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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO:3865/2016

In the matter between:

NTOMBOBOM NOBOM MNGUNI

APPLICANT

AND

MEC FOR THE DEPARTMENT OF
EDUCATION, EC AND ANOTHER

RESPONDENTS

JUDGMENT

DAWOOD, J:

1. The Applicant herein sought the following relief:

- “1. That the decision, of the Respondents, to wit, failing to allow the Applicant to continue with her employment contract with the Department of Education be and is hereby declared unlawful, unconstitutional, irregular and be set aside as a nullity.*
- 2. That the Applicant be and is hereby allowed to resume and discharge her duties as an Educator at Atwell Madala Senior Secondary School, Mthatha District or any school the Department may wish to place the Applicant and on conditions not less favourable than those which existed as at 20 August 2012.*
- 3. That the Respondents be and are hereby directed to pay the Applicant’s salary with effect from 20 October 2012 and continue to do so until the Applicant reaches her retirement age or resigns from the Department of Education.*
- 4. That the Respondents pay the costs of this application on an attorney and own client scale, such costs to include the appointment of two Counsel.*
- 5. That the Applicant be and is hereby condoned for non-compliance with any legislation, which she ought to have complied with before instituting these proceedings.”*

2. The Respondent raised the following points *in limine*:-

- a) Lack of Jurisdiction; and

b) Prescription.

3. It is necessary to deal with the points taken *in limine* points before dealing with the merits.

3.1 On the issue of jurisdiction the facts in this case are as correctly argued by the Applicant, distinguishable from the facts in **Chirwa V Tansnet Limited and Others**¹.

a) The Applicant's case is that the appeal procedure was decided in her favour and accordingly she is seeking to enforce a contract of employment.

b) She is not seeking to set aside an unlawful labour practice nor is she seeking to review the decision of the first respondent.

c) Whether or not her averments are correct or not is another issue.

She is relying on a letter dated 11 September 2013, received from the department which was emailed pursuant to the arbitrator requesting the department to furnish a copy of the outcome of the appeal lodged by the Applicant.

d) She accordingly cannot be faulted to relying upon the contents of this letter as being the findings of the appeal in respect of the findings of the disciplinary hearing that was referred to arbitration.

¹ 2008 (4) SA 367 CC

- e) Her application to court is accordingly based on the proposition that she was not dismissed and accordingly entitled to continue with her employment, in terms of a contract of employment.
- f) The issue of whether or not the letter actually deals with that disciplinary hearing is an issue to be considered when dealing with the merits of the matter.
- g) I accept in the circumstances that this court has concurrent jurisdiction with the labour court and the application is properly before court².
- h) The respondents point in limine in respect of lack of jurisdiction is accordingly dismissed.

3.2I now turn to the issue of prescription.

- a) It is common cause that the applicant only became aware of the outcome of her appeal on the 25 or 26 July 2016 at the arbitration hearing.
- b) Prescription could in the circumstances not be said to have commenced running against her from 2012.
- c) It may well be argued that the part of her claim relating to the repayment of the salary from 2012 may well fall within the ambit of the definition of debt in the Prescription Act and her

² Makhanya v University of Zululand (218/08) [2009] ZASCA 69

claim can be reduced to that extent but this argument was not presented nor was the applicant given an opportunity to pertinently reply to the same.

- d) However it cannot be argued that her claims as a whole have prescribed and that she should be non-suited.
- e) There are aspects of her claim that do not fall within the ambit of the prescription Act at all.
- f) In any event the delay in launching the proceedings was due to the failure on the part of the respondent to make the applicant aware of the outcome of the appeal prior to 2016. The Applicant had in fact referred the matter to arbitration well within that period.
- g) There is a sufficient basis to find that the applicant's entitlement to a substantial part of the relief sought has not prescribed, if indeed prescription of a portion is established.
- h) In the event that the ultimate decision is that she should be reinstated then the issue of prescription as already indicated in respect of some of the back pay may well be arguable. However her entitlement to claim back pay as a whole would not have prescribed and she would be entitled to her relief to the extent proven even in respect of that claim. She would accordingly not

be non-suited on the basis that part of the claim may have prescribed.

- i) In the circumstances the respondent's point *in limine* that the applicant's claims has prescribed, is dismissed.

4. I now turn to the merits of the matter.

- a) The application by the applicant revolves exclusively around the findings made by the department on the letter dated 11 September 2013 which reads as follows:-

*"Ms N Ngezana
Persal No:[....]
Atwell Madala Senior Secondary School
C/O The District Director
Mthatha District Office
Mthatha*

Dear Ms Ngezana

RE: YOUR APPEAL AGAINST THE FINDINGS AND THE SANCTION OF THE PRESIDING OFFICER IN YOUR DISCIPLINARY MATTER

The above matter refers.

I have considered your appeal against the findings and the sanction of the presiding officer of the disciplinary enquiry. The reasons for my decision are as follows:-

You were charged with absenteeism during 2009, 2010, 2011 failure (sic) to submit work, including mark sheets and non co-operation.

The evidence tendered was not actually disputed but there were attempts made to justify your conduct.

Your behaviour is not in accordance with the responsibility of you position. There is no justification for your behaviour. Several attempts where made to remedy the situation by the school but in vain. Learners suffered as a result of your conduct.

Your appeal against the findings is dismissed and upheld against the sanction which is replaced with a final written warning, counselling and a fine equivalent to one month's salary (2011 notch).

Yours Faithfully

*MEC FOR THE DEPARTMENT OF EDUCATION
PROVINCE OF THE EASTERN CAPE”*

- b) This letter was furnished upon the request by the arbitrator pertaining to the outcome of the appeal against the decision to dismiss her.
- c) The applicant upon becoming aware that the sanction had been overturned on appeal sought to be placed back at the school that she had been teaching and withdrew her matter before the arbitrator as she could not pursue a claim for unfair dismissal when she had not been dismissed according to the document furnished pertaining to the request.
- d) The respondents dispute that the letter pertained to the dismissal despite the fact that:
 - (i) The document was furnished to the arbitrator;
 - (ii) It was furnished upon him apparently requesting the decision that was taken by the department in respect of the appeal that was the subject matter of the Arbitration, being the dismissal of the applicant.
 - (iii) It was furnished by the Department.

- e) The respondent further dispute that any appeal was lodged with them pertaining to the applicant's dismissal in 2012 and even if it was it was out of time if one has regard to the applicant's version that she became aware of it in August 2012
- f) The notice of appeal differs from the previous appeal lodged by the applicant and annexed to her papers and it is not addressed to any particular person.
- g) There is no proof of receipt of the document on any person, nor does it indicate that it was sent by pre-paid registered post or delivered to the respondent.
- h) It appears to have been faxed but there is no indication with regard to whom the fax number belongs to nor whether indeed there is proof of receipt of the fax.
- i) The respondent's contention that they did not receive the notice of this appeal is accordingly not inconceivable.
- j) However the respondent had received the arbitration proceedings where mention is made of the appeal and even when asked for the outcome of the appeal instead of stating that there is no appeal because there was no referral to appeal they instead sent an outcome of an appeal.
- k) There clearly is a dispute of fact with regard to whether or not the notice of appeal was indeed served upon the respondent and

adjudicated upon and accordingly whether or not the outcome furnished did indeed refer to the appeal pertaining to the applicant's dismissal.

- l) The respondent stated that the letter furnished did not relate to the outcome of the appeal of the sanction of dismissal but rather to different proceedings and to a different outcome. They initially referred to a series of hearings then stated that it pertained to one hearing that covered 2009, 2010 and 2011 conduct and put up a letter from an attorney claiming to be a notice of appeal in respect of that hearing.
- m) The respondent failed to put up most of the annexures they referred to and despite the fact that these appear to have been furnished to the applicant these annexures did not form part of the indexed and paginated papers in this matter and were not placed before court.
- n) The manner in which the respondent presented its case in its answering affidavit can clearly be criticised, let alone the incompetent and incomprehensible manner in which they dealt with the applicant, from about 2008 and through the various disputes.
- o) The document furnished however clearly states it relates to conduct complained of in 2009/2010 and 2011 and that sanction is altered and that the applicant had made attempts to justify her behaviour, which she did not do in her notice of appeal in respect of the 2012 dispute.

- p) The applicant cannot wish away the contents of the document and insist that it relates to the sanction of dismissal, because on her version it dealt with conduct of the latter part of 2011 only not 2009/ 2010 and 2011.
- q) There clearly is a dispute of fact regarding whether or not the applicant had lodged any other appeal or whether this was the only appeal and accordingly this outcome could only relate to the outcome of the dismissal.
- r) This matter cannot be decided in favour of one or the other party without the hearing of oral evidence.
- s) The respondent case is not clear cut to enable a decision to be made in its favour but it does raise triable issues that cannot simply be regarded as bare denials warranting a decision in favour of the applicant.
- t) I am accordingly of the view that this matter, as argued by the respondent, does have material disputes of fact that warrant a referral to the hearing of oral evidence.
- u) The dismissal referred to in 2010 is not the subject matter of this application and the respondent has not sought reliance on that dismissal to warrant its refusal to re-instate the applicant.
- v) There clearly are disputes of facts pertaining to that dismissal and the failure on the part of the department to implement that decision.

- w) The respondent have not brought a counter-application seeking to enforce that decision so despite the disputes of fact pertaining to that dismissal in my view it is not relevant to these proceedings and it would not be prudent to refer this dispute to the hearing of oral evidence.
 - x) The real dispute pertains to the 2012 dismissal and whether or not the sanction of dismissal was overturned on Appeal or whether no Appeal was properly launched pertaining thereto by the applicants.
 - y) The respondent have a right of recourse should they wish to enforce the alleged 2010 dismissal.
 - z) The respondent did make an application for the matter to be referred to the hearing of oral evidence. However the applicant argued that the matter could be decided on the papers as they stand.
5. The question that arises is whether the court hearing an opposed application has the competence to *mero motu* order a referral to oral evidence.
- a) Rule of Court 6(5)(g) provides as follows:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a

witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

- b) The Rule extends a wide discretion to the court. See *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie, Noord Transvaal* 1970 (4) SA 350 (T) 365A-H and *Pautz v Horn* 1976 (4) SA 572 (O) 575H.
- c) The undesirability of a Judge *mero motu* ordering a referral to oral evidence or to trial was highlighted and conclusively dealt with by a full court of the then Transvaal Provincial Division in *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) where Myburgh J writing for the court, said the following (428H):

“It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)(g) to be invoked. In the present case the amount involved is only half of R5 375. In my view it should not be left to the presiding Judge to determine, in the light of what I have said, whether the application should be decided on the affidavits or not. In proper circumstances the presiding Judge may, in his discretion, decide to do otherwise. In the present case, in my view, the Judge cannot be faulted for not having referred the case to trial, notwithstanding that he had not been requested so to do.”³

The court in *Sentino* held, that in practice an application for a referral is typically made at the hearing of an opposed application by the applicant who is faced with the reality of irresolvable disputes of fact having arisen on the papers. Held, further, that no doubt that the court in principle has the competence to *mero motu* order such

³See also *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) 337G

referral, but this in the Judges's experience as well as in the experience of a number of his colleagues in this Division whom the Judge had consulted on this aspect, has never occurred.

Held, further, that applied to the present matter the learned Judge a quo quite clearly was neither obliged nor can he be faulted for not having mero motu referred the matter to the hearing of oral evidence."

d) In resolving to refer a matter to evidence a court has a **wide discretion**, to be exercised according to the principle explained by Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396 E-G:

"It is the respondent who would fail on the disputed issue if it fell to be decided on the papers; an oral hearing is being granted at its instance, in order to afford it an opportunity of altering, if it can, the incidence of the probabilities as they emerge from the papers, and of displacing the inference which flows from the signed document. Thus, as matters now stand, the applicant needs no oral evidence to strengthen its case; it will need such evidence only if and when the respondent creates, prima facie, a balance of probability in its favour. There is no reason why I should compel anyone to testify. What I should do is give the respondent the opportunity which it has sought, and to give the applicant an opportunity of answering, if he wishes the case made out by the respondent."

e) Where a referral to oral evidence is granted the parties would not be allowed to engage in a fishing expedition. Oral evidence will be heard on specified issues with a view to resolving any dispute of fact. The court will adopt this approach where the factual dispute is within a narrow compass and can be expeditiously disposed of, see *Standard Bank of SA Ltd v Neugarten & others* 1987 (3) SA 695 at 699C see also *Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd* 1949 (3) SA 1155 (T) at 1164, *Hopf v Pretoria City Council* 1947 (2) SA

752 (T) at 768; *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1978 (4) SA 696 (T) at 699A-B. The is my view allows the court to specify specify the issues that need to be determined in oral examination.

- f) *The law as it relates to resolution of genuine dispute of facts was laid in Plascon-Evans Paints LTD v Van Riebeeck Paints (PTY) LTD 1984 (3) S.A 623 at 634 F to be:-*

*“...where there is a dispute as to the facts a final interdict should only be granted in notice of motion of proceedings if the facts as stated by the respondents together with the admitted facts in applicant’s affidavits justify such an order...Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as being admitted”. In making the assessment whether there is a bona fide dispute of facts, this court should proceed with caution and must ‘guard against the danger of an injustice being done (more particularly to an injustice to the respondent) if unpleaded issues are readily treated as being fully canvassed’ (see *South Peninsula Municipality v Evans and others* 2001 (1) S.A. 281 E). The law as laid down in *Plascon Evans* is that where there is a genuine dispute of facts which cannot be resolved on the papers, the matter must be referred to oral evidence.”*

6. I am satisfied that there is a genuine dispute of facts in this case that is irresolvable on the papers which in the interest of justice ought to be referred to the hearing of oral evidence.
7. In the exercise of my discretion I refer this matter to the hearing of oral evidence on the following issues:-
- a) Whether or not a hearing took place pertaining to absenteeism from 2009/2010 and 2011.
 - b) If a hearing took place, what was the sanction imposed.

- c) If it is established there was a hearing, whether or not the outcome of that disciplinary hearing was appealed against by the Applicant.
- d) If indeed it was, whether or not the outcome of the appeal dated 11 September 2013 pertained to that appeal or if it did not then what was the outcome of that appeal.
- e) Whether or not the notice of appeal dated the 11 September 2012 was served on the respondent and adjudicated upon by respondents.
- f) If it is found that it was duly served and adjudicated upon then whether or not the outcome of the appeal dated 11 September 2013 related to an overturning of the sanction of dismissal of the disciplinary hearing of the 10 May 2012 and replacing it with a fine.
- g) If letter dated 11 September 2013 related to the setting aside of the sanction of dismissal whether the applicant is entitled to the relief sought and to what extent.

8. I accordingly make the following order:

- a) That the matter is referred to the hearing of oral evidence on the issues set out in paragraph 7 above.
- b) That the first respondent is directed to pay the Applicant's costs of the hearing in the opposed court on the 23 November 2017 in light of it being substantially unsuccessful in respect of the points *in limine* that were raised by the Respondents.

- c) The costs of the application and other reserved costs are reserved for determination by the trial court hearing oral evidence in this matter.
- d) The usual rules of court are applicable pertaining to pre-trials, furnishing of affidavits by additional witnesses and annexures and discovery of documentation that do not presently form part of the papers.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD: 23 November 2017

JUDGMENT DELIVERED: 23 January 2018

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