

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number:724/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CENTLEC (SOC) LIMITED

Applicant

And

HLONELWA NKOMO

Respondent

HEARD ON: 02 JUNE 2022

JUDGMENT DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 29 August 2022

[1] In this opposed application, Part B, the applicant (Centlec) seeks a declaratory order that the parties' employment relationship has been terminated on mutual basis pursuant to the settlement agreement concluded by the parties on 18 October 2021.

[2] The pertinent facts of this matter are generally of common cause: On 1 July 2021 the applicant (Centlec) appointed the respondent as its Chief Executive Officer (CFO) for a period of 5 years. Barely a month after the respondent assumed her duties, Centlec discovered that the respondent had a pending criminal case, an outstanding warrant of arrest for failing to appear at a criminal court and a civil judgment for an unpaid debt which rendered her ineligible to be appointed as a CFO. Centlec's investigations further revealed that the respondent had also falsified a letter and transmitted it to the Sheriff as if it emanated from her creditor's attorneys in which she instructed the Sheriff to release her goods which were attached by the Sheriff for the satisfaction of a judgment debt as a result, on 16 August 2021 Centlec instituted disciplinary proceedings against the respondent for misconduct.

[3] Shortly thereafter, the parties concluded a settlement agreement in terms of which Centlec essentially abandoned the disciplinary proceedings against the respondent and the respondent undertook to resign from her employment.¹

[4] The material terms of the settlement agreement are the following:

"1...

2. The parties agree that, the Employer will pay Ms Nkomo a without admission of liability three (3) months equivalent pay for settlement purposes and in order to reach finality and certainty, in this matter.

3. Ms Nkomo has agreed to formally resign at the end of November 2021. However, the parties agree that during this aforesaid period of November 2021, Ms Nkomo will not attend to the offices of the Employer.

¹ See in this regard, Annexure "CNT3" of the applicant's founding affidavit.

4. *Thereafter, subsequent to the lapsing of the November period, the Employer/Employee relationship will be considered amicably terminated and the Employer would then pay Ms Nkomo a salary equivalent to two (2) months.*

5. *Ms Nkomo has agreed to return to the Employer by no later than Thursday, 28 October 2021 all property, including the laptop, belonging to the Employer.*

6. *The Employer will allow Ms Nkomo to collect her furniture that she brought into the office being the micro wave, kettle, cups any further items not belonging to Centlec on the 28th of October 2021.*

7. *The employer has agreed to withdraw criminal charges against Ms Nkomo within 24 hours of compliance with paragraph 5. And same shall be sent by the 29th October 2021 via email to emmanuel@blairattorneys.co.za.*

8. *The employer has agreed to furnish Ms Nkomo with a letter of good standing by the 28th of October 2021.*

9. *Subject to paragraph 3, above the parties agree that they will issue a joint statement stating that all charges have been dropped and the employee is returning to work by the 28th of October 2021. Thereafter the period mentioned in paragraph 3 the employee will issue a statement stating her resignation on an amicable basis on which both parties will agree on prior.*

10. *...*

[5] On 25 February 2022, approximately four months after the settlement was concluded Centlec launched an urgent application in this court seeking an interdict (Part A) to prohibit the respondent from accessing and entering Centles's premises and from resuming her functions as an employee or passing herself as a Centlec's employee pending the hearing of this declaratory relief (Part B) in due course.

[6] The urgent application served before me and it was premised on the grounds that despite having agreed to resign from her employment by the end of November 2021 as provided for in the settlement agreement, clause 3 therein, the respondent has failed to do so instead on 15 February 2022 she presented herself at Centlec's premises and insisted on performing the duties of an CFO.

[7] Centlec stated that the respondent's appearance at its premises was preceded by a series of correspondences from her attorneys alleging that Centlec had breached the terms of the settlement agreement by failing to pay the respondent, to withdraw the criminal case/s and provide her with a letter of good standing as agreed therefore the settlement was null and void, the respondent was thus entitled to resume her duties as a CFO as she had not resigned and this is despite the fact that Centlec had duly performed its obligations in terms of the settlement agreement. It had allowed her to collect her personal belongings from its premises, paid her the amounts due, withdrew the criminal case it has lodged against her and also furnished her with a letter of good standing. See clause 6 to 8 of the settlement agreement.

[8] The respondent appeared in person and sought a postponement for the purpose of appointing a legal representative to assist her. She explained that she could not instruct an attorney prior to the hearing due to lack of funds she only received the application on Saturday, 19 February 2022 and the copies were illegible in any event.

[9] The application for a postponement was opposed. It was Centlec's contention that there was no merit to the respondent's reasons for requesting a postponement, at all material times hereto she was legally represented and it was as a result of the instructions that she gave to her attorneys that she reneged on the terms of the settlement of the settlement agreement and insisted on returning to her position as the CFO.² It was also not correct that she only received the application on 19 February 2022 as the application was served by the Sheriff at her residence on 18

² Annexure "CN35" of the applicant's founding affidavit is a letter addressed to the respondent's attorneys on 15 February 2022 reacting to the respondent's presence at Centlec's premises stating that Centlec will be laying trespassing charges and also launching a court application against the respondent as she was no longer entitled to report for duty at their premises.

February 2022³ another copy was served on her attorneys and they acknowledged receipt in that regard.

[10] It was also argued by counsel for Centlec, Mr Sibeko that the papers were in fact served in terms of the court rules despite the urgency of the matter, the respondent was provided with at least five days to oppose the application. Centlec would be prejudiced if the order is not granted as the CFO's responsibilities involve the overall management of finances and other resources of Centlec's business, the respondent's dishonest conduct places Centlec at risk of not being able to comply with its obligations in terms of transparency and accountability. There is also a real risk that in passing herself off as the current CFO, Centlec's staff members of about 703 in total and third parties will interact with the respondent on the mistaken belief that she is an employee of the Centlec to the prejudice of Centlec's assets, finances and effective management.

[11] Having considered the papers filed herewith and the submissions made by the respective parties, I was not persuaded that the respondent had made out a case entitling her to a postponement but that the matter was indeed urgent and Centlec could not be afforded substantial redress if it had to follow the normal course laid down by the rules of court. I accordingly granted a *rule nisi* returnable on 25 March 2022.

[12] On the return date the *rule nisi* was confirmed by Reinders ADJP on the following terms:

- “1. *The respondent's application for a postponement is hereby dismissed.*
2. *The rule nisi granted on 5 (sic) February 2022 is hereby confirmed.*
3. *The respondent is hereby directed to deliver her notice of intention to oppose Part B of the application no later than 1 April 2022 and to file her answering papers by no later than 28 April 2022.*

³ Page 136 of the applicant's bundle is a copy of the Sheriff's return of service in that regard.

4. *The applicant to file its replying affidavit (if any) by no later than 12 May 2022.*

5. *The parties shall deliver their respective heads of argument in terms of the directives of this division.*

6. *The matter shall be set down for hearing on 2 June 2022.”*

[13] The respondent's answering affidavit, in addition to the merits raises points *in limine* disputing the authority of the deponent of Centlec's founding affidavit to act on behalf of Centlec. The objection is premised on the grounds that Centlec is a company but no resolution has been attached to its founding affidavit as proof that its deponent has the necessary authority to act on its behalf. The respondent also disputes the jurisdiction of this court to entertain this matter. It is her contention that this matter involves a labour dispute which can only be adjudicated by a labour court.

[14] Before turning to the issues to be considered in this application, there is a condonation application that needs to be addressed. The respondent's answering affidavit and the head of arguments were delivered out of the time period prescribed in the order by Reinders ADJP. The answering affidavit was filed approximately 23 days out of time and the heads of argument were filed three days late.

[15] It is the respondent's case that at all material times hereto she was represented by attorneys as a result she was under the impression that they had filed the answering affidavit, the heads of argument and the rule 7(1) notice on her behalf. She states that her attorneys informed her on 21 March 2022 that if she cannot pay their fees they will not assist her they ultimately withdrew as her attorneys of record on Monday 30 May 2022 and it was only then that she realized that the said papers were not filed. It is her submission that Centlec is not prejudiced by the late filing and she has good merits in the main application.

[16] The applicant opposed the application for condonation on the grounds that the respondent's explanation for the delay in filing her papers is not reasonable and also not bona fide.

[17] According to Mr Sibeko, the respondent is not a clueless litigant so far she has appeared in this court on at least three different occasions in person having drafted and filed comprehensive papers which contain extensive legal arguments supported by legal authorities including the papers that she filed in the labour court therefore, she could have very well drafted the answering affidavit herself.

[18] It is trite that condonation cannot be had for the mere asking. It is an indulgence granted by the court upon a consideration of whether good cause has been shown for the failure to comply with the court rules. In the exercise of its discretion whether to condone the non-compliance or not, the court takes into account all the relevant factors which have a bearing on fairness and equity to both sides including the degree of lateness, the explanation provided for the delay, the prospects of success on the merits of the application and the respondent's interest in the finality of the matter. For that reason, the onus is on the respondent to provide a full, detailed and accurate account of the cause of the delay and this is to enable the court to understand how it came about.⁴

[19] The respondent's explanation for the delay does not constitute a sufficient cause to warrant the court's indulgence. Particularly in relation to the answering affidavit, the delay of over 20 days is extreme. On her own submission, she was first informed by her erstwhile attorneys on 21 March 2022, approximately a month before the answering affidavit was due that they will no longer be representing her due to non-payment. On 25 March 2022 when the order was made regarding the filing of the answering affidavit she was represented by an attorney who thereafter filed a notice in terms of rule 35(12) on her behalf.

[20] There is no explanation why she did not instruct her attorneys to also file the answering affidavit at that time, except to state that when the attorneys formally withdrew as attorney of record on 30 May 2022 she was under the impression that the required documents were filed. There is no explanation as to what she did from the day of the order to ensure that the answering affidavit and the heads of argument

⁴ *United Plant Hire (Pty) Ltd v Hills and others* **1976 (1) SA 717** (A) page 720 para E-G; *Uitenhage Transitional Local Council v South African Revenue Service* **2004 (1) SA 292** (SCA) para 6.

were filed. The respondent is the litigant not her legal representatives, she waited for the whole two months and two days before the day of the hearing and filed an answering affidavit running in length to 736 pages including legal authorities. The respondent has neglected her obligations as a litigant in this regard.

[22] The respondent's lack of funds to procure legal representation is also not a sufficient explanation of delay under these circumstances. She does not explain why if she deemed it necessary to be legally represented she did not consult the Legal Aid offices. She instead elected to conduct self-representation throughout all the court appearances where I must say, that she eloquently presented arguments after having filed voluminous opposing papers supported by extensive legal authorities.

[23] No basis whatsoever has been set out for absence of prejudice to Centlec, except to fleetingly assert that the Centlec is not prejudiced by the late answering affidavit and the heads of argument, the respondent does not explain why she is of the view that Centlec is not prejudiced by being deprived of its right to reply to her belated opposing papers.

[24] The respondent's prospects of success in the main application are also slim, considering the fact that the settlement agreement which is a subject of this application and the circumstances under which it was concluded are not in dispute.

[25] The matter does appear to be important to the parties. I'm also of the view that it would be in the interests of justice and also of Centlec that the late filing of the opposing papers is condoned for the matter to be heard and advanced to finality.

[26] Regarding the respondents' *in limine* objections, there is no merit to the respondent's objection to the authority of Centlec's representative to depose to the founding affidavit or to act on behalf of Centlec. It is now settled law that a remedy for a respondent who wishes to challenge the authority of a person allegedly acting

on behalf of an applicant (legal entity) is now provided for in Rule 7(1) of the Uniform Rules of court.⁵

[27] Rule 7 states thus:

“Power of attorney:

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

[28] It is common cause that the respondent’s notice in that regard was only filed on 31 May 2022 well out of the time prescribed by the rule. No condonation was sought for the late filing, consequently there is no proper objection to authority before this Court.

[29] Similarly, the objection against this court’s jurisdiction to entertain this matter is unsustainable. The relief sought by Centlec is essentially a declaratory order that Centlec has performed its obligations in terms of the settlement agreement therefore the respondent is bound by the terms of the settlement as a result, her employment with Centlec has been terminated.

[30] In my view, what is at issue here is Centlec’s contractual right to enforce the agreement which was meant to put the disputes between the parties to bed and for the parties to part ways. In any case, the High Court enjoys concurrent jurisdiction with the Labour Court in respect of claims arising from labour disputes. The *locus*

⁵*Eskom v Soweto City Council* 1992 (2) SA 703 (W); *Ganes v Telecom Namibia Ltd* 2004 (4) SA 615 (SCA) at 624I – 625A; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA).

classicus on this issue is *Baloyi v Public Protector and Others*.⁶ Here, the Court quoting with approval *Gcaba v Minister for Safety and Security*⁷ said the following:

“In sum, the mere fact that a dispute is located in the realm of labour and employment does not exclude the jurisdiction of the High Court.”

“[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. . . . If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.”

[31] In now turn to the merits of the application. A settlement agreement imposes reciprocal obligations. The issue that arise in this application is whether Centlec has fulfilled its obligations in terms of the settlement agreement which would entitle it to call upon the respondent’s co-operation namely, to vacate her employment.

[32] In her answering affidavit, the respondent contends that Centlec has breached the terms of the settlement agreement by failing to pay her as agreed, to withdraw the criminal charges Centlec laid against her and to issue a statement “which clears” her of all charges therefore she is not obliged to comply with the terms of the settlement agreement by resigning.

[33] The disputed facts can easily be resolved on the papers as the respondent’s averments are not genuine and they are also not bona fide for the reason that, the respondent has provided varying and inconsistent reasons why she is not obligated to fulfil her obligations.

[34] In a series of correspondences transmitted to Centlec by her attorneys from about 24 January 2022 to 15 February 2022⁸ she maintains that because she had

⁶ [2020] ZACC 27 at Para 45.

⁷ [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC)

not received any payment from Centlec, she was not provided with the letter of good standing, Centlec failed to provide her with a draft of the statement clearing her of wrong doing and to also release that statement she was thus entitled to retain her employment as the settlement agreement is null and void.

[35] The relevant clauses for the Centlec's obligations are clause 2, 4, 6, 7 and 8 of the settlement agreement.

[36] In terms of clause 2, Centlec undertook to pay the respondent "three (3) months equivalent pay". The allegations regarding Centlec's failure to pay the respondent as agreed are countered by the respondent's own version of the events regarding the payment issue.

[37] On 26 November 2021 approximately two months before her attorneys wrote to Centlec complaining about non-payment, the respondent sent an email to Centlec⁹ stating that she had been paid for the months October 2021 and November 2021. Her gripe was merely in relation to the amounts, that she was short paid. Inexplicably, in the next month, on 18 December 2021 the respondent wrote to Centlec stating that she had been overpaid with an amount of R62 584.81. Again on her own version, she paid back the said amount to Centlec.¹⁰ As correctly pointed out by, Mr Sibeko, it does not make sense to complain about being unpaid or even short paid then on the other hand complain about being overpaid.

[38] Clause 4 begins with "Thereafter..." and clearly states that the respondent will be paid further payments equivalent to two months "subsequent to the lapsing of the November period..." therefore, Centlec's obligation is reciprocal to the respondent's obligation namely, to resign at the end of November 2021.

[39] It is undisputed that the November period refers to the date on which the respondent undertook to resign (clause 3 of the settlement agreement). Centlec has made the payment despite the fact that the respondent has not resigned, see annexure "CNT28" to "CNT30" as copies of the salary slips in that regard.

⁸ Annexures "CNT33" to "CNT36".

⁹ Annexure "CHN28" of the respondent's answering affidavit.

¹⁰ See in this regard Annexure "CHN28.1" of her answering affidavit.

[40] In terms of clause 6, 7 and 8. Centlec was required to allow the respondent to collect her personal belongings from its premises, to withdraw the criminal charge it laid against her upon her returning Centlec's laptop and to also furnish her with a letter of good standing.

[41] The respondent does not dispute that she has collected her personal belongings and that on 28 October 2021 proof of withdrawal of the charge and the letter of good standing was furnished to her erstwhile attorneys of record.

[42] With regard to the withdrawal of the charges, she insists that Centlec has not complied because not all the charges instituted against her were withdrawn instead more charges were lodged even after court proceedings were instituted against her. Clause 7 states clearly that the charge that will be withdrawn is the charge relating to the theft of the laptop and on condition that that she has returned it as stated in clause 5. The contention that Centlec was required to withdraw all the criminal cases is fallacious.

[43] In conclusion, I'm of the view that Centlec has complied with its obligations in terms of the settlement agreement. The obligation to release a press statement falls squarely on both Centlec and the respondent and pursuant to the respondent's resignation.

[44] I have consequently arrived at the conclusion that the application ought to succeed. There is no reason why the costs should not follow the result, the respondent shall therefore bear the costs herein.

[45] In the premises, the following order is granted:

1. The application for condonation for the late filing of the respondent's answering affidavit and the heads of argument is granted.
2. It is declared the respondent's employment contract concluded between the parties on 1 June 2021 has been terminated as provided for in the settlement agreement concluded between the parties on 18 October

2021 in terms of which they mutually agreed to terminate their employment relationship.

3. The respondent shall pay the costs of this application (Part B) including the costs in respect of Part A and the costs of the application for a postponement heard on 25 March 2022.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Instructed by:

Adv. L.T Sibeko SC

Tshangana & Associates INC

BLOEMFONTEIN

Counsel on behalf Respondent:
person

Respondent appears in