

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 4638/2020

Reportable: YES

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

N.A. MGOQI

APPLICANT

and

CENTLEC (SOC) LIMITED

FIRST RESPONDENT

**MANGAUNG METROPOLITAN
MUNICIPALITY**

SECOND RESPONDENT

HEARD ON: 11 AUGUST 2022

CORAM: MATHEBULA, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII on 20 OCTOBER 2022. The date and time for hand-down is deemed to be 20 OCTOBER 2022 at 11H30.

[1] This is a third judgment to two others delivered by my brothers Mhlambi and Molitsoane JJ on 11 November 2020 and 18 March 2021 respectively in regard to a dispute between the same parties. In these proceedings the applicant is seeking an order against the first respondent to employ him to the position of Executive Manager: Engineering or the one equivalent to it within its staff component. In addition to be provided with the concomitant emoluments and benefits. The applicant was employed as the Chief Executive Officer of the first respondent until his contract was terminated by effluxion of time. The first respondent is a business entity established in terms of our laws and wholly owned by the second respondent. Only the first respondent filed papers opposing this application. No order is sought against the second respondent.

[2] Before coming to the document out of which the issue arises, I pause to set out the factual matrix of this case. In my view there is no real dispute of importance on the facts. The applicant entered the workforce of the first respondent as a trade worker in 1994. He rose through the ranks and on 1 February 2013, he was appointed as an Executive Manager: Engineering. On 1 April 2015, after a rigorous selection process, he assumed the role of the Chief Executive Officer tasked with the ultimate overall management of the first respondent. The appointment to this position was for a fixed term of five (5) years ending 31 March 2020. It is common cause that it was extended until 30 June 2020.

[3] A good ten (10) months later after the assumption of duties in his latest position, on 17 February 2016 to be exact, the applicant and the first respondent entered into an employment agreement. The applicant acted in person and the first respondent was represented by its then Chairperson of the Board of Directors ("the Board") to wit Mr Mthunzi Mbali. Both parties adhered to its terms and conditions until the dispute arose. The first respondent represented by its various Chairpersons of the Board conducted performance appraisals as a regular review of his performance and contribution to it in line with the best human resources practices.

[4] In the launching affidavit, the applicant averred that during its meeting on 5 December 2019, the then Chairperson of the Board Mr Nthimotse Mokhesi conveyed to him that they have decided to renew his contract. All the same, this changed after

his contract was not extended beyond 30 June 2020. Nothing much of substance turns on it in relation to the relief sought by the applicant.

[5] The matter turns largely on the meaning and interpretation of clause 16.6 of the employment agreement which reads:

“Irrespective of any provision to the contrary and/or despite what any other provision may state on this agreement, upon expiration of this employment agreement and in the event that the Employer reflects not to renew it on the same or similar terms, the Employee will be placed in the position which he previously held with the Employer immediately prior to the conclusion of this employment agreement and shall continue his employment with the Employer until retirement age. However, should the Employee’s position not be available for whatever reason, then the Employer will offer the Employee a position equivalent to the position he occupied immediately prior to the conclusion of this employment agreement. By signing this employment agreement, the Employees does not in any way waive his permanent employment status as an Employee of the Employer.”

A quite astonishing averment made by the first respondent in the papers is that it was not aware of the existence of the clause relied upon by the applicant.

[6] When it became apparent that the first respondent was not amenable to the extension of his contract as the Chief Executive Officer, the applicant invoked the aforementioned provision. The first respondent is opposing such invocation on many fronts. It is averred that the employment agreement was not placed before the Board for approval or ratification. Further that the Chairperson Mr Mthunzi Mbali acted beyond his powers when the employment agreement sought to place the applicant in a reserved position. The main criticism levelled against it is that it was against the fair processes of employment which must be followed unapologetically by a State Owned Enterprise.

[7] Mr Grobler for the applicant argued three (3) grounds upon which he intimated that the relief sought should be granted. Firstly, he pointed out that the first respondent approached the Labour Court for review of the employment agreement either in its entirety or parts thereof. The review application was dismissed by Harvey AJ on 29 June 2021. The application for leave to appeal and petition for leave to appeal were equally dismissed. Therefore, the defences that were raised there, which are similar as in this application, have been dealt with by another court of similar status. In essence he was raising a defence of *res judicata*.

[8] On the second ground he contended that Mhlambi J dismissed the application simply because in the exercise of his wide discretion, he concluded that the matter was not urgent. He emphasized that although the learned Judge dabbled on the merits, he did not deal with the issues. He pertinently referred to the judgment which in his view does not justify the order made by the learned Judge. He argued that the defence of *res judicata* relied upon by the first respondent cannot succeed. The third point relate to the concurrent jurisdiction of the High Court and Labour Court to hear this matter. He argued that the matter is properly placed before me and there is no merit in the contrary view.

[9] The submissions of Mr Mokhare for the first respondent can be summarised as follows. He argued that in his papers, the applicant has failed to discharge the necessary onus for the relief sought. He pointed out that the applicant was enforcing a contractual claim and therefore bore the onus to prove the existence of the contract. In this matter the applicant was seeking specific performance and it is common cause that the position sought is unavailable. He stated that the applicant did not make out averments for the existence of an alternative position.

[10] Turning to the Labour Court judgment he conceded that the court declined to exercise jurisdiction over the review application. Nevertheless, he still argued that there is no merit in the contention that the aforesaid judgment has rendered the defences of the first respondent *res judicata*. This point is kept alive by the assertion that the Labour Court dismissed the matter purely on the issue of condonation.

[11] The main contention pertaining to the judgment of Mhlambi J is that the learned Judge made certain findings in respect of the merits. He was non-committal on whether this judgment fits the requirements of *res judicata*. Overall he was of the view that I can proceed to deal with the merits of the matter.

[12] The anchor argument is that clause 16.6 is invalid and offends the procurement policy of the first respondent. Accordingly, this is an aspect that the applicant conceded to in the founding affidavit. The first respondent as an organ of State must act within the prescripts of the law. Therefore, the contentious clause cannot be given effect to without contravening the rule of law.

[13] I now turn to the merits of those submissions. In response to a direct question I posed to him, Mr Mokhare confirmed unequivocally that the existence of the agreement is not in dispute including the disputed clause 16.6. This concession, correctly made in my view, simply means that the applicant has discharged the necessary onus. The sole remaining issue is its validity thereof to which I shall return later in this judgment.

[14] Counsel relied on the principle of *res judicata* although from a different set of facts and circumstances. The decisive point raised by the applicant is that the Labour Court and subsequently the Labour Appeal Court have dismissed the application of the first respondent to declare the agreement as unlawful alternatively unenforceable. The cornerstone of the case for the first respondent is the judgment of Mhlambi J. It was contended that the learned Judge dismissed the urgent application whereby the applicant sought the enforcement of clause 16.6.

[15] The principle of *res judicata* implies that the matter has already been decided or settled on its merits. It draws its strength on respect for court orders and finality on litigation. The requirements accepted in a long line of decided cases are that “**(i) there must be a previous judgment by a competent court; (ii) between the same parties (iii) based on the same cause of action and with (iv) respect to the same subject matter or thing.**”¹ It is trite that in enforcing the requirements as

¹ *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* 2020 (1) SA 327 (CC) at para 71.

stated, they should yield to the facts of each case. The party seeking to rely on this defence must allege and prove all the elements underlying the defence.²

[16] On this occasion the transcribed record of the *ex tempore* judgment by Mhlambi J was annexed to the papers. This was not the position when the matter served before Molitsoane J. The applicant had launched an urgent application to enforce the provisions of the agreement and substantially to order the first respondent to pay his emoluments. At the end of the hearing the learned Judge handed down an order which reads: “***The application is dismissed with costs which costs include the costs of the employment of two counsel.***”

[17] There are opposing views whether this order brought finality to the or not within the common understanding of the principle of *res judicata*. That question can only be answered correctly upon proper reading of the judgment in context. It will serve no purpose to take out a word or phrase in isolation and use it as a basis for a particular view point. In seeking to resolve the ambiguity of the judgment (if any), I bear in mind the reasoning adopted in *Natal Joint Municipal Pension Fund v Endumeni Municipality* to examine its true meaning.³

[18] Counsel are in agreement, and I agree with them, that urgency is not an independent ground for dismissal of an application. It has been held that to do so will be erroneous. As to how a court should deal with a matter deemed not to be urgent but brought to court on urgency was articulated by Cameron JA (as he then was) in the case of *Commissioner, the South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others*.⁴

[19] Although the judgment concentrated on only one point, that is urgency, it was necessary for the learned Judge not to be totally oblivious of the merits of the application. It is only through the assessment of the merits that any court can pronounce on the issue of urgency. In his judgment the learned Judge stated that having perused and listened to the arguments, this application is deserved of being

² *Democratic Alliance v Brummer* [2021] 2 All SA 818 (WCC) at para 77.

³ 2012 (4) SA 593 (SCA) at para 18.

⁴ 2006 (4) SA 292 (SCA).

disposed of solely on the basis of urgency as there is no urgency whatsoever in the launching of the application. It cannot be clearer than that. The learned Judge went on to consider the contentions made on the merits. He expressed an opinion and made no finding on the merits.

[20] There is another reason why this argument cannot be upheld. If the first respondent genuinely understood this judgment to have brought finality to the matter, logic and common sense dictates that it would not have approached the Labour Court for a review application. The sole purpose of that application is well documented *ie* to declare the employment agreement of no force and effect. It is a fact that litigation fortunes of the first respondent were overseen by an eminent senior counsel who ably argued on its behalf in all applications. Taking that singular step, in my view, is a clear demonstration that parties are on the same wavelength regarding its status. It did not bring finality to the case.

[21] The judgment of Molitsoane J does not come to the assistance of the first respondent. The learned Judge applied the principles of an interim interdict to the facts as applicable to the case before him. He concluded that the applicant failed to establish a case for the relief sought. The learned Judge underlined parts of clause 16.6 of the employment agreement only to hold that there was an alternative relief not to make a finding on its invalidity.

[22] On this point, applying the principles to this case with its own facts and peculiarities I have come to the conclusion that the defence of *res judicata* raised on behalf of the first respondent cannot succeed. On plain reading of the judgment, it did not bring finality to the matter.

[23] This brings me to the point whether the defence of *res judicata*, this time raised by the applicant on the back of the Labour Court judgment is applicable. *In casu*, all the requirements to sustain the defence of *res judicata* are present. I am unable to uphold the submission that the Labour Court did not deal with the merits of the case, but only dismissed it on the issue of condonation. Therefore, I can still hear the arguments pertaining to the invalidity of the employment agreement. The fact is

that the Labour Court did not grant the relief to declare as unlawful or set aside the employment agreement. This was confirmed by the Labour Appeal Court.

[24] Counsel for the first respondent extensively argued another opportunistic point relating to the invalidity of the employment agreement. I say so because the decision of the Labour Court put paid to any efforts to declare it or any provision thereto invalid. This was a futile exercise to re-argue a matter which was ostensibly not before me. Whether or not Mr Mthunzi Mbali, the then Chairperson of the Board, had the authority or not to enter in an employment agreement with the applicant is not up for determination. Similarly, another submission is made about its legality. The law is trite that the decision exists in fact and it may give rise to legal consequences for as long as it has not been set aside.⁵

[25] Counsel for the first respondent developed the mainstay of his submissions around the decision of the court in *National Director of Public Prosecutions v Zuma*⁶ and relied almost exclusively on the paragraph that reads:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.” (Footnotes omitted)

⁵ *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and Others* 2020 (4) SA 375 (CC) at para 51.

⁶ 2009 (2) SA 277 (SCA) at para 26.

[26] This point which was argued with much vigour in the beginning was not supported to its logical conclusion. The concession by counsel for the first respondent that the existence of the employment agreement was not in dispute rendered it redundant. The pick of the case for the applicant is that the first respondent must perform in accordance with the provisions of the employment agreement. The first respondent raised peripheral issues like how the prayers are couched in conflict to the very agreement that the applicant seeks to enforce. This submission is unmeritorious because it deliberately ignores the very essence of the case for the applicant.

[27] The employment agreement provides that upon the expiration of his contract as the Chief Executive Officer and it is not renewed, he will be placed by the first respondent to a position he previously held. The proviso is that if such position is unavailable, he will be offered by the first respondent a position equivalent to the one prior to his elevation to that of the Chief Executive Officer.

[28] The first respondent had done none of the above. The point made is that the previous position occupied by the applicant is no longer available. That may well be so, but what about an offer to an equivalent position. Counsel submit that the applicant must state in his papers that there is a position that is available and that it must be offered to him. This submission is misplaced because it is based on the wrong reading of the employment agreement. It seems to me to be unreasonable to expect the applicant to have knowledge of the internal dynamics of the first respondent and petition for an offer. For all intents and purposes he is no longer part of it and only members of the Board and Management team will have such knowledge. Placement in this context cannot mean any other thing except employment. The nature of such an offer must be made to him. What is sought to be enforced is an employer-employee relationship within the ambit of the law of contract.

[29] In all these circumstances, I have come to the conclusion that the application must succeed and all the defences raised by the first respondent cannot be upheld. In the present case, specific performance is both feasible and possible to be implemented.

[30] It follows, in my view, like in all other previous applications between them that costs must follow the result. The matter was postponed on 9 June 2022 and the wasted costs occasioned by the postponement stood over for adjudication at a later stage. A candidate attorney in the employ of the attorneys of record for the applicant deposed to an affidavit which explains the service of the documents to the attorneys for the first respondent. Annexed to the said affidavit are the read reports by the recipients of the emails. The conclusion is that the attorneys for the first respondent are responsible for the resultant postponement and their client must bear the costs.

[31] The Order is as follows: -

31.1. The first respondent must in accordance with clause 16.6 of the Employment Agreement concluded between the parties on 17 February 2016 place the applicant in the position of Executive Manager: Engineering on/or before 1 November 2022.

31.2. Should the position mentioned in sub-paragraph 31.1 above not be available, the first respondent must offer the applicant a position equivalent to it.

31.3. The first respondent must provide the applicant with commensurate emoluments and benefits.

31.4. The first respondent must pay the costs of the application which includes wasted costs occasioned by the postponement on 9 June 2022.

M.A. MATHEBULA, J

APPEARANCES:

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