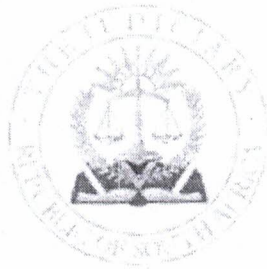


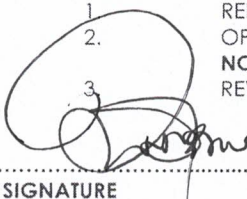
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A1266/2019

DOH 26 APRIL 2021

1.	REPORTABLE: NO/YES
2.	OF INTEREST TO OTHER JUDGES:
3.	NO/YES
	REVISED.
	
SIGNATURE	25 MAY 2021 DATE

In the matter of:

SASOL SOUTH AFRICA (PTY) LTD

APPELLANT

and

SULAIMAN LAWAL

RESPONDENT

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND
DOWN SHALL BE DEEMED TO BE 24 MAY 2021**

Bam AJ (Mabuse J and Holland-Muter AJ concurring)

1. This is an appeal against the order made by Baqwa J, sitting as court of first instance, in terms of which the appellant was ordered to pay the respondent an amount of R1 414 646.50 plus interest, along with additional relief, in line with the parties' contractual arrangement. The present appeal is with leave of that court. Before we set out the grounds of appeal, we provide a brief sketch of the background facts. For consistency, we use the parties' names.
2. Mr Suleiman Lawal, (Lawal) launched motion proceedings against his former employer, Sasol South African (Pty) Ltd (Sasol), on 24 March 2017 in which he sought an order of specific performance to perform in terms of the parties' VER agreement. In this regard, Lawal sought an order that Sasol: (i) pay him an amount of R1 414636.50; (ii) interest on the aforesaid amount at the rate of 10.25% per annum from 1 July 2015 to date of payment; (iii) reinstate Lawal as a member and his three dependents on Sasol's medical aid scheme, Sasolmed, and that Sasol be held liable for payment of 60% contribution towards the monthly medical aid premiums; (iv) transfer and or issue to Lawal

5000 (Five Thousand) shares in the Inzalo Management Scheme; (v) pay Lawal any and all dividends that were declared from the period 1 July 2015 until date of that court's order; (vi) interest on the aforesaid amounts at the rate of 10.25% per annum from the date that each dividend was payable to date of payment with costs. The case was argued on 25 February 2019 and the order was granted on 26 March. The events leading to the present litigation are captured in the court a quo's judgment. For purposes of this judgment, we consider that a summary will suffice.

3. Lawal was in the employ of Sasol from 21 July 1997 until his retirement on 30 June 2015. During the time of his employment, he occupied several positions, with the last position before his exit being that of a senior manager for Safety, Health and Environment. Sometime in October 2014, at a time when Lawal was 54, he applied and was approved for voluntary early retirement, VER, which was then offered by Sasol to some of its employees. It is common cause that employees who had successfully applied for the VER qualified for some benefits such as, a cash amount and had the option of remaining with the Sasol medical scheme, with a fraction of the individual employee's scheme contributions being paid by Sasol. Lawal's approval was confirmed in a letter dated 15 December 2014. The effect thereof was that his open ended employment contract became a fixed term contract with a final exit or retirement date determined by the employer as 30 June 2015. His notice period, as reflected in the Project Phoenix Workforce Transition document (Phoenix document), would begin on 1 March 2015 and end on 30 June 2015.

4. On 11 June 2015, Lawal was served with a notice informing him that he had been charged with falsification of certain safety checklists pertaining to Sasol's Nigeria based offices, a charge Lawal continues to deny. The notice directed him to attend a disciplinary hearing on 23 June 2015. There is no dispute about the fact that prior to the disciplinary hearing, Lawal had not been furnished with the documents supporting the employer's case. On the day of the hearing and upon his request, he was furnished with the Landman handwriting expert report, one key document on which Sasol based its case. He requested a postponement to consider the report. The postponement was granted, but he was informed that his retirement date would no longer be 30 June but 31 July 2015. Lawal objected to the unilateral variation of his VER date and promptly requested the chairman of the enquiry to record his objection. On 30 June 2015, Lawal handed in his clearance certificate, access card and the employer's equipment as he was reporting for work for the last time. On 3 July 2015, an employee from Sasol telephoned him and enquired about his reason for not being at work, to which Lawal responded that he had retired as of 1 July 2015, in line with his VER agreement. Subsequently, his lawyers wrote to Sasol regarding payment of his VER benefits. The response was a Notice of Continuation of Disciplinary proceedings with the date of 22 July 2015 noted as the date of the hearing. An additional charge of absenting himself from work without leave was also noted. His lawyers wrote to Sasol advising that Lawal was no longer an employee of Sasol and that there is no legal basis on which Sasol could pursue disciplinary proceedings against him. The only outstanding issue, advised the lawyers, was for Sasol to perform in terms of the VER agreement. Thus, Lawal did not attend the

hearing set down for 22 July or on the later date of 29 July 2015. In a letter penned by the chairman of the disciplinary proceedings dated 29 July 2015, Lawal was advised that he had been found guilty on the charges of falsifying the employer's checklists and the additional charge of absenting himself from work without leave and was thus summarily dismissed.

Proceedings in the court a quo

5. There were two issues before the court a quo. The first was whether it was competent for Sasol to cancel Lawal's employment contract based on the findings of the 29 July 2015 hearing. The second was whether Sasol was bound by the terms of the VER agreement, also rephrased as whether Sasol was entitled to unilaterally amend the terms of the VER agreement by changing Lawal's retirement date to 31 July 2015, without Lawal consenting thereto.
6. In summary, Lawal's case was premised on Sasol's disciplinary policies and the Phoenix document. The Phoenix document is identified in the court a quo's judgment as carrying terms that governed the reconstructed relationship between the parties. Briefly, clause 44 of the Phoenix document recorded that employees are bound by the employer's disciplinary processes and all applicable rules. In the clause, employees are cautioned to perform their duties in accordance with normal practices and that transgressions will be dealt with in terms of the employer's disciplinary code.

7. In terms of the Sasol disciplinary code, the following clauses bear mention: clauses 6.4.1.8 and 6.4.1.10. The first mentioned clause deals with the consequences of an employee furnishing the employer with insufficient notice to terminate the employment contract (regard being had to the employee's contract of employment), either prior to or during disciplinary proceedings. The clause provides that the employer may not accept such short notice, and in those circumstances, the enquiry may commence or continue, regardless of whether the employee attends. The second clause, 6.4.1.10, deals with a case of adequate notice, in line with the letter of appointment, in a case where an investigation or disciplinary proceedings cannot be concluded within the notice period. In terms of the clause, the resignation must prevail.
8. The thrust of Sasol's opposition was, as the court a quo found, premised on the outcome of the disciplinary proceedings of 29 July 2015. Briefly, Sasol submitted that it was justified in cancelling the contract in that: (i) Lawal had breached the terms of his employment contract. This must necessarily refer to the charge of falsifying the checklists. (ii) In the second instance, it was submitted that Lawal had made some pre-contractual material misrepresentations. (iii) Finally, it was submitted that Lawal had repudiated the contract. This final point referred to the additional charge of absenting himself from work without a valid reason. Sasol further submitted that it was bound to comply with the provisions of the Labour Relations Act¹ to validly cancel Lawal's contract, but it denied that the disciplinary code was applicable to Lawal, which the court a quo rejected.

¹Act 66 of 1995

9. In finding for Lawal, the court a quo referred to the following: (i) The alleged offence had been committed on or about December 2013 and that at the time of Lawal's application for the VER, Sasol's investigation into the matter had commenced. This is now around October 2014. (ii) Sasol approved Lawal's VER application with the full knowledge of the allegations against Lawal. (iii) Sasol had failed to provide reasons for its delay in finalising its investigation, regard being had to the provisions of its disciplinary code and Lawal's notice period. As to the submission that Lawal had sought the postponement of the disciplinary proceeding under a false pretence, the court a quo rejected this submission pointing to, *inter alia*, Sasol's failure to commence disciplinary proceedings on time and the fact that it had not shared with Lawal the documents on which the employer's case was premised. In short, the court accepted that Sasol ought to have expected that Lawal would seek a postponement to consider the report. As to the claim by Sasol that Lawal had made pre-contractual misrepresentations, the court a quo noted that Sasol's opposition to Lawal's case was premised on the outcome of the disciplinary proceedings. Finally, the court a quo found that Sasol's unilateral amendment of Lawal's retirement date to enable it to continue with the disciplinary proceedings was in violation of its own policies and was therefore unlawful. As is apparent from its order, the court a quo held Sasol to the terms of the VER agreement.

On appeal

10. Outlined in Sasol's heads of argument are three grounds. (i) First, Sasol submits that it does not matter whether Lawal's retirement date was extended to a date later than

30 June 2015, the fact is, Sasol's cancellation of Lawal's contract of employment on 29 July 2015 was effective. We demonstrate shortly that with this ground, Sasol is paddling two canoes at the same time. (ii) In the second instance, Sasol submits that Lawal's application for the postponement during his disciplinary hearing was tainted by wrongfulness. It is thus submitted that Lawal should not be allowed to better his position from his own wrongful conduct. Finally, Sasol submits that the VER agreement is in any event voidable because of Lawal's pre-contractual misrepresentation. In all, counsel asked that the appeal be upheld with costs.

11. The submissions on behalf of Lawal can be summarised thus: (i) Sasol, in terms of its own disciplinary policies, was precluded from continuing with the disciplinary proceedings against Lawal when he ceased being an employee. Thus, the findings of that forum cannot be considered. (ii) Having noted certain concessions made by Sasol, counsel submitted that the concessions are fatal to Sasol's case and that the appeal ought to be dismissed. (iii) It was further submitted that the VER contract constituted a binding agreement. In terms of the principle of *pacta servanda sunt*, agreements must be honoured. On this score, Sasol must be held to the contract. (iv) Finally, and in response to the submission that Lawal had committed material misrepresentations prior to the conclusion of the contract, which render the VER agreement voidable, it was submitted that Sasol had neither lodged a counterclaim of fraud nor proved the requirements of fraud. Counsel submitted that in any event, the objective facts belie that fraud had been proved. Counsel asked that the appeal be dismissed with costs.

Discussion

Cancellation of Lawal's employment contract following his retirement in terms of the VER

12. Sasol's development of this ground was fraught with contradictions. First, counsel submitted that the contract between Sasol and Lawal was not merely an employment contract but one with enduring obligations and, in that regard, the court a quo was wrong in a fundamental way in holding that there was no contract of employment after 30 June 2015 and consequently, that the contract could not be cancelled as Lawal officially ceased to be Sasol's employee on 30 June when he knocked off work. According to Sasol, it and Lawal remained parties to an ongoing contract after June 2015, thus the contract could be cancelled on 29 July 2015, as Sasol did. In an about turn, counsel conceded, both in its submissions before this court and in its heads of argument², that Sasol accepted that Lawal's employment came to an end on 30 June 2015 and that its cancellation of Lawal's contract of employment on 29 July 2015, after his retirement, was legally incompetent³. Counsel went further and submitted that owing to Sasol's mistaken belief that it could extend [unilaterally] Lawal's employment to 31 July 2015, based on its mistaken view of the law, Sasol proceeded with the disciplinary proceedings, leading to Lawal's dismissal.

² para 23 of Sasol's Heads of Argument, caselines page 8. See also paragraphs 27, 28 and 29 of caselines

³ See paragraphs 23 and 29 of Appellant's Heads of Argument

13. We had earlier noted that on this ground, Sasol is paddling two canoes at the same time, with the consequence that it must fail. It needs to be emphasised that the question before this court is whether Sasol could validly cancel Lawal's contract of employment following his retirement. As Sasol has correctly conceded, there was no such contract after 30 June 2015. Its purported cancellation by way of dismissal on 29 July was a misdirection and therefore invalid and of no force or effect. In our view, these concessions were appropriately made, and they align with the definition of dismissal in terms of section 186 of the Labour Relations Act⁴, which means: termination of a contract of employment by an employer with or without notice. It goes without saying that the statements about enduring obligations, pointing to the existence of a contract, as was submitted on behalf of Sasol, are not evidence of a current contract of employment. We add that thousands of people retire on their erstwhile employer's medical scheme, with the employer's commitment to contribute a fraction of the contributions remaining extant. Any suggestion that those pensioners may be dismissed by their former employers is incorrect. The court a quo had correctly found that there was no contract of employment to cancel after Lawal's retirement and thus no contract could be breached after that date.

14. Considering the inevitable concessions made by Sasol, one would assume that this was the end of the matter, but it was not. Counsel went further and submitted that Sasol's mistaken view of the law cannot amount to a waiver of its right to cancel the contract. Aligned to this proposition was a further submission that evidence showed, without a doubt, that Lawal had committed fraud by falsifying a checklist and

⁴ Act 66 of 1996

presented it to Sasol as genuine. Thus, the court a quo had erred in so far as its finding that fraud had not been established. Referring to the Plascon Evans rule, counsel submitted that in the circumstances, this court ought to find in its favour that Lawal is not entitled to benefit from his own wrongdoing. These submissions by counsel are startling considering Sasol's own version that it pursued disciplinary proceedings in violation of the law and its own policies. In that regard, there cannot be a dispute of fact. It is readily apparent that the reference to evidence can only mean evidence presented during the unlawful disciplinary proceedings held post Lawal's retirement. At this point, two important issues must be mentioned. Throughout the conduct of this case, Sasol does not appear to accept that it is bound by its own policies and the law. To this end, Sasol's disciplinary code⁵ precludes the continuation of disciplinary proceedings where termination of employment was preceded by adequate notice, such as in the present case. This is a question of *vires*. Fortifying our view are the comments below, extracted from the minority judgment of the Constitutional Court, by Zondo J, in *Toyota SA Motors (Pty) Ltd v CCMA and Others*⁶, where the court noted:

'...Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer and that employer does not have jurisdiction over the employee anymore. Indeed, even the CCMA or the relevant bargaining council would have no jurisdiction to entertain a referral of a "dismissal" dispute in such a case because there would be no dismissal as envisaged in section 186 of the LRA.'

⁵ clause 6.4.1.10.

⁶ [2015] ZACC 40 at paragraph 142

[See also *Mahamo v Nedbank Lesotho Limited* (LAC/CIV/04/11) [2011] LSLAC 9 (04 July 2011) at para 24; and *Naidoo and Another v Standard Bank SA Ltd and Another* (J1177/19) [2019] ZALCJHB 168; [2019] 9 BLLR 934 (LC); (2019) 40 ILJ 2589 (LC) (24 May 2019) at para 22.]

15. Before considering the next ground it is opportune to address pointedly, the consequences of Sasol's holding of disciplinary proceedings post Lawal's retirement, in circumstances where it lacked jurisdiction to do so, based on its own governance prescripts, and the law as cited above in *Toyota SA Motors*⁷. In *Herbex (Pty) Ltd v Advertising Standards Authority*⁸ where the applicant was aggrieved by the respondent's conduct of determining complaints and issuing rulings regarding advertisements of the applicant, a non-member of the respondent, the court, finding for the applicant reasoned:

'The fact is that the respondent has no jurisdiction to determine complaints or issue rulings against non-members. The absence of jurisdiction prohibits the granting of such rulings or orders *ab initio*. In consequence, a decision taken absent proper jurisdiction is void. As stated by Grosskopff JA in *Todt v Ipser* 1993 (3) SA 577 at 589 C-D:

"According to our common-law authorities judgments are void in only three types of cases - where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction. See *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd* 1961 (4) SA 415 (t) at 422E - 424H; Also, *S v Absalom* 1988 (3) SA 154 (A) at 163C and 164 E-G.."

⁷ Paragraph 13 *supra*

⁸(14/45774) [2016] ZAGPJHC 109; [2016] 3 All SA 146 (GJ); 2016 (5) SA 557 (GJ) (5 May 2016) at paragraph 36

16. In *Vidavsky v Body Corporate of Sunhill Villas*⁹:

'The authorities are clear that want of jurisdiction in judicial or quasi-judicial proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside. They are collected in *Minister of Agriculture and Economic Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd 1961 (4) SA 415 (T)*. See also *S v Absalom 1989 (3) SA 154 (A)* at 164E-G. Lack of jurisdiction in arbitration proceedings renders an award invalid...' [17] ...In the first place, as I have pointed out, the award carries no legal force at all and does not even require to be set aside. In the circumstances it is hardly surprising to find that courts have resisted attempts to confer the imprimatur of an enforceable judgment on such a wraith...'

17. We conclude that the court a quo was correct in holding that the continuation of disciplinary proceedings post Lawal's retirement violated Sasol's disciplinary code and was unlawful. The proceedings were in vain and amounted to a nullity. Finally, the finding of fraud, which Sasol relies on, as the court a quo had correctly stated, emanates from the ill-fated disciplinary proceedings whose outcome is a nullity.

Lawal's application for postponement was wrongful.

18. As an alternative to the first ground dealing with Sasol's cancellation of Lawal's contract post 30 June 2015, it was submitted in the court a quo that Lawal should not be allowed to benefit from the wrongful way in which he had sought the postponement of the disciplinary proceedings. Correctly so, the court a quo rejected this submission. In reaching its conclusion, the court a quo had canvassed the following factors:

⁹ (227/2004) [2005] ZASCA 53; [2005] 4 All SA 201 (SCA) (31 May 2005) at paragraph 14

(i) The alleged offence was said to have taken place during December 2013.

(ii) By October 2014, Sasol's investigation into the matter was already underway.

(iii) At the time Sasol entertained Lawal's application for the VER, it was aware of the complaint against Lawal, yet it approved the VER in December 2014 with full knowledge of the complaint.

(iv) As early as February 2015, Sasol was already in possession of the Landman Expert report, which according to the court a quo, marked the end of the investigation by Sasol.

(v) It took Sasol nearly a year to investigate the case, yet Lawal was notified to attend the disciplinary proceedings within two weeks of the notice, without any documents in support of the employer's case.

19. The court a quo concluded that Sasol should have expected that Lawal would seek a postponement to consider the evidence on which the employer's case rested, the Landman report, and in that regard, Lawal had no choice but to seek postponement on the day of the hearing. Before this court, it was submitted that Lawal, in fact, had a choice on the day of the hearing and that choice was to admit the fraud he had committed. Counsel had completely missed the point in this regard. The essence of the court a quo's reasoning is that Sasol is bound by the law and its own policies. Sasol had one year to gather evidence and prosecute the case against Lawal.

Counsel was repeatedly asked whether it was Sasol's submission that Lawal was not entitled to the necessary information and time for preparation to face the employer's case. The question was avoided several times with counsel insisting that Lawal should have admitted the fraud, this without any attempt to explain Sasol's delay in charging Lawal. We conclude that the reasoning of the court a quo cannot be faulted on this aspect. We agree that given the provisions of Sasol's disciplinary policy, in particular clause 6.4.1.10, time was of the essence as Lawal's retirement would have to prevail where the disciplinary processes could not be completed prior to 30 June 2015. Sasol cannot now seek to blame Lawal for its own tardiness. The point must fail.

Lawal is guilty of pre-contractual misrepresentations, the VER agreement is thus voidable

20. Sasol's counsel submitted that Lawal had committed material misrepresentations, with the result that the VER agreement is voidable. In this regard, the submission is that Lawal had a duty to disclose that he had committed fraud and he failed. Contrary to the submissions by counsel before this court, the court a quo had rejected the submissions based on the outcome of the unlawful disciplinary hearing. At the core of this submission that Lawal failed to disclose a material misrepresentation is a self-made finding by Sasol. But Sasol cannot appropriate itself the role of an arbiter in a case where it is a participant. It was for Sasol to investigate the matter properly, with adherence to the law and its disciplinary procedures. It failed. The alleged material misrepresentation is nothing more than another of Sasol's failed attempts to

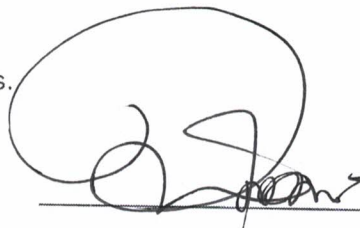
legitimise the unlawful hearing held post Lawal's retirement, using this court's authority. Lawal pleaded not guilty at the start of the hearing. In his papers to the court a quo, he attached emails evidencing communication between him and his Nigerian counterpart, one Ngozi wherein it is confirmed that there had been no inspection during December 2013. In our view, the court a quo correctly rejected Sasol's attempt to usurp the role of arbiter. The truth is, there has never been a finding against Lawal of material misrepresentation by any competent forum. We conclude that the appeal must fail.

CONCLUSION

21. For all the reasons in this judgment, the appeal must fail.

ORDER

22. The appeal is dismissed with costs.

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NN BAM

ACTING JUDGE OF THE HIGH COURT,

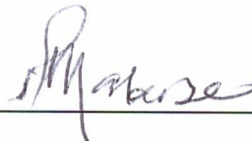
PRETORIA

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HOLLAND-MUTER

ACTING JUDGE OF THE HIGH COURT,

PRETORIA



MABUSE J

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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DATE OF HEARING: 26 APRIL 2021

DATE OF JUDGMENT: 24 MAY 2021