REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J1267/14

In the matter between:

SYREX (PTY) LTD **Applicant**

and

ANNAH LERATO RAMFOLO **Respondent**

Heard: **17 February 2015**

Delivered: **27 February 2015**

Summary: Application for the payment of damages arising from breach of contract and recovery of agreed training costs; Application launched under s. 77(3) of the BCEA; First part of the claim based on failure to serve notice period of two months and the second seeks to recover training costs; No proof of loss actually suffered in respect of the damages claim; Claim for training costs found to be arising from a penalty stipulation as envisaged by Act 15 of 1962 and s. 3 thereof invoked *mero motu*; Penalty reduced to NIL on account of it being disproportionately excessive with no prejudice having been suffered by the Applicant; Application dismissed with no order as to costs.

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VOYI, AJ

[1] This matter pertains to a claim for contractual damages allegedly suffered by the Applicant. The Applicant seeks to recover, by way of application, damages ostensibly suffered as a result of the Respondent's failure to serve the agreed two months' notice when she resigned from the Applicant's employ. The Applicant also seeks to recover an amount classified as training costs.

[2] The application is launched under the provisions of s 77(3) of the Basic Conditions of Employment Act.[1] It is axiomatic that a claim of the present nature can be brought before this court under the provisions of s 77(3) of the BCEA.[2]

[3] The Applicant's claim for damages is premised on a written contract of employment that was signed by both parties on 22 May 2013. In terms of the signed contract of employment, the Respondent's employment with the Applicant commenced on 3 June 2013. The Respondent was employed in the capacity of HR Officer and Administrator: Category 01.

[4] In terms of clause 14.1 of the written contract of employment, the Respondent could only terminate her employment with the Applicant by giving two calendar months' written notice. Put differently, the Respondent was required to serve a notice period of two calendar months upon her termination of the employment relationship. In this matter, the Respondent failed to honour this contractual obligation. She simply resigned with immediate effect on 10 September 2013. This was clearly in breach of the written contract of employment, particularly clause 14.1 thereof. On account of this breach of contract, the Applicant seeks to recover its alleged damages.

[5] It is trite law that a party who claims damages must prove that he *actually* suffered damages or loss as a result of the breach of contract.[3] It is clear to me that the Applicant must prove that the damages claimed were, indeed, suffered as a result of the Respondent's breach of contract. To merely allude

[1] Act No. 75 of 1997 ("the BCEA")
[2] See *Rand Water v Stoop and Another* (2013) 34 *ILJ* 579 (LAC) at para's 21, 30 and 31.
[3] See *Swart v Van der Vyver* 1970 (1) 633 (A) at 634C-D.

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to the contractual terms as entitling a party to lay a claim for damages is not sufficient. There must be actual proof of the damages or loss allegedly suffered.

[6] It was the approach of this court in *SA Music Rights Organisation Ltd v Mphatsoe*[4] that a claimant, in matters of the present nature, must establish the actual loss consequent on the breach of contract. This approach was reiterated by this court in *Labournet Payment Solutions (Pty) Ltd v Vosloo*,[5] where it was ultimately found that the claimant had '…failed to show the alleged loss it suffered (either because of failure to give 30 or seven days' notice as the case may be) was as a result of the breach of the employment contract by the respondent.'

[7] In laying the basis for the loss suffered, the following is stated in the Applicant's founding affidavit:

> 'The failure of the Respondent to serve her two (2) months' notice upon termination of her employment has caused the Applicant damage and prejudice. The Applicant is presently left without the services of an HR Officer and Administrator. The implication of the Respondent's conduct is rather detrimental to the Applicant in that the latter no longer enjoys the services of any personnel in its Human Resources Department. The Respondent's resignation came at a time when the Applicant had already experienced a previous loss of an HR Officer under very similar circumstances which cost the Applicant an approximate amount of R 23 232.10 to secure the urgent services of a temp in this position. In the circumstances therefore the Applicant is now left in the same position as the Respondent's resignation has now forced the Applicant to immediately source the services of another temp HR Officer so that the Human Resources department can function while the Applicant commences the recruitment process. The Respondent is accordingly liable in law to compensate the Applicant for such damages suffered.'

[8] What becomes apparent from the above is that the Applicant was forced to immediately source the services of another temporary HR Officer so that its

[4] (2009) 30 *ILJ* 2482 (LC).
[5] (2009) 30 *ILJ* 2437 (LC) at para 23.

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Human Resources Department can function. It also becomes apparent that the Applicant commenced a recruitment process to fill the vacancy left by the Respondent's unceremonious departure.

[9] There is regrettably no evidence put forward by the Applicant in relation to the other temporary HR Officer that was immediately secured. It is not known the extent to which the Applicant was out of pocket due to this temporary measure as there is no evidence to this end.

[10] It is equally not known if the services of the temporary HR Officer were secured for the full two months during which the Respondent was obliged to serve her notice period. Furthermore, it is not known if the recruitment process was finalised within the two months period or way thereafter. All of these disparities have a bearing on the damages allegedly suffered by the Applicant.

[11] Without these aspects of the claim having been adequately addressed, it cannot be said that the Applicant has established it actually suffered damages or loss as a result of the Respondent's breach of contract. The Applicant, in establishing the damages allegedly suffered, simply relies on the fact that the Respondent ought to have served two months' notice, without more. That to me is simply inadequate. I reiterate that damages suffered have to be proved. Absent such proof in the present matter, the Applicant's claim can therefore not succeed.

[12] In highlighting the necessity of actual proof of the damages suffered, it is apposite to allude to the following judgments.

[13] In *Aaron's Whale Rock Trust v Murray and Roberts Ltd and Another*,[6] it was held thus:

> 'Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his

[6] 1992 (1) SA 652 (C).

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favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss.'[7]

[14] In *Esso Standard SA (Pty) Ltd v Katz*,[8] the following was held with regard to the necessity of producing proof of damages suffered:

> 'In the present case it might be said with some justification that the plaintiff should have sought the assistance of an accountant. He failed to do so, but it does not follow that he should be non-suited. Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him… and is a problem which has engaged the attention of the Courts from time to time.'

The court went on to quote with approval the following passage in *Hersman v Shapiro and Co*:[9]

> 'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.'

[15] In *Aaron's Whale Rock Trust v Murray and Roberts Ltd and Another* (*supra*), the court also held as follows:

> 'Thus where evidence is available to a plaintiff to place before the Court to assist it in quantifying damages, and this is not produced, so that it is

[7] Ibid at 655H-J.
[8] 1981 (1) SA 964 (A) at 969D-E.
[9] 1926 TPD 367 at 379.

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> impossible for the Court to do so, or there is no, or quite insufficient, evidence which can be produced by an unfortunate plaintiff, he must fail and the defendant must be absolved from the instance.'[10]

[16] In making reference to these judgments, I find myself taking a rather longwinded route which leads me to the very same destination reached by this court in its judgments in *SA Music Rights Organisation Ltd v Mphatsoe* (*supra*) and *Labournet Payment Solutions (Pty) Ltd v Vosloo* (*supra*). The aim is to emphasise the need to prove or establish the actual loss suffered as a result of the breach complained of.

[17] In order for the Applicant's claim for damages to succeed, I have to be satisfied on the impact of the Respondent's breach in monetary terms. I cannot simply go with what is baldly alleged on the papers before me.

[18] The Applicant proceeded with its case on the assumption that once breach is established, the payment for the damages allegedly suffered automatically follows. That cannot be the case. There has to be a nexus between the beach and the loss *actually* suffered. I reiterate the term actually. Without proof of the actual loss suffered, I am unable to make that necessary connection. It is my judgment, therefore, that absent proof of the damages or loss actually suffered, the Applicant's claim for damages cannot succeed.

[19] The above aside, I now turn to the Applicant's claim for the 'training costs' in the amount of R45 900.00. This claim is also founded on the contract of employment entered into between the parties on 22 May 2013. Abruptly from clause 14.5 onwards,[11] the contract of employment provides as follows:

> '14.5 The attendance at this training by the employer (sic) shall be considered to be in-occupation training of the employee.
>
> 14.6 It is recorded and agreed that the total value of the in-occupation probationary training contemplated by this agreement, which includes time, expertise and actual disbursements expended by the company,

[10] *Aaron's Whale Rock Trust v Murray and Roberts Ltd and Another* (*supra*) at 956E-F.
[11] Under the heading 'Termination of Employment'.

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shall be in the amount of three times the employee's monthly cost to company salary.

14.7 In exchange for the in-occupation probationary training provided by the company to the employee in terms of this agreement, the employee agrees and undertakes as follows:

14.7.1 The employee shall serve the company for a minimum period of at least 1 (one) year, as an employee of the company in terms of the employee's\contract (sic) of employment, which period shall be calculated from the date of signature of this agreement by the company.

14.7.2 In the event of the employment of the employee with the company terminating for any cause or reason whatsoever, be it resignation or any other form of termination of employment, prior to the expiry of the time period in terms of clause 14.6 above, then and in such event the employees shall immediately be obliged and required to pay the sum of three times the employee's monthly cost to company salary.

14.7.3 The sum of three times the employee's monthly cost to company salary shall be immediately due, owing and payable by the employee to the company with effect from the date of termination of employment of the employee with the company in the circumstances contemplated by clause 14.6.2 above.'

[20] On closer consideration of the contract of employment, it becomes apparent that the above-quoted clause is somehow misplaced. There is a clause, namely clause 3, under the heading 'Training Period' which bears relation to the contents of clauses 14.5 to 14.7 as quoted above. Clause 3 of the contract of employment effectively deals with probation. This clause particularly provides as follows:

'3.1 The employee shall serve the company and the company shall employ the employee for a probationary period ("**the training period**") of three (3) months, calculated from the starting date of employment specified in clause 2.1 above.

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> 3.2 The employment is subject to a probationary period during which time this contract may be terminated by the company by giving the employee one (1) month's notice in writing. Considerations during the probation period will include, but not be limited to; the employee's suitability for the position, their attitude (in the opinion of the company) as well as their adaptation to the work environment. During this period the company will give the employee reasonable training, guidance, evaluation or counselling in order for the employee to render a satisfactory level of performance.'

[21] In the contract of employment between the parties, the Applicant puts value to the training to be provided during the probation period. To this end, clause 14.6 of the contract of employment states that '… the total value of the in-occupation probationary training contemplated by [the contract of employment], which includes time, expertise and actual disbursements expended by the company, shall be in the amount of three times the employee's monthly cost to company salary.'

[22] Under clause 14.7.1 of the contract of employment, it is stipulated that the Respondent would have to pay back the value of the in-occupation probationary training should she not complete a minimum of at least one year as an employee of the Applicant. It is common cause that the Respondent did not serve the minimum period of one year. The Respondent only worked for the Applicant for a period of less than four months, it being from 3 June 2013 to 10 September 2013.

[23] On account of the Respondent not having served the minimum period of at least one year, the Applicant now invokes the provisions of clause 14.7.2 and seeks to recover the value of the in-occupation probationary training. The Applicant labels this as 'training costs'.

[24] It seems to me that clause 14.7.2 of the contract of employment is nothing but a penalty stipulation. In terms of s 1(1) of the Conventional Penalties Act,[12] a penalty stipulation is defined to be a term which provides as follows:

[12] Act No 15 of 1962.

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> '… that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages…'

[25] In the present matter, it was a stipulation in the contract of employment that the Respondent shall be liable to pay the total value of the in-occupation probationary training (in the amount of R45 900.00) should she resign prior to serving the minimum period of one year. In ss 1(2) of the Conventional Penalties Act, it is stated that any sum of money for the payment of which a person may so become liable under ss 1(1) is a penalty.

[26] When a question arises as to whether a particular clause amounts to a penalty stipulation as contemplated by ss 1(1) of the Conventional Penalties Act, it becomes useful to employ the basic test that was laid down in *De Pinto and Another v Rensea Investments (Pty) Ltd*,[13] where the then Appellate Division stated thus:

> '… the test is whether the [parties] intended it to operate in *terorrem*, i.e. as a penalty in the common law sense.'

[27] It was also pointed out in *Pearl Assurance Co. Ltd v Union Government*[14] that the clause in issue must have been inserted '… as a fine, or as a punishment, or to frighten the obligor to carry out the terms of [the] contract.'

[28] In my view, clause 14.7.2 of the contract of employment was introduced as a weapon in *terorrem*. The clause was inserted to force the Respondent to stay with the Applicant for, at least, one year or else face liability of an amount three times her monthly cost to company salary.

[29] The terror that was intended by the introduction of clause 14.7.2 becomes even more apparent if one considers the exorbitant amount to be paid back by the Respondent for training that was allegedly offered in-house as part of the probation period.

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[13] 1977 (2) SA 1000 (A) at 1007A.
[14] 1933 AD 277 at 290.

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[30] By resigning barely four months into employment and in not serving the Applicant for the minimum period of one year as it was agreed upon in the contract of employment, the Respondent committed an act in conflict with her contractual obligation. She, therefore, breached the contract of employment, in particular clause 14.7.1 thereof.

[31] In *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance*,[15] it was held that for '…a provision to constitute a penalty it must be one which derives from a breach of contract.' This is an important determiner and it was decisive in *Sun Packaging (Pty) Ltd v Vreulink* in the overall consideration of whether a clause amounts to a penalty stipulation within the meaning of ss 1(1) of the Conventional Penalties Act.

[32] Being thus satisfied that clause 14.7.2 is a penalty stipulation, I do feel duty-bound to consider the implications of s 3 of the Conventional Penalties Act thereon. This necessity arises from the observable excessiveness of the penalty sought to be recovered from the Respondent on account of her breach of clause 14.7.1 of the contract of employment. Under s 3 of the Conventional Penalties Act, it is stated thus:

> 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

[33] This matter came before this court on an unopposed basis. The Respondent was also in default. A question that arises, therefore, is whether this court would, under such circumstances, be entitled to reduce the penalty *mero motu* and without the Respondent having advanced a case that the penalty is out of proportion to the prejudice suffered. I hold the considered view that this court is entitled to do so.

[15] 2008 (3) SA 47 (C) at para 24.

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[34] In *Western Bank Ltd v Meyer; Western Bank Ltd v De Waal; Western Bank Ltd v Swart and Another*,[16] the following authoritative stance was taken:

> 'The word 'may' in sec. 3 does not merely confer a discretion, but a power coupled with a duty. See *Western Credit Bank Ltd. v Kajee*, 1967 E (4) SA 386 (N) at p. 393B. The Court must apply the provisions of sec. 3 where it appears to it that there is a disproportion such as is visualised by that section. The Courts will therefore apply sec. 3 even where, in an action for enforcement of a penalty, the debtor is in default of appearance. See *Ephron Bros. Holdings (Pty.) Ltd. v Foutzitzoglou,* 1968 (3) SA 226 (W).'

The court went further and held as follows at pp 699F – 700A:

> 'The meaning to be assigned to the words 'if it appears to the Court' in this context has been discussed in *Maiden v David Jones (Pty.) Ltd* 1969 (1) SA 59 (N) at p. 64. There is no reason to differ from what is there said. It follows that a Court will not reduce the penalty unless it is clear or plain to the Court that the penalty is 'out of proportion to the prejudice suffered.' The words 'out of proportion' have also been interpreted. It seems that by the use of these words it was intended that the penalty is markedly, not infinitesimally, beyond the prejudice suffered, and that the excess is such that it would be unfair to the debtor not to reduce the penalty. (See *Western Credit Bank Ltd v Kajee*, (*supra)* at p. 391C - D). In this regard the Legislature has not provided any yardstick by which the 'proportion' is to be measured, or to be determined. It is a matter left entirely to the discretion of the Court which, so it seems to us, should only interfere if, bearing in mind that an object of a penalty clause is to compel the debtor to implement his obligations under the contract by providing harsh consequences should he default, it nevertheless is of the opinion that the penalty is unduly severe to an extent that it offends against one's sense of justice and equity.'

[35] In the matter before me, the penalty is glaringly excessive. The Applicant seeks to recover what it labels as 'training costs' in respect of an in-house training that was offered to the Respondent during her probation period. There is no indication of the Applicant having actually incurred these 'training costs'.

[16] 1973 (4) SA 697 (T) at 699E-F.

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[36] Even more disturbing, the Applicant seeks to recover 'training costs' in respect of training that it was, in any event, obliged to provide to the Respondent during the probation period. In this regard, item 8(1)(e) of the Code of Good Practice: Dismissal[17] states in no uncertain terms that '[a]n employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.'

[37] In this matter, the training allegedly offered to the Respondent was clearly not out-of-the ordinary and was simply part and parcel of probation. There is no evidence to the contrary.

[38] In fact and under clause 3.2 of the contract of employment, the Applicant accepted that it would '…give the [Respondent] reasonable training, guidance, evaluation or counselling in order for [her] to render a satisfactory level of performance.'

[39] It is, in the final analysis, my considered view that the alleged 'training costs' are exceedingly excessive and the penalty is way out of proportion to the prejudice that may have been suffered by the Applicant in providing training to an employee on probation.

[40] As indicated herein before, there is no indication of the costs that were actually incurred to train the Respondent. There is, equally, no indication of whether indeed such training was offered and for how long. In the exercise of my judicial discretion, it would be just and equitable to reduce the penalty to NIL.

[41] The Applicant undertook to provide the Respondent with training as part of the probation period. The training was provided internally as an 'in-occupation probationary training'. As a weapon in *terorrem*, the Applicant sought to place value on this training and to obligate the Respondent to stay in its employ for at least one year, failing which she would have to pay the determined value for the training allegedly offered.

[17] Under Schedule 8 to the Labour Relations Act, No. 66 of 1995 ("the LRA").

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[42] In conclusion, I find no prejudice suffered which would warrant the enforcement of the penalty stipulation, whether fully or partially. I conclude, therefore, by holding that the penalty of R45 900.00 is exceedingly severe and does offend my sense of justice and equity. In the circumstances, the Applicant's claim to recover the said penalty cannot succeed. It stands to fail.

[43] I, therefore, order as follows:

(i) The Applicant's application, launched under s 77(3) of the BCEA for the recovery of contractual damages and training costs from the Respondent, is hereby dismissed.

(ii) There is no order as to costs.

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Voyi, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Ms S Morgan (Attorney) of Snyman Attorneys

For the Respondent: (No appearance)

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