iAfrica Transcriptions (Pty) Limited

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 25803/2011

DATE: 2012-03-27

In the matter between

SETON SOUTH AFRICA (PTY) LTD	1ST APPLICANT
ERIC EVANS	2ND APPLICANT
SHALENDRA SEWNANDAN	3RD APPLICANT
AND	
RALPH DENNIS DELL	RESPONDENT

In the matter between

RALPH DENNIS DELL	PLAINTIFF
and	
SETON SOUTH AFRICA (PTY) LTD AND NINE OTHERS	1ST DEFENDANT

J U D G M E N T

PRINSLOO; J: This application came before me yesterday and was postponed until this morning for judgment. The three applicants are three

defendants out of ten defendants in an action ("the main action") instituted by the respondent in May 2011.

It is common cause that the summons commencing action has not been served on the remaining seven defendants who are all peregrini of South Africa, with the apparent exception of the sixth and seventh defendants. The applicants as three of the defendants, and the only three which feature as opposing the case, apply for an order:

1. Striking out each of the respondent's claims against the applicants, as being vexatious and constituting an abuse of process.

2. In the alternative, and to the extent that any of the respondent's claims are not struck out, they ask for an order directing the respondent to furnish security for the applicant's costs in respect of such claims in an amount to be determined by the Registrar and staying those claims until the security has been furnished.

3. They ask for the respondent to pay the costs of the application.

The respondent, in turn, brought an application for an order that the first and second applicants must furnish security "in respect of all claims for the total amount of the claims or alternatively in an amount to be determined by the Registrar."

The total amount of the claims, which I have not added up, come to something in the order of R200-million.

I turn to the applicable principles governing applications of this nature. The court has an inherent power to strike out claims which are vexatious. Ms de Kock who appeared for the applicants referred to a number of authorities in this regard including *Western Assurance*

Company v Coldwell's Trustee 1918 AD 262 at 272 and *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 518.

The facts in the last mentioned case correspond strikingly with the circumstances of the present case. Vexatious proceedings have been defined to include proceedings which are "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant".

It was pointed out by counsel that the power to strike out is one which must be exercised with great care and only in a clear case, since it restricts a litigant's rights to access to court. There is authority for this proposition. I was referred *inter alia* to the Western Insurance Company Case, supra.

It has been held by the Constitutional Court that the court is under a constitutional duty to protect *bona fide* litigants, the processes of courts and the administration against vexatious proceedings. In this regard I was referred to *Beinash and Another v Ernst and Young* 1999 (2) SA 116 CC at 123(D-G). In that case the Constitutional Court also held that the Vexatious Proceedings Act 3 of 1956, which in appropriate cases closes the door to vexatious litigants to have their day in court, passes constitutional muster.

I say this, because a defence often raised in cases of this nature is that any party is entitled to have his matter adjudicated by a court of law or another competent forum in terms of the provisions of Section 34 of the Constitution of 1996. In this case the respondent, who appears in person, raised the same point in his heads of argument.

It was submitted by Ms de Kock that an action which is obviously unsustainable is vexatious.and falls to be struck out. Suitable authority in support of this proposition was brought to my attention including the case of *African Farms and Townships Limited v Cape Town Municipality* 1963 (2) SA 555(A) at 565(D-E).

It was submitted that as part of its inherent jurisdiction the court has the power to prevent vexatious proceedings not only by striking out a claim, but also by ordering a plaintiff to furnish security for costs. See *Ecker v Dean* 1937 AD 254 at 259. I turn briefly to the background of the case, admirably summarised in the comprehensive heads of argument prepared by the applicants' counsel.

These background facts are common cause and undisputed and important for purposes of considering whether the somewhat drastic relief sought in this case ought to be granted. The respondent was the Managing Director of the first applicant until his dismissal for misconduct on 6 May 2005.

At that time he was the only Director of the first applicant situated in South Africa. The other Directors were based in America and Germany. In April 2005 various allegations of misconduct were brought against the respondent by the first applicant. At a disciplinary hearing chaired by an independent third party, Prof Weiner, he was found guilty of certain of the charges against him.

The charges entailed in essence that the respondent had over a period of almost five years granted to himself increases in his remuneration and procured for himself bonusses to which he was not

entitled and that he had misrepresented the extent of his remuneration to his employer.

Subsequent to his dismissal, and probably as a result thereof, the first applicant and the respondent had been involved in protracted litigation. This, in a nutshell, revolved around a challenge to the respondent's dismissal in the Labour Courts as well as a civil action instituted in this court by the first applicant, in which the respondent advanced certain counterclaims.

As far as the Labour Court proceedings are concerned the respondent unsuccessfully challenged his dismissal before the CCMA, and on 29 November 2005 the Commissioner found that the respondent's dismissal was substantively and procedurally fair and he accordingly dismissed the dispute.

The respondent then brought an application to review and set aside the decision of the CCMA. This application was dismissed by the Labour Court on 23 July 2008 and the respondent's appeal against this judgment to the Labour Appeal Court was also dismissed. As far as the proceedings in this court are concerned, on 4 July 2005 the first applicant instituted an action against the respondent in this court under case number 22380/2005. This will be referred to as the "High Court Action".

In short,the first applicant claimed that the respondent had breached his fiduciary duty to act in the best interest of the first applicant when he caused himself to be paid remuneration which he was not entitled to and a double incentive bonus. The first applicant sought to

obtain repayments of the amounts which the respondent had so irregularly caused himself to be paid.

The respondent not only defended all these claims, but brought the following counterclaims:

1. Counterclaim 1 for payment of a salary increase in the amount of some R142 000 for the period January 2005 to April 2005, the respondent contending that the first applicant had breached the terms of the employment agreement by failing to grant him a salary increase.

2. Counterclaim 2 was for payment of other amounts for the period January 2005 to April 2005 such as the pro rata portion of the respondent's 10% bonus and other items.

3. Counterclaim 3 was for payment of the respondent's monthly remuneration package in the alleged amount of sum R237 000 per month from 1 May 2005 onwards, as the respondent contended that the employment agreement had not been lawfully terminated, and the contract was still in existence.

4. Counterclaim 4 was for payment of an additional bonus for the financial year 2002, equal to 30% of the respondent's annual salary, in the amount of some R437 000, which the respondent contended had been orally agreed to by one Winkler.

5. Counterclaim 5 was for payment of the bonus the respondent contended he was entitled to in respect of the 1997 and 1999 bonusses for the first and second quarters of the 2005 financial year.

The Trial Court action in the High Court was heard by the late Snijman AJ. On 7 December 2006 he delivered a judgment and made an order:

1. Granting judgment in favour of the applicant on Claim A in the amount of some R1,7-million and on Claims B, C, D and E in lesser amounts except on Claim D the amount of the judgment was also some R1,7-million. Claim H of the first applicant in the trial was dismissed and counterclaims 1, 3, 4 and 5 were dismissed. The learned Judge granted judgment in favour of the respondent on counterclaim 2 in the amount of some R16 000.

The respondent was granted leave by Snijman AJ to appeal to the Full Court of this division, save in respect of the first applicant's Claim G in respect of which leave to appeal was not sought and in respect of the dismissal of counterclaim 1 where leave to appeal was sought but refused.

On 1 March 2011 judgment was handed down by the Full Court per Murphy J. The folowing order was made:

1. The appeal against the applicant's Claim D was dismissed.

2. The appeal in respect of the first applicant's Claims A, B, C, and E partially succeeded and the order of the court *a quo* in respect of those claims was set aside and substituted as follows:

> "The parties are directed to attempt to settle Claims A, B, C and E on the basis of a salary of R121 500 being payable to the appellant for the period 1 January 2002 until 5 May 2005. Any settlement so

reached is hereby made an order of court. Failing the parties being able to reach a settlement within 30 days of this order, either party may approach this court on the same papers, duly supplemented, for an order determining the amounts payable by the appellant to the respondent in terms of these claims."

3. The appeals against the dismissal of the counterclaims 3, 4 and 5 were dismissed and;

4. The respondent was ordered to pay 60% of the costs of the appeal.

As far as the qualified granting of the appeal with a view to the parties settling the details of certain figures are concerned, the contents of which order I have quoted, I was given the assurance by Ms de Kock that these outstanding issues, such as they are, are irrelevant for purposes of this application.

I turn to the proceedings in the Supreme Court of Appeal and the Constitutional Court. On 31 May 2011 the Supreme Court of Appeal dismissed with costs the respondent's petition for special leave to appeal against the judgment of the Labour Appeal Court as well as the respondent's petition for special leave to appeal against the judgment of the Full Court of this division.

On 8 August 2011 the Constitutional Court dismissed the respondent's application for an order remitting the petitions for special leave to appeal back to the Supreme Court of Appeal, alternatively that he be granted leave to appeal to the Constitutional Court. Subsequent to the

launching of this application, the respondent brought a further application to the Constitutional Court in terms of which he sought, seemingly, the same relief as in the first application to the Constitutional Court.

This application was dismissed on 12 September 2011. Following on the conclusion of all the appeal processes the respondent is at present indebted to the first applicant for the judgment debt in the High Court action of which, I have said, the capital amounts have been finally determined in the figures of R1 774 580 in respect of Claim D and R164 690 in respect of Claim G, as well as in respect of the various cost orders that had been made against him in the litigation.

It is important to note that the respondent deposed to an affidavit on 19 June 2011, which he attached to his application to the Constitutional Court and in which he stated that he has not been employed in any permanent type of employment since 6 May 2005, that he has no means to make any arrangements to repay any debt whatsoever, and that he has no assets that are not subject to judgments that have been executed.

Turning to the main action, I have already pointed out that this was instituted by the respondent as plaintiff against ten defendants, including the present three applicants. In the main action the respondent advances five claims. Claims 1 to 3 are claims arising from alleged breaches of his employment contract.

Claims 4 and 5 are ostensibly claims for defamation and *injuria*. As described later, Claims 1 to 3 are essentially the same claims which he advanced as counterclaims in the previous action in this court, "the High Court action", and it was argued pursuasively by Ms de Kock, who

illustrated the corresponding details of the first three claims in the main action with those in the counterclaims dismissed on appeal, that the first three claims are *res iudicata*, and apart from that they have clearly become prescribed.

It was also argued convincingly that to the extent that Claims 4 and 5 disclose any recognisable cause of action, they have also clearly become prescribed. Ms de Kock dealt with the trite principles surrounding the *exceptio rei iudicatae* and with the authorities prescribing that this defence entails an objection "to the same thing demanded on the same ground" or "the same relief claimed on the same issue" or that the issues raised by these claims have been "finally disposed of in the first action".

Ms de Kock referred me to a host of authorities in this regard notably the case of *National Sorghum Breweries (trading as Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001(2) SA 232 SCA at 239(I). In respect of the reliance on prescription I was reminded that the respondent, in his answering affidavit, does not dispute the applicant's contentions regarding the date from when prescription would run in respect of his claims, nor does he rely on any delay in the completion of prescription.

Indeed, in my view, on a general reading of the answering affidavit and the heads of argument presented by Mr Dell yesterday he offers nothing of note by way of defences to the relief sought in this application. The only answer to the defence of prescription is the ascertion that "this matter has been attended to and is still being attended to and still accumulating into the future".

It was correctly submitted that this is no answer to the allegation that the claims have become prescribed. Claims 1 to 3, all based on an alleged breach of contract, are brought not only against the first applicant, being the party to the contract relied upon, but also against the other defendants, in this case directors or employees of the first applicant.

In response to the applicant's assertion that no cause of action against these individuals had been made out, and that would include the second and third applicants before me, the respondent has responded that they "are or were agents acting for the first defendant". Assuming that this is so, so Ms de Kock argued, it is trite that an agent cannot be held liable on a contract concluded by his principal. I was referred to *Blower v van Noorden* 1909 TS 890 at 899.

In her comprehensive heads of argument Ms de Kock gave detailed summaries of the five claims featuring in the main action. Claim 1, based on breach of contract, is one in which the respondent alleges that the employment contract between him and the first applicant obliged the latter "and by implication all the defendants" to review his remuneration at least once a year, that it breached this obligation by failing to increase his salary during the period 2003 to 2005 and as a result he suffered "a loss of income and or damages" in the amount of sum R767 000.

In the High Court action the respondent, in terms of counterclaim 1, advanced the same claim, although he limited his claim to the period March 2005 to April 2005. This claim was dismissed by the Trial Court which held that the employment contract made annual increases subject

to the discretion of the first applicant, and that there had been a review of the respondent's salary for the year commencing January 2005.

Leave to appeal against this dismissal was refused. In the circumstances, so it was submitted, the respondent's claim against the first applicant insofar as it relates to the period March to April 2005 has been finally decided by a court of competent jurisdiction and is *res iudicata*.

The Full Court furthermore dealt in detail with the reviews of the respondent's salary during the period 2001 to 2005, and came to the conclusion that the respondent is liable to repay to the first applicant the amounts he received in excess of R121 500 per month during this period. In the circumstances this issue of whether the respondent is entitled to any increase in excess of R121 500 per month has been finally decided by a court of competent jurisdiction, so it was argued, correctly in my view, and is *res iudicata*.

In any event, the entire claim has clearly become prescribed since the debt to which it relates would have become due prior to 30 April 2005. Claim 2 was one for breach of contract. The respondent alleges that in terms of the employment contract between him and the first respondent, the latter was obliged to give him three months written notice of termination of his employment and that it has failed to do so and that he has accordingly suffered a loss of income or damages in the amount in excess of R144-million, apparently the amounts that he contends he would have earned in terms of the employment contract from May 2005 until his retirement at the age of 65 years. This claim, so I was informed

compellingly, is identical in all material respects to counterclaim 3 in the High Court action. The Trial Court dismissed this claim on the basis that given the CCMA Arbitrator's award that the dismissal without notice was substantively and procedurally fair, the issue was *res iudicata*.

The Full Court dismissed the respondent's appeal on the basis that the provision of the contract relied upon related to an instance of summary dismissal for material breach, that the respondent had seriously breached a material term of the contract, namely the implied duty of good faith, and that the first applicant had accordingly been entitled to terminate the contract.

In the circumstances, so it was correctly argued, the respondent's claim against the first applicant has been finally decided by a court of competent jurisdiction and is *res iudicata*. In any event, it was correctly pointed out that this claim has also clearly become prescribed since the debt which it relates to would have become due on the date of termination of the employment contract, namely 6 May 2005.

I debated with Ms de Kock the issue of whether prescription would affect the alleged further losses running up to retirement age and I was referred to *Truter and Another v Deysel* 2006(4) SA 168 SCA at 175(G) to 176(A) where it was held in terms of the "once and for all rule" that the cause of action is complete when some damages are sustained. The cause of action does not accrue or reaccrue on a yearly basis.

Claim 3, for breach of contract, is one in which the respondent alleges that the first applicant failed to give him a bonus equal to 30% of his annual salary for the year 2000 which he alleges he was entitled to in

terms of an oral agreement between him and one Winkler concluded in November 2002.

This claim is identical in all material respects to counterclaim 4 in the High Court action. This claim was dismissed by the Trial Judge and the respondent's appeal against such dismissal was dismissed by the Full Court which held "the claim if not frivolous is entirely without merit". In the circumstances, so Ms de Kock correctly argued, this claim has already been finally decided by a court of competent jurisdiction and is *res iudicata*.

In any event, so it was correctly pointed out, the claim has clearly become prescribed since the debt it relates to would have become due during 2002 or 2003. Claim 4 is one of defamation of character or *crimen injuria*. This did not feature in the earlier litigation so that the argument that it was *res iudicata* does not apply.

The respondent alleges that from 11 February 2005 to date the defendants "have on a continuous basis willfully, intentionally and with the sole objective of damaging and or destroying the plaintiff's reputation, good name and integrity by spreading false and damaging information in the immediate and wider community".

He claims an amount in excess of R92-million being apparently, so Ms de Kock concluded, special damages relating to the amount that he would have been able to earn until his retirement at age 65. The only reference to defamatory statements published of and concerning the respondent are those allegedly evidenced by ANNEXURE C to M to the particulars of claim.

They reflect statements by the first applicant's attorney during the proceedings before the CCMA Commissioner and statements made by witnesses during the proceedings of the CCMA. ANNEXURES E and F reflect the second applicant's testimony and ANNEXURE G reflects the testimony of Mr Coleman, a representative of Ernst and Young.

There are also statements reflecting evidence during the High Court action by one of the other defendants, not featuring in the application before me. These statements were made in the presence of the respondent during August and November 2005 in respect of the CCMA and August to September 2006 in respect of the trial in the High Court action.

Any claim arising from the publication of these statements has accordingly become prescribed. A statement made by one Mr Holloway who is not cited as a defendant, and in respect of which there is no indication as to why the first or other applicants would be liable for such statement, appears from a document relied upon and it seems that this statement came to the respondent's knowledge before March 2006 and was made in January 2006 so that this claim has also become prescribed.

Statements by a Mr Law, the Contracts Director of an entity described as HPD Construction which would not have become prescribed because they were allegedly made in November 2008 to February 2011 constitute and reflect no defamatory publication by any of the applicants or other defendants, so that any possible claim for defamation and *injuria* that the respondent may have has clearly become prescribed.

Claim 5, for physical and emotional pain and suffering is evidently also based on the allegations offered to support the particulars of claim relating to Claim 4 which I have dealt with. Here the respondent alleges that "from about 1 May 2005 to date the defendants have inflicted both physical and emotional pain and suffering on the plaintiffs and his family by destroying and or bodily damaging the good reputation, good name and integrity of the plaintiff and his family by spreading false and damaging information in the immediate and wider community (refer Claim 4)", and he claims that he has suffered damages in excess of R53-million, being the amount "that he have/would have required to have been able to alleviate the pain and suffering" to date of his retirement. Insofar as any meaning can be attributed to these allegations it appears to be a claim for general damages arrising from the defamation alleged in Claim 4.

The claim, so it was convincingly argued, must accordingly suffer the same fate as that of Claim 4 which I have dealt with. The only possible claim for *injuria* that is made out arising, at best for the respondent, from the statements that I have referred to, has long since become prescribed.

In the result, it was submitted by Ms de Kock, correctly in my view, that each of the respondent's claims are obviously unsustainable and as such constitute vexatious proceedings and each of those claims accordingly fall to be struck out. In the alternative, as I have said, there is a prayer for the respondent to be directed to furnish security for costs,

particularly in light of his statement to the Constitutional Court that he has no means whatsoever to pay any debt.

This will only be applicable in the event of some of the claims not being struck out. For reasons that I have mentioned, I do not propose dealing with this part of the relief claimed in the alternative. Finally, I turn to the respondent's application for security to be furnished by the applicants, in the total amounts of the claims to be found in the main action's summons or in an amount to be fixed by the Registrar. The allegations made in support of this application are unsupported by evidence. These are unsubstantiated allegations to the effect that the first applicant, which is still well into carrying on a successful business, is stripping its assets and that the second applicant intends fleeing the jurisdiction of the court.

It was argued correctly that this application is misconceived. There is no provision in the common law or any statute which entitles the plaintiff to demand security for either the amount of his claim or his costs from a defendant. I was referred to appropriate authorities in this regard. Mr Dell, in his address, argued that the applicants as defendants have now become applicants for purposes of this interlocatory application.

They have only become applicants in the course of their effort to protect their rights as defendants and are not applicants in the true sense as intended by the authorities dealing with security for costs. I find no merit in the defences, such as they are advanced by the defendant. For all the reasons I mentioned I am pursuaded that a proper case was made out for the relief sought, drastic as it may be.

The costs of this application should follow the result. I make the following order:

1. Each of the respondent's claims against the applicants in the action instituted by him under case number 25803/2011 is struck out.

2. The respondent is ordered to pay the costs of this application.

COURT ADJOURNS

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