

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 25604/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

12 AUGUST 2016

FHD VAN OOSTEN

In the matter between

VUYO MVOKO

APPLICANT

and

**THE SOUTH AFRICAN BROADCASTING
CORPORATION SOC LTD**

RESPONDENT

Contract - applicant employed by respondent in terms of written agreement - applicant temporarily suspended by respondent pending investigation into complaint - applicant urgently seeking re-instatement of his services - impropriety of - respondent having acted in terms of the agreement which provides for temporary suspension pending investigation - Constitutional challenge misconceived - application dismissed.

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] On 26 May 2016 the SABC published a controversial and widely criticised media statement to the effect that the SABC will no longer broadcast footage of violent protests and destruction of public property during protests. The statement caused significant public uproar and was soon disapproved of by way of a directive issued by ICASA, pursuant to a complaint lodged with the Complaints and Compliance Committee in respect of which a public hearing was held, for the SABC to withdraw its resolution. But there it did not end: a number of SABC employees (initially four and eventually seven), were alleged to have breached their employment contracts resulting in disciplinary steps being taken against them and their dismissal. Then, not unexpectedly, urgent applications were launched against the SABC in the Labour Court in which orders for their reinstatement were granted. In addition, an application to the Constitutional Court for direct access to that court, based on a constitutional challenge to the SABC's decisions, is pending.

[2] In essence the common thread underscoring the issue raised in the litigation concerns the constitutionality, lawfulness and validity of the decisions of the SABC to institute disciplinary proceedings against the applicants and the termination of their contracts of employment. This application, which comes before this court by way of urgency, is yet another case in this line of litigation. In regard to the Constitutional Court case the applicant in the present matter, Mr Mvoko, has joined forces with seven other applicants, as the eighth applicant. I should mention at this stage already, that the SABC contends that the applicant, in essence, seeks the same relief in both matters which constitutes the ground for raising a special plea of *lis alibi pendens*, to which I shall revert.

The applicant

[3] Although Mr Mvoko has made common cause with the other applicants in the Constitutional Court application, he is strictly speaking not an employee of the SABC, but an independent contractor to the SABC, in terms of a written agreement, concluded with the SABC in April 2014 (the agreement). The agreement provides for Mr Mvoko's engagement by the SABC on an 'as and when' basis for a period of three years and defines the services to be rendered by him as 'planning and contributing editor' in respect of SABC news programmes, which Mr Mvoko

elaborated requires him to perform a host of different functions, including that of executive producer of the TV show *On the Record*.

The STAR newspaper article

[4] On 6 July 2016 an article written by Mr Mvoko, with the title (supplied by the STAR) 'My Hell at SABC' and sub title 'In power mongers' grip', was published in the STAR daily newspaper. I do not consider it necessary in the view I take of this matter, to review the contents of the article. Suffice to briefly refer to the views of the parties in this application concerning its content. Mr Mvoko maintains that he had, based on previous instances of alleged intimidation, censorship and improper interference by the SABC in editorial decisions, firmly decided to stand up, as a professional journalist and in the interests of the public and the SABC. He states that he intended in writing the article to reflect and comment on recent events that had occurred within the ranks of the SABC, especially in regard to, what he referred to as 'the erosion of editorial independence' and, with the further objective 'to dispel some untruths about the goings on at the SABC' with the intention of reminding the public that 'there was still time to save the integrity of the SABC, as a national broadcaster serving the needs of the country as a whole'.

[5] The SABC proffers an entirely contrary view: the article, it states, is 'very critical' of the news gathering and news dissemination at the SABC and, moreover, contains adverse comments concerning the integrity of one of its most senior executive officers who, by inference, it then identifies. In so doing, the SABC contends, the applicant has brought the name of the SABC into disrepute which constitutes a breach of Mr Mvoko's contractual undertaking 'not to engage in any conduct, behaviour, utterances and the like that, in the reasonable opinion of the SABC, has the effect of bringing the name of the SABC into disrepute or impacting negatively on the relationship with colleagues...' (clause 5.4.3 of the agreement). I should add that in the agreement as one of the 'guarantees' by Mr Mvoko, it is recorded, that he 'shall not do anything that will be defamatory, injurious, or in any way bring the reputation of the SABC...into disrepute...' (clause 16.3)

Factual matrix

[6] Both the present application and Mr Mvoko's case in the Constitutional Court

application are premised on a letter addressed to him by the SABC, on 7 July 2016 (the SABC letter). Due to its relevance to and importance in deciding this matter, the body of the letter reads as follows:

'RE: INDEPENDANT CONTRACTOR'S AGREEMENT

It has come to management's attention that you have allegedly been involved in acts of non-compliance / contravention of your contract which conduct constitutes a material breach of the agreement, relating to the following issues:

You have brought the name of the SABC into disrepute and also damaging the image of the SABC with the comments/statements in the newspaper article of the STAR Newspaper dated 06 July 2016.

Management views your conduct in a very serious light and contemplates terminating this agreement. However, you are requested to submit written representations as to why the agreement should not be terminated and should you wish to do so, same have to be submitted to writer hereof on or before close of business on Monday 11 July 2016 (16:00).

Furthermore Management has resolved not to schedule you to render your services as the Independent Contractor until this matter has been resolved.'

Mr Mvoko did respond on 11 July 2016 in denying the 'charges' against him and requesting more time for the filing of his reply for consideration thereof by his legal team. On 15 July 2016 the applicant's then attorneys, with reference to the SABC's letter, stated as follows:

'Our client denies the allegations that he has brought the name of the SABC into disrepute or damaged its image in respect of his article dated 6 July 2016, due to the fact that the SABC's name is already in disrepute and its image damaged, by its own decision and actions to ban the broadcasting of violent protests, which amount to censorship.'

The letter concludes with a demand for the immediate reinstatement of Mr Mvoko's scheduling and a notification that the matter would be referred to the CCMA or the Labour Court in the event of a failure to comply with the demand within 5 days.

The application

[7] On 22 July 2016 the applicant launched the present application in which, in addition to the customary prayer relating to urgency, the following relief is sought:

‘2. It is declared that the respondent’s decision not to schedule the applicant’s services as an Independent Contractor conveyed in the letter dated 7 July 2016 is unlawful, unconstitutional and constitutes a breach of the contract of service dated 4 April 2016, (“the Agreement”) concluded between the applicant and respondent.

3. The respondent is prohibited from giving effect to its decision not to schedule the applicant’s services as an Independent Contractor.

4. The respondent is directed to schedule the applicant to perform his services and to remunerate him accordingly in terms of Clause 5 of the Agreement.

5. The respondent is directed to pay the costs of this application.

6. Further and/or alternative relief.

7. In the *alternative*:

7.1 The applicant seeks an interim order in the following terms:

7.1.1 The respondent is directed to schedule the applicant to perform his services and to remunerate him accordingly in terms of Clause 5 of the Agreement.

7.1.2 The relief in paragraph 7.1.1 above shall apply with immediate effect as an interim order, pending the final determination of the relief sought in paragraphs 2 to 4 of this Notice of Motion.

7.1.3 The respondent is directed to pay the costs of this application.

7.1.4 Further and/or alternative relief.’

[8] The SABC opposes the application and its answering affidavit has been filed. The applicant has not filed a reply thereto. The application was enrolled for hearing in the urgent court, on Thursday 28 July 2016, before Francis J. I was informed from the Bar that the learned judge, with reference to *Luna Meubels* (1977 (4) SA 135 (W) 137D) and the Practice Manual of this court, expressed reservations about the enrolment and hearing of the matter on a Thursday, in the urgent court. The applicant’s legal representatives took heed and decided to ask for the matter to be removed from the roll, costs reserved, which was granted. The matter was instantaneously enrolled for Tuesday the next week when it came before me. I am accordingly required to determine the costs reserved by Francis J as one of the issues in this matter.

[9] Having heard argument I issued the order appearing at the end of this judgment, the next day. In regard to the urgency of the matter, which was contested by the SABC, I ruled, in the interests of the parties and having had regard to the nature of the dispute, that a sufficient degree of urgency existed for the matter to be heard in the urgent court, in terms of rule 6(12). I further indicated that my reasons for the order would be delivered on 12 August 2016. What follows are those reasons.

Discussion

[10] Counsel for the applicant as a starting point, contended that the SABC was in breach of the agreement in refusing to schedule Mr Mvoko to further render his services. The argument is short-lived and, as rightly conceded by counsel for the applicant, the agreement specifically provides for the procedure adopted by the SABC. In this regard clause 13.2 of the agreement provides as follows:

'Should either party terminate this agreement and the other dispute the terminating party's right to do so or in instances where the SABC conducts an investigation into irregularities allegedly conducted by the independent contractor, the SABC shall have the right, pending determination of the dispute or the outcomes of the investigation, not to schedule the independent contractor to render any services and may engage/use another service provider to continue with the services.'

[emphasis added]

[11] The SABC's letter is clear as to the applicant's suspension to be of effect 'until this matter has been resolved'. Applicant's counsel seemingly overlooked the fact that the SABC's suspension of the applicant's services was of temporary duration and not permanent. But, counsel had another string to his bow: he submitted that the suspension of the applicant was punitive in nature and therefore unjust and unfair to the applicant thus entitling this court to decline enforcing the term. The applicant has seemingly failed to demonstrate why the enforcement of the clause would be unfair and unreasonable within the context of the agreement and, in any event, the applicant's case is not premised on this contention as a ground for this court to interfere with the decision of the SABC. I am moreover unable to find any conceivable reason that, as was contended for by the applicant with reliance on

Barkhuizen v Napier 2007 (5) SA 323 (CC), the contractual terms contained in the agreement are in any way incompatible with Constitutional principles and values.

[12] This brings me to the Constitutional challenge relating to the applicant's suspension. The relief sought by the applicant is for a *final order* in regard to the SABC's decision not to schedule the applicant for his services, as stated in the SABC's letter. In this regard counsel for the applicant in argument, after meticulous scrutiny of the STAR article and with reference to the Constitutional imperatives and principles relating to freedom of expression and speech as well as the duty of the SABC, as a public enterprise, to observe and apply Constitutional principles and values and generally public interest, submitted that the suspension was unconstitutional and therefore invalid.

[13] The applicant's Constitutional challenge flounders at the procedural level. The suspension of the applicant's services, as I have been at pains to observe, was temporary and not permanent. The SABC's letter, on which sole reliance is placed by the applicant, clearly indicates, and, in specific terms, provides for an investigation into the appropriateness of the STAR article. It would therefore be premature for this court to express any firm views, let alone decide on, the Constitutionality of the views expressed in the STAR article in the face of a final decision yet to be taken by the SABC whether or not to terminate the agreement at the conclusion of its investigation. The same principles applicable to the requirement that internal remedies ought to be exhausted prior to an approach to court, in my view, on a parity of reasoning, with equal force apply here (cf *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others* (2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC)) [2013] ZACC 52; [2013] ZACC 48 (13 December 2013) para [63] *et seq*).

[14] Nothing of substance was advanced on behalf of the applicant that would entitle this court to interfere with the SABC's investigation prior to finally determining the fate of the agreement, as set out in its letter. The applicant, as part of the investigation, was duly afforded the opportunity to make representations, which he indeed availed himself of. Regrettably, the contention raised by his then attorneys to which I have already referred, was not only non-sensical but could also not in any way contribute to a just decision of the issue.

[15] The SABC's investigation into the matter is still pending and probably due to this application intervening, no final determination has been made. I can only express the hope that this matter will now be dealt with expeditiously. In my view, in the interest of the parties and in order to ensure a proper determination of the issue, the SABC should be apprised of all the relevant facts and circumstances to enable it to arrive at a just decision. I have accordingly decided, in my discretion and to reach finality on the issue, to order that all documents filed in this application including counsels' heads of argument, shall form part of the investigation and to further direct the SABC to consider the content thereof in the determination of the issue (cf *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725); [1999] ZACC 9 paras [35] and [48]).

[16] Finally, I turn now to the plea of *lis pendens*. In my view, until the Constitutional Court has granted direct access, the issue cannot be said to be properly pending before that court. It follows for this reason alone that the plea of *lis pendens* must fail.

Costs

[17] The applicant has set out his dire financial position resulting from a lack of income due to the suspension of his services, which he maintains constitutes his only source of income. The ordinary rule of costs following the result applies. In order not to financially compromise the applicant's future conduct pending the determination of the issue, I have decided to suspend the taxation and payment of the costs of this application, pending the SABC's final decision.

[18] Finally, regarding the reserved costs, I am of the view that it is just and fair for each party to pay its own costs.

Order

[19] For all the above reasons I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application, excluding the costs referred to in paragraph 4 below, such costs to include the costs of

two counsel.

3. The taxation/payment of the costs referred to in paragraph 2 above is suspended pending finalisation of the SABC's determination of the dispute referred to in paragraph 6 below.
4. In regard to the costs reserved by the Francis J on 28 July 2016, each party shall pay its own costs.
5. The papers filed in this application, including counsels' heads of argument, shall form part of the written representations called for by the SABC in its letter to the applicant, dated 7 July 2016.
6. The SABC is directed to consider the content of the documents referred to in paragraph 4 above, in its investigation and determination of the issue referred to in the said letter.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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NCUBE INC

DATE OF HEARING

4 AUGUST 2016

DATE OF ORDER

5 AUGUST 2016

DATE OF REASONS FOR JUDGMENT

12 AUGUST 2016