

SOUTH AFRICA / JUDGMENT

Simelani v Minister of Defence and Others (62987/17) [2018] ZAGPPHC 407 (10 May 2018)

[2018] ZAGPPHC 407

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom

CASE / FILE NUMBER

62987/17

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO
OTHER JUDGES

(3)

REVISED

CASE NO: 62987/17

10/5/2018

In

the matter between:

BHEKUMNDENI
QEDUSIZI PENUEL SIMELANI
Applicant
And
MINISTER
OF
DEFENCE
First Respondent
SECRETARY
FOR
DEFENCE
Second
Respondent
THE

CHIEF OF THE SOUTH AFRICAN
NATIONAL
DEFENCE
FORCE
Third Respondent
PUBLIC
SERVICE COMMISSION
(PSC)
Fourth
Respondent
GOVERNMENT
EMPLOYEES PENSION FUND (GEPF)
Fifth Respondent

JUDGMENT

STRIJDOM AJ

- [1] In this matter the applicant seeks enforcement of an interim interdict granted on 27 January 2006 by Seriti J ("the Seriti J order"). It was an interim order pending the finalisation of a review application.
- [2] The review application was heard by Mynhardt J ("the Mynhardt J order") and the judgement was delivered on 7 May 2007. When this occurred the interim interdict lapsed.
- [3] The applicant now seeks enforcement of the interim interdict on the incorrect belief that the application for leave to appeal against the judgement of Mynhardt J suspended the effect of the Mynhardt J order and revived the lapsed interim interdict. The applicant brings this application between ten to twelve years after the granting of several orders.
- [4] Hartzenberg J refused a similar application in January 2008 ("the Hartzenberg J order") as did Msimeki J ("the Msimeki order") in September 2008.
- [5] The first to the fourth respondents opposed the application on the following basis:
 - 5.1 The application is an abuse of the court process
 - 5.2 The matters raised are res judicata, alternatively are liis pendens alternatively issue estoppel operates against the applicant.
 - 5.3 The applicant has failed to establish a cause of action for any of the relief sought by him.

The salient facts and

background

[6] The applicant integrated into the SANDF on 8 June 1996 . He was appointed in the SANDF from 8 June 1996 until he reached the age of retirement as prescribed by the General Regulations.[1]

[7] Regulation 21(1) of the General Regulations for the SANDF and the Reserve provided as follows:

"..... an officer serving in the Permanent Force , except an officer who has enrolled in the said force for a specified term of service , shall have the right to retire on pension and shall be so retired on the date when he or she attains the age of 60 years.."

[8] For policy reasons the applicant, amongst others, was afforded an opportunity to serve until the age of 65 years provided he met

certain requirements. The terms and conditions of his employment were set out in the letter of appointment.[2]

[9] In terms of this letter of appointment, the SANDF made the following offer to the applicant:

".. an offer (until the attainment of 60 years is hereby made to you for appointment in the SANDF for a period of 10 years with effect from 8 June 1996".

[10] Section 52 (1) of the Defence Act; 2002 provides that the Regular Force consists of persons not older tat 65 years whether in a permanent or temporary capacity.

[11] Section 59 (1) (c) provides that membership of Permanent force is terminated on reaching the prescribed age of retirement or termination of any fixed contract term. The age is prescribed in paragraph 21 (1) of the General Regulations for the SANDF and Reserve. It is 60 years.

[12] When it was decided that the applicant had to retire when he attained the age of 60, the applicant launched a review application under case number 40585/05 and 18159/06 respectively in order to salvage his employment in the SANDF as an officer in the Regular Force{" first review application").

[13] The applicant launched an urgent application for interim relief pending finalisation of the first review applicaiton.

[14] On 27 January 2006 Seriti J ordered that pending the finalisation of the first review application, the applicant should be reinstated.[3]

[15] The review application before Mynhardt J was dismissed on 3 Mat 2007.[4]

[16] After the judgment by Mynhardt J and on 11 December 2007 the applicant launched an urgent application under case no 57495/07 ("the

Hartzenberg application"). In this application the applicant sought an order that pending the appeal against the judgment of Mynhardt J, the applicant should be reinstated to the position he held prior thereto and that the Seriti J order would prevail. This application was dismissed with costs.

[17] During April 2008 under case no 40585/2005 the applicant brought an urgent application in which he sought the following order, inter alia:

"2. An order that the application for leave to appeal against the judgment of Justice Mynhardt handed down on 7 May 2007 had the effect of restoring the interim interdict granted by Seriti Jon 27 January 2006, pending the finalisation of the appeal.

3. That the first, second and third respondents be ordered to effect payment in accordance with the interim order to the applicant retrospectively from 8 May 2007, such payment to earn interest at a rate of 15.5 % per annum, compounded.
4. That the first and third respondents be ordered to effect payment in terms of prayer 3 supra, within 10 calendar days of this order being granted."

[18] This application was struck off the roll. The application eventually served before Justice Msimeki. Judgment was handed down on 1 September 2008. The order reads as follows:

"1. It is declared that the noting of the application for leave to appeal against the judgment of Mynhardt J handed down on 7 May 2007 does not have the effect of restoring the interim order granted by Seriti Jon 27 January 2006 pending the finalisation of the appeal.

2. The application is dismissed with costs."

[19] On 15 September 2008 the applicant served an application for leave to appeal against this judgement but failed to prosecute it. The applications for leave to appeal against the judgements of Hartzenberg J and Msimeki J have lapsed for want of prosecution.

[20] On 15 September 2008 the applicant launched an urgent application under case number 43204/08. The application was enrolled for hearing on 2 October 2008. In that application he sought the following relief inter alia:

"2. An order declaring that by operation of law (ex lege) the mandatory interdict granted by Justice Seriti on 27 January 2006 restores the status quo (reinstatement) and continues to operate or is revived by virtue of the noting of an application for leave to appeal against the judgment of Mr Justice Mynhardt handed on 7 May 2007 until such time that the appeal is finalised"

[21] The application was struck from the roll and the applicant was ordered to pay the costs.

[22] On 28 September 2016 the applicant issued an application under case number 75594/16 against among others the President of the Republic of South Africa as well as the present respondents. This application is pending.[5]

[23] On 4 may 2017 the applicant launched an application against among others the Minister of Defence, the Minister of Justice, Correctional

Services and Judicial Services Commission.[6]

[24] A defendant may plead *res iudicata* as a defence to a claim that raises an issue disposed of by a judgment in rem and also as a defence based upon a judgment in personam delivered in a prior action between the same parties concerning the same subject matter and founded upon the same cause of action. The requirements for successful reliance on the *exceptio rei judicatae vel litis finitae* (or /is finitae) are: *idem actor*, *idem reus*, *eadem res* and *eadem causa petendi*. This means that the exception can be raised by a defendant in a later suit against a plaintiff who is demanding the same thing on the same ground per Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality*. [7]

[25] The meaning of this rule is that the authority of *res iudicata* induces a presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption being *juris et de jure*, excluded every proof to the contrary. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirements of good faith which does not permit of the same thing being demanded more than once. There is no enquiry whether the judgement is right or wrong, but simply whether there is a judgement.

[26] It was held that although previous proceedings had not even been between the same parties, the respondent to attempt to re-try an issue which had already been decided merely by changing the form of this action was an abuse of the processes of the court and was vexatious.[8]

[27] *Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res iudicata*). The court reserves discretion in the matter even if all the essentials of the plea are present. It was contended by the applicant that the plea of *res iudicata* and *lis pendens* must be dismissed because the prayers in this application are not based on the same subject matter and founded on the same cause of action between the same the parties.

[28] In my view the following issues have been fully decided:

28.1 That the application for leave to appeal did not restore the interim interdict granted by Seriti J on 27 January 2006 (per Hartzenberg and Msimeki JJ; and

28.2 Consequently the applicant is not entitled to reinstatement (per Hartzenberg and Msimeki J).

[29] Prayers 2, 3, 4, 5 and 6 in my view were based on the same grounds or cause of action because in the previous applications before Hartzenberg and Msimeki J the applicant seeks a declaratory that the application for leave to appeal against the judgment of Mynhardt J did not suspend the interim order granted by Seriti J and the applicant therefore remains in employment. Msimeki J decided on 1 September 2008 that the interim interdict has not been revived.

[30] It was held in *M v Snow Delta Serva Ship v Discount Tonnage Ltd* that

"Where an interim order is not confirmed irrespective of the wording used, the application is effectively dismissed and there is nothing that can die suspended. An interim order has no independent existence but is conditional upon confirmation by the same court in the same proceedings after having heard the other side.,... any other conclusion give rise to an unacceptable anomaly...."[9]

[31] The result is that an interim order is not revived when the decision pending which it was to operate is dismissed and an appeal is lodged against the dismissal.

[32] In my view the litigation in this matter is between the same parties, the cause of action is the same and the same relief is sought as far as prayers 2,3,4,5 and 6 are concerned. Accordingly res judicata operates in respect of these prayers.

[33] The plea of lis pendens in respect of prayers 5, 8.5, and 12 must also be upheld. The litigation is between the same parties, the cause of action is the same and the same relief is sought in two other pending cases. In prayer 5 of the September 2016 application the applicant seeks an order in terms similar and having the same effect as prayer 5 in this application.[10]

[34] In prayer 8.5 of this application the same relief is sought in prayer 5 of the September 2016 application which is still pending.[11]

[35] In prayer 12 of this application, the same relief is claimed in prayer 6 of the September 2016 application which is still pending.[12]

[34] In the circumstances I make the following order:

35.1 The special plea of res judicata in relation to prayers 2,3,4,5 and 6 is upheld with costs, including the costs of two counsels.

35.2 The special plea of lis pendens in relation to prayers 5, 8.5, and 12 is upheld with costs, including the costs of two counsels.

35.3 The application in respect of prayers 7, 8, 8.1, 8.2, 8.3, 8.4, 8.6, 9, 10, 11, 12, 13, 14, 15, 17 and 18 is hereby postponed sine die.

J.J STRIJDOM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:

22 February 2018

Delivered on:

For the Applicant:

In person

For the Respondents:

Adv. S K Hassim Sc

(First to fourth Respondents)

Adv. L Pillay

Instructed by:

The State Attorney, Pretoria

Date of Judgment:

10 May 2018

[1] AA, LG 2

[2] Page 367, AA, LG 3.

[3] Court order pp 6-7 of 47 of the founding affidavit.

[4] Judgment BQPSI pp 60 - 125.

[5] Page 458, annexure LG 9.

[6] Page 479, annexure l G 10.

[7] 1963 (2) SA 555 (A) at 562 A.

[8] See also Nicksch v Van Niekerk and Another 1958 (4) SA 453 (E) at p 546.

[9] 2000 (4) SA 746 (SCA). P752, See also Ismael v Keshavjee 1957 (1) SA 684 (T).

[10] Notice of application p. 457.

[11] Notice of application p. 457.

[12] Notice of application p.457.

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