IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 13121/2015

Date: 22/6/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22/6/2016 .....
DATE SIGNATURE

In the matter between:

THE GOVERNMENT EMPLOYEES MEDICAL SCHEME

FIRST APPLICANT/DEFENDANT

LIZIWE KONYANE

SECOND APPLICANT/DEFENDANT

And

PETRONELLA NONLELA NKONYANE

RESPONDENT/PLAINTIFF

JUDGMENT

PRETORIUS J.

(1) This is an application in which the respondents have raised three special pleas, *inter alia*, that this court lacks jurisdiction, the matter has prescribed and the matter has been finalised.

(2) The parties agreed at a pre-trial meeting on 10 September 2015 that the defendants' special pleas should be adjudicated first, as a finding in the defendants' favour will dispose of the plaintiff's claim.

BACKGROUND:

(3) According to the plaintiff she was employed by the first defendant until her resignation on 23 February 2012. She alleges that she was emotionally and verbally abused by the second defendant. As a result of his action she was forced to resign. She is claiming damages for past and future losses for *"loss of her job"*. She further claims for post-traumatic stress and depression in the amount of R500 000. This is as a result of being forced to resign due to the emotional and verbal abuse of the second defendant.

SPECIAL PLEA: JURISDICTION:

(4) The plaintiff's claim is that she was constructively dismissed as she was forced to resign due to the defendants' actions. In this instance the court has to determine whether the plaintiff was in fact constructively dismissed. The result of this is that the **Labour**

Relations Act[1], as amended, applies as a claim for constructive dismissal has to be referred to the CCMA or relevant bargaining council. Should she not have been successful, the matter should have been arbitrated in the absence of a successful conciliation.

(5) In **Gcaba v Minister of Safety and Security and Others**[2] the court held:

> *"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision.* ***In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor****. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also* ***sustain another claim, cognisable only in another court. If, however, the pleadings, properly***

[1] Act 66 of 1995
[2] 2010(1) SA 238 CC at paragraph 74

interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction." (Court emphasis)

(6) In terms of this decision the plaintiff's pleading is the determining factor to decide whether this court has jurisdiction in this action. If the court finds that the plaintiff's claim is set out in terms which constitute a claim under the **Labour Relations Act**[3], then the Labour Court has exclusive jurisdiction and this court cannot hear the matter.

(7) In **Chirwa v Transnet Limited and Others**[4] the Constitutional Court held:

"It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. ***Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the***

[3] *Supra*
[4] [2008] 2 BLLR 97 (CC) at paragraph 41

employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims. " (Court emphasis)

(8) In this instance it is clear that the provisions of the **Labour Relations Act**[5] apply if the court takes into consideration the plaintiff's cause of action, which is constructive dismissal. This court thus lacks jurisdiction if the court applies the principles set out in the above decisions. Should I be wrong in this finding I deal with the other special pleas as well.

SPECIAL PLEA: PRESCRIPTION:

(9) In terms of section 10 of the **Prescription Act**[6], a debt shall be extinguished by prescription after the lapse of a period of three years, as stipulated in section 11 of the Act. Section 12 stipulates that prescription shall commence to run as soon as the debt is due. Section 17(2) provides that the court may hear the defence of prescription at any stage. In this matter it was raised in the plea.

(10) In terms of section 190 of the **Labour Relations Act**[7] the date of dismissal is the earlier of:

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[5] *Supra*
[6] Act 68 of 1969
[7] *Supra*

"(a) the date on which the contract of employment terminated; or

(b) ***the date on which the employee left the service of the employer.***" (Court emphasis)

(11) According to the plaintiff she was emotionally and verbally abused by the second respondent on 15 August 2009. Her claim against the defendants arose on 15 August 2009. She resigned from her employment on 12 January 2012 in a letter which, *inter alia* set out, *"My last day will be on 23 February 2012, six weeks from today"*.

(12) Her notice of resignation was accepted, confirming that her notice period would terminate on 23 February 2012. Her last working day was 13 January 2012 and her final date of service would have been 23 February 2012. Her e-mail in this regard on 13 January 2012 reads:

"I want to bid farewell to you all and inform you that I am leaving my position at GEMS. ***Today is my last day at work.*** *I have enjoyed working for this company and I appreciate having had this wonderful opportunity to work with you all. During these last few years you all have provided me with kindness, encouragement and support, which is so unforgettable. With many of you, I have shared a unique friendship which I hope will continue in the years to come even though I shall not be here with the company. I now look forward to new challenges and*

adds (sic) more diverse experience to my future." (Court emphasis)

(13) It is clear from both the e-mails by the applicant and the employee of the applicant, Dr Watson that her last day attending at her place of employment was 13 January 2012.

(14) The applicant served her notice on 12 January 2012 to terminate her employment. The respondent accepted the shorter notice period and set out in a letter dated 13 January 2012:

"CONFIRMATION OF TERMINATION

Further to the discussion held yesterday between yourself and Zandile Sebona, your last working day will be 13 January 2012 *and your final date of service will be 23 February 2012. Your January salary will be paid as normal and your final payout will be made on 23 February 2012."* (Court emphasis)

(15) Therefor the applicant's employment was terminated on 13 January 2012, the day she left her employment. This principle was confirmed in the matter of **Chabeli v Commissioner for Conciliation, Mediation and Arbitration and Others**[8]:

"On these facts the applicant's initial calculation was in terms of the provisions of section 190 (b) of the LRA, correct and

[8] (JR2241/08) [2009] ZALC 126 at paragraph 13

remains so, in my view. ***The contract between him and the respondent was terminated on the day he left his employment and not as he contended when he received the pay slip.***" (Court emphasis)

(16) The date that the claim would have become prescribed was therefore 13 January 2015 and not 23 February 2015 as counsel for the applicant submitted. I find that she left her employment on 13 January 2012 as set out in her e-mail to her colleagues and according to the letter by Dr Watson, on behalf of the employer.

(17) This special plea of prescription must therefore succeed. Her claim had thus prescribed on 13 January 2015, as summons was only issued on 20 February 2015.

SPECIAL PLEA: *RES JUDICATA*:

(18) During February 2012 the plaintiff referred a claim against the first defendant to the CCMA on the grounds of constructive dismissal. This claim was withdrawn by the plaintiff on 18 May 2012.

(19) The present action was instituted on 20 February 2015. It is quite clear that the present claim is essentially the same claim against the same party for the same relief, even if it was launched almost three

years after the original claim to the CCMA.

(20) The plaintiff recorded in her notice of withdrawal of the claim to the CCMA: *"I confirm that I signed this notice of withdrawal of my own free will and that I understand the contents and the implications thereof"*. There can be no doubt that she did understand that she could not pursue the same claim against the same parties for the same relief, albeit in the High Court.

(21) In **Nestlè (Pty) Ltd v Mars**[9] the Supreme Court of Appeal held:

> *"[16] The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle,* ***which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens).*** *By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata).* ***The same suit, between the same parties, should be brought only once and finally.*** *"* (Court emphasis)

The particulars of claim set out that the respondent was constructively dismissed and she bases her claim on constructive dismissal.

[9] 2001(4) 542 SCA at paragraph 16

Counsel for the respondent argued that the present claim is for breach of contract. I cannot agree with this submission if I have regard to the particulars of claim where it is set out:

> *"As a result of the aforesaid the Plaintiff was forced to resign from her job."*

(22) Therefor I find that the claim by the applicant is *res judicata* as she had already withdrawn the claim in 2012.

(23) Although the defendants request the court to grant costs on an attorney and own client scale, I cannot find that the facts in the present matter justify such an order.

(24) The special pleas in respect of jurisdiction, prescription, and res judicata are upheld.

(25) In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.

Judge C Pretorius

Case number	: 13121/2015
Matter heard on	: 23 May 2016
For the Applicants	: Adv WP Bekker
Instructed by	: Gildenhuys Malatji Inc
For the Respondent	: Modzuka and Magolego Inc
Instructed by	: Adv TM Mphahlele
Date of Judgment	: 22 June 2016