IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JA121/2014

In the matter between:

GOVERNMENT EMPLOYEES PENSION FUND	**Appellant**
and	
MAUREEN SITHOLE	**First Respondent**
PREMIER OF MPUMALANGA PROVINCE	**Second Respondent**
MEC: DEPARTMENT OF AGRICULTURE AND LAND ADMINISTRATION: MPUMALANGA	**Third Respondent**
DIRECTOR GENERAL: MPUMALANGA	**Fourth Respondent**

Heard: **27 March 2018**

Delivered: **10 July 2018**

Summary: Employee and an employer embroiled in the computation of employee's benefits after the bargaining council found employee's dismissal unfair – prolonged litigation ensued both before this Court and the court below – parties entering into a settlement agreement to solve the dispute – notwithstanding the settlement agreement, employee contending that not all benefits were paid – employer contending otherwise – employee then approaching the Labour Court to enforce the settlement agreement – Labour

Court removing the matter from the roll for want of jurisdiction – Despite the order matter finding its way back in the Labour Court before another judge –

Res judicata **Court held that: When the Labour Court assumed jurisdiction there was already an order to the effect that the Labour Court had no jurisdiction. Consequently, the proceedings before Haslop AJ are a nullity and can be ignored and Van Niekerk's order is valid until it is set aside by a competent court. Appeal upheld and Labour Court's order substituted with an order that the application is dismissed.**

Coram: Phatshoane ADJP, Musi JA and Savage AJA

JUDGMENT

MUSI JA

[1] This is an appeal against the judgment of the Labour Court (Haslop AJ). It is brought with the leave of the Labour Court. This matter has a long, chequered and unfortunate history. Although the appeal can be decided on the crisp issue of whether Haslop AJ had the power to adjudicate the matter, it is best for all parties concerned that the entire history of the matter be set out and some of the contentious issues be addressed.

[2] The first respondent, Ms Maureen Sithole (employee), was employed in the Public Service from 1979 to 2002. In 2002, she was appointed Head of Department (HOD) of Mpumalanga Department of Agriculture, Rural Development and Land Administration, on a five-year fixed term contract which was due to expire on 6 November 2007. However, before the contract could expire she was charged, convicted, and dismissed on 6 February 2007 for misconduct.

[3] She referred a dispute concerning the fairness of the dismissal to the General Public Service Sector Bargaining Council (GPSSBC). The employee only sought compensation and not reinstatement. The reason for this was because her fixed term contract had already expired by the time the matter was arbitrated and she had already reached retirement age.

[4] On 7 May 2008, the arbitrator issued the following award:

> '1. The dismissal of the applicant was substantially unfair to the extent that the sanction of dismissal was not appropriate. The respondent proved a procedurally fair process.
>
> 2. The respondent must pay the applicant compensation equal to three months' remuneration less statutory deductions…'

The arbitration award was made an order of court on 29 October 2008.

[5] When her exit benefits were calculated, they were calculated on the basis that she was dismissed from the Public Service. She was aggrieved by this and approached the Labour Court for the following substantive relief:

> '1. A declaration that the applicant had retired from the public service on 7 November 2007 when the fixed term written employment contract between applicant and the first respondent (Premier of Mpumalanga Province) expired.
>
> 2. A declaration that the applicant is entitled to all benefits due to her as a public servant who has retired in terms of section 19 of the Government Employees Pensions Law Act, 1996 (Proclamation No 21 of 1996). Hereafter referred to as the Pension Act.
>
> 3. A declaration that the applicant is entitled to be paid all benefits including pension benefits which accrued to her up to and including the last day of the fixed term employment contract (6 November 2007).

4. An order directing the first, second and/or third respondent to pay all benefits which accrued in law to the applicant as a retiree or has retired pursuant to section 19 of the Pension Act and that such benefits be paid in terms of section 26 of the Pension Act.

5. Directing the first, second and/or third respondents to pay all benefits that accrued to the applicant as a retiree within seven days of the order.

6. Directing the fourth respondent to pay pension benefits which accrued to the applicant in terms of section 26 of the Pension Act.

7 Directing the first respondent to amend the date of the commencement of contributions to the pension fund by the applicant from November 1984 to September 1979 as evidenced by the applicant's date of employment in the Public Service.'

[6] On 22 May 2009, Francis J, granted prayers 6 and 7 only. He dismissed the rest. The employee unsuccessfully applied for leave to appeal. She petitioned the Judge President and the matter was set down, in the Labour Appeal Court (LAC), to consider the petition as well as arguments on the merits.

[7] On the date of the hearing, the LAC indicated to the parties that the matter seemed capable of being settled. Thus the parties requested and were granted an opportunity to explore settlement options. The matter was postponed to 22 January 2010 for those purposes. The parties reached a settlement on 22 January 2010 and the settlement agreement between the parties was made an order of court. The order reads as follows:

'1.1 That the applicant be paid all the pension benefits which had accrued to her up to the time when she lost her permanent status as a government employee and when she took up the appointment as HOD on 6 November 2002;

1.2 That the respondents pay all pension and other benefits payable to the applicant in accordance with the Public Service Act and the SMS handbook for the period when she was employed as HOD until she was dismissed in (sic) 6 February 2007;

1.3 That the payment referred to in paragraph 1.1 and 1.2 above, should take into account the payments of over two million rand that had already been paid to the applicant;

1.4 That the issue of costs be postponed *sine die* with either party having a right to set the matter down on an agreed date before the Labour Appeal Court, or such court as the Labour Appeal Court may order for argument on costs.'

[8] The parties could not agree on the issue of costs and the matter was duly set down to determine the issue of costs. On 7 September 2010, the Labour Appeal Court ordered that each party is to pay its own costs.

[9] The parties remained at loggerheads. The employee alleged that she did not receive any money in terms of the settlement agreement and the respondents, on the other hand, alleged that she was paid all money due to her. The employee approached the Labour Court under case number J 2454/2010 for an order in the following terms:

1. That the 1st to 4th respondents be ordered to comply with the provisions of the settlement agreement subsequently made an order of court by the Labour Appeal Court dated February 2010.

2. That the first respondent (Premier of Mpumalanga), in compliance with the court order mentioned in paragraph 1 above, pay the applicant, within 10 days of the date of the order, an amount of R 1, 495,727,39 as well as interest at the rate of 15.5% calculated from 31 August 2010 to date of payment, which amount is an equivalent of all the other benefits payable by the first respondent in terms of the SMS handbook

3. That the fourth respondent (GEPF) in compliance with the court order mentioned in the foregoing paragraphs, pays the applicant, within 15 days from the date of the order, an amount of R1,727,565,29 as well as

interest at the rate of 15.5% calculated from 31 August 2010 to the date of payment, in respect of the pension benefits.

4. The first of the respondents (sic) are to pay the cost of this application.

5. Further and/or alternatively relief.'

[10] The application under case number J 2454/10 was argued before Van Niekerk J and he issued the following order:

'1 The application is removed from the roll due to lack of jurisdiction.

2 There is no order as to costs.'

[11] Subsequent to Van Niekerk J's order, the employee launched an application in the LAC under case number JA41/09[1] wherein she sought an order that the first and fourth respondents be ordered to comply with the settlement agreement; that the first and fourth respondents be directed to pay her all pension benefits which had accrued to her as referred to in paragraphs 1.1 and 1.2 of the settlement agreement; that the respondents be directed to pay her benefits in terms of paragraphs 1.1 and 1.2 of the settlement agreement as contained in the actuarial reports annexed to her founding affidavit and that in the event that the respondents were to fail to comply with the court order as aforesaid within 30 days from the date of the court order, that the applicant be and is granted leave to approach the LAC on the same papers duly supplemented for an order of contempt of court and the committal to prison of the respondents. This application is still pending in this Court because it has never been withdrawn.

[12] One would have thought that the launching of application JA 41/09 meant that the employee accepted Van Niekerk J's order and that the matter will then be prosecuted in this Court. Inexplicably, the same application, that was before Van Niekerk J, under the same case number (J2454/10) and between the same

[1] It should have been launched with a different case number because case number JA 41/09 was finally disposed of when the costs issue was decided. Van Niekerk J's order was made on 9 February 2012.

parties was again argued before Haslop AJ, on 20 March 2013. This was done in total disregard of Van Niekerk J's order.

[13] Haslop AJ, seemingly unaware of Van Niekerk's order, made the following order:

> '1. The 1st to 4th respondents are ordered to comply with the provisions of the settlement agreement subsequently made an order of the LAC on 22 January 2010 under case number JA41/09, the effect of that settlement agreement being that the benefits due to the applicant, both in respect of her employment up to and including 6 November 2002 and thereafter, are those due to an employee in the applicant's position who has retired from her employment on 6 February 2007.
>
> 2. In compliance with the provisions of the settlement agreement and court order, the first respondent is ordered to pay the applicant, within 21 days of the date of this order, the amount of R 1 495 727,39 plus interest calculated at the rate of 15.5% per annum from 31 August 2010 to date of payment.
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> 3. In further compliance with the provisions of the settlement agreement and court order, the fourth respondent is ordered to pay the applicant, within 21 days of the date of this order, the amount of R 1 727 565,29 plus interest calculated at the rate of 14.5% per annum from 31 August 2010 to date of payment.
>
> 4. The first second and third respondent are ordered to pay the applicants cost of this application, including the cost associated with the application to strike out, jointly and severally the one paying, the others to be absolved.'

[14] Haslop AJ interpreted the settlement agreement reached between the parties to mean that the employee should be paid all pension benefits as if she retired and not as if she was dismissed or had resigned.

[15] The fourth respondent referred to in Haslop AJ's judgment is the Government Employee Pension Fund (GEPF). It did not oppose the application in the Labour

Court. It was also not a party to the settlement agreement that was made an order of the LAC. It successfully applied for leave to appeal against Haslop AJ's order. Likewise, the other respondents, except the employee, also successfully applied for leave to appeal against Haslop AJ's order.

[16] The GEPF pointed out that Haslop AJ's order is incompetent and contrary to the laws governing pension funds. It also contended that the order is contrary to the Income Tax Act, 58 of 1962 because a pension benefit is taxable and the order does not make provision for the lump sum to be paid after the employee's tax liability has been determined.

[17] The Premier and the GEPF contended that Haslop AJ could not hear the matter subsequent to it having been decided by Van Niekerk J. The matter was *res judicata.* I agree. When Van Niekerk J decided that the Labour Court does not have jurisdiction to entertain the matter; that was the end of the matter in that court. Therefore, the matter could not be set down to be heard by another Judge of the Labour Court. The aggrieved party, in this case, the employee, had two options: to take Van Niekerk J's decision on appeal or to prosecute the matter in the correct forum. The employee decided to prosecute the matter in this Court.

[18] By launching the application in this Court, the issues between the parties had to be decided by this Court. It is clear from the pleadings that the issues before Van Niekerk J and Haslop AJ were the same issues which the employee wanted this Court to decide under case number JA41/09. When Haslop AJ heard and decided the matter, the dispute between the same parties, concerning the same subject matter was already pending before this Court. The fact that the same matter is pending in this Court was brought to Haslop AJ's attention and the employee undertook to withdraw the matter in this Court but never did so. When Haslop AJ heard and decided the matter it was already pending in this Court.

[19] Haslop AJ did not deal with these issues in his main judgment but stated the following in his judgment granting leave to appeal:

> 'In addition, and aside from the fact that this is a somewhat unusual case, there is another reason why I am inclined to grant leave to appeal to the first second and third respondents. When this matter came to court on a previous occasion, it was removed from the roll by my brother, Van Niekerk J, due to lack of jurisdiction. When the matter came before me I accepted that this Court did in fact have jurisdiction to deal with the matter, even though it effectively required me to interpret what was ultimately an order of the Labour Appeal Court. There was no jurisdictional challenge from the parties and the court's lack of jurisdiction is still not raised as a ground of appeal. However, it may be necessary for the Labour Appeal Court to consider whether this Court did have jurisdiction to deal with the matter in the first place.'

[20] It is not clear from the above passage whether the assumption of jurisdiction was made with the full knowledge of Van Niekerk J's order or not. What is clear is that jurisdiction was assumed without a proper investigation by the judge as to whether the court had the necessary jurisdiction or not. The Labour Court has no power to assume jurisdiction when it is clear that it does not have jurisdiction. On the facts of this case, it is also not necessary for this Court to decide whether the Labour Court had or did not have jurisdiction to interpret the order of the LAC. That is neither here nor there. This is so because a valid court order had already been made by Van Niekerk J that the Labour Court did not have such jurisdiction and that order still stands. When Haslop AJ assumed jurisdiction there was already an order to the effect that the Labour Court had no jurisdiction. Faced with such an order, Haslop AJ could not assume jurisdiction. Consequently, the proceedings before Haslop AJ are a nullity and can be ignored and Van Niekerk's order is valid until it is set aside by a competent court.

[21] In *the Master of The High Court (North Gauteng High Court, Pretoria) v Motala No and Others,* [2]the court stated that:

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[2] *The Master of The High Court (North Gauteng High Court, Pretoria) v Motala No and Others* 2012 (3) SA 325 (SCA) at para 12.

‘[12] As long ago as 1883 Connor CJ stated in *Willis v Cauvin* 4 NLR 97 at 98 – 99:

Ponnan JA (Malan JA and Wallis JA concurring) 'The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. The maxim *extra territorium jus dicenti inpune non paretur (Dig*. 2.1.20) is applicable (*Dig*. 50.17.170 & 2.1.20; *Cod.* 7.48.1 & 14.4; *Wes*. *ibi Poth. Pand.* 42.1.(14, 15); *Voet* 42.1.48; *Wes. ad. Dig*. 42.1.(5); *Wes. ad. Dig.* 50.17.170 & 2.1.(50); *Groenwn. ad. Cod.* 7.64; *Christin. Decis*. 4.94.2); . . .'

Willis v Cauvin was cited with approval in *Lewis & Marks v Middel* 1904 TS 291; and *Sliom v Wallach's Printing & Publishing Co, Ltd* 1925 TPD 650. In the former, Mason J (with whom Innes CJ and Bristowe J concurred) held at 303: 'It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, *ad Cod.* 2; 41; 7, 54; *Willis v Cauvin*, 4 N.L.R. 98; *Rex v Stockwell*, [1903] T.S. 177; *Barnett & Co. v Burmester & Co.,* [1903] T.H. 30).'

And in the latter Curlewis JP (Krause J concurring) held at 656: 'The action, therefore, of the respondent company in applying for judgment, apparently by default, against the individual partner Sliom, the appellant in the present case, was an illegal and wrongful act. A judgment was thereby obtained against a person who had not been legally cited before the Court, and the effect of that judgment is that it is a nulllity; it is invalid and of no effect. In the case of *Lewis & Marks v Middel*, to which Mr *Murray* has referred us, and also in an earlier case where the Roman-Dutch authorities were examined, it was laid down on the authority of *Voet* that a judgment given against a person who had not been duly cited before the Court is of no effect whatsoever. It is a nullity and can be disregarded. It seems to me that is the position here. A judgment was obtained against the individual Sliom personally, whereas he had never been cited personally and individually to appear before the Court. Therefore, that judgment was wrongly obtained against him, and that judgment, in my opinion, was a nullity as far as he was concerned. The only judgment the plaintiff, on that citation, was entitled to was against the partnership'"

[22] And further that:

'*Lewis & Marks* and *Sliom* were cited with approval by this court in *S v Absalom* 1989 (3) SA 154 (A) at 164, which held:

'Dit volg dus dat die Volle Hof myns insiens geen bevoegdheid gehad het om die appèl aan te hoor nie. Die gevolg, meen ek, was, soos voorspel deur Strydom R, dat die Volle Hof se uitspraak 'n nietigheid was. Sien, benewens die bronne, aangehaal deur Strydom R, Voet *Commentarius ad Pandectus* 49.8.1 en 3; Groenewegen *De Legibus Abrogatis*, *Ad Cod* 7.64; *Lewis & Marks v Middel* 1904 (TS) 291 op 303; *Sliom v Wallach's Printing and Publishing Co Ltd* 1925 TPD 650 op 656 en *Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA 177 (W) op 183D-E. Soos blyk uit hierdie bronne, het die uitspraak van 'n hof wat nie regsbevoegdheid het nie, geen regskrag nie, en kan dit eenvoudig geïgnoreer word. *Groenwegen* (*loc cit*) sê wel dat, waar dit gaan oor die nietigheid van 'n uitspraak van die Hooggeregshof, die *Princeps* se hulp ingeroep moet word, maar hierdie reël geld nie meer by ons nie[3].'

[23] It is, therefore, clear that the order of Haslop AJ should be set aside on the basis that the matter before him was *res judicata. It was also pending in this Court.*

[24] There are other reasons why Haslop AJ's order should be set aside. In paragraph 1 of the order, Haslop AJ states:

'the 1st to 4th respondents are ordered to comply with the provisions of the settlement agreement subsequently made an order of the Labour Appeal Court on 22 January 2010 under case number JA41/09, the effect of that settlement agreement being that the benefits due to the applicant, both in respect of the employment up to and including 6 November 2012 and thereafter, are those due

[3] The court also made reference to the following cases: *State v Mkize* 1962 (2) SA 457 (N) at 460 and also *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) at paras 18 and 19.

to an employee in the applicant's position who has retired from her employment on 6 February 2007.'

[25] This part of the order was made contrary to the employee's case. When the employee launched her application in this Court after Van Niekerk J's order, she stated the following:

> 'Basically, the first and third respondents' contention is that I have been dismissed and therefore not entitled to benefits of a retiree. With due respect to the respondents, they are completely missing the point or deliberately seek to conflate the issues because at no stage was there any contention that the settlement is on the basis that I am a retiree. The settlement acknowledges that I have been dismissed, but despite the dismissal, I am entitled to all the pension benefits and other benefits which accrue to a HoD.'

[26] It is abundantly clear that the employee's case was not based on the fact that the settlement agreement was entered into on the basis that she should be paid as a retired employee. Her argument was more about the computation of the benefits and not about whether she was a retiree. She was obviously aware that as a retiree she would be entitled to annuities which would be paid to her on a monthly basis. This proposition is fortified by the fact that in the notice of motion she did not claim that she should be paid a lump sum and thereafter annuities in terms of the rules of the pension fund. What she wanted was a particular amount from her erstwhile employer and an amount from the GEPF.

[27] Haslop AJ ordered the GEPF to pay the employee R1 727 565,29 plus 15,5%pa interest. This sum was based on the calculations of an actuary. The actuarial report was disputed. The Premier and the MEC pointed out that the actuary assumed that she retired, which was an incorrect assumption. They contended that she was not entitled to a leave gratuity, calculated at R603 703.30 because she was a HoD. The Labour Court did not attempt to resolve these disputes. It probably accepted the actuarial report because it comported with its view that the employee was to be treated as a retiree.

[28] Haslop AJ could not order the GEPF to pay a gratuity to the employee unless such payment was sanctioned by an Act of Parliament. Section 20 of the Government Employee Pensions Act states as follows:

> '(1) Save as is otherwise provided in this law, no award of a benefit or any increase thereof and no alteration of any condition or condonation of a breach of any condition upon which such benefit is by law earned or to be earned in respect of a pensioner of the Fund, the Temporary Employees Pension Fund or a previous fund, shall be lawful unless the award, increase, alteration or condonation is authorised by an Act of Parliament…' [4]

[29] It is not clear from Haslop AJ's judgment in terms of which Act of Parliament this award was made.

[30] I need to say a few words about a very disconcerting aspect. After the parties argued the matter, they were given an opportunity to explore, having heard their respective stances the possibility of a settlement. The parties request time and they were given until 9 April 2018. We were all under the impression that the parties found each other when we heard nothing from them. I enquired from the Acting Deputy Judge President what the status of the matter was. After an investigation, I was informed late on 5 July 2018 that the parties could not settle and that they communicated that to the Registrar's office during April 2018. This was not brought to our attention. We apologise to all the parties for the delay and the unfortunate situation.

[31] The following order is made.

[31.1] The appeal is upheld with no order as to costs.

[31.2] The order of the Labour Court is set and replaced with following:

> 'The application is dismissed.'

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[4] Proclamation 21 of 1996.

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CJ Musi JA

Phatshoane ADJP and Savage AJA concur with CJ Musi

APPEARANCES:

FOR THE APPELLANT:	Adv S Khumalo assisted by Adv K Magan
	Instructed by Bowman Gilfillan
	Sandton
FOR THE FIRST RESPONDENT:	Mr Kolisi
	BM Kolisi Inc Benoni