

Reportable

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO JS 240/2010

In the matter between:

DK JOUBERT

APPLICANT

and

LEGAL AID SOUTH AFRICA

RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant was employed by the respondent until his retirement in August 2009. The applicant contends that in terms of his employment contract, the respondent is obliged to pay him a post-retirement medical aid benefit (PRMAB), in the form of a contribution to his medical aid subscriptions, and that it is in breach of this obligation. The applicant seeks an order to the effect that the respondent is obliged to pay his monthly PRMAB and that of his spouse upon his death. He further seeks repayment of the PRMAB that he has since his retirement funded from his own pocket. The applicant's claim is premised on the fact that persons who retire from the public service and who were employed on the same salary scale as the applicant, and their surviving spouses, receive a PRMAB.

[2] The respondent denies that it is liable to the applicant. It has pleaded that the terms and conditions of employment in the public service applied to the applicant only to the extent that it was practically possible for the respondent to adopt any term and condition applicable in the public sector as a term and condition of employment of its employees, that the term and condition was specifically adopted by the respondent as part of its employees' terms and conditions of employment, and that any adoption of such terms was approved by the Minister of Justice in consultation with the Minister of Finance in terms of s 8 of the Legal Aid Act, 22 of 1969, (the LAA). In relation to the PRMAB, the respondent contends that none of these conditions have been satisfied.

[3] The applicant has pleaded an estoppel in reply and in the alternative, should the court find that the defence pleaded by the respondent is sound. The estoppel is founded on the averment that the respondent represented to the applicant that PRMAB formed part of his terms and conditions of employment, and that the necessary approval had been obtained from the Minister of Justice, in consultation with the Minister of Finance.

[4] After the applicant gave evidence, the respondent applied for absolution from the instance. The application was argued on the basis of an agreement between the parties that the court is entitled to assume that the applicant has proven that public sector employees on the applicant's salary scale are entitled to a PRMAB. Should the application for absolution fail, it was further agreed that this issue remains in dispute in the main proceedings, and represents the only matter upon which the applicant will present further evidence before closing his case.

The applicable principles: absolution from the instance

[5] In *Minister of Safety and Security v Madisha & others* (2009) 30 ILJ 591 (LC), this court recently affirmed its power to grant absolution from the instance in appropriate circumstances. The test is whether at the close of a plaintiff's case, there is evidence upon which a court, applying its mind reasonably to that evidence, could or might find for the plaintiff (see *Claude Neon Lights (Pty) Ltd v Daniel* 1976 (4) SA 403 (A)). In *Claude Neon*, the court formulated the test as follows:

When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff (Gascoyne v Paul and Hunter 1917 TPD 170 at 173, Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).

The Supreme Court of Appeal approved this approach in *Gordon Lloyd Page & Associates v Rivera & another* 2001 (1) SA 88 (SCA) at 92 H, where Harms JA added:

This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff... The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff"... – a test which had its origins in jury trials when the "reasonable man" was a reasonable member of the jury... Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.

More recently, in *De Klerk v ABSA Bank Ltd & others* [2003] 1 All SA 651 (SCA), the Supreme Court of Appeal affirmed the application of the approach adopted in *Gordon Lloyd Page* (at paragraph [10] of the judgment).

The statutory context

[6] The respondent is established by s 2 of the LAA, as a body corporate with separate legal personality. The respondent's statutory mandate is to "render or make

available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution..." (see s 3). Section 8 of the LAA is of particular significance in these proceedings. That section provides as follows:

The board [defined in s 1 to mean 'the Legal Aid Board'] may, with the consent or in accordance with the general instructions of the Minister [of Justice] acting in consultation with the Minister of Finance, appoint on such conditions and at such remuneration as may be approved by the Minister so acting, officers or agents to assist it in the performance of its functions.

[7] It is clear from this formulation that the LAA does not render the respondent's employees members of the public service. It is also not disputed that there is no provision in the Act to the effect that the respondent's employees are employed on terms equivalent to those that apply in the public service. The respondent appoints its own staff and determines their terms and conditions of employment, subject to the approval of the Minister of Justice, who in exercising a discretion as to whether or not to extend approval to any conditions of employment proposed by the respondent must act in consultation with the Minister of Finance.

[8] When s 8 is applied to a dispute such as the present, it seems to me that any party seeking to prove a term of employment contract must necessarily establish compliance with the provisions of section 8. In other words, it is incumbent on the applicant in the present circumstances to show that the respondent has adopted a resolution establishing a term or condition of employment that affords a right to a PRMAB, that the Minister of Justice has approved the payment of a PRMAB as a term and condition of employment and that in doing so, he or she acted in consultation with the Minister of Finance.

The evidence

[9] Only the applicant gave evidence. He was employed by the respondent from 1975 to 1981, and again from 1994 to August 2009, when he retired. The applicant became a member of the Bestmed medical aid scheme, and he remains a continuation member of that scheme. With effect from November 2002, the respondent contributed a monthly amount of R1014.00 toward the applicant's medical aid subscriptions; the same amount was contributed at the time of the

applicant's retirement in August 2009, when the payments ceased.

[10] The letter of appointment governing the latter period of the applicant's employment, signed on 8 April 1994, contains an annexure which records *inter alia* the following:

DIENSVoorWARDES: Die diensvoorwardes van toepassing op beamptes/werknemers van die Staatsdiens is mutatis mutandis van toepassing op die pos. Verdere besonderhede kan van die Direkteur van die Regshulpraad verkry word.

The applicant testified that these words reflected what he was told by a Mr Pretorius when he was interviewed in 1994 – that the respondent operated on the basis that its conditions of employment were *mutatis mutandis* those that applied in the public sector, and that he had agreed to be employed on those terms.

[11] The applicant's evidence was that his understanding of the term '*mutatis mutandis*' in his letter of appointment is that as an employee of the respondent, his terms and conditions of employment were a replica of those applicable to an employee of the public service engaged at the same level. His entitlement to the PRMAB was confirmed in a number of other respects. First, he referred to a memorandum from the Secretary of Finance to the Secretary of Justice dated 1 October 1971, recording approval from the Minister of Finance *inter alia* for the following:

(c) Die toepassing van die diensvoorwaardes wat in die Staatsdiens op staatsamptenare van toepassing is, mutatis mutandis op beamptes en werknemers van die Regshulpraad..

The applicant also referred to the terms of the respondent's Human Resources Policy and Procedure Manual, especially that of 2005, which was placed on the respondent's intranet. Paragraph 1 of the manual records the following:

Application of Public Service terms and conditions of employment

While the Legal Aid Board is not a Government Department, it is currently operating on conditions of employment as stipulated for the Public Service, by the Public Service Act, 1994 (Proclamation 103/1994).

I should mention that the same policy document contains a definition of “Public Service Act”, in which matters are cast in less unequivocal terms:

The Public Service Act, a proclamation of 1994. The Public Service Act regulates personnel matters in the public service (meaning employees employed in national and provincial government), and whilst not directly applicable to the Legal Aid Board, the Legal Aid Board's personnel practices remain closely aligned to the practices applicable in the public service.

[12] In so far as the respondent had recorded, in 2009, in a document that represented a consolidation of terms and conditions of employment, that only the salary scales applicable to the public service had from time to time been applied to the respondent's employees, and that employees who retired from the respondent's employ were not entitled to ‘continued subsidisation of any medical aid scheme’, the applicant testified that he had never agreed to any such variation to his terms and conditions of employment, nor had he mandated any person to reach an agreement to this effect on his behalf. He regarded the respondent as obliged to continue payment of the PRMAB after his retirement date in August 2009. This position had been communicated to the respondent during 2009 as part of a series of comments submitted in response to the draft document reflecting the consolidated terms and conditions of employment.

[13] In cross-examination, it was put applicant that in effect, the terms and conditions of employment in the public service did not represent a default position, in the sense that all of the terms and conditions applicable to employees in the public sector applied to the respondent's employees on an unconditional basis. A tabulated comparison of conditions of employment applicable to the public service and the respondent respectively was put to the applicant. The table clearly records conditions of employment that apply in the public sector but not in respect of the respondent, and *vice versa*. The differences are particularly apparent in relation to various allowances payable to public sector employees, but not to employees of the respondent. The applicant conceded the existence of these differences.

[14] The analysis of the differentials in public sector terms and conditions and those that pertain to the respondent shows, on a conspectus, is that there was no automatic adoption by the respondent of the public sector terms and conditions of employment. This much was conceded by the applicant in cross-examination. Rather, each proposal for the adoption of the new term derived from public service conditions of employment was deliberated on by the respondent's board, and a decision taken whether or not to include it as one of the respondent's terms and conditions of employment. Decisions were taken on the basis of whether or not the adoption by the respondent of the proposal concerned was practically possible. The adoption of this criterion was also conceded by the applicant in cross-examination.

[15] An analysis of minutes and other relevant documentation shows a number of instances with the respondent chose not to adopt a condition applicable in the public sector. The application of the respondent's approach in relation to the issue of PRMAB can be illustrated by reference to the minutes of meetings of the respondent's board held on 17 March 1978 and 15 September 1978, during the applicant's first period of employment with the respondent. At the 17 March meeting, the board considered a request to the effect that the respondent pay the subscriptions to the respondent's medical aid scheme (SOMS), payable by the widows of the respondent's employees who had died while in service. The request was specifically motivated on the basis of the *mutatis mutandis* principle – the payment of widow's medical aid subscriptions was a term and condition of employment in the public sector, albeit that it was the medical scheme rather than the employer that carried the cost of the benefit. It was resolved that the respondent should seek ministerial approval to establish a similar term and condition of employment, more particularly, that the respondent should meet the cost of widows' medical aid subscriptions to SOMS. The minutes of the meeting of 15 September 1978 record that the board took note of a decision by the Treasury to refuse the request to meet the cost of the subscriptions concerned from the respondent's funds.

[16] What these minutes establish is that the *mutatis mutandis* principle did not automatically render the PRMAB a term and condition of employment of the respondent's employees. On the contrary, the matter was raised as the result of a request motivated with specific reference to the *mutatis mutandis* clause. The request would not have been necessary had the benefit already been applicable to

the respondent's employees by reason of the *mutatis mutandis* clause. But the request was considered and the respondent's board decided to adopt a term and condition which would have the effect of paying a PRMAB to widows of deceased employees. The decision was however expressly made subject to ministerial approval. That approval was not forthcoming, and it is common cause that since then, the matter is never been revisited by the respondent.

[17] The applicant conceded that the term of the contract for which he contends, i.e. an obligation by the respondent pay a PRMAB, did not meet the four applicable criteria that must be present before such a term could be proven. In particular, there was never an unconditional decision by the respondent to adopt a term and condition in terms of s 8 that would entitle its employees to a PRMAB, the term was never approved by the Minister of Justice, nor did the Minister of Justice consult with the Minister of Finance in granting such approval. Given that concession, it is not necessary for me to consider the other grounds on which the applicant relied to sustain his general belief that the terms of his contract were a replica of public service conditions of employment, or his belief that he was entitled to a PRMAB. In so far as it is relevant, I would observe in passing that evidence of the applicant's subjective understanding of the position stands to be ignored for the purposes of the interpretation of the contract (see *KPMG Chartered Accountants (SA) v Securefin & another* 2009 (4) SA 399 (SCA), *Coopers and Lybrand v Bryant* 1995 (3) SA 761 (AD)). Had the applicant applied that part of the clause in his letter of appointment that referred him to the director for further details, the position as contained in the minutes would have been explained to him. There is no evidence to suggest that any such enquiry was ever put to the director regarding any right to a PRMAB pursuant to that clause.

[18] Turning next to the case based on estoppel, the primary defence raised by the respondent is based on the principle that in law, a statutory body cannot be bound by estoppel to act beyond its powers. This is a well-established rule. In *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 at 57 D-E, Corbett AJ (as he then was) said the following:

Finally, it should be observed that it is also a good affirmative answer to the case of estoppel by representation that the allowance of the estoppel must

result in a legality and thus a statutory body cannot be stopped from denying an act which is ultra vires.

There are two further authorities that are of more direct application to the present dispute, applying as they do to a statutory body and a duly constituted pension fund respectively. In *Strydom v Die Land-en Landboubank van Suid Afrika* 1972 (1) SA 801 (A), Botha JA said:

Versuim om 'n statutare liggaam, soos die Landbank, om voorskrifte na the kom wat die Wetgewer vir die geldigheid van 'n bepaalde handeling van daardie statutare liggaam voorgeskryf het, kan nie deur estoppel aangesuiwer word nie, want dit sou aan 'n handeling wat ultra vires is regsgeldigheid verleen. Spencer Bower, Estoppel by Representation, 2de uitg., stel dieselfde beginsel, soos deur die Engelse Howe toegepas, soos volg op bl. 132 –

“Nor can the lack of such essential formalities as the consent of a Minister of the Crown the making of a contract under seal all other particular formalities prescribed by statute, be remedied by estoppel, when the statute has made within the necessary conditions of entry into the transaction.”

Waar 'n handeling van 'n statutare liggaam, soos die Landbank, ultra vires is, hetsy omdat hy sy verlende bevoeghede buite gegaan het, hetsy omdat hy in gebreke gebly het om voorskrifte na the kom wat die Wetgewer vir die regsgeldigheid van daardie handeling voorgeskryf het, het hy in regte glad nie gehandel nie. ... 'n Handeling van 'n statutare liggaam wat in regte geen bestaan het omdat dit ultra vires daardie statutare liggaam is, kan klaarblyklik nie deur estoppel tot 'n geldige of wesenlik afdwingbare handeling verhef word nie.

Similarly, in *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W), the court held that the plaintiff, who had been dismissed as an employee of the company and who had claimed from the defendant, the company's pension fund, the balance of an amount due to him under the defendant's constitution, could not claim that the defendant was estopped from denying that he was a member of the fund because it had at all relevant times represented to him that he was a member by allowing the

company to deduct monthly contributions from his remuneration, which contributions had been accepted by the defendant. The court held that:

... (A) corporation like defendant cannot be estopped from denying that it has entered into a contract which it was ultra vires for it to make, and it cannot be bound by estoppel to do anything beyond its legal capacity...

Referring to *Rhyl Urban District Council v Rhyl Amusements Ltd* 1959 (1) WLR 465, the court noted the rationale for the rule – if a plea of estoppel could prevail as an answer to a claim that something done by a statutory body was *ultra vires* would reduce the *ultra vires* doctrine to a nullity. The court proceeded to grant absolution from the instance. (See further *Eastern Cape Provincial Government & others v Ontractprops (Pty) Ltd* 2001 (4) SA 142 (SCA), *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] SCA 28 (RSA) at paragraph [13] of the judgment, Rabie and Sonnekus *Estoppel in South Africa* (Butterworths, from p. 179, Visser & Potgieter *Estoppel: Cases and Materials* (Butterworths, 1994) at p 122-123.)

[19] The effect of the estoppel for which the applicant contends is that the respondent must be held to a term and condition of employment which has never been adopted by the respondent, nor approved by the Minister of Justice acting in consultation with the Minister of Finance, in accordance with the provisions of section 8 of the Act. Ms Lancaster, who appeared for the applicant, contended that the payment of the PRMAB was approved on the *mutatis mutandis* principle, and that the act in question was thus not *ultra vires*. There is no merit in this submission. It is common cause that the minutes show that there was no decision by the respondent to adopt a PRMAB, and that the respondent has never secured the approval of the Minister of Justice, acting in consultation with the Minister of Finance, for the introduction of a PRMAB. The effect of the estoppel for which the applicant contends is that the respondent must be held by estoppel to a term and condition of employment which manifestly does not meet the requirements of s 8 of the LAA.

[20] In summary: the applicant has failed to adduce such evidence that at this stage, this court could reasonably find that it was a term of his contract of employment that he be paid a PRMAB. In so far as the applicant contends that the

respondent is estopped from denying a representation made to the applicant that a PRMAB formed part of his terms and conditions of employment, the respondent cannot in law be estopped from denying an act which is *ultra vires*. It follows that the application for absolution from the instance should succeed.

[21] In relation to costs, the respondent seeks an order for costs, including the costs of two counsel. Section 162 of the Labour Relations Act empowers this court to make an order for the payment of costs, according to the requirements of the law and fairness. The factors that the court is entitled to take into account in deciding whether or not to order the payment of costs include the conduct of the parties both in proceeding with or defending the matter before the court, and during the proceedings. In the present matter, it was not disputed that the applicant is a pensioner, and that he is in dire financial straits. The applicant retired, by agreement with the respondent, prior to the normal retirement age. A number of annuities purchased by the applicant in anticipation of retirement at the normal retirement age are not yet payable. Without PRMAB, the applicant's undisputed evidence is that he finds it difficult to make ends meet. I fully appreciate that an applicant's financial position is not in itself factor that is determinative of whether or not a costs order should be made, but insofar as this court is obliged to take into account considerations of fairness in the exercise of its discretion, it seems to me that in the present circumstances, the difficult financial position in which the applicant finds itself is relevant factor. I also accept, and this was not challenged during the course of the proceedings, that the applicant was *bona fide* in referring this dispute for determination. Although the applicant manifested a blinkered approach, and while it might legitimately be contended that it was for the applicant timeously to enquire about and to ensure the application or otherwise of public sector conditions in this respect, he did not act vexatiously or frivolously in initiating this litigation, and was misguided at most when he decided to pursue his claim after an inspection of the minutes of all of the respondent's board meetings was tendered. In these circumstances, in my view, it is not appropriate to make any order as to costs

I accordingly make the following order:

1. Absolution from the instance is granted.
2. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 7 and 8 March 2011

Date of ruling: 16 March 2011

Appearances

For the applicant: Ms S Lancaster, McRoberts Inc

For the respondent: Adv A Dodson, with Adv N Fourie, instructed by Bowman
Gilfillan Inc.