THE HIGH COURT OF SWAZILAND

MANZINI CITY COUNCIL

Applicant

And

MUSA NXUMALO

Respondent

Civil Case No. 1067/2003

Coram:S.B. MAPHALALA - J

For the Applicant:ADVOCATE D.A.

SMITH SC (Instructed by Millin & Currie)

For Respondent: MR. C. NTIWANE

JUDGMENT

(15th December 2005)

Introduction

[1] Before proceeding with the determination of this matter, I wish to state that the tardiness of this judgment is perhaps explained, though it may not be excused by the interposing of other matters of immediate urgency which clamoured for attention. I desire to express my gratitude to the parties for their patience and understanding.

The relief sought

[2] The application before me is by Notice of Motion (in the long form) where the Applicant is seeking, amongst other things, a declaratory that the Respondent was dismissed from the employ of the Applicant as from 26th January 2000. In prayer 2 thereof that the Respondent is only entitled to such monies as the Applicant was lawfully obliged to pay him on his dismissal as at 26th January 2000. In prayer 3 that in the alternative to prayers 1 and 2 supra, declaring the Respondent no longer an employee of the Applicant as of 26th January 2000. In prayer 4 that an order declaring that the Respondent is only entitled to such monies as would be lawfully due, owing and payable to him so as if he resigned his employment with the Applicant on 26th January 2000. Further, in prayer 4 thereof that in the event of the relief sought in prayers 1 to 4 not being granted, requesting the court to make such order as in all the circumstances the court may deem just and equitable as between Applicant and Respondent. Costs of the application are sought in prayer 6 thereof.

Issues raised in the affidavits.

[3] The Founding affidavit of Applicant's Chief Executive Officer, Mr. Churchill Fakudze is filed in support thereto. A number of pertinent annexures are also filed including various letters of

correspondence relevant to the dispute, namely a copy of a judgment of this court handed down by Matsebula J on the 27th February 2002 (annexure "MCC4"); a copy of a judgment of the Court of Appeal confirming the judgment of Matsebula J delivered on the 22nd November 2002, marked as annexure "MCC5"; and more importantly a letter of resignation by the Respondent dated 28"[1] March 2003, marked as annexure "MCC13".

[4] The Respondent opposes the granting of the application and in this regard has filed an opposing affidavit where he has raised points in limine as well as answering on the merits of the dispute. He has raised three points in limine as follows: Firstly, that it is not open to the Applicant to proceed by way of motion for a declaratory order where it is clearly within Applicant's contemplation that there are material disputes of fact which cannot be resolved without the need of oral evidence. Secondly, that it is not open to the Applicant to seek the relief it seeks without first having afforded him a hearing in respect of his dismissal from Applicant's employ. By seeking a declaratory order in respect of his dismissal Applicant wrongfully seeks to review and/or correct and/or set aside the judgment of this court and the subsequent Court of Appeal ruling without first having afforded him a hearing in respect of the allegations levelled against him.

[5] The Respondent has also filed an application to strike out certain paragraphs in the Applicant's Founding affidavit as he intimated in paragraph 7.2 of his Answering affidavit.

[6] When the matter came for arguments, it was argued as a whole, namely the application to strike out, the dispute of facts, whether there was a waiver and the alternative claim. I shall hereinunder address

these issues ad seriatim. However before doing so, I wish to sketch a very brief history of the matter for a better understanding of the issues.

Brief background.

[7] The Respondent was a former employee of the Applicant, who resigned his employment with the Applicant on 28th March 2003, following an incident which took place on the 9th October 1999. There was an alteration between the Respondent and his superior, one Mr. Parker where damage occurred on the house of the latter, such damage was attributed to the Respondent. In consequence of this incident, the Applicant resolved to suspend the Respondent's employment forthwith. Thereafter, followed a disciplinary enquiry which was later challenged in this court and resulted in a judgment of Matsebula J; and further culminated in the Court of Appeal judgment confirming the decision of the High Court. The latter court set aside the decision by Applicant terminating Respondent's employment and ordered that the matter be heard de novo by Applicant and that Respondent be afforded an opportunity to engage the services of Counsel.

[8] I now turn to address the issues mentioned in paragraph [5] supra as follows: Application to strike out

[9] Presently before court, inter alia, is an application to strike out certain paragraphs in the Applicant's Founding affidavit on Notice of Application dated 8th June 2005. These paragraphs being the following:

i) paragraphs 4.1 to 4.2

ii) paragraph 4.9

iii) paragraph 5.17

iv)

[10] The ground advanced therein is that there are inadmissible and are hearsay.

[11] Paragraphs 4.1 to 4.2 thereof reads in extenso as follows:

"4.1 The Respondent was a former employee of the Applicant, who purportedly resigned his employment with the Applicant on 28lh March 2003. The word "purported" is used in the context of the facts hereinafter set out.

4.2 In the early morning of the 9lh of October, a Saturday, the following incident took place.

4.2.1 The Respondent arrived at the house of his superior, Mr. Parker, the then C.E.O of Applicant. From evidence available to the Applicant, it appears that the Respondent at the time was under the influence of alcohol;

4.2.2 The Respondent proceeded to damage Mr. Parker's house with an axe namely breaking certain door panes;

4.2.3 He was apprehended by a security guard who was at the time on duty. The Respondent threatened to kill the security guard with the axe which he was wielding at the time;

4.2.4 Mr. Parker alighted from the house, only to be threatened by the Respondent. The reason for his attack on Mr. Parker's house and the threats made to him was apparently because the said Mr. Parker was corrupt at work in that he, Respondent, was being deprived of certain benefits which were being allocated to other employees but not to him".

[12] Paragraph 4.9 is also being attacked as being inadmissible and hearsay. The said paragraph reads as follows:

4.9 On 22 September 2000, the matter was enrolled by the Respondent's attorneys and served before the then Chief Justice of Swaziland, the Honourable Judge Sapire. The Chief Justice was not prepared to hear the matter on the normal contested Motion Court roll and directed that both Counsel for the Applicant and the Respondent approach the Registrar to enrol the matter on a date suitable to Counsel and the court. I interpose at this juncture to inform the above Honourable Court that the Respondent was for reasons known only to him not prepared to have the matter adjudicated upon by the then Chief Justice and indicated quite clearly that his preference was for his Lordship Mr. Justice Matsebula to hear the matter.

[13] The Respondent has also mentioned paragraph 5.17 of the Applicant's Founding affidavit liable to be struck out with the other paragraphs. However, there is no paragraph 5.17 in the Applicant's Founding affidavit and accordingly the Respondent's application to this extent is fatally defective, therefore no further mention will be made in relation thereto. I must further add in this regard that when the matter came for argument Mr. Ntiwane conceded that there was no paragraph 5.17 that this was typing error, that Respondent meant paragraph 5.7. The said paragraph reads as follows:

5.7 With reference to the above the Applicant can with justification make the following submissions:

5.7.1 Eighteen months of the total time i.e. from 26th January 2000 up and until 28 March 2003 was caused exclusively by the Respondent;

5.7.2 16.5 months of the delay was caused by the legal process in the Kingdom of Swaziland which under the circumstances of this case, was beyond the control of the Applicant and possibly also of the Respondent, save that I state that part of the delay in having the review proceedings finalised before the above Honourable Court was caused by the Respondent.

[14] Again when the paragraph was argued Mr. Ntiwane conceded that this was not the paragraph

which is sought to be struck out but paragraph 4.17. The said paragraph reads as follows:

"4.17 Having been informed of the Appeal Court judgment, the Applicant immediately gave its attorneys instructions to proceed forthwith to arrange a time, date and place for the hearing of the disciplinary enquiry with the Respondent. On 2nd December 2002 there was a verbal discussion between the Applicant's attorney, Mr. Hlophe of Milliir and Currie and Mr. Ntiwane, representing the Respondent. During the course of this discussion, Mr. Ntiwane on behalf of the Respondent indicated that his client may wish to make certain settlement proposals with regard to the issue at hand. He was requested to put such settlement proposals in writing for the Applicant's consideration. Notwithstanding no settlement proposals were made either verbally or in writing and accordingly on 12,h December 2002 the Applicant's attorney wrote a letter to the Respondent's attorney Mr. Ntiwane of Ntiwane & Associates and I attach hereunto, marked annexure "MCC6" a copy of the said letter".

[15] In respect of paragraphs 4.1 - 4.2 and 4.9, it was strenuously argued by Mr. Ntiwane that the matters referred by the deponent thereto are not within his personal knowledge and that he has not filed any confirmatory affidavits by persons who had personal knowledge of the events as related. When these events took place in 1999 the deponent was not there. It also cannot be said that these matters are common cause between the parties. In paragraph 4.17 thereof the argument is that the issues raised therein should not have been adverted to as they were matters "without prejudice" basis between attorneys. For the general proposition regarding striking out the court was referred to the textbook by Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 368 in Jin 369.

[16] Starting with paragraph 4.1 of the Applicant's affidavit, it is Advocate Smith's submission that it is not understood what in paragraph 4.1 constitute hearsay evidence, bearing in mind that the Respondent indeed resigned on 28th March 2003, and same has not been placed in dispute. In this regard I agree in

toto with Mr Smith that it is not in dispute that Respondent resigned on this date as reflected in annexure "MCC13" being his letter of resignation addressed to the Town Clerk/Chief Executive Officer of the Applicant.

[17] Coming to paragraph 4.2, it is contended for the Applicant that the contents thereof fall within the recognised common law exceptions to the hearsay rule. In this regard Mr. Smith relied on the dicta of Watermever JA in the matter of R vs Miller 1939 A.D. 106 at page 119 where the following was stated:

"Statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e. as evidence of the truth of what they assert) they are hearsay and are excluded because their truth depends upon the credit of the asserter which can be tested only by the appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, they are admissible if what they are tendered to prove is relevant to the inquiry".

[18] It would appear to me that the contents of paragraph 4.2 are hearsay evidence in that the deponent is outlining facts leading to the purported dismissal of the Respondent. The fact of the dismissal of the Respondent is the gravamen of the application for the present application for the declaratory order (per prayer 1 thereof). It would appear to me, and in this regard I am in total agreement with Mr. Ntiwane that it is important to lead evidence on this aspect of the matter, the averments made by the Chief Executive Officer are clearly hearsay when also viewed against the fact that the dismissal was nullified by both the High Court and the Court of Appeal. Therefore it cannot be said that the contents of paragraph 4.2 is not tendered for the truth thereof, but tendered for other relevant purposes or to establish the existing state of affairs and thus not hearsay, (see International Tobacco Co. (S.A.) Ltd vs

United Tobacco Cos. (south) Ltd 1953 (3) S.A. 343 (W).

[19] I now turn to paragraph 4.9 and I agree with the Applicant's contention that it is not clear why the contents of the said paragraph constitute hearsay evidence, specifically in the light of the fact that it is admitted that the matter could not proceed on 22nd September 2000, and that the Chief Justice directed that both parties approached the Registrar to enrol the matter on a date suitable to Counsel and the court. However, I find the last sentence thereof objectionable which reads as follows:

"I interpose at this juncture to inform the above Honourable Court that the Respondent was for reasons known only to him not prepared to have the matter adjudicated upon by the then Chief Justice and indicated quite clearly that his preference was for his Lordship Mr. Justice Matsebula to hear the matter".

[20] In this regard I agree with the submissions made for the Respondent that this aspect of the paragraph ought to be strike out.

[21] I now turn to the remaining paragraph viz paragraph 4.17 thereof. In this regard I agree with the Applicant's contention that this paragraph is not prejudicial to the Respondent at all because the deponent therein merely makes reference to the existence of negotiations between the parties, and not the contents thereof, which may have been on "without prejudice basis". Herbstein et al (supra) at page 500 put it this way:

"A court may not grant an application to strike out unless it is satisfied that the Applicant will be prejudiced in the conduct of his claim or defence if the application is not granted

[22] Furthermore, in an application to strike out a court has a measure of flexibility and discretion in such matters, and I shall therefore in view of the above reasons exercise my discretion in favour of allowing these paragraphs viz 4.1, 4.9 and 4.17 to stand as part of the papers before me. Paragraph 4.2 is strike out. (See James Brown's Hamer (Pty) Ltd vs Simmons NO. 1963 (4) S.A. 656 (A) at 660 E - F, Wiese vs Jourbert En Andere 1983 (4) S.A. 182 (O) at 194 F - H and that of The Editor Times Sunday et al vs Susan Myzo Magagula - Appeal Case No. 31/2005 (unreported).

ii)The points of law in limine.

[23] The points of law in limine thereof are formulated in the following language:

3.1 It is not open to the Applicant to proceed by way of motion for a declaratory order where it is clearly within Applicant's contemplation that there are material disputes of fact which cannot be resolved without the need of oral evidence.

3.2 It is not open to the Applicant to seek the relief it seeks without first having afforded me a hearing in respect of my dismissal from Applicant's employ.

3.3 By seeking a declaratory order in respect of my dismissal Applicant wrongfully seeks to review and/or correct and/or set aside the judgment of the above Honourable Court and the subsequent Court of Appeal ruling without first having afforded me a hearing in respect of the allegations levelled against me.

3.4 The matter is not properly before court a sit is an industrial dispute which ought to be determined in terms of the set procedures our industrial law takes cognisance of.

[24] In argument Mr. Ntiwane only pursued the point covered in paragraph 3.1 as cited above. The point being made in this regard is that since Applicant is seeking that the court declares that Respondent was dismissed, it is therefore imperative to adduce evidence of the dismissal, paragraph 4.2 is hearsay and cannot be the basis of coming to a conclusion that Respondent was dismissed. Furthermore, it is also important to lead evidence as to how Respondent took alternative employment regard being had to the Applicant's Staff Regulation in this respect. That these constitute disputes of fact which should have been foreseen by the Applicant and that the common practice is seeking for declaratory orders is to proceed by way of action and not application proceedings. The court was referred to the South African cases of Adbro Investments Co. Ltd vs Minister of the Interior 1956 (3) S.A. 345 (A) at 349 in fin 350 A, at 352E and that of Hattingh vs Ngake 1966 ( I ) S.A. 64 (0). To the general proposition that the application may be dismissed with costs when the Applicant should have realized when launching his application that a serious dispute of fact was bound to develop.

[25] Mr. Smith on the other hand took the view that in casu there are no dispute facts in this matter since it is an objective fact that Respondent was dismissed on the 26th January 2000. It is common cause between the parties that the act of dismissal occurred on that date. Whether or not Applicant was entitled to do so is not relevant to the present enquiry.

[26] On considering the pros and cons of the arguments advanced by both parties in this regard, it appears lo me that Mr. Ntiwane is correct in his submissions that there is a dispute of fact as regards the dismissal of the Respondent on the stated date. The High Court judgment dated 27lh February 2002, set aside the decision by the Applicant terminating Respondent's employment and ordered that the matter be heard de novo and Respondent be afforded an opportunity to engage services of Counsel.

Therefore, the dismissal of the Respondent was set aside. The Appeal Court on the 22nd November 2002 confirmed the decision of the High Court, which meant the Respondent remained an employee of the Applicant. The decision by the Applicant to dismiss the Respondent was nullified by both courts. It would appear to me that for the court (as per prayer lof the Notice of Motion) to declare that "the Respondent was dismissed from the employ of the Applicant as from 26th January 2000", oral evidence has to be led to establish the existence of that event regard to be had to the fact that the decision to dismiss Respondent on the 26th January 2000 was nullified by both the High Court and the Appeal Court. Paragraph 4.2 of the Applicant's Founding affidavit which sought to establish this fact has been struck out in paragraph [18] (supra) on account of being hearsay evidence. Further, it is also important to lead evidence as to how Respondent took alternative employment regard being had to the Applicant's Staff Regulations in this respect.

[27] In the totality of what I have said above there are disputes of fact in this matter which cannot be resolved on the affidavits. In the case of Electrical Contractor's Association of S.A. vs Building Industries Federation S.A. 1980 (2) S.A. 516 (T), it was held that where a declaratory order is sought, if a dispute of fact is foreseeable, a declaration should be sought by way of action. The Applicant ought to have foreseen these disputes of fact, and therefore following the dictum in the case of Adbro Investments (supra) the point of law in limine in this regard is upheld with costs. The proper cause to follow is by way of action proceedings.

S.B. MAPHALALA
JUDGE