REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A240/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

12-08-2022 **PD. PHAHLANE**
DATE SIGNATURE

In the matter between:

MASTER BUSINESS ASSOCIATES SERVICES (PTY) LTD **APPELLANT**

and

MELISSA ERASMUS **RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] This is an appeal against the whole judgment and order handed down by the Learned Magistrate, Mrs ET Mosese, in the Magistrate's Court for the District of Ekurhuleni, South East Benoni on 27 July 2021. The respondent noted a cross-appeal (conditional upon the appellant's appeal succeeding) against failure by the Learned Magistrate to find that clause 27.1 of the Employment Agreement between the appellant and respondent contravenes section 37(3) of the Basic Conditions of Employment Act ("BCEA")[1].

[2] The appellant's grounds of appeal are as follows:

"1. The Honourable Magistrate erred, in omitting to find that it was common cause on the pleadings between the parties that the Honourable Court had jurisdiction.

2. The Honourable Magistrate erred in ruling that clause 27 of the contract entered into between the plaintiff and defendant is to be interpreted ex facie the document, without the need for viva voce evidence.

3. The Honourable Magistrate erred in fact and in law in considering the termination clause in isolation, without viva voce evidence.

4. The Honourable Magistrate erred in not giving consideration to other relevant clauses in the contract, alternatively placing emphasis on specific clauses without a consideration of the contract as a whole.

5. The Honourable Magistrate failed in applying the principles of contractual interpretation to the contract and in particular the clauses in dispute.

6. The Honourable Magistrate erred in not finding that the dispute between the parties is a contractual dispute for damages and accordingly, the Honourable Court clothed with the requisite jurisdiction. [sic]

[1] Act 75 of 1997.

7. *The Honourable Magistrate erred in limiting itself to the question that it was only required to decide the interpretation of clause 27 of the employment agreement.*

8. *The Honourable Magistrate erred in its application of section 77(3) of the Basic Conditions of Employment Act.*

9. *The Honourable Magistrate erred in referring the matter to the Labour Court when it is clothed with the concurrent jurisdiction*

10. *The Honourable Magistrate erred in awarding the defendant costs".*

[3] The factual background can briefly be summarised as follows:

3.1 The appellant, who was the plaintiff in the court *a quo*, instituted a claim for damages against the respondent, a former employee of the appellant, based on the Employment Agreement concluded on 28 April 2017 in which clause 27.1 thereof relating to termination of employment, grants both the employer (the company) and the employee the discretion to terminate employment by giving the other party a 3 (three) month's calendar notice of such termination. Clause 27.1 provides that:

"The employee or the company may effect termination of employment by giving the other party at least 3 (three) calendar months' notice. The company, in its sole discretion may allow earlier termination where an employee requests it or, in the instance where the company terminates employment, in its sole discretion, deems it necessary to effect termination with such shorter notice period as it deems fit, provided that it is not less than 1 (one) calendar months' notice".

3.2 The respondent gave notice of her intention to resign from the appellant's employ, requesting that her notice period be reduced to one calendar month. Her notice was given in terms of the BCEA.

[4] It is common cause that the court *a quo* did not determine the merits of appellant's claim and referred the matter to the Labour Court, holding that in terms of section 77(3) of the BCEA, the Labour Court has the requisite jurisdiction to entertain the appellant's claim for damages that are linked to the employment contract.

[5] The parties were *ad idem* that the issue of jurisdiction that was decided *mero motu* by the court *a quo* was erroneously decided because the matter should have been dealt with by the court *a quo* without referring it to the Labour Court.

[6] The issues for determination by this court are (1) whether the appeal court can entertain an appeal where no evidence was led before the court *a quo*, and (2) whether the court *a quo's* decision to refer the matter to the Labour Court was justified.

[7] It is the appellant's contention that it would suffer material prejudice if the matter were to proceed in the Labour Court where procedures to be followed and the applicable labour legislation would immediately find application with the resultant effect that the order granted in error cannot be corrected. Put differently, matters proceeding in the Labour Court fall within the ambit of the labour proceedings as opposed to contractual dispute – the effect of which would mean the order or judgment of the Labour Court granted in error, cannot be corrected by an appeal or review.

[8] Mr Venter for the appellant argued that the matter ought to be remitted back to the court *a quo* for evidence to be led by the appellant and respondent, and for the court's determination of contractual issues between the parties. He submitted that since no evidence was led in the court *a quo*, there is nothing before the appeal court, which would qualify it to adjudicate on the issues that are non-existent. He further submitted that the cross appeal by the respondent is bad in law and should be dismissed as it does not take into consideration the question of severability and interpretation of the contract between the parties.

[9] Mr van der Westhuizen on the other hand submitted that the court *a quo* was correct in deciding not to entertain the merits of appellant's claim and that it was not necessary to hear *viva voce* evidence. He further submitted that the dispute between the parties is a legal issue that relates to the interpretation of clause 27.1 of the employment agreement, which can be determined by the appeal court without referring the matter back to the court *a quo*.

[10] It is clear from the judgment of the court *a quo* that the interpretation of clause 27.1 of the employment agreement had to be decided upon[2] and yet, such was not done as the court was of the view that the appellant's claim for damages had to be decided upon by the Labour Court in terms of section 77(3) of the BCEA.

[11] With regards to the respondent's submission that the appeal court is not precluded from deciding matters where no evidence was led in the court *a quo*, I am of the view that this court's jurisdiction to determine that issue has not been triggered because the substantive issues in dispute have not been decided

[2] Para 8 of the Judgment.

by the court *a quo*, and consequently, no leave to appeal has been granted in respect of those issues, and in particular on the issue itself. This court has, thus, been deprived of the benefit of the court *a quo's* view on any of those issues. Were this court to do so, it would impermissibly usurp the function of the court *a quo* to ordinarily sit and pronounce as a court of first instance. In the result, this court would in effect be sitting both as a court of first instance and a court of appeal insofar as those issues are concerned.

[12] In relation to the issue of the referral of the matter to the Labour Court, I am inclined to agree with both parties' submissions that the court *a quo* was clothed with the necessary jurisdiction to adjudicate the matter. It was, therefore, not necessary for the court *a quo* to have referred the matter to the Labour Court.

[13] As regards costs, Mr Venter for the appellant pressed for costs against the respondents on the basis that this matter could have been disposed of in a day at the court *a quo*, but the matter was incorrectly referred to the Labour Court, necessitating the launching of this appeal on the premise that the Labour Court is not the correct forum to determine contractual disputes, and as such, the costs should follow the success of the appeal.

[14] As both parties are *ad idem* that the matter was erroneously referred to the Labour Court by the court *a quo*, I am of the view that the respondent ought not to be mulcted with costs as the error was that of the court *a quo*.

[15] In the circumstances, I would recommend that the following order be made:

1. The appeal is upheld.
2. The order granted by the court *a quo* on 27 July 2021 is set aside.
3. The matter is remitted to the court *a quo* to commence *de novo*.
4. Each party is ordered to pay own costs.

P. D. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

E. M. KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

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Date of hearing	: 25 May 2022
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