

SOUTH AFRICA / JUDGMENT

## Centlec (SOC) Ltd v Masepole and Others (A52/2022) [2023] ZAFSHC 73 (16 March 2023)

[2023] ZAFSHC 73

COURT

Free State High Court, Bloemfontein

BEFORE

C.J. Musi, P.J. Loubser, M.E. Mahlangu

CASE / FILE NUMBER

A52/2022

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Appeal No.: A52/2022

Reportable: YES/NO

Of Interest to other

Judges: YES/NO

Circulate

to Magistrates: YES/NO

In the appeal between: -

CENTLEC

(SOC)

LTD

Appellant

and

LEHLOHONOLO

D.

MASEPOLE

1st

Respondent

KABELO

MPHIRIME

2nd

Respondent

MOOKHO

M.

MOLEHE

3rd

Respondent

TSHOLOFELO

MATHE

4th

Respondent

CORAM: C. J. MUSI, JP et  
P.J. LOUBSER, J et M.  
E. MAHLANGU, AJ  
HEARD

ON: 06 MARCH 2023

## JUDGMENT

BY: C. J. MUSI, JP

DELIVERED ON: 16 MARCH 2023

- [1] This appeal, which is with the leave of the Supreme Court of Appeal, is against a judgment of a single judge of this Division. The question for consideration is whether the contracts concluded between the appellant and the individual respondents are valid.
- [2] The facts are as follows. The appellant, Centlec SOC (Centlec), is wholly owned by Mangaung Metropolitan Municipality (Mangaung). The four respondents are permanently employed by Centlec as Human Resources Officers. The respondents are at post level 7.
- [3] During 2012 the fourth respondent obtained a set of policies, including the purported Rapid Progression Policy (incorrect policy) from Mr Mopedi, Mangaung's Human Resources Employment Manager. It is common cause that some of Mangaung's policies, including its Rapid Progression Policy (RPP), automatically applied to Centlec employees. The purpose of the RPP is to progress eligible employees in qualifying posts to higher levels over a shorter period than the general annual movement to different grades and salary notches, subject to certain conditions.
- [4] The respondents approached Centlec's erstwhile Human Resources Manager, Mrs. Mkhawane, and requested her to consider them for promotion in terms of the incorrect policy. They were assessed in January 2015 and found eligible to be promoted to Senior Human Resources Officers, post level 5. They were subsequently subjected to another assessment, in terms of the same policy, by the then Manager: Performance Management who recommended to the CEO that they be promoted to post level 5. They were promoted.

- [5] The respondents were promoted on 9 January 2015 and each concluded a new employment contract with Centlec as a result of their respective promotions. They state that they were each properly considered, recommended and approved for Rapid Progression to the post level 5 positions.
- [6] During August 2015, Centlec served the fourth respondent with a notice to appear at a disciplinary hearing. She was, amongst others, charged with falsifying or manipulating Mangaung's authentic RPP. On 22 September 2015, she was found not guilty at the hearing because it could not be established that she falsified the document. The Chairman made the following finding:

'During the deliberations, and based on the evidence of the witness from the employer, it was undisputedly established that the authentic/original

Rapid Progression Policy that was obtained from the Mangaung Metropolitan Municipality by the accused employee, had undoubtedly

been tampered with rendering it a falsification of the authentic document.

It could however not be established who was responsible for this tampering with the authentic document. It transpired during the hearing that tampered and falsified replacement pages were utilised to effect the progression in rank of the accused employee.'

- [7] Having found her not guilty the Chairperson, however, went further and recommended that her 'erroneous promotion... as a result of the tampered/falsified pages alluded to above be administratively and retrospectively reversed and corrected from the date on which it was effected...'. On 9 October 2015, seemingly as a result of the Chairperson's recommendation, Centlec's CEO informed the respondents that their promotions would immediately be reversed. He wrote:

'Kindly take note that it has recently come to the attention of CENTLEC that you were erroneously promoted and advanced from your previous post of Personnel Officer to Senior Personnel Officer. This occurred due to a fabricated Rapid Progression Policy in terms of which the requirements for elevation from your post to that of Senior Personnel Officer were incorrect and thus you effectively do not qualify to be promoted/advanced because you do not meet the inherent requirements for advancement.

Consequently, you are hereby notified that CENTLEC intends to rectify the error and in so doing you are required to revert to your post of Personnel Officer. This will be applied effective immediately and retrospectively from the date on which the erroneous promotion/advancement was effected.

Please note that all salaries, bonuses, allowances and any other benefits which you erroneously received or accrued will be calculated and deducted from your salary over a period of months to be discussed with you.

To avoid doubt, it is confirmed that with effect from the 23rd of September 2015, you will revert to your position of Personnel Officer on the remuneration package for the incumbent occupying this position.

Should you have any queries, please do not to hesitate to contact writer.’

- [8] In order to give effect to its decision Centlec invited the respondents to indicate how much should be deducted from their respective salaries. The first and second respondents refused the invitation. The third and fourth respondents accepted it. Centlec proceeded to deduct R1000 per month from the first and second respondents and R500 per month from the third and fourth respondents. Dissatisfied with Centlec’s decision, which they view as a demotion, they referred a dispute to the South African Local Government Bargaining Council (SALGBC). They claimed that Centlec unilaterally changed their employment contracts by revoking their respective promotions. They subsequently withdrew the dispute at the SALGBC and launched these proceedings.
- [9] In the court a quo The respondents contended that the decision to put them back at level 7 was an unlawful demotion and in breach of their employment contracts, because they did not consent to the unilateral change of their employment conditions.
- [10] The appellant contended that the claim is bad in law because, at common law, the employer could unilaterally demote an employee. It argued that the respondents have a right not to be unfairly demoted and should therefore have utilised the Labour Relations Act[1] and referred an unfair labour practice dispute to the SALGBC.[2] Additionally they contended that no valid agreement was reached because both parties laboured under the common incorrect assumption

of a present fact – common mistake.

- [11] The court a quo found that the respondents did not admit that the RPP was tampered with or falsified. It also found that there was a complete lack of evidence regarding: (i) whether the respondents provided the incorrect policy; (ii) whether the recommendations were based on the wrong policy; (iii) whether Centlec would not have promoted the respondents based on the correct policy and (iv) whether the contracts were not entered into due to Centlec’s own fault by not establishing whether they are dealing with the correct policy.
- [12] Centlec’s case was based on a common mistake. The respondents did not dispute that there were two different policy documents. In fact, their case was that the documents were ‘on the whole, essentially the same’. They stated that ‘we have formed the view that the allegedly tampered or falsified excerpt of the policy was more probably an earlier version or draft of the excerpt now put forward by the respondent (appellant) as the authentic version of the policy’.
- [13] In its answering affidavit Centlec stated that:

‘A disciplinary enquiry chairperson came to the finding that there was simply no evidence to link her (fourth respondent) to the forged document. But the fact that the document was forged is beyond doubt – and even the fourth applicant (fourth respondent) accepted this.’

- [14] The respondents did not file a replying affidavit to dispute what was stated in the answering affidavit. The assertion that the fourth respondent accepted that the RPP was forged stands unchallenged.
- [15] The respondents attached both documents to their founding affidavit. In the incorrect one it is stated that a personnel officer with an appropriate qualification or equivalent would qualify for rapid progression. In the authentic policy it is stated that a personnel officer with an appropriate B.Degree or equivalent would qualify for rapid progression. The respondents adduced the testimony of the disciplinary enquiry and attached the chairperson’s findings. They did not take issue with the finding that the document was tampered with or falsified. They expressly took issue with the recommendation that he made and pointed out that the recommendations were ultra vires because he only had to determine the guilt or innocence of the fourth respondent.
- [16] It was the respondent’s case that the fourth respondent obtained the incorrect policy from Mr Mopedi and that their assessments were done based on that document. In the letters, dated 9 October 2015, addressed to the respective respondents Centlec clearly states that the erroneous promotions were due to a fabricated Rapid Progression Policy. There was no dispute about the incorrect document being used to promote the respondents.
- [17] The court a quo found that Centlec’s error was not an iustus error. It was careless by not checking whether the fourth respondent gave it the incorrect policy. Centlec’s case was not about a unilateral mistake or a iustus error, but a common mistake. Questions of blameworthiness or negligence does not arise when common mistake is at issue.[3] Centlec accepted that the respondents genuinely believed that Mr Mopedi gave the fourth respondent the authentic RPP.
- [18] In *Osman v Standard Bank* it was said that ‘what is required in order to render a contract void is a common assumption which turns out to be unfounded’.[4] In *Wilson Bayly Holmes*[5], which was cited with approval in *Van Reenen Steel v Smith*, [6] the Court surveyed South African and a foreign decision and concluded that:
- ‘a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs.’[7]
- [19] In *Van Reenen Steel v Smith Harms JA* stated that the correctness of the conclusion reached in *Wilson Bayly Holmes* can be tested by asking whether Centlec would

have concluded the agreement had it known the true facts.[8]In this case one can also ask whether the respondents would have requested to be assessed had they known that the policy was incorrect.

[20] Centlec states that the agreement to promote the respondents was due to the incorrect policy. There is no reason to doubt this assertion. By way of example, the second to fourth respondents do not have a B.Degree or its equivalent. The first respondent has a B.Degree. It is unclear whether it is an appropriate degree. The correct policy clearly states that an appropriate B.Degree or its equivalent is a requirement for Rapid Progression. The only sensible conclusion is that the utilization of the correct policy was a condition of the promotions. Absent that, I find that there was a common mistake.

[21] Centlec treated the contract as void based on the common mistake. In *Dickenson Motors, Schreinder J.A.* said:

‘In *Huddersfield Banking Company Ltd. v Henry Lister & Son Ltd.*, 1895 (2) Ch. 273, Lindley, L.J., states the proposition,

*“that an agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so.”*[9]

[22] Schreinder J.A. opined that the above proposition expresses a principle which is inherent in all developed systems of law.[10]

[23] Centlec could therefore treat the ‘agreement’ as set aside and as invalid based on the common mistake that the correct policy was used whereas an incorrect policy was used. It rectified an invalid contract. The correction had the effect of a demotion but it was done lawfully. The consent of the respondents was not needed to treat the ‘agreement’ as void and to effect the correction. It is not necessary to decide whether, at common law, it is a breach of an employee’s contract if the employee is demoted without consent.[11]

[24] This is a dispute between an employer and its employees, there is an ongoing relationship between the parties. I have decided not to make an order as to costs.

[25] I therefore make the following order:

1. The appeal is upheld with no order as to costs.
2. The order of the court a quo is set aside and replaced with the following:
3. The application is dismissed.
4. No costs order is made.

C.J. MUSI, JP

I concur.

P.J. LOUBSER, J

M.E. MAHLANGU, AJ

Appearances:

For the Applicant:

Adv. S. Grobler SC

Instructed by Phatshoane Henney Attorneys

Bloemfontein

For the Respondents:

Adv. A.I.B. Lechwano

Instructed by Motaung Attorneys

[1] Act 66 of 1995.

[2](2) “Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving— (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; ...

[2](2) “Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving—

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; ...

[3] Dickson Motors (Pty) Ltd v Oberholzer 1952 (1) SA 443 (A) AT 450D-E.

[4] Osman v Standard Bank National Credit Corporation Ltd- 1985 (2) SA 378 (CPD) at 386E.

[5] Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others 1995 (4) 340 (T).

[6] Van Reenen Steel (Pty) Ltd v Smith NO and Another 2002 (4) SA 264 (SCA) para 13.

[7] Supra at 344I.

[8] Supra at para 13.

[9] Supra at 450C-E.

[10] Ibid 450E.

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- [11] It has been decided that it is a breach of the employment contract which gives rise to contractual remedies. See *Monyela & Others v Bruce Jacobs t/a LV Construction* [1998] 19 ILJ 75 (LC) at 82 E-G; *Nxele v Chief Deputy Commisioner, Corporate Services, Department of Correctional Services and Others* (CA 9/06) [2008] ZALAC 28; (2008) 29 ILJ 2708 (LAC) para 89; *Van Wyk v Albany Bakeries Limited* (JR 1658/01) [2003] ZALC 107 (26 September 2003) para 13.
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Prepared on 11 October 2026 · Esheria