SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20044/2014

Reportable

In the matter between:

NATIONAL HEALTH LABORATORY SERVICE **Appellant**

and

MARIANA MAGDALENA LLOYD-JANSEN VAN VUUREN **Respondent**

Neutral citation: *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* (20044/2014) [2015] ZASCA 20 (19 March 2015).

Coram: Mhlantla, Shongwe and Wallis JJA and Dambuza and Mayat AJJA

Heard: **25 February 2015**

Delivered: **19 March 2015**

Summary: Contract – interpretation and application of employment agreements – the obligations under the two agreements are interdependent.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (LJ van der Merwe AJ sitting as court of first instance):

1 The appeal is upheld with costs.
2 The order of the high court is set aside and replaced with:
'(a) It is declared that the obligation recorded in clause 3.4 of the contract concluded on 4 January 2006 continued to exist notwithstanding the conclusion of the subsequent employment agreement dated 16 April 2010 between the plaintiff and the defendant.
(b) It is declared that the defendant is liable to the plaintiff pursuant to the provisions of clause 3.4 of the initial contract.
(c) The defendant is ordered to pay the costs of suit as between party and party.'

JUDGMENT

Mhlantla JA (Shongwe and Wallis JJA and Dambuza and Mayat AJJA concurring):

Introduction

[1] The present dispute arose from two separate agreements concluded between the National Health Laboratory Service (the appellant) and Dr Mariana Magdalena Lloyd-Jansen van Vuuren (the respondent). The respondent, a medical practitioner, wanted to become a specialist pathologist. In order to qualify as such one has to work as a specialist

trainee[1] and hold a training post within the Department of Health or at a health laboratory in South Africa. In January 2006 the appellant employed the respondent as a junior registrar. The parties concluded an agreement setting out the terms of the respondent's training and employment (the initial contract).

[2] The provisions relating to training are found in clause 3 of the initial contract. The respondent was required to complete her studies for the M.Med degree within a period of five years, be attached to the University of the Free State and be subject to some supervision and assessment. The parties quantified the value of the training to be provided by the appellant and agreed that if the respondent did not work for the appellant for a period of two years after completion of her training and qualification as a specialist, she would re-imburse the appellant for the training costs incurred. This meant that she would either work for the appellant for a period of two years or pay an amount of R2 million should she resign earlier than the stipulated period.

[3] On 1 February 2006 the respondent commenced her duties as a junior registrar. In 2008, she was promoted to the position of a senior registrar. She completed her studies and training before the expiry of the five year period stipulated in the contract.

[4] In April 2010 the appellant employed the respondent as a specialist pathologist. A contract to that effect was concluded (the second agreement). No reference was made in this contract to the respondent's

[1] A specialist trainee in any one of the branches of medicine including pathology has to be registered at a university for a master of medicine degree (M.Med). Only graduates in medicine (MBChB) who have completed the prescribed intern period and who are registered with the Health Professions Council of South Africa are allowed to register for the M.Med programme. A specialist trainee is referred to as a registrar.

obligation to work for the appellant for two years or pay the amount of R2 million if she left its employ before the expiry of the stipulated period.

[5] Four months later, in July 2010, the respondent resigned. The appellant demanded payment of the amount of R2 million from the respondent. She refused to pay contending that the second agreement was silent on her obligation to pay or work for the appellant for two years and that its conclusion had terminated the initial contract and with it the obligation to repay this amount.

[6] As a result, the appellant instituted action in the South Gauteng High Court, Johannesburg for payment of the amount of R2 million together with interest and costs. The matter came before LJ van der Merwe AJ. At the commencement of the trial the parties requested the court a quo to separate the issues relating to liability from those relating to quantum. The judge accordingly issued an order separating the merits from the quantum. The parties presented him with a stated case on the merits. Consequently, no evidence was led at the trial. The court a quo had to determine whether the conclusion of the second agreement between the appellant and the respondent on 16 April 2010 terminated the appellant's rights contained in clause 3.4 of the initial contract.

[7] The court a quo was left unpersuaded by the appellant's submission that the obligation recorded in clause 3.4 of the initial contract survived the termination of the initial contract and continued to exist after the conclusion of the second employment agreement between the parties. The court rejected all of the appellant's contentions and held that the appellant had the opportunity to incorporate the provisions of clause 3.4 of the initial contract into the second agreement. The court further held that the

second agreement not only replaced the initial agreement, but also expressly recorded that the second agreement constituted the whole agreement between the parties. The court concluded that the parties had agreed, by virtue of the provisions of the second agreement, that the provisions of clause 3.4 of the initial contract no longer applied. Therefore, the court a quo dismissed the appellant's claim. It refused leave to appeal and this appeal is with the leave of this court.

[8] The issues on appeal concern the interpretation and application of the two agreements and whether the second agreement replaced the initial contract.

Contracts

[9] It is apposite at this stage to set out in detail the relevant terms of these contracts. In this regard, I will commence with the initial contract (the 2006 agreement), which also covered the training of the respondent. It was concluded on 4 January 2006. The respondent was employed as a junior registrar with effect from 1 February 2006. The relevant details relating to training are set out in clause 3. The respondent was subject to an annual performance review. Her progression to the next year was subject to evidence of satisfactory progress. She was obliged to register with the University of the Free State for the M.Med degree and write the requisite examinations before the expiry of the five year period. She was also obliged to register with the Health Professions Council of South Africa (HPCSA).

[10] The contentious clause is clause 3.4 which reads:

'On completion of the requirements for registration as a specialist with the HPCSA the employee shall continue to work for the NHLS as a specialist pathologist for a

period of two years following specialist registration. For the purposes of this agreement, registrar training is deemed to be worth R2 million, irrespective of the time spent in training, the sum of which shall be worked off over a full two-year period (24 months). Should the employee complete the first full twelve months of this period, the employee's indebtedness to the NHLS shall be reduced to 75% of the full amount owing. Should the employee not complete the two-year post-specialist registration working requirement, the employee shall pay back to the NHLS the amount owing in a single lump sum prior to resignation. The employer may at its discretion cancel the indebtedness of the employee at any time.'

[11] The remainder of the clauses related to the terms and conditions of employment, that is, the duties of the employee, remuneration, probation period, restraint of trade and termination of employment. The termination clause made provision for the unilateral termination of the agreement by either party on one calendar month's written notice to the other party.

[12] In so far as the second agreement was concerned, this was concluded in April 2010, when the respondent was appointed as a specialist pathologist. She was required to provide proof, by 30 April 2010, that she had applied for registration with the HPCSA as a specialist pathologist. No reference was made to the obligation recorded in clause 3.4 of the initial contract. The second agreement was broadly similar to the initial contract, but excluded clause 3 which related to the training of the respondent. The termination clause also made provision for the unilateral termination of the agreement by either party on one calendar month's written notice to the other party.

Interpretation

[13] Our law relating to the interpretation of documents has evolved since the earlier approach enunciated in *Coopers & Lybrand & others* v

Bryant[2] where it was held:

'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ *supra;*

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted…;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.' (Citations omitted.)

[14] This court in *Bothma-Batho Transport (Edms) Bpk* v *S Bothma & Seun Transport (Edms) Bpk*,[3] reformulated the principles governing the approach to interpretation as follows:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly it is no longer helpful to refer to the earlier approach.'

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[2] *Coopers & Lybrand & others* v *Bryant* 1995 (3) SA 761 (A) at 768A-E.

[3] *Bothma-Batho Transport (Edms) Bpk* v *S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

Novation

[15] To the extent that the judgment of the court a quo was premised upon novation, it is necessary for me to consider this aspect. There is a presumption against novation because it involves a waiver of existing rights. When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In *Acacia Mines Ltd* v *Boshoff,*[4] the court held that novation is essentially a question of intention.

[16] In *Proflour (Pty) Ltd & another* v *Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another*[5] the court, when determining whether the agreement resulted in a novation, referred to the decision of *Electric Process Engraving and Stereo Co* v *Irwin* 1940 AD 220 at 226-227 where the court said:

'The law on the subject was clearly enunciated as far back as 1880 in the well-known case of *Ewers* v *The Resident Magistrate of Oudtshoorn and Another*, (Foord) 32, where DE VILLIERS, C.J, said: "The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case."'

It follows that in order to establish whether novation has occurred, the court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention.

[17] It was submitted before us, on behalf of the respondent, that both contracts could not exist simultaneously. It was contended that clause 3.4 of the initial contract should have been incorporated into the second

[4] *Acacia Mines Ltd* v *Boshoff* 1958 (4) SA 330 (A) at 337D.
[5] *Proflour (Pty) Ltd & another* v *Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another* [2010] 2 All SA 510 (KZD) para 10.

agreement. In the circumstances of this case, novation had occurred and the second agreement had replaced the initial contract in toto, so the argument went.

[18] I do not agree with this submission. The interpretation contended for by the respondent is contrary to the background circumstances of the matter and the intention of the parties. In this regard, I respectfully disagree with the reasoning of the court a quo. In applying the above mentioned legal principles to the facts of this matter, it is evident that the two contracts served different purposes. The initial contract was primarily concerned with the training of the respondent. The parties agreed on the value of the training so as to avoid any dispute should the respondent resign after qualifying as a specialist. The first sentence in clause 3.4 conferred some rights and obliged both parties to perform. On the one hand, the appellant undertook to employ the respondent upon qualifying as a pathologist whilst she undertook to work for the appellant for two years or to re-imburse the appellant if she did not do so. Clause 3.4 also provided that irrespective of the time spent in training, which included completion of the training in a shorter time period, the respondent undertook to work for a further two years, failing that, to pay the amount of R2 million to the appellant.

[19] Clauses 1.1 and 3.4 of the initial contract determined and regulated any future employment relationship between the parties. The respondent was obliged to recompense the appellant in respect of the moneys expended towards her training, either by rendering her services to the appellant for a specified period or by repaying the full amount spent on her training. This is what the parties agreed to do and they concluded an agreement to that effect. These undertakings are therefore binding on the

parties.

[20] It is common cause that the respondent received training with the financial assistance of the appellant. The appellant complied with its obligation by employing the respondent in April 2010. This is the contract in terms of which both parties would perform in order to comply with their obligations set out in clause 3.4. This agreement was purely an employment contract of the respondent as a specialist pathologist. The conclusion of the second agreement constituted the implementation of the two-year employment obligation following registration of the respondent as a specialist as undertaken in clause 3.4 of the initial contract. The second agreement was accordingly a continuation of the initial contract, in that the respondent was now employed as a specialist pathologist, something envisaged in clause 3.4. This contract did not vary or cancel the obligations imposed by the initial contract. In the result novation did not occur. The indebtedness of the respondent in terms of the initial contract could never be extinguished by the conclusion of the second agreement.

[21] Lastly, it was submitted on behalf of the respondent that the termination clause in the second agreement was in conflict with clause 3.4 of the initial contract. Any reliance on this clause is misplaced. It has to be borne in mind that the notice period was a standard term. The argument loses sight of the fact that both agreements contained the termination clauses and these were identical. There is nothing peculiar in having such a term. The only logical conclusion is that the respondent could terminate the agreement subject to the provisions of clause 3.4.

[22] It follows that clause 3.4 of the initial contract is still in operation and that the indebtedness of the respondent towards the appellant remains notwithstanding the conclusion of the second agreement. This clause could only be cancelled by the appellant and this was not done. The appeal must therefore succeed.

[23] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with:

'(a) It is declared that the obligation recorded in clause 3.4 of the contract concluded on 4 January 2006 continued to exist notwithstanding the conclusion of the subsequent employment agreement dated 16 April 2010 between the plaintiff and the defendant.

(b) It is declared that the defendant is liable to the plaintiff pursuant to the provisions of clause 3.4 of the initial contract.

(c) The defendant is ordered to pay the costs of suit as between party and party.'

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JUDGE OF APPEAL

APPEARANCES:

For Appellant:	R Ram Instructed by: Shepstone & Wylie Attorneys, Sandton Matsepes Inc, Bloemfontein
For Respondent:	S Snyman Instructed by: Snyman Attorneys, Houghton Honey Attorneys, Bloemfontein