



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS 1037-2019

In the matter between:

PRISCILLA MASEKO

Applicant

and

SOUTH AFRICAN POST OFFICE

Respondent

Heard: 20 October 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 October 2021.

Summary: Application for default judgment

JUDGMENT

COETZEE AJ

- [1] The applicant agreed that the matter be adjudicated on paper.
- [2] The applicant referred a dispute relating to the employer's alleged breach of contract. She now applies for default judgment.
- [3] She pleads her case in contract.
- [4] Her case is that she was appointed to develop a strategic working plan that she did.
- [5] Her employer, the respondent, then refused to accept the plan and the refusal constitutes a repudiation of the contract of employment.
- [6] She then pleads as follows:
- "As a result of the respondent's repudiation and on or about 23 May 2018, the applicant elected to terminate the contract of employment, The respondent accepted the termination of the contract."
- [7] She claims as damages the income that she would have derived from the respondent until the date of her retirement.

Analysis

- [8] It is trite law that an agreement may be terminated, *inter alia*, by either party giving notice as required in the contract, or by one party accepting the repudiation by the other party of a material provision of the agreement.
- [9] The way the applicant pleaded the termination of the agreement is that she elected to terminate the agreement and the respondent accepted the termination by her. This is not a case where she accepted a repudiation of the agreement and can claim damages. She has not disclosed a cause of action.
- [10] In the event that she incorrectly worded her claim and in fact relies upon the acceptance of a repudiation, then her claim is in any event subject to the limited damages rule.

The limited damages rule

[11] It is common cause that the contract of employment was terminable at the instance of either party, on notice. That entitled the applicant or the respondent to terminate the contract on notice.

[12] The Labour Appeal Court in dealing with the limited damages rule summarise the common law position in *National Entitled Workers Union v CCMA*:¹ .

"Under common law the employer's position was very strong as against an employee. If an employee was dismissed lawfully, egg if he was given proper notice of termination of his contract of employment or if he was paid notice pay in lieu of notice, the employee had no remedy in law even if the employer had no reason to terminate the contract of employment or if the dismissal was very unfair. The courts could also not provide any remedy in that situation. If the contract of employment was terminated unlawfully, generally speaking, the only relief that the courts could provide such employee was to award the employee damages which would be equivalent to the notice pay he would have been paid in lieu of notice." (Own emphasis)

[13] This is authority for the proposition that as long as the employer gives contractual notice of termination, or pays wages in *lieu* of notice, there is no recognised claim in law. It goes further to say that even if the employment contract is unlawfully terminated as alleged by the applicant, the employee's remedy is limited to damages equal to what he would have earned during the contractual notice period.

[14] The Labour Court followed this reasoning in *S A Music Rights Organisation Ltd v Mphatso*:²

" ... This approach reflects the conclusion that the purpose of damages for wrongful dismissal is only to protect the worker's interest in remuneration and benefits for the denied period of notice or the unexpired fixed term, and that its quantification is to be conducted on the assumption that the worker's pecuniary losses are limited to that remuneration and those benefits."

¹ (2007) 28 ILJ 1223 (LAC) para 15

² (2009) 30 ILJ 2482 (LC) at para 17

[15] However, in *Harper v Morgan Guarantee Trust Co of New York, Johannesburg*³ the Court per Flemming DJP held as follows:

"5.2.1 The principles are part also of our law. In *Mustapha v Receiver of Revenue* 1958 (3) SA 343 (A) at 358F it was said that in the case of a contract, a party's "reasons or motives for exercising an admitted right of cancellation of that contract are normally irrelevant". The result that the employee ends up with what he would have had if the employer had stayed within his legal right to terminate by notice was stated in *Grundlingh v Beyers* 1967 (2) SA 131 (W) at 142; *Langeni v Minister of Health and Welfare* 1988 (4) SA 93 (W) at 101C.

5.2.2 If in a specific case the right to give notice may only be exercised within some limitation, it would be for the plaintiff to prove and therefore to plead such a term (*Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W) at 728, 729). Plaintiff has not pleaded that her employer's "discretion" – a misleading word – was a fettered one".

[16] Flemming DJP also cited with approval the decision of *the House of Lords in Johnson v Unisys Ltd*⁴ where Lord Hoffman concluded that:

"The action for wrongful dismissal could therefore yield no more than the salary which should have been paid during the contractual period of notice."

[17] Flemming ADJP also cited with approval *Wallace v United Grain Growers Ltd*⁵ where the Court held that:

"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal ... A "wrongful dismissal" action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong only arises if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given."

³ 2003 JOL 11932 (W) at para 5.2

⁴ (2001) UKHL 13

⁵ (1997) 152 DLR (4th) 1

[18] Both the *Johnson* and the *Wallace* cases established the principle that, where an employer has reserved itself the right to terminate an employment contract, or where the employee accepts a repudiation, the only potential actionable wrong lies in its failure to comply with the applicable notice period. The employee's damages are always limited to their remuneration during the notice period.

[19] Flemming ADJP in *Harper*⁶ explained the logic underpinning the limited damages rule as follows:

" There is obvious logic for limiting the damages claim to the equivalent of earnings in the permissible notice period. to put the employee in the position in which you would have been but for the *instant* dismissal would leave him exposed to dismissal by notice – and I write to earnings for no more than that period. Even when the step of dismissing is ineffective to end the employer's obligation to pay for the salary, it effectively conveys that the employee must leave and so serves as the giving of notice."

[20] The applicant's construction, if it is correct, would not alter the outcome. The limited damages rule applies to all cases of wrongful termination. It applies regardless of whether the breach in question amounts to short or defective notice, or some other breach of the employment contract which gives rise, on the part of the employee, to an election to cancel. This was made clear in the *Harper*-decision.

[21] In *Volschenk v Pragma Africa (Pty) Ltd*⁷ the employee claimed that his employer was in breach of contract with regard to the payment of commission and in other respects. The employee elected to terminate the contract of employment on notice. He then initiated a claim, *inter-alia*, for payment of damages in respect of future loss of earnings for the period of twelve months. The court held that as the employee terminated the contract on two months' notice, worked during the two months and was paid for the two-month period the employee had suffered no loss as a loss would only

⁶ Para 5.3

⁷ 36 ILJ 494 (LC)

have been in respect of the notice period if the employee had not been paid during that time.

[22] The *Volschenk*-matter is on all fours with the case *in casu*.

[23] In *BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA*⁸ the employee was given notice to retire at the age of 60 while the Court found that he had exercised an option to remain on a retirement age of 65 but that BMW had failed to record his election and incorrectly retired him at 60. His actual retirement age remained 65.

[24] The unilateral change to the retirement age constituted a repudiation which the applicant accepted, and which constituted an automatically unfair dismissal as the dismissal was based on age discrimination. The LAC held that the employee was entitled, as he claimed, for compensation for the automatically unfair dismissal and for damages in respect of the unfair discrimination. In his cross-appeal before the LAC the employee also claimed contractual damages.

[25] The LAC had the following to say:

"[71] However, even if this court were inclined to find that Mr Deppe has succeeded in proving that BMW repudiated his employment contract by amending his retirement age from 65 to 60 without his consent, Mr Deppe would only be entitled to contractual damages in the amount of one month's notice in terms of his contract of employment. His damages are limited to the position he would have been in, under the contract, had the breach not occurred. Mr Deppe's contractual claim for five years' damages, therefore, is misplaced as Mr Deppe's contractual claim for wrongful termination of employment is limited to one month's notice pay."

[26] The limited damages rule clearly applies to the applicant's contractual claim for wrongful termination, that is a repudiation accepted by the applicant.

[27] The applicant has not pleaded that she forfeited any notice pay, and if so, how much.

⁸ (2020) 41 ILJ 1877 (LAC)

[28] The applicant has not made out a case for payment of damages after termination of the contract.

[29] The application stands to be dismissed.

Order

[30] I make the following order:

1. The application for default judgment is dismissed.



F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: In Chambers

LABOUR COURT