IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/ 22538

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

13 February 2015 .....

DATE SIGNATURE

In the matter between:

TRACY LUCILLE ROSCHER Plaintiff

And

INDUSTRIAL DEVELOPMENT CORPORATION 1st Defendant

FINDEVCO (PTY) LTD 2nd Defendant

JUDGMENT

SPILG, J:

13 February 2015

THE PLEADINGS

1. The Plaintiff instituted action proceedings against the Defendants by service of summons in June 2012 for payment of an amount of R403 950.00 together with *mora* interest reckoned from 1 July 2009. The claim is a contractual claim

for payment of a performance bonus under an employment agreement concluded between the Plaintiff and the Defendants in May 2007.

2. The Plaintiff alleges that the Defendants were contractually obliged to pay the amount claimed which was 60% of her annual remuneration package covering the employment period from 1 April 2008 to 31 March 2009. The plaintiff avers that the amount became due and payable on 1 July 2009.

3. The Defendant disputed the claim both by way of special pleas and a pleading over on the merits. When the trial roll was called the parties confirmed their agreement to separate the special pleas for separate adjudication.

4. The Defendants raised three special pleas; one of prescription, the other of *res judicata* and the last of *lis alibi pendens*. The special pleas all touch on the same broad concerns that the Defendants have with the basis of the Plaintiff's claim and the fact that the Plaintiff had brought a dispute effectively against the defendants based on an unfair labour practice arising from the same subject matter before the Commission for Conciliation, Mediation and Arbitration ('*CCMA*'). The dispute had been heard before the Commissioner whose award was the subject matter of a review brought before the Labour Court.

5. The prescription plea relies on clause 4 of the employment agreement which required the Plaintiff to undergo a performance assessment to determine whether she had achieved the requisite standard to be eligible for the performance bonus. The special plea alleges that on 31 March 2009 a determination had been made that she did not met the requisite performance standard. During argument the defendants relied on a subsequent date, being 22 May 2009, on the basis that by then the plaintiff was aware of the unfavourable outcome of her assessment.

   It is on this basis that the Defendants contends that Plaintiff's cause of action arose by no later than the end of May 2009 and not on the date when payment of any performance bonus was to be made (ie on 1 July 2009).

6. The plea of *res judicata* relies on the contention that the same matter presently before this court was determined by the CCMA pursuant to the Plaintiff having brought the dispute before that tribunal in June 2009 and in respect of which an adverse award had been made against the plaintiff in March 2011.

7. The plea of *lis pendens* also relies on the averments made in respect of the *res judicata* plea but adds that upon the Plaintiff instituting proceedings in May 2012 in the Labour Court to review and set aside the Commissioner's arbitration award such proceedings that are presently before the Labour Court are *lis pendens* on the grounds that they are between the same parties in respect of the same subject matter and based on the same cause of action.

SPECIAL PLEA OF PRESCRIPTION

8. The issue to be determined in respect of the prescription plea is whether the date when the *" debt is due*" for purposes of section 12(1) of the Prescription Act, 68 of 1969 is the date when the Plaintiff first became aware that the First Defendant had determined her ineligibility for a performance bonus. *Mr Franklin* on behalf of the Plaintiff accepted that the Plaintiff would have known of this determination by the end of May 2009.

   Section 12(1) provides

   12 When prescription begins to run

   (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

9. *Mr Mokoena* on behalf the Defendants contends that the operative date from when the debt would become due is when the creditor first acquired knowledge of the debtor's identity and of the facts giving rise to the debt.

10. While that may answer the question of when the material facts were known, it does not complete the enquiry as to when the debt is due for the purposes of section 12(1). There remains the second requirement that there must be a completed cause of action, as that term is understood for purposes of prescription.

11. I dealt with this in the recent unreported decision in *Makhwelo v Minister of Safety and Security* case no: 2013/26724 (GLD) on 3 February 2015. After referring to *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H and *Truter and another v Deysel* 2006 (4) SA 168 (SCA) at paras 16 to 21 I attempted to summarise the position as follows at para 53;

"

a. *a debt is due only when;*

    i. *the material facts from which the debt arises are known, or when they ought reasonably to have been known (see Truter);*

    and provided

    ii. *it is immediately claimable and the debtor is obliged to perform immediately (see Deloitte Haskins);*

b. *the material facts do not include knowing that the actions were culpable ….* "

12. The second requirement of the debt being immediately claimable and the debtor being obliged to perform immediately was based on the following clear statement of the position in *Deloitte Haskins* at 532H ;

> "'*This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See*

The Master v I L Back & Co Ltd and Others1983 (1) SA 986 (A) at 1004 read with Benson and Others v Walters and Others 1984 (1) SA 73 (A) at 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, ie before he is able to pursue his claim (cf Van Vuuren v Boshoff 1964 (1) SA 395 (T) at 401).'

13. Mr Mokoena also submitted that the Plaintiff knew by the 22nd of May 2009 that she would not receive a performance bonus. Accordingly there was no need for her to wait until the date by when payment would have been made if she had qualified.

14. As indicated earlier the question of knowledge of liability in the broad sense and whether a debt is immediately claimable on the other involves two discreet enquiries and *Deloitte Haskins* is binding authority on the application of the latter requirement. When it was enquired of Defendants' counsel whether the Plaintiff could have obtained a judgment prior to 1 July for payment of the performance bonus on the basis that she was aware that by May she would not receive it the answer was that she could not. I agree. It is for this very reason that the second fundamental requirement of when a debt becomes due could not have been satisfied prior to 1 July 2009.

15. The Plaintiff could only "*enforce*" payment on 1 July 2009, irrespective of whether or not payment would be forthcoming if regard is had to the relevant provision regarding the payment of the performance bonus. This is to be found in the terms of the Performance Bonus Scheme (*'the Scheme'*) which provides that the amount is paid annually on 1 July if the employee achieves the requisite performance standard.

16. The Defendants may have been correct as to the due date of the debt if the claim was based on reviewing and setting aside the assessment made. However if that was the case then the Plaintiff had already taken the issue before the CCMA in good time when she brought the dispute based on unfair dismissal before that tribunal in June 2009. The dispute was based on a contention that her department head, Mr Ford, was responsible for her

assessment despite her earlier having lodged a formal grievance against him. She claimed that this was the true reason for the alleged unfair assessment of poor performance which, she averred, constituted an unfair labour practice in terms of the Labour Relations Act, 66 of 1995 (LRA).

Mr Franklin on behalf of the Plaintiff emphasised that the claim presently before this court is one based on contract in terms of which a performance bonus would be paid in certain circumstances governed by the provisions of the agreement and the rules of the Scheme. He argued that since the claim is contractual the earliest date that the debt could have become due and payable, and therefore enforceable, was no sooner than the date the Defendants were obliged to make the payment, which was on 1 July 2009. I agree.

17. Accordingly I find that the summons was served on the Defendants prior to the expiry of the prescription period.

RES JUDICATA

18. In order for the plea of *res judicata* to succeed the Defendants were obliged to demonstrate that there was an adjudication in legal proceedings between the same parties in respect of a demand for the same relief and on the same grounds. It is also clear that the decision must relate to the merits of a question in issue. See generally *Prinsloo N.O v Goldex* 2014 (5) SA 297 (SCA) at para 10: *National Sorghum Breweries' (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001(2) SA 232 (SCA) at 239F-H and *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562C-D.

In my view the plea of *res judicata* falters on the requirement of there being a final determination on the merits in respect of a question in issue. I deal with this in the following paragraphs.

19. Mr Mokoena relies on the terms of the arbitration award of Commissioner Boyce of the CCMA which reads:

"5.1 the respondents failure to pay a performance bonus to the Applicant during or about June/July 2009, does not relate to the "provisions of benefits" contemplated in section 186(2) (a) of the Act

5.2 The Applicant, consequently failed to discharge the onus on her to prove that the Respondent's conduct amounted to an unfair labour practice."

The Plaintiff also drew attention to paragraph 2 of the award where the Commissioner identified the primary issue which he was required to determine in the following terms:

"*….. Whether the Respondent committed an unfair labour practice as contemplated by section 186(2) (a)… by failing to pay the Applicant a performance bonus."*

20. In my view the mere fact that a party may have defined an issue before a tribunal does not inform us as to whether that indeed was the issue actually determined. This must be so because the opposing party may take jurisdictional or other preliminary points (eg in money claims where the debtor avers that the jurisdictional prerequisites of notice under the National Credit Act have not been complied with). Although it may however assist where there is ambiguity regarding the *ratio decidendi* or order made, those considerations do not arise in the present case.

21. While the award may at first blush suggest that the Commissioner considered that there was an unfair labour practice, in its terms (and more particularly the introduction of the word *'consequently'*) the second part of the award appears to be a conclusion drawn from what precedes it and is not necessarily a self-contained determination.

22. In order to determine whether there has been a decision on the merits in respect of the question identified as being the issue for determination between the parties it is necessary to establish if there was any *ratio* dealing with whether or not the agreement entitled the Plaintiff to claim the performance bonus or whether or not there was some unfair labour practice which precluded her from receiving the amount.

23. I am satisfied that on an ordinary reading of the award the Commissioner did no more than find that the performance bonus was not a benefit but simply a remuneration under section 213[1] of the LRA and therefore fell outside the parameters of section 186(2)(a) of the Act since that section requires the alleged *"unfair conduct*" to relate to "*promotion*, *demotion*, *probation*, *training or benefits*"[2].

24. After considering a number of Labour Court decisions the Commissioner was satisfied that:

"Even on the Applicant's own version, the payment of the performance bonus was subject to her work performance being of a particular standard, and I fail to see how the said performance bonus can be construed as anything other than remuneration (see para 4.5)

…..

Having regard to the foregoing, and bearing in mind that the performance bonus in question was , indeed a quid quo pro for services rendered by the Applicant, I cannot find that the dispute in casu relates to "benefits"." It follows that the said dispute does not fall into the parameters of section 186(2) (a) of the Act"(see para 4.7)

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[1] Section 213 is the definition section which does not define a '*benefit'* but defines *'remuneration*' to mean:
" any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and 'remunerate' has a corresponding meaning"

[2] Section 186 deals with the meaning of dismissal and unfair labour practice under the LRA. Section 186 (2) provides;
'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-
(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

25. There is nothing in the award that refers to a determination of whether the Applicant was rightly or wrongly aggrieved by not receiving the performance bonus. The decision was concerned solely with whether the performance bonus was a benefit or a remuneration and that, being a remuneration, it did not fall under section 186(2)(a). It was for this reason that the Commissioner determined that the issue was not cognisable under the Act as a matter susceptible to being challenged on the grounds of an "*unfair labour practice*" or "*unfair conduct*."

26. The Commissioner went so far as to say at para 4.3 that:

> *"The unfair labour practice provisions in the Act do not vest the CCMA with jurisdiction to arbitrate a dispute relating to remuneration, and such a dispute may be referred to the Department of Labour"* .

In my view there is no doubt that the decision of the Commissioner was limited to whether the plaintiff's dispute fell within the provisions of section 186(2)(a); a purely jurisdictional question which did not touch on the merits of her claim of unfair conduct or entitlement to payment of the performance bonus.

Accordingly the second special plea fails.

LIS PENDENS

27. Mr Mokoena had already commenced arguing this point when the court took the mid-morning adjournment. On resuming Mr Franklin advised that the plaintiff would be withdrawing the review proceedings pending before the Labour Court. Quite clearly this renders the *lis pendens* issue moot.

COSTS

28. The defendants however contended that they were entitled to the costs of the third special plea. The plaintiff argued that if the court dismissed the other special pleas she would be substantially successful and should be entitled to full costs. It was also contended that the plaintiff did not concede the merits of the special plea but simply made an election not to proceed with the review.

29. I have already found that the other two special pleas fall to be dismissed. By not conceding the point one of the issues that requires consideration when dealing with costs is whether the *lis pendens* plea had merit.

30. The issue comes back to whether the claim as formulated is a contractual claim based exclusively on the terms of the agreement and not susceptible to the exercise of a discretion by Mr Ford which must first be set aside. If the latter then it would follow that the review proceedings before the Labour Court were directed to that end, albeit couched as an unfair labour practice justiciable under section 186(2)(a) of the LRA.

31. The plaintiff pointed out that the claim as formulated in the summons is not premised on setting aside the decision of Mr Ford. The defendant however contends that Mr Ford exercised a discretion in determining whether the plaintiff was entitled to a performance bonus.

32. At this stage the court is not required to determine the merits of the case made out in the particulars of claim. It is only concerned with whether a claim has been pleaded which is immune from an attack based on *lis pendens*.

33. The defendants rely on clause 5 of the Scheme. At its highest the point would be that the plaintiff's claim cannot be based simply on a contractual entitlement to receive the performance bonus but requires first a successful challenge to the discretion Mr Ford was entitled to exercise under the agreement when assessing the plaintiff's eligibility for the bonus. The consequence is that in order to succeed it would be necessary for the plaintiff to challenge the exercise of that discretion; a matter which was characterised

before the CCMA as "*unfair conduct"* but which in substance amounts to the same challenge that would have to be mounted in this court if Mr Mokoena's submissions are correct..

34. The only parts of clause 5 that was referred to on this aspect were the following;

    - *Performance targets for individuals (all bands) are finalised and filed by Divisional Heads before end of March*

    - *The Divisional Merit Committee consisting of the Divisional Executives (Chairperson), Team Heads, HR representatives and outside of the Division VP representative, have the following responsibilities:*

        - *Ratify all matters relating to the individual performance management system (target setting and measurement)*

35. In my view these matters are concerned with the setting of performance targets, which the plaintiff readily accepts as appears from her attorney's letter dated 9 June 2009 complaining of an unfair labour practice.

36. Mr Franklin candidly stated that the claim is based strictly on the agreement and it is unnecessary to challenge the regularity of the assessment performed by Mr Ford since the Scheme provides for the objective criteria that are to be applied.

37. In preparing this judgment I had the opportunity of considering the balance of clause 5 which admittedly contains a lengthy set of provisions. It is possible to distil from the clause that any qualitative issues should be limited[3] . But even measurements that are of a subjective or qualitative nature appear to be determined against objectively established criteria. In this regard there is a measuring scale which defines the different levels of performance by

[3] The relevant bullet point reads: "Individual targets must reflect the core business priorities and service levels of the SBU/Department. Soft, qualitative issues should be limited" (emphasis added)

reference to generally ascertainable criteria and then allocates points for the level of performance attained.

38. Once again it is irrelevant for present purposes to consider whether the plaintiff will convince a court in due course that she has produced sufficient objective evidence to demonstrate that she would in any event have attained the required overall percentage score to be contractually entitled to payment of the performance bonus without having to engage in setting aside what appears to be the limited subjective elements of the assessment. That goes to the merits; not to the cause of action as pleaded.

39. Similarly no point has been taken about whether the plaintiff's claim remains within the exclusive jurisdiction of the Labour Court. The CCMA award said it was not, and this was pursuant to the defendants raising it as a preliminary point. The claim as presently framed does not rely on an unfair labour practice.

40. The point of departure between a plea of *res judicata* and *lis pendens* is that in the latter a plaintiff pleads the same set of facts arising from the same cause of action against the same party whereas in the former it is the breadth of the case pleaded that affords the dilatory defence even if there is a decision only on one claim which leaves the other claims unaffected.

    In the present case while the review to the Labour Court was in place, it was still possible for that court to effectively afford substantive relief albeit based on different grounds. Whether that has to be pleaded in the alternative, as with certain contractual claims that may also raise a delictual liability, was not argued as the review proceedings were withdrawn. I do not propose deciding on an issue that was not canvassed.

41. That being so, and costs being a matter of judicial discretion, the fairest order is for the defendants bear two thirds of the plaintiff's costs.

ORDER

42. I accordingly order that;

a. The first and second special pleas are dismissed;

b. The third special plea of *lis pendens* falls away;

c. The defendants are to pay two thirds of the plaintiff's costs including the costs of engaging two counsel and in preparing the heads of argument. The costs are to be paid jointly and severally by the defendants, the one paying the other to be absolved.

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SPILG J

DATE OF HEARING: 12 February 2015
DATE OF JUDGMENT: 13 February 2015
LEGAL REPRESENTATION:

FOR PLAINTIFF: Adv A Franklin SC

Adv L Hollander

Anthony Hinds Attorneys

FOR DEFENDANT: Adv P Mokoena

Adv J Nalone

Maserumule Inc Attorneys