



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J1116/2012

In the matter between:

JOHAN ANDRE MULLER

Applicant

and

MASSCASH HOLDINGS (PTY) LTD

First Respondent

CCW WHOLESALERS (PTY) LTD

Second Respondent

KLERKSDORP CASH AND CARRY

Third Respondent

Heard: 14 November 2013

Delivered: 25 February 2014

Summary: Clear dispute of fact in application. Application dismissed.

JUDGMENT

GUSH J

[1] The applicant in this matter applies for an order:

- a. 1. declaring the third respondent to have been his employer at all material times ;

- b. 2. declaring that the applicant's contract of employment with the third respondent is still in existence; and
- c. 3. directing the first respondent to pay the applicant his remuneration and benefits with retrospective effect from 4 July 2011; Alternatively ordering the first respondent to pay the applicant his remuneration benefits for the period 4 July 2011 up to and including 14 September 2011;
- d. 4. "that the third respondent, alternatively the first respondent further alternatively both third and first respondent shall forthwith reinstate the applicant in his position as manager of the third respondent and comply with [his] contractual rights and permit the applicant to comply with his contractual obligations.

[2] After the respondents had filed their answering affidavits, the applicant filed his replying affidavit to which was annexed an amended notice of motion. The amendment comprised the addition of a further alternative prayer to payer 2 above for an order declaring the termination of the applicant's contract of employment with the third respondent to be unlawful.

[3] In the absence of any application to amend the notice of motion, the respondents opposed the amendment and the applicant withdrew the amended notice of motion, only to immediately thereafter file a Notice of Amendment seeking to amend his application by ~~including the~~including the alternative prayer that the termination of his contract of employment with the third respondent be declared unlawful.

[4] All three respondents are all private duly incorporated companies and accordingly separate entities and all oppose the applicant's application.

[5] In his founding affidavit, the applicant avers that he was an employee and manager of the third respondent as well as a shareholder and director of the third respondent. The applicant attaches to his affidavit a copy of the shareholders agreement and a copy of his latest contract of employment that

was signed and dated by the applicant on 28 November 2008.¹ The contract of employment clearly reflects that the third respondent is the employer and the applicant the employee. It is common cause that the applicant was a director and shareholder of the third respondent.

- [6] On 18 April 2011, the applicant was handed a letter suspending him pending a disciplinary enquiry into alleged misconduct. The suspension letter was handed to the applicant by a Mr Greg Smith is the first respondent regional operations manager. The applicant records that he assumed that Smith had the necessary authority to suspend him.
- [7] Whilst the applicant did not go into the details of the disciplinary charges, it appears from the "summons to attend a disciplinary enquiry" that the misconduct the applicant was accused and found guilty of related to incidents involving irregularities with relation to management of the third respondents stock. T
- [8] The applicant participated in the disciplinary enquiry that was presided over by an attorney who was an employee of a firm of attorneys who acted for the first respondent. At the conclusion of the enquiry the chairperson of the enquiry recommended that the applicant be dismissed. The applicant appealed against this recommendation of dismissal which appeal was heard by a Mr von Fintel a regional manager employed by the first respondent. The applicants appeal was unsuccessful and the applicant was dismissed.
- [9] The applicant mentions in his affidavit, almost in passing, that he referred an unfair dismissal dispute to the CCMA which dispute remains unresolved. It appears that in this referral, inexplicably, the applicant cited the first respondent as his employer and alleges that he had been unfairly dismissed by the first respondent. The applicant attempts to explain this by suggesting that he did so prior to being advised by his "legal counsel" of his "true legal position", presumably that he was employed by the third respondent.

¹ Annexure AM2 page 55 of the pleadings.

- [10] The applicant attaches to this affidavit a disciplinary code and procedure that he disputes had been incorporated into his contract of employment with the respondent and lists aspects of the procedure set out therein that he avers had not been complied with. These are all issues which probably fall within the ambit of an unfair dismissal dispute in respect of which the CCMA has jurisdiction.
- [11] The applicant however continues to aver that if the disciplinary procedure applies to his employment he challenges his dismissal on the grounds that neither Smith nor any human resource of visual of the first respondent enjoyed the prerogative to decide whether or not to take disciplinary action against him as they did not form part of the management of the third respondent.
- [12] The applicant's averment appears to be that he was dismissed pursuant to disciplinary proceedings instituted against him by the first respondent, and not the third respondent and that the first respondent was not entitled to dismiss him and in the circumstances he was not properly or lawfully dismissed by the third respondent. Accordingly the applicant avers that he remains an employee of the third respondent.
- [13] In support of his averment that he was not properly or lawfully dismissed by the third respondent, the applicant relies primarily on his averment that by virtue of his shareholding and directorship of the third respondent and specifically by virtue of his contract of employment that he was subject only to the authority of the board of directors and only the board of directors could terminate his employment.
- [14] The further averments advanced by the applicant that relate to his belief that he was under the misapprehension that "the first respondent enjoyed disciplinary prerogative" over him and that the chairperson of the disciplinary enquiry was an attorney employed by the first respondent's attorneys are merely statements made by the applicant in his affidavit
- [15] As far as the issue relating to the outcome the disciplinary enquiry was concerned and in particular the chairperson of the enquiry's decision to

recommend that he be dismissed, it is clear that the applicant participated in the enquiry and having been given the opportunity to appeal the ~~outcome~~ did outcome did so. The applicant complains that the chairperson of the disciplinary appeal "upheld the decision of dismissal taken at the disciplinary enquiry" whereas in fact it was merely a recommendation.

- [16] In support of his averment that he was not dismissed by the third respondent, the applicant avers that the person who suspended him and was instrumental in the charges of misconduct been brought against him Mr Gregory Smith (who deposed to the respondents opposing affidavit) did not have the "prerogative to decide whether or not to take disciplinary action" against the applicant as they did not form part of the management of the third respondent.
- [17] In support of his application, the applicant annexed to his founding affidavit his contract of employment. The contract is attached supporting the averment "in terms of my contract of employment further, I was subject only to the authority of the board of directors of the third respondent company". The heading of this contract specifically provides that it is an agreement entered into between the third respondent and the applicant. Despite the applicant's so-called misapprehension as to who had "disciplinary prerogative", it could not be any clearer that at all times the applicant was employed by only the third respondent.
- [18] That however is not the applicant's only difficulty with regard to his contract of employment. The definitions clause apart from the somewhat confusing definition: "anyone gender include the other two genders" employees is defined as the employee referred to the heading of the agreement. A careful perusal of this contract reveals that the averment by the applicant that "in terms of my contract of employment further, I was subject only to the authority of the board of directors of the third respondent company" is without any foundation at all. In fact the only clause in the contract that remotely deals with this issue is clause 6.20 that provides that the employee shall "obey the orders and directors of the board and any duly authorised officer or official of the company, show carry out such functions and duties as are from time to time assigned to him ..."

- [19] It is unclear from the applicant's affidavits on what basis he had joined the first and second respondents. He seeks no damages from the first respondent whom he appears to regard as the entity that dismissed him but startlingly asks the court to order the first respondent to pay his remuneration and benefits with effect from the date of his purported dismissal. This is particularly surprising as in the prayer immediately before this, the applicant asks the court to declare the applicant's contract of employment with the third respondent to be still in existence. There is nothing in the application that in any way remotely links the second respondent to the relief sought by the applicant.
- [20] Taking into account the respondents' answering affidavit, it is clear that the first respondent denies having been instrumental in the applicant's dismissal. The deponent to the answering affidavit Mr Smith confirms his role in the applicant's dismissal and avers that he was acting duly authorised by the third respondent. This averment is confirmed by the third respondent's managing director.
- [21] *Prima facie*, taking into account the applicant's founding and replying affidavits, the annexures attached to his application and the respondents' answering affidavit, the applicant's application seems devoid of all merit. The applicant annexes to his affidavit his contract of employment. Not only does the applicant offer the spurious unsupportable proposition that in terms of his contract, he was subject only to the board of directors, the applicant fails to explain on what basis he appeared to be unclear as to who his employer was. This is particularly surprising as it is clear from the contract that the applicant was a senior managerial employee. It is inconceivable that the applicant was unaware of who his employer was and who was "dismissing" him.
- [22] A disturbing aspect of the applicant's case is the relief he seeks. I have referred to the incomprehensible decision to join the first and the second respondent. The second respondent is mentioned in passing as a shareholder of the third respondent but that does not feature at all in the relief sought. The applicant firstly prayed for an order declaring the third respondent was his employer when this is obvious from the contract of employment that the

applicant himself is attached to his papers. I. Secondly the applicant's prayer for an order declaring his contract with the third respondent to still be in existence is followed with a prayer for an order directing the first respondent to remunerate him for the period from the date of his dismissal to date of payment.

- [23] The applicant's confused logic persists in the applicant's notice of Amendment in which he seeks, as an alternative to the declaration that he is still employed by the third respondent, an order declaring his dismissal to be unlawful. Not The crucial issue however is that it is abundantly clear from the applicant's papers is that there are clear and unavoidable disputes of fact that cannot be resolved on affidavit. The most fundamental of these disputes relates to who dismissed the applicant and on whose authority they were acting.
- [24] It must have been apparent to the applicant at the outset that the averments regarding the unlawfulness of his dismissal and in particular the roles he avers were played by the individuals involved in the disciplinary process that they would inevitably lead to disputes of fact that could not be resolved on affidavit. In the extremely unlikely event that it was not clear to the applicant at the outset of this matter that there was a clear and obvious dispute of fact, once the respondents had filed their answering affidavit this would have become abundantly clear.
- [25] At the commencement of his argument, it was put to the applicant's counsel that there were disputes of fact that could not be resolved on affidavit. Counsel for the applicant was however adamant that this was not the case and elected to persist with the application.
- [26] In matters such as this the court has a discretion "as in the future course of the proceedings" and that discretion includes the dismissal of the application with costs.
- [27] This is dealt with in the matter of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*² where it was held:

² 1949 (3) SA 1155 (T) at1162.

'It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated *infra*) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.'

[28] For the reasons set out above, I determine that the disputes of fact render the matter incapable of being determined on affidavit. In the particular circumstances of this matter and in accordance with my discretion as to the future course of action, I am satisfied that the applicant's application should be dismissed.

[29] I accordingly make the following order:

The applicant's application is dismissed with costs.

Gush J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:

Adv M G Hitge

Instructed by Kirsten van Niekerk Attorneys

FOR THE RESPONDENTS:

Adv S Grobler

Instructed by Kramer Wiehmann Joubert Inc

LABOUR COURT