



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J3480/18

In the matter between:

DR YANELYS MARQUES ALEAGA

Applicant

and

**MEC FOR HEALTH AND WELFARE
GAUTENG PROVINCE**

First Respondent

**ACTING CHIEF DIRECTOR: DEPARTMENT
OF HEALTH: SEDIBENG DISTRICT HEALTH
SERVICES**

Second Respondent

**THE CLINICAL MANAGER:
BOPHELONG CLINIC**

Third Respondent

Heard: 8 October 2018

Delivered: 24 October 2018

Summary: Section 77(3) of the LRA- concurrent jurisdiction does not avail a litigant whose pleaded cause of action is that of unfair dismissal – for the LRA breach there is an LRA remedy.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] This is one of matters that are atypical in this Court. The applicant, a Cuban doctor, seeks an order directing the respondents to reinstate her contract of employment and allow her access to the workplace with immediate effect, pending any disciplinary enquiry that the respondents may wish to institute.
- [2] The applicant was employed by the Gauteng Department of Health (Department) under the political headship of the first respondent as a Medical Officer Grade 3 on a three year fixed term contract (from 27 June 2016 to 12 May 2019). She was placed at Bophelong Clinic in Sedibeng District.
- [3] It is important that I sketch out the background to the applicant's employment in South Africa. On 25 May 2012, the Government of the Republic of South Africa and the Government of the Republic of Cuba concluded a Cooperation Agreement in the Public Health and Medical Science Sector (Cooperation Treaty). The purpose of the Cooperation Treaty is to promote and develop collaboration in the following areas:
- 3.1 Recruitment of doctors and lecturers from Cuba;
 - 3.2 Training of South African medical students and postgraduates in Cuba;
 - 3.3 Exploration of possible mutual interest in the fields of biotechnology, production, the development of pharmaceuticals and in any field of scientific research; and
 - 3.4 Any other programme or activity that may be mutually agreed between Cuba and South Africa.
- [4] The respondents assert that the applicant's recruitment by the Department was in accordance with the Cooperation Treaty. To facilitate the whole process, the applicant concluded an agreement with a company called *Comercializadora De Servicios Medicos Cubanos, SA* (CSMC, SA), the English translation is 'The Marketing Company for Cuban Medical Services'; agent of the Cuban Government. In terms of the CSMC Agreement, CSMC, SA is authorised, *inter alia*, to:

- 4.1 Ensure that the rights and obligations in terms of the Cooperation Treaty are complied with, to transfer the Cuban Health Professional to and from the country where she/he is providing services;
- 4.2 Provide the Cuban Health Professional with information necessary for the fulfilment of the collaboration in terms of customs in both countries;
- 4.3 Transfer the Cuban Health Professional to and from the country where she/he will be providing services in terms of the Cooperation Treaty;
- 4.4 Guarantee on monthly stipend of about \$1000.00 for personal expenses and food; and maintenance amount for up to \$200.00 for accommodation provided by the Department to be deducted monthly from salary received;
- 4.5 Guarantee the Cuban Health Professional accommodation with all necessary services and facilities (such as furniture, household appliances, kitchen utensils, linen, electricity, etc.) in accordance with the Cooperation Treaty; and
- 4.6 Guarantee the Cuban Health Professional during her/his stay in the country where she/he provides services in accordance with the Cooperation Treaty and under the CSMC Agreement, to continue to receive all the employment and social security benefits applicable in accordance with the Cuban legislation.

[5] The Cuban Health Professional, on the other hand is enjoined, *inter alia*, to:

- 5.1 Fulfil the duties, tasks and obligations arising from the Cooperation Treaty;
- 5.2 To comply, in terms of the concerned action, with the provisions of Resolution No. 168 "Disciplinary Regulations for Cuban Civil Workers Serving Abroad as Collaborators" dated 29 March

2010, issued by the Cuban Minister of Foreign Affairs and Foreign Investments;

- 5.3 To recognise that the representatives of CSMC, SA are vested with sufficient powers to act on her behalf and to appear before the national authorities of the country where service is being provided in accordance with the Cooperation Treaty;
- 5.4 To notify the representatives of CSMC, SA about the intended visit of a family member or friend in a place where she is providing services under the CSMC Agreement; and
- 5.6 To transfer to the bank account of the CSMC, SA approximately 50% of her monthly remuneration received under the Cooperation Treaty.

[6] After concluding the CSMC Agreement, the applicant became part of the Cooperation Treaty placement and was assisted by both governments to be issued with necessary documents to enable her to be employed by the Department; particularly, the passport, treaty visa and registration with the Health Professions Council of South Africa (HPCSA).

[7] On 21 June 2018, the Embassy of the Republic of Cuba in South Africa sent a communication to the South African Department of International Relations and Cooperation (DIRCO) and copied the South African National Department of Health (NDOH) and the South Africa Department of Home Affairs (DOHA) which states the following:

'The Embassy of the Republic of Cuba presents its complements to the Department of International Relations and Cooperation...and has honour to inform that Dr. Dairine Rodriguez Moudoch, Dr. Luis Enrique Pino Aldana, Dr. Lizet Leyva Herrera, Dr. Yanelys Marquez Aleaga [applicant]; Dr Dagnuria de las Mercedes Macias Jon and Dr Angelino Ramon Garcia Hernandez, whose information is enclosed, have opted out of the Health Program under the Agreement between the Republic of Cuba and the Republic of South Africa, there after their official passports have been cancelled.

The Embassy wishes to indicate that based of their decision, the aforementioned doctors are no longer members of the Cuban medical

cooperation team and are not authorised to continue providing Health Services under the auspices of South African-Cuban Intergovernmental Agreement.

In this regard the Embassy kindly requests that the Department of International Relations and Cooperation conveys this information to the National Department of Health and to the Department of Home Affairs in order to make necessary arrangements in accordance with the terms of the Intergovernmental Agreement and the national Department of Health Endorsement Certificate, to promptly notify the aforesaid former contract employees on the immediate termination of their employment in the South African Public sector.

The Embassy of the Republic of Cuba avails itself on this opportunity to renew to the Honourable Department of International Relations and Cooperation... of Republic of South Africa the assurance of its highest consideration.' (Emphasis added)

- [8] On 15 August 2018, the NDOH sent a letter directing the Department to terminate the applicant's contract of employment in accordance with the letter from the Cuban Embassy given the fact that she was employed in terms of the Cooperation Treaty and had been accordingly issued a treaty visa. The applicant's contract of employment was summarily terminated on 13 September 2018.
- [9] The applicant disavows being bound by the Cooperation Treaty, though she concedes that she is aware of the negotiations between Cuba and South Africa. She asserts that she is only bound by the CSMC Agreement which she has since terminated because its representatives insisted that she should return her minor daughter back to Cuba. She is adamant that she approached the Court solely to vindicate her rights in terms of the contract of employment she concluded with the Department which incorporates the Labour Relations Act¹ (LRA) as well as the Public Service Regulatory framework.

Legal principles and application

¹ Act 66 of 1995 as amended.

- [10] In terms of section 77(3) of the Basic Conditions of Employment Act² (BCEA), this Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any Basic Conditions of Employment constitutes a term of that contract. Relevant also is section 77A (e) of the BCEA, which empowers this Court to make any appropriate order, including an order 'making a determination that the court considers reasonable on any matter concerning a contract of employment in terms of s 77 (3) of the BCEA, which determination may include an order for specific performance.'
- [11] The applicant's claim is that her employment with the Department is governed by the LRA and the regulatory framework applicable in the Public Service in terms of her letter of appointment. However, her contract of employment refers to the Public Service prescripts and regulatory framework only for purposes of misconduct. It is apparent from facts alluded to above that the termination of the applicant's contract has nothing to do with her conduct.
- [12] Instead, the reason given by the Department for the termination of the applicant's contract is basically that consequent to her opting out from the Cooperation Treaty and the cancellation of her official passport by the Cuban Embassy, her contract of employment had to terminate since it was subject to the treaty visa. It would seem that the Department availed itself to the provisions of clause 8 of the applicant's contract of employment which clearly states that if, for any reason, her residential status or validity of her work permit expire, her contract employment shall terminate simultaneously. In essence, her continued employment would have been illegal.
- [13] I need to quickly deal with the applicant's disavowal that her employment with the Department was subject to the terms of the Cooperation Treaty. The CSMC Agreement specifically refers to the terms of the Cooperation Treaty. In terms of the Cooperation Treaty, the applicant got immediate registration with the HPCSA without having to go through the usual examination procedures for foreign doctors. She was issued with a treaty visa which is issued to a foreigner conducting activities in South Africa in terms of an international

² Act 77 of 1997 as amended.

agreement to which South Africa is a party.³ Pertinently, she also paid about 50% of her monthly salary into the CSMC bank account in accordance with article 4(k) of the Cooperation Treaty.

[14] Even so, the applicant herself confirms that her deployment to South Africa and her ultimate employment with the Department emanates from her dispute with the Cuban Provincial Public Health Department which sought to evict her from the state allocated house in Cuba. In order to resolve the dispute, she was offered a placement abroad. She was given an option to be placed either in Brazil, Portugal or South Africa and she chose South Africa. The recent correspondence from the Cuban Provincial Public Health Department in relation to her house in Cuba confirms that she is on a mission abroad hence her family would not be evicted.

[15] Clearly, the applicant remains the Cuban Government employee for the duration of the mission abroad and she is also bound by the provisions of the Cuban Resolution No. 168 Disciplinary Regulations for Cuban Civil Workers Serving Abroad as Collaborators in terms of the CSMC Agreement. I am accordingly convinced that the applicant's appointment was subject to the Cooperation Treaty.

[16] The applicant's submission that the Cooperation Treaty has since terminated does not assist her case. Article 8(2) of the Cooperation Treaty permits extension for another five years unless terminated within six months' notice through diplomatic channels. In the absence of any notice of termination in line with Article 8(3), the Cooperation Treaty was impliedly extended for another five years. It must be noted that the Cuban Embassy has since intimated the Cuban Government's intention to renew the Cooperation Treaty. Notwithstanding, Article 8(4) of the Cooperation Treaty states:

'The termination the of this Agreement shall not affect the completion of any project already undertaken by the Parties prior to the termination thereof, full execution of any cooperation activity that has not been fully executed at the time of termination, unless otherwise agreed upon in writing.'

³ Section 14(1) of the Immigration Act 13 of 2002 as amended.

[17] The Cooperation Treaty also prohibits employment of a Cuban doctor upon termination of the contract of employment for any reason, including the effluxion of time. Since the applicant decided to quit the programme, she might have to return to Cuba and apply from there to work in South Africa, following the rules that apply to all other foreign doctors. This Court cannot pronounce on the contractual dispute between the applicant and the Republic of Cuba which has in a sense rendered her continued employment with the Department impracticable.

[18] Stripped of verbiage, the applicant's claim is simply to enforce the provisions of the LRA in relation to the fairness of her dismissal. She asserts in no uncertain terms in paragraph 6.9 of the founding affidavit that 'the termination of my employment was procedurally and substantively tainted'. Her reliance on this Court's concurrent jurisdiction in terms of section 77(3) of the BCEA to enforce her rights in terms of the LRA on the basis that the labour laws of South Africa are implied in her contract of employment is plainly misplaced. She ought to have availed herself to the comprehensive machinery provided in terms of the LRA. In *Steenkamp and Others v Edcon Ltd*,⁴ the Constitutional Court was empathic that in instances where there is an LRA breach, an LRA remedy must be sought. In this regard it was stated:

The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant, as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA.⁵

[19] The decision in *Ngubeni v The National Youth Development Agency and Another*,⁶ referred by the applicant is distinguishable. In that case, the cause of action relied on by Mr Ngubeni was a contractual right in terms of the specific clause in his contract of employment that entitled him to an enquiry

⁴ 2016 (3) SA 251 (CC); see para 130 where it is stated: 'The scheme of the LRA is that if it creates a right, it also creates processes or procedures for the enforcement of that right, a dispute resolution procedure for disputes about the infringement of that right, specifies the fora in which that right must be enforced and specifies the remedies available for a breach of that right.'

⁵ *Supra* at para 137.

⁶ (2014) 35 ILJ 1356 (LC).

prior to a lawful termination of his contract of employment, not an unfair dismissal dispute, as pleaded in the present case. In the recent decision in *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union and Others*,⁷ the LAC warned that it is not open to a court to conflate the two causes of action.

[20] Also the decision in *Donato v MEC for Health and Welfare Limpopo Province and Others*⁸ relied on by the applicant is equally distinguishable. The applicant, Cuban doctor, in that case was not aware of the terms of the Cooperation Treaty that was applicable then, in 2003. In this instance, the terms of the current Cooperation Treaty are specifically referred to in the CSMC Agreement. But most importantly, in *Donato*⁹, like in *Ngubeni*¹⁰, the applicant's cause of action was purely contractual.

[21] I hasten to mention in passing that in terms of the Cooperation Treaty, the Public Service Act¹¹ and the LRA are not applicable to the employment of Cuban doctors. Even so, I prefer not to express a view on the conflicting clauses in the contract of employment and the Cooperation Treaty in this regard as it is for another forum to traverse.

Points in limine

[22] I do not think that much turns on the dispute between the applicant and the Cuban Embassy and/or the CSMC, SA Agreement given my findings above. Accordingly, the respondents' *point in limine* on non-joinder of the Cuban Embassy cannot be upheld. Similarly, the non-joinder of the DIRCO, NDOH, HPCSA and DOHA.

[23] With regard to urgency, I am satisfied that the matter is urgent. The applicant is a foreign national who may be facing deportation from South Africa given the decision by the Cuban Embassy to cancel her official passport.

Conclusion

⁷ (2018) 39 ILJ 546 (LAC) at para 16.

⁸ (J507/03) [2003] ZALC 71 (10 June 2003).

⁹ *Supra*.

¹⁰ *Supra*.

¹¹ Act 103 of 1994 as amended.

[24] In all the circumstances, this Court lacks jurisdiction to entertain the matter. As such, the application stands to be dismissed.

Costs

[25] I am not persuaded that the applicant should be burdened with costs given the set of circumstances in this case. In any event, costs do not necessarily follow the result in this Court.

[26] In the circumstances, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate M Hugo

Instructed by : Fabricius & Engelbrecht Attorneys

For the Respondent: Advocate S Nhlapo and S Mahlangu

Instructed by: The State Attorney, Johannesburg

LABOUR COURT