REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D218/2011

In the matter between:

NOSIPHO PATIENCE PHIRI **Applicant**

and

NTSHAWINI COMMUNITY TRUST **Respondent**

Heard : 25 - 27 August 2014

Judgment : 08 October 2014

Summary : Oral evidence. Application in terms of section 158(1)(c) to have a settlement agreement made an order of court. Factual dispute decided in favour of the respondent. Application dismissed with costs.

JUDGMENT

AC BASSON. J

[1] Despite the fact that the parties have led fairly detailed evidence about issues largely not relevant to the matter, the issue before this Court is fairly narrow. I will therefore confine myself to those issues relevant to this application.

[2] The applicant in the section 158(1)(c) of the Labour Relations Act[1] ("the LRA") application is Ms Phiri. The respondent is the Ntwashini Community Trust, a Trust established for the benefit of approximately 248 previously displaced families (hereinafter referred to as "the respondent" or "the Trust").

[3] It is common cause that on 13 December 2010 the parties had entered into a settlement agreement at the CCMA following a referral by the applicant to the CCMA of a dispute. It is irrelevant for purposes of this application what the nature of the dispute that was referred to the CCMA was although I should point out that it was common cause that from the time the applicant had referred the dispute to the CCMA she did not tender her services to the applicant.

[4] It is further common cause that the said dispute was conciliated on 13 December 2010 and that the matter was settled. The salient terms of the settlement agreement are as follows: The applicant agreed to abandon her claim for R 58 000.00 against the respondent. It was also specifically agreed that the applicant will report for duty on 14 December 2010 (the following day). In terms of the settlement agreement the applicant would be remunerated at a salary of R 11 000.00 per month and the respondent would prepare a "suitably worded" contract of employment before the end of January 2011 for her to sign. It was further agreed that the respondent would assist the applicant in obtaining certain skills in the area of farm management.

[5] The applicant had referred the settlement agreement to the Labour Court in terms of section 189(1)(c) to have it made an order of Court. When a dispute of fact arose in respect of whether there was compliance with the said agreement, the matter was referred to oral evidence. It is relevant to point out that is now approximately four years later. The applicant is therefore claiming that she should be re-employed in terms of the agreement and that

[1] Act 66 of 1995.

she should receive her salary for the past (approximately) 44 months. She also claimed that the respondent had failed to comply with the settlement agreement and that she had reported for duty and therefore she had complied with the settlement agreement. The respondent is claiming that the applicant never reported for duty as was her obligation to do in terms of the settlement agreement.

[6] In the opening statement it was claimed that the applicant not only reported for duty on 14 December 2010 but that she had worked until approximately May 2011. In her evidence, however, the applicant admitted that she never worked after December 2010.

[7] Mr Biyela was the first witness on behalf of the respondent. He explained that he is the chairperson of the Trust. He explained how the Trust came about and explained that the Trust was created in order to manage three farms (in the Doornkop district) on behalf of approximately 248 families who were previously removed from the farms. The farms produced sugar cane and have also unsuccessfully produced some nuts in the past. The uncontested evidence before the Court was that the farms were not very productive.

[8] Both the applicant and Mr Mthembu were employed as the assistant manager and manager respectively of the farm. Biyla explained that he was authorized on behalf of the Trust (which consisted of a committee) to settle the dispute with the applicant.

[9] Biyela explained that after he had settled the matter at the CCMA he spoke to the applicant as they were leaving the CCMA. He told her that she had to contact Mthembu (the manager of the farm) so that she can report to him and receive instructions from him as she had not been on the farm for some time. (I have already referred to the fact that the applicant did not work since she had referred the dispute (that was eventually settled) to the CCMA.)

[10] It is common cause that on 14 December 2010 the applicant phoned Biyela and told him that she had tried to get hold of Mthembu but that she could not get hold of him. Biyela testified that he then phoned Mthembu and told him that the applicant was looking for him. He then switched off his phone when he went into a meeting. Biyela testified that he never heard from the applicant again – not on that day or any day thereafter except when he

spoke to the applicant in April 2011 when a notice to attend a disciplinary hearing was served on her to explain her continued absence from work. Biyela also testified that he did speak to the applicant at some stage in 2011 when he collected the key for the farmhouse which was occupied by the applicant during 2010 and early 2011.

[11] Regarding the disciplinary hearing, Biyela explained why it was decided to charge the applicant. The reason being the fact that the applicant was absent from work. In other words, the applicant never reported for duty as was required in terms of the settlement agreement. It was therefore decided to convene a disciplinary hearing scheduled for 9 April 2011 in order to afford the applicant an opportunity to explain her continued absence from work. It is not in dispute that the applicant did in fact receive notification of the hearing although it was in dispute exactly when she received it. It is also not disputed that the applicant had said to Biyela upon receipt of the notification that she will not attend the hearing and that she was advised not to discuss the issue with him because she had referred the matter to the Labour Court (in terms of section 158(1)(c) of the LRA). The applicant had also contacted Biyela around this time and requested him to fetch the keys of the house on one of the farms (which she occupied) from her. When Biyela collected the keys from her he told the applicant that the way in which they parted ways "did not sit well with him" and told her that she was an asset to the Trust. He then requested her to withdraw the matter from court so that she could get the same work as Mthembu – which was to work as a contractor on the farms owned by the Trust. Nothing came from the offer because the applicant (according to Biyela) went behind his back to the committee of the Trust and told them that he had apologised on behalf of the Trust. Biyela also testified that he had spoken to the applicant three weeks ago (that is three weeks before the hearing in this Court) and told her that they should resolve the matter and that she must accept the offer of being a contractor. He testified that he had expected her to accept the offer. The applicant, however, informed Biyela that they should wait for the court to decide.

[12] Mthembu confirmed that he was the farm manager and that he was expecting the applicant to report for duty on 14 December 2010 since he

was informed by Biyela to expect her and that she would report for duty. Mthembu also testified that he had instructed Mr Phathekile Vuysile – the supervisor (also referred to as "Dlamini") to contact him if and when the applicant reported for duty because he (Biyela) moved around on the farms. Mthembu emphatically denied that the applicant ever reported for duty on 14 December 2010 or for that matter at any time thereafter. Mthembu was also clear in his evidence that had she reported at any time he would have seen her.

[13] He also explained (and it was not disputed by the applicant) that cell phone reception was poor and sometimes non-existent on the farms. He was, however, adamant that the applicant never contacted him on 14 December nor did she send him a sms. He explained that there was also no indication on his phone that she had tried to contact him on 14 December 2010 or even thereafter. He was also adamant that the supervisor (Dlamini) and the other farmworkers informed him that they did not see the applicant on 14 December 2010 or at any time thereafter.

[14] Mthembu also confirmed that workers were recorded on an attendance register. Copies of the register for December until July 2011 were presented into evidence. Mthembu explained that if a worker was present his name would be ticked off. It was explained to the Court that because Dlamini was illiterate, a certain Ms Masikane Gugu assisted with ticking off (recording) the names. I will return to the attendance register herein below. Mthembu explained that if your name did not appear on the register it meant that you were no longer employed. With reference to the register he specifically denied that Ms Busiswe Zulu and Mr Dumisani Dlamini were employed at the stage the applicant alleged that she reported for duty. It does, however, appear that Ms Ntombifuthi Msweli was employed at that stage. (The relevance of this evidence will become clear where I discuss the applicant's evidence).

[15] Mr Phathekile Vuysile – the supervisor ("Dlamini") confirmed that he was instructed by Mthembu to expect the applicant and that he was to inform Mthembu if and when the applicant reported for duty. He was emphatic that the applicant never reported for duty on 14 December and denied that he

saw her on that day. He also confirmed that he did not talk to her on that day or any other day thereafter.

[16] The applicant's evidence was brief. She testified that she had worked as a paralegal at some time and, after she had received training as a farm manager, joined the respondent as an assistant farm manager. She confirmed that she had referred a dispute to the CCMA and that the matter was settled. She also confirmed the terms of the settlement agreement which were, *inter alia*, that she had to report for duty on 14 December 2010. According to her she did report for duty on 14 December 2010 and according to her did she try to phone Mthembu on 14 December 2010 but that his phone was off. She confirmed that she then contacted Biyela and that Biyela told her that should carry on trying to get hold of Mthembu. As will be pointed out herein below she admitted that she never tried again to get hold of Mthembu.

[17] In her statement of claim, the applicant specifically claimed that she met with Ms Busiswe Zulu, Mr Dumisani Dlamini and Ms Ntombifuthi Msweli and a few others on 14 December 2010 when she allegedly reported for duty. It was also her evidence that she spoke to the supervisor (Dlamini) although this was emphatically denied by Dlamini.

[18] On her own version (and at best for the applicant), the applicant admitted that she worked about 8 days in December and admitted that she never returned to work in January when operations commenced again. She testified that she was waiting for the Trust (the employer) to contact her. She admitted that she never demanded an employment contract and admitted that she never discussed her employment situation with anyone of the Trust. On her own version therefore and at best for the applicant she only worked approximately 8 days in December 2010 and therefore sat idle for another few months until an application in terms of section 158(1)(c) of the LRA was launched.

[19] The applicant's evidence in cross-examination is instructive. She admitted that after she tried to phone Mthembu on 14 December 2010 she never phoned him again. She also admitted that she did not report to Mthembu on 14 December 2010 nor at any time thereafter. She also admitted that she was instructed by Biyela to report to Mthembu. Factually, the applicant could

therefore not deny that she did not report for duty on 14 December 2010 (apart from her claim that she reported to Dlamini which he denied) or at any time thereafter. More startling was the applicant's admission that she sent no sms's to Mthembu nor did she leave any written messages for him, nor did she visit his house (although she knew where he lived) nor did she phone him at any time thereafter. She also admitted that she did not contact Biyela thereafter to inform him that she had difficulties in reporting to Mthembu. In fact, it was Mthembu' s uncontested evidence that if there was any complaint against him to the effect that he had refused to take the applicant's calls, he would have been disciplined by the committee of the Trust. Even more startling is the applicant's admission that she accepted that she could have contacted Mthembu and that she accepted that she did not.

Onus

[20] There was some issue about who bears the onus. At the outset it is accepted that a settlement agreement is nothing more than a bilateral contract of reciprocal obligations:

> "In a bilateral contract certain obligations may be reciprocal in the sense that the performance of one may be conditional upon the performance, or tender of performance, of the other. This reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions, that is, each is conditional upon the other. A ready example of this would be delivery of the res vendita and payment of the purchase price under a cash sale. Alternatively, the reciprocity may be one-sided in that the complete performance of his contractual obligation by one party may be the condition precedent to the performance of his reciprocal obligation by the other party. In other words the obligations, though inter-dependant, fall to be performed consecutively. An example of this would be a location-conductio operis whereunder the conductor operis is normally obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case the obligation to pay the money is conditional on the preperformance of the obligation to carry out the work, but, of course, the converse does not apply."[2]

[2] *ESE Financial Services (Pty) Ltd v Cramer* 1973 2 SA 805 (C) at 808 - 809.

[21] The terms of the settlement agreement are not in dispute nor can there be any doubt that the applicant was required to tender her services to the respondent in order for the respondent's obligation to take her back into service to have arisen.

[22] The question which arises is who bears the onus in regard to the issue of establishing on a balance of probabilities whether or not the applicant had reported for duty on 14 December 2010 or for that matter at any other time thereafter. The respondent's defence, as already indicated, was that because the applicant did not report for duty, the respondent was excused from performance. In essence, therefore, the respondent is raising the defence of *exceptio non adimpleti contractus*.

[23] I am in agreement with the submission that if a defendant pleads *exception non adimpleti contractus* the onus is on the plaintiff (or applicant in this matter) to prove her performance or her ability and willingness to perform or that she had no obligation of performing in advance or simultaneously. See in this regard: *BK Tooling v Scope Precision Engineering*: [3]

> "Volgens Voet 19.1.23 is die bewyslas op die eiser om, wanneer die exceptio teen hom opgewerp word, te bewys dat hy sy deel van die kontrak wel nagekom het. Dit is skynbaar sedertdien nog nooit, wat ons reg betref, betwyfel nie."

[24] In light of the above I am therefore in agreement that the onus is on the applicant to prove any one of the following:

(i) That she had performed her obligation which was to report for duty; or

(ii) That she remained willing and able to perform, and tendered to do so; or

(iii) That she had no obligation to perform in advance of or simultaneously with the Respondent.

[25] The applicant's pleaded case and her evidence in Court was limited to the allegation that she had performed her obligation by having reported for duty and therefore the respondent was in breach. I should also mention that the applicant accepted in cross-examination that she had been obliged to report to Mthembu and that it was insufficient for her merely to have been in

[3] 1979 (1) SA 391 (A) at 419H.

attendance at the respondent's farm where she in any event resided. I will now briefly turn to the evidence.

[26] On the evidence before this Court it is abundantly clear that the applicant did not report for duty on 14 December 2010. Not only did she not, on her own evidence, report to Mthembu as was instructed, it is also clear from the evidence that her claim that she was with three other employees (as per her statement of claim) is simply false. Firstly, she did not call Ntombifuthi Msweli to support her claim nor did she call Busiswe Zulu as a witness. Although she called Mr Dumisani Dlamini as a witness he could not explain why his name was not on the attendance register. Her claim that she was with him on that day therefore is simply false. The applicant also called Ms Masikane Gugu as a witness. Her evidence was of no assistance to the applicant and in fact only confirmed that names were ticked off on the attendance register to record attendance. Her evidence only served to confirm that the applicant's claim in respect of Zulu and Dumisani Dlamini is simply false. The Court also cannot ignore the evidence of Mr Phathekile who categorically denied that he had ever seen the applicant on 14 December 2010, or that she had worked that day or thereafter. In amplification of his denial, he quite sensibly explained that the applicant herself would not have worked in the fields and that she would simply have issued instructions to him regarding the work she required the workers to do. I should also point out that as a witness, Dlamini made a particularly good impression on the Court. The applicant, on the other hand, had no hesitation to try and mislead the Court about her whereabouts on 14 December 2010.

[27] I am of the view that the fact that the applicant admitted that she did nothing to announce her presence on the farm (apart from claiming that she phoned Mthembu on 14 December 2010) for months on end is simply not consistent with her claim that she did report on 14 December 2010. There is simply no evidence before this Court that Biyela would not have assisted her if she had contacted her. Furthermore, on her own evidence she did absolutely nothing to announce her attendance. The extent of the efforts she took to comply with her obligation in this regard constituted a few alleged attempts by her to contact Mthembu telephonically on 14 December 2010, in circumstances in which she conceded that the cellular telephone coverage in the area is poor

to non-existent. The applicant had no cogent or reasonable explanation for not having attempted to have made her presence known to Mthembu by any means other than her purported attempts to have telephoned him. In this regard, Mthembu testified, and it was put to the applicant in cross-examination, that she could have left a message for him with the respondent's supervisor, Mr Vuyisile Phathekile; she could have left a message for Biyela at his home; she could have waited at the office for Biyela; she could have left a message for Biyela or Mthembu at the worker's compound; she could have left a written note at the office; or she could have sent Biyela or Mthembu a text message. Her sole explanation for her having failed to have resorted to any other means of attempting to contact Biyela was that she had not thought of doing so. This is simply not acceptable.

[28] On the applicant's own version the only person associated with the respondent with whom she had made contact with on 14 December 2010 was Biyela. I have already pointed out that Biyela admitted that he received a telephone call from the applicant on the day in question and that he had advised her to persist in telephoning Mthembu. He himself testified that he had contacted Mthembu immediately pursuant to having spoken to the applicant and that he experienced no difficulty in getting through to him. He advised Mthembu to be alert to a telephone call from the applicant. According to Mthembu he remained alive to the possibility of such a telephone call but none was forthcoming. The applicant could not explain why she did not attempt to contact Biyela again in circumstances in which she was allegedly experiencing difficulty in making contact with Mthembu.

[29] It is also startling that on the applicant's own version, she worked for approximately 8 days in December 2010 (although it is not accepted by this Court) yet she now wishes to be re-employed and be paid back-pay in the amount of approximately R 484 000.00 whilst she did absolutely nothing (on her own version) over a period of almost 4 years to offer her services. Lastly, even if it was accepted, at best for the applicant, that she did somehow work in December 2010 (although no one saw her and although no one even knew she was allegedly working) her actions, on her own admission not to work as from January when operations resumed leaves much to be desired.

[30] I am therefore persuaded to accept the respondent's version that the applicant never tendered her services on 14 December 2010 and for that matter at any time thereafter.

[31] Furthermore and at the very least, when the applicant received notification to attend a disciplinary hearing on 9 April 2011, she must have realised that the respondent was of the view that she never reported for duty on 14 December 2010 although she may have (on her version) thought that she did. The terms of the notification to attend the disciplinary hearing are clear: The respondent was of the view that the applicant did not return on 14 December 2010 and made no attempts whatsoever to notify her employer of her whereabouts or at least submitted information or reported to justify her unwarranted absence which was at the time running to three months. The applicant's response was merely to ignore this notification and to persist with her section 158(1)(c) application. At the very least, if the applicant was of the view that the respondent was incorrect with their view that she never reported for duty on 14 December 2010, she ought to have attended the hearing and rely the facts (as she viewed them) to the hearing. Yet she made a conscious decision not to attend.

[32] On all of these facts I am therefore of the view that the applicant has failed dismally to persuade this Court to grant her the relief sought in terms of section 158(1)(c) of the LRA. In the absence of the applicant having reported for duty to the respondent, the respondent could not have been expected to have given her the contract. In all events, the preparation of a 'suitably worded' contract of employment was not solely the respondent's obligation, as the Settlement Agreement is silent as to who was required to prepare the agreement or, in fact, what it's terms were to be.

[33] In the event, the application is dismissed.

Costs

[34] The Court cannot disregard the fact that this was an opportunistic application. The Court also cannot disregard the fact that the applicant had tried to obtain a substantial amount of money from the respondent when, on her own version, or at best for her, she had only worked 8 days. Furthermore, the applicant clearly had no hesitation to present evidence from an individual (Dumisani Dlamini) who was no longer employed by the

respondent to sustain her false claim that she reported for work. Lastly, the Court also cannot lose sight of the fact that the respondent is a Trust and that the Trust is at the behest of approximately 248 families who have been disenfranchised by the apartheid government in the past. The applicant is therefore effectively claiming an exorbitant amount of money from a Trust in circumstances where she never reported for duty and falsely claimed that she had. I am of the view that a cost order in these circumstances is warranted.

Order

[35] The application is dismissed with costs. Costs to include the costs reserved on 22 August 2012.

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AC Basson

Judge of the Labour Court

Appearances:

For the Applicant : N.M Sithole of N.M Sithole and Associates

For the Respondent: Advocate K. Allen

Instructed by : Farrell and Associates Incorporated