

**IN THE EASTERN CAPE HIGH COURT, BHISHO**

**CASE NO: 550/10**

In the matter between:

**MALIBONGWE MTUZULA**

**Applicant**

and

**THE SUPERINTENDENT-GENERAL FOR HEALTH,  
EASTERN CAPE PROVINCE**

**1<sup>ST</sup> Respondent**

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH,  
EASTERN CAPE PROVINCE**

**2<sup>nd</sup> Respondent**

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**JUDGMENT – LEAVE TO APPEAL**

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**Y EBRAHIM J:**

- 1] The applicant seeks leave to appeal against the whole of the judgment and order of this Court, delivered on 14 March 2011, dismissing with costs the application ('the application') launched by the applicant on 22 September 2010. An application for condonation for the late lodgement of the application for leave to appeal has also been lodged.

- 2] The respondent did not oppose the application for condonation but only the application for leave to appeal and the late noting of the application for leave to appeal was accordingly condoned.
- 3] The applicant seeks leave to appeal on two grounds. The first is that the Court erred in finding that the defence of rectification had been properly raised by the respondents in their answering papers.
- 4] Mr Zilwa's submissions, on behalf of the applicant, were essentially similar to those advanced at the hearing of the application. He contended there were only two references to rectification in the respondents' answering affidavit. The respondents had also asserted in their answering affidavit that a counter application would be brought for rectification but the application was not proceeded with and withdrawn. In the absence of the counter application having been brought and granted, so Mr Zilwa contended, the respondents were not entitled to rely on rectification as a defence.
- 5] Mr Rorke SC, who appeared for the respondents, submitted there was no merit in the argument that the withdrawal of the application for rectification meant the defence of rectification had not been properly pleaded. The affidavits filed by the respondents contained numerous and detailed references to rectification, which had been specifically pleaded as a defence and the withdrawal of the application for rectification took the matter no further. All this evidence had been correctly

summarised by the Court in its judgment and there was no reasonable prospect that another Court may come to a different conclusion than that of this Court.

6] I do not find any substance in the arguments advanced by Mr Zilwa. The contention by Mr Rorke that the defence of rectification was adequately pleaded by the respondents is well-founded. Mr Zilwa's contention that there are only two references to rectification in the answering affidavit is not substantiated by a proper reading of the respondents' papers. There are numerous references and the respondents have throughout asserted that the period of the contract of employment was three and not five years. Moreover, the abandonment of the application for rectification does not preclude the respondents from raising rectification as a defence. The Supreme Court of Appeal ('SCA'), as Mr Rorke has submitted, dealt with this issue in the case of *Gralio (Pty) (Ltd) v D E Claassen (Pty) (Ltd)*.<sup>1</sup> On the basis of what the SCA said in *Gralio* it is clear that the respondents in the instant matter have properly pleaded the defence of rectification. There is, therefore, no reasonable prospect that another Court may reach a different conclusion.

7] The second ground is that the Court erred in not finding that the period of five years, which the contract signed by the parties reflects, was neither a *bona fide* error nor a common error between the parties.

8] The gist of Mr Zilwa's argument was that it was common cause that the parties had

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<sup>1</sup> 1980 (1) SA 816 (AD) at 824B-C: '..... a defendant who raises the defence that the contract sued upon does not correctly reflect the common intention of the parties, need not even claim formal rectification of the contract; it is sufficient if he pleads the facts necessary to entitle him to rectification and asks the Court to adjudicate upon the basis of the written contract relied upon by the plaintiff as it stands to be corrected. (See, *per* Steyn J in *Volkscas Bpk v Geyser* 1960 (4) SA 412 (T) at 419.); *Standard Bank of SA Ltd v Cohen* (2) 1993 (3) SA 854 (SECLD) at 862C

entered into a contract of employment for five years and it was not open to the respondents, on the facts and probabilities, to refute that it had given the applicant a written contract for this period five years which he had accepted. The applicant's claim that he never received the three year contract, that the respondents aver they sent, was on the probabilities true. If he received this contract there was no explanation why it had not been signed by anyone. Mr Boya, who signed the contract on behalf of the respondents, did not deny that the period reflected in the contract was five years and he signed well knowing it was for this period. There was no error on the part of the applicant regarding the period of the contract and thus no error common to the parties.

- 9] Mr Rorke's submissions, to the contrary, were that there was a dispute of fact regarding the period of the contract and that on application of the test enunciated in *Plascon-Evans*<sup>2</sup> the respondents' version had to be accepted. There was consequently no basis upon which another Court may come to the conclusion that the period of the contract was three years. A further submission by Mr Rorke was that it was not a requirement of rectification that the error had to be common to both parties. It was sufficient that there was an intentional act on the part of one party which induced the error.<sup>3</sup> In the instant matter, on the applicant's own version, he received a contract that reflected his period of employment as five years, which was clearly incorrect, but still signed the contract. This was an error caused by an intentional act of the applicant.

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<sup>2</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-G

<sup>3</sup> See *Amler's Precedents of Pleadings* (7<sup>th</sup> Ed) p 337 at (d)(ii) and the cases cited there

10] I am in agreement with Mr Rorke. This issue was fully dealt with in the judgment and I do not deem any further comment necessary save to say that the applicant has failed to present any facts to substantiate that the respondents agreed to the period of the contract being five years instead of three years as stipulated in the advertisement for the post, and reiterated at his interview, and confirmed once more in the letter of appointment. The applicant's lack of candour on this issue in his founding affidavit indicates he well knew that the period of his contract of employment was three years and not five years. But, as the proverbial saying goes, he was not going to look a gift horse in the mouth when Mr Boya signed the contract that incorrectly reflected his appointment was for a period of five years. In regard to this ground, too, there is no reasonable prospect that another Court may reach a different conclusion.

11] Mr Rorke submitted that a third basis upon which there was no prospect that another Court might come to a different conclusion was that the applicant had sought a final interdict in respect of which the requisites were: (i) a clear right on the part of the applicant, (ii) an injury actually committed or reasonably apprehended, and (iii) the absence of any other satisfactory remedy.<sup>4</sup> The applicant, however, had not made out a case for the grant thereof. First, since the question of the term of the contract had, in accordance with the test enunciated in *Plascon-Evans*, to be determined in favour of the respondents' version that it was a three year contract, the applicant had failed to establish that he had a clear right to a contract for five years. Second, in

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<sup>4</sup> Van Loggerenberg & Farlam, *Erasmus Superior Court Practice*, pp E8-6C to E8-6D

the absence of a clear right there could not be an injury actually committed or reasonably apprehended in the form of non-payment of a salary for a further two years. Third, there were other satisfactory remedies available to the applicant such as an award for damages<sup>5</sup> or appropriate relief under the Labour Relations Act.<sup>6</sup>

12]In response to Mr Rorke's submissions, Mr Zilwa contended that no dispute of fact existed regarding the term of the contract being five years. The harm the applicant was suffering was that the Department of Health had stopped payment of his salary. And, a claim for damages was not a satisfactory remedy as the applicant was suffering harm now and the promise of obtaining relief, most likely a few years later, was cold comfort to him. The Labour Relations Act was inappropriate as the applicant was not alleging an unfair labour practice but seeking enforcement of a contract. The applicant, Mr Zilwa contended, had met the requirements for a final interdict.

13]The arguments advanced by Mr Zilwa are not convincing. It should be apparent from what I have stated previously, and as correctly submitted by Mr Rorke, there is a dispute of fact regarding the period of the contract and the respondents' version must prevail. The applicant has not established a clear right to a contract for five years nether an entitlement to a salary for a further two years and the non-payment of a salary does not mean he is suffering harm. Even if he could possibly establish that he still had a right to be paid a salary, which I have found is not the case, a

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5 *UDC Bank Ltd v Seacat Leasing and Finance Co (Pty) Ltd and Another* 1979 (4) SA 682 (T) at 695D to 696C

6 Act No. 66 of 1995

claim for damages would be a satisfactory remedy.

14] In the circumstances, I am not persuaded there is a reasonable possibility that another Court would reach a different conclusion to that reached by this Court. It follows that the application for leave to appeal must fail.

15] It is trite that costs should follow the result in the absence of cogent reasons to order otherwise. Such reasons have not been advanced and the respondents are entitled to an order for costs in their favour.

16] In the result, the following order shall issue:

The applicant's application for leave to appeal is dismissed with costs.

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**Y EBRAHIM**  
**JUDGE OF THE HIGH COURT**

**8 AUGUST 2011**

Delivered on: 8 August 2011

Counsel for the applicant: P H S Zilwa

Attorneys for the applicant: Hutton & Cook

KING WILLIAM'S TOWN

Counsel for the respondent: S Rorke SC

Attorneys for the respondent: Wesley Pretorius & Associates

EAST LONDON

MTUZULA v SG for HEALTH, EC and MEC.LAPJ