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17 February 2010

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Solidarity obo Strydom and Another v Albert Luthuli Municipality Council (2010) ZALC 2

JUDGEMENT: VAN NIEKERK J

Introduction

These proceedings involve two applications for condonation and three special pleas. The first application is made by the respondent for condonation of the late filing of its statement in response to the applicant's statement of claim. The second application for condonation is an application by the applicant made in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 ('the Act'). In addition, the respondent has filed three special pleas (excluding a point to the effect that the applicant had failed timeously to file a notice in terms of the Act) to the statement of claim filed by the applicant. These have been enrolled for hearing simultaneously with the applications for condonation.

The application for condonation: statutory notice

-----LABOUR NEWS-----

Section 3 (1) of the Act provides that no legal proceedings for the recovery of any debt may be instituted against an organ of state unless the creditor has given notice of the intention to institute the proceedings in question. The respondent is an organ of state (see section 239 of the Constitution). Section 3 (2) (a) requires that a notice must be served within six months from the date on which the debt became due. “Debt” is defined in section 1 of the Act to include any debt arising from any cause of action which arises from delictual, contractual or other liability.

The applicant’s claim is brought under section 77 of the Basic Conditions of Employment Act (‘BCEA’), as a contractual claim for the payment of severance pay, a long service bonus and a pro-rata performance bonus on behalf of two of the applicant’s members (‘the individual applicants), both of whom were previously employed by the respondent. The applicant was therefore required to give the statutory notice required by section 3 (1) of the Act.

The individual applicants failed to give the required notice, because it was their case that they only became aware at a later stage that they could claim severance pay and bonuses.



-----LABOUR NEWS-----

Section 3 (4) (b) of the Act defines a Court's power to grant condonation for a failure to comply with section 3 (2) (a). The Court must be satisfied that:

- (i) the debt has not been extinguished by prescription;**
- (ii) good cause exists for the failure by the creditor to serve the statutory notice timeously; and**
- (iii) the organ of state was not unreasonably prejudiced by the failure.**

The court after considered all these factors concluded that, the applicants' failure to file a notice in terms of section 3 of the Act should be condoned.

Special pleas

The respondent has raised three special pleas.

Private arbitration

The first is that the dispute between the parties ought to have been referred to arbitration. In support of this contention, the respondent relies on a clause in the relevant contracts of employment that read as follows:

“20.1 For the purposes of this clause, dispute includes without prejudice to the generality of that term, any dispute arising out of or in connection with this



-----LABOUR NEWS-----

agreement and/or the interpretation thereof and/or the implementation and/or termination thereof and/or transactions contemplated thereby;

Save as specifically provided to the contrary in this agreement, should a dispute arise any party shall be entitled to require, by written notice to the other, that the dispute is submitted to arbitration in terms of this clause....”

The respondent submits that in terms of this clause, the individual applicants have bound themselves to arbitration under the Arbitration Act as the applicable dispute resolution mechanism, and that in the absence of any compelling reason for refusing to hold them to the contract, the proceedings ought to be stayed. The court disagreed. The plain meaning of clause 20 of the individual applicants’ contracts of employment is not that the parties are obliged to refer a dispute to arbitration, but rather that either party to the agreement is entitled to require, on written notice, that a dispute be referred to arbitration in terms of the clause. It is common cause that neither party to this dispute invoked the provisions of clause 20. In the absence of any written notice requiring the dispute to be referred to arbitration, the applicant was entitled to refer its claim to this Court for adjudication, and this Court has jurisdiction to entertain that claim.

Severance pay disputes



-----LABOUR NEWS-----

The third and fourth special pleas are to the effect that a severance pay dispute may be brought only in terms of section 41 of the BCEA, and that only the CCMA or a relevant bargaining council have jurisdiction to determine the dispute. Secondly, the respondent submits that disputes about an entitlement to a long service bonus and a performance bonus amount to disputes concerning alleged unfair labour practices, a matter over which only the CCMA or a relevant bargaining council has jurisdiction.

Section 41 of the BCEA was introduced into the Act in 2002. As such, a right to severance pay constitutes a basic condition of any contract of employment, and can be enforced on that basis. Section 41 establishes a right to severance pay only when an employee is dismissed by reason of an employer's operational requirements. To the extent that this Court has held that it is entitled to adjudicate disputes about severance pay, these must be read subject to that caveat. But the fact that an employee becomes entitled to severance pay under the BCEA on termination of employment for reasons related to the employer's operational requirements does not preclude parties from entering into contracts of employment that provide for the payment of severance pay in other circumstances. In the present instance, the applicant relies on clause 3.5 of the individual applicants' contracts of employment. The clause provides:



-----LABOUR NEWS-----

“The parties hereby agree that upon expiry of this agreement in terms of clause 3.2 or termination thereof by the EMPLOYER in terms of clause 15, the EMPLOYEE shall be deemed to have been retrenched due to redundancy for purposes of the rules of the EMPLOYEE’s retirement, gratuity or pension fund and the EMPLOYEE shall have the right to the full benefits of the said fund rules applicable to a retrenched employee.”

Further, clause 23 of the contract provides that the contracts are subject to the LRA, the BCEA and various other statutes and their successors. In particular, the applicants rely on the term of a Regulation Gazette and of a collective agreement to sustain their claim to the payment of severance pay. In short, the claim for severance pay is not posited on the application of section 41 of the BCEA – the applicants seek to enforce a contractual and not a statutory right. In these circumstances, the court held that it failed to appreciate how the necessary precondition of a dismissal for reasons related to an employer’s operational requirements that applies to a claim to statutory severance pay has any relevance or application.

Long service and performance bonuses

The court held that similarly, the rights to long service and performance bonuses are not framed as unfair labour practice disputes – they are clearly brought as contractual claims. Whether they may also found an unfair labour practice claim under



-----LABOUR NEWS-----

section 186 (2) of the LRA is neither here nor there. While it is conceivable that there might be a degree of overlap in the protections that the definition of unfair labour practice might extend and the protections that the terms of an employment contract afford, there is no statutory bar to an employee electing to pursue a contractual claim to the exclusion of any statutory remedy that may be available. (In general, see *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA) and *Mogothle v Premier of the North West Province* [2009] 4 BLLR 331 (LC)).

In so far as the application to condone the late filing of the respondent's response to the statement of claim is concerned, the response was filed 18 days late in circumstances where the court held that it did not understand the applicants to seriously contest that condonation should not be granted. There is no reason why the late filing of the response should not be condoned.

In summary: the Court was satisfied, having regard to the criteria established by section 3 (4) (b) of the Act that condonation for the failure to file the requisite notice should be granted. Further, the respondent's failure timeously to file its statement in



-----LABOUR NEWS-----

response to the applicant's statement of claim was condoned. The court further held that there was no merit in any of the special pleas filed by the respondent.

