

SOUTH AFRICA / JUDGMENT

Mbebe v Minister of Communications and Another (31593/2014) [2016] ZAGPJHC 48 (26 February 2016) [2016] ZAGPJHC 48

COURT

South Gauteng High Court, Johannesburg

BEFORE

N Davis

CASE / FILE NUMBER

31593/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

DATE:

26 February 2016

CASE

NO: 31593/2014

In

the matter between:

MBEBE,

MVUZO

MARTIN.....Applicant

And

THE

MINISTER OF

COMMUNICATIONS.....First

Respondent

SOUTH

AFRICAN BROADCASTING CORPORATION LTD.....Second

Respondent

JUDGMENT

DAVIS AJ

[1]

INTRODUCTION:

1.1 The current Applicant is Lungiswa Mbebe in her capacity as the duly appointed executrix of the estate of the late Mvuzo Martin Mbebe (“Mr Mbebe”). Mr Mbebe has during the course of this litigation passed away and was replaced by the executrix in terms of a notice in terms of Rule 15(3) delivered on 4 November 2015.

1.2 The Applicant is proceeding with a claim against the Minister of Communications as First Respondent for the payment of R1 853 000,00 and with a claim against the South African Broadcasting Corporation Ltd (SABC) as Second Respondent for the payment of a sum of R787 170,00. These two claims are said to arise from two settlement agreements which Mr Mbebe alleged he had concluded with the two Respondents.

1.3 It is common cause that there are no written settlement agreements countersigned by both the respective parties thereto. The agreements on which Mr Mbebe sought to rely are in dispute and both Respondents oppose the application. The First Respondent, being the incumbent Minister, has delivered an answering affidavit to which I shall refer to more fully hereunder and to which the late Mr Mbebe had replied prior to his passing away. The Second Respondent has not delivered an answering affidavit and a belated “opposing affidavit” by one of its attorneys was handed to me at the hearing of the matter. The Applicant declined to reply thereto and was content in dealing with the affidavit by way of argument.

[2]

BACKGROUND:

2.1 Early on in his founding affidavit the late Mr Mbebe stated that the background circumstances to the disputes between himself and the First and Second Respondents were not “pertinently relevant to the present application” and that the briefest outline thereof would suffice. He then did go on to describe the disputes and the preceding litigation between the parties in some detail. In argument, this has been summarised along the lines to which I shall refer to hereunder.

2.2 During 2006 and after a selection process described by Mr Mbebe, he emerged as the Applicant preferred by the board of the SABC for appointment as its Chief Operating Officer. In terms of the prescribed procedure the First Respondent (to whom I shall also refer to from time to time as “the Minister”) was to place the recommendation before Cabinet for acceptance or refusal. Having regard to the time frames and various Cabinet shuffles, no less than six consecutive ministers became involved in the matter from time to time.

2.3 The incumbent Minister at the time of the SABC board's recommendation failed to place the recommendation before Cabinet. Pursuant hereto the SABC board resolved to rescind its earlier recommendation, citing the fact that the then Minister had not approved the recommendation as a basis for the rescission.

2.4 Mr Mbebe then instituted proceedings in this court and obtained urgent interim relief aimed at preventing the SABC from appointing another Chief Operating Officer pending the outcome of his application to review the failure of the Minister to place the recommendation before Cabinet as well as a review of the board's resolution to rescind its earlier recommendation.

2.5 It was common cause between the parties to the review application that the Minister's function in the appointment of the Chief Operating Officer of the SABC was limited to placing the board's recommendation before Cabinet. The Minister was not empowered to accept or reject the recommendation.

2.6 Ultimately, the SABC conceded the relief sought against it by Mr Mbebe and resubmitted the initial recommendation to the Minister in order for it to be placed before Cabinet.

2.7 On 13 May 2009 the relief sought against the Minister was postponed sine die to enable the then Minister to consider and deal with the renewed recommendation of the board.

2.8 Despite the amendment of the relief sought by Mr Mbebe and the re-enrolment of his review application, the dispute remained unresolved.

[3] SETTLEMENT:

3.1 Against the abovementioned background Mr Mbebe set out his cause of action in his founding affidavit as follows:

“8.

After lengthy negotiations between myself, the Minister and the SABC we reached agreement upon the settlement of the review application:

(8).1 In December 2013 my attorneys received a settlement proposal from the attorneys representing the SABC. On 19 December 2013 my attorneys notified the SABC's attorneys of my acceptance of the SABC's settlement proposal. Annexures “MMM1” and “MMM2” are copies of the SABC's settlement proposal and my attorney's acceptance thereof on my behalf.

(8).2 On 16 February 2014 my attorneys received a settlement proposal from the Minister. On 17 February 2014 my attorneys notified the Minister of my acceptance of the Minister's settlement proposal. Annexures “MMM3” and “MMM4” are copies of the Minister's settlement proposal and my attorney's acceptance thereof on my behalf.”

3.2 In addition to the allegations regarding the settlement agreements themselves, Mr Mbebe dealt with the issue of the subsequent appointment of Mr Hlaudi Motsoeneng as the Chief Operating Officer of the SABC as follows:

“50.

On Wednesday 9 July 2014 I woke up to the news that the board of the SABC purported to appoint Mr Hlaudi Motsoeneng as the Chief Operating Officer of the SABC following upon the purported acceptance by the Minister of a recommendation from the board to this effect.

51.

The purported appointment of Mr Motsoeneng immediately became the subject of much debate in the public domain. Media reports raised the matter of the interim interdict I obtained on 2 October 2008 that prevented the appointment of a Chief Operating Officer for the SABC until the final determination of my review application. In response to this the Minister was widely reported to have stated that she, the SABC and I had reached an agreement of settlement removing the impediment of the interim interdict and paving the way for the appointment of a Chief Operating Officer.

52.

It is evident from these reports that the Minister was cognisant both of the interim interdict and the settlement agreements I reached with her predecessor and the SABC.”

3.3 Prior to dealing with the aforementioned annexures and the documents which Mr Mbebe averred constituted the settlement agreement, it is apposite to refer to the First Respondent’s stance. This stance is set out in an answering affidavit of the incumbent Minister, the Honourable Azwihangwisi Faith Muthambi. In view of allegations of conflicting versions of the Minister, it is necessary to quote from her affidavits, which I do hereunder.

3.4 The version of Mr Mbebe that the dispute had been settled is dealt with inter alia as follows:
“17.

AD PARAGRAPH 8:

I am not the Minister that the Applicant is referring to herein, I have never discussed the settlement with the Applicant and deny that any of my predecessors have settled the matter with the Applicant, in this regard I challenge the Applicant to produce any signed settlement agreement by any Minister representing the Department of Communications of the Republic of South Africa ...

19.

AD PARAGRAPH 1.2:

The alleged settlement agreement as reflected on “MMM1” is not signed by the Second Respondent and there is no proof

accompanying the alleged settlement agreement to show it was coming from the Second Respondent. Applicant failed to provide this court with a signed settlement agreement to show that the matter is settled. Annexure “MMM3” and “MMM4”

only serve to proof (sic) that there was settlement discussion between the office of my predecessor and the Applicant attorneys, the said annexures do not show any signed settlement.

20.

AD PARAGRAPH 9:

I deny that any of my predecessors had signed a settlement with the Applicant or they have agreed with the Applicant as alleged ...

37.

AD PARAGRAPH 40 TO 43:

Annexure “MMM3” reflected a discussion about the settlement rather the actual settlement. My predecessor was Mr Carrim informed me that there was no agreement between the Department of Communication and the Applicant to settle the matter ...

41.

AD PARAGRAPH 52:

I deny that I have made a statement to the effect that the SABC and the Applicant had reached a settlement and I further deny that my predecessor or myself had signed any settlement with the Applicant.”

3.5 In dealing with the Minister’s aforementioned denials, Mr Mbebe in reply relied on affidavits exchanged in an application launched by the Democratic Alliance on or about 16 July 2014 in the Western Cape High Court under case no. 12497/14. In the Democratic Alliance’s founding affidavit deposed to by the Chairperson of the Federal Executive of the Democratic Alliance at the time, Mr James Selfe, he stated the following with reference to Mr Mbebe:

“53.

One of the obstacles to filling the post of COO and part of the reasons Motsoeneng served in an acting capacity for so long – was that Mr Mvuzo Mbebe had obtained an interdict preventing the post from being filled on a permanent basis. Mbebe had been recommended as COO in 2007 by the board, but his recommendation was overturned when a new chairperson – Ms Khanyi Mkhonza – took office. The interdict prevented the board from permanently filling the post pending Mbebe’s review of the board’s reversal.

54.

The matter was close to being resolved by the previous Minister, Mr Yusuf (sic) Carrim. It appears that the matter may have been finally settled by the current Minister (Ms Muthambi) some time in early July. The Minister arrived at a board meeting on 7 July 2014 in possession of a note of settlement of the Mbebe dispute. If valid, this would open the way for the appointment (sic) a new COO.”

3.6 The following was said by the said Minister in response to the aforementioned allegations in her answering affidavit delivered in the application in the Western Cape High Court:

“46.3 I deny that I arrived at the board meeting of the (sic) 7 July 2014 with a so-called note of settlement on Mbebe’s matter. It is further not true that I had a 2 hours meeting with the Third Respondent upon my arrival to the said board meeting. As a matter of protocol it is the duty of the Third Respondent to give me a brief of the

issues.

46.4 The Second Respondent had already noted in its previous board meeting the closure of Mbebe’s matter and Mbebe through his attorneys had written to me on two occasions confirming that he had accepted settlement.”

(The Second Respondent referred to in the quotation is also the Second Respondent in the present application and the Third Respondent

referred to was its chairperson.)

3.7 Based on the aforementioned, Mr Mbebe averred that the Minister’s current denial of a settlement having been reached is untrue.

3.8 In view of the conflicting statements, it is necessary to examine Mr Mbebe’s statement and the documents on which he relied for alleging the existence of settlement agreements in detail.

[4] THE AGREEMENT WITH THE SABC:

4.1 According to Mr Mbebe’s statement, this agreement is constituted by Annexure “MMM1” and the acceptance thereof in Annexure “MMM2”.

4.2 Annexure “MMM1” is a 4-page typewritten document. It bears the heading “IN THE DISCIPLINARY HEARING BETWEEN SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD THE EMPLOYER AND MR MVUZO MBEBE THE EMPLOYEE”. It refers in the preamble to disciplinary proceedings initiated by the employer against the employee and concludes the preamble by stating that the parties have agreed that there is “...no longer a need to proceed with the disciplinary hearing ...”

4.3 Hereafter the agreement records that the employer formally withdraws all charges of misconduct levelled against the employee and that the employer will within 5 days of signature of the agreement pay the employee’s legal costs occasioned by the disciplinary hearing amounting to:

“2.1 R582 540 (Five Hundred and Eighty Two Thousand Five Hundred and Forty Rand) inclusive of VAT for Mncedisi Ndlovu and Sedumedi Attorneys’ legal fees; and

2.2 R204 630 (Two Hundred and Four Thousand Six Hundred and Thirty Rand) for senior and junior counsel’s fees”.

4.4 The agreement also contains a paragraph stating that the employee shall within 5 days of signature of the agreement withdraw any legal action in any court or tribunal that he may have instituted against the employer related to the disciplinary hearing. The agreement also contains a non-variation clause to the effect that no amendment or waiver shall be binding unless contained in the agreement and signed by the parties.

4.5 Annexure “MMM1” is undated and was not signed by the employer (the Second Respondent in this application). The last page of the document is blank, save for in the top right-hand corner there is a space and the typewritten words “for the employee” and a signature which Mr Mebebe alleged was his.

4.6 Annexure “MMM2” is a letter from Mr Mbebe’s attorneys dated 19 December 2013 but bears no relevance to Annexure “MMM1”. The letter is directed to the then Minister of Communications, the Honourable Yunus Carrim and a copy thereof is apparently also sent to Ms Rosey Sekese to whom I shall refer to hereunder. The letter reads as follows:

“Pursuant to the telephone conversation that Mr Mvuzo Mbebe had with Minister and Mr Mjwara last night and the subsequent text messages sent to yourselves, we attach herewith a revised settlement agreement which our client has already signed. We look forward to receiving a signed settlement agreement by Minister Yunus Carrim by close of business today.”

4.7 The document to which this letter apparently refers is another settlement agreement which bears the heading of the review application in this court in case no. 30814/2008. Its preamble reads as follows:

“Whereas the Applicant has instituted legal action against the Second Respondent in the South Gauteng High Court under case no. 30814/2008

contesting the process followed by the Second Respondent in filling up the position of Chief Operating Officer and whereas the parties have now agreed that there is no longer a need to proceed with said action. The parties have agreed to settle the dispute as follows ...”

(The Second Respondent referred to in this settlement agreement is the First Respondent in the present application.)

4.8 This settlement agreement (which counsel for the Applicant has assured me is not one on which the Applicant relies) provides that the Minister shall within 5 days of signature of the agreement pay Mr Mbebe one year’s salary equivalent to the salary package that Mr Mbebe would have earned as Chief Operating Officer of the SABC as well as his legal costs occasioned by the litigation process in an amount of R787 170,00. As a separate part of the agreement the Minister would have appointed Mr Mbebe for one year to review and develop the sports broadcasting policy of the SABC, to project-manage the drafting of legislation that will govern sports broadcasting and to oversee the implementation of the Digital Terrestrial Television

Project. Certain ancillary issues are also referred to and again, the agreement contains a non-variation clause in similar

fashion as “MMM1” and purports to constitute the full and final agreement between the parties. The agreement was only signed by Mr Mbebe and not by any Minister.

4.9 So far Mr Mbebe’s allegations.

[5] THE AGREEMENT WITH THE MINISTER:

5.1 Mr Mbebe averred that on 16 February 2014 his attorneys received a settlement proposal from the Minister to which his attorneys responded the next day notifying the Minister of Mr Mbebe’s acceptance. This Mr Mbebe and the Applicant still says constitutes the agreement with the First Respondent and which is contained in Annexures “MMM3” and “MMM4”.

5.2 Annexure “MMM3” was apparently e-mailed by Ms Rosey Sekese to whom I had referred to above to Mr Mbebe and his attorneys at 19:08 on the evening of 16 February 2014. The attachment to Ms Sekese’s e-mail is identified as “Mvuzo Mbebe draft Tripartite Settlement Agreement”.

5.3 The document which she had attached to her e-mail is headed “draft only for discussion purposes”. It similarly bears the heading of case no. 30814/2008 in this court and its preamble reads as follows:

“Whereas the Applicant has instituted the above action against the Respondents and whereas the Applicant and the Respondents have agreed to settle the matter in the interests of the South African Broadcasting Corporation and in the interests of the broader South African public by allowing the First Respondent through his settlement to fill critical vacancies to assist the First Respondent to fulfil its broadcasting mandate in accordance with the applicable legislation and constitutional requirements and whereas the parties have agreed to reduce the settlement to writing ...”

5.4 Hereafter the Deed of Settlement again states that the First Respondent therein (the SABC) will pay Mr Mbebe’s legal costs occasioned by the disciplinary hearing amounting to R582 540,00 and R207 630,00 being a total amount of R787 170,00. It also provides that Mr Mbebe would within 5 days of signature of the agreement withdraw any legal action. The agreement provides that the Minister would within 30 days of receiving an invoice pay Mr Mbebe one year’s salary equivalent to the salary package that he would have earned at the time as Chief Operations Officer of the SABC which was then estimated at an amount of R1 853 000,00 less the salary that Mr Mbebe was earning at the time that he was

recommended for the position and again payment of the legal costs in the amount of R787 170,00 was repeated.

5.5 Apart from the obvious question of the repeated inclusion in this agreement of what Mr Mbebe stated had already been agreed to between him and the SABC in Annexure “MMM1”, the document annexed to Ms Sekese’s e-mail of “MMM3” is replete with numerous “tracking changes” apparently done to an initial draft document. The changes are also from time to time on the right-hand side of the document supplemented by comment. Examples hereof are the following:

5.4.1 In paragraph 5 of the document reference is made to the Public Finance Management Act and the obligations of accounting officers and resolutions relating to the implications of unauthorised expenditure not budgeted for. The comment on this document on the right-hand side reads as follows:

“Mbulo, I haven’t been able to secure the resolution and/or minutes that authorised this settlement.”

5.4.2 Virtually all the time periods referred to in the initial agreement of which this was clearly an amendment were amended. Time periods of payment within 5 days were extended to 30 days and the like.

5.4.3 Various wordings referring to the description of the disciplinary or misconduct hearings were also made on this document. Deletions were made by a line having been drawn through words and insertions indicated by underlining. From paragraph 11 onwards all the paragraph numbers have all been changed and reformatted.

5.5 The document ends on the top of the last page thereof on paragraph 31 which has been amended to read paragraph 29 whereafter no provision has been made for any signatures. Despite this the document again contains the standard non-variation clause and the statement that it constitutes a full and final agreement between the Minister and Mr Mbebe and in particular insofar as Mr Mbebe might have had any right relating to the filling of the Chief Operating Officer position.

5.6 The typescript of the document has in the background on each page a printed draft statement reading “M Mbebe draft settlement agreement tracked”.

5.7 The acceptance of this document on which Mr Mbebe relies is contained in Annexure “MMM4” which is an e-mail by Mr Mbebe’s attorneys with the subject “DoC/SABC/Mbebe Tripartite Agreement”. It simply reads:

“Dear Rosey, We refer to the settlement agreement between Mvuzo Mbebe and SABC/Minister of Communications and advise that our instructions are to accept the proposed settlement agreement. Please note that the acceptance of payment of R1 853 000 is a further compromise by our client. Our client is available to sign the settlement agreement during the course of the day. We will shortly send you and the SABC the invoice for the legal costs.”

5.8 So far Mr Mbebe’s allegations pertaining to the agreement with the Minister.

[6] APPLYING THE LAW TO THE FACTS:

6.1 Additional to what I have already stated above, it is common cause that neither of the agreements on which Mr Mbebe seeks to rely were countersigned by or on behalf of the SABC or the Minister.

6.2 It was further common cause that no payment has been made by either the SABC or the Minister and no appointment of Mr Mbebe to any other position with the SABC had been made.

6.3 It is also common cause that for the initial four months subsequent to the date of the second purported agreement no demand has been made for any of the substantial amounts mentioned in the agreements. The only demand which was made was done by Mr Mbebe's attorneys in writing on 16 July 2014 being a week after Mr Mbebe heard of the appointment of Mr Motsoeneng.

6.4 In considering the finality validity of the agreements contained in Annexures "MMM1" to "MMM4" of Mr Mbebe's affidavit I find the following summary of the position contained in the well-known work of Christie and Bradfield, Christie's The Law of Contract in South Africa, 6th Edition at 37 under the heading "Proposals for partial, incomplete or provisional agreement" instructive:

"Especially in complicated or protracted negotiations it is not uncommon for the parties to record the progress they have made in a partial agreement, thus clearing the points on which they are agreed out of the way and facilitating discussion on the points that remain outstanding. If agreement is eventually reached on the outstanding points and a complete contract drawn up and signed, the prior partial agreement is usually forgotten, but if for one reason or another the intended contract is never concluded one party will sometimes seek to hold the other to the partial agreement. Obviously he cannot be permitted to do so ..."

6.5 In my view this is exactly what Mr Mbebe attempted to do in launching the application and what the Applicant is now still doing.

6.6 In relation to the question of whether the documents on which Mr Mbebe and the Applicant seek to rely constituted provisional or final agreements the following was stated by Corbett JA (as he then was) in *Pitout v North Cape Livestock Co-Op Ltd* 1977(4) SA 842 (A) at 850D:

"Was the undertaking an offer made animo contrahendi which upon acceptance would give rise to an enforceable contract or was it merely a proposal made ... while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case." See also: Alstham Equipments et Enterprises Electriques, South Africa Division v GKN Sankey (Pty)Ltd 1987(1)SA 81 (A) at 92 E:

6.7 Mr Mbebe and the Respondents appear to argue that the contract in question did not have any outstanding items and that there was sufficient consensus on the contents thereof to constitute agreements upon acceptance. While there might not be much difference in detail in the contracts it is clear that when Ms Sekese sent MMM3, she did so as a draft or as a proposal. It was not a complete offer which merely required the signature of Mr Mbebe. That this proposal was understood in that sense and that a signature of a later document was required also appears from his own attorney's letter. Annexure "MMM4" does not constitute an acceptance of "MMM3" but an indication that the terms thereof are acceptable and can be embodied in a subsequent document which would be signed. It is common cause that this never happened.

6.8 In similar fashion, if “MMM1” had been the final say in respect of the agreement between Mr Mbebe and the SABC, then why would those same terms again be repeated in Ms Sekese’s draft document? This question becomes even more pertinent when “MMM3” is styled to be a tripartite agreement. Furthermore, Annexure MMM2

was not an acceptance of AnnexureMMM1.

6.9 In all the instances all the documents on which the Applicant relied envisaged a written agreement signed by all the parties thereto. The requirement for signature is reiterated by the non-variation clauses.

6.10 A further indication that the agreements were not yet final one finds in the agreement with the Minister wherein various and numerous references were made to the requirements of the Public Finance Management Act and the need for reporting of the Deed of Settlement to the National Treasury and the Auditor-General. None of these steps had taken place or were catered for and would only have followed once a final document had been signed.

6.11 The clear animus of the parties, in particular the SABC and the Minister was that signature of a final complete document without amendments or variations would constitute a settlement and nothing else.

6.12 I therefore find that the documents were incomplete and that an agreement had not yet come into being between the late Mr Mbebe and the SABC and the Minister of Communications as claimed by Mr Mbebe.

6.13 Having reached the aforementioned conclusion, it is not necessary to further comment on or speculate on the reasons for the conflicting statements made by the Minister. In argument for the Second Respondent any statement amounting to an admission of a settlement was expressly disavowed. The statements made in public and referred to in the affidavit in the litigation in the Western Cape may or may not have been made for the sake of political expediency but I need not make any finding on that. What is clear however from the Minister’s answering affidavit, is her insistence that no signed written agreement existed.

6.14 Apart from the fact that the employment offered to Mr Mbebe can of course no longer be accepted since his passing away and the fact that the Notice of Motion erroneously claims a double payment of the amount of R787 170,00 and that the amount of R1 853 000,00 claimed therein also does not accord with the terms of the “MMM3” to which I have referred, I find that there were no final agreements between the respective parties which would entitle the Applicant to the relief claimed.

[7] On a conspectus of the evidence presented and documents filed I find no reason why costs should not follow the event.

[8] ORDER:

The Applicant’s application is dismissed with costs.

N DAVIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date Heard: 23 February 2016

Counsel for Applicants: Adv H. M Viljoen

Instructed by: Mncedisi Ndlovu & Sedumedi Attorneys

Counsel for First Respondent: Adv A. Tiny

Counsel for Second respondent: Adv P. P Sekhula

Instructed by: Lugisani Mantsha Incorporated

Date of Judgment: 26 February 2016

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