Sneller Verbatim/MB

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2609/02

2002-07-03

In the matter between

GARY WAYNE HOLLAWAY Applicant

and

MERISANT (SA) (PTY) LTD Respondent

J U D G M E N T

WAGLAY J: This is an urgent application. The applicant in this matter was placed under suspension by his employer the respondent, pending a disciplinary hearing to be held for alleged misconduct. After being placed on suspension, certain discussions were held between the legal representatives of the two parties. These discussions according to the applicant

culminated in an agreement being concluded between them.

The agreement that was concluded is recorded by the applicant as being the following:

1. That should charges be formulated against the applicant and a disciplinary inquiry held, an independent counsel would be appointed by agreement between the parties to chair such inquiry, and
2. The applicant will be entitled to legal representation at such an inquiry.

The respondent according to the applicant has renaged on the agreement and therefore come to this court for an order of specific performance.

The second issue before this court relates to remuneration payable to the applicant for the month of June 2002. In this regard it is relevant to note that the applicant who holds a senior position in respondent's enterprise was issued with a circular letter from the receiver of revenue (hereafter “Receiver”) on 25 February 2002, which had the effect that the respondent was not obliged to deduct PAYE tax from the applicant's salary. The applicant was required to pay his taxes as would any provisional tax payer.

Notwithstanding this, respondent has for the month of

June not paid applicant his remuneration stating that it utilized such remuneration towards paying part of the PAYE tax that is due by the Applicant in respect of the period March 2002 to June 2002.

Applicant seeks this court to order payment of the full remuneration to him for the month of June alleging that the deduction made by the respondent is unlawful.

Finally applicant seeks an order compelling the respondent to provide further and better particulars to its request as well as other requested documentation so that it can be in a position to prepare for the disciplinary inquiry contemplated by the respondent.

I will deal firstly with the last issue. An application to compel the respondent to provide particulars and documents was only made at a time that applicant filed its reply to respondent's opposing papers to this application. Respondent has not been given an opportunity to respond to this application. This is sufficient ground for me not to entertain this issue.

I am also not prepared to entertain this issue on the grounds that this court does not impose procedural steps in respect of disputes over which it does not have jurisdiction.

See in this respect *Morepane v Gilbey's Distillers and Vinters (Pty) Ltd [1997] 10 BLLR 1320 (LC).* The only time the court may do so is where there are exceptional circumstances in that, failure to provide or secure documents which may be necessary for the proper determination of substantive issues may result in its permanent loss and thus cause severe prejudice to one of the parties. See in this respect *Botha v Gensec [2000] 3 BLLR 260 (LC).*

In the circumstances the application to compel particulars and documents is refused.

Turning then to the issue of remuneration, while there is an obligation on an employer to pay remuneration due to the employee within seven days after the end of the month in the case of a monthly paid employee in terms of the Basic Conditions of Employment Act, and that the employer is not entitled to make any deductions without the employee's consent, other than those in terms of some statutory obligation, the issue here is not the refusal by the respondent to pay the remuneration, but to deduct the money due to the Receiver of revenue from that remuneration.

The applicant argues that since PAYE has never been deducted from his remuneration, respondent is not lawfully

entitled to make this deduction. This argument is presented despite an acknowledgement by the applicant that notwithstanding the letter from the receiver of revenue referred to above, due to an amendment in the Income Tax Act 58 of 1962, since March this year, the concession of being excused from PAYE tax no longer applies. It is common cause that since March 2002 the PAYE tax was supposed to have been deducted from applicant's salary and paid over to the receiver of revenue, and this was not done.

While respondent sought to apportion blame for this on the applicant whether it is correct in doing so, is irrelevant for the present purposes.

The respondent thus decided, no doubt because of the precarious relationship between the parties, to ensure that monies due to the Receiver was immediately deducted and paid over and has therefore proceeded to do this. The result has been that the applicant is effectively left with no income for June, and he is very unlikely to receive any income in July if the respondent, as it is obliged to do, deducts all such monies that are due to the Receiver in terms of the Income Tax Act and which amount the respondent is obliged to deduct and pay over to the Receiver.

The actions by the respondent is by no means unlawful. It is an action, it is obliged or at least entitled to take. That this may cause hardship to the applicant, there is no doubt, but this court cannot where a party takes action it is in law entitled to take, stop such action because of the hardship that may result as a consequence thereof.

Applicant has referred me to various sections in the Income Tax Act to indicate that an employer is not allowed to make a deduction from an employee's remuneration particularly with regard to arrears, unless the employer has paid such taxes on behalf of the employee. This submission is of no merit *vis-à-vis* an employer and employee. While it is true that the act provides that the employer may deduct from his employee's remuneration taxes in arrears after it (the employer) has paid such taxes, this is so because in terms of the Income Tax Act notwithstanding the employer's failure to deduct the taxes from the employee, it, the employer , is still obliged to make the payments to the Receiver, that is the employer is obliged to pay even before if he makes the deduction for the arrears; if he has not done so it does not preclude him from making the deduction and then paying it over to the Receiver.

The Income Tax Act also makes provision for payment of PAYE taxes to be deferred on application to the Receiver. However there is no obligation on an employer to apply for such concession. The fact that it has not done so here did not render the deduction made by the employer and the manner in which it was done, unlawful.

I am therefore not prepared to come to the applicant's assistance in that regard.

Turning then to what I consider to be the principal issue before me, the applicant alleging an agreement seeks specific performance. The agreement as stated earlier according to the applicant is the following:

1. an independent counsel will be appointed to chair the disciplinary inquiry, and
2. the applicant will be entitled to be legally represented at such inquiry.

Applicant further adds that the normal consequences of such right of appointing legal representative is the right to agree upon dates for the hearing of the disciplinary inquiry.

There is of course a dispute about the agreement as alleged by the applicant. It is sad that there is this dispute about exactly what two attorneys had agreed to. Both require

of me to make a finding that the other is being less than candid with regard to agreed terms of the agreement.

I have however decided not to pronounce on who it is that should be believed particularly when this may be an issue relating to procedural fairness that an arbitrator may be required to determine, assuming that the applicant is dismissed and challenges such dismissal. However, I am for the purposes of this matter prepared to assume that the agreement as alleged by the applicant was in fact concluded between the parties.

Since, on this assumption, there was a duty to agree upon the selection of the chairperson for the disciplinary inquiry and to agree on dates, the failure by the respondent to comply with these terms and unilaterally deciding upon the chairperson and dates constitutes a breach of the agreement

While it is so that a victim of the breach has the right to seek specific performance, the court always has a discretion on whether or not to grant such relief. If I weigh the consequences of the alleged breach what we have is that applicant is faced with having his disciplinary inquiry heard by a chairperson who he has not agreed to and having the hearing on the dates that is not convenient to him. Taking the

worst scenario the Applicant could be dismissed. If so, what is his remedies? He may refer the matter in terms of the dispute remedy procedures as provided for in the Labour Relations Act and have his disciplinary hearing heard *de novo* and be granted the relief which has the effect that no dismissal had in fact taken place.

On the other hand complying with the agreement cannot be prejudicial to the respondent particularly when it has already decided to appoint an independent third party to chair the inquiry. However the fact that it is not prejudicial to the respondent is not sufficient for me to grant specific performance. Specific performance I am satisfied should only be granted where, but for the granting of it would result in the victim of the breach in an employment context suffering irreparable harm. In the matter before me by not granting specific performance, applicant is not placed in a position where he will suffer irreparable harm because of the relief available to him as recorded earlier.

In the circumstances I am not prepared to grant the relief sought.

This then brings us to the issue of costs. Although the respondent did waste some time in raising three issues as a

point *in limine*, the time spent thereon was negligible. With regard to the issues raised by the applicant, all of which have been found to be of little merit I see no reason why costs should not follow the result. In the result the application is dismissed with costs.

SIGNED AND DATED AT BRAAMFONTEIN ON 03 JULY 2002

_____

WAGALY J

JUDGE OF THE LABOUR COURT

CANT : **Adv M.M Antonie instructed by Jowell Glyn and Marais.**

ESPONDENT: **Adv R. Vender instructed by Venter, Dupper and Wildenboer.**

DATE OF HEARING AND

T: **03 JULY 2002.**