



**REPUBLIC OF SOUTH AFRICA**

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: JS 104/15

**In the matter between:**

**AUDREY LEAH MOFOMME**

Applicant

and

**MINISTER OF POLICE**

First Respondent

**COMMISSIONER OF THE SOUTH AFRICAN**

**POLICE SERVICES**

Second Respondent

**Heard: 23 October 2015**

**Delivered: 27 October 2015**

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## JUDGMENT

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### VAN NIEKERK J

- [1] The applicant has referred a dispute to this court in terms of Rule 6. The dispute concerns what the applicant contends to be unfair dismissal, which took effect on 1 June 2014. On 29 January 2015 the applicant filed a statement of claim in which she seeks the remedy of reinstatement. The respondents have raised a special plea of *res judicata*. They do so by reference to an order granted by this court on 2 April 2014 in an urgent application filed under case number J751\2014.
- [2] The order granted in the urgent application, by agreement, reads as follows:
1. The first respondent [the second respondent in the present proceedings] is ordered to permit the applicant to return to work with effect from 31 March 2014 on the same terms and conditions as applied then, pending consultations with over her possible retrenchment in accordance with the provisions of s 189 of the Labour Relations Act 66 of 1995.
  2. The first respondent is ordered to pay the costs of the application.
- [3] In her statement of claim, the applicant summarises the events that culminated in the institution of urgent proceeding is on the granting of the order on 2 April 2014. In paragraph 40 of the statement onward, she canvasses developments that occurred during the course of April and May 2014. It is not necessary for present purposes to canvass the nature and content of these developments and interactions. In paragraph 50 of the statement of claim, the applicant avers that her services would terminate with effect from 1 June 2014. This is admitted by the respondents. In part E of the statement of claim, the applicant avers that the second respondent failed to comply with the LRA in that she failed to consult,

alternatively properly to consult with the applicant about a contemplated dismissal based on operational requirements rendering her dismissal substantively and/or procedurally unfair. The applicant also contends that in terms of her contract of employment and applicable legal directives, it was not competent for the second respondent to terminate her employment on the grounds of 'self-redundancy' which appears to be the basis on which the applicant's employment was ultimately terminated.

- [4] The requirements for a plea of *res judicata* are well established – they acquire the party raising the defence to show that a previous judgment on the merits by a competent court has been given in an action or application between the same parties, based on the same cause of action and in respect of the same subject matter. In *National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) Olivier JA (writing for the majority) said the following:

The fundamental question in the appeal is whether the same issue is involved into actions; in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause of action, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action?

- [5] In other words, what the court is required to do is to compare the relevant facts upon which reliance is placed for the contention that the cause of action is the same in both proceedings. Additionally, the order granted in the first application must be considered to determine whether or not the issues raised in the pleadings have been definitively disposed of on the merits.
- [6] The respondents contend that the applicant's claim in the present proceedings, having regard particularly to paragraph 55 of her statement of claim, make it clear that her present claim is the same as under case number J751\14.
- [7] I am not persuaded that this is so. First, in the present proceedings, the applicant seeks final relief. She seeks to be reinstated on the basis that the second

respondent dismissed her with effect from 1 June 2014 and that the dismissal was substantively and procedurally unfair. The applicant also relies on events that took place between 2 April 2014 and 1 June 2014 in order to support her claim. Secondly, a proper interpretation of the order granted by this court on 2 April 2014 indicates that what is clearly contemplated is that the applicant be entitled to return to work pending the outcome of consultations to be held with her over her possible retrenchment. The use of the word 'possible' in particular indicates that neither party accepted the applicant's termination of employment as anything more than that – a possibility that may or may not eventuate after further consultation. The tentative wording indicates that the order does not constitute a final judgment; indeed, it specifically leaves open the prospect that the applicant may not be retrenched or put another way, it contemplates the applicant's dismissal is no more than a future possible event.

- [8] In these circumstances, in my view, it cannot be said that the order granted on 2 April 2014 is a final order or that the legal and factual issues raised in the present proceedings are limited to those raised in the proceedings conducted under case number J 751\14 are the same.
- [9] Finally, in relation to costs, there is no reason having regard to the requirements of the law and fairness why costs should not follow the result.

I make the following order:

1. The special plea is dismissed, with costs

ANDRÉ VAN NIEKERK  
JUDGE OF THE LABOUR COURT

## APPEARANCES

For the applicant: Adv. MF Ackerman instructed by Len Dekker & Associates  
Attorneys

For the Respondent: Adv. AP Laka SC with him Adv. W Lusenga instructed by the State  
Attorneys Pretoria