

SOUTH AFRICA / JUDGMENT

Jojwana v King Sabata Dalindyebo Municipality and Others (1626/19) [2020] ZAECMHC 52 (10 November 2020) [2020] ZAECMHC 52

COURT

Eastern Cape High Court, Mthatha

BEFORE

Z. M. Nhlangulela

CASE / FILE NUMBER

1626/19

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IN THE HIGH COURT OF
SOUTH AFRICA
[EASTERN
CAPE LOCAL DIVISION, MTHATHA]
[Not
Reportable]
CASE
NO: 1626/19
Heard
on: 29/10/20
Delivered
on: 10/11/20
In

the matter between:

MALIZOLE
JOJWANA
Applicant
and
KING SABATA DALINDYEBO
MUNICIPALITY
1st
Respondent
THE MUNICIPAL MANAGER,
KSD MUNICIPALITY
2nd Respondent
THE CHIEF FINANCIAL
OFFICER, KSD MUNICIPALITY 3rd Respondent
THE DIRECTOR CORPORATE

SERVICES,
KSD MUNICIPALITY
4th
Respondent
ROAD
SAFETY COORDINATOR, KSD MUNICIPALITY
5th
Respondent

JUDGMENT

NHLANGULELA DJP

- [1] The applicant seeks a relief declaring as unlawful the refusal by the respondents to pay 10% allowance of his monthly salaries calculated from August 2015 to July 2018; and that, if successful, compelling the respondent to pay accordingly.
- [2] The respondents oppose the relief sought on various grounds, namely that: the applicant has no right to be paid allowances as claimed; this Court lack jurisdiction to entertain the application; the claim for allowances have become prescribed; and that the applicant's claim does not comply with the provisions of s 3 of Act 40 of 2002.

For any one or more of these grounds this Court was urged to dismiss the application with costs.

- [3] It having appeared during the stage of argument, that success of the legal objection to the jurisdiction of this Court will disentitle the Court to adjudicate the application in its entirety, I ruled that the special defence of jurisdiction must be adjudicated separately from the other special defences raised, including the merits of the application.
- [4] The founding affidavit is not a model of clarity in that it does not comply with the rule of practice that in application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial. See: Minister Of Land Affairs And Agriculture v D & F Wevel Trust And Others 2008 (2) SA 184 (SCA) where the following was stated at 200D-E:

"In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) at 600, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."

- [5] The applicant states in the founding affidavit that on 05 February 2015 he was seconded as a road safety officer to serve for a period of three months that is renewable until a permanent employee was appointed; and that for his services he would be paid an extra duty allowance of 10% of his monthly salary per month. He alleges that the respondents owe him payments for services he rendered from 01 August 2015 to 31 July 2018. A litany of internal

correspondence is annexed to the affidavit being notifications to the respondents that they had omitted to pay his allowances. Although he alleges that in February 2018 his attorneys were instructed to address a statutory letter of demand for payment to the respondents, proof thereof was not annexed to the affidavit. He then states in paragraphs 16 and 17 of his founding affidavit as follows:

“

16.

My legal representatives having been advised by me about all that has been alluded herein above, they advised me that I should approach

this court in this fashion as this matter revolves around the lawfulness of my right to fair labour practice as far as remuneration

is concerned.

17.

My attorneys of record advised me further that in terms of section 77

(3) of the Basic Conditions of Employment Act (the Act) this

honourable court has a concurrent jurisdiction with the Labour Court to entertain this application.”

[6] In argument it was submitted on behalf of the applicant that this Court is clothed with jurisdiction to entertain the application. To the contrary, it was submitted on behalf of the respondents that since the applicant is the employee of the first respondent; and has raised a dispute that his right to fair labour practice has been breached the Labour Court has exclusive jurisdiction to resolve the dispute as is envisaged in s 185 (1)(b) read with s 157 (1) of the Labour Relations Act 66 of 1995 (the LRA). Further, it was submitted that the applicant has failed to bring his case within the purview of s 157 (2)(a) of the LRA which reads:

“The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental

right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations...”

[7] Mr Pangwa, for the respondents, brought the case of *Gcaba v Minister For Safety And Security And Others* 2010 (1) SA 239 (CC) to the attention of the Court in support of his submission that the applicant has failed to plead a case that invokes the

jurisdiction of this Court. In *Gcaba* the Constitutional Court said the following at [75]:

“Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in [Chirwa v Transet Ltd and Others [2007] ZACC 23; 2008

(4) SA 367 (CC)], and not the substantive merits of the case.”

[8] The applicant’s pleading of a case fitting the exception in s 157 (2)(a) such that his case may competently be determined by this Court is, to say the least, terse. Not enough was averred by him on affidavit to disclose a case of an employment agreement, written or oral, between him and the first respondent that should, if

proved, entitle him to a contractual remedy for breach which is justiciable in the High Court. Neither did the applicant plead a case founded on administrative law breach under PAJA. The allegations on affidavit that the applicant tendered extra duties, that the respondents failed to remunerate at 10% of his salary relating to another employment agreement (also not pleaded), is difficult to make out even upon the perusal of a litany of annexures which speak only to reminders for payment. It may as well be stated that the cause of action cannot be set out in the annexures to the founding affidavit - see: *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324.

[9] The relief in paragraph 1 of the notice of motion, which reads: “That the failure and/or refusal by the respondents and/or its duly authorized officials to pay applicant’s extra duty allowance being 10% of his monthly salary dated from 01st August 2015 up until 31st July 2018 be and is hereby declared unlawful and unconstitutional” which is unsupported by a pleading in the founding affidavit that applicant’s constitution right has been breached and the evidence laying the basis of such breach, cannot invoke the jurisdiction of the High Court. Therefore, the submission made on behalf of the applicant that a cause of action flowing from the Constitution is sustained on affidavit falls to be rejected. Further, in this regard, Mr Pangwa submitted that the injunction stated in *National Commissioner of Police And Another v Gun Owners Of South Africa* 2020

(6) SA 69 (SCA) at page 81 puts paid to the constitutional law argument in that:

*“[I]t is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for “it is impermissible for a party to rely on a constitutional complaint that was not pleaded”. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.” (cf: *Fischer and Another v Ramahlele and Others* 2014 (40 SA 614 (SCA) in para [13]; and *Public Protector v South African Reserve Bank* 2019*

(6) SA 253 (CC) in para [234]).

[10] It is plain from the decided cases referred to above that the applicant failed in his duty to state on affidavit the full terms and conditions of the alleged contract of employment and the evidence that entitle him to payments for extra duties from which the Court could assess whether, or not, the provisions of s 157 (2)(a) of the LRA permitted the launching of this application in the High Court rather than in the Labour Court that enjoys exclusive

jurisdiction to decide all labour related disputes.

[11] In all the circumstances of this case the objection to the jurisdiction of this Court passes muster. That said, I can find no reason to deny costs due to the respondents by reason that they have been unnecessarily incurred.

[12] As indicated at the outset of this judgment the legal incompetence of this Court to entertain the application makes it impossible for it to decide the remaining preliminary objections relating to prescription and non-compliance with s 3 of Act 40 of 2002.

[13] In the result the following order shall issue:

1. The application be and is hereby dismissed.
2. The applicant to pay the costs of the application

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the applicant

: Adv Maliwa

Instructed by

: M. Ntlonze Attorneys

MTHATHA.

Attorney for the respondents :

Mr C. Pangwa

: c/o Caps Pangwa Attorneys

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