



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)

Case No: 3581/2011

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

1 August 2014

EJ FRANCIS

In the matter between:

SARAFINA FIKILE ZWANE

Plaintiff

and

MEC FOR EDUCATION

1st Defendant

MINISTER OF EDUCATION

2nd Defendant

JUDGMENT

FRANCIS J

Introduction

1... The plaintiff instituted an action for damages against the first and second defendants on the basis of the *lex aquilia* after her house was sold in execution by a commercial bank. She is claiming the current market value of her house which was sold by the sheriff at a public auction. She contended that had the employees of the first defendant sent a letter to the commercial bank timeously that she was an employee of the defendants and that there were some monies due to her, her house would not have been sold at an auction. The employees

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of the defendants were negligent in the handling of the matter which constitutes gross negligence on the part of such employees. The plaintiff has abandoned her claim for emotional shock, depression and stress as a result of her house that was sold.

2. At the commencement of the proceedings, the court ordered that quantum be separated from the merits and that the matter proceed only on the merits.

The evidence led

3. The plaintiff testified and said that she is a single mother of three children. She commenced her employment with the Gauteng Department of Education (the department) in 1994 and was working at the laundry at King Edward School. In 2002 she was redeployed and worked as a cleaner at the Isu'Lihle Primary School which falls under district 14 of the department. She is earning about R7 000.00 per month and after deductions about R5 000.00 per month. She bought the house in 1997 for R77 000.00 and when it was sold by the bank at an auction, the balance was R30 000.00. She had made improvements on it. She took out a bond for her house at 8411 Protea Glen, Extension 11 initially with Saambou Bank and the bond is now with First National Bank (FNB). She said that her bond repayments were deducted from her salary and as proof thereof she submitted BN14 which is her salary advice showing that the sum of R1 237.00 was deducted. The plaintiff said that she has been having high blood since she was 16 years old and is also suffering from depression since her mother had passed away. She has not been cured of her

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depression and is still on medication. She stopped working in 2005 due to her illness and remained at home until 2010. Her salary was stopped sometime between January and March 2007. She did not receive any salary from 2007 to 2009 and was not told if she had to work or not. She said that she is reliant on her salary from her employer. Whilst she was at home she completed some forms to be placed on medical retirement but only discovered in 2010 that her application was unsuccessful. After her salary was stopped in 2007, she was unaware that no deductions were made from her salary for her bond until she had received a letter in 2008 from the bank informing her that her bond was not being paid off. After she had received the letter from the bank, she went to her employer to enquire whether she was going to receive her money or if she had been dismissed. She spoke with Musi Xaba (Xaba) who works in the human resources department. She told Xaba that she was sick and that she was working at the school and had noted that her salary was not paid to her and that she had received a letter from the bank stating that her bond was not being paid. She enquired from him whether her salary was going to be paid or if she had been dismissed. He told her to wait for the outcome of her application for medical boarding and to tell the bank that she was still waiting for the outcome of her application for medical boarding. She went to the department on many occasions where she spoke with Xaba.

4. The plaintiff testified that as time went on, she noticed that her salary had not been paid. She went to see an attorney who had tried to contact her employer but was but was told that they were waiting for a response for her application

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for medical boarding. The bank had foreclosed her bond and had taken legal action and had attached her house. She was notified by the bank in 2009 that her house was going to be sold. She went to the department and told them that she was coming from offices of president Zuma. She had telephoned his hotline. She then met a Ismail at the department who took her to Xaba. Ismail had asked Xaba if he knew that her house was going to be sold. He said that he would telephone and make sure that she would get her money before December 2009. She returned to the department in December 2009 since she had not received her money but found that the offices were closed. She was telephoned by the bank and as told that her house was going to be sold at an auction on 22 January 2010. She went back to the department in January 2010 after their offices had opened. She told Xaba on a Thursday a week before the 22 January 2010 that her house was going to be sold on 22 January 2010. Xaba told her that she was going to receive her three years salary on the same Thursday of the week that her house was going to be sold but she did not receive it. She then went to the bank with her shop steward and he spoke with the bank. After she had seen Xaba on that Thursday she went back to the department a day before the house was going to be sold. She told Xaba that the house was going to be sold the next day at 10h00 and he told her that the money would be paid to her on the Thursday.

5. The plaintiff testified that on the day of the sale in execution, she went back with her twins to the department before it had opened its offices at 8h00. She had the auction documents with her. They had been notified by the bank at

what time and hour her house was going to be sold. She had told them that the department had said that they were going to pay her the arrear salary. She first went to her shopsteward, Cedric who works at the department. She told Cedric and showed him that her house was going to be sold. He took the documents and telephoned the auction people and spoke to them in her presence and that of her children. He had put the telephone and speaker phone and she could hear some of the words that were uttered. They spoke in English and she could follow what they were saying. She heard Cedric saying that her house was going to be sold and he wanted to know what he could do to stop the auction. Cedric told the person that he was talking with that she was going to receive her money on the Thursday and that it was going to be paid into her bank account. She heard the other person saying that he had to write a letter stating that she would get the money so that they could stop the auction. Cedric told her that they had asked for a letter to be sent to them before 10h00 stating that she was going to get her money on the Thursday which would stop the auction from proceeding. They had given a fax number where the letter had to be sent to. Cedric later also explained to her in detail what had been discussed. From Cedric's office, she and her children and Cedric went to Hlengiwe Biyela's office. Her twins remained sitting at the door. Cedric spoke to her in Isizulu which she understands and speaks. They greeted her and Cedric asked her if she knew about her case. She told him that she did. He then told her that her house was about to be sold but they had requested human resources to write a letter. She told them that Xaba would write it. The three of them went to Xaba's office who was at his desk and this

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was before 9h00. Biyela told him to write the letter to confirm that she was going to get her money on the Thursday. Xaba agreed that he would write the letter and Cedric asked her if she had heard what he had said. She called her children to witness what he had said. From there Cedric left and she went to sit with her children and waited for Xaba to write the letter. Cedric had told Biyela by what time the letter had to be sent namely that it had to reach the auctioneers before 10h00 which was the time when the house was going to be auctioned. Biyela had told Xaba that if the letter did not reach the auctioneers before 10h00, the house was going to be sold. Xaba did not complain that he was given short time to write the letter. She remained seated with her children and saw that the time was going on and saw that Xaba did not fax the letter. She went to Xaba at 9h45 and told him that they had said that the letter had to be faxed before 10h00 or that it would be sold and he responded that nothing has ever been late. He was busy on his computer. She went back to sit with her children and Xaba faxed the letter after 11h00. She left human resources and went to labour and told them that Xaba had sent the letter. Cedric asked her if she had telephoned the auctioneers. She told him that she did not and he said that he would telephone them. They said that they got the letter but it arrived late and that the house had already been auctioned. She and her children went back to human resources and told Xaba that her house had been auctioned. He responded that it did not matter since the people at Protea Glen were staying for free and she then went to the Chiawelo clinic.

6. During cross examination the plaintiff denied that she liked to have things for

free. She was questioned about the reasons for staying away from work which is not relevant to the issue before me. She agreed that she stayed away from work in 2003 and had said that she does not know whether in 2003 she had exhausted all her leave because most of the time she was informed that she had no such leave. She said that there was a time during 2004 and 2005 that she stayed at home for being sick and when she was sick she telephoned and said that she was either sick or in hospital. She said that from 2007 to 2009 she did not receive her salary. She said that the department adopted the no work no pay principle. She defaulted with her payments to the bank between 2007 to 2009 and her house was eventually repossessed. She said that in 2008 she received court documents about the repossession of her house. She then tried to go to the department to ask for help and she was already not receiving a salary. She then went to the department to ask them if they were going to pay her or they were dismissing her. She tried to pay amounts of R300 and R500 which was money that she had received from her children since they were working temporarily. She agreed that the bank had taken legal action against her in 2008. She did not defend the court papers and decided to pay the above amounts to try and prevent the house from being sent. She had a lawyer whose name she had forgotten but she did not defend the bank's action. She then received a document from the bank that the house had been sold. She did not agree that her house was attached because she had failed to defend the papers. It was put to her that the mortgage agreement was between the plaintiff and the bank. She agreed that it could be like that but that when she bought the house she was not told that it was between her and the bank but

she thought that it was an agreement between her and the employer. She said that she could say that her employer bought her the house, since they were subsidising her. In 2006, she had received a salary and in 2007 and 2008 she received no salary and she thought that the department still had to pay off the bond. It was put to her that the department has no legal basis to buy houses for its employees and she said ok. It was put to her that it was the responsibility of every bond holder to meet their financial obligations of the bond with the bank and she said ok. She agreed that she made her financial obligations since she did not get an income anymore. When she realised that her house was going to be sold she approached lawyers for legal assistance besides going to the department. When she got the letter that her house was going to be sold on 22 January 2010, she did not consult an attorney. It was put to her that she wanted the department to buy her a house. She said that she does not want the department to buy her a house but to give her a house since it was the department's fault that her house was sold. It was put to her that her house was auctioned because she had failed to meet her financial obligations to the bank. She agreed but said that the reason was that the department did not pay her salary and when she used to be paid, her bond was up to date. It was put to her that she was not paid since she was not working. She said that she was not rendering service as she was sick. It was put to her that she was sick and not incapacitated. She said that she felt incapacitated and applied for medical boarding. She was questioned about her application for medical boarding which is not relevant to the issue before me. She said that her house problem started in 2007 because she was not getting her salary. She could not

honour her bond due to not being paid her salary. It was put to her that this was the reason why the house was repossessed. She said that the house was repossessed because the department had failed to send the letter that her salary would be paid. She said that she did not know that once there was a court order against her that she could apply for a rescission of judgement. She did not approach a lawyer when she received the letter that her house was going to be sold in execution to stay the execution. It was put to her that one of the most appropriate remedy when a house is to be sold, is to bring an application to stay the execution. She said that she did not know it at the time and she went to the department to try and stop the execution. It was put to her that the house was sold because of a legitimate court order. She said that her house was sold because the department had failed to stop the sale by not sending the letter. In 2010 when she received the letter that the house would be sold in execution, she went to the department. She agreed that she consulted the offices of Winnie Mandela. She did so because she was sick in hospital and when she was discharged from hospital the doctors found a social worker for her and the social worker referred her to Winnie Mandela's offices. She went there a month or two after her house was sold and discussed the matter with Winnie Mandela. She went there because she wanted them to assist her with the issue of her house. They assisted her by finding her current attorneys for her. After her house had been sold, she received money from the department. She said that the money was going to be used for the house and that she had spent it. She did not pay the bond because her house had already been repossessed and the bank told her to wait for a while until the issue of the

house was sorted out. She used the money to pay off her medication. She received R32 000 on the Thursday and the other came later in two tranches. The first amount was for R32 258,96 and the second for R68 689.11. She would have paid for the house had it not been auctioned and it was sold to the other person. The money was back pay from 2007 to 2010. It was put to her that the department owes her nothing. She said that it owes her. It was put to her that they paid her for 3 and half years even though she had rendered no services. She said that the government paid her and she went Soweto College to ask what happened to her. She wants the department to pay her a house because if they had written the letter in time, they would not be in this position in court. She was asked if she was serious about the claim and she said that she was and that it was painful to lose a house. She has now gone back to work in district 14 and is getting a salary. She does not go to work every day as is almost sick every day. It was put to her that her house was repossessed as she failed to meet her financial obligations and she said that she could not do it since she was not getting a salary. It was put to her that they would say that there was no legal basis to buy houses for employees. She said that the government gives houses and wanted the question of subsidies to be explained to her. She agreed that housing subsidies and bonds are two different things. The subsidy was from the employer. It was put to her that the bond was between employee and the bank. She said that like she could not pay for the bond and was not getting a salary. It was put to her that the issue was her failure to pay the bond. She said that she could not pay as the government was not paying her anymore. She said that she was now working. It was put to her

that she could apply for another house. She said that she will not get another house since she does not qualify for a bond. She is getting a salary and is working. She was asked whether it was even though she received R100 000.00. She said that when she received the money the house had been sold and she was not paid a salary for years. She was not paid the money because the house was repossessed. She was referred to paragraph 8 of B8 which was read into the record and that FNB did not give her anything. It was put to her that in her evidence in chief she said that the agreement made and an undertaking letter was dispatched to the bank before 10h00 and the department would deny that they made an undertaking to send the letter before 10h00. She said that Biyela and Xaba agreed to send the letter before 10h00. She was asked if she communicated with the bank or the lawyers of the bank. She said that she was talking to the people of the auction. She was asked if there was anything in writing about the auction i.e. if they received a letter from the department that the house would not be sold. She said no and they spoke telephonically. She was asked who she had spoken to telephonically. She said that Cedric spoke to the person on the telephone and the day of the auction and she has the papers from them and his name appears on it. It was put to her that she does not have all the details of the transaction on the day of the auction. She said that they spoke in English and she heard part of it and in particular she heard that the letter must be sent and received before 10h00. She was asked if she heard the words 'before 10h00'. She said that those are the words in English that she could hear and some terms and the others she could not. There was a discussion between Cedric and the people of the

auction. She was there with her daughters and Cedric and the phone was on loudspeaker and said that the letter had to be sent before 10h00.

7. During re-examination the plaintiff was asked if the letter at C110 is the letter she was testifying about. She said that she could not compare it with the one that she had in her possession. E1 was handed in as evidence and she was asked if that was the letter that Xaba sent to the bank. She said that it looks like the one that he had sent. It was faxed an hour later than it had to be faxed. After it was faxed she was given the letter after she had enquired about what had happened to the faxing. It was given to her on the same day by Xaba. He gave her the letter because she had asked for it. After the letter had been faxed she went back to Cedric and he telephoned the auctioneers and they said that the auction had taken place and that the letter came late. She, Cedric, and her daughters went to human resources to confirm that the letter had been faxed and that the house had already been auctioned. She said that she knows that the letter was faxed after 11h00 by Xaba. She had given him the document to whom the letter had to be sent to. She was asked if she knew who it was directed to and she said that she knows who it was directed to but has forgotten. It was directed to the auctioneers. She did not see the letter before it was sent and does not know the content of the letter.

8. The plaintiff's first witness was Amanda Zwane. She said that the plaintiff is her mother and her house was sold in execution on 22 January 2010. A day before the sale in execution, they received a letter that the house was going to

be sold at an auction on 22 January 2010 at 10h00. Her mother had received the letter and she read it. The next morning they went to her mother's workplace at the Soweto College. They left their home at about 6h30 and got there before 08h30 and a lady told them to wait. They went to Cedric and explained to him and gave him the letter. He telephoned the auctioneers and spoke to them and they said that they understood and said that they wanted a letter stating that the house would be paid. He had put the telephone on the loud speaker and the person on the other side that the letter should be sent before 10h00. She could hear the conversation which was in English. She said that she is comfortable with English and has a matric. She testified in court in English. They then went to Biyela who then took them to Xaba's office with her mother and Cedric. Biyela told Xaba that he needed to write a letter before 10h00 either by email or by fax. She agreed in front of them when she spoke to Xaba to have the letter typed and Xaba agreed to do so. Xaba told them to wait at the side of his office. They then waited. They could see him from where they were they were waiting. Before 10h00 she went to Cedric and told him that the letter had not been faxed. Cedric took them to Musi Xaba and told him that the letter had to be faxed and he agreed that he was going to do it now now. However, it was only faxed at about 11h00.

9. During cross examination she said that her mother's house was going to be sold in execution on 22 January 2010 and she went with her mother to her workplace. She was later joined by Cedric the shopsteward who telephoned the auctioneers. A deal was reached that the letter would be written and sent

to the auctioneers before 10h00. The letter was never faxed at 10h00 and was faxed after 10h00. She said that she does not know who faxed it and was around his office when he faxed it. She and her mother were present and Cedric was not there when he sent it. After he had sent it, they took the fax confirmation to Cedric. Her mother should have the fax confirmation and it was faxed after 10h00. She saw the contents of the letter. They had stated that they were going to release her money but she does not recall what the letter said about when it was going to be released. She said that the letter had to be faxed before 10h00 and this was a deal that was reached between Cedric and the auctioneer. She said that she was in Xaba's office when the letter was faxed.

10. The plaintiff's second witness was Lorraine Zodwa Zwane. She said that the matter was about the plaintiff's house that was sold in execution on 22 January 2010. She is not related to the plaintiff. She knows about the matter. She was not involved in the sale in execution but knows that the house was sold and the plaintiff came to their offices after the house had been sold. She is based at Winnie Mandela's offices and people come there with different problems. It is not like an advice centre. The plaintiff was in hospital and had been to many places seeking assistance but did not get it. She was referred to them by social workers after she had been to many places and did not find any help. She then came to their offices after her house had been sold. She had explained to her that she was working at the Isi'lihle school as a cleaner and had bought a house whilst she was still working. She said that her mother had

passed away and was not well thereafter and she stayed away from work and they knew that she was ill. Her salary was stopped and she tried to pay the banks with less money than before. They then telephoned her and told her that her house was going to be sold in execution. She told the bank that she had returned to work and would be paid her arrears. The bank requested a letter to confirm that she was back at work and would be able to pay her arrears. The house was going to be sold at 10h00 on 22 January 2010. She requested Xaba to write a letter that she had returned to work and was getting her salary and would be able to pay her arrears. Had the bank received the letter before 10h00, it would not have sold the house and the bank received the letter after the house had already been sold. She testified that after the plaintiff had explained this to her she telephoned Xaba at the department of education and told him that she was telephoning from Winnie Mandela's and was with the plaintiff who was complaining about her house that was sold by the bank and that he had to send the letter before 10h00 and had sent it late. He admitted that he sent the letter late. He told her that it was not his job and that the plaintiff had asked him to send the letter but he was afraid and would write the letter and she asked him that if he sent the letter why he was not scared. He said that he saw that the plaintiff was crying and was not well.

11. During cross examination she said that the plaintiff contacted their offices after the house had been sold. Before the house was sold the plaintiff had not contacted them. The information that she had was received from the plaintiff. It was put to her that her evidence in court was hearsay. She said that she

would not say so because the plaintiff told her something and as they went ahead it did not end there and it was the truth but she had telephoned Musi Xaba and he admitted what the plaintiff told her. She was asked if the plaintiff gave her the background of her problem. She said no but the main problem was that her house had been sold. She had told her that she was sick and the department had frozen her salary but she focussed on what she came to her about the selling of her house. She had said that she could not go to work because she was sick. She said that she was told by the plaintiff that Xaba sent the letter to the bank and he had admitted to her that he had sent the letter. She telephoned the head of department and was referred to Biyela who worked in the office of the head of department who admitted that she knew about the matter. She the witness said that she does not know at what time the letter was sent to the bank manager at FNB. It is the letter of 22 January 2010 but she was not shown the letter. When asked how she could testify about a letter that she had not seen she said that they had a meeting with the bank managers at FNB, with the person who bought the house and officials of the department and them and the manager from FNB said that he had unfortunately received the letter late and the house had already been sold and had they received the letter before 10h00 the house would not have been sold. He told them that the balance on the house was R30 000 and they sold the house for R150 000.00. It was put to her that the plaintiff's daughter said that the letter was sent to the auctioneers. She said that the bank manager said that the letter was sent after the house had been sold and she was saying that it was sent to the bank manager. She was telling the court what the bank manager told her. It was

put to her that she was not present when the letter was sent to the auctioneer. She agreed that she was not there and the plaintiff made contact with them after the house had been auctioned. It was put to her that she could not say with certainty that the letter was sent to the bank. She said that she could say that it was sent since the plaintiff, Biyela and the bank managers all said that the letter was sent late. This included Xaba too. She was asked whether she was disputing the plaintiff's daughter's version that it was not sent to the bank but to the auctioneers. She said that she was testifying about what the bank manager told her and she did not speak to the plaintiff's daughter. It was put to her that she could not say with certainty that the letter was sent to the bank manager. She said that she was not there and did not know the plaintiff who came to them after the house had been sold. It was put to her that Xaba will testify that they were approached on 22 January 2010 by the plaintiff who told him that she wanted a confirmation letter that her back pay would be paid by the department and the letter that he sent was addressed to whom it may concern and not to the auctioneers or the bank and that he cannot remember at what time it was sent but it was early in the morning. She said that if it was sent "To whom it may concern" and if it came to the auctioneers they have would stop the sale. The fax number showed that they had received it and the bank manager confirmed to her that it was received. Xaba would be lying if he says that he sent it early in the morning. She spoke to him and he told her that he sent the letter late. It was put to her that he would say that the bank never requested any letter from him. She said that the bank did not ask Xaba for a letter since it was not his house and the bank had requested a letter from

the employer to state that the plaintiff was back at work and would be able to pay it back. The bank told the plaintiff to request the employer to send a letter. It was put to her that the defendant will say that no letter was requested from the bank or authorities on 22 January 2010. She said that the bank had asked the plaintiff that they wanted proof that the plaintiff has returned to work and the bank saw no need to contact the employer as it was not their house and they called the plaintiff and requested such a letter. She said at the meeting they had with the bank managers, officials of the department and with the purchaser of the house, she was shown the letter which she did not read.

12. The defendant first witness was Rockland Joubert Mabasa. He testified that he is employed by the Gauteng Education Department and is a deputy education specialist for five years and before that he was a labour relations officer in Johannesburg Central. He joined the department as a relations officer in 2005. He has to ensure the discipline of employees and that they comply with policy issues like leave etc. In 2005 he encountered problems with the plaintiff on the issue of absenteeism which was brought to their office by her line manager. She was absent from work and had taken unauthorised leave from 2003, 2004, 2005 and part of 2006. There was a long leave of absence and unauthorised leave. During 2003 to 2006 the department paid her a salary even though the leave was unauthorised and it was not normal to pay her. She was warned about the consequences of being absent. As a department, they communicated with her about leave of absence and that the leave was not unauthorised and her salary was frozen towards the end of

2006/2007. She was requested to contact them failing which her salary would be freezed but she failed to do so. In 2007 she came to complete her application for medical incapacity leave and did not return to work after she had completed the said forms. She was then absent from work from 2007 to 2010. Her application was declined sometime in 2008/2009 as the report that she had used in support of her application for incapacity leave indicated that she was fit for work. The documentation was incomplete. Her own doctor, Dr Haroon Essa a clinical psychologist stated in the report that she was fit for work and should not be boarded. Whilst she was absent, he did not hear anything from her and he only heard from her when her house was going to be auctioned in 2010. As a department they were not aware that she had a bond with the bank. They only pay her salary and do not care what she does with her salary. He only heard that she had a problem with the bank and that her house was auctioned because she did not honour her financial obligations with the bank. She did not approach the department for help as early as 2007 when her salary was frozen. She never discussed the house issue with the department until her house was to be sold. Her salary was reinstated in early 2010 and she got her other benefits. The back pay was from 2007 to 2010 and he does not know if it included her housing subsidy. She was paid about R100 000 and he does not know what she used it for. She was paid because there was political pressure from Winnie Mandela's office and when her salary was frozen she did not challenge it in court or bring an application to compel the department to approve her application to be boarded off medically. Currently she is on and off from work.

13. During cross examination he was questioned about issues that are not relevant to the issue before me. Most of it related to her being absent from work, her application for being boarded off and whether she had notified the department about her absence and the freezing of her salary. He agreed that he said that the plaintiff received her back pay when she was absent and this was due to political pressure. He agreed that Zodwa Zwane testified that they became involved after the house had been sold which was on 22 January 2010 and that there was a letter of communication between the Winnie Mandela office and them. The first payment was made on 25 January 2010 and the second payment on 7 April 2010 according to exhibits E2 and E3. He said that he became aware of this matter after the house was sold. The Winnie Mandela office communicated with them before the house was sold in execution. It was put to him that the plaintiff would not have gone to the Winnie Mandela office and complain that the house has been sold and it was not before 22 January 2010. He said that before the sale in execution there was communication between head office but not with him personally. He said that he can remember a meeting at head office where he had to explain what had happened. He was at the meeting long before the sale in execution. It was put to him that the first payment was not made on 13 January 2010 and it was three days after the sale in execution. He said that he was not sure about when the exactly the payment was made. It was put to him that the plaintiff said that the first payment was made three days after the sale in execution. He said that there are people who could testify about it. It was put to him that the balance on her bond was R30 000.00 and if she was paid on 13 January 2010 it would

have wiped off the balance. He said that he did not know when it was made. He said that he saw that E1 was sent on 13 January 2010. The content of the letter was read into the record and that it was common cause that it was sent on 22 January 2010. He said that he was not the author of the letter and was not consulted about it. He said that she paid her back pay because the department had succumbed to political pressure.

14. The defendant's second witness was Musi Petrus Xaba. He testified that he is employed by the Gauteng Education Department for 10 years. He is a personnel officer and makes appointments and deals with conditions of service. He knows the plaintiff who is an employee and is a person with a problem of absenteeism. He knew her when she came to the office with a problem of her house that was going to be auctioned. She came to see him on the day when her house was going to be auctioned. She requested a letter and confirmation that she was working for the department and to confirm that there were monies due to her and that her salary would be paid soon. The letter that he wrote is exhibit E1. It was addressed "To whom it may concern". He signed the letter on behalf of H Biyela who is the head of the department and she had to sign it. The letter was urgent and he drafted and signed it. He was not told that he had to address it to a specific person. He said that it was common cause that the house was sold on 22 January 2010. There were no requests from any bank for a letter. After he wrote the letter, the plaintiff provided him with a fax number and asked him to fax it to. After he had done so, he gave her the original letter. He does not know who it was addressed to or sent to. He had

faxed the letter on her behalf on the morning of the auction and does not know whether it reached its destination. He had to confirm that the money that was frozen would be paid to her. The letter did not mention when it would be paid and did not make any commitment about when it would be paid.

15. During cross examination he said that he knew that the letter was very urgent and that it was important for it to be faxed as soon as possible to prevent the house from being sold. It was put to him that he knew because the plaintiff told him to send to avoid the sale in execution. He disagreed and said that she had requested confirmation and that her salary would be paid. The plaintiff came to him with her union representative and he cannot remember if there was another person present. Biyela had instructed him to prepare the letter and to give it to the plaintiff since she was tied up in a meeting. She told him to confirm that the plaintiff was employed and that her salary would be paid. He did not ask her any further questions and the plaintiff told him to fax it to a certain number. He prepared the letter and gave it to the plaintiff and does not know what she did but she left. It was the last time that he saw her and she did not return to him to discuss any issues around the fact that her property was being sold. Biyela did not come to him and she had remained in her office. She had instructed him telephonically to write a confirmation letter for the plaintiff. He then typed the letter and signed it and before he gave it to her she had asked him to fax it and he did so and gave her the original letter. He said that the plaintiff came to him in the morning but cannot remember if it was at 8h00 or 11h00 and he cannot say at what time Biyela instructed him to type

the letter. Biyela did not tell him why he had to prepare the letter and had said that he should prepare a confirmation letter that she was working and that her salary would be paid. The plaintiff did not tell him why it had to be faxed. He said that when Cedric and the plaintiff were on their way to his office, Biyela instructed him but did not tell him of the reasons. When the plaintiff and Cedric came to his office and told him that Biyela had asked them to come to him they did not tell him why they needed the letter and did not tell him by when the letter had to be faxed. He prepared the letter, signed it and faxed it and gave the original to the plaintiff and she left and he never saw her again. The plaintiff's version about what she did on the morning of 22 January 2010 was put to him and he said that it is not true that Biyela and the plaintiff and Cedric walked to his office and instructed him to write the letter. He said that she did not come and if she was there he would not have signed the letter on her behalf. It was put to him that the plaintiff's version was not challenged and he repeated that Biyela did not come to his office but had instructed him telephonically. It was put to him that the plaintiff's version was that she came to his office long before 10h00. He said that he does not know what time it was when he drafted the letter and that Cedric was present. She did not tell him that it had to be drafted and sent before 10h00. It was put to him that her version was that he said that he would do so and she went out of his office and at 9h45 she realised that the time was moving on and went back to him and asked him to fax it. He said that he did the letter immediately when Cedric was not there and does not know why her version was not challenged. He denied that he told the plaintiff that nothing was ever late. It was put to him

that her version was that she went out and set with her daughter and that the letter was only faxed after 11h00. He said that it was faxed before noon. He said that he cannot dispute the plaintiff's version that after he had faxed the letter and had given her the original that she went to Cedric who telephoned the auctioneer and was told that the letter had arrived after the property had been sold in execution, since he was not a party to the telephonic conversation. He denied that she came to him and told him that the house had been sold and that he told her that it does not matter since the people in Protea Glen were staying for free and that it was not a big deal. It was put to him that her version was not challenged and that she went to the Chiawelo clinic. It was put to him that the plaintiff went to him as she knew that her house was going to be sold and she, Biyela and Cedric came to him and told him that the letter had to reach the other side before 10h00 and he had failed to do so. He said that Biyela called him and requested him to do the letter and he did so. It was put to him that the probabilities are that because she came to his office and that an undertaking was made and they waited on the chairs for the letter to be sent. He said that he was not sure of that. He was asked what he meant with 'not sure of that'. He said that the letter was given immediately when she came with Cedric and he does not know why she went to sit on the chairs. He agreed that E1 indicates that it was urgent. He said that he does not recall being called by Zodwa Zwane, the second witness. He said he cannot deny receiving telephone calls but cannot recall that she called him about that incident. They dealt with the head office and district offices. He said that it is not true that he told her that he had sent the letter late. He said that it could

have happened but does not recall if she called him. He agreed that her version was not challenged. He said that it is not true that she came to him on 21 January 2010 and instructed him to do the letter urgently and told him by what time it had to be sent and that he had undertaken to do so and that he had decided not to comply for his own reasons and that he failed to do so and faxed it late long after the sale and she came to him and he told her that it did not matter since the people were staying for free. He said that on 22 January 2010 he always arrived at his workplace before 8h00 and he remembers the incident. He does not know why she said that she came to him before 9h00 but she came long after 8h00 but cannot give a specific time but it could have been an hour or 2 hours after 08h00.

Analysis of the evidence and arguments raised

16. The plaintiff instituted an action for damages against the defendants after her house was sold in execution. Her case before this court is that the employees of the defendants were negligent in failing to send a letter to the bank on 22 January 2010 before 10h00. Had the letter been sent to the bank, the sale in execution would not have proceeded. The bank had required a letter from her employer confirming that she was employed by the department and that her salary was going to be paid to her. The balance owing on her bond was R30 000.00 at the time.

17. The plaintiff pleads specifically in paragraph 12.5 of her particulars of claim that the staff members of the department were negligent in handling the matter

in the following respect that the authorities and staff members of the department ought to have replied timeously to a request of a letter from the bank and they failed and/or refused to act timeously which constituted gross negligence on the part of their staff members. As a result of the conduct of the staff members of the department, the plaintiff suffered damages to the amount of R500 000 which is the current market value of her house which was sold by the sheriff at a public auction.

18. The defendant's defence as pleaded was that it had no legal duty to assist the plaintiff in paying her bond. The payment of the bond is a matter between the plaintiff and the bank and the plaintiff has a duty to meet all her financial obligations.
19. The plaintiff's claim is founded on the *lex aquilia*. Since the parties have reached an agreement and this court had ordered that the issue of liability be separated from quantum, the issue of causation need not be considered at this stage.
20. The facts in this matter are not complicated. It is common cause that the plaintiff is an employee of the department and that she had been absent from her workplace during 2003 to 2005 due to her being diagnosed with hypertension and major depression. The defendant implemented the no work no pay principle and there is some dispute about whether this was conveyed to the plaintiff. Nothing turns around this. Sometime in 2005 the plaintiff

applied to be medically boarded off and completed the necessary forms. She included a report from her doctor who did not support her application that she was incapacitated. The plaintiff did not report for work during 2007 and 2010 and her salary was stopped. As a result of her salary being stopped she could not pay back her bond repayments which resulted in judgment been taken against her and her bond been foreclosed by the bank. She had received the bank's court documents but did not oppose the application. She attempted and made payments to pay the bank whenever she could with the assistance of her children.

21. In January 2010 she received a letter from the bank informing her that her house was going to be sold in execution on 22 January 2010. She approached her employer about it and was told that her salary was going to be paid on the Thursday of the week of the sale. She then sought the assistance of her shop steward Cedric. On the morning of the sale in execution her shop steward telephoned the auctioneers who were selling her house. They told him that they needed to be furnished with a letter from her employer confirming that she was employed by them and that her money was going to be paid. The letter had to be faxed to them on the same day before 10h00. The letter was only faxed to the bank after 11h00. The bank sold the house at 10h00 when no letter came from the first defendant stating that the plaintiff was employed by the first defendant and that she would be paid her arrear salary.
22. The defendants called two witnesses in support of their case. The main witness

was Xaba. He admitted that he was approached by Cedric and the plaintiff for a letter that had to be sent to the bank. He denied however that he was told by when the letter had to be sent. He also denied that Biyela came to his office but had asked him telephonically to write the letter. There was no explanation given why Biyela was not called as a witness. She was an important witness and should have been called by the defendants. She would either have supported the defendants case about what time she had told Xaba to send the letter. She would have confirmed what her exact words to Xaba was.

23. As stated earlier the plaintiff's case was that the bank had requested that the letter be sent before 10h00 to stay the sale in execution. They had approached Biyela who then took them to Xaba and instructed him to prepare a letter and transmit it to the Bank before 10h00. They were told by Xaba to wait outside his office. They again approached him by 9h45 to enquire whether the letter had be sent. He told them things were never late. They were given a letter after 11h00. She approached her shopsteward who then telephoned the auctioneers in her presence. They were told that the house was auctioned after they had failed to send the letter before 10h00. The letter was only received after the house had been sold.

24. Ms Zodwa Zwane confirmed that she had spoken to Xaba. She telephoned Xaba who told her that he had sent the letter late. Her evidence was not disputed or contested. The obvious question that arises is why he would have told her that he had sent the letter late if the plaintiff did not tell him by when

29.

the letter had to be sent. The plaintiff's evidence as well as that of her daughter that Biyela had told him in their presence to send the letter by 10h00 was not disputed.

25. The defendants stated that it has no duty to pay the bond of its employees. The key question is whether the bank would have sold the house if it had received the letter before 10h00. The answer is that if the letter was sent before 10h00 the bank would not have sold the house. The next question is whether the defendants knew that the letter had to be sent before 10h00. The answer to the question is that the Biyela knew that the letter had to be sent before 10h00. She had then instructed Xaba to send the letter before 10h00 which he did not do. It is as a result of his failure to do so, that the house was sold at an auction.
26. I am satisfied that the plaintiff has proven on a balance of probabilities that her house was sold as a result of the defendants to send a letter confirming that she was going to be paid her arrear salary. The letter had to be sent before 10h00 on 22 January 2010 and was only sent after 10h00. It is as a result of this that the house was sold.
27. The defendants are therefore liable for the damages that the plaintiff may be able to prove at a later stage.
28. There is no reason why costs should not follow the result.

30.

29. In the circumstances I make the following order:

29.1 The defendants are liable for the damages that the plaintiff may be able to prove.

29.2 The defendants are to pay the costs of the action.

FRANCIS J

HIGH COURT JUDGE

FOR THE PLAINTIFF : L P MKHIZE INSTRUCTED BY DUDULA
INC

FOR DEFENDANTS : B SHABALALA INSTRUCTED BY STATE
ATTORNEY

DATE OF JUDGMENT : 1 AUGUST 2014