Breach of the employment contract

By Jan du Toit

A breach of contract by either party entitles the other party to either accept the breach or sue for damages, or to reject it and sue for specific performance. A material breach of contract constitutes repudiation where it evinces an intention on the part of the guilty party not to continue with the contract. A breach of a material term constitutes repudiation, whether the term is express, tacit or incorporated. Repudiation by a party does not itself terminate the contract, it merely gives the innocent party the choice of accepting it and bringing the contract to an end; or rejecting it and seeking an order for specific performance, which effectively declares the contract of full force and effect[1].

In Fijen v CSIR [1994] 8 BLLR 8 (LAC) the Labour Appeal Court dealt with the question of repudiation in a situation where the appellant, a senior employee, was found not guilty on charges of alleged misconduct after an enquiry chaired by one Swart at which the appellant's immediate superior was the main witness. Following the enquiry, Swart held a discussion with the appellant, the contents of which led the appellant to conclude that Swart believed he was guilty.

The appellant subsequently indicated in a letter that he considered the relationship between himself and the respondent to be permanently damaged and suggested that the relationship be terminated by way of a voluntary redundancy coupled with a suitable financial package. The respondent replied contending that it did not consider the relationship permanently damaged and stating that redundancy would not be considered. In a further letter, the appellant reiterated that he had lost faith in Swart and his immediate superior and that he considered the working relationship permanently damaged.

The respondent then advised the appellant that it considered the tenor of his correspondence to constitute a repudiation of his contract of service which it accepted. Voluminous correspondence ensued although the respondent's stance remained unaltered and the appellant's services were terminated. The Industrial Court held that although the appellant had not repudiated his contract, the termination had been fair as it was based upon a fair reason and, in light of the voluminous correspondence between the parties, the *audi alteram partem* principle had been observed.

In an appeal to the Labour Appeal Court, the court first considered whether in fact the respondent had dismissed the appellant. In the court's view, the appellant at no stage, either by words or conduct, evidenced a clear and unambiguous intention not to continue with his contract of employment or further did not act in such a way so as to lead a reasonable person to such a conclusion. Having found that the respondent dismissed the appellant, the court turned to consider whether that dismissal was substantively fair. The court had little difficulty finding that the respondent purported to terminate the appellant's contract on the basis of an acceptance of his repudiation and consequently never purported to give him notice of dismissal or apply its mind to the question as to whether a fair and valid reason existed for the taking of such a step. The court also expressed the view that as the respondent had failed to indicate categorically in its correspondence that there existed no mechanism in terms of which the appellant could obtain financial compensation, there existed no justification for holding, as the Industrial Court had, that the appellant would have continued in not taking no for an answer.

In the court's view, the evidence made it clear that the respondent had taken no real steps to reinstate a normal working relationship. In concluding that the appellant's dismissal was substantively unfair, the court found that the appellant was entitled to propose termination of his services by agreement, and that the manner in which he went about it did not constitute a repudiation of his contract and accordingly did not amount to a fair reason for dismissal.

Forms of breach

One needs to distinguish between serious (or fundamental) and less serious forms of breach. Theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract. The cases have in the past emphasized, with good reason, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanor. (*Toyota South Africa Motors (Pty) Ltd v Radebe& others [2000] 3 BLLR 243 (LAC))*

Remedies of the employer

Summary dismissal (cancellation of the contract)

Summary dismissal means the termination of the employee's services without giving notice – the cancellation/termination of the contract. The employer is entitled to terminate/cancel the contract (dismiss the employee) when the employee has committed a material breach of contract.

Nyathi v Special Investigating Unit [2011] 12 BLLR 1211 (LC)

Can the respondent terminate the applicant's employment contract lawfully?

I will now turn to the next question, namely, whether the respondent is entitled to terminate the contract lawfully. I have already referred to the fact that the respondent is of the view that because the applicant repudiated a material provision of the employment contract by refusing to submit to a polygraph examination, as she is contractually obliged to do, the respondent is entitled to accept her repudiation of her employment contract and terminate her contract employment. The applicant's case is that the respondent may only terminate the contract by following the procedure as contained in the disciplinary policy.

Before I turn to the merits of the argument, it is relevant to point out that, although the applicant has been informed that the respondent accepts what they regard as a repudiation of her contract of employment, the respondent has yet to terminate her contract of employment. What is, however, clear from the papers [is] that the respondent is intending to terminate the contract on the basis of the breach and not to do so by following procedures as set out in the disciplinary policy. As already pointed out, the applicant is seeking a (final) order from this Court interdicting the respondent from terminating the applicant's employment contract unlawfully. The respondent argued that it is entitled to elect to deal with the refusal of the applicant to submit to a polygraph examination as a breach of a material term of the contract and terminate the contract in terms of the provisions of the contract and not to deal with it as a form of misconduct, which would then have to be dealt with in terms of the Disciplinary Policy. Mr *Bruinders* accepted, and correctly so, that a breach of a material term usually also constitutes misconduct. He was, however, of the view that where an employee is contractually (specifically) obliged to obey certain instructions, the refusal or failure to do so may be dealt with in contractual terms as a breach of the contract and not as misconduct (which must be dealt with in terms of the Disciplinary Policy). In this case, as already stated, the applicant is contractually obliged to submit to a polygraph examination.

I do not intend dwelling on the issue of the requirement of a polygraph examination. Suffice to point out that the court accepts that the respondent has sound reasons for including such an obligation, to submit to, *inter alia*, a polygraph, in light of the core business and functions of the SIU which is to investigate corruption and maladministration in government departments and State institutions. The court also accepts that although some of the measures, such as having to submit to a polygraph examination, having to provide urine and blood samples, may seem to be intrusive, these measures are reasonable in the context of an organisation such as the respondent (provided, of course, that these measures are applied fairly and only when reasonably necessary to do so).

The law of contract and the law of unfair dismissal in terms of the LRA

In order to decide this issue, it is necessary to give a brief overview of the status of the contract of employment and the rights that a contracting party has in terms of the law of contract *vis-à-vis* the right not to be unfairly dismissed. I do not intend giving a detailed exposition of the jurisdictional issues that arise when an employee decides to proceed with a claim on the basis of contract as opposed to proceeding with a claim based on a breach of the provisions contained in the Labour Relations Act 66 of 1995 ("the LRA"). This issue has been debated in various cases particularly in the context of a claim based on the right not to be unfairly dismissed (which flows from the LRA) as opposed to a claim for breach of contract.

For purposes of this judgment, it is accepted that the employment relationship has a contractual character although labour legislation has supplemented the deficiencies of the common-law principles particularly in respect of the termination of a contract of employment with the import of the requirement of fairness. The contract of employment and the principles of the law of contract, therefore, remain intact in respect of the question whether a contract is lawful and whether the contract of employment was lawfully, as opposed to fairly, terminated.

The act of terminating the employment contract contemplates both the termination of the contract through a right in terms of the contract (or where one party breached the contract, or by repudiating a material term of the contract, or by repudiating the whole of the contract) as well as the termination of the contract by following the guidelines encapsulating the requirement of fairness as contained in the LRA

(and more in particular in the Code of Good Practice: Dismissals in Schedule 8 of the LRA). A distinction must therefore be made between the lawfulness and the fairness of the termination of the contract of employment. The requirement of a "fair" termination does not, therefore, suggest that employers need not adhere to the requirements in respect of the lawful termination of the contract of employment. It cannot therefore, in my view, be said that the LRA has completely overtaken the common-law principles relating to the cancellation and repudiation of the contact. The fact that a contract of employment contemplates both a lawful and a fair termination was described as follows by the Appellate Division (as it then was) in *National Union of Mineworkers of SA v Vetsak Co-operative Ltd & others*, where the court held as follows:

"The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair – and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair."

It is further accepted that an employee has rights both in terms of the common law and in terms of the LRA in the event of a premature termination of a fixed-term contract, or in the event of other dismissals, and that the employee has a choice whether or not to pursue his common-law rights to enforce a claim for contractual damages in the event of a termination of the contract or claiming on the basis of an unfair dismissal because of a lack of substantive and/or procedural fairness. In this regard the Labour Court in *Jonker v Okhahlamba Municipality & others* stated as follows:

"A breach of the common law contract of employment, in so far it has not been supplanted by legislation, may also be actionable under the Constitution. Remedies for such breaches must be derived from the LRA itself . . . The interface between the Constitution, labour legislation and the common law depends on the right claimed and how it is pleaded."

It is, therefore, for the employee to choose whether or not she wishes to base her claim on contract or on the principles embodied in the LRA and to make out a case for the relief sought in the pleadings.

In principle, therefore, an employer has the right contractually to terminate the contract. Whether the termination will also be fair is an entirely different question and not relevant in these proceedings. Where a contract is terminated unlawfully it will usually also constitutes an unfair termination. The reverse is, however, not always true.

The only remaining question is whether there are facts before this Court to indicate that the respondent is intending to interdict the contract unlawfully.

I am firstly persuaded on the papers that it is a material term of the contract to submit to a polygraph test and that the applicant by refusing to do so has repudiated a material term of the contract entitling the respondent to terminate the contract. As already pointed out, it is not at issue here whether or not the termination would be fair. I am, therefore, not persuaded by the submissions advanced on behalf of the applicant that this refusal does not go to the root of the agreement and therefore not material. I am persuaded in light of the facts contained in the answering affidavit that it is neither unreasonable nor unlawful – taking into account the nature of the business of the respondent and the high premium placed on integrity in light of the SIU's functions – for the respondent to require of an employee to submit to a polygraph test.

She had, after all, contractually agreed to do so. The refusal to undergo a polygraph test may also constitute misconduct and may even be a ground for dismissal. However, as already pointed out, it is not at issue here whether or not the respondent can charge the applicant with misconduct in that she had refused to submit to a polygraph test. At issue here is whether or not the respondent can lawfully terminate the contract because the applicant had repudiated a material term of her contract and whether or not certain procedures as contained in the disciplinary policy must be followed.

The applicant argued that the respondent elected to hold an inquiry (in terms of the Disciplinary Code) and therefore elected to deal with the refusal as misconduct. Accordingly, the respondent cannot follow the procedure it followed, namely, to require the applicant to make representations as to why the contract should not be terminated. The court was also referred to the fact that a complaint was filed in

terms of clause 10 of the Disciplinary Code with the result that the respondent thereafter had to follow the procedures set out in the disciplinary policy (clause 10.9). In essence, the applicant argued that the applicant elected to follow the misconduct route and is therefore bound by this election.

I am not persuaded by this argument. I have already indicated that the termination of a contract of employment envisages two acts: one in terms of the contract and one in terms of the circumstances provided for in the LRA. Where the employer treats the repudiation as misconduct, it must follow the procedures contained in the Disciplinary Code. The contract in this case is silent on the procedures that must be followed when terminating the contract. It does not provide for a contractual right to a hearing before termination (for breach of a material term of her contract). What she does have is a contractual right to a fair procedure as contained in the disciplinary policy where the employee is seeking to terminate the contract on the basis of misconduct. Put differently, the Disciplinary Policy provides for a hearing in the event of misconduct. It does not provide for a hearing before termination for breach of the employment contract.

At issue here is whether the court should interdict the respondent from lawfully terminating the contract. I am not persuaded that the applicant has made out a case for the relief sought in circumstances where it appears from the facts that the applicant has breached a material term of her contract and where it appears that the respondent is terminating the contract in terms of the provisions of the contract. What remain, however, intact are the applicant's remedies under the LRA and should the contract of the applicant be terminated lawfully, she may still refer the dispute pertaining to an alleged unfair dismissal to the appropriate forum, should she wish to do so. By refusing to grant an interdict to prevent the respondent from terminating the contract lawfully, the applicant is therefore not prevented in any way from exercising any rights she may have under the law of unfair dismissal.

In order to succeed, the applicant had to show that she has a right to a disciplinary hearing as set out in the disciplinary policy before her employment contract is terminated for breach of a material term in terms of the contract. I am not persuaded that the applicant has made out such a case.

Specific performance

The courts are unlikely to order specific performance against an employee who has breached the contract. This is illustrated in *Santos Professional Football Club (Pty) Ltd v Igesund& another [2002] 10 BLLR 1017 (C)* where the employee (a professional football coach) wished to leave the services of the employer because he had secured a more favorable contract with another club. Since the relief sought by the applicant constituted an order of specific performance, the critical issue was whether such an order was appropriate in the circumstances. In *Troskie en 'n Ander v Van der Walt* 1994 (3) SA 545 (O).a full bench upheld the decision of the court *a quo* refusing an order of specific performance in respect of a contracted rugby player. Wright J at 552–553 commented as follows:

"Die aard van die Dienste wat in die onderhawigesaak gelewer moes word is die speel van rugby vir 'n besondereklub. Die lewering van die betrokkediens is nie alleenafhanklik van die persoonlike entoesiasme, bereidwilligheid, en deursettings vermoë van die besondere speller nie, maar ook is daaraan die betrokked dienste 'n groot mate van kundigheid, bedrewenheid en vaardigheid van persoonlike aard verbonde en wat afhanklik sal wees van die besondere speler se spesifieke eienskappe en ook sy verhouding met die klub vir wie hy rugby speel. Dit is sterk te betwyfel of daar in die besondere omstandighede van hierdie saak ooit 'n bevel tot spesifieke nakoming gepas sou kon wees, heeltemal afgesien van die feit dat die amateurskode van die Internasionale Rugby/Voetbalraad ook nag van toepassing is."

As in the *Troskie* case (*supra*) – and I tried to point this out at the very beginning of argument in this matter in this instance also the performance of the service is dependent upon ability, efficiency and skill of a very personal nature. The courts have previously held that the reasons militating against an award for specific performance of a contract of employment were so compelling that they were generally regarded as a rule of law, that specific performance of such contracts would never be granted. Though it is today not an inflexible rule of law, the compelling considerations why such an order should not be granted remain weighty (see *National Union of Textile Workers v Stag Packings (Pty) Ltd & Another* 1982 (4) SA 151 (T) at 158).

Compelling reasons not to enforce specific performance on the part of an employee include a disapproval of forced labour, the fact that damages appears to be a sufficient remedy for an employer and simply a reluctance to interfere with an employee's right to freely exercise his or her skills or

profession (see in this regard the authors A Rycroft & B Jordaan *A Guide to South African Labour Law* 2ed at 102). As Rosenberg has correctly pointed out, these policy considerations find strong resonance and echoes in the constitutionally enshrined rights to freedom of movement, the right to choose a profession or occupation freely and the right to dignity. Ultimately, the Court has discretion whether to grant specific performance. I must exercise this discretion judicially. There are in these instance practical considerations which deter me from granting the order. The nature of the services is of such a highly personal nature that it would be virtually impossible to determine whether the first respondent is functioning optimally. He no longer wishes to work for the applicant. Should I compel him to be their coach for a further 12 months? Would this not compromise his dignity? He has problems with regard to his family which may or may not be resolved if he moves on to another team.

Furthermore, first respondent's relationship with applicant's management has deteriorated. There has been a great deal of publicity, perhaps fuelled to some extent by the applicant or its lawyers, which has undoubtedly exacerbated the ill-feeling between the parties. I do not believe that in these circumstances they will be able to restore a working relationship, let alone the intimate relationship of that of a coach and his team.

Damages

An employer is entitled to claim damages from an employee whose behaviour caused him damage.

Remedies of the employee

Cancellation of the contract

Material breach of contract by the employer allows the employee to resile from the contract. Examples include a reduction in status, the non-payment of remuneration etc. In *Eagleton & others v You Asked Services (Pty) Ltd [2008] 11 BLLR 1040 (LC)* the court pointed out that "where an employer breaches a material term of the contract, such as not paying an employee which is a material and fundamental term of the contract, the employee has an election. In *Coetzee*, *supra*, at 1332F, the Labour Court pointed out that the innocent party has a choice whether to cancel the contract or to uphold the contract and enforce it. If the employee does not elect to terminate the employment contract by resigning, he or she will not be entitled to claim a constructive dismissal as an essential element of a claim of constructive dismissal will not be present. In order to place an employer in a position to formulate a defense against a claim of constructive dismissal it is therefore, necessary to make a factual allegation in the statement of claim to the effect that it was the employee who had terminated the contract of employment by resigning."

"One can find dicta to the effect that breach going to the root or repudiation in themselves terminate the contract and that the innocent party's 'cancellation' is no more than an acceptance of this position. But such language must be taken to be no more than a figure of speech, intended to convey the idea that the termination of the contract is a process started off by the breach or repudiation. If it were literally true that breach or repudiation terminated the contract the innocent party would have no choice in the matter and the guilty party could insist that the results of termination follow, but it is trite law that he cannot do so and the choice lies with the innocent party whether to cancel and claim damages or keep the contract in being and enforce it" (*RH Christie The Law of Contract 2ed Butterworth's 1991 at 635*).

Specific performance

Due to the personal nature of a contract of employment, the courts will not order specific performance where a contract was breached. It was decided in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd & Another 1082 4 SA 151 (T)* that specific performance (reinstatement) was not excluded as a remedy for the employee. The fact that the relationship between the parties has broken irretrievably broken down is one of the factors which may be taken into consideration when the decision to reinstate or not is made.

Coetzee & another v Pitani (Pty) Ltd t/a Pitani Electrification Projects & others [2000] 8 BLLR 907 (LC)

After the first respondent experienced financial difficulties, the applicants' salaries were reduced. They were subsequently "laid off" without pay until conditions improved. The applicants subsequently contacted the first respondent and were informed that the situation had not changed. The first respondent denied that the applicants had been dismissed.

The Court held that although the first respondent had acted unfairly towards the applicants by failing to assure them that they had not been dismissed, and by not consulting them prior to taking the drastic

action of suspending them without pay, the applicants had not been dismissed. However, the respondent had breached its obligations under the Act and the contract of employment. In terms of the law, an employer is not permitted to suspend employees without pay. This amounted to a breach of contract. In terms of the common law, such a breach gave the applicants a choice to either cancel the contract or enforce it. However, the breach did not in itself terminate the contact. The applicant would have had to exercise their right to terminate the contract by resigning. They had not done so. The applicants had accordingly failed to prove that they had been dismissed.

The Court pointed out, however, that the applicants could bring an action for constructive dismissal or sue for contractual damages. However, because the applicants had made it clear that they were not relying on constructive dismissal, that claim could not be pressed in the current proceedings.

The application was accordingly dismissed.

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[1] Grogan J, 2010. Employment Rights, 69