REMEDIES OF THE EMPLOYEE IN CASE OF BREACH OF THE EMPLOYMENT CONTRACT

1 Introduction

The subject of this note is the case of *Weweje v The Department of Education* (case 460/2003 [2009] ZAECBHC 3, judgment delivered 24 April 2009). The decision of the court is not in issue, but the case makes for interesting discussion with regard to the remedies available to the employee where there has been a breach of the employment contract by the employer. Often when dealing with breach of an employment contract, issues of possible unfair dismissal of the employee come to the fore. Although the employee (in cases dealing with breach and unfair dismissal) would have the usual contractual remedies available, he is also compelled to use and follow the procedures provided for in the Labour Relations Act 66 of 1995 (LRA). (*Weweje* did not deal with unfair dismissal). Many other situations arise in practice (some of which are also discussed) where the obvious statutory procedures are not applicable. In this note, attention is given to the importance of the structuring of the particulars of claim and the repercussions where the claims of the employee were formulated incorrectly. Possible remedies available to the employee in terms of both common law and legislation are investigated.

2 *Weweje v The Department of Education*

2 1 Facts

In *Weweje* the appeal concerned an educator (the appellant) who commenced teaching at a public school in the Eastern Cape. She did not, however, receive her monthly remuneration as was stipulated in her employment contract for a full twelve months. Instead she received a global amount of R78 311,14, representing her salary for the preceding year. Chetty J described the details of the non-payment of the appellant as bespeaking of "bureaucratic mayhem" which made for interesting reading but were irrelevant to the issues which arose for determination (para 2). The unpaid salary was eventually paid but not in accordance with the employment contract. The issue was the damages that the appellant suffered for the period (12 months) in which her salary was not paid and the consequences of the initial non-payment and breach. The appellant instituted action against the respondents in which she claimed general damages of R250 000. Prior to the commencement of the trial the particulars of claim were amended, the appellant persisting only with a claim for general damages *ex contractu.*

2 2 Decision of the court a quo

The court *a quo* dismissed the appellant's (plaintiff's) claim (per Ndzondo J). As part of its *ratio* it would appear that the appointment of the appellant was held to be unprocedural, irregular and illegal and moreover that the appellant was aware of such facts (para 3). On appeal, Chetty J described the judgment by Ndzondo J as "to say the least, astounding" (para 4). All Ndzondo J had to decide was whether the appellant's action for damages could be sustained. The question of breach was not in issue. Prior to the hearing the respondents amended their plea and not only admitted the contractual relationship between the parties but also admitted that the failure to pay the appellant her emoluments for the period in

question constituted a breach of the agreement. The only matters placed in issue were the foreseeability and *quantum* of damages flowing from the breach (paras 4–5). Since these issues were not correctly addressed by the court *a quo* it was incumbent upon the court of appeal to determine the issues regarding damages (para 7).

2 3 Decision by the court of appeal and analysis of the appellant's particulars of claim

The court stated that in order to decide whether the appellant could succeed in her claim for damages and apply the correct legal principles, it was necessary to have regard to the appellant's particulars of claim (para 7).

Paragraph 6 of the particulars provided details of the contract of employment and the respondent's breach thereof. The appellant averred that in terms of her employment contract she became entitled to receive monthly emoluments. The appellant contended that the provisions of the Employment Equity Act 55 of 1998 (EEA) relating to the payment of emoluments (including benefits such as house subsidies and pension benefits) are applicable. (Unfortunately the appellant neither indicated specific provisions of the EEA nor referred to specific provisions in the employment contract). The appellant also averred that she was entitled to be accorded fair labour practices in terms of section 23(1) of the Constitution (para 8).

In paragraph 7 of the particulars of claim the appellant claimed that non-payment of her monthly emoluments resulted in breach of the contract between the parties, and/or a breach of the statutory duties of the respondent and/or the violation of her fundamental constitutional rights (*ibid*).

Furthermore, the court examined the somewhat lengthy paragraph 9 of the particulars of claim which set out the general damages in the sum of R250 000. The amount of damages was based on psychological and physical pain and suffering, humiliation, anxiety, insult and *contumelia* (para 9) incurred by the appellant because of the breach. It is not necessary to list all the reasons for the claim for damages but for the purposes of further discussion a few will be mentioned (para 9). It was averred that the appellant became compromised by default judgments granted against her for non-payment of debt, she had to approach the magistrate's court to be placed under administration in terms of section 74 of the Magistrates' Courts Act 32 of 1944 and had to appear in the debtor's court. This was argued to be demeaning and humiliating to the appellant. She was subjected to the attachment of her property by the sheriff of the court for unpaid debt. She also had to raise bridging finance by way of loans to meet her and her family's living costs. This was said to be humiliating to the appellant and her dignity was harmed. The appellant was also allegedly being demeaned and humiliated for not being able to pay for basic household necessities for her family, not being able to pay her children's school fees and being deprived of hospital benefits. All of this added to her indignity, concomitant anxiety and apparent suicidal condition (para 9).

The court held that the appellant's cause of action was founded in contract and that the general damages claim in terms of the contract related to the mental anguish, pain and suffering of the appellant because of the breach thereof (para 10). The question was therefore whether the admitted breach of contract gave rise to a claim for damages as was applied for (para 11). The court held that there was ample authority to the contrary (*Victoria Falls and Transvaal Power Co Ltd*

v Consolidated Langlaagte Mines Ltd 1915 AD 22; *Administrator, Natal v Edouard* 1990 3 SA 581 (A); *Jockie v Meyer* 1945 AD 354) (paras 11–13).

The court made a subsequent order that, given the current status of our law, no damages for the mental anguish, humiliation and contumelia suffered by the appellant may in law be awarded for breach of contract (para 14). The appeal was dismissed with costs (para 15).

4 Commentary

4 1 Common-law remedies of the employee for the breach of an employment contract

The purpose of this note is not to comment on whether the appellant should have received an award for damages based on mental anguish and humiliation. It is clear that an action for pain and suffering cannot be brought for breach of contract. The question is rather whether the appellant could have succeeded in her claim for damages under an employment contract if the basis of her claim was different. In other words, if her claim had been based on damages for patrimonial loss for breach (the loss of money and things that have a monetary value). Such damages may be recovered irrespective of the form of breach or the availability of other remedies (Visser, Potgieter, Steynberg and Floyd *Visser and Potgieter's law of damages* (2003) 179). The object of the award is to place the plaintiff in the position she would have been in had the defendant performed properly and timeously. It is my contention that, had the particulars of claim been worded in a different manner, the court would have awarded (at least in substance) the amount of damages claimed. There existed non-payment of emoluments including all the benefits connected thereto for over a year. Surely because of the continuous non-payment on the part of the respondents, the appellant was unable to pay the daily living costs of her and her family. This resulted in various default judgments against her. The legal costs and interest, for example, relating to these judgments could be included in the claim for damages. Any interest payable on loans, expenses with regard to her children's school fees, medical expenses which would have been paid had she received the benefits that formed part of her emolument in terms of the breach of an employment contract would also form part of such a claim. She would have been in a much different position if her salary had been paid monthly in terms of her employment contract.

Although legislation regulates almost every facet of the employment relationship, common-law remedies based on breach of an employment contract have been awarded in the past. In *Fedlife Assurance Ltd v Wolfaardt* 2001 *ILJ* 2407 (SCA) paras 19–24 the Supreme Court of Appeal held that if an employee cannot recover his or her full common-law damages via the procedures provided for in terms of, for instance, the LRA, the employee is entitled to recover the balance via the civil courts. Nugent AJA held that a contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law (2411). It should be noted that the controversial constitutional case of *Chirwa v Transnet Ltd* (2008) 29 *ILJ* 73 (CC) brought about some uncertainty with regard to the jurisdiction of the High Court to hear claims based on breach of the employment contract. This uncertain position has, however, been rectified by the recent judgments of *Nakin v MEC, Department of Education, Eastern Cape Province*

(2008) 29 *ILJ* 1426 (E) and *Makambi v MEC, Department of Education, Eastern Cape Province* (2008) 29 *ILJ* 2129 (SCA) where the concurrent jurisdiction of the high courts and the labour courts was confirmed. The position as regards to en employee's rights to claim damages, as opposed to statutory compensation following breach of an employment relationship by the employer, was also clarified.

Specific performance as a common-law remedy in the case of breach was awarded in *Nationwide Airlines (Pty) Ltd v Roediger* 2008 1 SA 293 (W). The court held that the general rules that a plaintiff was entitled to enforce his contract (ie to claim specific performance) applied as much to employment contracts as to any other type of contract. The court had a discretion in determining whether or not to grant specific performance and made its determination on the facts of each case (para 21). The court also held that the applicant would be prejudiced if the order was not granted (para 29).

In *Everson v Moral Regeneration Movement* (2008) 29 *ILJ* 2941 (LC) the court noted that the mere repudiation of an employment contract does not in itself constitute sufficient conduct for a party to approach a court with a claim for damages on the grounds of breach. Repudiation itself does not terminate the contract. If a party ignores the repudiation, it has no influence or effect on the rights and obligations of the parties. The party needs to accept the repudiation and elect either to seek specific performance or to regard the contract as cancelled and then seek damages (2942). The court further held that the employee's conduct in continuing to render her services and working a whole month after repudiation was a failure to accept the repudiation and therefore there was also no cancellation of the contract (2942). The employee in this case did not have a claim for damages.

4 2 Common-law duties of the employer in an employment relationship

It is my contention that the breach in *Weweje* established a clear breach of the employer's common-law duty of good faith and trust. In *Council for Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (A) 691 it was held that

> "in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties".

Bosch "The implied term of trust and confidence in South African labour law" 2006 *ILJ* 28–47, explains that in South Africa the utility of the implied terms of good faith and trust would have to be extended to apply during the employment relationship as well. He adds that instead of the employee waiting for the conduct of the employer to become intolerable before redress can be taken, it would be more satisfactory to bring a claim for damages for breach of the implied terms of trust and confidence during the course of the employment relationship (*ibid*).

The possible breach of the employer's duty to act fairly should also be considered. Thompson and Benjamin *South African labour law* 1967 (loose-leaf) E1-38 state that such a duty appears to have been the "lodestar" for the Supreme Court of Appeal in *Old Mutual Life Assurance Ltd v Gumbi* 2007 *ILJ* 1499 (SCA) and *Boxer Superstore Mthatha v Mbenya* 2007 *ILJ* 2209 (SCA) where it was held that the common law has developed to include a right to a pre-dismissal hearing. This was also firmly endorsed by the Supreme Court of Appeal in

Murray v Minister of Defence [2008] 6 BLLR 513 (SCA) 1369 where it was held that "the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees – even those the LRA does not cover" (Thompson and Benjamin E1-39). It has been confirmed by more recent judgments that the contract of employment now imposes on all employers a general duty to treat employees fairly (*Tsika v Buffalo City Municipality* (2009) 30 *ILJ* 105 (E), *Mogothle v Premier of the Northwest Province* (2009) 30 *ILJ* 605 (LC)).

4 3 Breach of the respondent's statutory duties in terms of the particulars of claim

For the sake of completeness a short discussion follows with regard to the alleged breach of the respondent's statutory duties in *Weweje* as per paragraphs 6 and 7 of the particulars of claim (see also 2 3 above). Paragraph 6 of the appellant's particulars of claim alleged a breach on the part of the respondents for not complying with their duties in terms of the provisions of the EEA. As mentioned earlier, the appellant never referred to particular provisions of the EEA. Section 6(1) of the EEA makes it clear that discrimination based on one or more of the following grounds should exist and includes discrimination based on race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture. language or birth. It is difficult to imagine that the appellant in *Weweje* would have succeeded with a claim under the realm of the EEA unless she could claim discrimination under an "unspecified ground" as was the case in *Stoje v University of KZN* [2007] 3 BLLR 246 (LC). In the more recent case of *Chizunza v MTN (Pty) Ltd* (2008) 29 *ILJ* 2919 (LC) the court found that a claim based on "unspecified grounds" was not proved (para 17).

The appellant also claims a breach by the respondents because of its violation of the appellant's fundamental constitutional right to fair labour practices in terms of section 23(1) of the Constitution (para 8). The right to fair labour practices as provided for in section 23(1) is given effect to by the provisions of the LRA. Section 186(2) of the LRA provides an exclusive list of unfair labour practices whilst the employment relationship is still in existence. The provisions of section 186(2) therefore could not be applied in *Weweje*. The Constitution's ambit in terms of section 23(1) and the right to fair labour practices are unclear and broad. The appellant in my opinion would not have succeeded on this basis and this should not have formed part of her particulars of claim.

5 Conclusion

The statutory remedies available to the appellant in *Weweje* were limited or virtually non-existent, emphasising the importance of common-law remedies.

Unique circumstances still arise where the employment contract cannot be dealt with in isolation with regard to labour legislation. A broader vision is needed to include different common-law remedies. In some instances employees who have been prejudiced by the breach of an employer in an employment contract have no other choice but to take the less-travelled road. In *Weweje* the employee was prejudiced by the employer's breach of contract and common-law remedies should always apply in such a case. It could also be argued that the employee was prejudiced by the incorrect drafting of her particulars of claim and

by not applying to her claim the remedies applicable under breach of contract and the incurrence of patrimonial damages. The mere payment of the performance (emoluments for over a year) for work already completed by way of a global amount by the employer was not sufficient. Could it not be argued that, as the court affirmed in *Nationwide Airlines (Pty) Ltd v Roediger* 2008 1 SA 293 (W) para 29, it could be prejudicial to the employee *not* to grant such an order for the partimonial damages suffered had it been claimed? It is my contention that the appellant had and would have been prejudiced.

The common-law duties of the employer, such as the duty of good faith and fairness (keeping in mind that the duty of good faith is a mutual one), also still have an important role to play in the employment relationship. The duty of the employer to act fairly was reafirrmed in recent judgments (see 4 2). I am confident that, because of the court's approach, these common law duties will be given more attention in future. In *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 *ILJ* 1024 (W) the court was prepared to accept that fairness plays a role in contractual disputes between employers and employees. It also held that the employer and employee voluntarily enter into an employment relationship and that this fact may give rise to an implied term of good faith while the relationship exists.

Finally, I am in agreement with Cheadle "Regulated flexibility: Revising the LRA and the BCEA" 2006 *ILJ* 663 paras 39–43 who argues for an acknowledgement of remedies that already exist under contract or under the common law when dealing with the "unbalanced employment relationship".

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