IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/ NO

Case number: **2217/2022**

In the matter between:

SAMUEL MOKETE YIKA **PLAINTIFF**

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **DEFENDANT**

CORAM: **NAIDOO, J**

HEARD ON: **14, 15 and 17 NOVEMBER 2023**

DELIVERED ON: **20 November 2023**

JUDGMENT

---

[1] The plaintiff issued summons against the defendant, National Union of Metalworkers of South Africa (NUMSA) for the payment of damages for past and future loss of income. The relief claimed in the summons reads, *inter alia*, as follows:

"1. Payment of R3 660 033.90,

2. Interest at a rate of 7.25% per annum a tempora morae,

3. Costs of suit."

Adv Mashinini appeared for the plaintiff and Adv S Dlali appeared for NUMSA in this court.

[2] The background to the matter, as pleaded in the Particulars of Claim, is that, the plaintiff was employed as a security guard by EFS Security Company in Bethlehem, Free State Province, until he was dismissed on 6 July 2020, which dismissal he claims to be unfair. The plaintiff alleges that he was a member in good standing of NUMSA at the time of his dismissal, having been paying a monthly subscription fee of One Hundred and Fifty Seven Rand and Eight Cents (R157.08). As such, he was entitled to be represented by NUMSA at any labour dispute with his employer, and that upon the payment of the said subscription fee, a contract of mandate came into existence between him and NUMSA. The contract was concluded in Bethlehem on a date unknown to him, where he acted in person and NUMSA was represented by its (unnamed) shop steward.

[3] The plaintiff alleges that an express, alternatively tacit and/or implied

agreement came into existence between him and NUMSA, with the following material terms:

"1. Plaintiff to pay monthly subscription fee of R157-80 per month'

2. Defendant will at all material times render services to Plaintiff related to labour matters including labour dispute with employer,

3. Defendant is under legal duty of mandate to render to the Plaintiff services related the course and scope of Defendant's mandate,

4. Defendant is required to exercise the degree of skill and care to the Plaintiff that can reasonably be expected of a trade union, bring Defendant in the prevailing circumstances".

The plaintiff alleges that at all material times, he fulfilled his mandate (sic) by paying the subscription fees timeously.

[4] A shop steward of NUMSA, Mr Ezekiel Mngomezulu (Mngomezulu), represented the plaintiff at a disciplinary hearing against him by his employer. Subsequent to such hearing, the plaintiff was dismissed from his employment. On the advice of the shop steward, he referred the matter to NUMSA's organiser in Bethlehem, Chris Seotsane (Seotsane), who undertook to refer the matter to the Commission of Conciliation, Mediation and Arbitration (CCMA), in order to challenge the substantive fairness of his dismissal. With the assistance of Mngomezulu, he followed up the matter and was assured that the matter was referred to the CCMA. He subsequently discovered that the matter was referred to the CCMA after the 30- day period allowed for the referral of such dispute, and that, without his knowledge, an application for condonation was made to the CCMA, which application was not granted, having the result that his unfair dismissal

has not been addressed.

[5] The plaintiff alleges that Mngomezulu and Seotsane were employees of NUMSA, acting within the course and scope of their employment with NUMSA, alternatively, they acted in furtherance of NUMSA's interest, particularly service to its members. He alleges, further, that they acted negligently in not referring his dispute timeously, causing his dismissal to remain unchallenged. He also alleges that as a result of such negligence, he suffered a loss income, in the past and for the future. Based on NUMSA's alleged negligence, he claims from it, an amount of Two Hundred and Sixty Seven Thousand and Forty One Rand and Ten Cents (R267 041.10) as past loss of earnings, calculated on his monthly salary of Fifteen Thousand Seven Hundred and Sixty Eight Rand and Thirty Cents (R15 768.30) from the date of his dismissal (6 July 2020) "to date", being seventeen (17) months. It is not clear which is the latter date referred to. In respect of future loss of earnings, the plaintiff claims an amount Three Million Three Hundred and Ninety Two Thousand Nine Hundred and Ninety Two Rand and Eighty Cents (R 3 392 992.80), based on a retirement age of 65 years, which would have been reached 18 years from the date of his dismissal. Therefore, the total amount claimed by the plaintiff is Three Million Six Hundred and Sixty Thousand Nine Hundred and Ninety Two Rand and Ninety Cents (R3 660 992.90).

[6] NUMSA denied knowledge that the plaintiff was a member in good standing and the plaintiff was put to the proof thereof. It also denied

that a contract of mandate came into existence upon payment of subscription fees, or that such a contract, with an unfettered obligation to render services related to labour matters to the plaintiff, existed or was created. NUMSA's case is that it has a discretion with regard which disputes of its members to take on and to what extent such disputes are to be pursued. NUMSA has a duty to advise its members in respect of the merits of the case and to refrain from burdening courts and labour fora with matters that have no prospects of success. It further alleges that at all relevant times, it took all necessary steps to deal with the plaintiff's dispute against his employer.

[7] NUMSA's version is that their local organiser, Seotsane, consulted with the plaintiff and asked him to provide to Seotsane all the documents relevant to his dispute. The plaintiff provided the Notice of Termination of Employment, and was immediately asked to provide all the other documentation relevant to his disciplinary hearing, such as the record of the disciplinary hearing and the charge sheet, before the expiration of thirty days. The plaintiff failed to do so, rendering NUMSA unable to properly assess the merits of the plaintiff's case. It decided to refer the dispute to the CCMA anyway, and was informed by the latter that the referral was one day late. Seotsane decided to apply for condonation as the delay was not excessive.

[8] The plaintiff's employer opposed the application for condonation and in the course of exchanging pleadings, provided the documentation

that Seotsane had requested the plaintiff to provide. The employer provided the record of the plaintiff's disciplinary hearing from which it became apparent that the plaintiff was charged with six (6) counts of misconduct and had pleaded guilty to four (4) of those charges. NUMSA alleges that when those 4 charges are considered individually, each one justifies the sanction of dismissal. The charges that the plaintiff pleaded guilty to are:

8.1 Deviation from laydown procedure for asset in transit;

8.2 Putting client assets at risk;

8.3 Putting lives of your colleagues at risk, and

8.4 Risking the company's financial/future operations.

[9] The plaintiff gave no information or instructions that countered the allegations of his employer in connection with his dismissal. The Commissioner therefore decided the matter on the available evidence and refused the application for condonation on the basis that the plaintiff's case did not have good prospects of success. The plaintiff was advised of the outcome of the condonation application telephonically on 14 April 2021 and NUMSA also advised him of the various options he could exercise, should he wish to pursue the matter. I mention that a further point raised by NUMSA is that the plaintiff may not claim loss of income until retirement, as he was gainfully employed in the security industry after his dismissal from EFS Security Company. I will deal further with this aspect shortly.

[10] The plaintiff testified in this matter and called no other witnesses. He testified that he is unemployed and indicated that he was dismissed by his previous employer, as a result of which, and acting on the advice of Mngomezulu, the latter sent documents to Seotsane. He indicated that only the letter of termination was sent. He further testified that Seotsane gave an assurance that the documents had been sent to the CCMA, and he only later discovered that the documents were sent late and that an application for condonation was made. According to him, he was advised that his case was dismissed. He insisted that it was the negligence of NUMSA that caused his matter not to be heard by the CCMA, with the result that he could not do anything about his unfair dismissal. He also confirmed his claim for past and future loss of earnings calculated on the basis I indicated earlier.

[11] The plaintiff did not disclose during evidence in chief that he pleaded guilty to the charges brought against him by his former employer. Only one question was asked of him about the charges and whether they were serious. He said he did not consider them to be serious. It was only in cross-examination that he conceded that he pleaded guilty to the 4 of the charges, and furthermore that, at that time, he was issued with a written warning for a previous similar misconduct. The period of the written warning had not expired when he committed the misconduct giving rise to the charges, which were the subject matter of the disciplinary hearing.

[12] An aspect of the evidence that emerged in cross-examination and which bears directly on the plaintiff's claim for loss of earnings is that he was employed in the security industry after his dismissal from EFS Security Company. Disturbingly, no mention of this was made in the Particulars of Claim, nor in the plaintiff's evidence in chief. As I indicated, he pointedly testified that he was unemployed. In cross-examination, he was referred to the records of the Private Security Industry Regulatory Authority (PSIRA), with which employers and employees are required to register before they can work or trade in the security industry. The plaintiff confirmed that the records related to him and his employer, Royal Security CC. He testified that he commenced working for Royal Security CC on 12 May 2021. He issued summons on 13 May 2022. Exhibit C2 indicates that the expiry date of his PSIRA certificate was 21 June 2022 and was pending renewal. Exhibit C1 reflects that the plaintiff's PSIRA certificate was renewed, that he was employed by Royal Security CC and that the expiry date of the certificate is 20 January 2025

[13] The plaintiff's evidence is that he worked for Royal Security CC on a contract basis and that his contract ended earlier this year (2023). He refrained from giving any further details of his employment, insisting that he is currently unemployed. What emerges from this evidence is that he was employed at least since 12 May 2021, and was clearly so employed when he issued the summons in this matter, yet alleged therein that he is unemployed. The probabilities are that he was continuously in employment until this year, for him to have renewed his PSIRA certificate which has an expiry date of 20 January 2025.

may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate".

[16] Uniform Rule 18 also finds application in this matter. The relevant provision is subrule (6) which provides that:

"A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".

[17] The test for granting absolution from the instance is well established in our law from as early as 1917 when the test was first formulated in *Gascoyne v Paul and Hunter 1917 TPD 170* and since approved in a long line of cases. The test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. [See *Erasmus Superior Court Practice RS 21, 2023, D1-530* and the numerous cases cited therein].

[18] In the present matter, it is perhaps useful to start with the plaintiff's allegations in respect of the contract he alleges came into existence between him and NUMSA. It is trite that if a party relies upon a contract in his pleading, he is required to state whether it was written

or oral, when and by whom it was entered into, and if it was written, then at least a true copy thereof should be annexed to the pleading. The plaintiff alleges that a contract was entered into between himself and the defendant, duly represented by a shop steward. He makes no allegation as to whether it was written or oral, he alleges that the date is unknown to him but gives no reasons as to why he is does not know the date, considering he acted personally in the conclusion of the contract.

[19] The plaintiff furthermore, alleges certain express, tacit or alternatively implied terms, without setting out circumstances from which such terms can be inferred. This is particularly so as no contract was attached to the Particulars of Claim, and one is left to surmise whether it was a written agreement or whether it may have been an oral agreement. He has furnished no reasons for the lacunae in his pleadings. In my view, the plaintiff has not complied with Rule 18(6).

[20] With regard to the negligence on the part of NUMSA, which the plaintiff relies on to found his claim against it, he clearly did not furnish NUMSA with the record of the disciplinary hearing, which it required in order to assess the merits of his case. It is clear from the content of the Referral of Dispute form and the affidavit in support of the application for condonation that NUMSA did not have access to the information contained in the minutes of the disciplinary hearing. Its version that the plaintiff failed to furnish this document is far more probable than that of the plaintiff who initially conceded that he did

not provide the document to NUMSA and then insisted that the shop steward, Mngomezulu, furnished the document to Seotsane.

[21] I also accept NUMSA's version that it saw the minutes of the disciplinary hearing for the first time when it was attached to the opposing affidavit in respect of the condonation application. It also is more probable that if NUMSA had sight of the document it would not have referred the dispute to the CCMA, as the plaintiff would have had little or no prospects of success. I am consequently of the view that the plaintiff has not properly established the terms of the contract he alleges came into existence between him and NUMSA, nor that there was any negligence on the part of NUMSA.

[22] The evidence most destructive to the plaintiff's case is that in respect of his claim for loss of earnings. By his own admission, he was employed after he was dismissed by EFS Security Company, although he tried to dismiss it as contract work, which does not count as employment. He clearly earned a salary during this period and attempted to mislead the court into believing that he was unemployed during the entire period after his dismissal. He continued to be employed for over two years thereafter, until at least a few months ago. The basis of his calculations, as I have set out earlier is flawed, for two reasons. He also provided no details of the period he was employed post dismissal nor the amounts he had earned from such employment. Firstly, it is clear from his evidence under cross – examination that the amounts relating to past and future loss of earnings are based on his gross salary and do not take into account all the usual deductions that are made from the salary of an

employed person and secondly it completely omits the salary he earned from his employment with Royal Security CC. Similarly, he has made no provision, in respect of future loss of earnings, for such items as contingency deductions, tax, and other deductions which his earnings would have been subject to. These calculations would have become relevant if the dismissal could have been shown to be unfair, and NUMSA shown to be negligent, neither of which was done.

[23] During his oral address before court, Mr Dlali reiterated that the plaintiff's failure to provide the relevant documentation to it in the form of the record of the disciplinary hearing, caused the delay in referring the dispute to the CCMA, and not any negligence or failure on its part. If it had received the evidence, which came to its attention at a late stage, it would not have referred a dispute to the CCMA, and there would have been no need to apply for condonation, as it was of the view that the merits of the plaintiff's case had no prospects of success in the CCMA. MR Dlali also dealt with the issue of the alleged contract between the parties, submitting that the plaintiff had failed to place any cogent evidence before the court in that respect.

[24] He raised similar arguments, as I have set out earlier, in respect of the plaintiff's employment after his dismissal by EFS Security Company, and the flawed calculations of past and future loss of earnings. He also intimated that the plaintiff has not proved his entitlement to damages in the form of loss of earnings. Mr Dlali made the point that if the court were to uphold the plaintiff's claim for loss of earnings, he has in any event, failed to claim an amount in

accordance with labour practices in this country. It is settled law that a claim for past loss of earnings would be limited to an amount equivalent to twelve (12) months' salary post dismissal. The plaintiff has claimed loss of earnings for 17 months. I was referred to the case of *Food and Alliance Workers Union v Ngcobo NO 2013(5) SA 378 (SCA)*. In that matter the Supreme Court of Appeal had found that the union was negligent in not referring the dispute to the Labour Court, and held that the dismissal was unfair, and while reinstatement was not appropriate, the employees were entitled to a discretionary solatium. It held that not more than 12 months' salary was appropriate in the circumstances.

[25] Mr Mashinini's Heads of Argument simply repeated the allegations in the Particulars of Claim, which I have previously set out in this judgment. The submissions in the Heads are that the plaintiff has proved that NUMSA was negligent, causing him damages and that he had shown his entitlement to payment of the damages he seeks. The court engaged with Mr Mashinini with regard to the plaintiff's evidence as well as other evidence placed before the court, and enquired whether he still holds the view that the plaintiff had proved his case. Mr Mashinini's response was that he stood by his Heads of Argument

[26] In my view, the plaintiff has failed to place evidence before this court in support of the claims he makes and the relief he seeks. I am unable to find that, based on the evidence before me, this court, applying its mind reasonably to such evidence, could or might find for the plaintiff. He has simply failed to make out a case for the relief he seeks.

[27] In the circumstances, the following order is made:

27.1 Absolution from the instance is granted;

27.2 The plaintiff is ordered to pay the defendant's party and party costs.

[redacted]

S NAIDOO J

On behalf of the Plaintiff: Adv Mashinini

1st Floor, Office 103

Afrikaner Building

Cnr Zastron and DeVilliers Streets

Bloemfontein

(Ref Yik001D#1245)

On behalf of the Defendant: Adv S Dlali

Instructed by: CN Phukubje Inc Attorneys

Johannesburg

(Ref: Mr Phukubje/Modisane/NUMSA/981/22)

c/o Salley's Attorneys

Salley's Yamaha Building

55 Nelson Mandela Drive

Bloemfontein