IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 31/2020

In the matter between:

MINISTER OF DEFENCE AND MILITARY VETERANS	**First Appellant**
DEPARTMENT OF DEFENCE	**Second Appellant**
SECRETARY FOR DEFENCE	**Third Appellant**
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	**Fourth Appellant**
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	**Fifth Appellant**

And

PUBLIC SERVANTS' ASSOCIATION obo MEMBERS	**Respondent**

Heard: 9 September 2021

Delivered: Deemed to be on 3 November 2021

Coram: Davis, C Musi et Coppin JJA

JUDGMENT

COPPIN JA

[1] This appeal is against the orders of the Labour Court (Mabaso AJ) in terms of which it partly dismissed the appellant's special plea of prescription and condoned the respondent's failure to comply with section 3 of the Institution of

Legal Proceedings Against Certain Organs of State Act[1] ("ILPA"). Leave to appeal to this Court was granted by the court *a quo*. There is no cross-appeal.

[2] The prominent issue in this matter is, essentially, whether the court *a quo* was correct in granting the said condonation even if it was only in respect of those "claims" that it found had not prescribed, being those that "arose" after October 2011. As part of the condonation aspect, the question arose to considered whether the debts that were being claimed by the respondents had been extinguished by prescription, as envisaged in the Prescription Act[2].

[3] The Public Servants Association ("PSA"), acting on behalf of certain of its members, listed in annexure "A" to its statement of case (and who, together, are referred to as "the respondents") instituted a claim against the appellants for declaratory orders and relief consequential thereto, including damages, allegedly made up of overall differences in salaries and pension benefits due from about 1998 until after the date of the delivery of the statement of claim on 24 October 2016. The claim is based on alternative causes of action, the main one being alleged breach of contract, and the immediate alternatives, alleged misrepresentation (fraudulent, alternatively, negligent) and further alternative, delictual (for alleged pure economic loss).

[4] In response to the claim, the appellants raised two special pleas, namely, firstly, the failure by the respondents to comply with section 3 of the ILPA, which provides, in essence, that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless a notice, as prescribed in that section, had been given to the organ of state within six months from the date the debt became due[3] , and secondly, a plea of prescription, more particularly, alleging that the entire debt that the respondents were claiming had been extinguished by prescription as contemplated in the Prescription Act.

[5] It is not disputed, at least for purposes of adjudication of the said special pleas, that the respondent members of the PSA, who were previously part of

[1] Act 40 of 2002.
[2] Act 68 of 1969.
[3] a "debt" is defined in section 1 of the ILPA as any debt arising from any cause of action.

the South African Defence Force and who occupied, essentially, accounting, financial, or administrative positions, had agreed, in terms of individual written contracts entered into with the Department of Defence in about November 1998, to be demilitarised, and effectively, to become members of the Public Service.

[6] In their claim the respondents essentially allege that they were induced to enter into the demilitarisation contracts by, *inter alia*, representations made by the appellants, or more particularly, individuals in the National Defence Department, that if they were demilitarised they would "not be in a worse off position with regard to their monthly salaries and pension benefits" than if they remained in the Defence Force (i.e. militarised). They further allege, *inter-alia*, that the representations were false, because soon after they had entered into the demilitarisation contracts, it became apparent that they were indeed going to be worse-off in respect of salaries and pension benefits in the Public Service.

The Labour Court

[7] Instead of considering the failure to comply with the ILPA and the condonation aspect first and then determining the issue of prescription as an adjunct to that exercise, as section 3 of the ILPA seems to dictate, the court *a quo* determined the prescription aspect first, and then considered the condonation aspect only in respect of the part of the claim which it held had not prescribed.

[8] Accordingly, the court *a quo*, having decided that only the debts up to October 2011 had prescribed, went on to consider the condonation aspect only in relation to the part(s) of the "claim", that it concluded had arisen after October 2011, and granted condonation in respect of those, reasoning that "condonation for the period prior to October 2011 is not necessary."

[9] Viewed superficially this unconventional approach does not seem to matter, but closely analysed, it does indeed have a material impact on the proper approach to and outcome of the condonation enquiry required in terms of section 3 of the ILPA.

[10] It is not in issue that the respondents did not give any notice as contemplated in section 3 of the ILPA to any of the appellants in respect of any “debt” that they were claiming. It was also not disputed that the claims of the respondents are“debts” as defined in section 1 of the ILPA .

[11] The court a quo dealt with the condonation aspect for the part of the claim for the period following October 2014 in one paragraph, and more particularly, as follows: “the [respondents] contend that following the demilitarisation, the formal grievances were launched, and as late as November 2014 there continued to be indications that the State were attending to their concerns in respect of the pension funds however without the resolution. In a condonation application a court has to take into account the interest of justice. Section 3(4)(a) of the ILPA provides that this court may grant condonation if good cause exists for the failure and the organ of state was not unreasonably prejudiced by the failure. Based on the reasons provided for the non-compliance with the provisions of section 3 notice and that the parties were engaging each other and that before me there is no suggestions that the State was unreasonably prejudiced by the failure to comply with the provisions of section 3. I have considered the facts of this case and the explanation provided for the delay and [I] am of the view that it would not be in the interest of justice if condonation is not granted for the period that I have mentioned above, October 2011 onwards.” Significantly, the court *a quo* did not mention other aspects of the concept “good cause”, such as, for example, prospects of success.

[12] Having reasoned thus the court *a quo* went on to make the following order: “1. The special plea of prescription, relating to the plaintiff before the period of October 2011 is upheld; 2. The special plea of prescription, relating to claims after October 2011 is dismissed; 3. The [respondents] failure to comply with section 3 of the [ILPA] is condoned; 4. There is no order as to costs.”

<u>Submissions</u>

[13] On appeal, the appellants argued, essentially, that while the court *a quo* was wrong in not finding that the entire claim (i.e. before and after October 2011) effectively for damages had prescribed, and had also erred in condoning the respondents' failure to comply with section 3 of the ILPA. Appellants submitted that this was not only because the claim had prescribed, but also because no good cause had been shown for the respondents' failure to comply with the section and because the appellants were indeed unreasonably prejudiced by that failure.

[14] The respondents, on the other hand, support the court *a quo*'s judgment on the prescription issue and argue, essentially, that the grant of condonation was justified in light of the explanation they gave for their failure to comply and, according to them, because of the absence of any prejudice on the part of the appellants and their good prospects of success.

<u>Discussion</u>

[15] The structure of section 3(4) of the ILPA appears to dictate the approach that has to be adopted in considering the order of the special pleas. The section provides as follows: "(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure. (b) The court may grant an application referred to in paragraph (a) if it is satisfied that – (i) the debt has not been extinguished by prescription; (ii) good cause exists for the failure by the creditor; and (iii) the organ of state was not unreasonably prejudiced by the failure. (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[16] Thus, in the process of determining whether to grant condonation the court would have to determine whether the debt that is being claimed has not been extinguished by prescription as contemplated in the Prescription Act.

[17] It has been held with reference, in particular, to section 3(4)(b) of the ILPA that its structure implies that the court considering condonation in the exercise

of its discretion has to be satisfied that all three the requirements listed in subsections (i),(ii) and(iii) are met[4]. The court must therefore be satisfied not only that the debt that is being claimed has not been extinguished by prescription, but that good cause also exists for the failure to serve the notice contemplated in section 3(2) of the ILPA and that the organ of state has not been unreasonably prejudiced by such failure.

Prescription

[18] The respondents, in effect, averred that the claim could not prescribe because the "unfair labour practice" was ongoing and occurred on a monthly basis. The court *a quo,* supportive of that argument, was of the view that the "ongoing effect" supports the respondents' "cause of action" only in relation to a period of three years from October 2011 onwards. This conclusion, according to the court *a quo*, was premised on the respondents' reliance on the judgment of this Court in *SABC Ltd v CCMA*[5]. In its understanding, that decision "relating to 'ongoing effect', confirmed that the cause of action would be regarded as a factor if by the time of referral the conduct was still there", and even though that matter was distinguishable on the facts, in that the issue there was about continuous discrimination allegedly perpetrated by the SABC.

[19] Thus, essentially, the court *a quo*, seemingly, regarded the respondents' cause of action as consisting of claims arising from multiple causes of action, which would have arisen as and when the affected member's salary and all pension benefits fell due. Each of those would have prescribed, according to the court *a quo*, after a period of three years from the date they fell due, and the only claims, as it were, that survived extinction by prescription were those that arose from October 2011 onwards. That date was adopted as a "cut-off" date, presumably, because of the respondents' version that grievances had been lodged.

[20] According to the appellants, the court *a quo* erred in its approach and conclusion, because there was only one cause of action and, effectively, only

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[4] *Madinda v Minister of Safety and Security, RSA* 2008 (4) SA 312 (SCA) para 16.
[5] [2010] 3 BLLR 251 (LAC).

one debt that was being claimed, for the entire period, namely, damages; that the debt became due immediately after demilitarisation commenced on 1 November 1998 and particularly in December 1998, when it became apparent that the members were "worse-off", as found by the court *a quo*; and that the entire debt, accordingly, prescribed three years later, so that by the time the statement of claim was issued, the entire debt had long been extinguished by prescription.

[21] It bears mentioning that the Prescription Act refers to a "debt" principally because it views prescription from the perspective of the debtor. The creditor, on the other hand, has a right of action which it enforces by making out a cause of action. The right of action and cause of action are therefore corollaries of the debt. They arise simultaneously and are simultaneously extinguished.

[22] The breach of a right might, according to the substantive law, give rise to a single or multiple causes of action which may be pursued either at once, or in the alternative, as the substantive law and logic dictates.

[23] Procedural law requires the creditor, not merely to claim relief, but to inform the debtor about the precise nature of his claim. This involves setting out the cause of action relied upon by the creditor, including the essential facts on which it is based (i.e. the *facta probanda*). The following definition of "cause of action" by Lord Esher MR in *Read v Brown*[6] has been accepted and adopted by our courts[7]: "[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[24] In their statement of case, delivered on 24 October 2016, the respondents claim several forms of relief, more particularly, declaratory orders, namely declaring, firstly, that its members are in a "worse-off" position, with regard to their monthly salaries and benefits, than what they would have been in if they

[6] (1888) 22 QBD 131.
[7] See, *inter alia*, *McKenzie v Farmers' Co-Operative Meat Undertaking Ltd* 1922 AD 16 at 22; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835 ("*Evins*").

were not demilitarised; secondly, that the appellants are in breach of a term (alleged to be implied or tacit) of the demilitarisation contract that their members would not be "worse-off" after demilitarisation, alternatively, declaring that the appellants made a fraudulent (alternatively, negligent) misrepresentation to that effect, that induced their members to enter into the demilitarisation contract, further alternatively, declaring that the appellants caused their members pure economic loss.

[25] From the statement of case and those claims for declaratory relief, the causes of action relied upon by the respondents are largely discernible, but for the one based on alleged ''pure economic loss''. Their main cause of action is one of breach of contract, the allegation being that the appellants breached a term of the contract. The alternative causes of action are delictual[8], firstly they allege fraudulent (alternatively negligent) misrepresentation, and further alternatively, pure economic loss (which would at least require proof of negligence, that is, assuming that it is what it on the surface appears to be).

[26] In the ensuing prayers in their statement of case the respondents claim relief consequential to those declarators. Firstly, in paragraph 56.3, they claim an order: "ordering [the appellants] to with immediate effect restore the pension benefits for each member to that which would have applied to him or her had he or she not demilitarised, including extension of the compulsory retirement age to 65 (sixty-five) instead of 60 (sixty), alternatively restoring the extra 1 in every 4 years' service for purposes of pension (equating to 16% employer contribution)."

[27] Secondly, in paragraph 56.4, they claim an order: "ordering [the appellants] to with immediate effect place the members on the salary scales/notches respectively that they would have been on had they not demilitarised, and to pay each member the concomitant monthly salary henceforth." Thirdly, in paragraph 56.5 they claim an order "ordering the [appellants] with immediate

[8] See *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1936 TPD 209 at 215; *Trotman v Edwick* 1951 (1) SA 443 (A) at 449B;GB Bradfield *Christie's Law of Contract in South Africa* (7 ed) at 344 ("*Christie's*") (re: fraudulent and negligent misrepresentations relating to contracts); and *Pilkington Bros.(SA)(Pty) Ltd v LIllicrap, Wassenaar & Partners* 1983 (2) SA 159 (W) (re: pure economic loss).

effect to pay the amounts as set out in annexure "C"" to the statement of claim, "as damages with regard to salary losses to the members." Fourthly, in paragraph 56.6 they seek an order that the appellants pay interest at the prescribed rate (presumably on all amounts claimed) from the date of issue of the statement of case to the date of full and final settlement (presumably of all monetary claims). And lastly, they seek the costs of suit.

[28] In light of the case made out by the respondents in their statement of case, there is merit in the appellant's submissions that the court *a quo* erred in its view of "ongoing effect", so that it adopted an approach and conclusion, in effect, that even though there was a single cause of action, there were multiple claims and only those claims before October 2011 had prescribed. It should not have made the distinction that it had made, but should have given due consideration to the exact nature of the causes of action pleaded and to legal prescripts such as, vitally in this case, the "once and for all" rule, which is closely allied to the *res judicata* principle and prescription.

[29] The rule applies especially to delictual claims for damages[9] and to claims for breach of contract[10] arising from a single cause of action. The rule is the same in both contexts and is aptly summarised by the Supreme Court of Appeal in *Symington*[11] as follows: "This rule is based on the principle that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such cause. Its purpose is to prevent a multiplicity of actions based on the single cause of action and to ensure that there is an end to litigation."

[30] Thus, if a breach of contract, or delict, relied upon, causes damage, a right of action accrues immediately for all damages flowing from the unlawful act, including for prospective damages. If a cause of action for the damages has accrued and the prescriptive period has run, the claimant's (or creditor's) right of action is prescribed and he or she is precluded by the principles of prescription (and of *res judicata*) from suing for damages arising from that

[9] See inter alia, *Evins* (above) at 835.
[S] See *Christie's* (above) at 650-651 and the cases cited there.
[11] *Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd* 2005 (5) SA 550 SCA) at 563.

same cause of action, even though the loss or losses, giving rise to the claim for damages or occurs, or becomes manifest, after the prescriptive period has run. In sum, the "once and for all" rule requires a claimant to claim all damages (past, present and future), flowing from the same cause of action, at once[12].

[31] It is apparent from the respondents' statement of case that the cause of action based on breach of contract has been pleaded as a single cause of action from which the claims have arisen. The respondents rely on the single breach of a single (alleged) implied, alternatively, tacit term that the members of the PSA, that opted for demilitarisation, would not be "worse off" in that position than those in the military.

[32] The alternative delictual causes of action are obviously pleaded as single causes of action. According to the statement of case the alleged fraudulent or negligent misrepresentation was made before the demilitarisation contracts were concluded. The fact that these causes of action are singular further confirms that the main cause of action, based on contract, is also a singular cause of action. Assuming the cause of action for pure economic loss is based on an alleged misstatement, it is, similarly, a single cause of action that could give rise to multiple claims, including a claim for the payment of damages. Upon further scrutiny, the statement of case, in dealing with the claim for pure economic loss, makes reference to the members' right to fair labour practices and alleges that the condition of being "worse off", after demilitarisation, was unfair. This "cause of acton" is therefore not a quintessential delictual one for pure economic loss. The implications of that will be considered when dealing with prospects of success under the "good cause" aspect.

[33] In this instance, the damages alleged to have been suffered (i.e. seemingly representing the difference in salary and pension benefits which the members of the respondent receive and which they allegedly would have received if they remained in the military, or ought to have received in terms of their demilitarised contracts, i.e.with the tacit term, they contend for, having been

[12] See *inter alia*, *Evins* (above)

imported therein) flows from one alleged source, namely the alleged breach of that implied or tacit contractual term. Alternatively, it flows from an alleged fraudulent or negligent misrepresentation to that effect which induced the contracts, or negligent act (resulting in their alleged pure economic loss).

[34] Those rights and causes of action relied upon by the respondents would have arisen simultaneously, on the respondents' very version, and as found by the court *a quo*, shortly after the signature of the demilitarisation contracts at the end of 1998, and would have been subject to a three year prescriptive period. The "once and for all" rule, which applies to all of them, required that all claims for damages, which had already been suffered and that which was still to be suffered (i.e. prospective damages), to have been claimed once and for all in one action, albeit in the alternative, before prescription had run. The fact that the "lesser" payments in salary and pension benefits for future dates were not yet manifest and would only become so later after the prescriptive period had run, did not make them claimable after that period.

[35] To summarise on the prescription issue, the court *a quo* erred in finding that only awards up to October 2011 had prescribed while the rest remained claimable. It should have found that the single causes of action relied upon by the respondents had prescribed three years after they had arisen, that is shortly after the signature of the demilitarisation contracts in November 1998 and that by the time the statement of case was issued, in which the respondents attempted to pursue those very causes of action, they had long prescribed.

[36] Put differently, it should have found that all the debts, that is for damages and payments and for the performance of other obligations, that properly fall within the meaning of "debt" in the Prescription Act, and that the respondents sought to claim from the appellants, and which flowed from the breach of contract or delict relied upon by the respondents, had been extinguished by prescription. It would make no sense in those circumstances to issue a declarators in respect of causes or rights of action that had already prescribed.

[37] Even though the conclusion on the prescription issue will produce a decisive result in respect of the broader question of condonation, the other aspects of the condonation are also considered below.

The requirement of "good cause"

[38] It is appropriate to preface the discussion of this aspect with a summary of the rationale for the kind of time-barring legislation such as the ILPA. In *Moise*[13] the Constitutional Court found that the rationale for such legislation had been conveniently summarised by the South African Law Commission in paragraph 4 of its report of October 1985, and particularly, as follows: "The circumstances under which the State can incur liability are legion. Because of the State's large and fluctuating workforce and extent of its activities, it is impossible to investigate an incident properly long after it has taken place… The State is obliged by law to follow cautious and sometimes cumbersome procedures. Government bodies operate on an annual budget and must be notified of possible claims as soon as possible….The State needs time to deliberate and consider questions of policy and the possibility of settlements….The State acts in the public interest and not for gain… Because public funds are involved the State must guard against unfounded claims….The State is an attractive target for unfounded claims."[14]

[39] The phrase "good cause" is well known in our law and practice. The need to consider whether "good cause" exists often arises, for example, in regard to non-compliance with the rules of court. Relevant considerations are now trite. They may include the degree of non-compliance, the explanation therefor, the prospects of success, the importance of the matter, the convenience of the court and avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. It is also a matter of trite principle that in the exercise of the court's discretion these factors are to be weighed against each other. But condonation is not a mere formality or granted merely because it is requested. The party who seeks condonation would have to satisfy the court that there exists good cause for its failure to comply. The absence of a reasonable

[13] *Moise v Germiston Transitional Local Council* 2001 (4) SA 491 (CC) para 9.
[14] See also per Didcott J in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 11 and per Ngcobo J in *Brummer v Minister of Social Development and others* 2009(6) SA 323 (CC) para 50.

explanation for the delay may well be decisive of the application, and so may a lack of, or weak prospects of success.

The extent of the delay and its explanation (including prejudice)

[40] Shortly after signing the contracts opting to become demilitarised, the PSA and its affected members, on their own version, became aware that they would be worse off than their military colleagues and that the representation to the contrary was false, but they seemingly did nothing substantive about it. Mr Arnold Dlamini, who deposed to the affidavit in support of the respondents' application for condonation, *inter-alia*, states, that the differences in salary and other benefits started becoming apparent from 2002; and that "over time a number of grievances were raised", without being more specific about the precise date(s) when such grievances were raised. He also states that the appellants "have continuously and up to recently indicated that particularly the issue of pension benefits was still being considered", again without giving specific dates or details, save for stating that "the last indication was about in November 2014."

[41] Instead of being specific, Mr Dlamini makes broad, vague statements that create an impression, that the grievances were pursued with diligence, but unfortunately they fall short on detail. He, for example, even tries to blame the respondents dilatoriness on the fact that the process (presumably referring to the revision of the pension benefits) "was a cumbersome and lengthy process, involving the consideration of documentation stretching over a long period of time". He also, curiously, mentions that it would also involve the gathering of information from "many members (some still serving, other retired) and various consultations", seemingly underscoring the very source of the prejudice that arises when claimants do not act promptly in asserting their rights in bringing claims as soon as possible after they had arisen.

[42] Under the heading "delays/failure", Mr Dlamini refers to correspondence exchanged between the respondents' attorneys and the appellants and more particularly to (a) a letter dated 30 March 2015 in which details of the members and their claims are supposedly summarised; and (b) a follow-up

letter dated 4 June 2016; and (c) a further follow-up letter, the date of which is not stated, in which mention was made of a "possible approach to the court" for relief; and (d) an email message allegedly dated 27 August 2015 addressed to the Secretary of Defence. But the copies of those letters were however omitted from and not attached to the affidavit. The respondents only purported to insert them by way of a "supplementary affidavit" which they delivered at the same time as their replying affidavit in the condonation application on 5 April 2019. Leave for the filing of the further affidavit had never been sought or granted by the court and technically therefore could not have been taken into account.

[43] In any event, with reference to those letters, Mr Dlamini states that the appellants "clearly have known about this matter for a substantial period of time and are purportedly still giving attention to particularly the pension prejudice suffered by the members." He further claims that the appellants "have not and could not have been caught by surprise when the statement of case was served on them."

[44] The explanation hardly covers the entire period, from shortly after signature of the demilitarisation contract, that is November or December 1998 and lacks detail. According to the respondents, they commenced consultation with their legal team in respect of the preparation of the statement of case only in November 2014, that is about 16 years after November 1998 when the causes of action, relied upon by the respondents, would have arisen.

[45] More significantly, no reason, at all, is furnished by the respondents why a notice as contemplated in section 3 of the ILPA had not been served, or caused to be served, on the appellants (or the State Attorney) informing of their intention to institute the very proceedings in this matter in the Labour Court, and no effort was made to even give a belated notice, despite acquiring knowledge that such a notice was required. The application for condonation itself was not brought promptly after the appellants had raised the issue of non-compliance with section 3 of the ILPA. It was only brought at the end of March 2017; that is more than three months later.

[46] The appellants deny that any, let alone a number of grievances had been raised by the respondents concerning their being “worse off” in respect of salaries and pension benefits, and aver that the only greviance that had been raised related to former “Mkonto we Sizwe”, or “MK” soldiers, some of whom had been appointed in the Finance Unit of the Defence Force, who wanted a review of their ranks. Instead of replying to the appellants’ version by providing specifics of the alleged grievances (i.e. relating specifically to the issues raised in this matter regarding salaries and pension benefits) they raised, the respondents replied to the appellants’ averment with a bare denial.

[47] Regarding the issue of the pension benefits, the appellants admit endeavouring to engage concerning that issue even though the respondent members had no right or entitlement to the benefits of military soldiers in terms of the Defence Act. Despite not being obliged to do so, the appellants took the initiative and engaged in a process of seeking approval for the reinstatement of a one quarter increase of pensionable service years for the period by which the members’ pensionable service exceeds the period of 10 years that was forfeited by those members who became de-militarised on 31 October 1998 and left the Department of Defence before reaching the age of 60, as well as those that were still in its service who had retained the retirement age of 60.

[48] According to the appellants, even though that initiative was in conflict with the rules of the Government Employees Pension Fund, the first appellant and the Department of Public Service and Administration have approved the initiative and a resolution (No. 1 of 2018), which regulates the reinstatement of the pension fund, was signed on 29 March 2017. The pension fund benefit issue had thus been settled in full. In their reply to these contentions of the appellants, the respondents recorded a bare denial, but then, curiously, make mention of being advised that the relevant changes to the pension benefits will be made to the government pension fund rules.

[49] Contrary to the suggestion of the respondents that the appellants could not have been surprised by their statement of case, the appellants aver that they were indeed “caught by surprise when served with the statement of case” as

18 years had elapsed since the conclusion of the demilitarisation contracts. The appellants further state that this delay had caused them substantial prejudice in that in order to refute the respondents' claims they would be obliged to call as witnesses the persons who allegedly made the representations that formed the basis of respondents claims; that there is a great likelihood, because of the substantial passage of time, that those persons may no longer be alive, or traceable, and even if they were alive and traceable, that their memories of the details may have faded. These possibilities cannot be gainsaid.

Prospects of the claims

[50] I turn briefly to the prospects of success - Contrary to the respondents' optimistic averments that they have good prospects of succeeding in proving their claims, the appellants contend that there are none.

[51] As pointed out earlier, the claims susceptible to prescription, that arose from the single contractual and delictual causes of action, relied upon by the respondents, have prescribed. It would make no sense to grant declaratory relief in respect of prescribed rights of action.

[52] In any event, the main cause of action, relied upon by the respondents is destructive of the alternative delictual claims they rely upon, and vice versa. In respect of the former the respondents seek to rely on an (alleged) breach of an "implied alternatively tacit term" that "after demilitarisation… the members would not be worse off with regard to their terms and conditions of employment, including remuneration and pension benefits". And yet, in the alternative delictual claims, the respondents allege that very statement to be a false representation which induced the demilitarisation contracts.

[53] In respect of the main claim, it is not apparent at all from the statement of case whether the "implied" term is alleged to be one of law, since no detail of the law(s), in terms of which it is supposedly implied, has been given. Presumably as they have pleaded the "implied" term as an alternative to the

"tacit" term, they did not intend for them to have a synonymous meaning[15]. In any event, insofar is reliance is placed on a "tacit term", the enquiry will first have to be whether there is room for importing that term into the demilitarisation contracts of each individual member of the respondent that has been affected.

[54] It cannot be imported if it would be in conflict with the express provisions in those contacts nor can it be imported in respect of matters to which the parties have clearly applied their minds and in respect of which express provision had been made for in the contract. Courts are slow to imply terms; that is to import tacit terms into an express contract, which are not found in the contract, "where in the printed conditions the whole subject is dealt with in the greatest detail; and where the condition…asked [to be implied] is one of the very greatest importance on a matter which could not have been absent from the minds of the parties at the time when the agreement was made."[16] It is also a requirement that a term will only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such term if it had been suggested to them at the time of contracting[17].

[55] In all of those respects, the respondents, on the face of it, would be confronted with considerable, most probably insurmountable, hurdles. The term contended for is not only very vague, reducing the likelihood of consensus if it had been proposed as a term at the time of the conclusion of the contract, but, in addition, the signed demilitarisation contracts deal comprehensively with all the relevant aspects, including the remuneration and pension benefits upon demilitarisation. It can hardly be said that the parties did not apply their minds to those aspects. Further, if the respondents seek to accord their alleged term a meaning that the demilitarised would be treated on an equal footing with those that remained in the military – that is, notwithstanding the fact that the Defence Act and other defence laws were no longer applicable to them, and the Public Service Act and Public Finance

[15] See, inter alia, *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); *Christie's* (above) at 197.
[16] See per Solomon JA in *Union Government (Minister of Railways) v Fause Ltd* 1916 AD 105 at 112; *Christie's* (above) at 198.
[17] *City of Cape Town (CMC Administration) v Bourbon Leftly* 2006 (3) SA 488 (SCA) para 19.

Management Act and other laws in the Public Service now applied to them (and did not apply to those that remained in the military) – it might well mean that the alleged tacit term is in conflict with the express terms of the demilitarisation contract. The importation of that term would defeat the object of that contract and of demilitarisation.

[56] As pointed out earlier, in their delictual claims the very term they seek to import, which they refer to as a representation, and which, when made, was known to be false. While the rules of pleading may allow the latitude of pleading conflicting concepts (or versions) in the alternative, the evidence to be presented by the respondents at the trial can either be one or the other, but it cannot be attested to as being both, a tacit term, which ought to be imported into the contract, and a false representation. The one is the product of agreement the other a unilateral, delictual wrong.

[57] The respondents claim for “pure economic loss” seems more of a claim for an alleged unfair labour practice, in the thin guise of a delictual claim for pure economic loss. But for its adopted moniker, it seems to have a lot in common with a claim, brought in the Labour Court by another union, NEHAWU, acting on behalf of civilian employees of the Department of Defence’s Financial Management Division, which was purportedly based on contract and in which they effectively sought a declaratory order that their placement in civilian posts had an ‘’unfair effect’’ on them, and consequential relief, in general terms, but to the effect that the Department place them in the position they would have been in, but for their demilitarisation in respect of their salares and benefits from 1 November 1998. On 21 October 2016 the Labour Court (per Van Niekerk J) dismissed the matter on the basis that it did not have jurisdiction to entertain the claim based on alleged unfairness. The pension issues seem to have been already resolved.

[58] In light of the above, the court *a quo* could not have found that all or any of the requirements of section 3(4)(b) of the ILPA had been met. In fact, none had been met. In the circumstances it ought to have refused the condonation sought. In coming to the opposite conclusion the court *a quo* wrongly exercised its discretion in terms of section 3 of the ILPA.

[59] In the result:

1. The appeal against the orders of the court *a quo* is upheld;

2. The orders of the court *a quo* are set aside and are substituted with the following: “1. The application for condonation is dismissed; 2. There is no costs order.”

3. There is no costs order in respect of the appeal.

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P Coppin

Judge of the Labour Appeal Court

Davis and C Musi JJA concur in the judgment of Coppin JA.

APPEARANCES: (There was a virtual hearing via Teams)

FOR THE APPELLANTS:	WR Mokhare SC and M Kgatla
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