IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

REPORTABLE

CASE NO: J2543/08

2008-12-09

In the matter between

GARRY HARLEY **Applicant**

And

Bacarac Trading 39 (Pty) Limited **Respondent**

J U D G M E N T

VAN NIEKERK J

This is my judgment in the matter heard by way of an urgent application on Friday, 5 December 2008. The applicant initiated these proceedings on 27 November 2008, on an urgent basis, seeking an order declaring him to be an employee of the respondent, declaring his continued suspension to be unfair, and reinstating him into the position of the technical director of the respondent.

It is common cause that on the day after this application was filed, on 27 November 2008, the respondent's attorney wrote a letter to the applicant's attorney notifying the applicant of his dismissal with immediate effect.

On 3 December 2008, prior to the hearing of this application, the applicant filed an application to amend the notice of motion by the addition of a paragraph requiring the respondent to make payment to the applicant of all his remuneration up to and including the date of his dismissal.

10 Mr Van Der Merwe, who appeared for the respondent, opposed this application on the basis that it represented a case different to that which the respondent was initially required to meet and which it had addressed in its answering affidavit. There is no merit in this submission. The effect of the relief sought in the notice of motion filed on 27 November 2008 was to confirm the applicant's employment status, with the consequent rights to payment of all remuneration withheld by the respondent during the period of his suspension.

The respondent having now dismissed the applicant, the essence of the 20 relief sought in these circumstances is different only in relation to the applicant's continued employment. His claim to the remuneration which he contends is owed to him in respect of his period of suspension is unaffected.

The respondent has dealt fully with these and related issues in its

answering papers and I fail to appreciate any basis upon which the respondent is likely to be prejudiced by my granting the application for amendment of the notice of motion. The application to amend the notice of motion is accordingly granted.

Mr Van Der Merwe submitted that the application was not urgent. He contended that this court has been disinclined to consider financial hardship and more particularly loss of income as a good ground for urgency. If financial hardship were to be allowed as a ground for urgency, so the argument went, then virtually every dismissed employee would have *locus standi* to approach this court for urgent relief.

In support of his submission on this point, Mr Van Der Merwe made reference to a number of cases, including *SACAWU v Shoprite Checkers (Pty) Limited*, 1997 (10) BLLR 1360 (LC), *Hultzer v Standard Bank of South Africa*, 1999 (8) BLLR 809 (LC), and *University of the Western Cape, Academic Staff Union & Others v University of the Western Cape*, 1999 (2) ILJ 1300 (LC).

The principle established in these cases is one that inclines this court to avoid granting what amounts to status quo relief in unfair dismissal disputes pending a final determination of the dispute by the appropriate dispute resolution body. None of these cases, it seems to me, establishes that financial hardship and loss of income can never be grounds for urgency. If an applicant is able to demonstrate detrimental consequences

that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.

A more recent indication of the approach to be adopted is to be found in the case of *Hospice & Another v MEC for Health, Gauteng Provincial Government*, 2008 (9) BLLR 861 (LC). In that case, Basson J, held that an employee was entitled to urgent relief in circumstances where her employer had unilaterally terminated her salary in breach of the Basic Conditions of Employment Act, and where she had not been given an opportunity to make representations before her remuneration was stopped.

This case similarly concerns a unilateral termination of the payment of remuneration. The respondent does not dispute the applicant's claim that the consequences of his suspension was such that he is in dire financial strains, and in particular that on 21 November 2008, the bank addressed correspondence to him threatening *inter alia* to foreclose on his mortgage bond.

The respondent on the other hand contends that the applicant's financial circumstances are of his own making. Given the facts of this case to

which I will refer shortly, that is nothing less than a fatuous statement. This court has a wide discretion to determine the urgency with which applications should or should not be treated and I am satisfied that this application is urgent and that the applicant is not abusing the processes of this court. I will therefore proceed to deal with the application on that basis.

Turning to the merits of the application, the applicant seeks a final order for payment of his remuneration during the period of suspension. That being so, factual disputes must be resolved in the first instance in favour of the respondent. The applicable test is that established by *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Limited*, 1984 (3) SA 623 (A), where the court found:

> *"It is correct that wherein proceedings on notice of motion, disputes of fact had 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 had been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.*
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> *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 the respondent of a fact alleged by the applicant, may not be such as to raise a real genuine or bona fide*

dispute of fact.

Moreover, there may be exceptions to this general rule, as for example where the allegation or denials of the respondent are so far fetched or clearly untenable, the court is justified in rejecting them merely on the papers. If in such a case, the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under rule 65G of the uniform rules of court, and the court is satisfied as to the inherent credibility of the applicant's factual averment, he may proceed on the basis of the correctness thereof and include this fact amongst those upon which he determines whether the applicant is entitled to the final relief which he seeks".

On this basis and applying this approach, the relevant factual context to this application is broadly the following. Here I draw on the papers filed in this application and those filed under case number J2116/08 which were incorporated into these papers.

The applicant was employed by the respondent on 1 July 2007. On 12 November 2007, he purchased 30 shares in the respondent company from the existing shareholders, Yolanda and Carla Pinnero, for a consideration of R1.8 million. On signature of the agreement, the

applicant was to pay the Pinneros R500 000 in part payment for the shares.

The agreement contains a clause to the effect that should the employment of any shareholder be terminated on a count of misconduct, that party is obliged to dispense of his or her shareholding to the other shareholders for no purchase consideration and the remaining shareholders are not obliged in those circumstances to pay anything to acquire the shareholding. The validity of this clause, on the basis that it was *contra bonos mores,* is subject of a separate dispute.

Between July 2007 and December 2007, the applicant received a nett amount of R40 000 each month. In January 2008 he received no payment. In April 2008 and May 2008 he received R20 000 for each of those months. In July 2008, he again received no payment. On 21 July the applicant addressed a letter to the Pinneros regarding what he considered to be the non payment of his salary. In the same month, the applicant attended at the respondent's auditors to enquire as to the reasons for his not being paid and as to the respondent's financial well being.

On 24 July the applicant was advised by one Dobson, the auditor, that Carla Pinnero had demanded the applicant's immediate resignation, that he should make his shares available for sale at a price of R300 000 (to include the amount of R120 000 being arrear salary) that the applicant

should not return to work and that he would be paid an initial amount of R80 000 on receipt of his letter of resignation.

On 29 July 2008, the applicant addressed a letter of demand to the Pinneros and to the auditor, claiming payment of R120 000 which he alleged was arrear salary due to him for the months of January, April, May and July 2008. On 30 July 2008, the applicant was advised by the respondent's attorney that he had been suspended pending an investigation and the convening of a disciplinary enquiry.

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On 1 August 2008, the Pinneros addressed a letter to the respondent's creditors stating *inter alia* that *"we would like to bring to your attention that Mr Garry Harley (the applicant) is no longer with our company"*.

On the same day, 1 August 2008, the respondent's attorney addressed a letter to the applicant's attorney stating that the auditors held R120 000 in trust as proof of the respondent's ability to meet the applicant's claim and further notified the applicant that an amount R80 000 would be released to him that day.

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On 21 August 2008, the respondent's attorney wrote to the applicant's attorney regarding the disciplinary enquiry. The enquiry was convened on 26 August and postponed to 8 September 2008. The enquiry eventually proceeded on 22 September 2008. On 29 September the chairperson of the enquiry found the applicant guilty of three out of 17 charges of

misconduct brought against him, a finding that the applicant contests.

On 7 October 2008, the applicant filed an application in this court under case number J2116/08 for an order declaring the respondent to be in breach of its contractual obligations to the applicant by not making payment to the applicant of his remuneration and benefits, and for other alternative relief.

When the matter came before this court on 14 October 2008, an interim agreement was reached in terms of which the respondent agreed to pay the applicant R40 000 by the next day and that the matter would be postponed *sine die* and placed on the opposed motion roll.

After subsequent agreement on the resumption of the disciplinary enquiry and in particular a hearing on the disciplinary sanction to be imposed on the applicant, the chair of the enquiry recused himself. After further discussion between the parties' legal representatives, the applicant's attorney addressed a letter to the respondent's attorney recording that the applicant remained suspended and that he had not been paid the months of September and October 2008. No response was received to that letter.

On 24 November 2008, the applicant's attorney addressed a further letter to the respondent's attorney recording that the applicant's continued suspension was unwarranted, unlawful and unfair. The letter also recorded the respondent's failure to pay the applicant his salary for

September and October and to pay attention to the applicant's financial circumstances.

There was further correspondence relating to an application brought in the High Court that the applicant had initiated and the wording of certain affidavits in that matter, none of which are material to the present dispute. On 26 November 2008, the applicant's attorney again recorded the disciplinary chairperson's decision to recuse himself on 22 October 2008, the applicant's continued suspension and the fact that he had not been paid his salary for the months of September and October 2008.

That letter or more accurately, the lack of any response to it, led to the filing of this application.

There are a number of issues in dispute and which fall to be dealt with in accordance with the rule established by the *Plascon Evans* case. The most material of them and indeed the only dispute that is significant for present purposes is the respondent's denial that the applicant is owed any remuneration. The respondent contends that its policy was that the respondent could make payment of salaries to its management staff in circumstances where that salary could be deferred or even forfeited in the interest of growing the business or maintaining a positive cash flow position. The existence of this policy, which the respondent concedes may be applied in a harsh and brutal manner in appropriate circumstances, was supported by a schedule of payments annexed to the

papers which reflect that the Pinneros between August 2007 and September 2008 had on occasion been paid less than what appears to be a norm of R40 000 per month and that on occasion they had been paid nothing at all. The total amounts in the schedule for the period I have referred to, reflect that in that period the applicant was paid a total of R520 000 and the Pinneros a total of R380 000 each.

I am not persuaded that the denial by the respondent of the applicant's entitlement to a monthly nett remuneration of R40 000 raises a genuine or *bona fide* dispute of fact. The undisputed facts in this case establish a pattern, according to which the applicant was paid monthly on a regular basis from the date that he commenced employment in July 2007 until December 2007. The month after he signed the shareholder's agreement and paid the Pinneros R500 000, short payments or no-payments were made to the applicant in January, April, May and July 2008. These outstanding amounts were paid to the applicant only after he had met with the respondent's auditor and applied pressure on the Pinneros. After the applicant's suspension, no further payments were made to him, except the amount of R40 000, paid after the proceedings initiated in this court under case number J2116/08.

This pattern and the obviously close correlation between non payment of salary to the applicant which he alleges, and the activities by him to question and ultimately seek enforcement of payment, are in my view indicative of a right to the receipt of remuneration at regular monthly

intervals.

In these circumstances, the respondent's allegations regarding its remuneration policy and the application of that policy (given that it is common cause that the applicant was never provided with any justification or explanation by the Pinneros in relation to each instance of non payment or part payment and that the version of an agreement to receive irregular payments of an unspecified amount, or even no payment at all, was raised only in these proceedings), are clearly untenable and should be rejected.

There is a further submission by the respondent that needs to be considered. In the answering papers, Carla Pinnero deposes to the following:

> *"I fail to understand the applicant's contention that his suspension is unfair because he has not received payment of an amount he claims to be entitled to. Rationally, the two concepts have nothing to do with each other, the applicant has in any event received what he is entitled to".*

Suspension without pay and the fairness thereof, is self evidently linked to the payment of remuneration, especially where, as is the case here, an employee is suspended without pay. Where suspension is effected as a measure pending a disciplinary hearing, as is the case here, suspension

without pay is a material breach of contract. In the absence of any apparent apprehension that the applicant's continued presence in the workplace prejudiced a legitimate business interest and in view of the demonstrated psychological and financial prejudice to the applicant, the applicant's suspension was also unfair.

Insofar as it might be suggested that the applicant has an alternative remedy and is therefore not entitled to final relief in these proceedings, it is true, as Mr Van Der Merwe submitted, that the applicant is entitled to sue the respondent for unpaid remuneration on a contractual basis, either in this court or in a civil court with jurisdiction. However, in my view, that submission ignores the context in which this application is brought. The relief claimed by the applicant is premised on an unlawful suspension, breach of contract in the form of a failure to pay the applicant his remuneration, and also a breach of the Basic Conditions of Employment Act. These are all matters in respect of which this court clearly has the powers to entertain applications for final relief and in appropriate circumstances, to grant the relief.

Finally, there is the argument that, given the applicant's dismissal, the relief he seeks in this application has become academic and that the application should be refused for that reason. There is no merit in this submission. The applicant's dismissal was clearly a direct response to the filing of this application and effected in circumstances where formal notice of termination of employment was given by the respondent's

attorneys to the applicant's attorneys. Far from being academic in the present circumstances, this smacks of an act of victimisation.

I am satisfied that the applicant has made out a case for the relief he seeks and I accordingly make the following order:

1. The applicant's suspension was unlawful;
2. The respondent is ordered to pay the applicant his remuneration for the months of September, October and November 2008, a nett amount of R120 000;
3. The respondent is to pay the costs of this application.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of Hearing 09 December 2008

Date of Judgment 09 December 2009

Appearances:

For the applicant Mr B Bleazard from Brian Bleazard Attorneys

For the Respondent Adv H A Van Der Merwe

Instructed by Senekal Simmonds Inc