IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

14/11/2014
DATE

SIGNATURE

CASE NUMBER: 12240/14

DATE: 14 November 2014

FLOYD WINNERS MATHEBULA — Applicant

V

SOUTH AFRICAN POST OFFICE LIMITED — First Respondent

POST OFFICE RETIREMENT FUND — Second Respondent

JUDGMENT

STRYDOM AJ:

Introductory remarks

[1] Sad is the day when a party with a watertight case, come to court and he is stopped in his tracks by a sudden death due to a fatal blow from a watertight defence of prescription. The present matter is a classic case of this nature.

[2] In its notice of motion the applicant seeks the following relief:

"*2.1 Declaring unlawful and invalid the payment made by second respondent to first respondent;*

2.2 Declaring the payment by the second respondent to first respondent as unlawful enrichment;

2.3 Ordering the first respondent to pay back to the applicant the amount paid by the second respondent to the first respondent termed as employer compensation;

2.4 Ordering the first respondent to pay the said amount of R159,878.00 with interest from date of payment from 11 March 2010 at a rate of 15.5%;

2.5 Ordering the first respondent to pay costs of this application on an attorney and client scale."

[3] In its founding affidavit, under the heading "*the nature of the application*" the applicant avers that he is claiming specific performance from the respondents. The applicant's cause of action is based on an unlawful deduction in the amount of R159,878.00 which was deducted from the applicant's retirement funds on 11 March 2010 by the second respondent and paid over to the first respondent. Notwithstanding the terminology used, the evidence presented supports a claim for unjust enrichment.

[4] The first respondent filed an answering affidavit to the applicant's founding papers, to which the applicant filed a replying affidavit and the first respondent filed a further affidavit to which he refers as a "*supplementary answering affidavit*." When the matter came before me on 3 November 2014 I indicated to the counsel for the first respondent that this affidavit amounts to a "*duplication*" for which the approval of court should be sought before it can be admitted as evidence. Counsel for the first respondent conceded that the latter affidavit is not

necessary and/or essential for the defence it raised against the claim of the applicant, and abandon reliance upon it.

[5] The first respondent raised four points *in limine* against the claim of the applicant being: prescription of the claim;[1] *lis alibi pendens;*[2] concurrent jurisdiction of the regional court;[3] and no valid contract between the applicant and the first respondent.[4] When the matter came before me the first respondent correctly, in my view, abandoned its reliance on *lis alibi pendens* and no valid contract. In respect of the jurisdiction point *in limine*, the first respondent only persisted with it in so far as it pertains to a cost order in the matter. The first respondent's argument in this regard is that the applicant could have instituted his claim in the Regional Court, which would have curtailed the costs of both parties. I am not convinced by this argument.

[6] The second respondent abided by the decision of court, after withdrawing its opposition to the application[5].

Common cause facts

[7] The facts of this matter are common cause and can be summarised as follows:

The applicant, a former employee of the first respondent since 1995, was the branch manager of the Welobie Post Office, from 1 December 2004[6]. The applicant's employment with the first respondent was regulated by an employment agreement, which was attached

[1] See: pages 42-44 of the paginated pages
[2] See: pages 45-46 of the paginated pages
[3] See: pages 46-47 of the paginated pages
[4] See: pages 47-48 of the paginated pages
[5] See: pages 29-31 of the paginated pages
[6] Compare page 8 and page 49 of the paginated pages

as annexure *"SAP02"*[7]. Due to the operational requirements of the first respondent, the applicant was appointed as acting branch manager of the Honeydew branch of the first respondent. At the same time the applicant was still the branch manager of the Welobie branch of the first respondent and accordingly carried the responsibility for two branches[8]. The applicant's duties and responsibilities, while employed by the first respondent, was also regulated by the first respondent's "*postal operation instructions.*" Chapter 13 thereof, under the heading: "*secure mail antifraud system policy*"; required that the validity of customers' (recipient of postal secure item) identification documents should be established before any item is handed over to a customer. The said policy sets out the criteria that should be used to conduct such verification[9]. The applicant failed to comply with the provisions of the latter policy of the first respondent therein that a credit card was given to an incorrect person. The latter person used the credit card to an amount of R75 412.43[10]. As a result of the applicant's conduct the first respondent suffered financial loss in an amount of R75 412.43 therein that it was required to refund Absa Bank for the unlawful use of the credit card by the incorrect recipient thereof, plus a further amount of R100.00 as cancellation fee for the credit card[11]. The applicant was subjected by the first respondent to a disciplinary hearing on a charge of gross misconduct relating to the aforesaid financial loss[12]. The disciplinary enquiry found the applicant guilty of the charge of negligence or gross misconduct upon which the first respondent dismissed the applicant from its service. The applicant challenged his dismissal in the Commission for Consolidation, Mediation and Arbitration ("*the CCMA*"), which found his dismissal to be fair.[13] The applicant instituted review proceedings in the labour court on 3 December 2010 against the finding of the CCMA. The

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[7] Compare page 8 of the paginated pages clauses 6.6 and 10.4 of the employment agreement between the applicant and the first respondent
[8] See: page 8, compared with page 52 of the paginated pages
[9] See: pages 91 to 128 of the paginated documents
[10] See: pages 53 to 58 of the paginated pages
[11] See: page 54 of the paginated pages
[12] Compare page 58 and 129 of the paginated pages
[13] See: pages 58 to 59 and page 130-140 of the paginated pages

latter litigation is still pending between the parties[14]. The first respondent, allegedly acting in terms of clause 6.6 of the employment agreement between the parties, deducted an amount of R159,878.00 from the applicant's pension funds and/or receive the latter amount from the second respondent which deducted the said amount from the applicant's retirement funds[15]. On 11 March 2010 the applicant received an amount of R55 001.40 in his bank account, being the balance of his pension monies after the aforesaid deduction by the first respondent[16]. On 31 March 2009, on the applicant's version and his founding papers, he was aware that his pension benefit on the latter date amounted to R230 960.74. The applicant further alleged, which was not properly challenged by the first respondent, that he made several verbal demands to the first respondent, for a breakdown or specification of the deductions the first respondent made from his pension funds. The first respondent only placed the applicant in possession of a letter, dated 11 March 2010, on 2 October 2013, which specified the deductions made by the first respondent. It appears from this document that the applicants pension benefit amounted to R256,800.86 on 11 March 2010. An amount of R42,174.13 was deducted as tax and R159,878.00 as damages which the first respondent suffered as a result of the conduct of the applicant, prior to his dismissal.

Respondent's defence against the applicant's claim

[8] The applicant's cause of action is in essence a claim for unjust enrichment, referred to as a *condictio indebiti:* for which the essential allegations are that:

(a) The first respondent must have been enriched;

(b) The applicant must have been impoverished;

(c) The first respondent's enrichment must have been at the expense of the applicant, and;

[14] See: pages 68 to 81 of the paginated pages
[15] See: pages 17; 59-60 and 173 to 186 of the paginated pages
[16] See: page 22 of the paginated pages

(d) The enrichment must be unjustified or *sine causa*[17] (without reason).

[9] The first respondent's defence against the applicant's claim is that the applicant consented to or authorised the deductions which was made from its pension, by virtue of the provisions of clause 6.6 read with clause 10.4 of the employment contract.[18] Clause 6.6 of the said agreement reads as follows:

> *"Any debt owed to the employer by the employee upon resignation may be deducted from the employee's pension."*

Clause 10.4 reads as follows:

> *"The employee hereby consents that the employer recovers amounts owing to the company from his remuneration in the month following the expenditure or from the employee's pension in the event of the person leaving the service."*

[10] Upon dismissal on 2 December 2009 the applicant further signed a document, upon which the first respondent relies as defence; which reads as follows:

> *"I, Mr/Mrs (FW Mathebula) hereby grant permission for any money I owe to the South African Post Office in respect of arrears, medical aid contributions, medical aid shortfall, housing, bursaries, student loans, leave without pay, salary overpayment, salary sacrifices (DR1 to higher) and any damage to the company assets to be recovered from my pension benefits.*
> *I declare that the above information is true and correct and that I have not withheld any information."*

[11] The first respondent further attempted to rely on the said deduction on section 47D (ii) of the Pension Fund Act, 1956 (Act No. 24 of 1956), which reads as follows:

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[17] See: McCarthy Retail Ltd vs Shortdistance Carriers CC 2001(3) SA 482(SCA); Wille's Principles of South African Law (9th Edition) on page 1046
[18] See: pages 84 and 88 of the paginated pages

"37D. Fund may make certain deductions from pension benefits (1) a registered fund may –

(a) ...

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –

(i) ...

(ii) compensation (including any legal cost recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which (aa) a member has in writing admitted liability to the employer ..."

[12] On a proper interpretation of the aforesaid clauses of the contract and the provisions of the Pension Fund Act, there is absolutely no basis upon which the first defendant was lawfully entitled to deduct any amount from the applicant's retirement funds which was ultimately managed by the second defendant. I find it unnecessary to go into further detail in this regard, save to state that the applicant clearly indicated on the document referred to in paragraph [10] above, that there is no outstanding debt due by him to the first respondent.

[13] The affidavits filed by the parties in motion proceedings serves both as the pleadings and the evidence on their behalf. It is clear from the common cause facts and my latter finding that the applicant met all four corners of its claim against the first respondent. If it was not for the claim of prescription he would have been entitled to the relief sought.

Prescription

[14] The first respondent formally raised a defence of prescription against the applicant's claim in its opposing papers. I have set out the facts above. The applicant's counsel argued that prescription only began to run on 2 October 2013 when "*the facts from which the debt*

arises" came to the applicant's attention. This argument is obviously wrong and not in accordance with the law relating to prescription.

[15] Section 11 of the Prescription Act, 1969 (Act No. 68 of 1969, *"the Prescription Act"*) reads as follows:

> *"11 periods of prescription of debt shall be the following:*
> *(a)...*
> *(d) Safe where an act of parliament provides otherwise, three years in respect of any other debt."*

[16] The relevant portions of section 12 of the Prescription Act read further as follows:

> *"12. When prescription begins to run:*
> *(1) Subject to the provisions of subsection (2), (3) and (4) prescription shall commence to run as soon as the debt is due.*
> *(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescriptions are not commenced to run until the creditor becomes aware of the existence of the debt.*
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."*

[17] Prescription of the applicant's claim against the first respondent thus began to run on 10 March 2010 and not on 2 October 2013. The applicant was required to institute legal proceedings against the first respondent within a period of 3 years from 11 March 2010, which ended on or about 13 March 2013. It is common cause between the parties that the applicant only instituted the present claim against the respondents on 10 October 2013 which is more then 3 years after prescription started to run. The applicant clearly knew the identity of the debtor, being the first respondent. It is clear from the facts before me that the

applicant knew, or should have known, exercising of reasonable care that the first respondent did not pay him the full amount of his pension on 10 March 2010. In fact the applicant instituted a labour dispute against the first respondent, which is presently pending in the labour court. There is no indication that the applicant did not comply with the time periods for referral of that dispute to the labour forums.

[18] I am fortified in my finding by the remarks of his Lordship Mr. Justice Olivier in the matter of Drennan Maud and Partners vs Pennington Town Board[19] where the court stated:

> *"In my view, the requirement "exercising reasonable care" requires diligence not only in the ascertainment of the facts underline the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises."*

[19] In Minister of Finance vs Gorr[20] the court found as follows:

> *"This court, in a series of decisions, emphasized that the time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably."*

[20] It is abundantly clear from caselaw that knowledge of the legal conclusions is not required before prescription begins to run. Even if, as apparently alluded to by the counsel for the applicant, the applicant did not fully appreciated the legal consequences which flow from the facts, his failure to do so did not interrupt, and/or delay the running of prescription[21]. It is further clear from authority that the standard to be applied in the circumstances is an

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[19] 1998(3) SA 200 at 209F-G
[20] 2007(1) SA 111(SCA), at para 17
[21] Compare Yellow Star Properties vs NEC, Department of Planning and Local Government 2009(3) All SA 475(SCA) at para 37

objective standard and not the applicant's own subjective evaluation of the presence or absence of knowledge of the requisite minimum facts.

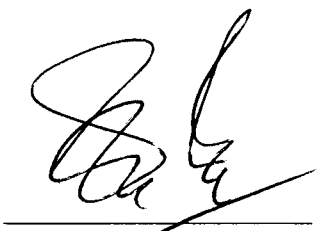
[21] In my view the applicant knew, or should have known that the amount he received on 10 March 2010 was far less money than his pension benefit he was entitled too. It follows therefore that the applicant had the minimum facts necessary to institute a claim against the respondents on the latter date.

[22] The ultimate necessary conclusion that follows from the aforesaid facts and legal position is that the applicant's claim prescribed almost a year prior to him instituting legal proceedings, against the respondents.

ORDER

In view of the aforesaid facts and considerations I make the following order:

1. The applicant's claim against the respondents is dismissed on the ground that it prescribed in terms of the Prescription Act, 1968.
2. Each party is ordered to pay its own costs.



J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

Appearances:

Attorneys for the Applicant:	*Faku Attorneys*
Attorneys for the respondents:	*Manamela Marobela & Associates*
Date Heard:	*5 November 2014*
Date of Judgment:	*14 November 2014*