



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2080/13

In the matter between:

NDVHUHO NORMAN MUNZHELE

FIRST APPLICANT

FANISA LYDIA LAMOLA

SECOND APPLICANT

THOMAS JOHN NKUNA

THIRD APPLICANT

MOYAHABO RAPHUDU

FORTH APPLICANT

JAN GIDEON MOCKE

FIFTH APPLICANT

AND

LIMPOPO ECONOMIC DEVELOPMENT AGENCY

FIRST RESPONDENT

MEC FOR ECONOMIC DEVELOPMENT,

SECOND RESPONDENT

ENVIRONMENT AND TOURISM

Heard: 17 December 2013

Delivered: 19 June 2014

JUDGMENT

Nkutha AJ

Introduction

[1] This application was initially brought on urgent basis before my brother, Tlhothalemaje AJ, on 20 September 2013 for the following orders:

- “1.1 Declaring the decision of the second respondent to the effect that the applicants’ appointments by the first Respondent are *null* and *void ab initio* is unlawful, invalid and of no force and effect;
- 1.2 Setting aside the second respondent’s aforesaid decision; and
- 1.3 Directing the first respondent to comply with its obligations in terms of the applicants’ letters of appointment, in particular to pay the applicants the salaries contemplated in those letters.”

[2] In a judgement delivered on 8 October 2013, the court struck the application off the roll on an account of lack of urgency with no order as to costs. Consequently, the applicants set the application down on the ordinary opposed roll.

[3] The second respondent filed supplementary papers wherein it raised a point *in limine* that the matter is *res judicata* on the basis that, in the same judgement, Tlhothalemaje AJ went further and dismissed the application on the jurisdictional point, which in essence disposed of the application.

Background facts

[4] I do not intend to burden this judgement with a reprise of the background facts as they are succinctly captured in the judgment delivered by Tlhothalemaje AJ. The court, after it had held that the applicant failed to make a case for urgency, went further and extensively dealt with the jurisdictional point that had been raised by the second respondent. The court accordingly upheld the jurisdictional point on the basis that the applicants have alternative remedies and that conclusion appears in paragraphs [41] to [42] of the judgment in which the court said the following:

“[41] Coming back to the requirements of a declaratory order, in light of what the applicants are seeking, is my view that this court cannot countenance situations where the parties couch their claim in such a manner that the sole purpose is to clearly circumvent the dispute resolution provisions as provided for by the Labour Relation Act. As already indicated elsewhere in this judgement, this court should be loath to granting declaratory orders where a party has access to alternative remedies. In this case, irrespective of how the applicants pleaded their case or framed the nature of their dispute, ultimately, their alternative remedies lie in the provisions of section 186(1)(a) and section 191 of the LRA. Like other unfortunate litigants who find themselves without employment, they should wait for their turn in the litigation queue. In the alternative, nothing precludes them from approaching this court in terms of section 77A(e) of the BCEA.

[42] Following upon the principles set out in Gradwell there is no basis upon which the court can grant the declaratory order sought in this case, moreso in view of alternative remedies at the disposal of the applicants. To this end, the respondents’ contention that this court lacks jurisdiction to determine this application is equally upheld.”

Has the same issue now before this court been finally disposed?

[5] The second respondent’s bone of contention in the present proceedings is that the application has been brought to its proper conclusion and, as such, the applicants should not be permitted to revive it.

[6] In *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government*¹ the court, quoting from the *National Sorghum Breweries v International Liquor Distributors*,² stated the requirements for a successful reliance on the *res judicata* or *exceptio* to be as follows:

¹ [2009] 3 All SA 475 (SCA)

² 2001 (2) SA 232 (SCA) at 239 para 2.

“The requirements for a successful reliance on the exceptio were, and still are: idem actor, idem reus, eadem res and eadem causa petendi. This means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is ‘demanding the same thing on the same ground’ (per Steyn CJ in African Farms and Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, ‘on the same cause for the same relief’ (per Van Winsen AJA in Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at 472A-B; see also the discussion in Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A) at 664C-E); or which also comes to the same thing, whether the ‘same issue’ had been adjudicated upon (see Horowitz v Brock and others 1988 (2) SA 160 (A) at 179A-H).”

- [7] In *Dumisani & another v Mintroad Sawmills (Pty) Ltd*³ the Labour Appeal Court held that ‘it is against public policy that a litigant should, on the same grounds, be able to keep demanding the same relief from the same adversary’.
- [8] There is no dispute that the judgment of Tlhotlhamajane AJ is a prior judgment that concerned the same parties. The applicants, however, contended that the court order only struck the matter off the roll on the basis of urgency. As such, the merits of the application could not have been properly canvassed, at that stage, so as to warrant a final determination by the court. In this regard, the counsel for the applicants referred this court to *Yellow Star* where the court held that:

“The applicant also faces difficulties in regard to the requirement of eadem quaestio. For purposes of res judicata or issue estoppel, the relevant issue must be one which the court is called upon to determine in its judgment. Where, as is here the case, the court is dealing with motion proceedings, the issues which arise for determination are those contained in the parties’ affidavits and a court can only decide an issue not raised in the papers if such issue has been fully canvassed by the parties in the expectation that it will be

³ (2000) 21 ILJ 125 (LAC) at para 6.

determined as an issue before court. There is no suggestion of that having here been the case.”⁴

- [9] In *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*,⁵ the Labour Appeal Court considered the issue of dismissal of applications on the grounds of urgency. Even though the context is different to the present, the principle is relevant and the court concluded as follows:

“Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word “dismissed” is used it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits then the order is final. If not, then it is not final. A finding that a matter is not urgent does not mean that there are no merits in the applicant’s case. Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance.”

- [10] It is clear, *ex facie*, the judgment that Tlhotlhemaje AJ exhaustively dealt with the application on its merits. He was alive to the fact that his findings on urgency rendered superfluous to deal with the jurisdictional point but he did so, nonetheless, for the sake of completeness, so he states.
- [11] From paragraphs [21] to [42] of the judgement, the court dealt with the issues raised in the papers as detailed by the parties. In essence, the applicants sought a declaratory order against the respondents on urgent basis. The court, despite having refused to indulge the applicants on urgency, dealt with the merits of the application and found that it lacked jurisdiction to grant the said order since the applicants have alternative remedies at their disposal.
- [12] Therefore, *Yellow Star* is evidently distinguishable. Even though the form of court order permits re-enrolment since the matter was struck off the roll, the substance of the judgement is final since it dismissed the application on the merits. I am satisfied that, in these circumstances, the requirements for a

⁴ *Yellow Star* at para 29.

⁵ (2013) 34 ILJ 1138 (LAC) at para 35.

defence of *res judicata* have been met and the present application stands to be dismissed on that basis.

Costs

[13] In this court, the law and fairness are prime considerations when dealing with costs and the rule that costs follow the result is not automatically applicable. The applicants are individual litigants seeking to vindicate their rights in good faith and the doors of this court should always be open to such persons. For this reason, I am not inclined to make an order as to costs.

Order

[14] In the premises, the application is dismissed with no order as to costs.

Nkutha AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: K Tsatsawane Gildenhuys Malatji Inc.

For the Second Respondent: WR Mokhare SC and SB Nhlapo

Instructed by: The State Attorney