



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PS32/21

In the matter between:

**SAMSON GROOM**

Applicant

and

**VEA ROAD MAINTENANCE AND CIVILS (PTY) LTD**

Respondent

Heard: 23 March 2023

Delivered: This judgment was handed down electronically by circulation to the Applicant and Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 16h30 on 31 October 2023.

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JUDGMENT

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LALLIE, J

- [1] The applicant instituted these proceedings against the respondent in an attempt to assert his rights in terms of section 77 (3) read with section 77A of the Basic Conditions of Employment Act<sup>1</sup> (the BCEA). The respondent opposes the

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<sup>1</sup> Act 75 of 1997.

applicant's claim. The parties agreed to deal with the issues they raised by way of a stated case.

[2] The facts of this dispute are largely not in dispute. On 16 March 2016, the parties concluded a contract of employment in terms of which the respondent employed the applicant. The respondent dismissed the applicant for its operational requirements on 17 January 2018. The applicant challenged the fairness of his dismissal by referring a dispute to this Court. On 13 November 2018, this Court handed down a judgment in which it found the applicant's dismissal unfair and ordered his reinstatement with back pay in the amount of R480 000, 00. The back pay covered the period from 17 January 2018 to 18 November 2018.

[3] As the applicant was entitled to resume his duties after the reinstatement order had been issued, the respondent informed him, in a letter dated 15 November 2018, not to report for duty as it intended to seek the rescission of the order of 13 November 2018. The respondent filed the rescission application which was dismissed. On 2 May 2019, the respondent launched an application for leave to appeal against the order dismissing its rescission application. The application was dismissed on 19 June 2019. On 3 July 2019, the respondent petitioned the Labour appeal Court (the LAC) seeking an order overturning the judgment on the fairness of the applicant's dismissal and the refusal of the rescission application. The petition was refused on 9 December 2019.

[4] The parties agreed that the applicant's employment by Rainbow Civils CC on 12 March 2019 constituted a breach of clause 19 of their contract of

employment. The applicant's monthly remuneration at Rainbow Civils CC was R30 000, 00 from 12 March 2019 with May 2020 pro-rated accordingly. The applicant agreed that had he not been dismissed on 17 January 2018 his contract of employment with the respondent would have terminated in December 2018 if the parties had not agreed otherwise. The applicant turned 60 years old on 3 December 2018. The respondent reinstated the applicant on 7 May 2020 on new terms and conditions of employment not less favourable than those that governed his employment on 17 January 2018.

[5] By agreement between the parties the issues that have to be decided are the following:

“25 Whether the Applicant's contract of employment was terminated automatically or through operational of law on 3 December 2018.

26. The Court is to determine whether interest is payable, a *tempora morae* or otherwise, on the Applicant's claim is payable and is so from when and at what rate.

27. The Court is to determine whether either party is liable for payment of costs in the matter.”

[6] The first question for determination is whether the respondent has a legal obligation to pay the applicant's remuneration from 19 November 2018, his reinstatement date to 7 May 2020 when the applicant resumed his duties on the respondent's instructions. In terms of the reinstatement order of 13 November 2018, the respondent was required to reinstate the applicant in its employ. In order to be entitled to remuneration in terms of a reinstatement order an employee must have rendered his or her services in compliance with

the order<sup>2</sup>. It is common cause that the applicant tendered his services after the reinstatement order was granted.

- [7] The respondent raised a number of defences opposing the validity and extent of the applicant's claim. The first was that the applicant's contract of employment terminated automatically on 3 December 2018 when he reached the agreed retirement age of 60 years in terms clause 7.6 of his contract. As the contract was terminated it had no contractual obligation to pay the applicant remuneration beyond December 2018.
- [8] The applicant denied that his contract of employment terminated when he turned 60 years old. He pointed out that clause 6.7 of his contract provides that 'This contract will be automatically terminated in the month the employee reaches the age of 60 or as agreed upon'. He contended that his contract was terminated on his dismissal on 9 June 2020. He further sought to rely on the respondent's efforts to set aside the order of 13 November 2018 and his reinstatement on 7 May 2020.
- [9] The respondent relied on clause 31.2 of the initial contract of employment which provides that 'Any changes to this agreement will only be valid if they are in writing and have been agreed and signed by both parties. The applicant presented no proof of his compliance with clause 31.2. His attempts to prove compliance by conduct cannot succeed as they fall short of the required form of effecting changes to the contract. The sanctity of contracts is essential. Parties are therefore bound by the terms of valid contracts they have entered into. They therefore may not be permitted to unilaterally and unjustifiably renege

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<sup>2</sup> *NUM obo Fohlisa v Hendor Mining Supplies* (2017) 38 ILJ 150 (CC).

from them. The applicant's submission that the parties agreed to extend his retirement age was not proved and cannot be sustained.

- [10] The applicant's argument that the new contract the parties entered into on 07 May 2020 reinstating the applicant (the new contract) extended the initial contract of employment is incorrect. It is common cause that the new contract had new terms and conditions of employment. The reason the parties concluded the new contract on the applicant's reinstatement was that the initial one was terminated in December 2018 when he attained the agreed retirement age. In *Abrinah 7804 (Pty) Ltd v Kapa Koni Investments CC*<sup>3</sup> the court reaffirmed the principle that a lapsed agreement cannot be revived. The parties have to conclude a new agreement and amend the condition which led to the lapsing of the old one. The new contract therefore did not constitute an extension or revival of the initial one which had clear provisions on how it should be amended.
- [11] The applicant may not rely on the respondent's efforts to have the order of 13 November 2018 overturned in arguing that the respondent waived its right to enforce the agreed retirement age. In *NUM obo Fohlisa (supra)* it was held that before reinstatement the contract of employment does not exist. Nothing precluded the respondent from exercising its rights to overturn the order. The applicant's efforts to rely on waiver can also not succeed. It is trite that waiver is not assumed lightly. It 'can be inferred from the clear and unequivocal conduct of the employer'. In this regard see *Motor Industry Staff Association And Another v Great South Panel Beaters*<sup>4</sup>. The contract of employment on

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<sup>3</sup> [2018] (3) SA 108 (NCK).

<sup>4</sup> [2022] ZALAC 103 at para 28.

which the order of 13 November 2018 is based was terminated automatically in December 2018, the month on which the applicant attained the age of 60. The respondent's defence must, in the circumstances, be upheld. The respondent conceded that it is liable for payment of the applicant's remuneration from 19 November 2018 to 31 December 2018. In light of the dispositive nature of the decision on the termination date of the applicant's contract of employment, dealing with the other defences would be superfluous. The only issue that must be determined is whether the applicant is entitled to interest on the amount due to him.

[12] I accept the applicant's argument that he is entitled to *mora* interest on the amount due to him from 3 June 2020. In terms of section 2(1) of the Prescribed Rate of Interest Act<sup>5</sup> interest on a judgment debt becomes payable from the date on which the debt is payable. The respondent provided no valid counter argument to the applicant's submission. The respondent is therefore ordered to pay the applicant interest a *tempore morae* on the remuneration the applicant would have earned from 19 November 2018 to 31 December 2018 at the prescribed rate of 7.75% per annum from 3 June 2020 to the date of the final payment of the amount due to the applicant.

[13] Both parties have been partially successful. Granting a costs order will, in the circumstances, not be appropriate.

[14] In the premises, the following order is made;

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<sup>5</sup> Act 55 of 1975.

1. The applicant's contract of employment was automatically terminated in December 2008.
2. The respondent is ordered to pay the applicant remuneration he would have earned from 19 November 2018 to 31 December 2018.
3. The respondent is ordered to pay interest a *tempore morae* on the prescribed rate of 7.75% per annum on the amount referred to in paragraph 2 above from 3 June 2020 to the date of final payment.
4. There is no order as to costs.



Z. Lallie

Judge of the Labour Court of South Africa

LABOUR COURT

## Appearances

For the Applicant: Advocate M. Thys

Instructed by Butler Attorneys

For the Respondent: Advocate Higgs

Instructed by Steenkamp & Van Niekerk Inc

LABOUR COURT