

SOUTH AFRICA / JUDGMENT

Solidarity obo De Villiers v Council for Medical Schemes (JS147/21) [2024] ZALCJHB 433 (15 November 2024) [2024] ZALCJHB 433

COURT

Labour Court Johannesburg

BEFORE

Naidoo

CASE / FILE NUMBER

JS147/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS147/201

In

the matter between:

SOLIDARITY
obo DE VILLIERS A.
Applicant
and
COUNCIL
FOR MEDICAL SCHEMES
Respondent
Heard: 14
November 2024
Delivered: 15
November 2024

JUDGMENT

NAIDOO, AJ

Introduction

- [1] This matter was scheduled for a 2-day trial commencing on 14 November 2024.
- [2] On 11 November 2024, the defendant brought an application to postpone the trial. The request for postponement was underpinned by the fact that the defendant's current attorney of record was only briefed on 15 October 2024 and had insufficient time to adequately prepare for the trial. Secondly, its witness was unavailable. The applicant trade union, Solidarity, filed its opposing affidavit on 14 November 2024, the same day it received the application to postpone.
- [3] Prior to the commencement of the hearing, and on the court's suggestion, the parties agreed that the defendant abandon its application for postponement and instead, the parties addressed the court on the special plea of *lis alibi pendens* raised by the defendant. It was further agreed that this court, having considered the special plea would deliver a judgment in which parties would be directed as to the next step in litigation, following the outcome of the defendant's special plea.

Background

facts relevant to the special plea

- [1] Mr De Villiers was employed by the defendant on a 5-year fixed term contract which was to end in September 2018. Sometime in June 2018, 3 months before the expiry of his fixed term contract, De Villiers was dismissed for incompatibility and subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [2] The arbitrator found De Villiers' dismissal substantively unfair. De Villiers was the only person to testify that prior to his dismissal, his initial fixed term contract was renewed for a further five-year period. Based on this evidence, the arbitrator awarded De Villiers retrospective reinstatement. At the time the arbitration process concluded, and on De Villiers' testimony, he would have been 18 months into his second 5-year contract had he not been dismissed.
- [3] The defendant has since launched an application seeking to review the aforementioned award under case number JR754/20, which is currently pending. One of its primary arguments, so I am advised, is that the defendant did not offer De Villiers a second fixed term contract prior to his dismissal. Presumably, this argument seeks to attack the remedy of retrospective reinstatement.

- [6] On 23 February 2021, Solidarity acting on behalf of De Villiers, referred a contractual dispute to this court, by way of a statement of claim. In its action, Solidarity alleges that the defendant unlawfully terminated De Villiers' employment contract and as a result thereof, De Villiers seeks an order of specific performance.

Alibi lis pendens

- [7] Mr Matebese SC together with Mr Mpakane, on behalf of the defendant, submitted that a primary defence the defendant intends to raise in this action, as recorded in its statement of defence, is that it did not renew De Villiers' employment contract any time prior to his dismissal.
- [8] Mr Matebese submitted that the pending review application, when compared to the action before this court, involves the same parties, where the same issue (that being whether the respondent renewed De Villiers' employment contract or not), is before the reviewing court and this court. It was further submitted that if the reviewing court finds that the respondent had not renewed De Villiers' employment contract then his cause of action in this trial stands to fall. Counsel took the view that the findings of the review court were binding on this court. For these reasons, counsel submitted that the trial ought to be adjourned sine die pending the conclusion of the defendant's review application.

Evaluation

- [9] Regrettably, I am not persuaded by the argument submitted on behalf of the defendant.
- [10] The defence of alibi lis pendis requires a defendant to establish there is pending litigation between the same parties, based on the same cause of action and in respect of the same subject matter.[1]
- [11] While I accept that the same parties are before the reviewing court and this court, the remaining two requirements have not been met.
- [12] The issue before the reviewing court is whether the arbitrator arrived at a reasonable decision when he, amongst other issues, awarded De Villiers' retrospective reinstatement. The issue before this court is whether the defendant unlawfully terminated De Villiers' employment contract, which is a question the reviewing court has no jurisdiction to consider.
- [13] In addition, I fail to appreciate how a potential finding by the reviewing court, that the defendant did not renew De Villiers' employment contract, is binding on this court in an action for unlawful termination. Ms Jansen van Rensburg, appearing on behalf of De Villiers, correctly stated that in circumstances where an employee refers to different causes of actions arising from the same set of facts, it is inevitable that the two adjudicators will be required to make similar determinations independently of one another on the same or similar evidence. Put differently, one adjudicator will not be bound by the findings of another adjudicator over the same issue in dispute, when determining two different causes

of action brought by an employee.

- [14] Expanding on the practical limitations of Mr Matebese's argument, Ms Jansen van Rensburg correctly submitted that as a result of De Villiers being the only person at arbitration proceedings to testify that his contract was renewed prior to his dismissal, the reviewing court will be limited to that evidence when making a finding whether the arbitrator's finding on this score was reasonable or not. In the action before this court, it would be open for either party to lead additional or new evidence (when compared to the evidence at arbitration) in support of whether or not De Villiers' contract was renewed or not. Ms Jansen van Rensburg's submissions cannot be faulted. I therefore cannot respectfully accept the proposition that this court will be bound by the reviewing court's decision on whether the defendant renewed De Villiers' contract or not.
- [15] Moreover, Mr Matebese's argument that a finding by the reviewing court that De Villiers' contract had not been renewed, axiomatically extinguishes his cause of action before this court, is respectfully incorrect. As held, this court is not bound by the findings of the reviewing court over the same factual dispute.
- [16] Hypothetically, even if this court was bound by the findings of the reviewing court over this subject matter (which for reasons advanced, is contrary to my findings above), that in itself would not mean the end of De Villiers' unlawful termination case. It is common cause that De Villiers' contract was terminated 3 months before it was to expire. If his contract was unlawfully terminated without having been renewed, De Villiers' would nevertheless be in a position to seek damages equivalent to the remuneration he would have received for the full duration of his initial contract but for his unlawful termination.

[17] In the premises, I make the following order:

Order

1. The defendant's special plea is dismissed, and the matter should be set down for a determination on the merits.
2. The Registrar is directed to give this matter preference when setting it down.
3. There is no order as to costs.

M Naidoo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms M van Rensburg from Solidarity For the Defendant: Instructed by: Mr Matebese SC with Mr Mpakane Ramatshila

- Mugeru Attorney

[1] Association of Mineworkers & Construction Union & others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) & others

(2020) 41 ILJ 1837 (CC); [2020] 10 BLLR 959 (CC) at para 26.

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Prepared on 11 October 2026 · Esheria