

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No: 5224/2011

In the matter between:

**VUYO MOKSEKI MOROBANE**

Plaintiff

and

**LETSEMENG LOCAL MUNICIPALITY**

Defendant

---

**JUDGMENT BY:**

REINDERS, AJ

---

**HEARD ON:**

15 OCTOBER 2013

---

**DELIVERED ON:**

17 OCTOBER 2013

---

[1] On 17 October 2013 I made the following order:

1. Both special pleas raised by the defendant are dismissed with costs.
2. The action is postponed *sine die* for disposal of the remaining issues.
3. Reasons for the order will be furnished to any of the parties in terms of Rule 49(1)(c) on application.

[2] In terms thereof defendant requested the reasons for the order.

[3] These are those reasons:

- [4] At the onset of the proceedings this court made a ruling in terms of Rule 33(4) that issues be separated and that the two special pleas raised by defendant firstly be adjudicated upon as agreed by the parties during the pre-trial conference in terms of Rule 37.
- [5] The first special plea raised by defendant was one of non-compliance with the provisions of section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act"). In the terms of section 3(2)(a) a notice of the intention to institute legal action must be given to an organ of state within six months from the date on which the cause of action arose.
- [6] Mr Motlaung on behalf of defendant argued that plaintiff resigned in writing on 11 February 2010, which letter was followed up by letters from the defendant on respectively 30 April 2010, 7 May 2010 and 14 May 2010. The next step taken by plaintiff was on 29 April 2011 being the notice in terms of section 3(2)(a). The said letter was thus issued almost a year after plaintiff's resignation, and plaintiff should have applied for condonation for the late notice.
- [7] Mr Pienaar on behalf of plaintiff submitted that plaintiff based his claim on breach of a fixed term contract and elected to sue defendant for specific performance in terms of the agreement. Defendant pleaded to plaintiff's particulars of claim. On 20 September 2013 plaintiff amended his particulars by adding an alternative claim for damages. Defendant did not plea to the amended particulars.

- [8] It was further submitted by Mr Pienaar that plaintiff tendered his conditional resignation on 11 February 2010, whereafter defendant did not accept plaintiff's resignation on the said conditions, but instead unconditionally terminated the contract with effect from 30 April 2010. The said termination by defendant constituted repudiation, which repudiation plaintiff refused to accept. Plaintiff tendered to work for defendant since 30 April 2010, but defendant failed to pay the monthly instalments of plaintiff's remuneration for the period 1 May 2010 to 31 August 2011.
- [9] In his replication Mr Motlaung argued that plaintiff was unable to claim for specific performance as defendant made it very clear that his (plaintiff's) services were no longer required. The plaintiff had a reciprocal obligation to render his services, and since this was an employment relationship, plaintiff was not entitled to remuneration if he did not work.
- [10] I cannot agree with Mr Motlaung. The plaintiff seeks an order that defendant pays money which he undertook to pay in terms of a contract.
- [11] In Christie's **The Law of Contract in South Africa** (7<sup>th</sup> Edition on p 544) specific performance is defined as:
- “ ... an order to perform a specific act or to pay money (*ad pecuniamsolvendam*) in pursuance of a contractual obligation.”
- [12] It is trite law that a plaintiff is always entitled to claim specific performance and, assuming he makes out a case, his claim will be

granted subject to the court's discretion (see **Farmers' Co-op Society (Reg) v Berry** 1912 AD 343; **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd** 1982 (1) SA 398 (A).)

- [13] In **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk** 1979 (1) SA 391 (A) it was decided that, when a defendant from whom performance is claimed says that the plaintiff is not entitled to claim because the parties' obligations are reciprocal and he (plaintiff) has neither performed nor tendered to perform his obligations, the defendant should raise the *exceptio non adempticontractus*.
- [14] Defendant did not raise this defence.
- [15] Whether plaintiff is obliged to notify the defendant of his intention to institute legal proceedings, depends on the question if plaintiff's claim constitutes a "debt" as defined in section 1 of the Act.
- [16] After thorough consideration Lever AJ came to the conclusion in **Nicor Consulting v North-West Housing Corporation** 2010 (3) SA 90 (NWM) at 103C that a "debt" as referred to in the Act, is confined to damages, and a claim for specific performance therefore does not constitute a debt as contemplated in the Act. It was confirmed in **Director General, Department of Public Works v Kovacs Investments 289 (Pty) Ltd** 2010 (6) SA 646 (GNP) at 648G that a plaintiff does not have to comply with the provisions of the Act in an action for specific performance.

- [17] I am satisfied that plaintiff's main claim against defendant is a claim for specific performance and accordingly plaintiff did not have to comply with section 3(2) of the Act.
- [18] It follows that defendant's first special plea cannot succeed.
- [19] The second special plea raised by defendant entailed *res iudicata* and jurisdiction.
- [20] Mr Motlaung submitted that the parties consented in terms of clause 19.3 of the employment contract to the jurisdiction of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), and if the CCMA was unable to adjudicate the dispute, the Courts of the Republic of South-Africa. Plaintiff referred the matter to the CCMA, and on 29 March 2011 it was finally adjudicated in favour of the defendant.
- [21] Thus Mr Motlaung concluded that the CCMA was able to adjudicate the matter and no further referral to the High Court was possible.
- [22] Mr Motlaung also argued that the High Court was in any event the wrong forum for plaintiff to institute his action. He relied heavily on **Chirwa v Transnet Ltd and Others** 2008 (4) SA 367 (CC) at 380 D-E for his submission that, since the Labour Relations Act 65 of 1995 (LRA) had created a specialised framework for the resolution of labour disputes, it was primarily through the mechanisms of the LRA that an employee had to pursue his or her claims.

[23] Mr Motlaung insisted that the action instituted by plaintiff is purely a labour matter which is camouflaged in common law breach of contract and that the High Court lacked jurisdiction to entertain the labour matter.

[24] Mr Pienaar submitted that the claim brought by plaintiff in the CCMA was one of unfair dismissal as is evident from the discovered CCMA ruling of 29 March 2011. Moreover, the merits were never considered as this was an application for condonation of referral outside the statutory prescribed time frame, a fact to which Mr Motlaung conceded.

[25] He argued that it is trite law that there is a potential for three separate claims to arise when an employee's contract is terminated, namely for the infringement of his or her:

1. right not to be unfairly dismissed or be subjected to unfair labour practices;
2. common law rights; and
3. constitutional rights.

[26] I agree with Mr Pienaar.

[27] In **Makhanya v University of Zululand** 2010 (1) SA 62 SCA at 67 paras [11] –[13], Nugent JA referred to the rights created by the LRA as “LRA rights”, and indicated that the CCMA and Labour Court have exclusive jurisdiction to enforce these rights. The learned judge stated at 71 para [26] as follows:

“But, in respect of the enforcement of both contractual and constitutional rights the High Courts retain their original jurisdiction assigned to them by the constitution. In both cases equivalent jurisdiction has been conferred upon the Labour Court to be exercised concurrently with the High Courts.”

- [28] It was also stressed that, where a claim that was pursued before the CCMA was a claim to enforce the right of an employee not to be dismissed unfairly, a plaintiff will still have a claim for enforcement of a right emanating from the common law to exact performance of a contract (at 77 – 78 paras [56] – [63]).
- [29] The court considered the Chirwa-decision and concluded that in that instance the case was essentially not about jurisdiction, but rather whether there was a good cause of action.
- [30] I am accordingly satisfied that plaintiff’s claim can be entertained by this court.
- [31] Mr Pienaar pointed out in his Heads of Argument that the Constitutional Court ruled in Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC) at 263 D – G para [57] that jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case.
- [32] In terms of the pleadings plaintiff’s action is for specific performance, alternatively damages, both of which the High Court has the power of competence to hear and determine the issues.

[33] As far as defendant raised a special plea that the matter had already been adjudicated by the CCMA, it is clear that the claim before the CCMA (unfair dismissal) and the claim before this court (specific performance) is not the same. In such an instance a defence of *res iudicata* cannot succeed (see **Makhanya v Minister of Safety and Security and Others**<sup>supra</sup> at 85 paras [96] – [100]).

[34] The defendant's second special plea of jurisdiction and *res iudicata* accordingly suffers the same fate as the first special plea and cannot succeed.

[35] As far as costs is concerned, it is trite that costs normally follow the result. I can see no reason to deviate therefrom *in casu*.

[36] Accordingly I made the said order.

---

**C. REINDERS, AJ**

|                             |                                                                          |
|-----------------------------|--------------------------------------------------------------------------|
| On behalf of the plaintiff: | Adv. C. D. Pienaar<br>Instructed by:<br>Bezuidenhout Inc<br>BLOEMFONTEIN |
|-----------------------------|--------------------------------------------------------------------------|

|                             |                                                                          |
|-----------------------------|--------------------------------------------------------------------------|
| On behalf of the defendant: | Mr D. C. Motlaung<br>Instructed by:<br>Motaung Attorneys<br>BLOEMFONTEIN |
|-----------------------------|--------------------------------------------------------------------------|