REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1105/10

In the matter between:

FATIMA ABRAHAMS **Applicant**

and

DRAKE & SCULL

FACILITIES MANAGEMENT (SA) (PTY) LTD **First respondent**

DRAKE & SCULL FM, a division of

TSEBO HOLDINGS & OPERATIONS (PTY) LTD **Second respondent**

Heard: 22-27 September; 4 November 2011

Delivered: 11 November 2011

Summary: Contract of employment – unilateral change – claim for specific performance.

JUDGMENT

STEENKAMP J

Introduction

1] When an individual employee is faced with a unilateral change to her terms and conditions of employment, what is she to do? Collective power – as contemplated by s 64 of the Labour Relations Act[1] -- is not available to her. Can she claim specific performance of her contract of employment?

2] This is the dilemma in which the applicant, Ms Fatima Abrahams, found herself. She approached this court by way of application on an urgent basis on 13 December 2010. Basson J found that it was not urgent and the matter was referred to the trial roll. Oral evidence and argument was heard from 22 to 29 September and on 4 November 2011.

Background facts

3] The applicant was employed by Clicks Group Limited for some 28 years, from 1997 to 2007. On 1 June 2007 her contract of employment was transferred to the respondent, Drake and Scull[2], in terms of section 197 of LRA.

4] The applicant signed a new contract of employment with Drake and Scull. In terms of that contract, she was employed as a “creditors purchase order clerk" based at Clicks head office in Searle Street, Woodstock. (Drake & Scull is a temporary employment service that provides staff and "management solutions" to retailers and other organisations, such as Clicks stores).

5] At the time of the transfer, the applicant's basic salary was R23 551, 18

1 Act 66 of 1995 (the LRA).

2 The employer, who is cited as the first respondent, is Drake & Scull Facilities Management (SA) (Pty) Ltd. The company is a division of Tsebe Holdings and Operations (Pty) Ltd, the second respondent. I shall refer to the employer simply as “the respondent” or “Drake & Scull”.

per month. On 10 November 2008, her job title was changed to that of financial administrator. She received further salary increases, the latest being on 9 April 2010, when her monthly salary was increased to R 30 286, 33.

6] On 7 September 2010, the respondent's operations executive, Mr Colin Bekker, addressed a letter to the applicant in the following terms:

“RE: ALIGNMENT OF PACKAGES (CONSULTATIVE MEETING)

Please accept this communiqué as confirmation that you are invited to a meeting to consult on the possible realignment of your package. At this stage no decision has been made as to what the impact may be. The meeting shall take place at Clicks head office, Woodstock, conference room 1, ground floor at 9h00.

The Group National IR Manager (Terence Lategan) and myself [*sic*] shall attend the meeting from Drake & Scull side.

You are required to attend the meeting as your input and contribution would be invaluable and would allow the company to consider any proposals you may put forward."

7] The meeting took place on 8 September 2010. The company was represented by Bekker, Lategan and its human resources officer, Ms Astrid Saaiman. The respondent's representatives informed the applicant that she was earning 4 1/2 times the average remuneration package within her department. They proposed that her salary be reduced from R30 286, 33 to R8 500 per month. In a letter to the applicant on the same day, Bekker stated:

"The effective proposed date of this change will be 01 October 2010."

8] Further meetings took place on 16 September, 21 September and 29 September 2010. The applicant did not accept the proposed change to her remuneration.

9] On 29 September 2010 Bekker wrote to the applicant in the following terms:

"Further to our extensive consultations you are herewith informed of your salary

change effective from 1 October 2010.

Your new salary will be **R8500, 00 TCOE.**

All other terms and conditions will remain unchanged."

10] The letter was signed by Bekker. Underneath his signature provision was made for the following:

"Accepted by employee:_____ Date: _____"

However, the employee refused to sign acceptance and Ms Saaiman at annotated a copy of the letter to that effect.

Legal proceedings

11] On 26 October 2010, the applicant referred a dispute concerning the unilateral change to her terms and conditions of employment to the CCMA for conciliation. Conciliation was unsuccessful. On 15 November 2010 the CCMA issued a certificate of outcome reflecting that the dispute remained unresolved. The LRA form 7.12 contains a section in the following terms:

"If this dispute remains unresolved, it can be referred to:

Arbitration / Labour Court / Strike/lockout / None."

The Commissioner clicked the box "none".

12] When cross-examining the applicant, Mr *Donen*, for the respondent, suggested that the certificate of outcome had some kind of binding force and that the effect of it was that the applicant was precluded from referring a dispute to the Labour Court. In argument, he wisely abandoned that submission.

13] On 8 December 2010 the applicant delivered a notice of motion to have an urgent application heard on 13 December 2010 and sought relief in the following terms:

13.1 "that the applicant's failure to comply with the ordinary forms and time periods contained in the rules of this honourable court be

condoned and that the honourable court direct that the matter may be heard as a matter of urgency in terms of rule 8;

13.2 that a rule nisi be issued, calling upon the first and/or second respondent to show cause, on a date to be determined by this honourable court or the registrar, why a final order should not be made in the following terms:

13.2.1 that the first and/or second respondent be ordered and directed to forthwith restore and comply with the terms and conditions of applicant's employment contract entitling her to receive monthly remuneration in the amount of R30 286, 33;

13.2.2 that the first and/or second respondent be ordered and directed to forthwith restore and comply with the terms and conditions of applicant's employment contract requiring the respondents to deduct and pay the amount of R2 271, 47 as contributions to the Old Mutual Provident Fund;

13.3 that first and/or second respondent be ordered and directed to forthwith, or within a period stipulated by the honourable court, comply with the terms and conditions of the applicant’s contract of employment and:

13.3.1 pay to the applicant an amount of remuneration constituting the difference between the remuneration she received for the months of October and November 2010 and the remuneration the applicant was lawfully entitled to receive by virtue of her contract of employment in the monthly amount of R 30 286, 33;

13.3.2 pay contributions on applicant’s behalf to the Old Mutual Provident Fund being the difference between the contributions paid for the months of October and November 2010 (in the monthly amount of R427,65) and the contributions that the respondent was lawfully required to deduct and pay in the monthly amount of R2 271, 47;

13.4 that the first and/or second respondent be ordered to desist from any action or conduct which infringes the applicant's right to fair labour practices and those rights and entitlements arising from her employment contract;

13.5 that the first and/or second respondent be ordered to pay the costs of this application on an attorney and own client scale."

It then sought for the rule *nisi* to operate as an interim order pending the return day.

14] The respondents delivered an answering affidavit on 13 December 2010. The matter came before Basson J on that day. She ruled that the matter was not urgent and struck it from the roll. She further directed that the matter be referred to the trial roll for oral evidence; and directed the parties to file a pre-trial minute by 31 January 2011.

15] In the pre-trial minute the main issues in dispute are described as follows:

"Whether the respondent's decision to reduce the applicant's remuneration was unilateral and unlawful;

The nature and extent of any damages due, owing and payable to the applicant by the respondent;

Whether, assuming that the Honourable Court determines that the respondent wrongfully and unlawfully altered the applicant's employment contract the amounts, if any, that she is entitled to receive in respect of damages."

16] The practice note filed in terms of rule 9 by the applicant's attorney further described the issues involved as follows:

"The applicant seeks that the respondent comply with the contractual obligations of her employment contract. The applicant seeks an order from the honourable court directing that the respondent:

reinstate her contractual right and entitlements to receive monthly remuneration in the amount of R 30 286, 33;

be ordered to restore and comply with the terms of her employment contract;

be ordered to pay to the applicant the difference in the remuneration she would have received had her conditions of employment not been unilaterally amended in October 2010, including paying the difference in the benefit entitlements (provident fund) she was entitled to receive."

The relief sought

17] Mr *Donen* pointed out that the exact relief sought was stated in somewhat different terms in the notice of motion, the pre-trial minute and the practice note respectively. This, he said, made it difficult for the respondent to know what case it had to meet.

18] In this regard, Mr Donan suggested that the relief sought was not spelt out in the terms prescribed by rule 6(1)(b)(iii) and (iv), viz:

"a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document; and

the relief sought."

19] The difficulty is that this matter was not referred to court in terms of rule 6. The applicant launched an urgent application in terms of rules 7 and 8; the matter was then referred to the trial roll for oral evidence to be led. The initial set of pleadings that spelt out the relief sought, therefore, is the notice of motion in the urgent application.

20] It is clear from the notice of motion that the applicant seeks specific performance to enforce the terms of her contract of employment, specifically relating to remuneration. The respondent has at no stage raised an exception to complain that the way in which that relief was set out is vague and embarrassing. In the course of the trial it was quite clear that the respondent knew what the case was that it had to meet.

Jurisdiction

21] In his heads of argument, for the first time, Mr Donen submitted that this court does not have jurisdiction to decide on the pleaded claim.

22] In support of this submission, he points out that the applicant – in her founding affidavit – asked for "urgent interim relief in the form of an order as contemplated by sections 158(1)(a)(i) and 158(1)(a)(iii) of the Labour Relations Act, which directs the respondent to restore and abide by the terms and conditions of thee employment contract properly concluded between us...".

23] This, says he, means that the applicant's relief is located in the LRA; that the only primary object of the Act which is relevant in terms of section 158(1)(a)(iii) is to give effect to the right to fair labour practices conferred by s 23(1) of the Constitution; and that this avenue has been closed to the applicant by virtue of the judgment in *SAMSA v McKenzie*[3] because specific performance arising from a unilateral variation of a term of employment is regulated by s 64(4) of the LRA.

24] This argument is, with respect to Mr Donen, based on a fundamental misreading of the purposes of section 64 of the LRA and of the *SAMSA* judgment.

25] Section 64 is located in chapter 4 of the Act dealing with strikes and lockouts in the context of collective bargaining. As an adjunct to the process outlined in order to give a strike (or lockout) protected status, section 64(4) presents a trade union with the mechanism to obtain *status quo* relief for a period of 30 days after referring a dispute about an alleged unilateral change to terms and conditions of employment to the CCMA or a bargaining council. For the duration of that period, the employer must restore the *status quo ante*; after that period (or a shorter period after which a certificate has been issued stating that the dispute remains unresolved), the trade union may give 48 hours' notice and embark on a protected strike. That is the power play that the union, using its collective

3 (2010) 31 *ILJ* 529 (SCA); [2010] 5 BLLR 488 (SCA).

bargaining power, may use in order to resist the efforts of the employer to change terms and conditions of employment. Similarly, the employer may embark on a protected lock-out in order to persuade employees to accept a variation in terms and conditions of employment. What it cannot do, is to impose those terms unilaterally, as the respondent did in this case.

26] The respondent could have locked the applicant out, had it followed the prescribed procedure. But it elected not to do so. It had four meetings with her in order to persuade her to accept a 70% reduction in remuneration; she refused; and the respondent implemented it unilaterally on the day on which it indicated from the start that it would do so, ie 1 October 2010.

27] The applicant is a single employee. Mr Donen conceded that she could not use the weapon of strike action. In the circumstances, his reference to s 64 is entirely misconceived.

28] The respondent's reliance on *SAMSA* does not assist it either. In that case, Wallis AJA was at pains to point out that the question is whether the court has jurisdiction over the pleaded claim, and not over some other claim that has not been pleaded but could arise from the same facts. In this case, the applicant asks for specific performance of her contract of employment. She does not and indeed cannot, as an individual, rely on section 64. There can be no doubt that this court has jurisdiction to adjudicate her claim for specific performance. As Wallis AJA[4] remarked in *SAMSA:*

> "As was the case in *Fedlife*, and in other cases purporting to raise similar challenges, the plea, properly construed, does not raise a jurisdictional challenge at all. In substance what is alleged in the plea is that the Labour Relations Act is the exclusive source of remedies for unfair dismissal, with the result that Mr McKenzie has no contractual claim. That is not a challenge to the jurisdiction of the High Court to consider the pleaded claim. It is a challenge to the validity of the pleaded claim. I can only echo, in relation to the facts of this case, what Nugent JA said in *Makhanya*[5] in regard to special pleas purporting to be pleas to

4 (as he then was) in *SAMSA v McKenzie (supra)* at para [8].

5 2009 (2) SA 628 (ECD) para 66.

the jurisdiction of the court, such as the present one. I adapt his words to the facts at present before us:

'Once more, so it seems to me, [this case], like all the cases that preceded it, [is] not about jurisdiction at all. It [is] about whether there [is] a good cause of action. In my view the least said about jurisdiction in such cases the better because, once that red herring is out of the way, courts will be better placed to focus on the substantive issue that arises in such cases, which is whether, and if so in what circumstances, employees might or might not have rights that arise outside the LRA."

29] And lastly, the provisions of s 158(1)(a)(iii) does anything but deprive this court of jurisdiction to adjudicate the claim as pleaded. That section deals not with jurisdiction, but powers. Section 158(1)(a)(iii) makes it clear in plain language that this court may make any appropriate order, including –

"an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act".

30] Such an order, widely framed as it is (ie "any appropriate order"), must surely include an order for specific performance, directing an employer to remedy its breach of a contract of employment and to abide by its terms.

31] That brings me the contractual claim for specific performance.

Contractual claim for specific performance

32] Mr Donen also submitted that the applicant has not specifically located her claim in s 77(3) of the Basic Conditions of Employment Act.[6] That section provides that:

"The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

33] That section makes it abundantly clear, once again in plain language, that this court does have jurisdiction to hear and determine a matter such as

6 Act 75 of 1997 (the BCEA).

the one before me. It clearly concerns a contract of employment: the respondent has breached its terms by amending it unilaterally, and the applicant seeks specific performance of the contract. Maybe the applicant would have done better, through her attorney, to spell it out; but the fact that she doesn't allege in so many words that this court has jurisdiction in terms of s 77(3) of the BCEA does not deprive the court of that jurisdiction.

34] The powers of this court are further spelt out in s 77A(e) of the BCEA, including –

> "making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation."

35] The applicant in this case seeks specific performance of the terms of her contract of employment relating to her remuneration. The fact that she has not specifically alluded to s 77(3) of the BCEA cannot deprive this court of jurisdiction to hear the matter in terms of the provisions of that section, nor of the power to grant an order of specific performance in terms of s 77A(e) of the BCEA.

36] This provision should also be read with the provisions of s 158(1)(a)(iii) of the LRA quoted above and relied upon in the founding affidavit. Thus, in *Wiltshire & others v University of the North*[7] it was held:

> "Section 151(2) of the Labour Relations Act establishes the Labour Court as a superior court with the authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction. This read with section 158(1) of the Labour Relations Act establishes that this Court has jurisdiction to make an order of specific performance."

Alternative submissions by respondent

37] In the alternative, and should I decide (as I have) that this court has

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7 [2006] 1 BLLR 82 (LC) para [64].

jurisdiction and the power to order specific performance of the terms of the contract of employment, Mr Donen submitted that I should exercise my discretion not to do so.[8]

38] He suggests that it would be glaringly unfair to perpetuate a situation where the applicant earns substantially more than other similarly situated employees. He appears to suggest that the respondent was *bona fide* in attempting to reach agreement with the applicant; and even though they did not reach consensus, it was somehow entitled to implement the reduced salary unilaterally.

39] Inexplicably, he cites the *dictum* of the Labour Appeal Court in *Mazista Tiles (Pty) Ltd v National Union of Mineworkers and Others*[9] for that submission. But that authority is destructive rather than supportive of his case. Jafta AJA[10] succinctly and with respect correctly set out the relevant legal principles as follows:

> 'An employer who is desirous of effecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. It may so happen, as it was the position in this case, that the employees refuse to enter into any agreement relating to the alteration of their terms and conditions because the new terms are less attractive or beneficial to them. While it is impermissible for such employer to dismiss his employees in order to compel them to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue their implementation, he has the right to invoke the provisions of section 189 and dismiss the employees provided the necessary requirements of that section are met.
>
> The fact that the dismissal came about after the employees' rejection of the proposed changes cannot affect the fairness of the dismissal if the employer

8 That a court has such a discretion is trite law: *Haynes v Kingwilliamstown Municipality* 1951 (2) 371 (A); *Benson v SA Mutual Life Assurance Society* 1986 (1) 776 (A); *Mafihla v Govan Mbeki Municipality* [2005] 4 BLLR 334 (LC) paras [46] – [51].

9 (2004) 25 *ILJ* 2156 (LAC); [2005] 3 BLLR 219 (LAC).

10 (as he then was) paras [48] – [51].

established that it was effected for a fair reason relating to his operational requirements and not in order to compel the employees to accept the proposed changes. The prohibition in section 187(1)(c) cannot apply to it as long as it was effected for a purpose other than to compel the employees to accept the employer's demand. In *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) Zondo JP emphasised that what is most important is to determine the purpose of the dismissal. The learned Judge President stated at paragraph [37]:

"[37] Such an employer may then dismiss the employees for operational requirements in order to get rid of them permanently and employ a new workforce that will be prepared to work in accordance with the needs of his business. In such a case the employer will be dismissing the old workforce because the contracts of employment he has with them can no longer properly serve his operational requirements. That was the nature of the dismissal that the employer effected in *TAWU & others v Natal Co-operative (Pty) Ltd* (1992) 13 *ILJ* 1154 (D) as well as in *Fry's Metals (Pty) Ltd v NUMSA & others* (2003) 24 *ILJ* 133 (LAC). However, in a case which requires the working of short time, such as has been referred to above, the employer could take the attitude that for certain reasons such as their experience and skills he does not want to get rid of his workforce permanently but wishes to retain them and for that reason dismisses them not for the purpose of employing others in their positions permanently but for the purpose of compelling them to agree to work short time. If he did that, he would be hoping that the implications and consequences of dismissal would be such that the employees would feel that they should rather agree to the employer's demand and escape the consequences of dismissal rather than not agree to the demand and face such consequences. Under the repealed Labour Relations Act 28 of 1956 ('the old Act'), such a dismissal was permitted. Under the current Act it is not permitted and it is automatically unfair. From this it must be abundantly clear that the existence of valid operational requirements does not prevent a dismissal being effected for the purpose contemplated by section 187(1)(c). What is most important is to determine what the purpose of the dismissal is."

...

'As it appears above, the Labour Court's conclusion to the effect that the dismissal was substantively unfair was based on two key findings. The first finding was that the appellant had alternative options to dismissal by means of which it could have implemented its proposal. As an example of such options the

Labour Court suggested that the appellant could have unilaterally implemented the proposal and if the workers resisted, it could have enforced the implementation by disciplinary action or used a lockout. For this finding reliance was placed on the decision of the Labour Court in *National Union of Metalworkers of SA & others v Fry's Metal & others (Pty) Ltd* (2001) 22 *ILJ* 701 (LC) and *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC) at 1731. It needs to be noted that the decision of the Labour Court in *Fry's Metals* has since been overturned by this Court on appeal in the *Fry's Metal* case referred to above. As to the reference to 731 of the judgment of this Court in *Afrox*, a reading of that page of the judgment does not reveal any support for that finding of the Labour Court nor is there support for that proposition anywhere in the judgment of this Court in *Afrox*.'

40] This dictum restates the principle that an employer may not unilaterally implement a change to terms and conditions of employment – which is exactly what the respondent did in this case.

41] The Supreme Court of Appeal again restated these principles in *Fry's Metals*[11]. Following the judgment in *Fry's Metals,* of course, the respondent could have embarked on a process in terms of s 189 of the LRA; but it elected not to do so, and nor did it follow the lock-out route in terms of section 64. The unilateral change was unlawful. It was also unfair. I can see no reason why I should exercise my discretion not to award specific performance.

Costs

42] The applicant was represented on a *pro bono* basis. As I explained at length in *Zeman v Quickelberge and another*[12]*,* that fact does not necessarily preclude her from obtaining a costs order in her favour. I will

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11 *NUMSA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA); [2005] 3 AllSA 318 (SCA). In this judgment – decided after the LAC judgment in *Mazista Tiles* – the SCA dismissed an application for leave to appeal the judgment of the LAC in *Fry's Metals.* Since the judgment of the LAC in *Mazista Tiles* the Supreme Court of Appeal declined leave to appeal to that court, expressing the view that it was correctly decided by the LAC: *National Union of Mineworkers and others v Mazista Tiles (Pty) Ltd* (2006) 3 All SA 337 (SCA); (2006) 27 *ILJ* 471 (SCA).

12 (2011) 32 *ILJ* 453 (LC).

not repeat my reasoning here; but it is noteworthy that Wallis J[13] came to a similar conclusion via a different route in *Thusi v Minister of Home Affairs and others*[14]. The principle must now be accepted as settled law.

43] The respondent has unilaterally changed the applicant's contract of employment. That is impermissible. There is no reason in law and fairness why it should not be ordered to pay the applicant's costs.

Order

44] For these reasons, I make the following order:

44.1 The respondents are ordered to forthwith restore and comply with the terms and conditions of applicant's employment contract entitling her to receive monthly remuneration in the amount of R30 286, 33;

44.2 The respondents are ordered to forthwith restore and comply with the terms and conditions of applicant's employment contract requiring the respondents to deduct and pay the amount of R2 271, 47 per month as contributions to the Old Mutual Provident Fund;

44.3 The respondents are ordered to pay the applicant, by no later than 30 November 2011, the difference between the remuneration she received for the period from 1 October 2010 to 30 November 2011 and the remuneration the applicant was lawfully entitled to receive by virtue of her contract of employment in the monthly amount of R 30 286, 33;

44.4 The respondents are ordered to pay the contributions on applicant's behalf to the Old Mutual Provident Fund, being the difference between the contributions paid for the period of 1 October 2010 to 30 November 2011 (in the monthly amount of R427,65) and the contributions that the respondent was lawfully required to deduct and pay in the monthly amount of R2 271, 47.

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13 As he then was.

14 2011 (2) SA 561 (KZP) paras [104] – [114], dealing in the main with contingency fees.

44.5 The respondents are ordered to pay the applicant's costs.

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A J Steenkamp
Judge

APPEARANCES

APPLICANT:	G Marinus of Werksmans Inc.
RESPONDENTS:	M Donen SC Instructed by Bagraims Inc.