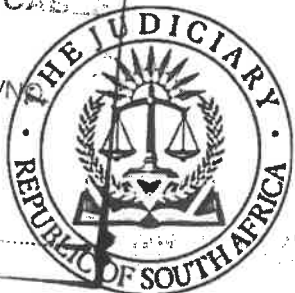


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08/03/2021
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable

Case no: J173/21

In the matter between

M B TABANE

Applicant

and

T KGARE

First Respondent

RAILWAY SAFETY REGULATOR

Second Respondent

B J NOBUNGA

Third Respondent

Heard: 2 March 2021

Delivered: Date delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be Monday 8 March 2021.

Summary: Urgent application

JUDGMENT

COETZEE AJ,

1. This is an urgent application in which the applicant in her notice of motion asks for the following relief:

"That the first respondent be ordered and directed to comply with the resolution of the Board of Directors Railway Safety Regulator taken during its special meeting sitting on Wednesday, 10 February 2021, recorded in the second bullet of paragraph 7.19, stating that:

"An extension be granted to the probation of the Company Secretary for a period of 3 months".

2. The applicant also asks for an order that the first respondent be ordered and directed to comply with the above order within 24 hours of the order being made and/or served upon her.
3. The applicant was appointed on a fixed term contract effective 1 August 2020 and signed a contract to that extent on 21 October 2020.
4. In the offer of employment, it is stated that pursuant to section 2.1 of the amended Conditions of Service the applicant would be on probation for a period of six months.
5. She further pleaded that also clause 4 of the contract of employment provided that the employee would serve a probationary period of six months during which she would be assessed as to their suitability for continued employment.
6. The Board of the second respondent adopted a Probation Policy for the organisation which applied to all newly appointed employees. In terms of clause 6.4 of the policy all new employees must serve the six months' probation. Management would conduct a mid-term probation review after three months.
7. The contract of employment incorporated all the policies, including the one on probation, as part and parcel of the employment conditions.
8. The Board also adopted a Performance Management Policy that applies

only to those employees who have successfully completed probation.

9. The applicant further pleaded that clause 12.4 of the Board Charter provides that the company secretary, the position that the applicant enjoyed, should report to the Board and its **chairperson** on all statutory duties and functions relating to the Board and regarding other duties to the CEO.
10. The applicant contends that the first respondent is the responsible manager driving the implementation of the Probation Policy regarding the applicant but that she has failed in their responsibility to implement the provisions of the policy.
11. In terms of clause 12.5 of the Board Charter the Board must assess the performance of the company secretary. She contends that as she had a dual reporting responsibility her performance should have been assessed by both.
12. The acting CEO requested the applicant to complete a performance agreement although it is clear that the Performance Management Policy was not applicable to the applicant who had not yet completed her probation period. In addition, the human resources Department has not provided her with the necessary template and job profile.
13. On 29 January 2021 the acting CEO by letter informed the applicant by notice of the expiry of probation. In the letter the acting CEO relies upon the fact that the applicant allegedly did not cooperate regards the conclusion of the performance agreement. She also accuses the applicant of failing to honour a meeting request for a mid-term review of her performance. Therefore, her employment would not be confirmed or extended at the end of the probation period. As a result, the applicant's employment was effectively terminated, according to the acting CEO on account of not having successfully completed her probation period. The last day of work would be 5 February 2020 (which should be 2021).
14. Contrary to clause 1.6 of the Charter regulating the conduct of the

directors she failed to consult with them before terminating her services.

15. This, according to the applicant, was contrary to the provisions of the Probation Policy and the Board charter, both of which form part of her conditions of employment.
16. She took the matter further on 1 February 2021 by forwarding a memorandum to the chairperson of the Board requesting an intervention. The acting CEO on 3 February 2021 informed the entire staff of the termination of her employment and shortly thereafter locked out the applicant from the system.
17. The Board held a special meeting on 10 February 2021 specifically to discuss the position of the applicant. The Board resolved as follows: "an extension be granted to the promotion of the company secretary for the period of three months"
18. She sets out the reasons for urgency. Although the respondents dispute urgency it is clear that she acted with diligence.
19. She submits she had a clear right to work and to employment without undue interference. Amongst others she contends that she has a right to equality which includes the right not to be unfairly discriminated against and a right to human dignity and privacy.
20. She fears that her right to fair labour practices is interfered with and that she is treated like a dismissed person whereas the board has resolved that the probation be extended. In addition, the acting CEO applied the Performance Management Policy to her which was not applicable to the applicant.
21. She contends that she has no other remedy.
22. The respondents took issue with the applicant.
23. Firstly, that this is not an application in terms of the BCEA (section 77) and therefore the Court does not have jurisdiction. Nowhere in the

founding affidavit is there any reference to this section. Secondly, if it is such an application, there is no allegation of any breach of contract or the section of the contract allegedly violated. Neither can the applicant rely upon section 157 or 158 of the LRA.

24. A further submission is that once the contract has expired, the Board is not legally in a position to extend a contract that is not in existence anymore. It is also submitted that the resolution of the board does not amount to an extension of the contract that the acting CEO had to implement. It is merely a resolution that is ineffective until such time as it has been given effect to.

25. The respondents also took issue on the basis that it is an application for an interdict in an instance where the applicant has not proven a clear right as she merely relied upon the Board resolution. This court, according to the respondents does not have the jurisdiction to give effect to a Board decision.

Analysis:

26. The applicant has not specifically pleaded that she relied upon the BCEA. The authorities that the respondents relied upon, do not require of an applicant to refer to the BCEA provided the facts and allegations show that it is a contractual matter. What the authorities require is that the allegations contained in the founding affidavit must make it clear that the case relates to a matter that resorts under section 77 of the BCEA.

27. In this matter the applicant explicitly referred to a contract of employment with two or three remarks about an unfair labour practice or unfair dismissal. It is clear from a conspectus of fact that she relies upon a contract and an alleged breach thereof.

28. The respondents rely upon *Shezi v SA Police Service & others* for the proposition that the BCEA should have been referred to in the founding affidavit with reference to par [15]":

"But an applicant invoking s 77(3) must necessarily plead a case in contract. The applicant's pleaded case is not one that invokes any term of her employment contract, or that alleges a breach of contract on the part of her employer. Ordinarily, pleadings in a claim of this nature would assert the term of the contract relied upon, the alleged breach of that term by the employer, record an election to enforce the contract by way of specific performance, and seek consequential relief. This is not the case made by the applicant."

29. On a reading of the *Shezi*-judgment it becomes clear that all that the judgment said was that the way the cause of action is pleaded must make it clear that the applicant relies upon a breach of contract.
30. The contract incorporates the policy on probation and the policy on performance appraisals. She pleaded as much.
31. In essence her case is that she was on probation and had to be assessed as such. What the acting CEO did was amongst others to terminate her services because she did not during probation completed a performance agreement. The CEO wrongly did so as the performance agreement only applies to those employees who have completed their probation period successfully.
32. A breach of the policy regulating probation constitutes a breach of contract. When she raised this matter with the Board, It resolved to extend the probationary period for another three months. The Board could not have extended the probation period without extending the contract. The Board did so in accordance with the probation policy that provides for an extension of probation.
33. The respondents submit that as it is common cause that the contract was terminated it then becomes impossible to extend an expired contract.

34. The reliance upon *Merafong City Local Municipality v AngloGold Ashanti Limited*¹ for this proposition does not support the respondents. This case concerns permission to establish a township subject to conditions one of which was a time period. When the period of time expired an extension was granted. That was not competent as the relevant functionary had no power to do so. The case does not concern a contract.
35. The *Tasima*-case² also does not assist the respondents as it dealt with an unlawful agreement, being unlawful with regard to all the legislation that had a bearing on the agreement. This is not the case where a lawful contract is extended in terms of a provision of the contract itself.
36. The respondents submit that the extension of the contract by the Board was unlawful as the Board did not follow the prescribed procedures regarding recruitment and selection.
37. The extension of the contract however did not amount to a new contract that had to be advertised and dealt with in terms of the prescribed legislation. It was an existing position with an existing contract provided for a lawful extension.
38. The respondents submit that the Board did not have the power to appoint staff. The Board did not appoint the applicant when taking the resolution. It simply instructed the CEO on a condition of employment of the applicant and that is that the probation period, which is a condition of employment, be extended.
39. In *Fairoaks Investments Holdings (Pty) Ltd and Another v Oliver and Others*³ record dealt with a different scenario from the one that is the subject matter of this application. The Court dealt with a contract that lapsed because of the non-fulfilment of a condition and not with the revival of a cancelled contract. The case is distinguishable on that basis alone.

¹(CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC)

² Department of Transport and Others v *Tasima (Pty) Limited* (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CO); 2017 (2) SA 622 (CC)

³ (2008) JOL 21581 SCA

40. The applicant must succeed with the application as contract of employment has been extended for another three months subject to probation.

41. As far as costs are concerned, I am of the view that costs should not follow the result. The parties are still in an employment relationship.

42. Under the circumstances I make the following order:

- a. The matter is regarded as urgent.
- b. The first respondent is ordered and directed to comply with the resolution of the Board of Directors Railway Safety Regulator taken during its special meeting sitting on Wednesday, 10 February 2021, stating that:

"An extension be granted to the probation of the Company Secretary for a period of 3 months".

- c. The first respondent is ordered and directed to comply with the above order within 24 hours of the order being made.
- d. There is no order as to costs.



Coetzee, AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR APPLICANT: Mr D Mashego of Mashego Attorneys

FOR RESPONDENT: Mr Sandile July of Werksmans Attorneys