IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)

CASE NO. : 2056/2022

Date of hearing : 18 March 2022

Date delivered : 21 April 2022

In the matter between:

NDIVIWE DUKISO Applicant

And

KING SABATA DALINDYEBO LOCAL MUNICIPALITY (K.S.D) First Respondent

MUNIVCIPAL MANAGER, K.S.D Second Respondent

DIAL KETTLEDAS Third Respondent

JUDGMENT

MAJIKI J

[1] On the applicant's salary pay date for the month of February 2022, the applicant, an employee of the first respondent, was not paid. The payment of his salary is in terms of his contract of employment. The applicant approached this court on urgent basis seeking an order that the respondents' conduct of terminating his salary be declared unlawful. Further, that the respondents be ordered to reinstate his salary, retrospectively and that they pay the costs of the application. The respondents oppose the application, the second and third

respondents are agents of the first respondent. The applicant was directly reporting to the third respondent.

[2] The common cause facts, in the main, are that during September 2005, the first respondent and the applicant entered into a written contract of employment (the contract). The applicant was employed as a law enforcement officer. His letter of employment embodied his terms and conditions of employment. In terms of clause 43 thereof, the Disciplinary and Grievance Codes and Procedures and Machine Regulations attached thereto, formed part of his contract. The applicant was entitled to salary, payable on the 25th day of each calendar month, or last working day before the 25th, during the period of his employment.

[3] It is also common cause that the applicant first reported for work at Mqanduli municipal offices. In November 2018 the applicant agreed to the first respondent's requirement, facilitated and communicated by the third respondent, that he should report at Mthatha in the law enforcement by-law section.

[4] It is also common cause that when the applicant realised that the first respondent did not pay his salary, he approached the first respondent's salary section. The official who attended him, one Sinalo was not aware of the development, she provided him with a payslip for the month. It was only after she looked up in the computer system that she learnt that the applicant's salary was terminated. She said there was no reason was recorded for the said termination. The human resources department could not furnish him with the reason for the termination as well. He was only advised that, his salary was terminated at the instance of the third respondent, the director in his department. Even when his attorneys of record addressed a letter of demand for the reinstatement of his salary, no response was received.

[5] According to the applicant, his impression was that his salary was capriciously terminated.

[6] The applicant averred that he was not given notice of the termination of his salary. He was not called to show cause or make representations why his salary should not be terminated or he was also not consulted before his salary was terminated. According to the applicant the decision to terminate his salary was unlawful. Further, his contract of employment still existed, the first respondent breached it. His contractual right to a salary was violated by the first respondent.

[7] The applicant attached his payslips for the months of December 2021 to February 2022. Therein, there is a provision for payment of a shift allowance for the sum of R1 108.94.

[8] According to the respondents, the first respondent in its case relied on clauses 8 and 22 (h) of the contract of employment. In the alternative, the first respondent relied on clause 30 of the contract. The respondents averred that since the applicant's reporting site was changed, the applicant's work attendance became very sporadic. That conduct took time to be established. In the middle of January 2022 the second respondent was made aware of the state of affairs.

[9] Further, in the beginning of February 2022 the third respondent was asked by the second respondent to monitor the applicant's work attendance. That whole month, the applicant did not report for work and did not render services. By 21 February 2022 fourteen (14) days had elapsed without the applicant reporting to work, without his absence being authorised by the first respondent.

[10] No reasons were furnished to the first respondent for such absence. It also did not approve the applicant's leave of absence or give permission for the applicant to be absent from work. The applicant therefore triggered clause 22(h) of the contract, and discharged himself from service. The contractual relationship terminated and the first respondent is no longer obliged to pay a salary to the applicant. The salary advice for the month of February 2022 was issued in error.

[11] In the alternative, the respondents averred that if the applicant had not triggered clause 22 (h) of the contract, he still would not be entitled to the reinstatement of his salary because the first respondent would be entitled to treat the days on which he was absent as leave without pay.

[12] In the circumstances, the respondents placed in issue the fact that the applicant was entitled to the relief sought. They averred that the first respondent had not acted unlawfully and did not breach the applicant's contractual right.

[13] The third respondent denied that he terminated the payment of the applicant's salary. He said he never employed the applicant, therefore he could not terminate his salary. The third respondent confirmed that the applicant did not attend work in February 2022 and that the second respondent asked him to monitor the applicant's attendance.

[14] According to the respondents, once the provisions of clause 22 (h) had been triggered, there was no requirement for the applicant to be called upon to show cause or make representations as to why his salary should not be paid.

[15] Regarding urgency the respondents complained about the time table set by the applicant. They stated that it was not commensurate with the degree of

urgency of the matter, he himself did not act with expediency. The founding affidavit was signed on 7 March 2022 and only issued and served on 9 March 2022. Had the papers been served on the 7 March 2022, that would have afforded the respondents more time to attend to the matter. As a result, it was not possible for the respondents to comply with the applicant's time table as set out in the notice of motion. The applicant did not take issue with the respondents' failure to comply with the timetable set by the applicant. The court also accepts the respondents' filing of the answering affidavit in the time that it did.

[16] The applicant in reply averred that clauses 43 and 47 are relevant in the light of respondent's pleaded case based on clauses 22 (h) and 30 of the contract. According to the applicant the reading of the clauses in the contract ought to be in a context that is harmonious with the entire contract and all the other instruments referred to in clause 43 of the contract. Clause 47 provides that the appointment is terminable by one calendar month notice from either side.

[17] Further, according to the applicant clauses 4.5.7 (a) (v) and (vi) of Human Resources Policies and Procedures enjoin the human resources manager of the first respondent to give notice to the employee of any change in the employee's particulars of employment and that the contract of employment shall expire. Further, clause 14.11 of Disciplinary Procedures Collective Agreement (DPCA), circular 01/2018 share the same sentiment, that of an engagement process when there was contemplated change of details contained in the letter of appointment. Clause 4.12.3, repeated in clause 12 of DPCA, is applicable when the employee has allegedly been absent from work for a period exceeding ten (10) working days, without having notified his or her immediate supervisor. The employee may be deemed to have absconded and the service must be terminated, subject to the disciplinary procedure.

[18] The first respondent as a member of South African Local Government Bargaining Council and a party to DPCA, should have, before all else, invoked the provisions of collective agreement relating to notice and its human resources policies and procedures. The requirements of notice and consultation need be complied with, even if it was alleged that the applicant had been absent from work for more than fourteen (14) days. There is no legal dispensation that permits punishment without hearing.

[19] According to the applicant, he was at work during the period that the respondents allege that he was absent. He said on 19 January 2022 and 4 March 2022, there were incidents that got to be recorded. According to the payslips he annexed, in February there was a provision for shift allowance as well. According to clause 6 of the contract, that is in respect of stand-by, night work, Sunday work and public holiday work allowance. According to the applicant the shift allowance is computed after having taken into account the hours worked and applicable rate as contemplated in clause 5.20 of the municipality's policies and procedures.

[20] The issue for determination is whether the applicant is entitled to the payment of his salary for the month of February 2022. Further, whether the respondents was, without more, entitled to terminate the applicant's salary, on the basis that his contract of employment was terminated or that he absented himself from work without leave.

[21] The relationship between the applicant and the first respondent is regulated by the contract of employment. In terms thereof, the applicant was to render services and the first respondent in turn was to pay him a monthly salary. It is common cause that the contract of employment had to be considered

together with first respondent's policies which contained conditions of service and other municipality policies and applicable instruments. Clause 8 of the contract relates to the fact that the place of work of the applicant would be determined by the first respondent within its municipal area. Clause 22 (h) will be referred to in detail below.

[22] With regard to whether the applicant was at work or not, there is a material dispute. The applicant was not aware of the fact that the respondents' non-payment of his salary was for the alleged absence from work without authorisation. All his attempts to be advised of the reasons for the non-payment came to a naught. He heard of that reason for the first time upon the filing of the answering affidavit. Therefore, he could only deal with it in the replying affidavit. In that light, it cannot be said he was not entitled to deal with it in reply. However, a determination of the actual dispute about his being absent or not has to be made.

[23] The general rule in determination of an application for a final relief as formulated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) dispute in motion proceedings is :

'*where there is a dispute as to the facts, a final interdict should be granted in motion proceedings only if facts as stated by the respondents, together with the admitted facts in the applicant's affidavit justify such an order, or where it is clear that the facts, although not formally admitted, cannot be denied and must be regarded as admitted* '.

The clarification and qualification in *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 I – 635 C, about the respondent's denial of fact alleged by the applicant served to expand the application of this

principle. In this light, it would be difficult to find that the applicant was present at work during February 2022. More so, the reference to the recorded incidents in the applicant's case do not relate to the month of February 2022.

[24] The next issue is whether the respondents were not required to comply with certain requirements before the termination of the applicant's salary. Clause 22 of the contract provides:

'Your contract of employment shall terminate in the following circumstances

(a) On the date of your death, in the event of it occurring before you reach superannuation age;

(b) Upon your resignation from the employ of the Municipality;

(c) Where you become incapacitated or are found incompetent and cannot deliver the services as expected of you, subject to the Municipality's incapacity policies and procedures;

(d) Where you are dismissed from employment for any reason related to your conduct, subject to the Municipalities Disciplinary Code and Procedure;

(e) Upon your reaching of superannuation age, provided that you may, at any time when you are between 55 and 65 years of age, voluntarily request to retire should you so desire and such request will be approved by the Municipality subject to the rules governing the Retirement Fund of which you are a member at the time of your request;

(f) In the event of redundancy of your post, either as a result of re-organisation, work re-engineering or any re-structuring of the Municipality subject to laid down Policy and relevant legislation;

(g) In the event that operational requirements of the Municipality warrant your retrenchment or staff reduction, subject to Council Policy on retrenchment of staff;

(h) In the event of unauthorised absence for a period in excess of fourteen days without the Municipality being notified of a valid reason for your absence;

(i) In the event of breach of any of the provisions of your contract of employment;

(j) For any other lawful reason.

[25] According to the respondents once it is accepted that the applicant was absent for more than fourteen (14) days, clause 22(h) kicks in, and the termination of the contract is automatic by operation of the terms provided for in clause 22 (h). The applicant disagrees and submits that the applicant was entitled to be given notice of termination of his salary and to be consulted first before the said termination, by invoking the disciplinary and grievance codes and procedures.

[26] Regarding the interpretation of agreements the Supreme Court of Appeal in **Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others** (470/2020) [2021] ZASCA 99 (9 July 2021) at paragraph 25 stated:

'The much-cited passages from **Natal Joint Municipal Pension Fund v Endumeni municipality** (2012 (4) SA 593 SCA) (Endumeni) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitute the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known

cases, '[t]he inevitable point of departure is the language of the provision itself. (Endumeni paragraph 18) (Citation and explanatory notes added).'

[27] Mr Bodlani, counsel for the applicant, submitted that the respondent categorised the clause of the contract that envisages termination by reason of application of disciplinary procedure against those that do not. He said only clause 22(d) requires the application of the municipality Disciplinary Code and Procedure. The rest do not require the invoking of the Disciplinary Code and Procedures. The notice would only serve to advise applicant of the state of affairs.

[28] It is difficult to contend with this submission. For example, if the Disciplinary Code and Procedure and the notice requirement, among others, would not be invoked in clauses 22(i) and (j), which are broad provisions of '*breach of any provisions of your contract of employment*' and '*any other lawful reason*', one struggles to think of any circumstance that the first respondent would have to comply with the disciplinary code and procedure and the like. The question would then arise as to why reference was made to those documents in clause 43 of the contract.

[29] In the circumstances of this case, the applicant was not advised that the contract was to be or was terminated, for the reason of unauthorised absence for a period in excess of fourteen (14) days, without the first respondent being notified of a valid reason for his absence. In my view, in accordance with the tools of interpretation, referred to in paragraph 24 above, that state of affairs would not be the correct interpretation of clause 22, when considered in its entirety. Firstly, such notice would advise him of the operative date of the intended termination of contract of employment. Further, it would afford the applicant an opportunity to make an election whether to advise the first respondent of the reason for the absence. It has not been disputed that the applicant was at work on 4 March 2022,

the fist respondent still did not enquire from him about the reasons for his absence, absence of which the applicant was not aware had consequences of termination of his contract of employment.

[30] In my view, attending work is a contractual obligation on the applicant. That the contract shall terminate, as provided for in clause 22 of the contract, I am not of the view that, save for clause 22 (d), the provisions of clause 22 are to be construed as allowing a one size fits all termination, without more. The reason for absence, the previous conduct which blemished employee's record and the employee's attempt to contact the employer, the employee's intention to return to work, among others, ought to be up for consideration, even when clause 22(h) applies. Clause 43 of the contract calls for application of policies, disciplinary codes and procedures and etc. I am therefore not persuaded that clause 22(h) envisaged termination of contract of employment as suggested by the respondents.

[31] I am unable to agree with the submission made by Mr Bodlani, counsel for the respondents that once the criteria in clause 22(h) is met, the contract terminates on its own automatically, without more. Further, clause 4.5.7 (v) of Human Resources Management Policies and Procedures (HR policies and procedures) enjoins the Human Resources Manager to notify the employee about various aspects regarding the status of his employment, in particular termination thereof. Other than the termination of salary, it does not seem as if there was any indication of a further step that would be a consequence of the alleged termination of contract. I am not of the view that, there was termination of contract of employment. It is not supported by the facts, of which none are indicative of the fact that the respondents' actions of termination of the applicant's salary was a result of the contract having been terminated. The termination was not even recorded with the finance or human resources departments of the respondents. The issuing of the salary advice seems to be more of an indication of an intention to

pay the applicant's salary than an error in these circumstances. Finally, it is difficult to understand why the alleged termination was only communicated upon the respondents' filing of the answering affidavit in these proceedings.

[32] In my view, even in circumstances where clause 22(h) was applicable clause 4.5.7 of Human Resources policies and procedures and 14.11 of DPCA and other relevant legal instruments regarding the issuing of notices had to be complied with. I do not agree with Mr Bodlani, in his submission, that any notice to the applicant would only be for information purposes. It would serve as an initiation of a relevant process, in terms of the relevant municipal policies meant to be read in conjunction with the contract. The process would allow the applicant to advance reasons for his absence, for example. I am inclined to agree with Mr Zono, attorney for the applicant, that in *Phenithi v Minister of Education and others* 2008 (1) SA 420 (SCA) and *Masinga and others v Chief of South African National Defence Force and others* (51 of 2021) [2022] ZASCA 1 (5 January 2022), the court was considering statutes. The jurisdictional requirements provided for therein were found to have been met. Further, the employees were advised of the steps to be taken if they failed to return to work. In the present matter the issue relates to the interpretation of a contract, which contract, itself, directs that it has to be read with other internal policies of the first respondent.

[33] The alternative defence of the respondents' action is that of absence without leave as provided in clause 30 of the contract. The only issue for determination therein, is whether the respondents were entitled to terminate the applicant's salary, without more, in effecting clause 30 of the contract. The evidence tendered by the respondents in this regard is that the applicant's absence was not authorised or approved by the first respondent. He did not inform the first respondent of reasons of his absence, during the period he was absent. He did not apply for leave and none was granted. There was no express permission given to him to be absent

from work. The applicant did not address the said allegations, his pleaded version was that he was not absent.

[34] That the applicant was absent at work had to be determined on the respondent's version as explained above. In relation to the alternate defence, the applicant's salary was not paid because he would not be entitled to a remuneration when he had not worked. Clause 30 of the contract provided that, unless the applicant advanced valid reason for his absence, it would be treated as leave without pay. In court, Mr Bodlani submitted that the standard amount paid for shift allowance suggests that it was predetermined. The manner in which it appears to have been computed is not indicative of the fact that the applicant actually worked standby, night work, Sunday work or public holiday work, as provided for in clause 6 of the contract. It was rather a standard amount payable to employees who ordinarily did that work. I do not deem it necessary to resolve this, however it appears to be so that, the figure suggests that, the applicant would have been entitled to it by virtue of the nature of his duties, that is, it was not calculated according to the actual hours he discharged those duties during the specified period.

[35] With regard to the alternate defence, it has to be considered that, again there was no communication requiring the applicant to explain his absence and or advising him that it was to be treated as leave without pay. This was so, despite the fact that he went to make enquiries from the offices of the first respondent and was present at work, at least on 4 March 2022. Consequently, he remains without having had the opportunity to explain the absence. That in his defence in these proceedings, he said he was at work, which could not be accepted, does not in my view, exonerate the respondents from affording the applicant an opportunity to explain his absence or to be given notice that the first respondent intended to treat it as leave without pay. Without that exercise, there is also no indication in the

respondents' case that the respondents considered if he had no credit of leave days, for example, which would have been a factor for consideration as a possible set off for the number of days he was absent. Finally, there is no indication of the calculation of and accounting of the number of days he ought not to receive payment for. Had the applicant been given notice of the fact that his absence would be treated as leave without pay, he would have been entitled to those considerations.

[36] The court is mindful of the fact that the applicant did not address the issue relating to clause 30. However, within clause 30, it is envisaged that the respondent should have shown that the applicant failed to advance the reason for the absence. Common cause facts indicate that he could not do so as he was not advised about his absenteeism. Further, in my view, such a failure had a consequence of the applicant coming to court without properly exploring the entire circumstances regarding the respondents' action.

[37] In the circumstances, I am of the view that the first respondent's termination of the applicant's salary was premature and not justified. In any event, if the first respondent, after due process is entitled to a deduction equivalent to the days the applicant was absent, the first respondent would still be able to make the said deduction from his future emoluments or other monies that may remain due to the applicant, in terms of his employment contract.

In the result,

1. The respondents are hereby ordered to reinstate the applicant's salary retrospectively, from February 2022.

2. The respondents are hereby ordered to pay costs of this application.

_____

B MAJIKI

JUDGE OF THE HIGH COURT

Counsel for the Applicant	:	Mr A S Zono
Instructed by	:	Messrs A S Zono & Associates Suite 153 – 1st Floor ECDC Building MTHATHA
Counsel for the Respondent	:	Mr S A M Bodlani
Instructed by	:	Messrs T. L. Luzipho Attorneys No. 26 Cnr Victoria & Madeira Street First Floor-Steve Motors Building MTHATHA