

IN THE HIGH COURT OF SOUTH AFRICA, DURBAN
REPUBLIC OF SOUTH AFRICA

Case no.: 15664/2007

In the matter between

KEITH FLACK

Plaintiff

and

THE NATIONAL DIRECTOR OF PROSECUTIONS

First Defendant

THE MINISTER OF FINANCE

Second Defendant

**THE MINISTER JUSTICE & CONSTITUTIONAL
DEVELOPMENT**

Third Defendant

JUDGMENT

Heard: 22 August 2012

Handed down: 2 October 2012

D. PILLAY J

[1] Keith Flack, the plaintiff, claims under-payment of remuneration and benefits of R189 635 as damages from the defendants. In response to an advertisement in a newspaper for Senior Special Investigator (Forensic Accountant) he applied for and was appointed as a forensic accountant in the Durban office of the Directorate of Special Operations (DSO) or 'Scorpions' with effect from 1 August 2001.

[2] The DSO was established in terms of s 7 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). Between 1 August 2001 to 30 April 2002 the National Director of Public Prosecutions (NDPP), the first defendant, paid Mr Flack his remuneration and benefits in terms of s 19C(1) of the NPA Act. Such remuneration and benefits were determined by the Minister of Justice and

Constitutional Development (the Minister), the third Defendant, in consultation with the NDPP and in concurrence with the Minister of Finance, the second defendant.

[3] Between 1 May 2002 to 31 May 2006 the NDPP paid Mr Flack's remuneration and benefits in terms of the Public Service Act, 1994 (the PSA). The plaintiff alleges that this change from being remunerated in terms of the NPA Act to the PSA was unlawful; one or other of the defendants breached their contractual obligation and statutory duty resulting in his loss and damages.

[4] In its defence on the merits, the NDPP pointed out that when the DSO advertised the post of Senior Special Investigator (Forensic Accountant) the post of forensic accountant had not been created. The DSO was a new unit. However, it needed forensic accountants urgently. Consequently, the NDPP resolved to 'piggy back' the forensic accountant position on the special investigators' post. Special investigators were appointed in terms of the NPA Act. Hence Mr Flack's initial appointment was to the position of forensic accountant in terms of the NPA Act.

[5] The defendants further alleged that during February 2001 the post of forensic accountant was created. The process began on 28 February 2001 when the NDPP submitted an internal memorandum to the Minister for the creation of a forensic accounting unit within the DSO (exhibit C1-4). He recommended that posts be created on the following notches:

- a) Senior Forensic Accountant +- R550 000 (Deputy Director-General)
- b) Forensic Accountant +- R300 000 (Chief Director)
- c) Assistant Forensic Accountant +- R150 000 (Assistant Director)
- d) Trainee Forensic Accountant +- R70 000 (Administrative Officer)

[6] This recommendation was approved by the Minister on 26 March 2001 subject to a discussion and agreement with his Director-General. The Deputy NDPP (Advocate P Sonn), Chief Director of Finance and Procurement (Mr SZ Nkosi), the Chief Executive Officer (Miss M Sparge) and the NDPP (Mr B Ngcuka) endorsed the recommendation.

[7] About 30 November 2001 Mr Flack applied to the NDPP to be appointed as forensic accountant which was one of the posts created in exhibit C1-4. This post was advertised in the Sunday Times of 18 November 2001 at a package of R348 987 per annum (SMS package). Consequently, on 5 March 2002 the NDPP offered Mr Flack the position of forensic accountant at the DSO. Mr Flack accepted the offer on 11 April 2002. The defendants insist that the post was advertised and accepted as a PSA post. As there was a written offer and acceptance the defendants denied breaching unilaterally and unlawfully any contractual or statutory obligation to Mr Flack.

[8] Mr Flack replicated that he had no knowledge as to when the posts were created or authorised. He maintained that his second appointment was a transfer to the position of forensic accountant with effect from 1 May 2002. Furthermore, he denied knowing before March 2004 that an investigative member of the DSO was remunerated under the NPA Act and not under the PSA, and that there was a material disparity between the remuneration paid in terms of the NPA Act and the PSA. Despite admitting the exchange of correspondence leading to his appointment, Mr Flack denied that he asked to be appointed in terms of the PSA.

[9] About the end of 2001 or early 2002 Mr Flack notified the NDPP that his total salary package of R272 744 differed from the package offered for the same or substantially the same job which was advertised at the package of R348 987 – R375 948. The NDPP adjusted his salary and raised his level from 12 to 13 in line with the advertised post. He contended that the NDPP failed to inform him at the time that the new level 13 post was under the PSA and not the NPA.

[10] Accordingly, he alleged that when he accepted his appointment to forensic accountant on 1 May 2002, he was unaware that his appointment was under the PSA. He further contended that the NDPP had a duty in law to remunerate him in accordance with the package for investigators at level 13 under the NPA Act. Therefore his appointment under the PSA was unlawful and invalid.

[11] Most, if not all the relevant evidence was documented. As the parties agreed that the documents were what they purported to be without admitting the truth of their contents, most of the material facts were common cause. Facts that were not common cause are:

- (a) the dates when the posts to which Mr Flack was appointed were created;
- (b) whether the post of forensic accountant was a NPA or PSA post; and
- (c) whether Mr Flack was underpaid for the period 1 May 2002 – 31 May 2006. If he was underpaid the parties agreed amount due to him would be the amount claimed.

[12] The date when the first post to which Mr Flack applied was established, is not clear. However, exhibit B10-15 is a memorandum signed by the Deputy NDPP, the Executive Manager (Human Resource Manager and Development), the Executive Manager of Finance and the Chief Executive Officer of the NPA recommending Mr Flack's appointment as forensic accountant, not special investigator, at the DSO, Durban.

[13] The date when the second post of forensic accountant to which Mr Flack was appointed was established should have been soon after the recommendation in exhibit C1-4 was adopted. However, in exhibit I, the memorandum dated 29 September 2005 to the Minister, the Chief Executive Officer (Miss MM Sparge) acknowledges queries by the Auditor-General about the:

‘non-existence of an approved organogram/establishment of the National Prosecuting Authority that reflects the current number of posts’.

To that memorandum was attached the establishment for the NPA which was approved. Although the defendants say that the post was created in February 2001, it was only properly established in September 2005.

[14] Therefore, Mr Flack's second appointment was to a post that was only established on 29 September 2005. He was appointed in May 2002 to a post that had been hastily created but not properly established. Nothing turns on the date

of the establishment of the DSO posts other than confirmation that the DSO was newly established and had to overcome some administrative hurdles.

[15] However, exhibit C1-4 imparted a sense of incompleteness. For instance, the notches were estimates. They were also subject to the Director-General's approval. This incompleteness suggested that there had to be further documentation, a fact corroborated by the Auditor-General's queries. Mr Flack pursued the search for further documentation through the application to compel better discovery which yielded exhibit I handed in during the trial. Exhibit I completes exhibit C1-4. The Auditor-General's queries explain and corroborate the defence version that there was no other documentation establishing the DSO before 29 September 2005.

[16] Notwithstanding the disclosure of exhibit I, Miss Nel persisted that the recommendation in exhibit C1-4 was for the creation of posts in the NPA in terms of the NPA Act to the exclusion of the PSA. Her reasons for saying so were firstly, that the vacancy for senior forensic accountant was advertised as a 'director level' post; exhibit C1-4 refers to director posts. As exhibit C1-4 established posts in the NPA, Mr Flack applied for a director level post in the NPA. Secondly, the NPA and its Investigating Directorates had to be free of political interference. Maintaining the independence of the NDPP was an imperative compelled by the Constitution of the Republic of South Africa, 1996. To affirm this she provided the court with copies of *The Khampepe Commission Of Inquiry Report* (Final) February 2006 and *Glenister v President Of The Republic Of South Africa And Others* 2011 (3) SA 347 (CC). To be free of political interference special investigators had to be employed in terms of the NPA Act. PSA employees could not be employed in the NPA without compromising the independence of the NPA because they fell under the authority and influence of the executing authorities referred to in the PSA. Lastly, the legislation did not permit PSA employees to be appointed to the NPA except when they were seconded.

[17] The defendants insisted that the accounting unit posts in exhibit C1-4 were created in terms of the PSA. Furthermore, Mr Flack was not appointed as a

senior special investigator or at director level but as a forensic accountant. Lastly, his terms and conditions were prescribed under the PSA.

[18] When Mr Flack was appointed in August 2001, the DSO was a new unit within the NPA. It did not have a forensic accounting unit. The unit originated in exhibit C1-4, the internal memorandum. The reference in exhibit C1-4 for the posts of Deputy Director-General, Chief Director, Assistant Director and Administrative Officer are references to the equivalent positions in the PSA. They could not possibly have been references to such positions in the NPA Act because no such positions existed. Furthermore, the notches reflected alongside each post are payable to such posts in the PSA. The term 'directors' under the NPA refer to the upper echelons of the investigating directorates and include the NDPP, Deputy NDPPs, Investigating Directors and the heads of Investigating Directorates. Obvious features distinguishing directors under the PSA from directors under the NPA are not only the huge gap in their pay but also in their duties and levels of responsibility.

[19] In exhibit I which established the forensic accounting unit in the DSO the position of senior special investigator and special investigator rank six and seven in the hierarchy of the establishment. Forensic accountants are even lower at eight. Directors rank one and two. The reference to 'director' in the advertisement for senior forensic accountant could therefore not have been for a director post under the NPA.

[20] Mr Flack is also not correct when he asserts that he was employed as a senior special investigator. Notwithstanding the advertisement and his letter of appointment, he was appointed as forensic accountant. He attempted to mislead the court when he testified that he was transferred to a level 13 NPA employee at the beginning of 2002. His Persal records show clearly that he was only elevated to level 13 with his second appointment as forensic accountant.

[21] I finding that Mr Flack was neither a senior special investigator nor at director level. The only issues remaining are whether his employment on PSA terms and conditions was lawful and what his rate of remuneration should have

been.

[22] Ostensibly under the common law, the offers, counter-offers and acceptance of employment were properly made. They are recorded in writing which facilitates my findings. The changes in Mr Flack's conditions of service were therefore not unilateral. On each occasion, he applied for posts which were advertised with the conditions of service. Notwithstanding the ostensible lawfulness of Mr Flack's second contract of employment, the question for determination is whether in law the NPA Act precluded appointments in terms of the PSA to preserve the independence of the NPA.

[23] The NPA is institutionally independent. Section 179 of the Constitution of the Republic of South Africa 1996 establishes

‘a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament’.

The structure consists of the NDPP as the head of the NPA, Directors of Public Prosecutions and prosecutors.

[24] Notably, only the NDPP is appointed by the President, ‘as head of the national executive’. The appointment of forensic accountants, special investigators and other staff was not prescribed by the Constitution to be part of the establishment of the NPA. However, such appointments and all other matters concerning the NPA had to be determined by national legislation. This formation set the NPA apart from other organs of state. Not being a department as defined in the PSA also enhances its independences.

[25] Section 7 of the NPA Act, the legislation contemplated in s 179 of the Constitution, established the DSO in the office of the NDPP. It provided for the NDPP to appoint special investigators to the DSO on the recommendation of the head of the DSO.¹ The head of the DSO was the Deputy NDPP assigned by the NDPP.² Deputy NDPP's were assisted by investigating directors, deputy directors and prosecutors. In addition, sub-sec 7(4)(a) provided for the appointment of

¹ s 19 A

² s 7 (3)

special investigators, public service and other appointments as follows:

(iiA) in the case of the Directorate of Special Operations, special investigators;

iii) officers of any department of state seconded to the service of the Investigating Directorate in terms of the laws governing the public service;

(iv) persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Investigating Directorate; and

(v) any other person whose services are obtained by the head of the Investigating Directorate,

and the persons referred to in subparagraphs (i) to (v) shall perform their powers, duties and functions subject to the control and direction of the head of the Investigating Directorate concerned.

(b) For the purposes of subparagraphs (iv) and (v) of paragraph (a) –

(i) any person or body requested by the head of an Investigating Directorate in writing to do so, shall from time to time, after consultation with the head of an Investigating Directorate, furnish him or her with a list of the names of persons, in the employ or under the control of that person or body, who are fit and available to assist the head of that Investigating Directorate as contemplated in the said subparagraphs (iv) or (v), as the case may be; and

(ii) such a person or body shall, at the request of, and after consultation with, the head of the Investigating Directorate concerned, designate a person or persons mentioned in the list concerned so to assist the head of the Investigating Directorate.’ *(my underlining)*

[26] Apart from the President appointing the NDPP, the NDPP appointed everyone else in the DSO. None of the defendants participated in the

appointments to the DSO. Accountability to and control by the head of the DSO was critical to preserving the independence of the DSO. Everyone appointed to the DSO had to perform their powers, duties and functions subject to the control and direction of the head of the Investigating Directorate.³ It is this accountability and control that insulated the DSO from political interference.

[27] Whatever Mr Flack's position in the DSO, he was, like every other employee in the DSO, subject to the control and direction of the head of the DSO. He would have exercised such powers and performed such duties that the NPA Act 'or any other law'⁴ conferred upon him. Manifestly, the NPA Act was not the only law regulating special investigators and other employees in the DSO.

[28] Ms Nel submitted that the only basis on which persons employed in terms of laws governing the public service could be employed in the DSO was by secondment to the DSO in terms of s 7(4)(a)(iii) and (iv) above of the NPA Act. Put differently, no one, or no special investigator employed in terms of the PSA could be employed in the DSO unless they were seconded.

[29] Her interpretation is unduly restrictive. The NPA Act was a new statute. The investigating directorates and the DSO in particular were even newer. The DSO had to have sufficient flexibility to establish itself and to achieve its objective of being 'the most efficient and effective' prosecuting authority.⁵ Sub-sections 7(4)(a)(iii) and (iv) merely enabled the secondment of people employed in other state departments or even the private sector to the DSO. It did not preclude the appointment of employees on PSA terms and conditions. Sub-section 7(4)(a)(v) conferred a wide power on the head of the investigating directorate to employ any person. Such persons might well have been employees in the public service and elsewhere who were not seconded. Another consideration was that from the perspective of the employees seconded, these provisions ensured that their security of tenure was not disturbed by the secondment.⁶

³ S 7(4)(a)

⁴ S 30(a) of NPA Act

⁵ Preamble to the NPA Act

⁶ S 19C (2): 'If an officer or employee in the public service is appointed as a special investigator, the period of his or her service as special a investigator shall be calculated

[30] Sub-section 7(4)(b) placed the prerogative of employing the most suitable persons in the hands of the head of the Investigating Directorate. This signalled the priority given to the DSO and the authority to seek and employ the best people. Furthermore, it asserted the hierarchy of the DSO over other state departments and any public or other bodies to avoid or minimise conflicts that might have arisen if the DSO poached staff from other entities.

[31] The secondment of public service employees clearly anticipated that some persons staffing the DSO would have conditions of service determined by the PSA and other laws. Section 19 of the NPA also imports the PSA to determine the conditions of service of deputy directors and prosecutors. Section 37 enables the administrative staff of the Investigating Directorates to be appointed under the PSA. In so far as Mr Flack alleged that he was appointed as a director or at director level, s 19 would have had his conditions of service, excluding his remuneration, determined by the PSA. But Mr Flack was not appointed as a director or at director level.

[32] Significantly, s 40(2) empowered the political head, i.e. the Minister in consultation with the NDPP to make regulations regarding the DSO to prescribe the employment, training, promotion, posting, transfer and other personnel management of special investigators. Importantly, it prescribed:

‘the numerical establishment of the Directorate of Special Operations, the conditions of service of the special investigators thereof, the salaries, salary scales, wages and allowances of special investigators and the systems relating to the administration and determination thereof and the various structures, grades, ranks and designations in the Directorate of Special Operations; . . .’⁷

as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other condition of service. The provisions of any pension law applicable to him or her or, in the event of his or her death, to his or her dependents.’ which are not inconsistent with this section, shall, with the necessary changes, continue so to apply. . . .’; See also similar provisions in s 17(2) relating to conditions of NDPP and Deputy NDPP.

⁷ S 40(2)(d)

Nothing in s 40(2)(d) above precluded PSA conditions being imported into the NPA to determine the pay of special investigators.

[33] Regulation 3 published on 2 February 2001⁸ expressly imported the conditions of service of special investigators as follows:

‘Subject to the provisions of Chapter 3A of the Act, all conditions of service of special investigators are governed and regulated by the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994).’

[34] In so far as Mr Flack asserted that he was a senior special investigator, reg 3 imported the PSA conditions of service to apply to him. Regulation 3 did not detract from the Minister’s authority to determine the remuneration and other allowances in terms of s 19C (1). But Mr Flack was not appointed as a senior special investigator.

[35] Employment under PSA terms and conditions did not weaken the independence of the NPA because when making the regulations that import the PSA the Minister had to consult the NDPP. It was not Mr Flack’s case that the participation of the Minister in setting the terms and conditions of special investigators, compromised or diluted the independence of the DSO and therefore s 40(2) read with regulation 3 were unconstitutional. Or that importing the PSA conditions of service into the NPA Act was for the same reasons unconstitutional. This puts to bed Mr Flack’s assertion that the PSA conditions did not apply to special investigators and other staff in the NPA.

[36] Appointing staff on terms and conditions prescribed by the PSA to departments and entities other than the Department of Public Service and Administration is a common and convenient practice. It is convenient because it simply means extending the well-known tried and tested rules for the public service for certainty and clarity. For example, members of the South African Police Service (SAPS) appointed in terms of the PSA are under the command of the SAPS hierarchy and not the hierarchy of the Department of Public Service

⁸ GNR 108 in GG 22027.

and Administration.⁹

[37] Section 19C (1) of NPA Act provided that the remuneration, allowances and other service benefits of special investigators were determined by the Minister, in consultation with the NDPP and with the concurrence of the Minister of Finance. Mr Flack insists that his remuneration and other benefits should be determined in terms of s 19C of the NPA Act, not least because that insulates the DSO from political interference and assures its independence, in a way that the PSA does not. This reasoning is flawed. The NPA Act allows two political heads to participate in determining the pay of special investigators. In contrast, PSA terms and conditions which are determined through centralised collective bargaining in the Public Service Co-ordinating Bargaining Council give political heads less opportunity to influence officials through their pay packets. The executing authorities are usually the director generals. I do not suggest that the participation of the two ministers in determining remuneration, compromises the independence of the NPA; that is Mr Flack's proposition. The fact that the ministers consult the NDPP minimises the risk of political interference.

[38] Accordingly, I find that the NPA Act authorised the employment of personnel on PSA terms and conditions of service. Such employment did not compromise the independence of the NPA or the DSO. Furthermore, Mr Flack was not seconded from a department of state or any public or other body. Sub-section 7(4)(a)(v) authorised the head of the DSO to employ Mr Flack on PSA terms and conditions of service.

[39] Having established that the NPA Act permitted employment within the NPA on PSA terms and conditions, it remains then for the court to determine whether Mr Flack knew or ought to have known that he was employed under PSA terms and conditions. Although Mr Flack alleges that he was not aware that his appointment from 1 May 2002 was in terms of the PSA, the NDPP's offer of employment to him states that it was to

‘a post of **Forensic Accountant at the DSO (Scorpions)** in the **National**

⁹ See for example *SAPS v Police and Prisons Civil Rights Union and Another* (2001) 32 ILJ 1603 (CC) in which the Constitutional Court distinguished between policemen employed in terms of the PSA and those employed under the South African Police Services Act 68 of 1995.

Prosecuting Authority with remuneration of **R371 673 SMS package per annum**. Please take note that you will enjoy the same benefits as officials employed under the **Public Service Act** and **Public Service Regulations**.'

[40] The NDPP highlighted the material portions of its offer as indicated above. This offer differs significantly from his first appointment which did not refer to the PSA and its regulations. As a chartered accountant Mr Flack could not have been in any doubt that the benefits following his appointment from May 2002 was the same as officials employed under the PSA and its regulations. Although this letter of appointment appears to distinguish between his remuneration and benefits, which might suggest that his position was akin to deputy directors and prosecutors in terms of s 19, nothing turns on this distinction because he was not a deputy director or prosecutor. Furthermore, s 19C also did not apply to him because he was not a special investigator. Section 37 of the NPA Act enabled his appointment under the broad category of administrative staff performing the functions of a forensic accountant for the forensic accounting unit created in terms of exhibits C1-4, established in the DSO and confirmed by exhibit I.

[41] Mr Flack asserts that as he was at level 13 he should have been paid at that level as a NPA employee, not as a PSA employee. When the job evaluation was conducted it confirmed that the nature of his duties was such that he should have been at level 13 on the NPA scale. Using the salary scales for chief special investigators and senior special investigators who were level 13 on the NPA scales, he calculated his losses or under payments.

[42] Mr Flack's Persal records show that initially when he was appointed on 1 August 2001 his rank was Line Function with a salary code SUP SR12 on a notch of R206 700 adjusted to R216 129. On promotion on 1 May 2002 his rank was Management Support code SR 13 on notch R371 673. On 1 January 2003 his rank changed to Management Support SR 13 on notch R401 406. He remained on this salary, rank and code with various upward adjustments of his package until he was promoted on 1 September 2006 to the rank of Legal Support salary code SR 13 on notch R523 012. Thereafter his rank and salary

code remained the same with adjustments to his notch until he was transferred on 30 June 2009.

[43] According to Mr Flack's Persal records he never once held the rank of senior special investigator or director. Mr Flack would have been aware of his salary, rank and code with every pay slip he received. Furthermore, his application on 30 November 2001 was for the position of forensic accountant 'as advertised'. The Sunday Times advertisement was for posts at a package of R348 987. Following representations by the regional head of the DSO, Mr Flack received a salary offer of R371 673 SMS package. He accepted his position as a 'transfer' to the post of forensic accountant at the DSO, Durban at the remuneration offered. Therefore Mr Flack was always aware of his rank and the full terms and conditions of his employment.

[44] The nature of Mr Flack's duties also did not entitle him to be paid as a senior special investigator as he claimed. Neither was he an administrator. He rendered forensic accounting services. In terms of the job description of special investigators their powers enumerated in s 30(2) of the NPA Act are akin to the powers of the police. Sub-section 30(2) which enumerated the powers and functions of special investigators, began as follows:

'(2) A special investigator has the powers as provided for in the Criminal Procedure Act, 1977 (Act 51 of 1977), which are bestowed upon a peace officer or a police official, relating to –'

[45] At most, forensic accountants might have been involved in the investigation of offences but from a purely forensic accounting angle. Accountants did not have to search and enter premises, seize and dispose of articles, effect arrests, serve execution warrants and attend on the accused in court. The protocols for the appointment of special investigators were also prescribed. The NDPP had to issue an identity document in the prescribed form to each special investigator to serve as proof of his or her appointment as such. Special investigators were also subjected to security screening in terms of s 19B of the NPA. The NDPP had to issue a security clearance certificate to every special investigator. Special investigators were also subjected to periodic

screening. They had to take an oath of office before a judge which Mr Flack confirmed he did not do.

[46] Although Mr Flack testified in cross-examination that he had to obtain security clearance he was not subjected to the same degree of scrutiny as special investigators. He was not inducted with the same training as special investigators. In the nature of his duties he did not carry the same degree of personal risk as special investigators did. He was desk bound. His job description was not investigative in the same way that special investigators were. Accordingly I am fortified in my finding that he was not employed as a senior special investigator and his duties were not those of a special investigator. However, the value of his work as a forensic accountant was important. First recognition of this came with the job evaluation undertaken in 2006 when he was ranked level 13 on the NPA scale.

[47] Chapter 1 part 5 of the regulations to the PSA provide at reg C7 that the absorption of an incumbent employee into a higher grade post takes effect on the first day of the month following the month during which the executing authority approves that absorption. In other words the re-grading of Mr Flack's position could not be effected retrospectively. Surprisingly, after denying his appointment in terms of the PSA, Ms Nel relied on s 37 of the PSA as the means by which Mr Flack could be paid more than the scale he agreed to. Besides there being no legal mechanisms to back pay him, there is no factual justification to do so. The job evaluation was an assessment of the current state of the DSO. In a new evolving unit, the nature of his duties and his experience in the job would also have evolved. Therefore, it did not necessarily follow that his level 13 on the NPA scale in 2006 would have been his level in 2002. However, the most compelling reason for not paying Mr Flack anything more than what he agreed to emerges from his own choice.

[48] Confirmation that Mr Flack was not entitled to a higher rate of pay emerges from The Sunday Times advertisement. Above the position he applied for was another advertisement for forensic accountants on an SMS package of R553 626. Besides the substantial pay differential, the higher package required

the incumbent to supervise other accountants in the DSO. Ms Nel's submission that the two posts were the same was therefore misleading. Mr Flack occupied the only post for a forensic accountant in KwaZulu Natal. He had no one to supervise. He could have applied for the post carrying the higher package since both advertisements were next to each other. But he did not do so. He must have known his own limitations when he applied for the position with a lower package. Mr Flack was therefore not underpaid.

[49] The defendants raised four special pleas. The first two related to alleged noncompliance with the statutory requirements of ss 3, 4 and 5 of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The defendants alleged that Mr Flack did not give six months' notice before instituting proceedings and they did not consent in writing to the proceedings being instituted. The third special plea was that the claims before 2 January 2005 had prescribed. Mr Flack issued summons on 21 December 2007. The fourth special plea was to the jurisdiction of the High Court. The defendants alleged that s 157(1) of the Labour Relations Act 66 of 1995 conferred exclusive jurisdiction on the Labour Court in respect of labour disputes.

[50] Following an application for condonation of non-compliance with Act 40 of 2002 the parties agreed to take an order withdrawing the application with no order as to costs. The defendants abandoned the second point *in limine*. When the matter was set down for trial the first time and adjourned *sine die* with costs reserved, the defendants withdrew their first and fourth special pleas. On that day they also obtained an order condoning Mr Flack's failure to give notice in terms of the Act 40 of 2002.

[51] The only special plea remaining was that of prescription. Having found that Mr Flack was aware of his rank, rates of pay, terms and conditions of employment with every advertisement he responded to, and every letter of appointment and payslip he received, he cannot reasonably plead ignorance of these facts. Furthermore, the salary scales of senior special investigators and chief investigating officers were published periodically in the Government Gazette and advertisements for vacancies. As a forensic accountant Mr Flack

could easily have ascertained the information he needed to assess whether he was employed in terms of the NPA Act or the PSA from the outset. In the circumstances prescription was well pleaded.

[52] The costs of the special pleas and interlocutory applications including an application to discover remain outstanding. Two factors weigh strongly in my deliberations. Firstly, much of the information relevant to determining this dispute on its merits was in the public domain or easily available to Mr Flack. Secondly both parties left trial preparation to the last minute. Furthermore, when they did conduct pre-trial conferences they failed to apply themselves properly to identifying what the issues in dispute were, what information was lacking, and how they intended to prosecute the trial. For instance, in reply to a request for further particulars from the defendants Mr Flack's representatives continued to play coy with the information at their disposal. On the side of the defendants, they failed to search and disclose documents timeously.

[53] Mr Flack cannot claim costs of the application for condonation from the defendants merely because the defendants consented eventually. This was an indulgence he sought. The defendants obliged. They cannot be saddled with the costs of his oversight.

[54] The costs of all the special pleas are inconsequential in the circumstances of this case. Given the degree of unpreparedness for trial, each party should pay its own costs reserved on 24 October 2011.

[55] However, Mr Flack launched a substantial application to compel discovery the day before the trial. I adjourned that application after directing the parties to exchange whatever documents they had that were relevant to the trial. In the course of the trial the defendants produced only one further document that was relevant namely the establishment of the DSO exhibit I. Another document which was relevant namely the Sunday Times advertisement of 18 November 2001 was sourced by Mr Flack's representatives. As a document generated by the NDPP, the defendants should have discovered exhibit I. However, exhibit I merely completes the picture as far as the establishment of the DSO goes. It does not

assist the plaintiff. The plaintiff prepared a massive volume of documents for this trial, much of which was not referred to. The documents sought in the discovery application were irrelevant to proving Mr Flack's claim. In the circumstances Mr Flack is not entitled to the costs of the application to compel discovery. However, the defendants are also not entitled to those costs as they should have responded to the rule 35(3) notice sooner to avert the application to compel. Consequently each party should pay its own costs of the application to compel discovery.

[56] As for costs of the trial, all the relevant evidence was documentary. The parties could have avoided three full trial days with oral evidence being led of one witness for each side. They should have agreed on a bundle of documents and presented a stated case for the court to determine. The dispute was located in a bureaucracy. Therefore context in which the documents emerged could not be disputed. Furthermore, the parties agreed that the documents were what they purported to be. Add to that the Parol evidence rule, the interpretation of the documents was a matter for the courts, not witnesses. Inattention to pre-trial preparation and underrating its value for efficient dispute resolution is not only weighing down the court rolls but also increasing the cost of litigation unduly. To remedy this, litigants who burden the court rolls unduly and lawyers who fail to pre-trial properly should be denied or mulcted with costs. In this instance imposing such a punitive order for costs as between party and party is not appropriate as both legal representatives are co-responsible for the unnecessary was of court time. However, their clients are informed in this judgment that this case could have been concluded in a day if the parties had presented a stated case.

[57] The order I grant is the following:

- a) the claim of the plaintiff Mr Flack is dismissed with costs;
- b) each party pays its own costs of the special pleas and interlocutory applications.

D.PILLAY J

Date of Hearing: 21-24 August 2012 and

Date of Judgment: 2 October 2012

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