22 NOV drafting heads of argument

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 10635/2011

In the matter between:

MELISSA DONNELLY **Applicant**

and

DAVILL RECRUITMENT SA (PTY) LTD **First Respondent**
DAVID R. MITCHELL **Second Respondent**
JILL MITCHELL **Third Respondent**

JUDGMENT
Delivered on 24 November 2011

McLAREN J

[1] In this opposed application the Applicant claimed the following relief:

"...an order against the First, Second and Third Respondents on the following terms:

1. The Respondents are ordered to forthwith cause the salaries of the staff members of the First Respondent, namely the Applicant, and those persons stipulated in paragraph 19 of the founding affidavit for the month of October 2011 to be paid forthwith;
2. The Second Respondent is ordered to pay the costs of this application on a scale as between attorney, and own client;

3. Alternative relief."

[2] Mr Oberholzer appeared for the Applicant, while Mr Boulle represented the Respondents.

[3] The Applicant's Notice of Motion is dated 2 November 2011 and the application was instituted on that day.

[4] On 3 November 2011 an order was made by consent in terms of which the matter was adjourned to 17 November 2011 and dates were stipulated for the delivery of answering and replying affidavits.

[5] On 17 November 2011 the application was adjourned to 22 November 2011 and costs were reserved. On 22 November 2011 no argument was addressed to me on the issue of those reserved costs. The application was clearly not ready to be heard as an opposed matter on 17 November 2011 - for one thing, Mr Oberholzer's heads of argument were only delivered on 18 November 201. It is unlikely that any one of the legal representatives would have submitted that the reserved costs should be treated otherwise than as costs in the cause. I intend making an order to that effect, but it will only be of a provisional nature. In my view this is an expeditious and cost effective way of dealing with the issue which escaped everybody's attention. Any party who is dissatisfied with that order can set the matter for hearing before me on 7(seven) days' notice to the other side. At such a hearing, I will rescind that order and consider those reserved costs afresh. I discussed the efficacy of this proposed order with a colleague, who shared my view that it is competent for me to come to the assistance of the parties in this manner.

I, therefore, make a provisional order that the reserved costs of the adjournment on 17 November 2011 are costs in the cause.

[6] In his argument before me, Mr Oberholzer made it clear that, in paragraph 1 of the Notice of Motion, the Applicant did not claim the payment of money, but an interdict, namely, an order directing the Respondents to perform an act, in other words, to do something. Following on this, Mr Oberholzer submitted that the Applicant sought a punitive cost order against the Second Respondent only and that it was not necessary for the Applicant to have joined the other employees of the First Respondent who will benefit from the interdict, in the sense that their October 2011 salaries will be paid. As will become apparent hereinafter, it is not necessary for me to consider whether the said other employees should have been joined as parties in the application.

[7] At the hearing of the application it was common cause that the First Respondent had paid the October 2011 salaries of the Applicant and the said other employees on or about 18 November 2011. Mr Oberholzer, therefore, did not ask for an order in terms of paragraph 1 of the Notice of Motion, but he persisted with a claim in accordance with paragraph 2 thereof.

[8] In my view the issue of the costs of the application can only be decided by first determining whether the Applicant was entitled to the relief claimed against all three Respondents in paragraph 1 of the Notice of Motion. The legal representations did not disagree with this view and accordingly the so-called "merits" of the application were argued before me.

[9] It was common cause that the Applicant was, at all relevant times, an employee and a director and a shareholder of the First Respondent and that her monthly salary for October 2011 had not been paid by 2 November 2011.

[10] In the answering affidavit the Respondents raised certain points **in limine**, the first of which is that the application had been prematurely launched. In this regard, the deponent to the said affidavit relied on the provisions of section 32 (3)(a) of the Basic Conditions of Employment Act, 75 if 1997 ("the Act"), which provides thus:

> "An employer must pay remuneration not later than seven days after the completion of the period for which the remuneration is payable."

[11] At the hearing before me it was common cause that the provisions of the Act applied to the employment of the Applicant and the said other employees and that "the period for which the remuneration is payable" to them was October 2011 and that the said period ended on 31 October 2011.

[12] In her replying affidavit the Applicant erroneously stated that the first preliminary point was that the application "was launched before 9 November 2011". The reference to the date should obviously have been to 7 November 2011. In his argument before me, Mr Oberholzer sought to overcome the obstacle which the first preliminary point created, by referring to and relying on the following statement by the Applicant in her replying affidavit:

> "I am advised that 9 November 2011, has come, and gone, and on the level the money is due, owing, and payable. In any event, and with submission, I would have been entitled to the relief on 2 November 2011, subject to the proviso that

the date of payment simply be adjusted to 9 November 2011, at best for the Respondents."

[13] However, the matter cannot simply be brushed aside, in the manner set out in paragraph 12. I draw attention to the following:

13.1 The "date of payment' in paragraph 1 of the Notice of Motion is "forthwith".

13.2 The application was already before this Court on 3 November 2011.

13.3 In the full bench decision of this Court in **NG Kerk van Natal (Voortrekker Gemeente) v Administrator, Natal and Another,** 1954 (4) SA 763 (N) Broome JP said this at 769 G-H:

"It is elementary that a plaintiff's cause of action must be complete when he institutes his action."

13.4 Inasmuch as an application, commenced with the issue of a notice of motion, compromises the pleadings and the evidence, the words of Broome JP, in my view, apply equally to this application.

[14] In my judgment, the Applicant did not prove that on 2 November 2011, she was entitled to receive her October 2011 salary "forthwith" and, therefore, she did not have any enforceable cause of action against any Respondent on that date, when the application was issued.

[15] It follows that the first point **in limine** is good and, for that reason alone, the application should be dismissed, with costs

[16] In case I am wrong in my conclusion referred to in paragraph 15, I turn to a consideration of the merits of the application, principally with a view to establish whether the Applicant proved a clear right to the relief claimed in paragraph 1 of the Notice of Motion.

[17] At the outset, I point out that it is not easy to determine, from the application papers what the nature of the Applicant's cause of action is. In amplification of this observation, I draw attention to the following:

17.1 In her founding affidavit, the Applicant incorporated, by reference thereto, the entire set of application papers (comprising 171 pages) in the so-called "first application" between the same parties and under the same case number.

17.2 In the first application an order was granted by Mbatha J on 23 September 2011 in favour of the Applicant, which contains exhaustive provisions, the clear purpose of which is to enable the Applicant "and her expert" to investigate the affairs of the First Respondent.

17.3 Paragraph 1.3 of the order referred to on paragraph 17.2 reads as follows:

"The Respondents are ordered to not (**sic**) without the written consent of the Application (**sic**) to:

1.3.1 Retrench any staff members, including the Applicant, pending finalization of this application, and to duly pay their current salaries;

1.3.2 Close the Durban office, but to keep it fully operational, functional, and funded in its present form;

1.3.3 Permit the withdrawal, or expending of any funds from the First Respondent without the prior written consent of the Applicant."

17.4 The order referred to in paragraph 17.2 was made the day after the first application had been served on the Respondents, whose "request for a postponement to enable them to deliver an answering affidavit" was refused by Mbatha J.

17.5 On 30 September 2011 the Respondents delivered a Notice of Application for leave to appeal, in terms of Uniform Rule of the Court 49 (1)(b). This application for leave to appeal relates, **inter alia**, to that part of the order quoted in paragraph 17.3 and it is pending.

17.6 In her founding affidavit the Applicant refers to an attached transcript of the proceedings before Mbatha J. I fail to understand why this was done.

17.7 In her founding affidavit the Applicant refers to an averment by the Second Respondent "who controls the (First Respondent's) bank account exclusively" that "we are not in a position to pay salaries today as we do not have sufficient funds to pay both salaries and the VAT which is due"; the Applicant avers that the "Second Respondent is intentionally and unlawfully withholding" the said salaries; that the "reason for his illegal action is because he says that there are not sufficient funds to pay the salaries"; that "this allegation is not true and (that she) can demonstrate the untruthfulness of this statement".

17.8 The Applicant then sets out that the First Respondent has an overdraft facility which could be used to pay the said salaries and that the Second Respondent drew substantial amounts for himself from the First Respondent's banking account during October 2011.

17.9 The Applicant concludes her founding affidavit by averring that the said salaries are "simply being withheld unlawfully to try and gain an advantage in the pending litigation", i.e. the first application.

17.10 The Applicant, in my view, only made averments that the Second Respondent's conduct is unlawful and she did not "provide the facts that support those allegations" – **A.M. Moola Group Ltd and Others v The Gap Inc. and Others**, 2005 (6) SA 568 (SCA) 585 C.

[18] In my judgment, the Second Respondent dealt fully and satisfactory in his answering affidavit with all the Applicant's unsubstantiated averments of unlawful conduct on his part. In a nutshell, this is his version:

18.1 The overdraft facility had to be used to pay Value Added Tax which was due by the First Respondent to the South African Revenue Service.

18.2 The Second Respondent was contractually entitled to withdraw amounts from the banking account of the First Respondent by way of repayments towards the Second Respondent's loan account in the First Respondent.

[19] In her replying affidavit the Applicant avers that "the defence on the merits, namely that (the First Respondent) cannot afford the salaries and the wages is untruthful and by viture of the remarkable allegations contained in paragraphs 24, 26 and 28 of the Second Respondent's answering affidavit this has been proven...". I point out the following in this regard:

19.1 The Applicant claims final relief in the application.

19.2 Paragraph 24 of the Second Respondents answering affidavit reads thus:

"The transactions Applicant refers to are legitimate withdrawals which I have made, to service my personal loans to the First Respondent, which I have always been doing, since its inception in 2002, in order to assist the First Respondent with its financial obligations."

19.3 The Applicant's replying affidavit does not refer to the said paragraph 24 at all.

19.4 In paragraph 26 of the Second Respondent's answering affidavit he refers to and quotes from the shareholders' agreement which is attached to the said affidavit. The Applicant's denial of the Second Respondent's averments does not appear **bona fide** and her further averments in this regard are unintelligible.

19.5 The Applicant did not deny the averments in paragraph 28 of the Second Respondent's answering affidavit, but made this statement:

"The startling admissions confirmed in this paragraph illustrates (**sic**) and proves (**sic**) my and the company's urgent need for relief."

19.6 The Applicant's reference to "the company", as quoted in paragraph 19.5, is a reference to the First Respondent.

19.7 As I said in paragraph 17, it is not easy to find out what the Applicant's cause of action against the Respondents is and in her replying affidavit she, inexplicably, avers that the First Respondent has an "urgent need for relief".

19.8 In paragraph 6, above, I pointed out that the Applicant's claim is for a final interdict. In my view the evidence does not remotely establish all three the requisites for the granting of such relief, namely, a clear or definite right; an injury actually committed or reasonably apprehended and the absence of another adequate remedy – **The Law of South Africa** (second edition) volume 11 paragraphs 397-399.

[20] I do not intend summarising Mr Oberholzer's heads of argument, save to say that the Applicant's cause of action, as advanced therein, is founded on the provisions of one or more of the following sections of the Companies Act, 71 of 2008: 75, 76, 77, 158, 161 and 163.

[21] In my view the Applicant's reliance on the provisions referred to in paragraph 20 is misplaced because the said provisions are not applicable or, if they are, the evidence does not prove that the Second Respondent or the Third Respondent breached any one of the said provisions.

[22] In any event, and even if I am wrong in my assessments referred to in paragraph 21, the cause of action set out in paragraph 20 was not made out in the Applicant's founding affidavit (as it should have been done) but in her replying affidavit. The Applicant set the pace at which the application proceeded and Mr Oberholzer obtained from the senior duty Judge the preference, in terms of which the application was adjourned from 17 November 2011 to 22 November 2011. The Applicant's replying affidavit is dated 17 November 2011 and the Respondents did not respond to the "new cases" which the Applicant attempted to make out therein.

[23] I say "new cases" because the Applicant also introduced the following claims in her replying affidavit:

23.1 "In accordance with rule 49(11), the appeal against the court is herewith declared to be of full force, and effect, notwithstanding the pending application for leave to appeal."

23.2 "I also ask for further additional relief. Clearly, and on his own version, the Second Respondent has overpaid himself from the company to the tune of R473 572-00 (four hundred and seventy three thousand five hundred and seventy two rand). The company clearly needs this money to continue operating. I therefore also ask for an order in the following terms:-

> 'The Second Respondent is ordered to pay into the bank account of the First Respondent the sum of R473 572-00 (four hundred and seventy three thousand five hundred and seventy two rand) within seven (7) days of date of this order, such monies to be used as working capital by the First Respondent'."

[24] At the hearing of the application, Mr Oberholzer conceded that the relief set out in paragraph 23 was first raised in the Applicant's replying affidavit. Mr Oberholzer did not address me on this relief and said that he "left the matter in the hands of the Court". Mr Boulle submitted that the Applicant's claims for the relief set out in paragraph 23 should be dismissed.

[25] In her replying affidavit the Applicant stated, clearly with reference to paragraph 3 of the Notice of Motion, that she seeks "further relief under the heading 'alternative relief'". There is a vast difference between the relief claimed in paragraphs 1 and 2 of the Notice of Motion and the claims set out in paragraph 23, above. In my view, the Applicant is not entitled to advance those claims - compare **Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd**, 2003 (1) SA 265 (C) 268 B-G.

[26] Mr Oberholzer submitted, in the alternative, that if the Applicant is not entitled to an order for costs against the Second Respondent, I should grant such an order against the First Respondent. In my view, this submission cannot be sustained. I say so for the following reasons:

26.1 In paragraph 15, above, I concluded that the first point **in limine** is good and it follows that the Applicant's claim against the First Respondent must be dismissed, with costs.

26.2 Even if the conclusion referred to in paragraph 26.1 is wrong, I am satisfied that the Applicant did not prove that she has any clear right against the First Respondent, which will support the grant of any order against the First Respondent. Put differently, the Applicant did not prove any claim against the First Respondent. See also, paragraph 19.8, above. It, therefore, follows that there is no basis on which I can order the First Respondent to pay the Applicant's costs.

[27] For the above reasons, I make the following order:

The application is dismissed, with costs.

McLaren J

24 November 2011

Date of Hearing : 22 November 2011

Date delivered : 24 November 2011

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