IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. J343/09 and 344/09

In the matter between:

SOLANE MATOTO REUBEN Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION Respondent

REASONS

BHOOLA J:

Introduction

[1] These are my amended *ex tempore* reasons for an order granted in the following terms on 30 April 2010:

1. *The application for consolidation is granted on an unopposed basis;*

2. *Condonation is granted for the late filing of the respondent's answering affidavit;*

3. *The applicant's claim (under case numbers J343/09 and 344/09) as consolidated is dismissed;*

4. *The respondent's counter-claim in the sum of R3358.00 succeeds;*

5. Costs on an attorney and own client scale de boniis propriis are to be paid by the applicant's former attorneys of record, Jansens Inc.

Background

[2] Two separate claims under case number 343/09 and 344/09 were brought by the applicant in terms of sections 77(1) and 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("the BCEA"). In the first application, the applicant sought payment in the sum of R3533.20 as well as interest thereon, in respect of travel expenses occasioned by his travel on duties performed in the course of his employment with the respondent ("the travel claim"). In the second claim ("the particulars of employment claim"), the applicant seeks an order directing the respondent to provide him with its records relating to his employment in terms of section 31 read with section 78(1)(e) of the BCEA. Both claims arose from the termination of the applicant's employment with the respondent on 28 February 2009, when he was employed as a full-time junior (Level B) commissioner.

[3] The respondent opposed the relief sought in both claims and instituted a counter claim in the sum of R3358.00 in respect of travel claims that were not owed or payable to the applicant but were paid to him. In respect of the particulars of employment claim, which are ostensibly sought to assess whether there are any further amounts due to the applicant arising from his employment, the respondent alleges that he already has the particulars referred to in section 29 of the BCEA (such as his name, occupation and the address at which he was employed); seeks information that will not assist him in furthering his claim; and seeks information to which he is not entitled.

[4] Both claims followed separate letters of demand addressed to the respondent, and in respect of both claims the respondent contends that the matter should have been referred to the Department of Labour for investigation.

[5] In both claims the applicant sought costs on a scale as between attorney and own client, which he acknowledges in his founding affidavit is due to the fact that a party and party costs order will not result in full restitution for his costs in bringing the applications, and it would be just and fair for this court to award costs on this scale.

[6] The respondent filed an application for consolidation of the two claims, which (at least until the matter was heard on 30 April 2010) was not opposed by the applicant. The consolidation application, an application for condonation of the respondent's late filing of its answering affidavit, as well as the merits of the two claims and the counter-claim were enrolled for hearing on 30 April 2010.

Conduct of the applicant's attorneys

[7] The applicant's attorneys, Jansens Inc obviously made no effort to prepare for the hearing. No heads of argument were filed by them. The respondent had also attended to indexing and pagination of the court file as required by Rule 22B of the Rules for the conduct of proceedings in the Labour Court ("the Rules"). At the commencement of the matter, and in an obvious ploy to prevent the matter proceeding, the applicant's attorney Mr Scholtz raised a number of technical objections, which (as I understood them) included that the matter had been prematurely set down by the respondent and it had indexed and paginated the court file; that the consolidation and/or condonation applications were defective; and that the respondent had taken an irregular step in filing a consolidated answering affidavit prior to the application for consolidation being granted.

[8] The consolidation application had been filed in May 2009 and no notice of opposition was forthcoming. Mr Scholtz submitted that the consolidation matter should be disposed of first, and only thereafter should the merits be enrolled for hearing in due course. However he conceded that the applicant did not oppose consolidation and I proceeded to order that the two claims be consolidated. In any event, the need for consolidation should not even have arisen in the first place. It was only necessitated by the unduly burdensome and vexatious manner in which Jansens Inc approaches litigation in this court, the prime objective appearing to be generation of income by way of seeking, as a matter of course, costs on an attorney and own client scale in order to cover the costs of bringing multiple claims for small amounts arising out of the same contract of employment. There would appear to be no other justification for bringing two applications in this matter, and there is no reason why a public institution like the respondent should have to incur the costs of defending two separate claims. It is trite that in terms of Rule 23 an order for consolidation may be granted where it is just and expedient. Both applications arose from the same facts and circumstances; involve the same parties and were dated and signed on the same day. This pattern of conduct has drawn the ire of this court on a number of occasions[1], and it is in line with these authorities as well as the interests of expeditious dispute resolution that I ordered that the claims should be consolidated, and moreover that the merits should be heard.

[9] Mr Scholtz then sought a postponement, without tendering costs, to enable the applicant to file a replying affidavit to deal with the allegations regarding condonation made in the answering affidavit, and to oppose condonation of the late

[1] See for instance the judgment of Todd AJ in *Baartmann AAC and Baartmann MME t/a Khaya Ibhubesi v Sheriff of Potchefstroom and another* [2009] JOL 23566 (LC) para 41, and that of Van Niekerk J in *Ephraim Mtokafona Mayo v Bull Brand Foods (Pty) Ltd* (unreported judgment under case J104/09) as well as the judgment of Basson J in *Indwe Risk Services (Pty) Ltd v Hester Petronella Van Zyl* (unreported judgment under case2647/2007).

filing of the answering affidavit. He submitted that the respondent should have anticipated that the applicant would seek an opportunity to file a replying affidavit and it was accordingly responsible for the costs occasioned by the postponement. However, no objection to the answering affidavit as being an irregular step or on any other basis had been filed, no had the applicant indicated otherwise its intention to oppose condonation, despite the answering affidavit having been filed 9 months ago. The applicant's attorneys had moreover ignored three directives to file heads of argument and had also been informed by respondent's attorneys that they intended the interlocutory as well as the main matters to proceed on the date allocated for hearing.

Condonation

[10] In support of the respondent's application for condonation it was submitted that it had been necessary to investigate the alleged non-payment of the claims specified in the applicant's founding affidavit as well as to conduct a more general investigation into all of his travel claims. This was a time-consuming process. In any event once the respondent became aware of the existence of two separate applications arising from the same set of facts the decision was made to seek consolidation. The consolidation application was filed less than two months after the claim was brought, and it was submitted that this delay was not substantial. In addition the answering affidavit was filed 10 weeks after the consolidation application, and was not sufficiently serious to warrant refusal of condonation particularly given that the prospects of success appeared to favour the respondent. Moreover, there was no prejudice to the applicant. He sought a relatively small amount in his travel claim relative to the costs of litigating, and in the event he succeeded in proving his claim would be adequately compensated by way of payment of interest. In regard to the claim requesting particulars of employment the applicant already had the information and his claim in this regard was without merit, and any delay was accordingly of little consequence. On the contrary, the respondent would be prejudiced by a refusal of condonation.

[11] In the circumstances, I determined that good cause existed to condone the late filing of the answering affidavit. Although the basis for the condonation application was adequately set out in the answering affidavit I permitted the respondent's attorney to hand in a formal notice of application during the hearing. Mr Scholtz sought a postponement on the basis that, in the absence of a ruling as to condonation the applicant had not been obliged to file a replying affidavit prior to the hearing and now sought the opportunity to do so. The postponement was opposed by the respondent on the basis that a tender of costs had not been made and Mr Scholtz took the view that as the applicant was not responsible for the postponement, the respondent should tender costs. The basis for this, as I understood his submissions, was that the respondent should have anticipated that condonation would be granted and that the applicant would then be entitled to file a

reply. I considered this to be nothing short of a disingenuous attempt to delay the matter and exercised my discretion to refuse a postponement.

Costs

[12] Following the refusal of his application for postponement Mr Scholtz sought an opportunity to take instructions following which he withdrew as attorney of record. This was a pure expedience as the respondent sought costs on an attorney and own client scale and extensive submissions had been made in its heads of argument in this regard. In my view the conduct of Mr Scholtz justified the initial grounds on which this costs order had been sought. I proceeded to hear the merits, granted the counter claim on an unopposed basis and dismissed the main claim. When I asked the respondent to address me on the issue of costs Mr Scholtz then conveniently sought leave on behalf of Jansens Inc to intervene as an interested party. Leave to intervene was refused. In my view this was a mere subterfuge to avoid an adverse costs order. Notwithstanding his withdrawal as attorney of record, which appeared to be a last ditch effort to avoid the matter proceeding, and given his vexatious and contemptuous conduct in this matter, I considered it justified that Jansens Inc be ordered to pay the respondent's costs on an attorney and own client scale *de boniis propriis.* I have also directed the Registrar to provide a copy of these reasons to the relevant Law Society for investigation of unprofessional conduct.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing and *ex tempore* order and reasons: 30 May 2010

Date of amended reasons: 22 June 2010

Appearance:

For the applicant: Mr C Scholtz, Jansens Inc

For the respondent: Mr D Hochstrasser, Bowman Gilfillan