IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

CASE NO.: 29767/2004
DATE: 08/06/2010.

In the matter between:

GABRIEL MPATO PLAINTIFF

DE[illegible]TE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED
25-05-2010. [signature]
DATE SIGNATURE

And

THE CROSS BORDER ROAD TRANSPORT AGENCY DEFENDANT

JUDGMENT

WEBSTER J

1. The plaintiff claims damages in the sum of R1 402 444.80 (One million four hundred and two thousand four hundred and forty-four rand and eighty cents) in respect of loss of income, annual bonuses and accrued paid leave suffered in consequence of an alleged unlawful termination of his contract of employment with the defendant which was "partly in writing and partly oral".

2. The defendant has raised i.a., two special pleas to the summons, *viz.*, (i) that the plaintiff's claim had in terms of the provisions of section 11(d) read with section 12 of the Prescription Act no. 68 of 1969 become prescribed prior to the service of the summons on the

defendant; and, (ii) that the alleged oral contract of employment relied upon contravened the provisions of section 36(5) of the Public Finance Management Act no. 1 of 1999 ("the PFMA") which expressly stipulates that the employment contract of any accounting officer must be in writing, which was not the position in this case.

3. According to the minute of the rule 37 conference, the parties agreed that the defendant's special pleas be determined separately in terms of Rule 33(4) – (6) of the Uniform Rules of Court and that the other issues be postponed *sine die*. Such an order was duly made.

4. Certain facts were agreed upon by the parties for the purpose of adjudication of the defendant's special pleas:

4.1 RE: PRESCIRPTION

(i) The date of dismissal of the Plaintiff by the Defendant was 27 July 2001;

(ii) The dismissal was referred to the CCMA in terms of Section 191 of the Labour Relations Act 68 of 1995 to establish whether the dismissal was fair or not;

(iii) The CCMA, Commissioner Pearl Mbeka made an award in favour of the Plaintiff on 2 December 2002, reading as follows:

> "I find that the dismissal of the applicant w2as substantively and procedurally unfair.
>
> The applicant stated that he did not seek reinstatement if he is entitled to relief in this matter. I order that the applicant should be compensated for unfair dismissal as provided for in the Act. The respondent should pay him an equivalent of 12 month's salary viz, R400

000.00 (his yearly salary) payable within fourteen days from the date of receipt of this award.

This award should be given effect within fourteen days from date of receipt of the award."

(iv) The Plaintiff's summons was issued on 9 November 2004;

(v) Service of the summons on the Defendant was effected on a date between 9 December 2004 and 17 December 2004.

4.2 FAILURE TO COMPLY WITH PROVISIONS OF PFMA

(i) "9.1.1 That the date of the Plaintiff's employment by the Defendant was 20 November 2000;"

(ii) "9.1.2 Annexure "A" to the Plaintiff's Particulars of Claim constitutes the only written record of the terms of the Plaintiff's appointment by the Defendant and that no separate written employment contract was drafted or signed by the parties in regard thereto;"

(iii) "By virtue of his appointment as Chief Executive Officer of the Defendant he was the accounting officer of the Defendant for the duration of his employment by the Defendant."

Annexure "A" referred to in 9.1.2 *supra* is a letter written by the defendant to the plaintiff: it is dated 20 November, 2000. It is addressed to the defendant and the author was the chairman of the defendant. It reads as follows:

"APPOINTMENT AS CHIEF EXECUTIVE OFFICER

- We have pleasure confirming your appointment as the Chief Executive Officer of the Cross-Border Road

Transport Agency as from 20 November 2000. Your remuneration will be R400 000.00 per annum on a "cost-to-agency" basis.

All Basic Conditions of Employment will apply unless otherwise stipulated in a separate employment contract. This appointment may be terminated after a 30 day notice period by either party.

On behalf of the Board, we wish you well with this appointment and success with the Agency."

5. PRESCRIPTION:

The defendant's submission is that prescription commenced to run on 27 July, 2001 i.e. the date of his dismissal from employment. It was submitted that the plaintiff could not delay or postpone the commencement of prescription by electing to exercise an election whether to first contest the fairness or otherwise of his dismissal in accordance with the provisions of section 191 of the Labour Relations Act no. 68 of 1995 ("the LRA") before electing to accept the termination of his contract of employment and instituting an action for damages. It was submitted further that all that the plaintiff had to do was a "simple unilateral act" of informing the defendant that he accepted such dismissal and institute action for damages. It was submitted further that nothing prevented the plaintiff from contesting his dismissal in terms of the LRA whilst enforcing his contractual right to claim damages as both remedies were available to him simultaneously as the proceedings before the CCMA were for the decision of the "fairness" of dismissal and not the "lawfulness" or otherwise of the dismissal.

6. NON-COMPLIANCE WITH PFMA

It was common cause as set out in the Addendum to the Pre-Trial Minute that having been appointed the defendant's Chief Executive

Officer the plaintiff was also the Accounting Officer of the defendant in terms of the provisions of section 36(2) of the PFMA, as set out above. It is further common cause that the only written record of the plaintiff's appointment with the defendant is the letter quoted under paragraph 4.2 (*supra*). It was submitted that Annexure "A" falls foul of section 36(5) which reads:

> "(5) The employment contract of an accounting officer for the department, trading entity or constitutional institution must be in writing and, where possible, include performance standards. The provisions of section 38 to 42, as may be appropriate, are regarded as forming part of each such contract"

7. It was emphasized that Annexure "A" is clearly not 'a contract of employment signed by the parties' but a letter merely confirming the plaintiff's appointment and accordingly that the provisions of section 36(5) had not been complied with.

8. Mr Mashoane, for the plaintiff, submitted that the plaintiff's employment with the defendant was subject to the "Basic Conditions of Employment in terms of the relevant Labour Legislation..." i.a. the Labour Relations Act. He submitted that the plaintiff had been entitled to contest his dismissal, as he did, through the CCMA which he did. He submitted that for as long as the matter was pending before the CCMA the running of prescription was suspended and only commenced to run when the award was made on 2 December, 2002. He referred to the case of Minister of Finance and Others v Gore NO 2007(1) All SA Law Reports at page 219 (Par. 25) and submitted that the award constituted "...the smoking gun" which entitled the plaintiff to institute the action for damages, as was the position in this case. He submitted further that the common law right to sue was vested in section 195 of the Labour Relations Act. He rounded his

argument that a finding of unlawfulness was a *sine qua non* in the action instituted by the plaintiff and that until the finding by the CCMA prescription did not run.

9. On the issue of non-compliance with the provisions of the PFMA he submitted that for the Act to apply the defendant had to persuade the court that the defendant was, in terms of section 36(5) "...a department, trading entity or constitutional institution". He argued that the relevant statutory provision was section 29 of the Basic Conditions of Employment Act no. 75 of 1997 which was adequately met by the contents of Annexure "A" to the Particulars of Claim.

10. I revert to the issue of prescription. It was common cause between the parties that the applicable period of prescription in this case is three (3) years. There is no dispute that the action was instituted after the expiry of three (3) years of the plaintiff's dismissal from employment.

11. There is not much to be said in this matter for the simple reason that the basis of the plaintiff's claim is identical to that in the recent case of South African Maritime Safety Authority v Fafie Fortune Mckenzie (017/09) [2010] ZASCA 2 handed down on 15 February, 2010.

12. In that case, as in the present one, it was submitted that "...the right in terms of section 185 of the LRA, taken together with the remedies for a breach of that right contained in section 194 and the procedures prescribed for adjudication over unfair dismissals in section 191, constitutes a complete statement of the extent of the rights in respect of unfair dismissal. They are entirely statutory in origin and content and give rise to no contractual obligation.

Dealing with this issue, Wallis AJA as he then was, dealt with it as follows:

"[14] The fundamental difference between rights arising from a contract and rights arising from statute is that the former depend upon the actual or imputed consent of the parties whilst the latter are imposed by the legislature in order to give effect to social policies underpinning the legislation. The nature of the latter rights may vary. They may be conferred by way of mandatory injunctions, such as the provision in the Truck Acts[1] in England, which have been carried over into South African legislation dealing with employment, in terms of which an employee's wages must be paid in cash in the currency of the country.[2] Alternatively they may prohibit or regulate conduct that might otherwise be permissible such as the making of deductions from an employee's remuneration.[3] Rights to safe working conditions[4] and to compensation for injuries at work[5] are protective in nature. All of this has limited the extent to which employers and employees are free to determine the terms of their relationship.[6] In most instances the employee cannot waive such statutory rights because it would be contrary to public policy to permit such a waiver,[7] although the parties to the contract can stipulate for more favourable rights to vest in the employee.

[15] A relevant feature of some legislation of this type is that it not only confers rights but also provides a mechanism for the enforcement of those rights. Where that happens the question arises whether those means are exclusive and provide the sole means of enforcement or whether it is open to the beneficiary of the right to use the ordinary processes of the courts in order to enforce them. Another question that

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[1] The Truck Act 1831; Truck Amendment Act 1887 and the Truck Act 1896.

[2] Now embodied in section 32(1) of the Basic Conditions of Employment Act 75 of 1997. Hereafter the BCEA

[3] Section 34 of the BCEA.

[4] Under the Occupational Health and Safety Act 85 of 1993.

[5] Under the Compensation for Occupational Injuries and Diseases Act 130 of 1993

[6] *R v Canqan and others* 1956 (3) SA 366 (E) at 367H-368A; *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd* 1994 (3) SA 15 (A) at 23B-D.

[7] *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734-5; *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and another* 1997 (3) SA 236 (SCA) at 242H-243D and 244D-E.

arises is whether the beneficiary of the right enjoys not only the benefit of the right itself but also a right to claim damages if the right is infringed.[8] *Our courts have frequently grappled with these questions and the jurisprudence in that regard casts light upon the present problem.*

> *[16] Where a statute creates both a right and a means for enforcing that right the position is that:*
> *'We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded.'*[i]
> *If on a proper interpretation of the statute in question the legislature has confined a person harmed by a breach of the right conferred therein to the statutory remedy then resort to other means of enforcement is excluded.*[ii] *Accordingly both the scope of the right itself and the means of enforcing that right are determined by the intention of the legislature as ascertained on a proper interpretation of the legislation. It follows from the authorities mentioned in paragraph 7 of this judgment that it is now clearly established that in order to enforce the statutory right not to be unfairly dismissed as embodied in section 185 of the LRA an injured party must have resort to the tribunals established under the LRA, being either the CCMA or in some instances the Labour Court."*

[i] *Coetzee v Fick and another* 1926 T.P.D. 213 at 216 approved in *Da Silva and another v Coutinho* 1971 (3) SA 123 (A) at 135.
[ii] *Callinicos v Burman* 1963 (1) SA 489 (A) at 497H - 498A

[Paragraphs 14-16 of the judgment]

13. Dealing with the question whether "*[20]...in enacting in enacting section 185 of the LRA and the sections that follow, intended not only to outlaw unfair dismissals and provide statutory remedies*

[8] The right to an interdict is generally recognised. *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718.

when they occur, but also intended to incorporate into all contracts of employment a term that they could not be terminated unfairly. That is necessarily the question inasmuch as Mr McKenzie's contract of employment does not contain any unusual features that would serve to place it in an exceptional category insofar as implication of this term from the LRA is concerned."

14. Willis AJA went on to say:

"*[21] The LRA was enacted in order to give effect to the labour rights now guaranteed by section 24 of the Constitution*[ii] *and in particular the right to fair labour practices. One of the most important rights flowing from that constitutional guarantee is the right not to be unfairly dismissed embodied in s185 of the LRA.*[ii] *Where an employee claims that their dismissal is unfair, whether substantively or procedurally, or that they have been subjected to an unfair labour practice the LRA establishes the mechanism for resolving disputes arising from that claim.*[ii] *In the case of an unfair dismissal it also specifies the remedies that are available to an aggrieved employee*[ii] *and, where that remedy consists of compensation, establishes limits on the amount of such compensation.*[ii] *The statutory mechanism for resolving disputes over unfair dismissals is by way of conciliation and if that fails arbitration before either the CCMA or the Labour Court.*

[22] The arrangements in these sections constitute a legislative scheme for giving effect to the right not to be unfairly dismissed. The scheme is enacted as a package embodying the right itself together with sections that explain what is a dismissal (s186); identify automatically unfair dismissals (s187) and state the test for determining when other dismissals are unfair (s188); and prescribe the procedures to be followed in relation to dismissals for

operational reasons (ss189 and 189A). It then stipulates the mechanism for dealing with disputes over unfair dismissals (s191); deals with the onus of proof in proceedings concerning such disputes (s192) and prescribes the remedies that flow from an unfair dismissal (ss193 and 194)."

15. In conclusion Wallis AJA points out in para 58 that:

"*[58] In the present case the issue is whether Mr McKenzie's contract contains a term implied by law as pleaded by him. That is a question within this Court's jurisdiction and in my view the answer is that it does not. What creates difficulties is when the merits of a claim are confused with the jurisdiction to deal with it. Once it is shown that claims such as the present one or those in Chirwa and Gcaba are without merit they will no longer be pursued in any court and one suspects that the jurisdictional quagmire will prove to be nothing more than a muddy puddle that should have been avoided had the parties focussed on the merits of the claims rather than trying to avoid them by way of jurisdictional challenges. In the present case there was nothing wrong in Mr McKenzie pursuing his claim in the High Court. However, it is not a good claim and the only viable claim he could have brought based on those allegations had to be pursued, as indeed it was, before the CCMA."*

16. It is this court's considered view that the plaintiff is clearly incorrect in his submission that prescription only commenced to run upon the finding that the plaintiff's dismissal was substantially and procedurally unfair i.e. on 2 December 2002. That being so the point of prescription was a good one and the special plea has to be upheld.

17. With regard to the second special plea, Mr Mashoane's submission that section 36(5) of PFMA does not apply to the defendant is devoid of any merit. The fundamental question is not whether the defendant is "...a department, trading entity or constitutional institution", for the provisions of this section to apply.

18. The defendant was created in accordance with the Cross-Border Road Transport Agency Act no. 4 of 1998 (the Road Transport Agency Act) i.e. prior to the enactment of PFMA. Its purpose, according to the pre-amble is:

> "...*To provide for co-operative and co-ordinated provision of advice, regulation, facilitation and law enforcement in respect of cross-border road transport by the public and private sectors; to that end, to provide for the establishment of the Cross-Border Road Transport Agency; to repeal certain laws; and to provide for matters connected therewith.*
>
> *Preamble*
>
> *SINCE there is a need to improve the unimpeded flow by road of freight and passengers in the region, to liberalise market access progressively in respect of cross-border freight road transport, to introduce regulated competition in respect of cross-border passenger road transport and to reduce operational constraints for the cross-border road transport industry as a whole;*
>
> *AND SINCE there is a need to enhance and strengthen the capacity of the public sector in support of its strategic planning, enabling and monitoring functions;*
>
> *AND SINCE there is a commitment to empower the cross-border road transport industry to maximise business opportunities and to regulate themselves incrementally to*

improve safety, security, reliability, quality and efficiency of services;"

19. According to the definition in the PFMA "'**trading entity**' means an entity operating within the administration of a department for the provision of sale of goods or services, and established-
    (a) in the case of a national department, with the approval of the National Treasury; or
    (b) in the case of a provincial department, with the approval of the relevant provincial treasury acting within a prescribed framework;"

20. There can be no doubt that the defendant provides a service on a national basis, as stipulated in the definition of trading entity (*supra*).

21. In terms of section 14 of the Cross-Border Road Transport Agency Act the Chief Executive Officer is appointed by the Minister of Transport (section 14(1)(a)).

22. The Chief Executive Officer, in accordance with the provisions of section 14(b) of the Road Transport Agency Act "...holds office on such terms and conditions including those relating to remuneration and allowances as the Minister, after considering the recommendations of the Board and in consultation with the Minister of Finance, may determine in writing."

23. The plaintiff's appointment as Chief Executive Officer must be in writing and so must his appointment in terms of section 36(5) in his capacity as the "Accounting Officer". Annexure "A" cannot, by any

stretch of imagination be deemed to set out the "...terms and conditions..." as envisaged in the sections referred to above.

24. Any doubt that may linger with regard to the applicability of section 36(5) of PFMA is dispelled by the fact that the respondent is expressly mentioned in Schedule 3 of PFMA as being a "public entity".

25. The obvious consequence of the aforesaid is that even if the first point of prescription had not been upheld the plaintiff would have failed to surmount the second point and the defendant would have been entitled to the dismissal of the action on this point alone.

26. The result therefore is that the special pleas raised by the defendant are clearly good in law.

27. **The following order is accordingly granted:**

1. **The special pleas raised by the defendant are upheld.**
2. **The plaintiff's action is dismissed with costs.**

G. Webster

G. WEBSTER

JUDGE IN THE HIGH COURT