

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case No: 236/15

In the matter between:

**MASIXOLE TEYISE**

**PLAINTIFF**

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS**

**DEFENDANT**

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**JUDGMENT**

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**MBENENGE J:**

- [1] The plaintiff was appointed by the Eastern Cape Provincial Government to be the defendant's driver/messenger for a period linked to the term of office of the defendant. Consequent upon that, the plaintiff commenced serving on 1 July 2014. On 12 December 2015 the defendant gave the plaintiff notice of termination of the plaintiff's services. The termination would take effect on 31 March 2015. The plaintiff now seeks to recover the sum of R728 736.80 from the defendant who has been sued in a nominal capacity.

[2] It would appear that the defendant is cited purely by reason thereof that he represented the defendant when the subject agreement was being concluded, and issued notice to terminate the agreement. The Premier of the Eastern Cape Provincial Government, in his capacity as the functionary upon whom the executive authority of the Eastern Cape Province is vested, has not been cited as a further respondent in these proceedings. The claim is said to arise from an alleged breach of contract on the part of the defendant. In pursuit of the claim, and consequent upon the defendant entering an appearance to defend, the plaintiff applied for summary judgment on the basis that the defendant lacks a *bona fide* defence, and has entered the appearance to defend solely for purposes of delaying the action.

[3] According to the plaintiff's particulars of claim the material terms of the written service agreement (the written agreement) are, *inter alia*, as follows:

- (a) the agreement would endure for a period linked to the term of office of the defendant, which is currently a period of 5 years;
- (b) in return for the services rendered, the plaintiff would earn R145 758.00 per annum, plus a personal non-pensionable allowance of R1 165.00 per month; and

(c) in the event of a breach by, or misconduct on the part of, the plaintiff, the agreement would be terminable upon the defendant giving 3 months-notice to the plaintiff.

[4] The plaintiff further alleges that it was an implied term of the agreement that he would receive an annual increment of 1% of his remuneration.

[5] Copies of the relevant appointment letter and the relevant written agreement are annexed to the particulars of claim in support of the action. Therefore, the allegations made in the particulars of claim ought to be read in the context of the provisions and clauses of the appointment letter and the written agreement. To contend otherwise, would be to suggest that is possible for a litigant to make allegations in his/her summons amounting to a contradiction between summons and documents relied upon as basis for the claim.<sup>1</sup>

[6] With regard to the breach of contract, the plaintiff avers:

- "7. In terms of the agreement, the plaintiff reported for duty on 1<sup>st</sup> June 2014 and continued to work for the defendant until the 31<sup>st</sup> March 2015 when the agreement was terminated by the defendant in terms of a letter annexed hereto as annexure "**MT4**".
8. By terminating the agreement contrary to its termination clauses, the defendant is consequently in breach of the agreement.

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<sup>1</sup> *Naidu v Naidoo* 1967 (2) SA 223 (N) at 226.

9. In the premises, and as a consequence of the defendant's breach set out above, the defendant is liable to the plaintiff in damages in South African Rand currency in the amount of R728 736.80."

[7] The amount being claimed has been calculated as follows:

| Nature of damages                        | Amount            |
|------------------------------------------|-------------------|
| Remuneration for the remuneration period | 583 032. 00       |
| Annual increments at 1%                  | 87 454.80         |
| Personal non-pensionable allowance       | 58 250.00         |
| <b>TOTAL</b>                             | <b>728 736.80</b> |

[8] Before delving into the substance of the issues emerging from the papers, I have deemed it necessary to point to some shortcomings that, in my view, bedevil the action and thus the related summary judgment application.

[9] It is available to a defendant to base his/her opposition to a summary judgment application on the excipiability of the claim as formulated.<sup>2</sup> Nothing, in my view, precludes the court from *mero motu* pointing to the excipiability of an action founding a summary judgment application where, as here, the allegations made in the particulars of claim do not disclose a cause of action. It hardly lies with a litigant whose summons discloses no cause of action to argue that his/her adversary has no *bona fide* defence.

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<sup>2</sup> *South African Burea of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592 E – H.

[10] It is trite law that a court can raise a matter *mero motu* in the event that that the particular point amounts to a point of law. In *Cusa v Tao Metal Industries and Others* it was held:

“Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law... Otherwise, the result would be a decision premised on an incorrect application of the law.”<sup>3</sup>

[11] In *Nedbank Limited v Mendelow NO and another*,<sup>4</sup> it was held that the court could raise issues “*mero motu where the facts to which those principles apply are squarely raised in the papers before the court (and that were before the high court) ... a court should not allow the continuation of a wrong because the legal representatives of the parties did not appreciate the correct legal principles*”.<sup>5</sup>

[12] In the circumstances of this case the question is whether the issue relating to the existence or absence of a cause of action amounts to the raising of a point of law. I hasten to answer that question in the affirmative.

[13] The plaintiff’s employment had, in terms of the written agreement, been subject to a 12 calendar months’ probation period. The purpose of the probation is stated as being “*to determine whether [the plaintiff is] suitable for the type of work that [he has] been employed for.*” The

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<sup>3</sup> 2009 (2) SA 204 (CC) at para 68.

<sup>4</sup> [2013] ZASCA 98.

<sup>5</sup> *Supra* para 17.

plaintiff alleges that he reported for duty on 1 July 2014 and that the agreement was terminated on 31 March 2015. At the time of the termination of the agreement, the plaintiff was still on probation.

[14] The plaintiff has failed to make out a case that beyond the probation period he would still have been employed. Secondly, the plaintiff has not made out a case for breach of contract. He simply alleges that there was a breach of contract when in actual fact the defendant acted in terms of the termination clause of the agreement. Asserting a right to payment of remuneration for the entire contract period (5 years) is, in the circumstances, without factual and legal bases.

[15] It is not possible in the instant matter to consider whether the written agreement has been terminated “*contrary to its termination clauses*” without having regard to clause 8(a) of the written agreement. The clause reads:

“[E]ither party to this Agreement may terminate it at any time during the currency thereof on giving three months notice in writing to the other party. The employer may, however, accept a shorter period of notice in an exceptional case, using his own discretion...”

[16] As already pointed out, the letter terminating the written agreement is dated 12 December 2015 and the termination was, on the plaintiff’s own showing, to take effect on 31 March 2015. Followed to its logical conclusion, and upon a proper construction of clause 8(a), the plaintiff was given more than the requisite 3 months written notice of the

termination of the written agreement. How a breach arises in these circumstances, is hard to comprehend. Clause 8(a) entitles the employer to terminate the agreement on any lawful ground, subject of course to compliance with the clause itself. The plaintiff seems to have arrogated to himself a right which the written agreement does not accord him. The allegation made that “[b]y terminating the agreement contrary to its termination clauses, the defendant is consequently in breach of the agreement”, flies in the face of the termination clause of the written agreement.

- [17] There is a further insurmountable obstacle on the plaintiff's path to success. No allegation is made in the impugned particulars of claim that the plaintiff elected to cancel the agreement on account of his employer's repudiation and that he has communicated the election to the guilty party. Such allegations are necessary to sustain a cause of action founded on breach of contract.<sup>6</sup> Cancellation of the written agreement is not being sought. Therefore, the agreement is still in existence, with the result that the question of damages consequent upon a breach simply does not arise.

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<sup>6</sup> *Van Rooyen v Minter van Openbare Werke & Gemeenskapbou* [1978] 3 All SA 445 (A), 1978 (2) SA 835 (A); *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* [1980] 1 All SA 358 (A), 1980 (1) SA 645 (A); *Highveld 7 Properties (Pty) Ltd v Bailes* [1999] 4 All SA 461 (A), 1999 (4) SA 1307 (SCA).

[18] I now turn to deal with the question of whether the amount claimed qualifies as a liquidated amount in money within the meaning and contemplation of rule 32(1)(b) of the Rules of this Court, the principal question being whether the amount is capable of prompt ascertainment.<sup>7</sup>

[19] During argument, counsel for the plaintiff, Mr Nzuzo, was quick to abandon the application in so far as it relates to R87 455.80 (for “[a]nnual increments at 1%”) as it is not clear from the impugned particulars of claim as to how the calculation of the amount has been arrived at.

[20] In my view, the same fate ought to befall the remaining amounts (R583 032.00, being remuneration for the “*remaining period*”, and R58 250.00, being for a personal non-pensionable allowance). Upon a consideration of the particulars of claim these amounts do not constitute liquidated amounts in money. The summons is silent regarding whether the amount for remuneration constitutes gross or net income. Absent an allegation of when the defendant’s term of office, to which that of the plaintiff was linked, commenced, it is not possible to determine precisely

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<sup>7</sup> *Blakes Maphanga Inc v Outsurance Insurance Co. Ltd* 2010 (4) SA 232 (SCA) at 240D – 241C; also see *Botha v W Swanson and Company (Pty) Ltd* 1908(2) PH F85 (CPD) where Corbett J said “a claim cannot be regarded as one for “a *liquidated amount in money*” unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.

what “*the remaining period*” is. This shortcoming equally applies to the claim for personal and non-pensionable allowance.

[21] Even if it were to be held that I erred in coming to the conclusion that the plaintiff’s claims are not liquidated amounts, the defendant has, in my view, established that he has a *bona fide* defence to the claim, which suffices to resist the summary judgment application. He states that he intends “*defending the plaintiff’s claim on the basis that [he] has reversed [his] decision to dismiss the plaintiff and that the plaintiff must return to work.*” The statement, having been made under oath, cannot be ignored. This, coupled with the fact that the written agreement is still in existence, as indeed the plaintiff has not sought cancellation thereof, makes it demonstrably clear that the defendant has a *bona fide* defence.

[22] In these circumstances, the application cannot succeed. There is no reason why the usual cost order, which follows upon a refusal of a summary judgment application, should not be granted. In his heads of argument the defendant’s counsel, Mr. Pitt, has pointed to an occasion on which the application was set down for 30 June 2015. It is contended that on that occasion the defendant attended court but “*the matter was not properly enrolled by the plaintiff*” and that, therefore, the plaintiff must be ordered to pay the defendant’s costs incurred by counsel’s

attendance to argue the summary judgment application. This contention was not persisted in during oral argument.

[23] In any event, nothing points to the issue of costs as having been reserved, on 30 June 2015, for determination by the court hearing the summary judgment application. The order of 30 June 2015 is not before this court and therefore the issue raised is not ripe for hearing. Not even the order of 30 June 2015 is serving before me. Why the defendant briefed counsel to attend court to resist a summary judgment application that was, on the defendant's own showing, "*not properly enrolled*" is not clear. If this is anything to go by, the defendant should derive comfort from knowing that he is not barred from pursuing the quest for a cost order, in due course, with all the salient facts being placed before the court hearing the main action.

[24] The following order is therefore made:

- (a) The plaintiff's summary judgment application is refused.
- (b) The defendant is granted leave to defend the main action.
- (c) The costs of the application shall stand over for determination by the court hearing the main action.

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**S M MBENENGE**

**JUDGE OF THE HIGH COURT**

Plaintiff's Counsel:      Mr S Nzuzo (instructed by Badi Loliwe Attorneys, c/o  
S Z Sigabi & Co., King William's Town)

Defendant's Counsel:    Mr D V Pitt (instructed by the Bhisho State Attorney)

Heard on:                    14 July 2015

Delivered on:              28 July 2015