
**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA 113/14

In the matter between:

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| **KWAZULU–NATAL TOURISM AUTHORTIY** | **First Appellant** |
| **THOLAKELE DLAMINI** | **Second Appellant** |
| **NDABEZITHA KHOZA** | **Third Appellant** |

and

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| **NALELI WASA** | **Respondent** |

**Heard:** **18 February 2016**

**Delivered:** **28 June 2016**

**Summary: Practice and procedure – Plascon-Evans rule that a founding affidavit must set out essential evidence if unchallenged, would prove the applicant's case restated - an applicant that foresees that the facts adduced to prove its case would be challenged, should not proceed by way of application but by way of action – in application proceedings where court is unable to determine on the papers the veracity of the facts has the option to either refer the matter to oral**

**evidence or dismiss the application on the basis that the applicant had failed to discharge its *onus* by proving its case on a balance of probabilities. If it should be obvious to applicant that the facts will be placed in dispute the Court should refuse to refer the matter to Oral evidence- In *casu* employee dismissed for dishonesty sought damages as a result of the breach of contract – employer providing document evincing that employee dishonest and in breach of her contract – employee ought to have foreseen that dispute of facts will arise from her application as employee charged with dishonesty and a disciplinary hearing held where she was found to have committed the breach– Labour Court ought to have accepted employer's evidence in light of the Plascon-Evans rule - Labour Court erring in finding that there was no dispute of facts. –**

**Relief for damages – unlike compensatory relief granted for unfair dismissal in terms of the LRA, no such relief available in a claim for breach of contract made under the BCEA. Claim under BCEA is a claim for damages – the extent of the damages suffered by the party seeking damages must be proved – employee that failed to prove damages as a result of the breach of contract entitled to no relief – Labour Court's judgment finding to the contrary set aside. Appeal upheld.**

**Coram: Waglay JP, Ndlovu JA *et* Murphy AJA**

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**JUDGMENT**

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WAGLAY JP

Introduction

[1] This is an appeal against the judgment of the Labour Court (Baloyi AJ) which found that the termination of the respondent's (employee) fixed term contract of employment by the first appellant (employer) was unlawful and constituted a breach of contract. As relief for the breach, the Labour Court ordered the

employer to pay the employee as damages the amount the employee would have earned over the full contract period. The employer was also ordered to repay to the employee certain deductions made from the employee's last salary payment.

Background

[2] The employee was employed as the Chief Operation Officer (COO) on a fixed term contract for a period of five years, commencing on 1 August 2008. The employee was to report directly to the employer's Chief Executive Officer (CEO) who in turn reported to the employer's Board. In terms of the employer's applicable policy, the authority to appoint and to institute disciplinary proceedings against the COO rested in its Board.

[3] The duties that the employee was required to perform included:

> *'To provide strategic leadership to the Tourism Information Services, Marketing and Communications and Tourism Development functions at the Kwazulu-Natal Tourism Authority (the employer) by devising, implementing and controlling systems and procedures, supervising subordinates, developing and driving initiatives, reporting on key issues to the CEO and management in order to ensure that these departments are positioned to support the Authority in accomplishing its strategic tourism objectives through the effective implementation'.*

[4] The Two Oceans Marathon (Two Oceans) is a race that takes place in Cape Town. This race serves to contrast the Comrades Marathon (the Comrades), a race that takes place in Durban under the auspices of the employer. Both these races are extremely popular and attract runners from all over the world. A week or two preceding the Two Oceans, the employee sought permission from the CEO to travel to Cape Town to attend the Two Oceans for purposes of *"activating and promoting"* the Comrades at that event.

[5] The CEO granted the permission and the employee instructed her subordinate, one Thembelihle Dlamini, to travel with her to Cape Town to assist her in performing her tasks.

[6] Prior to the employee's departure to Cape Town, some members of the employer's staff, who heard about the employee's pending trip attempted to discourage her from attending the Two Oceans because the trip was not planned. Added to the lack of planning, the Two Oceans coincided with the annual research project the employer was conducting over the same weekend. The research project involved a music festival at Splashy Fen in Kwazulu-Natal Midlands. This project had taken immense planning, including surveys, printing of material and the obtaining of accreditation for the event for the employer to be able to conduct their research. The employee's presence at this event was considered to be important.

[7] Notwithstanding the protest from certain members of the employer's staff, the employee with her assistant travelled to Cape Town, on 2 April 2010, at the employer's expense to attend the Two Oceans.

[8] On her return, questions were asked as to why the employee had not informed the employer's head of research about the research the employee intended to conduct at the Two Oceans, particularly, because the employer had done the necessary research with respect to the Two Oceans just two years earlier. Furthermore, requests to the employee to file a report about the research she performed at the Two Oceans were either ignored or not responded to.

[9] The employer then discovered that: although the employee had instructed her assistant to accompany her to Cape Town, the assistant was not asked to perform any task; the employee also did not seek, and was not granted, accreditation to attend the event; the employee had registered as any other athlete to participate in the event; and had, indeed, competed in the Two Oceans.

[10] The employee while admitting that she participated as an athlete stated that she conducted a survey at the race and did so while running the race.

[11] When the above information reached the ears of the CEO, he decided to investigate whether the trip undertaken by the employee was simply a personal one to participate in the Two Oceans or to do research and promote the Comrades for the employer as she had indicated when requesting his authority to undertake the trip. He thus engaged the Internal Audit Unit to investigate whether the trip undertaken by the employee was indeed part of her work project or merely a holiday. Due to various reasons including the resignation of the initial investigator, the report by the Internal Audit Unit was only finalised almost a year after being requested.

[12] The report indicated that the employee planned the trip to Cape Town to participate in the Two Oceans and not for any official purpose. It called for the employee to be charged for, amongst other things, dishonesty.

[13] The employee was duly charged, a hearing was held and the employee was found to have committed the misconduct complained of. The Chairperson of the hearing recommended that she be dismissed. The CEO dismissed the employee, on 19 April 2012, a decision which was later ratified by the Board.

[14] I may add that the employee was in terms of the employer's practice and rules required to file a report on the work she performed in the field, in this case at the Two Oceans. She did eventually file a report, this she did after being called to answer misconduct charges. The report failed to establish the nature of the survey she had said she had conducted, in fact the report gave no indication of the employee having conducted any survey or done any work *"activating and promoting"* the Comrades.

[15] The total expenses incurred by the employer for the trip on the employee and her assistant amounted to R21 049.31

The Labour Court Application

[16] After her dismissal, relying on the Basic Conditions of Employment Act (BCEA),[1] the employee instituted the application proceedings, the result of which is the subject of this appeal. She sought amongst other things for her dismissal to be declared an unlawful breach of her employment contract and for the employer to be ordered to pay damages for such breach in an amount equal to what she would have earned for the remainder of her fixed term contract, and for payment of certain other monies which she alleged were due to her.

[17] In the founding affidavits filed by the employee in support of the application, she avers that the investigation undertaken by the employer did not comply with the prescripts of Public Finance Management Act 1 of 1999 read with Public Finance Treasury Regulations. She further states that the real charge of misconduct that was preferred against her was that of "Financial Misconduct" and, as such, only an "Accounting Authority" or a person authorised in writing by the Accounting Authority could institute such a misconduct charge. This she said was not done.

[18] The employee also avers in her founding affidavit that the forensic investigation report was neither credible not authentic and that her representations in rebuttal of the allegation made against her "*fell on deaf ears*".

[19] Finally, she avers that her dismissal was unlawful because it was not authorised by the Board and states that she had *"in fact performed [her] duties in terms of the scope falling under [her] responsibilities as outlined by employment contract job description"*.

[20] The employee also takes a swipe at the CEO stating that the only reason she was charged was because the CEO was determined to terminate her employment as his (the CEO's) contract was due to expire and he feared that the employee would get his job because he became the CEO after holding the position as then held by the employee.

[1] No 75 of 1997.

[21] With regard to the damages and repayment of monies claimed, the employee makes no averments at all save to state the following in her founding affidavit:

> *'RELIEF*
>
> *11.The relief sought is as set out in paragraphs 1 to 3.2 of the Notice of Motion.'*

[22] The application was opposed by the employer on a number of grounds; I see no need to repeat all of the grounds although they are not without merit. Essentially the employer sets out exactly how the Forensic Investigation Report was sought, prepared and received. While the employer does not deny that it suffered financial loss consequent upon the employee's conduct, the charge preferred against her was not that of financial mismanagement but that of dishonesty. Most importantly though, the employer submitted that the application should be dismissed because in approaching the Court by way of motion proceedings, the employee jeopardised her own case because she should have anticipated that a number of disputes of fact would arise which could not be resolved without the need of leading oral evidence. The employer added that since all the essential facts were disputed, applying the *Plascon- Evans* test, the application should be dismissed. Finally, the respondent argued that notwithstanding all of the above, the employee's claim should be dismissed because she had failed to prove any damages as she did not set out any facts, nor made averments about any damages she may have suffered, assuming a breach on the part of the employer.

[23] The Labour Court curiously found that there were no factual disputes on the papers and that the employer had failed to follow its own procedures relating to disciplinary procedure that applied to employees in the position of the employee. Based thereon, it held that the employee's contract was unlawfully breached and ordered the employer to pay to the employee an amount equal to what the employee would have earned, for the balance of her contract period, as damages, and to repay the amount R21 049.31 being the amount deducted by it in respect of the costs incurred on the Cape Town trip. The Labour Court relying on the matter of the *South African Football Association v Kwena Darius*

*Mangope*[2] (*SAFA*) and *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (*Billiton)*[3] believed there was no need for the employee to prove damages.

The Appeal

[24] The employer has raised a number of grounds of appeal, none of them are without merit. However, at the very outset and on a very basic level, the issue of the rules relating to application proceedings need to be restated as was done by this Court in the matter of *SAFA* where it said:

> 'It is trite that an application encompasses pleadings and evidence, all rolled into one. The affidavits take the place of the pleadings and the evidence, and formulate the issues of fact between the parties and contain the evidence upon which each wishes to rely. The applicant must set out in the founding affidavit the facts necessary to establish a *prima facie* case in as complete a way as the circumstances demand. The respondent is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set out his version of the relevant facts. In dealing with the applicant's allegations of fact, the respondent should bear in mind that the affidavit is not solely a pleading and that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments of the applicant. Likewise, failure to deal with an allegation by the applicant amounts to an admission. It is normally not sufficient to rely on a bare or unsubstantiated denial. Unless an admission, including a failure to deny, is properly withdrawn (usually by way of an affidavit explaining why the admission was made and providing appropriate reasons for seeking to withdraw it) it will be binding on the party and prohibits any further dispute of the admitted fact by the party making it as well as any evidence to disprove or contradict it.
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> The inherently limited form and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit,

[2] (2013) 34 ILJ 311 (LAC).
[3] 2010 (5) BCLR 422 (CC).

because there are factual disputes which cannot or should not be resolved on the papers in the absence of oral evidence. The various provisions of Rule 7 of the Rules of the Labour Court take cognisance of this reality. Rule 7(3) requires the applicant to set out the material facts in the founding affidavit with sufficient particularity to enable the respondent to reply to them, while Rule 7(4) expects the same on the part of the respondent. Rule 7(7) grants the Labour Court a discretion to deal with an application "in any manner it deems fit", which may include "referring a dispute for the hearing of oral evidence". That discretion, in keeping with general practice and principles applicable in relation to the determination of applications, should be exercised to ensure that justice is done with a view to resolving a dispute of fact. Whether a factual dispute arises from the papers is not a discretionary decision; it is itself a question of fact and, importantly, a jurisdictional pre-requisite for the exercise of the discretion to refer the dispute for the hearing of oral evidence. While the equivalent provision in Rule 6(5) (g) of the High Court Rules is more explicit in this regard, requiring, as it does, the referral to oral evidence to be "with a view to resolving any dispute of fact", there can be no doubt that Rule 7(7) of the Labour Court Rules, being *in pari materia*, should be construed similarly to that effect.

As pointed out in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, a real dispute of fact will arise in one of three ways. Firstly, the respondent may deny one or more of the material allegations made by the applicant and produce evidence to the contrary, or may apply for the leading of oral witnesses who are not presently available or who though averse to making an affidavit, would give evidence if subpoenaed. Secondly, the respondent may admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Thirdly, the respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself give or propose to give evidence to show that the applicant and his deponents are untruthful or their evidence unreliable.

A real dispute of fact will not arise therefore if the respondent relies merely on a bare denial of the applicant's allegations or simply puts the applicant to the proof of allegations and in effect indicates no intention to lead evidence disputing the truth of the applicant's allegations. Bare denials will not suffice to give rise to a dispute of fact where the facts averred fall within the knowledge of the denying

> party and no basis is laid for disputing the veracity or accuracy of the averment. There is accordingly a duty upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his or her client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen, the court may well take a robust approach and grant the applicant relief in accordance with the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, which provides that notwithstanding factual disputes on the papers, if the court is satisfied that the applicant is entitled to relief in view of the facts stated by the respondent together with the facts in the applicant's affidavits which are admitted or have not been denied by the respondent, it will grant the relief sought by the applicant.'[4] [Footnotes omitted]

[25] Although the above *dictum* deals with what a respondent is required to do to oppose an application, it demonstrates that a founding affidavit must set out all of the essential evidence which, if left unchallenged, would prove the applicant's case and grant it the relief sought. Alternatively, challenges to the averments the applicant makes could arguably not be sustained. However, where an applicant can or should anticipate that the facts essential for it to prove its case would be challenged, it should not proceed by way of application but by way of action. The reason for this is that where there will be dispute of fact the court will be unable to determine on the papers before it where the truth lies and it will simply dismiss the application on the basis that the applicant had failed to discharge its *onus* by proving its case on a balance of probabilities. While the Court always has a discretion to refer certain issues in an application for oral evidence, where there are disputes of fact, this is not automatic. In my view, a Court will or should however never refer an application to be determined by the leading of oral evidence, thus converting an application to a trial, where an applicant, in total disregard of the principle that where disputes of facts are anticipated a matter should be instituted by way of action, proceeds nonetheless by way of an application.

[4] At paras 9-12.

[26] Considering the real issues before the Court, the employee needed to satisfy the Labour Court on its papers that:

(a) she travelled to Cape Town to perform the tasks she claimed she would perform, that she did so perform the tasks and filed her report as required;

(b) the employer failed to follow the proper procedure in disciplining her; and,

(c) her dismissal was not properly authorised as provided for in the employer's rules.

[27] On all of the above issues, the facts presented by the employee were disputed by the employer. More importantly however the employee should have anticipated that those facts would be disputed. On the very first issue of whether the employee performed the tasks for which she sought and was granted permission to travel to Cape Town, the employee only makes a bold statement that she did so. In its answer, the employer provides details as to why this could not be so, not least of which was the report filed by the employee just prior to her misconduct hearing (nearly two years after the event) which fails to demonstrate that she had carried out the tasks that she had said she would. Added to this is the statement by her assistant who accompanied her that no work was indeed performed at the Two Oceans. It would be naïve to accept a flippant remark made by the employee that she conducted a survey while running the race. Besides the fact that this dispute does not get the employee out of the starting blocks in proving her claim for breach of her employment contract, it demonstrates that it was indeed the employee who breached her contract of employment. What is critical here, however, is that it should have been clear as daylight to the employee that the employer would dispute her claim that she went to the Two Oceans to conduct the business of the employer. Also that the employer would challenge such allegation and would be supported in its stance by producing a report prepared by an independent body that she went on a personal trip. Added is the fact that a proper disciplinary hearing was conducted at which evidence was placed before a chairperson and the employee was given an opportunity to state

her case (the employee very conveniently forgot to even mention that she was subjected to a disciplinary hearing in respect of the misconduct the employer alleged she had committed). The employee was faced with evidence presented by the employer to demonstrate that it was she who had breached the contract of employment by being dishonest in making a request of travelling to Cape Town on a pretext of performing work-related duties while she went on a personal jaunt. The issue here is not whether what the employer says is true. It is simply that applying the *Plascon Evans* test, the court is obliged to accept the version of the employer. All the court had before it was a statement in the founding affidavit to the effect that the employee did no wrong, as against this is a statement from the employer with supporting documents that the employee was and continued to be dishonest. Those advising the employee should have known that what the employer said in its papers is exactly what it would say and they would then not be able to succeed in their application.

[28] Every essential fact that the employee needed to satisfy the court about was disputed by the employer with sufficient averments to remove the dispute from the realm of bare or unsubstantiated denial. In the absence of the facts being tested by the leading of oral evidence, the Labour Court had no choice but to accept the averments made by the employer on all of the critical issues relating to the alleged breach.

[29] The only allegation made by the employee, of some merit, was that she could only be dismissed by the Board and this was not done. She was in fact dismissed by the Chairperson of the Board subsequent to a disciplinary hearing. But again, in response to this, the employer presented evidence to the effect that it had delegated that function to the Chairperson of the Board (this was supported by minutes of the Board); that the Board was at all times aware of the processes that were taking place with regard to the disciplinary action taken against the employee; and, that after the dismissal the Board had ratified the decision of its chairman to dismiss the employee.

[30] The issue of whether the Board had to decide on the dismissal itself prior to the employee's dismissal or that the Board could not *ex post facto* ratify a decision as it was a decision for them to make: this issue is one which had to be canvassed at trial as to whether or not the formalities followed by the employer in dismissing the employee was within the ambit of its constitution. On the papers, while there may be a suspicion that it might not be so, this is not sufficient. It is the employee as the applicant, who bears the *onus* of satisfying the court that this was a pre-emptive fact going to the root of her dismissal and thus leading to the alleged unlawful breach of her contract.

[31] In the circumstances, the Labour Court's finding that there was no dispute of facts was totally erroneous. In fact, every relevant fact was properly disputed on the papers before the Labour Court and as such the application should have been dismissed by the Labour Court.

[32] Having arrived at the above decision, there is no need to deal with the issue of damages. I however consider this an important issue in this matter in light of the reasons given by the Labour Court in awarding damages to the respondent. As stated earlier, the Labour Court relying on the matters of the *SAFA* and *Billiton* concluded that there was no need for the employee to prove damages. This is clearly wrong. The employee did not seek compensation based on her dismissal being unfair in terms of the Labour Relations Act (LRA)[5], she sought damages consequent upon a breach of contract in terms of the BCEA. She instituted a civil claim for damages. Two issues arise in this respect. Firstly, she had to prove: (i) that she suffered damages as consequence of the breach, that there is a link between the damages she suffered and the breach; and secondly (ii) the quantum of damages she actually suffered.

[33] The employee failed to provide any evidence whatsoever as to the loss she suffered as a result of her dismissal and, as such, even if she had proved that the employer had breached the employment contract, she would not succeed in

[5] Act 66 of 1995

obtaining any award. Insofar as the Labour Court sought support for its decision to grant the relief sought on the basis of the *dictum* in the *Billiton* matter which stated that there was no need to prove damages to obtain compensatory relief in an unfair dismissal dispute, such support was erroneous. *Billiton* case dealt with a claim under the LRA and not one under the BCEA. It is correct that no damages need to be proved when seeking compensatory relief under the LRA because section 194 of the LRA provides that where a dismissal is found to be unfair on substantive or procedural grounds, the commissioner or the Labour Court may grant compensation to the employee within certain limitations. The amount awarded there to a dismissed employee is not damages as understood within a civil claim context but a statutory relief, hence there is no need to prove any loss. *Billiton* therefore had no application to this dispute. See also *ARB Electrical Wholesalers v. Hibbert* [6].

[34] While the *SAFA* matter is of application, the Labour Court appears to have totally misread the judgment. The Court there emphasised that in a claim such as this, the employee was obliged to prove his/her damages failing which no amount is awarded to the employee. It stated:

> '[A] plaintiff claiming damages for a prospective loss of future salary must adduce evidence enabling a fair approximation of the loss even though it is of uncertain predictability and exactitude. It is not competent for a court to embark upon conjecture or guesswork in assessing damages when there is inadequate factual basis in evidence. Moreover, allowance has to be made for the contingency or probability that the anticipated future loss may not in fact eventuate, at least not in its entirety, because the dismissed employee may obtain another job or source of income. There should be evidence as to the reasonable period it would take a person in the position of the respondent to obtain analogous employment. By similar token, any amount awarded as damages for future loss has to be discounted to current value. In other words, the value of the expectancy of future salary before and after the breach has to be determined in order to quantify

[6] Compare: *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC); [2015] 11 BLLR 1081 (LAC) at para 22-24.

> damages. Where it is highly probable that the expectancy would have been realised but for the breach, the value of the expectancy will usually be the value of the expected income (the salary for the unexpired period) less amounts which reasonably might be earned (potential collateral and mitigated amounts), adjusted firstly by a contingency for the possibility of the entire loss not being realised, and discounted in addition for the advantage of the expectancy being accelerated or received earlier than it would have been.
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> It was therefore, in my opinion, wrong for the Labour Court to equate, without further ado, the respondent's damages with the salary owing for the balance of the unexpired period of his fixed term contract. Such an amount, in the nature of things, will in all cases be the maximum payable as damages. But the maximum does not axiomatically follow upon breach…'[7]

[35] Also in the *SAFA* matter, the employee did not receive the balance of his contract value but only the damages he had proved to have suffered. The employee in that matter set out, in an affidavit, the losses he suffered as a result of the employer's breach and this loss was not challenged by the respondent. It was this proved loss which constituted the damages in that matter and that is what was awarded to the employee, not the balance of his contract value, nor was the damages awarded in the absence of it being proved. In the circumstances, the Labour Court got it wrong. Not only did the employee fail to prove any damages, but she failed to make out a case for a breach in the first place.

[36] Finally, I need to re-emphasise that a civil claim for damages as provided for in the BCEA (as was the case here) has nothing to do with a claim for an unfair dismissal in terms of the LRA.

Order

[37] In the result, I make the following order:

[7] At para 45 and 47.

(i) The appeal is upheld with costs.

(ii) The order of the Labour Court is substituted with the following order:

"The application is dismissed with costs.

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Waglay JP

I agree

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Ndlovu JA

I agree

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Murphy AJA

APPEARANCES:

| | |
|---|---|
| FOR THE APPELLANTS: | Adv M T K Moerane SC and Adv W S Kuboni |
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