshness of a dismissal, it has not taken away the principles governing the need for a lawful termination of an employment contract in terms of the common law principles neither has it taken away the remedies provided for in terms of the principles of the law of contract. See *MEC, Department of Health, Eastern Cape v Odendaal & Others (2009) JOL 2311*

(LC).

- [19] In *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA), the court in drawing the distinction between rights acquired under a statute such as the LRA and the contract had the following to say:

“The fundamental difference between rights arising from a contract and rights arising from statute is that the former depend upon the actual or imputed consent of the parties whilst the latter are imposed by the legislature in order to give effect to social policies underpinning the legislation.”

- [20] In terms of the common law any material breach of the terms of an employment contract can be regarded as repudiation of the contract entitling the affected party (commonly referred to as the “innocent party”) the right to accept the repudiation and sue for such a breach. The affected party may elect to hold the other party to the contract and claim specific performance or claim damages caused by the breach. Breach of a contract generally arises when an employee or an employer fails in a material way to comply with his or her duties as set out in the contract. See *Steward Wrightson (Pty) Ltd v Thorpe* [1977] 3 All SA 267 (A) and *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [1997] 2 BLLR 124 (LAC).

- [21] As stated earlier in terms of the common law an employee who claims that the employer is in breach of the terms of contract of employment may elect to either accept the repudiation or claim damages or, reject the repudiation and hold the employer to the contract. In a fixed term contract damages are generally calculated on the basis of what the employee would have earned for the remainder of the period of the contract but for the unlawful and premature termination of the contract.
- [22] In *Fed Life Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA), a case which was referred to with approval in *Buthlezi v Municipal Demarcation Board* (2005) 2 BLLR 115 (LAC), the court held that the common law right of an employee to claim for damages for breach of contract was not in conflict with the Bill of Rights. The principle espoused in these decisions is that an employee has a right to claim and be compensated for damages suffered as result of an unlawful termination of the contract of employment by the employer. See also *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & others* (2007) 28 ILJ 1223 (LAC).
- [23] Turning to the issue of disputes of facts, the approach to be adopted in our law is quite clear. It is generally accepted that motion proceedings are inappropriate in seeking to resolve disputes where there exist genuine and material disputes of facts in a matter. The approach to adopt when confronted with disputes of facts in motion proceedings has been set out in *Plascon –Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), wherein the court in dealing with this issue had the following to say:

“It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of facts.”

It is clear from the above that it is not every claim of dispute of facts that leads to the matter having to be referred to oral evidence. In other words a claim of the existence of disputes of facts should not be accepted on face value. There is always a need in particular in labour matters where speed is of the essence in the resolution of disputes, that any allegation of disputes of fact should be closely scrutinized to determine whether or not indeed a genuine dispute of facts exists. In this respect I align myself with the authorities that say that the court in dealing with the issue of whether or not a dispute of facts exists or not should adopt a robust approach. In my view what is also of importance in dealing with this issue is to determine whether the dispute of facts, have any bearing on the legal issues to be resolved.

Claim for damages

- [24] The amount of damages to be awarded to an employee as a result of an unlawful termination of a fixed term contract by the employer is the amount he or she would have received in salary but for the repudiation of the contract by the employer. In other words the damages in an unlawful termination of an employment contract is calculated on the basis of what would have been due to the employee for the unexpired period of the contract less whatever amount he or she may have received after the termination of the contract, constituting mitigation of his or her damages.

Evaluation

- [25] The first issue that needs to be determined in this matter is whether or not disputes of facts have arisen as a result of the issues raised by the respondent in its answering papers. If the answer is in the affirmative then the court would have to consider whether or not to refer the matter to oral evidence. If the answer is in the negative, then the court would have to determine whether or not the respondent was in breach of any of the terms of the contract of employment between itself and the applicant. If it is found that the respondent was indeed in breach of the contract of employment then the next issue for determination would be the determination of the issue of damages.
- [26] As concerning the issue of disputes of facts, it would seem to me that the issue arose from

the side of the respondent largely because of the misconception of the cause of action and the issues upon which that cause of action is based on. In my view, there would have been no difficulty in agreeing with the point raised by the respondent, in this regard, had the applicant's cause of action been based on the unfair dismissal concept. The dispute of facts would have probably arisen largely because the investigation into the fairness or otherwise of a dismissal which is much broader than the inquiry into whether or not there has been a breach of the terms of the contract. In my view the enquiry into whether or not there has been a breach of contract focuses on two aspects, the conduct that is alleged to have constituted the breach of the terms of the contract and the provisions of the contract in relation to that conduct.

- [27] The other issue which according to the respondent has given rise to the dispute of facts concerns the question of the extension of the probationary period. It is common cause that the probationary period was extended. The issue of dispute of facts in this regard seems to concern the reason for the extension. The respondent's version is that the extension was for the purposes of giving the applicant an opportunity to improve on his performance. The applicant's version is that he was told that the probationary period was extended because there was a break in the three months probation he had to serve. The break in the period occurred apparently because the applicant took ill for some days during that period. The applicant says that the deponent to the opposing affidavit gave him the letter of the extension of the period and said he should take it to Mr. Hack for approval of the extension. According to the applicant Mr. Hack told him that he approved the extension and that he had no problems with his performance. It is important to note that the

affidavit of Mr. Hack is not attached to the respondent's papers. The affidavit of Mr. Hack would have dealt with this issue. However in my view even if that was the case as will appear later nothing would have turned on whatever answer he gave as to what he said to the applicant. Assuming he had made an affidavit saying that he told the applicant that his performance was not up to standard, that would not have altered the case of the respondent in as far as the question of compliance with the terms and conditions of the contract was concerned. The terms of the contract were not amended by the extension, in fact the contract does allow for the extension of the probationary period. At the end or prior to the end of the month's extension the respondent would still have had to comply with the provisions of clause 5 of the contract.

[28] Although there is some dispute of facts as to why the probationary period was extended, the undisputed fact is that the contract was extended for a month. The dispute as to the reason for the extension of the probationary period is, in my view, not material to deny this court the ability to determine the issue at hand. The admitted fact by the respondent is that the probationary period for whatever reason was extend for a month. Thus the issue at hand as indicated above is whether in terminating the employment contract of the applicant, the respondent complied with the provisions of that contract. There is no doubt from even the version of the respondent that there was no compliance with the provisions of the contract of employment and thus the respondent breached its contract with the applicant.

[29] In assessing whether or not the conduct of the respondent repudiated the contract in

terminating it in the manner and for the reason it did, clause 5.2 of the employment contract is of great importance. This clause as appears from the above quotation indicates very clearly that the intention of the parties was not to use the probationary period to deny the applicant the opportunity for a permanent employment. In other words the proper reading of the contract is that whilst the respondent had the right to terminate the contract for failure to meet the standard of performance required of the applicant, that would be done sparingly and only after certain processes have been complied with. One of those processes entailed the respondent having to properly evaluate the performance of the applicant prior to taking a decision not to permanently appoint him.

[30] The principle in clause 5.2 is taken further in clause 5.3 where it is stated that the employee will be given reasonable evaluation, training and counseling to afford him the opportunity to improve on his performance. The argument of the respondent that the applicant was a senior manager appointed with the understanding that he has the necessary skills is not sustainable. The argument would have applied had the respondent firstly conducted the evaluation and thereafter informed the applicant that the evaluation indicated that he has failed in arrears where a person of his qualification, skills and experience ought not to have had difficulties in meeting the standard of performance expected of him. This would have been in line and in compliance with the provisions of clause 5.4 of the employment contract.

[31] There is no evidence before this court that the respondent did advice the applicant that his performance was below standard and which aspects of his performance is below the

required standard of performance. The evidence presented which in certain respect can be regarded as common cause is that the respondent received certain complaints about the work of the applicant and those complaints were brought to the attention of the applicant. Clause 5.5 clearly indicates that the employee should be given an opportunity to make representation where the evaluation properly conducted indicates that his performance was below the required standard of performance.

[32] In one instance, after receipt of a complaint forwarded to him by the respondent, the applicant replied in a letter to the respondent. If indeed the complaint was regarded as poor work performance then in terms of the employment contract the respondent ought to have followed up and indicated to the applicant that the reply was unsatisfactory and that the issues raised in the complaint are related to poor work performance. On the facts as they stand, the applicant was never given an opportunity to deal with the complaint and or an opportunity to improve on his performance in terms of clause 5.4 of the employment contract. The applicant only came to deal with the complaints in his founding affidavit when he launched these proceedings.

[33] It is apparent from the reading of the contract that the parties sought to regulate their affairs in terms of their contract in line with the principles and the norms set out in the Code of Good Practice as provided for in the LRA. The incorporation of those principles do not however change the nature of the inquiry into whether or not there has been a breach of contract. They also do not play any role in the determination of the existence of the dispute of facts in the present matter. There seems to be no doubt that the contention

of the respondent and the argument of Mr. Hutchinson are informed by these principles. I have indicated earlier that the inquiry into whether there has been a breach of a contract is much narrower than that of investigating the fairness or otherwise of the dismissal.

[34] The allegation in the present instance is that the respondent repudiated the contract by unlawfully and prematurely terminating it. In as far as breach of the terms of the contract is concerned it is alleged that the contract was cancelled without compliance with the provisions of that contract in particular cause 5 thereof. Based on this analysis and focusing in particular on the cause of action it can never be said that disputes of facts have arisen. In this respect it does seem common cause that there are a number of complaints that had been made against the applicant by an number of people and institutions, the main question that needs to be answered is whether in terms of the provisions of the employment contract submission of those complaints entitled the respondent to automatically terminate the employment contract. I do not think so a closer and proper reading of the contract, in particular clause 5 thereof indicates very clearly that the respondent needed to do more than simply receiving and forwarding the complaints to the applicant.

[35] In relation to damages, the applicant claimed damages in the full amount of what he would have received in salary had the respondent not terminated the employment contract which is in the sum total of R1 860 000, 00.

[36] On the 3rd June 2010, Francis J postponed the matter sine die to afford the parties to file further affidavits. It would seem one of the reasons for granting leave to file further

affidavits was to afford the applicant to deal with an issue which was raised in the respondent's heads of argument concerning the alleged failure to mitigate damages by the applicant. The applicant has now filed his further affidavit wherein he deals with the issue of mitigating damages. The respondent has not filed any further affidavit in response to the applicant's further affidavit. There is therefore no reason to doubt this evidence in the absence of any challenge thereof by the respondent.

[37] In the further affidavit the applicant indicates that after his dismissal he obtained employment during March 2010 and was paid a salary of R26 000,00 per month. The new employment of the applicant was terminated during May 2010. Taking into account the amount he has earned since his dismissal the applicant says his damages amount to R1 777 000, 00. he had received since his dismissal

[38] In summary, I find the following:

- a. Regard being had to the cause of action in this matter, there are no disputes of facts in relation to the breach of the contract of employment. The respondent would probably have succeeded in raising the dispute of facts had the applicant based his case of the unfair dismissal claim. It also needs to be pointed out that even those facts that appear to be in dispute, they are not material to the determination of the legal issues before this court.
- b. The respondent in terminating the employment contract of the applicant failed to comply with its duties as set out in the provisions of the employment contract in particular clause 5 thereof. The conduct of the respondent in the manner in which

it terminated the contract of employment with the applicant amount to repudiation and material breach of that contract. Put simply, the respondent failed to do those things it was required to do in terms of clause 5 of the contract of employment.

- c. The applicant has as a result of the unlawful conduct of the respondent suffered damages. The applicant has in compliance with the law taken all reasonable steps to mitigate his damages.

[39] In the light of the above, the applicant has made out a case of breach of contract and damages. I see no reason in the circumstances of this case why in law and fairness costs should not follow the results.

[40] In the premises the following order is made:

1. The decision of the respondent to terminate the applicant's contract on 23rd November 2009 was unlawful.
2. The termination of the contract amounts to breach of contract.
3. The respondent is ordered to pay the applicant in the amount of R1 777 000, 00 as damages occasioned by the unlawful repudiation of the contract of employment of the applicant.

4. The respondent is to pay the costs of this application.

MOLAHLEHI J

Judge of the Labour Court

Date of hearing: 17 September 2010

Date of judgment: 17 December 2010

Representatives:

For the applicant: Adv FA Boda

Instructed by: Eversheds

For the respondent: Adv W Hutchinson

Instructed by: Fluxmans Inc