IN THE GAUTENG DIVISION, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

12/12/2014

CASE NO: A173/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓

12.12.2014
DATE

SIGNATURE

In the matter between:

DR. JG STRYDOM **APPELANT**

And

UNIVERSITY OF SOUTH AFRICA **RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The appellant brought an application in the court a quo seeking an order directing the respondent to pay him the actuarial calculated amount due to him in terms of the applicant's membership of the medical aid fund at the respondent in the alternative an amount of R187 660.92. The respondent opposed the application which was dismissed with costs by the court a quo.

BACKGROUND FACTS

[2] The appellant, after the dismissal of his application, sought leave to appeal against the judgment of Makgoba J (the court a quo) of 15 April 2010 to the full court of this division. Leave to appeal was granted and the appellant then proceeded to prosecute the appeal which then came before us. On 1January 1985 the appellant joined the Old Testament Department at the respondent. He worked for 22 years after which he enquired what his financial payout would be if he applied for a voluntary severance package. On 28 September 2007 J K Moloto, the Executive Director of the respondent in a letter (annexure "JGSI" to the founding affidavit) stating that the estimated benefits for the voluntary severance package would be:

1.	Retirement Fund Member's Credit:	R1682 888.76
2.	Vacation Leave payout value:	R18 954.33
3.	Medical Aid Fund Credit (if not taken previously)	R187 660.92
4.	Two weeks gratuity leave:	R311 382.58
	Total:	**R2 210 886.59**

It is important to note that the appellant had requested information which was as a result furnished. It is also important to note that the appellant would have to submit an application in the event that he decided to proceed with the application for the voluntary staff reduction in which event he would be advised of the final figures. This, because the retirement fund information was subject to market fluctuation. The appellant, however, could withdraw the application within five days of his receipt of the final figures.

The appellant was invited to discuss the matter further if he so wished, by making an appointment at (012) 429 2007. The appellant, according to him, then submitted the application. JK Moloto in a letter of 7 November 2007 after due consideration of

the application, recommended the application for approval by the Human Resources Committee of Council. The Human Resources Committee of Council approved the application and the voluntary severance package would be effective from 31 December 2007. JK Moloto in his letter to the appellant of 23 November 2007 further advised the appellant that the processing of his "pension benefits" could not be "commenced with until such time as the relevant documentation" would have been completed by him and returned to the HR Department. A claim form to be completed was enclosed. The documents had to be submitted to the appellant's HR Practitioner not later than 7 December 2007. The appellant was paid the pension benefits. The medical aid lump sum payout was, however, not effected. This resulted in correspondence between the appellant and the respondent. The appellant ultimately was advised that he was not entitled to the lump sum payout of the post retirement medical aid benefit. The appellant, unhappy with the advice, then brought an application for the payment of the R187 660.92 which was dismissed with costs on 15 April 2007 by the Court a quo. The appellant's appeal now serves before us. Again the respondent opposes the appeal.

[3] It is important to refer to the appellant's grounds of appeal before I deal with the matter. These are the following:

"1.1. It is respectfully stated that the Honourable Judge erred in finding:

1.1.1. That the Appellant's reliance on a contract had no merit;

1.1.2. That no contract came into being between the Appellant and the Respondent;

1.1.3. That annexure **"JGS1"** does not outline the terms of such a contract between the parties;

1.1.4. That the Respondent's denial of a contract is correct, especially in the light of the failure by the Respondent to provide an alternative legal basis for the Appellant's resignation;

1.1.5. That the Respondent had not breached any term of the contract on which the Appellant relied on;

1.2. It is respectfully stated that the Honourable Judge erred in finding that the Appellant had not complied with the conditions for a post retirement medical aid fund payout;

1.3. It is respectfully stated that the Honourable Judge erred in finding that the circular, dated 31 July 2006, had been provided to the Appellant and that such circular is applicable and relevant in the current matter;

1.4. It is respectfully stated that the Honourable Judge erred in finding that the Appellant had not complied with the conditions set out in the circular, dated 31 July 2006;

1.5. It is respectfully stated that the Honourable Judge erred in finding that the Appellant had failed to indemnify the Respondent regarding any future post retirement medical aid subsidy;

1.6. It is respectfully stated that the Honourable Judge erred in not finding that the Appellant waived expressly, tacitly or by implication, any retirement to any future post retirement medical aid subsidy;

1.7. It is respectfully stated that the Honourable Judge erred in not finding that the Appellant acknowledged, expressly, tacitly or by implication, that he has no further future claims against the Respondent for post retirement medical aid subsidy

1.8. It is respectfully stated that the Honourable Judge erred in finding that there was a particular procedure that the Appellant had to comply with and the

Appellant had to comply with and that the Appellant had not complied with such procedure

1.9. It is respectfully stated that the Honourable Judge erred in finding that the Appellant had not applied for a post retirement medical aid payout, prior to resigning from the Respondent;

1.10. It is respectfully stated that the Honourable Judge erred in finding that the judgment in the Labour Court in 2006 granted by the Honourable Mokgoatlheng AJ (as he then was) was applicable in the current matter;

1.11. It is respectfully stated that the Honourable Judge erred in finding that a payout by the Respondent to the Appellant of money arising from the post retirement medical aid credit would undermine the said Labour Court judgment;

1.12. It is respectfully stated that the Honourable Judge erred in finding that the Appellant's application should be dismissed with costs."

[4] The appellant alleges that an agreement has come into being between the appellant and the respondent in terms of which the respondent should be ordered to pay to him the actuarial calculated amount, interest and costs due to him in terms of the appellant's membership of the medical aid fund at the respondent alternatively, an amount of R187 660.92. The respondent denies the existence of such an agreement. The respondent contends that if an agreement was concluded then same was subject to conditions precedent. The Labour Court judgment, according to the respondent, rendered performance in terms of the alleged agreement impossible.

THE ISSUES ON APPEAL

[5] These are whether:

1. an agreement came into being in terms of which the appellant could hold the respondent liable to pay him the amount of R187 660.92
2. If an agreement was concluded same was subject to conditions precedent.
3. the appellant had failed to comply with those conditions precedent.
4. where the Labour Court order is applicable:
    - 4.1. this court can exercise its discretion and, contrary to the order, allow the enforcement of the agreement
    - 4.2. the appellant could abandon or waive the applicability of such an order
    - 4.3. the appellant had, in fact, validly waived or abandoned such an order.

[6] The respondent's contention is that the appellant, for the first time in the heads of argument, raises new argument in the alternative to say that he made the offer to the respondent which it accepted. This, according to Mr Gengiades for the respondent, contradicts the appellants case, namely that the respondent made an offer to him which he accepted thereby giving rise to the agreement contended for by him. The new argument, according to the respondent, should be disregarded as it was not fully canvassed before the court a quo.

[7] It is contended on behalf of the respondent that the appellant again, for the first time, on appeal, raises a matter which was not pleaded in his papers namely, that of estoppel. This, the appellant, according to Mr Georgindes, should not be allowed to do.

COMMON CAUSE FACTS

[8] These are that:

1. the appellant was part of the respondent's academic staff for 22 years;
2. the appellant enquired from the respondent's human resources department what financial payout he would receive if he opted for a voluntary severance package;
3. JK Moloto in his letter of 28 September 2007 replied that he would receive R2 210 886.59 which amount included R187 660.92 for the post retirement medical aid credit (the PRMA).
4. the appellant's PRMA credit had not been paid out previously.
5. the appellant, after considering his financial position, applied for the voluntary severage package.
6. JK Moloto, in his letter dated 23 November 2007, advised that the human resources committee of council had approved the respondent's application.
7. An agreement came into being between the appellant and the respondent with respect to the pension benefits as evidenced by paragraph two of Moloto's letter dated 23 November 2007.
8. The respondent had a PRMA subsidy which it offered its employees who had retired from active service. The employees, however, had to comply with conditions precedent which were in place.
9. The appellant was a member of the Academic and Professional staff Association (APSA) which was the Union which operated within the respondent.

[9] The respondent, during 2006, embarked upon a process for liquidation of its PRMA which, at the time, according to it, had become financially burdensome. APSA was

not happy with the process which, according to it, amounted to a unilateral implementation of change to the terms and conditions of employment pertaining to the post retirement medical aid benefits of Apsa members. APSA (the "Union"), by way of urgency obtained an interim interdict on 13 September 2006 interdicting the respondent from inviting or continuing to invite APSA's members to waive their entitlement to post retirement medical aid benefits. On 23 March 2007 Mokgoatlheng AJ, as he then was, confirmed the rule nisi (the interim interdict).

[10] It is important to have regard to the document which prompted APSA to bring the urgent application against the respondent. The respondent, once the decision to liquidate PRMA was taken, sent out a circular or a letter to its employees dated 13 July 2006. This is the circular which Mr De Wet, for the appellant, argued had to be disregarded by the court. It is not very clear why the circular should be disregarded because it is the very circular which prompted the application that APSA brought against the respondent. The circular, in my view, remains key to this appeal.

[11] The circular, inter alia, stated:

"Please note that should you elect not to take up your share of the payout as indicated hereunder, the funds will be placed in a trust account for the benefit of qualifying employees to withdraw as and when they decide to do so.

The funds in the said trust account will be duly and properly invested, but the University neither guarantees any particular growth nor will it be responsible for any negative trends in the markets.

Please take further notice that should an employee elect to take his/her share of the payout, he/she shall do so in full and final settlement in all respects, and in particular by doing so acknowledge (sic) that he/she has no future claims regarding

any form or format of post retirement medical aid subsidy against the University. Further that he/she specifically indemnifies the University in all respects regarding any future post retirement medical aid liability".

[12] The extract from the circular clearly specifies what an employee needed to do to access the post retirement medical aid benefit. It follows therefore that unless an employee followed the stipulated procedure he/she would not be able to access the benefit. It must be remembered that the benefit was meant for the employees who had retired. It must also be borne in mind that the appellant did not retire. He took a voluntary severance package. This obviously meant that special mechanism had to be in place to enable the employees to access the benefits. The employee either complied or did not comply with the mechanism which then would influence the availability of the benefit to such an employee. Clearly, as the court a quo correctly observed, the appellant nowhere in his papers does he allege that he satisfied the above procedure or mechanism.

[13] Further the circular reads:

"As this payment is in lien of the right to the post retirement medical aid subsidy, the following undertaking has to be signed".

The employee first must furnish his full names, identity number and staff number and then give the following undertaking:

"I hereby accept this entitlement in full settlement of any future right to post retirement medical aid subsidy against the University of South Africa and specially indemnify the University in all respects regarding any future post retirement medical aid liability".

[14] The undertaking becomes more relevant if regard is had to the fact that the benefit was meant for those who would have retired. This mechanism made it possible for employees to access the benefit before retirement. The respondent had to ensure that it was properly covered and protected against future claims. This then immediately informs one that for the benefit to be accessed an agreement had to be entered into between the respondent and the employees.

[15] To access the benefit, therefore, the employee had to apply for the benefit, signal his waiver of the post retirement aid subsidy in future and accept the pay out in full and final settlement. The court a quo correctly found that the appellant did not do this. What complicates the appellant's case even further is that the employee, according to the mechanism, had to apply for the benefit while still an employee of the respondent.

[16] The respondent contends that it had to respect and comply with the Labour Court order which prevented it from dealing with the benefit which related to the appellant. The interim order was made final and that made it impossible for the respondent to perform and pay the respondent. It must be remembered that it is the appellant's union that created the problem. It was against the mechanism and the decision of the respondent regarding the early payment of the benefit to the employee. The appellant, had he not resigned, would have been entitled to the post retirement medical aid subsidy. The Labour Court order and the taking of the voluntary severance package created problems for the appellant.

[17] The respondent contends that the appellant's union which took the respondent to court was the appellant's agent. Indeed that is so. Its further contention is that the

agent was obliged to properly inform advice and assist the appellant. The union had legal representatives who were even able to get the interim and final orders in the Labour Court. The matter and the circular were discussed by the employees some of whom, according to the respondent, resigned from APSA claimed their benefits, rejoined the union and went on working for the respondent. How the appellant took the decision he took well knowing that there were employees who were accessing their benefits and still remained the respondent's employees cannot properly be understood and remains inexplicable.

[18] The respondent contends that:

1. the appellant, out of time, applied for a post retirement medical aid subsidy payout. This is true.
2. the appellant never indemnified the respondent from future PRMA liability as prescribed by the mechanism. This is correct.
3. the appellant never waived his right to a future PRMA claim. This is correct.
4. the appellant ought to have applied for his payout while still a member who also remained a member after the application was processed. The appellant obtained his pension payout and only applied for the PRMA subsidy after he had taken his severance package. This indeed, was against the mechanism in place.
5. the labour court order prevented the respondent from inviting or continuing to invite members of the union from waiving their entitlement to the retirement medical aid benefits. The order indeed, had to be respected because failure to respect it would have amounted to contempt. The appellant was a member of the union until 31 December 2007. He after that date ceased to be an employee of the respondent. Effectively the Labour Court order

prevented both the appellant and the respondent to take advantage of the mechanism in place. The respondent was never to blame for that. The appellant, in the circumstances of this case, could not validly waive the applicability of the Labour Court.

[19] Introducing estoppel into the equation does not help the appellant. The circular was in circulation. It prompted the appellant's union to approach the court for an order which unfortunately worked against the appellant. The respondent was the adversary in the labour court application. To expect the respondent in that situation to have done more while the appellant had an agent who took care of his affairs cannot be just and fair. It is also unacceptable that the appellant did not know what to do regarding the application for the retirement medical aid benefit. The matter must have been a common topic among the respondent's employees.

[20] Mr De Wet, for the appellant, vigorously argued that the basis of their application was the agreement which came into being when the respondent responded to the appellant's enquiry regarding what amounts he would receive if he were to take the severance package. This was nothing else but an enquiry. An enquiry can never translate into or be elevated to an agreement. Once the appellant applied for the severance package and that was approved and accepted an agreement came into being only in respect of the pension benefits as evidenced by Motolo's letter to the appellant dated 23 November 2007. The post retirement medical aid benefit is not referred to in the letter. This, in my view, is indicative of the fact that the medical aid benefit belonged to another and a different regime. Bearing in mind that there was a mechanism in place, it can only make sense that an agreement was a requirement for one to access the post retirement medical aid benefit. This, also because the

post retirement medical aid benefits were meant for those who had retired. The appellant did not retire. He only took voluntary severance package which catered for his pension benefits. He would have accessed his post retirement medical aid benefit the normal way had he not taken the voluntary severance package. This he did not do. He then had to exercise his option to elect to participate in the mechanism in place. Their union stopped their participation. I do not think that one can blame the respondent for the union's decision.

[21] For the agreement to arise the appellant needed to participate fully and follow the requirements of the mechanism in place. The respondent would have duly considered the appellant's application and decided to enter into an agreement with the appellant or not. Put differently, there were conditions precedent to be met before the agreement alleged by the appellant would become a valid agreement. The answer to the question whether or not an agreement came into being is simply that: for failure to satisfy the conditions precedent, no agreement came into existence. The appellant's claim has no basis. An agreement entails the meeting of the parties' minds. Did the appellant's and the respondent's minds meet? The answer is an obvious no.

[22] Mr De Wet referred the court to the case of **Goldblatt v Fremantle 1920 AD 123.** The nub of the case seems to be that the party who alleges that they were *ad idem* as to the material conditions of the contract and that the legal validity of an agreement should be postponed until the due execution of a written document should prove it. The case, in my view, does not seem to assist the appellant. Similarly the position, in my view, is the same regarding the case of **Build-a-Brick**

BK & ń Ander ESKOM 1996 (1) SA 115 (O) to which the court was also referred. The case does not help the appellant either.

[23] It is noteworthy that the appellant's case in the court a quo had been that the respondent made the offer to the appellant relating to the liquidation of his benefits in the post retirement medical aid liability. This in the reply changed to: the offer was made by him and accepted by the respondent and thereby giving birth to the alleged contract. This is contradictory. I have dealt with the position of his post retirement medical aid benefit above.

[24] The estoppel which the appellant raised in the reply does not assist him as I pointed out above. In any event, for the appellant to raise estoppel in his reply, the circumstances under which that is done have to comply with what the court said in **Sharga v Chalk 1994 (3) SA 145 (N) at 150 F-J to 151A**. There the court dealing with a point of law brought to its notice which was not taken earlier said:

"If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

[25] The appellant failed to prove the existence of an agreement or contract. The appellant being a member of APSA should have known of the process that needed to be followed to access the PRMA benefit. The contract of mandate entails that the agent is obliged to fulfil the agreed functions faithfully, honestly and with care and

diligence and to account to the principal for the actions taken. APSA ought to have fully and properly advised the appellant on the mechanism in place to access his PRMA benefit. This, because APSA knew of the process for claiming the PRMA benefit. I do not think that this responsibility ought to be shifted to the respondent.

[26] The appellant failed to take advantage of the mechanism in place to access his PMRA benefit which accrued only to employees of the respondent. The appellant ceased to be an employees of the respondent on 31 December 2007.

[27] The Labour Court barred the respondent from offering the appellant his benefits in terms of the PRMA. It was incumbent upon the union to explain this to the respondent. The respondent cannot be blamed for such failure if that was not done. Performance of the agreement was rendered impossible. There was also no compliance with the mechanism in place which would have enabled the appellant to access his post retirement medical aid benefits. No agreement therefore came into existence. The court a quo, in my view, was correct in dismissing the application with costs. This appeal therefore should fail.

[28] I, in the result make the following order:

The appeal is dismissed with costs which costs include costs of two counsel.

M.W MSIMEKI
JUDGE OF THE GAUTENG DIVISION
PRETORIA

I agree

P.M MABUSE
JUDGE OF THE GAUTENG DIVISION
PRETORIA

I agree

L.WINDELL
JUDGE GAUTENG DIVISION
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INSTRUCTED BY:	NTABENI ATTORNEYS
DATE OF HEARING:	
DATE OF JUDGMENT:	03 SEPTEMBER 2014