IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:J2525/07

In the matter between: **NOT REPORTABLE**

SWANEPOEL Applicant

and

KIEVIETSKROON COUNTRY ESTATE Respondent

JUDGMENT

TODD AJ:

On 2 April 2009 I made an order in the following terms:

1. The Respondent is directed to send a certificate of service, reflecting 30 May 2007 as the last date of the Applicant's employment, to the Applicant's attorneys of record within 7 days of the date of this order.

2. There is no order as to costs.

These are the reasons for the order that I made:

1. This was an application for an order directing the Respondent to issue the Applicant with a certificate of service in compliance with the provisions of section 42 of the Basic Conditions of Employment Act (BCEA), and ordering the Respondent to pay the costs of the application on a punitive scale.

2. The Applicant had been employed by the Respondent as a Financial Manager from 1 February 2004 until she resigned on 30 May 2007.

3. As at 17 October 2007, she had not been provided with a certificate of service as contemplated by the provisions of section 42 of the BCEA. On 17 October 2007 her

attorneys of record wrote to the Respondent, in relevant part as follows:

> *"3. We are accordingly instructed to demand from you, as we hereby do, that you furnish us with our client's certificate of service in terms of section 42 of the BCEA, failing which we are instructed to make an urgent application to the Labour Court to compel you to do so.*
>
> *4. Should the said certificate of service not be received in our office before the close of business, Thursday, 18 October 2007, we will proceed with launching the aforementioned urgent application against you, the costs of which you will be liable for.*
>
> *5. Your urgent response is awaited."*

4. Although the letter alleged that previous demands had been made, this was denied by the Respondent in answering papers. There is no evidence before me of any such demand having been made prior to the letter of 17 October 2007 and the matter must be determined on the basis that this was the first demand made.

5. The Respondent's attorneys answered two days later in a letter dated 19 October 2007. In response to the contention that the Respondent had refused to provide the Applicant with a certificate of service despite prior demand, the Respondent's attorneys stated the following:

> *"We deny that our client has acted in any manner in breach of the provisions of the law and as is stated in terms of your letter. Our client denies that any request has been received from your client in this regard. Your letter is therefore totally out of line in this regard. We take it that you are making a request to receive a service certificate. We confirm that such a certificate may reflect the circumstances that your client left our client's employment and should not be of much use to her when seeking employment."*

6. In response to paragraphs 3 to 5 of the letter of demand, which are the paragraphs quoted above, the Respondent's attorneys replied as follows:

> *"Our client's Personnel Manager is currently out of the office and we shall provide you with such details, on her return.*
>
> *We deny that your client shall succeed with bringing an urgent application as is stated in terms of your letter, due to a total lack of urgency. Such conduct shall be vigorously defended by our client."*

7. In this letter the Respondent, through its attorneys:

7.1 Placed in dispute the contention that there had been any previous demand for a

certificate of service.

7.2 Recorded that it would treat the letter of demand of 17 October 2007 as a request for a certificate of service.

7.3 Recorded that the certificate "may reflect" the circumstances in which the Applicant left employment and further records that the certificate of service "should not be of much use to" the Applicant when seeking employment.

7.4 Recorded that the Respondent's personnel manager was at the time out of the office, but that the further details would be provided on her return.

8. Following receipt of that letter and on the same date, the Applicant, acting through her attorneys of record, instituted the present application. The application was not brought on an urgent basis as threatened in the letter of demand but in the ordinary course in terms of the provisions of rule 7 of the rules of this Court.

9. In the Respondent's answering papers, the Respondent's human resources manager:

9.1 Stated that a certificate of service had already been prepared by her on 28 May 2007, and attached a copy of that certificate to the answering papers.

9.2 Contended that the Applicant had been remiss in not contacting her to arrange to collect the certificate of service.

9.3 Reiterated that the Applicant had not previously requested a copy of the certificate of service and had also not provided an address for delivery of the certificate of service following her relocation from Pretoria to Cape Town.

9.4 Contended that the Applicant could easily have secured the certificate of service through other means than approaching this Court by way of the present application.

10. The certificate of service attached to the answering papers and dated 28 May 2007 recorded the last date of the Applicant's employment as being 7 May 2007. That was the last day on which, on the papers before me, the Applicant rendered services to the Respondent. She subsequently resigned with effect from 30 May 2007 and there are

proceedings currently pending before this Court in which the Applicant contends that her resignation constituted a dismissal and that the circumstances in which her resignation took place, and the reason for her resignation, rendered the dismissal automatically unfair.

11. The only relevance of those facts to the present application is that as at 28 May 2007 the Applicant had not resigned and the Respondent was treating her as having absconded from her employment with effect from 7 May 2007.

12. In the proceedings before me, Mr Scholtz who appeared for the Applicant, and Mr Scheepers who appeared for the Respondent, were in agreement that the operative event that caused the termination of the Applicant's employment was her resignation on 30 May 2007.

13. As to whether these proceedings were necessary at all, Mr Scholtz made submissions which I summarise broadly as follows:

13.1 Section 42 of the BCEA obliges an employer to submit a certificate of service on or after the termination of employment irrespective of whether a certificate is requested or demanded by the employee.

13.2 The Applicant would have been entitled to institute these proceedings without prior warning to the Respondent in those circumstances as her legal right to receive the certificate of service from the Respondent had been violated.

13.3 In those circumstances the letter of demand of 17 October 2007, giving the Respondent one day to produce the certificate of service, was strictly speaking unnecessary, but was in any event reasonable.

13.4 The response from the Respondent's attorneys dated 19 October 2007 clearly demonstrated a wilful refusal on the part of the Respondent to comply with its obligations under the provisions of section 42 of the BCEA.

13.5 Under those circumstances the Applicant was fully justified in launching the present proceedings.

14. Mr Scholtz relied in instituting these proceedings on the jurisdiction conferred on this

Court by reason of the provisions of section 77(3) of the BCEA. In support of this proposition he contended that the right of an employee to be provided with a certificate of service, conferred by section 42 of the BCEA, falls within the definition of a basic condition of employed as defined in that Act, which in turn, in terms of the provisions of section 4 of that Act, constituted a term of the contract of employment between the Applicant and the Respondent.

15. The right of an employee, in terms of section 42 of the BCEA, to be provided with a certificate of service does not in my view constitute a basic condition of employment as defined in the BCEA. A basic condition of employment is defined to be a provision of the BCEA "that stipulates a minimum term or condition of employment". In those circumstances I have considerable doubt as to whether this Court has jurisdiction to deal with an application such as the present one by reason of the provisions of section 77(3) of the BCEA. This point was not taken by Mr Scheepers, and was not fully argued. For that reason, I decided to deal with the matter on the assumption that this Court does have jurisdiction as contended by Mr Scholtz.

16. Mr Scholtz sought to persuade the Court, through a process of inferential reasoning based on a number of collateral facts, that the certificate of service dated 28 May 2007 had, on the probabilities, been prepared only after the application was launched on 19 October 2007 and had been back dated. The issues in this application must be decided on the application of the rule in *Plascon-Evans*[1]. I was not satisfied that any of the considerations raised by Mr Scholtz cast serious doubt on the assertion in the answering papers that a certificate of service had been prepared on 28 May 2007. In any event, the question of exactly when the certificate of service attached to the answering papers was prepared was ultimately not material to my decision in the matter.

17. Mr Scholtz also sought to persuade the Court that the assertion by the Respondent's attorneys, in their letter of 19 October 2007, that the certificate of service "may reflect" the circumstances in which the Applicant had left the Respondent's employ, and (presumably for this reason) would not be of much use to her, was a threat to include material in the certificate of service that the employer was not entitled to include other than at the request of the employee (section 42(g) of the BCEA).

18. The circumstances in which the Applicant left the Respondent's employment involved allegations on the part of the Respondent that she had absconded from her employment

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

and was unable to account for a certain sum of money that had been under her care. For her part, the Applicant contended that she had been subjected over a long period of time to sexual harassment of an extremely serious nature at the instance of her direct superior. In my view the passage from the letter of the Respondent's attorneys referred to does contain an implicit threat (to include reference to these matters in the certificate of service) that was unwarranted and inappropriate in the circumstances.

19. Despite this, no reasonable construction can be placed on the letter from the Respondent's attorneys other than that on the return of the Respondent's personnel manager to the office a certificate of service would be provided.

20. Mr Scholtz contended that the response gave no indication of when this would be, and that in the circumstances the Applicant was entitled to launch these proceedings on the same day, 19 October 2007. I do not agree. The appropriate course of action for the Applicant would have been to respond and, first, to point out that the provisions of section 42 permitted the employer to include reasons for termination of employment only at the employee's request; second, to record that the employee did not request this; and third, to enquire by what date the certificate of service would be available.

21. It was not appropriate to institute the present proceedings and to rack up the legal costs necessarily consequent on doing so.

22. Had the Applicant, through her attorneys, adopted the alternative approach suggested above there is no reason to believe that she would not have been provided with a copy of a certificate of service on the return of the Respondent's personnel manager to office, whether the certificate was one previously prepared, or was prepared only in October 2007.

23. Mr Scholtz submitted that by October 2007 the Respondent was already in breach of its obligations under the BCEA, and that the Applicant was justified in instituting these proceedings for that reason. Section 42 does not impose on the employer the obligation for which Mr Scholtz contended. Undoubtedly an employee is entitled to be provided with a certificate of service and in the ordinary course, as a matter of sound human resources practice, an employer should provide such a certificate at the time or soon after the employee leaves the employer's service. It does not follow that an employer has a statutory duty to do so even where the employee makes no request that she be provided with such a certificate. In my view an employer will breach its obligations under

section 42 if it fails to provide an employee with a certificate of service within a reasonable time after being requested to do so by the employee.

24. Although I have dealt with this matter on the assumption that this Court has jurisdiction to deal with applications of this nature, it remains important to point out that Chapter 10 of the BCEA deals with monitoring, enforcement and legal proceedings arising from the provisions of the BCEA. In terms of section 69, a labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of the BCEA has the power to issue a compliance order. This power, it is clear, extends to ordering compliance with a provision of the BCEA whether or not that provision constitutes a basic condition of employment as defined in the Act. A person in the position of the Applicant should, in my view, properly invoke the provisions of section 69 and, if necessary, the further provisions of Chapter 10 of the BCEA, to secure compliance with an obligation to issue a certificate of service. Even if this Court does have jurisdiction (and I have expressed my reservations in this regard above) it is not appropriate to bypass the enforcement mechanisms contained in the BCEA and to approach this Court directly unless there are compelling reasons for doing so.

25. If that were not so, there may be multiple claims brought in this Court under the provisions of section 77(3) of the BCEA with cost implications for parties to that litigation that are far beyond what may reasonably have been contemplated by the drafters of the statute. Indeed, this Court's roll is already flooded with applications similar to the present one, many of which, being initially unopposed, result in an order being granted together with costs. Many of those matters then return to the Court's roll when the Respondent, who it transpires did not receive service of the application, brings a rescission application. Frequently this is accompanied by an urgent application to stay a writ of execution that has by then been issued for a relatively trifling sum.

26. A week on duty in the motion Court reveals an alarming number of urgent applications to stay execution. Many of these involve relatively small sums of money. Others involve a claim for costs, in which it transpires that a bill of costs has been taxed in an amount of between R15,000 and R20,000 when the underlying claim, in an unopposed application, was to compel an employer to issue a certificate of service.

27. That practice, whether or not permissible in the sense that the cause of action falls within the jurisdiction in this Court by reason of the provisions of section 77(3) of the BCEA,

appears to confirm the existence of a cottage industry of the kind described by Wallis J in *Sibiya v Director General: Home Affairs and others* (High Court, Kwazulu-Natal Division, Pietermaritzburg, unreported, case number 13859/08), referred to in other recent judgments of this Court.

28. In the present matter both the Applicant and Respondent have incurred substantial legal costs in bringing and opposing an application which for reasons that I have stated earlier, should never have been brought. Assuming, as I have done, that the matter indeed falls within the jurisdiction of this Court, I raised with Mr Scholtz whether or not, if I refuse the Applicant her costs in the matter, I should not simultaneously make an order that deprives the Applicant's attorneys of their costs. In short, the question was whether or not, if the application was brought inappropriately, the Applicant should be out of pocket at all in respect of legal costs.

29. Mr Scholtz pointed out that there was nothing on the papers before me from which I could draw an inference as to the advice that had been given to the Applicant, and that it was plausible that she may have instructed her attorneys to institute the present proceedings against their better advice. It seems to me that that is an inference that I should not readily draw, and that I should more probably draw an inference that the Applicant was advised that the application was appropriate and that it had prospects of success. Nevertheless, I was ultimately not satisfied that I had a proper basis to make an order other than the one that I made.

Date of hearing: 2 April 2009

Date written reasons given: 29 April 2009

For the Applicant: W Scholtz of Jansens Incorporated

For the First Respondent: M Scheepers of Marius Scheepers Attorneys