IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 84/2014

In the matter between:

PETER HUDSON **First Appellant**

DIRK ROBERT BULDER **Second Appellant**

and

SOUTH AFRICAN AIRWAYS SOC LIMITED **Respondent**

Heard: **27 May 2015**

Delivered: **24 June 2015**

Summary: Authority to contract - Acting CEO having no authority to conclude fixed terms contract with employees without approval of the Board – appointment not in accordance with rules and procedures - *Turquand* rule of no assistance to alleged appointees. Plascon-Evans rule – principles that in motion proceedings contested issues referred for oral evidence for determination restated - conflicting versions raised in parties' papers – issues could not be determined on papers - employees failing to request for oral evidence - failure detrimental to

their application – Labour Court's judgment upheld albeit for different reasons – appeal dismissed with costs.

Coram: Davis, Ndlovu JJA *et* Mngqibisa-Thusi AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against the judgment of Walele AJ which was delivered on 24 April 2014. At first blush, it requires this Court to decide important legal points, namely whether respondent proved that the appointments of the appellants were *ultra vires* as they were in breach of an applicable moratorium placed on appointments within respondent's organisation, whether the appointments contravened the relevant legislative framework, whether appellants were entitled to assume that the Acting Chief Executive Officer of respondent, Mr Vuyisile Kona, possessed the necessary authority to make these appointments and further whether the respondent is estopped from denying that he had no such authority. However, as I shall explain presently, this appeal turns exclusively on the proper approach to the determination of a dispute within the context of application proceedings.

[2] Briefly, the facts are as follows. On 19 November 2012, first appellant entered into a fixed term employment contract with respondent for a period of three years. On 13 November 2012, second appellant entered into a fixed term of employment contract with the respondent for a period of one year. Both fixed term contracts were signed by Mr Kona on behalf of the respondent. In terms of the contract of first respondent, the latter was appointed as the Marketing

Manager of Air Chefs and received an annual remuneration of R 1.1m together with certain benefits. Second appellant was appointed as a level 2 Manager with the title Financial Manager with specific responsibility to assist South African Airways Technical Services (Pty) Limited, Air Chefs and the South African Travel Centre. He received an annual remuneration of R 1.5 m together with benefits.

[3] On 17 January 2013, both appellants were summoned to meetings. They were informed by the Human Resources General Manager of respondent, Ms Mathulwane Mpshe, that the board of respondent had resolved to annul their contracts because:

> 'Your appointment and the conclusion of the above mentioned contracts were in violation of due process with a standing moratorium on appointments and against good governance practices'.

In short, respondent contends that the contracts were *ultra vires* and were concluded in violation of due process and a moratorium placed on appointments. The justification is set out comprehensively in the answering affidavit:

> 'During October 2012 it came to the attention of the Board that certain persons, including the Applicant , had been appointed to render services to the Respondent, but that the appointments were made contrary to the policies and procedures of the respondent.
>
> The Board conducted investigations into the matter. Due to the public nature of the Respondent its activities and actions are in the public eye and subject to constant public reporting and scrutiny.
>
> The investigations revealed that during or about November 2012 Kona, in his capacity as acting CEO, concluded what was termed "a fixed term service contract" with the Applicant as Financial Manager (SAAT, Air Chefs and SATC) for a period of twelve months commencing 13 November 2012 and terminating 12 November 2013 at a remuneration of R 1 500 000.00 per annum.

The investigations also revealed that Kona had concluded other agreements including an agreement with Mr Peter Hudson (Hudson), who like the applicant in this matter has issued proceedings similar to those of the applicant (case number J545/13). Kona appointed two other persons irregularly.

Subsequent to the conclusion of the above service contracts the Board took a resolution reading, in part, as follows:

> *"Appointment of four consultants.*
>
> *The Board proceeded to report that it had been informed by the Shareholder that consultants who were occupying high positions in SAA had been appointed. They were allegedly appointed to positions at executive level.*
>
> *According to the repost from the Shareholder, no advertisements were issued and no proper process was followed in appointing those consultants.*
>
> *The shareholder wanted to know what those consultants were doing, what process was followed in appointing them, what informed the appointment and whether the Board was aware of the appointment.*
>
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>
> *The Acting Chairperson further reported that she was advised to instruct the acting CEO to cease appointing employees until a permanent CEO was appointed. The Shareholder wanted to know the risk associated with these appointments.*
>
> *Having considered the concerns, the Board deliberated on the matter and decided that:*
>
> - *the contracts with the four consultants be reviewed to ascertain their validity;*
> - *it be established whether or not due process was followed;*

- *if due process was not followed, the contracts be terminated;*

- *if the contracts are found to be valid, the Board considers how SAA could have them terminated.""*

[4] In her judgment, Walele AJ found that the appellants ought to have known that the recruitment process fell within a particular legislative framework, that these legislative requirements were peremptory and that appellants were parties to appointments that they ought to have been aware were unlawful, impermissible and *void ab initio* because they were concluded in violation of due process and the standing moratorium on appointments within the respondent's business.

Appellant's case

[5] The case made out by both appellants as set out in their respective founding affidavits can be summarised as follows: the contention that the contracts were concluded on the basis that the underlying decisions were *ultra vires* were "baffling" and were based on "nebulous allegations". An opinion of Ms Fikile Thabethe, respondent's Head of Legal Services, was invoked to show that the fixed term contracts could not be nullified and that there were no breaches of the Public Finance Management Act 1 of 1999. Further, appellants contended that Ms Thabethe's opinion was changed to support respondent's case. Thus, according to first appellant:

> 'Given what is set out in the correspondence addressed by Thabethe, the respondent's Head of Legal, it is evident that in addition to the respondent's conduct being unlawful, it was malicious and amounted to a gross violation of corporate governance and indeed the PFMA on which the respondent had purported to base its decision to terminate my contract. The decision to terminate my contract was premeditated and intended to have been implemented irrespective of the advice furnished by the respondent's own Head of Legal; hence the need to unlawfully alter the opinion of the Head of the Legal Department.'

Respondent's answer

[6] On the basis of Ms Thabethe's answering affidavit, respondent contends that the rules and procedures which applied to the appointment of employees were contained in its Human Resources Policy. The policy stipulates that before vacant positions could be filled, they must first be advertised internally and externally which was not done in this case. Accordingly, the appointments were made without adherence to any standard recruitment procedures. Significantly, in the form headed "request for non-permanent staff" which form was signed by Mr Kona and Ms Mpshe, it was made clear that the positions had not been budgeted for and there was no budget available. Ms Thabethe avers further:

> 'I wish to highlight the fact that due to the unhealthy financial state of the respondent the management had put in place a moratorium on recruitment and appointment of new employees unless it was strictly necessary for the critical business operations. The Acting CEO was aware of the moratorium and was specifically advised thereof by Mpshe.'

Serious allegations are then made regarding Mr Kona:

> 'The Acting CEO summoned Mpshe to his office in on about November 2012 and instructed her to process the ostensible employment of the applicant and Bulder. Mpshe refused to appoint the applicant because he had been dismissed by the respondent and was involved in a Labour Court dispute with the respondent challenging his dismissal (which dispute is currently pending before the Honourable Court). In order not to burden the papers unnecessarily, I do not deem it necessary to annex a copy of the court process, however, I shall make same available at the hearing of the matter or upon request.
>
> Mpshe refused to appoint the applicant because there was also no position for him to fill, there was a moratorium on appointments and there was no budget available to sustain his non-existent and vague position. In addition, his position had not been advertised. Mpshe confronted the Acting CEO with the information

that the applicant had been dismissed and he said that she should not worry because the applicant had been dismissed due to the Acting CEO.

The Acting CEO instructed Mpshe that he did not care how the appointments of the applicant and the Bulder were to be made and they must just be effected.

Mpshe asked the Acting CEO to put his instructions in writing because any new positions created needed the approval of the Board and Chairman. Any new positions also needed to be signed off by the GM HR and GM Finance. No such approval or sign off happened in the case of the applicant and Bulder.

When Mpshe refused to make the appointments the Acting CEO instructed her subordinate, Joubert, to make the appointments.'

Ms Mpshe deposed to a confirmatory affidavit in which she states the following:

'I confirm, as alleged in the aforementioned affidavits, that the appointment of both Messrs Bulder and Hudson were irregular. There were no existing positions for them to fill. The Acting CEO, Mr Vuyisile Kona, acted on a frolic of his own and did not follow the prescribed Human Resources procedures of *inter alia* obtaining the approval for the creation of the positions prior to appointing Messrs Hudson and Bulder. For instance the positions were never advertised and the gentlemen involved were never interviewed.

The Acting CEO also did not follow the prescribed process of appointing them as consultants either, which should have been in accordance with the provisions of the respondent's Supply Chain Management Policy.

I warned the Acting CEO against appointing the gentlemen and refused to cooperate with him in this regard. As a result he threatened to dismiss me.'

Evaluation

[7] As I indicated in the introduction, this case potentially raised an important question: that is the application of the *Turquand* rule which was canvassed in

Blue IQ Investments Holdings (Pty) Ltd v Douglas Southgate:[1] "[The *Turquand* rule can only apply] where a person purporting to transact with a company had the actual authority with the necessary internal formalities had been complied with. When the rule applies it entitles the third party to assume that the company has in fact contracted. There is nothing to show that the appellant purported to authorise Canca, the CEO to create the position and to appoint the respondent to the position in terms of the third contract.'[2]

[8] In short, the effect of the *Turquand* rule is to prevent the company from lawfully resiling from a contract with a *bona fide* third party on the ground that some "internal" requirement was not observed. The rule does not prevent the company from lawfully resiling from a contract on any other ground, apart from such non observance. For appellants to hold the respondent to a contract *intra vires* the company and its directors, necessitates the requisite proof. Thus, appellants must show that Mr Kona, who purported to represent the company when concluding the relevant contracts, was duly authorised. If express authority was lacking, because it was never conferred by the Board or their delegates or the conferral thereof was conditional on the compliance with an internal requirement which compliance was lacking, unless appellants can prove that Mr Kona had implied or ostensible authority, they cannot rely on the contracts. Appellants cannot merely, because of their presumed knowledge thereof, rely on the contents of the company's public documents to establish the existence of either form of authority. If the existence of neither can be established, respondent was not bound to the contract. This represents the approach adopted by respondent in its answering affidavit. What was then required of the court *a quo* was an engagement, based upon the applicable rules, with the competing versions of the parties.

<u>Deciding a case on application</u>

[1] (2014) 35 ILJ 3326 (LAC).
[2] At para 32.

[9] I have set out in some detail the averments contained in both the founding and the answering affidavits. It must be remembered that the appellants came to court by way of an application. This should have immediately caused the evidence as contained in the affidavits to be interrogated through the prism of the well-established rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*Plascon-Evans*).[3] Most certainly, even before *Plascon-Evans,* in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*[4], the principle existed that where material facts are in dispute and there is no request for the hearing of oral evidence, a final order of the kind sought by appellants in this case can only be granted, if the facts as stated by the respondent together with the facts as alleged by the applicant, that are admitted by the respondent, could justify such an order.

[10] In the case of a bare denial of an applicant's allegations in an affidavit, a court is entitled to contend that there is no genuine or real dispute of facts. See *Wightman t/a JA Construction v Headfour (Pty) Ltd* (*Wightman*).[5] Similarly, a court is entitled to reject a denial where there is no real genuine dispute on the facts in question or the respondent's allegations are so farfetched, so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers. See *National Scrap Metal (Cape Town) v Murray and Roberts* 2012 (5) SA 300 (SCA) at para 21 relying on *Plascon-Evans, supra* at 635 C.

[11] As was noted in *Wightman*:

> 'A real, genuine and *bona fide* disputed fact can exist only where the court is satisfied that the party who purports to raise a dispute has in his affidavit seriously and unambiguously addressed the fact set to be disputed.'[6]

[12] In this case, as I have outlined, respondent put up a series of averments which, unquestionably raised real, genuine and *bona fide* disputes. Respondent's

[3] 1984 (3) SA 623 (A) at 634.
[4] 1957 (4) SA 234 (C) at 235.
[5] 2008 (3) SA 371 (SCA) at 375.
[6] At para 13.

contention was that the evidence showed that there was a moratorium on appointments, there was no budget available for the positions, the positions had not been advertised and accordingly, Mr Kona had no authority to make these appointments. To the extent that documentation was signed not only by Mr Kona but also by Ms Mpshe, respondent contends that she did so under duress for fear that she would lose her job.

[13] In *Buffalo Freight Systems (Pty) Ltd v Castleigh Trading (Pty) Ltd and Another,*[7] Shongwe JA noted that courts must be cautious about deciding probabilities in the face of conflict of facts as set out in affidavits. In this case, the conflicts were profound, the justification offered by respondent was substantiated and thus constituted a weighty defence to any relief sought by the appellants.

[14] Manifestly, the appellants are faced in this case with answering affidavits that set out a detailed case. They must have known that this was a case which could not be resolved on the papers. By pursuing the route of an application, they ran the risk that there would be an insufficient evidential basis to justify the relief that they sought.

[15] On these papers, the application of the well-known principles of *Plascon-Evans* dictated that the application stood to be dismissed for insufficient evidence. There was no need therefore to go any further in dealing with the relevant disputes. The appellants chose an ill-considered form of motion proceedings in this case. They bore the risk and were unable to surmount the problem.

[16] For these reasons, the ultimate result reached by Walele AJ was correct although for different reasons. The dispute of facts cannot be resolved on these papers. There was no recourse to oral evidence and thus, on these papers, the dispute cannot be resolved in favour of appellants.

[17] In the result, the order that the application was dismissed with costs must stand.

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[7] 2011 (1) SA 8 (SCA) at para 14.

[18] In the result: **“The appeal is dismissed with costs”**.

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Davis JA

Ndlovu JA and Mngqibisa-Thusi concur in the Judgment of Davis JA

APPEARANCES:

FOR THE APPELLANTS: Mr Donald Carls of D C Carls Inc

FOR THE RESPONDENT: Adv A Mosam

Instructed by Norton Rose Fulbright SA Inc