



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA4/2014

In the matter between:

ALPHEUS MAKWENA MATHEKGANA

Appellant

and

FILM AND PUBLICATION BOARD

Respondent

Heard: 13 May 2015

Delivered: 21 October 2015

Summary: Employee seeking in an urgent application payment of 13th cheque – employer disputing the existence of the claim- dispute of facts whether payment was made – principle that in motion proceedings when there exists a dispute of facts which cannot be resolved on the papers court having the discretion to refer the matter to oral evidence restated – employee failing to request that disputed fact be referred to trial court – court *a quo* exercising its discretion not to *mero motu* referring matter to trial court – Plascon Evans' rule considered – appeal dismissed.

CORAM: Tlaetsi DJP, Sutherland JA, and Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

- [1] The appellant is appealing against the judgment and order of Rabkin-Naicker J handed down on 16 April 2013 in which the court *a quo* dismissed the appellant's claim for payment of a 13th cheque against his erstwhile employer, the respondent. On 14 May 2014, this Court granted the appellant leave to appeal on petition.
- [2] The appellant was employed by the respondent as Chief Finance Officer from June 2008 until his resignation in June 2009. On his resignation, the appellant requested payment of his arrear leave benefit and a 13th cheque to which he was entitled in terms of his terms and conditions of employment.¹ Upon accepting the appellant's resignation, the respondent indicated to the appellant that whatever was due to him would be paid in due course once deductions the respondent was entitled to were worked out. Subsequent thereto, the respondent informed the appellant that he was entitled to R9 674.09 *in lieu* of his leave benefit. Nothing was said about the 13th cheque.
- [3] When no payment was made by the respondent, the appellant's attorneys wrote a letter, dated 30 March 2012, in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997 "(BCEA) in which a demand on behalf of the appellant was made for payment of leave pay and the 13th cheque in the sum of R349 375.02. After several email exchanges, on 24 July 2012, the respondent acknowledged in a letter that it owed the appellant the sum of R37 619.40 as leave pay.
- [4] On 24 July 2012, the respondent made a settlement offer to the appellant in which it undertook to pay the appellant the amount of R 37 619.40 as arrear leave payment in full and final settlement of all claims the appellant may have with regard to his employment with the respondent. In the same e-mail containing the offer, the respondent alleged that it had paid the appellant his 13th cheque. Whilst accepting the offer with regard to the leave pay, the appellant still disputed payment of the 13th cheque.
- [5] On 10 September 2012, the appellant brought an urgent application under case number JR2391/12 in which it claimed payment of the 13th cheque. On

¹ See clause 3 of the appellant's terms and conditions of employment.

the same day, an amended settlement agreement relating to the leave pay was made an order of court. The relevant portion of the settlement agreement reads as follows:

- '1. The parties have agreed to settle the Applicant's claim in relation to the leave pay claimed as follows:
 - a. The First Respondent will pay to the Applicant an amount of R37 619.40 in full and final settlement of this application and the Applicant's leave claim only, less any taxation thereon.'

The only outstanding issue between the parties being payment of the 13th cheque.

[6] On 21 January 2013, the applicant again launched an urgent application in the court *a quo* under case number J96/13² in which it claimed payment of the 13th cheque. In its answering affidavit, the respondent raised two points. Whilst alleging that the appellant was paid his pro-rated 13th cheque in July 2009, the respondent alleged that the appellant's claim has prescribed in view of the fact that three years has expired since June 2009 when payment of the 13th cheque was due. Secondly, the respondent alleged that a factual dispute exists as to whether the 13th cheque was paid to the appellant that the appellant foresaw and failed to refer the matter for oral evidence.

[7] At the hearing of the matter, the parties presented argument on both the issue of prescription and the alleged payment of the 13th cheque. With regard to the alleged payment of the 13th cheque, the respondent argued that there was a factual dispute on whether the 13th cheque was paid. It is the respondent's contention that the appellant foresaw the existence of a dispute of facts and should have prayed for a referral to oral evidence on this point. The respondent asked for the dismissal of the appellant's claim on the ground that the claim has prescribed and in the alternative on the ground of the existence of a factual dispute that could not be resolved on the papers.

[8] In dismissing the application, the court said:

² The matter under J96/13 is the same matter under case number JR2391/12. As appears from the appellant's founding affidavit, it was the Registrar's decision to allocate a new case number to the previous urgent application under JR2391/12.

[4] The applicant clearly foresaw that there was a dispute of fact over the issue of whether the monies had in fact been paid. This is reflected in his founding papers. Where there are material disputes of fact on the papers it is trite that an application should not proceed by way of motion, but rather by way of action. The applicant did not seek a hearing of oral evidence in the alternative to his prayers. In such circumstances, the appropriate order must be to dismiss the application.'

[9] The appellant is appealing on the following grounds:

9.1 that the court *a quo* had erred in making a finding that he had been aware of the outstanding money paid for the 13th cheque but did nothing to pursue his claim;

9.2 that the court *a quo* erred in not postponing the hearing for further investigation into the money owed.

[10] Motion proceedings are decided on the papers filed by the parties. In case where there is a factual dispute which can only be resolved through oral evidence,³ it is appropriate that action proceedings should be used unless the factual dispute is not real and genuine.⁴ In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,⁵ the court held that where there is a dispute of facts final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order.

[11] This rule applies irrespective of where the *onus* lies. Where a factual dispute exists or arises before the hearing of an application and the applicant does not seek the matter to be referred either to oral evidence on a specific issue which is in dispute or to trial, the court has a discretion either to dismiss the application or direct that oral evidence be heard or that the matter goes to trial. The discretion whether to refer the matter to oral evidence lies with the

³ *Plascon –Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

⁴ *Soffiantini v Mould* [1956] 4 All SA 171 (E).

⁵ 1957 (4) SA 234 ((C) at 235 E-G. See also *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428-429; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 56F-57B.

court of first instance. A court of appeal will only interfere with the exercise of such discretion if it was not exercised properly.

[12] Taking into account that in its answering affidavit the respondent had already alleged that it had paid the appellant his 13th cheque, which is disputed, the respondent averred that a dispute of facts exists, which cannot be resolved on the papers. The appellant foresaw the existence of a dispute of facts. It was up to the appellant at the beginning of the hearing in the court *a quo* to have sought a referral to oral evidence on the issue of whether payment was made. Bearing in mind the undesirability of a court to *mero motu* refer an existing factual dispute to oral evidence, I am of the view that there is no reason this Court should interfere with the court *a quo*'s discretion to dismiss the application and not refer the factual dispute to oral evidence.

[13] Faced with a dispute of facts which cannot be resolved on the papers before it, it was not unreasonable for the court *a quo* not to have dealt with the issue of prescription.

[14] Normally costs follow the cause. In this matter, however, I am of the view that it was not unreasonable to seek to pursue payment of the disputed 13th cheque and it would be fair that no order as to costs should be made.

[15] Accordingly, the following order is made:

1. The appeal is dismissed.
2. No order as to costs is made.

Mngqibisa-Thusi AJA

Tlaletsi DJP and Sutherland JA concur in the judgment Mngqibisa-Thusi AJA

APPEARANCES:

FOR THE APPELLANT: Mr AM Mathekgana (self)

FOR THE RESPONDENT: Mr M Motsoeneng of Motsoeneng Bill Attorneys
Inc

LABOUR APPEAL COURT