



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1071/2019

In the matter between:

KENEILWE RAMOHAI	1 st Applicant
PORTIA RAMAGAGA	2 nd Applicant
BOITUMELO SELALEDI	3 rd Applicant
SELABE MOTHUPI	4 th Applicant
MOLOEDI LECHOANO	5 th Applicant
NTEBALANG KHOETE	6 th Applicant
TREVOR TSUPA	7 th Applicant

and

PRECINCT FINANCIAL CONSULTANTS (PTY) LTD	1 st Respondent
LEBOKO ANDRIES MOGOTSI	2 nd Respondent
NIEL DU PLESSIS	3 rd Respondent

JUDGMENT BY: **MHLAMBI J,**

HEARD ON: **14 MARCH 2019**

DELIVERED ON: **26 APRIL 2019**

MHLAMBI, J

Introduction

- [1] The applicants approached the court on an urgent basis for an order compelling the first respondent to pay forthwith commission and/or salaries duly earned by the first to the seventh applicants.
- [2] The first respondent, and subsequently the second respondent, opposed the application. On 08 March 2019, Chesiwe, J granted an order that the application be heard as one of urgency. The matter was postponed to 14 March 2019 as an opposed application and time periods were established for the filing of both answering and replying affidavits.
- [3] As at the date of the launching of this application, the first, second, fourth and sixth applicants were in the employ of the first respondent as independent brokers registered with the Financial Sector Conduct Authority¹ who were entitled to the payment of commission whereas the fifth and seventh applicants were salaried employees².
- [4] The first respondent is a registered financial service provider, registered as such in terms of the Financial Advisory and

¹ Paragraph 18.2 of the opposing affidavit

² Paragraphs 13,14,15,18.2,18.3 and 21.2 of the opposing affidavit.

Intermediary Services Act, 37 of 2002 (“FAIS”). The second respondent is the sole director and key individual of the first respondent. The third respondent is a registered accountant and auditor appointed by the court as an administrator who had authority to deal with any dispute regarding payments between the fifth applicant and the second respondent³.

Background

- [5] The fifth applicant was, in terms of a ruling by the registrar of the financial services provider, excluded and prohibited for a period of five years, which ended on 31 October 2018, from furnishing financial services or rendering any intermediary services to clients. He was also disallowed to render any financial services on behalf of any registered financial service provider. In order to remain involved in the financial services industry, the fifth applicant and second respondent established the first respondent; with the second respondent appointed the sole shareholder and director. As stated by Daffue, J in the Mogotsi case⁴, the transaction was a simulated one designed to pull wool over the financial services board’s eyes as the parties knew that the financial services board would not accept this type of partnership.
- [6] The second respondent ran into financial difficulties and withdrew more money from the first respondent’s bank accounts than he was entitled to. The fifth applicant filed an urgent application in order to freeze the first respondent’s bank accounts. The *rule nisi* obtained by the fifth applicant was discharged by agreement on 20 September 2018 and the bank accounts were unfrozen. An

³ Lebeko Andries Mogotsi vs. Molwedi Elias Lechoano and others Case 3227/2018 FSHC

⁴ Case 3227/2018 supra, a case instituted by second respondent against the fifth applicant and others based on their business relationship.

administrator was appointed as sole signatory and administrator of the bank accounts on condition that both the fifth applicant and the second respondent had access thereto. The said administrator had authority to deal with any dispute between the parties regarding the payments between them.

- [7] Certain misunderstandings cropped up between the parties which led to the order by Daffue, J on 24 January 2019 rescinding the order granted on 20 September 2018, replacing the administrator with the third respondent. Both the fifth applicant and the second respondent were given access to the bank accounts.
- [8] During January 2019 payments, in the form of commission or salaries were not made to the applicants and matters came to a heard during February 2019 when repeated demands were made for the payment of the said salaries or remuneration. This culminated in the present application being launched on an urgent basis on 07 March 2019.

Points in *limine*

- [9] The first and second respondents in their opposition of the application, raised the following points in *limine*:
 - 9.1 The deponent to the founding affidavit did not have the authority to institute the proceedings on behalf of the six other applicants as she did not allege that she was authorised to so institute the proceedings; alternatively that the deponent did not have an authority in relation to the third and sixth applicants;
 - 9.2 The court did not have jurisdiction to adjudicate the matter in terms of the provisions of section 77, read together with

section 73A of the Basic Conditions of Employment Act 75 of 1997 as amended.

- 9.3 The third and fifth respondents were currently engaged in arbitration proceedings at the Commission for Conciliation Mediation and Arbitration (CCMA) as they had referred disputes relating to unfair dismissal to be heard by this body.
- 9.4 The founding affidavit was incorrectly commissioned as it was signed on 06 March 2017 whereas the commissioning took place on 07 March 2019. This constituted an irregularity which rendered the application fatal. Furthermore the confirmatory affidavits of the third and sixth applicants were not deposed to, therefore rendering any allegations in relation to them as inadmissible hearsay.

The respondents' response to the applicants' claims

- [10] In their opposing affidavits, the respondents admitted that the applicants had a clear contractual right to payments of their commission and/or remuneration and that the commission payments were made for products already sold, for which such payments and amounts were due and had been confirmed by the product supplier in the fee statements.⁵ The applicants had therefore a clear right that their income would not be withheld unlawfully and/or unilaterally by the first respondent and that the fee statements were correct.⁶ However, payments had subsequently been made and no payments were currently or

⁵ Paragraphs 28.1 of the respondent's opposing affidavits; paragraphs 36; founding affidavit.

⁶ Paragraphs 37 and 38 of the founding affidavit; paragraph 28.3 of the opposing affidavits.

previously due to the third applicant.⁷ The first respondent had made payments to the applicants in terms of what was due to each of them.⁸

The replying affidavit

[10] In brief, the applicants argued for the dismissal of the points in *limine* on the following grounds:

- 10.1 The respondents failed to act in terms of Uniform Rule 7 in order to join issue with the first applicant's lack of authority to act or depose to an affidavit on behalf of the co-applicants;
- 10.2 The High Court's jurisdiction was not ousted to entertain an ordinary common law issue relating to a contract of employment;
- 10.3 The respondents failed to satisfy the requirements of the defences of *lis pendens*. Besides, the dispute before the CCMA, an unfair dismissal, was different from the one *in casu* as the disputes were not of the same subject matter.
- 10.4 The first applicant's affidavit was signed on 07 March 2019 but erroneously dated 06 March 2019. Though the third and sixth applicants' affidavits were not signed and attested to as at the time of the service thereof due to the urgent nature of the application, signed affidavits were filed after service was effected and before the application was lodged⁹.

⁷ Paragraph 28.2 of the opposing affidavit.

⁸ Paragraph 30.1 of the opposing affidavit.

⁹ Paragraph 15 of the replying affidavit.

- [11] It was submitted on behalf of the applicants that the claims of both the first and the sixth applicants were academic as the amounts claimed were paid. It was contended that the third applicant claimed the amount of R 22 117.79 being the commission for the amount payable during February for ongoing business. The second applicant claimed payment of the amount of R 10 756.35 in respect of the outstanding amount since January 2019. The fourth applicant claimed only his mentorship fee in the amount of R 7 520.42 for the mentorship of the sixth applicant. The fifth applicant claimed his monthly mentorship fee in the amount of R 11 495.63 while the seventh applicant claimed an amount of R 10 000.00 in respect of his monthly salary.
- [12] A draft order was filed in terms of which reduced amounts were claimed in respect of the second, third, fourth, fifth and seventh applicants.

Points in issue

- [13] It would appear to me that the only points in issue is whether payments were effected in full in respect of the second, third, fourth fifth and seventh applicants and whether the fifth applicant should receive payment only after the deliberations of the CCMA.¹⁰

Discussion

- [14] The fifth applicant and the second respondent signed a written agreement during a mediation process on 27 June 2018 in terms of which a decision was taken to dissolve the partnership; a process which was seen as a restructuring of the business in the

¹⁰ Paragraph 18.4 of opposing affidavit

best interests of the clients, the individual business partners, the existing and new business¹¹.

[15] The way forward would entail, amongst others, the implementation of the restructuring (exit strategy) to be done as soon as practically possible, but not later than 28 February 2019. Progress would be monitored formally on a monthly basis by the external mediator and the representative of the product supplier. The value of all income generated through the fifth applicant's efforts would be transferred to the new business entity and it was emphasised that communication and mutual agreement in respect of any actions in this regard would be of vital importance.

[16] Paragraph 3 of the agreement referred to the first respondent's representatives and reads as follows:

"3.1 ...

3.2 ...

3.3 *The existing remuneration structures will remain unchanged until at least 28 February 2019.*

3.4 *The staff of Precinct will be informed of this restructuring and the consequences thereof as soon as the preparation has been finalised."*

[17] There is no evidence that as at 28 February 2019 the restructuring of the business or the exit strategy had either been implemented or finalised. The third respondent, who was the sole signatory and administrator of the bank accounts, that both the fifth applicant and second respondent had access to, and who had authority to deal with any dispute regarding the payments between the two parties in terms of the court order,

¹¹ Annexure "FA3" to founding affidavit

had not been discharged as at 28 February 2019. It goes without saying therefore, that as at the latter date, the dispute was still unresolved and the restructuring incomplete or not finalised as per the agreement of 27 June 2018. This state of affairs militates against the respondents' allegations that the fifth applicant was dismissed¹². Besides, he continued to receive his salary up until January and February 2019¹³. Similarly, the respondents failed to lay a basis for the allegation that the seventh applicant was employed as an intern, receiving a stipend of R 3000.00 as a salary; his position having been rectified during January 2019.¹⁴ Evidently, this is in stark contrast to the written agreement of 27 June 2018 and the court orders granted in this regard.

- [18] The applicants admitted that certain payments were made to them but that as at 07 March 2019 they had neither heard nor received their remuneration in full. On the other hand, the respondents appeared to be uncertain as to when their obligations as regards the payment of the remuneration to the applicants arose.¹⁵ In their attempt to prove such payments, they relied on hearsay and irrelevant evidence and failed to grapple and address the issues at hand.¹⁶

Conclusion

- [19] In the light of the above, I agree with the submission of the applicant's counsel that there was no substance in the points in *limine* raised by the respondents. The real issue of whether the

¹² Paragraph 14 of the answering affidavit

¹³ Paragraph 21.3 of replying affidavit

¹⁴ Paragraph 25.10 of the opposing affidavit

¹⁵ Paragraph 18.6 of the opposing affidavit

¹⁶ Paragraphs 25.7; 25, 28.2, and 30.1 of the opposing affidavit and Paragraph 32 and 33 of the founding affidavit; *Wightman t/a JW Construction vs. Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA); *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 A .

applicants were paid the amount due to them was parried and skirted by the respondents and never properly addressed. The preliminary points raised were but an obfuscation and an endeavour by the respondents to evade grappling with the real issues. Paragraph 3.3 of the written agreement between the parties makes clear that the existing remuneration structures would remain unchanged until, at the earliest, 28 February 2019. The *status quo* had to be maintained for this period as any changes by the respondents of such structures would be a breach of the agreement. Neither justification nor reasons were proffered for the non-compliance with the provisions of the agreement. In these circumstances, the respondents' reliance on the special pleas appear hollow and uncalled for. Consequently, I am of the view that both the points in *limine* and the respondents' defence to the applicants' claims must be rejected. The application must therefore succeed.

Costs

- [20] The first and sixth applicants, despite their claims having been settled, insisted on the payment of their costs as they were of the view that the respondents effected payments or that such payments came to their attention after the application was lodged. I am inclined to agree with this view. The amounts claimed and reflected on the annexures to the founding affidavit¹⁷ do not exceed the amount of R 200 000.00. In my view this matter was justiciable in the magistrate's court. Consequently I find it appropriate that the costs to be awarded should be awarded on the district magistrate's court scale.

¹⁷ Annexures "FA 8.1 to 8.3" to the founding affidavit.

Order

[21] I therefore make the following order:

1. The first respondent is ordered to pay to the applicants remuneration/commission in the amounts as set out below:
 - 1.1 Second applicant R 8 067.26
 - 1.2 Third applicant R 16 588.34
 - 1.3 Fourth applicant R 5 640.31
 - 1.4 Fifth applicant R 8 621.72
 - 1.5 Seventh applicant R 12 744.00
2. The second and third respondents are ordered to take all necessary steps in order to give effect to the order granted in terms of prayer 1 above;
3. The first and second respondents are ordered to pay the costs of this application on the scale applicable to the district magistrate's court in respect of the first, second, third, fourth, fifth, sixth and seventh applicants jointly and severally, the one paying, the other to be absolved.

MHLAMBI, J

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