THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No. J1006/20

In the matter between:

LUBABALO MANYASHE **Applicant**

and

AFRICA'S BEST 359 LIMITED **Respondent**

Heard: 28 June 2024

Delivered: 14 October 2024

JUDGMENT

SONO, AJ

Introduction

[1] The Application has brought a claim in terms of section 77(1) and 77(3) read with section 4 of the Basic Conditions of Employment Act[1] (BCEA) for payment of outstanding salaries in the amount of R601,719.36 which has been accruing from the date when the arbitration award was issued in favour of the Applicant and the date of the expiry of the fixed term contract that was entered into between the Applicant and the Respondent.

[2] The claim is defended by the Respondent.

Background

[3] The Applicant was employed by the Respondent in the position of Mechanic on a fixed term contract commencing 15 June 2015 and terminating on 31 August 2018.

[4] On 10 February 2016, the Applicant's employment was terminated for alleged misconduct. At the time of dismissal, the Applicant was earning a salary of R20 900.00 per month. The Applicant referred the alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 6 March 2016, the CCMA scheduled the matter for Con-Arb. The Respondent was not in attendance at the Con-Arb proceedings and accordingly the matter proceeded by default.

[5] The CCMA issued a default award in terms of which the Applicant was reinstated with back pay in the amount of R41 800.00 On 15 February 2016, the Applicant made an application in terms of section 143 of the Labour Relations Act[2] (LRA) to certify the award.

[6] On 31 May 2018, the CCMA certified the Applicant's award. On 18 July, the CCMA issued a Writ of Execution against the Respondent. The Applicant could not

[1] No. 75 of 1997.
[2] No. 66 of 1995.

proceed to enforce the award because the Respondent brought an application to rescind the default award.

[7] On 6 December 2018, the CCMA issued a ruling in terms of which the rescission application was dismissed. The Applicant was ordered to return to work on 1 April 2016. It is not in dispute that the Applicant was paid the amount of R41 600.00 as per the award.

[8] The Applicant claims the amount that he would have earned from 1 April 2016 to 31 May 2018 had he been reinstated by the Respondent. There is a dispute between the parties as to whether the Applicant reported for work on 1 April 2016 as ordered in terms of the award.

Issues to be decided

[9] The Respondent contends that the Applicant is not entitled to the amount claimed because he failed to report for duty on 1 April 2016. The Applicant on the other hand argues that he reported for duty and was sent away and told to wait until the outcome of the rescission application. It became apparent during argument that there is a dispute between the parties as to whether the Applicant reported for duty on 1 April 2016.

[10] In *National Union of Mineworkers SA obo Fohlisa and others v Hendor Mining Suppliers (A division of Marschalk Beleggings (Pty) Ltd)*[3] the court said the following:

> "Although a reinstatement order places a primary obligation on the employer to reinstate, creates an obligation in terms of which an employee must first present her- or himself for resumption of duties. The employer must then accept her or him back in employment. These are reciprocal obligations. The employee's obligation to present her- or himself for work and the

[3] (2017) 38 ILJ 1560 (CC) at para 22.

corresponding obligation to accept her- or him back to work flow from the court order."

[11] In *Kubeka and Others v Ni-Da Transport (Pty) Ltd*[4] the court held that:

"In accordance with the general principle applying to reciprocal contracts, an employee claiming specific performance of contract is obliged to perform or tender to perform. An employee's principal obligation under contract of employment is to make his or her services available to the employer from the agreed date and for the duration of the contract. The reciprocal duty of the employer to pay wages under an extant contract of employment depends therefore only on the tender of services. Where the performances of a reciprocal contract are divisible, the principle of reciprocity must be applied independently to each different part of a performance. A contract of employment for an indeterminate period is a divisible contract. Hence, a party who has fully performed a part of a divisible performance (for instance by making his or services available for the relevant period) is entitled to the corresponding part of the counter-performance (wages). An employee who sues for specific performance under a contract of employment (which he or she opted to keep alive) in effect tenders his or her services by making the claim."

[12] There is no dispute between the parties that in order to be entitle to the relief sought, the Applicant had to tender his services to the employer. The dispute is as to whether the Applicant did indeed tender his services.

[13] The Respondent denies that there was such a tender and its denial is based on the fact that having been allegedly refused to return to work, the Applicant ought to have enforced the award through contempt proceedings but instead the Applicant opted to sit and wait to see the wages accrue year on year.

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[4] [2021] 4 BLLR 352 (LAC) at para

[14] In this court's view, this raises a genuine dispute of fact which cannot be resolved on the papers.

Analysis

[15] In his papers, the Applicant claims that he tendered his services but was turned away pending the outcome of the rescission application.

[16] The Applicant does not however allege who he interacted with at the Respondent and who turned him away.

[17] In its response, the Respondent disputes that the Applicant tendered his services on 1 April 2016 or at all and on this basis contends that the Applicant is therefore not entitled to any prospective salary because for any prospective salary to be due, the Applicant needs to tender his services or proof thereof that he made his services available to the Respondent.

[18] The papers as they stand are not helpful to resolve this issue based on the above divergent versions.

[19] The court generally has the option to dismiss the application on the basis that the Respondent's version should be accepted as true following the *Plascon-Evans*[5] principle. This may result in determination which may be disturbed by hearing of oral evidence as the court in *Delport v Gugushe and others*[6] found.

[20] Whether or not the Applicant reported for duty is a material fact to determine whether he is entitled to the relief sought. The claim is brought by way of motion proceedings. The court in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[7] held that:

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[5] See: *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A)
[6] (15733/2020) [2021] ZAGPPHC 486 (5 August 2021).
[7] 2008 (3) SA 371 (SCA) at para 12.

> "Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version of his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".

[21] Other than the bald assertion that he reported for work on 1 April 2016 and was returned pending the outcome of the rescission application, the Applicant does not make any allegations as to who at the Respondent he interacted with and told him to go back home pending the rescission application or where that interaction took place. The leaves in dispute, the question whether the Applicant reported for duty on 1 April 2016.

[22] In *Delport*[8] *supra*, the Court per Davis J, said the following:

> "I am similarly of the view that to simply apply the Plascon-Evans - test and refuse the application by virtue of the factual disputes, would not solve the disputes between the parties."

[23] The Court then held by virtue of the version outlined above, referral to oral evidence on a narrow issue might also result in a disservice being done to either party. A fuller exploration of the facts, beyond a mere eviction issue, encompassing the validity and/or existence of various agreements and all the allegations of fraud can only be canvased by way of a trial.

[24] In the view of this Court, no such disservice as was prevalent in the *Marcel Daniel Delport* matter can be done to the parties if this matter is referred to oral evidence on the narrow issue. There is not much dispute of fact between the parties other than on the limited and narrow fact as to whether the Applicant tendered his services on 1 April 2016.

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[8] Id fn 6 at para 4.9.

[25] Accordingly, the following order is made:

Order

1. The matter is referred to oral evidence on the narrow issue as described above;
2. The notice of motion shall be deemed to constitute a statement of claim and the answering affidavit shall be deemed or constitute the statement of response;

3. The Applicant shall deliver his replication within twenty (20) days after the date of this order whereafter the rules applicable to pleading and discovering as for trials, shall apply.
4. The Respondent shall deliver the answer to the replication within ten (10) days of the replication, if any;
5. The matter shall be allocated a date of hearing on the earliest date available to the Registrar;
6. Costs shall be cost in the cause.

B. M. Sono
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr A Goldberg of Goldberg Attorneys

For the Respondent: Mr M Qotoyi of Mbulelo Qotoyi Attorneys