"" **IN THE LABOUR COURT OF SOUTH AFRICA**

HELD AT CAPE TOWN

NO: C658/99

In the matter between:

Applicant

and

SOUTH AFRICAN MUTUAL LIFE ASSURANCE

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

WAGLAY, J

[1] The Applicant was employed by the First Respondent as from 21 April 1998. After serving a probationary period she was made a member of First Respondent's permanent staff and signed a written contract of employment. Clause 6B of that contract provided as follows:

FUNDS

Subject to the rules of the respective fund, the employee

will become a member of:

1. The Old Mutual Staff Retirement Fund;

2.The Old Mutual Staff Benefit Fund;

3.The Three Anchor Benefit Fund and

4.The Old Mutual Staff Medical Fund.

Employer contributions and Medical Aid cease at point of retirement.

Employees who are uninsurable will not participate in funds 2,3, and 4 above"

[2] Applicant as a permanent member of First Respondent's staff was required by the Respondent to undergo a medical examination. The medical examination was held on 10 September 1998. On 23rd September 1998 Applicant was advised that as a consequence of the medical test she would be employed "with no insured benefits". Applicant was therefore excluded from memberships of the Funds referred to under points 2,3,and 4(hereinafter FUNDS) of clause 6B of the contract referred to above.

[3] After some correspondence passed between the Applicant and the First Respondent, the Applicant "declared a dispute with the First Respondent in consequence of its refusal to admit her to membership of the Funds." On 10 May 1999 Applicant referred the said dispute to the CCMA for conciliation in pursuance to item 2 of Schedule 7 of the Labour Relations Act (the Act) and on 14 September 1999 the CCMA issued a certificate of non-resolution of the dispute after conciliation failed.

[4] After the referral of the dispute to the CCMA but prior to the CCMA issuing the certificate of non-resolution of the dispute the Applicant resigned from her employment with the First Respondent. On 10 December 1999 the Applicant instituted proceedings in this Court seeking compensation on the grounds that First Respondent committed an unfair labour practice.

[5] The Applicant's claim is based on the provisions of item 2(1)(a) read together with items 3(4)(a) and 4(1) of Schedule 7 of the Act. While item 3(4)(a) provides that disputes concerning any act or omission pursuance

to item 2(1)(a) may be referred to this

Court for adjudication, item 2(1)(a) and 4(1) provide the following:

"2 RESIDUAL UNFAIR LABOUR PRACTICES

(1) For the purpose of this item an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving-

(a) the unfair discrimination; either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientations, age, disability,

religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

"4 POWERS OF LABOUR COURT AND COMMISSION

(1) The Labour Court has the power to determine any dispute that has been referred to it in terms of item 3 on terms it deems reasonable, including but not limited to the ordering of reinstatement or compensation."

[6] For completion sake I may also add that the word employee in item 2(1)(a) is in italics indicating that it is defined in the Act and item 2(2)(a) provides that the employee referred to in item 2(1)(a) includes "an applicant for employment."

[7] The Applicant has, other than her former employer, the First Respondent, also cited the FUNDS referred to above, as the second, third and fourth Respondents but seeks no relief from these Respondents.

[8] The First Respondent opposes the claim and in its response raised a point *in limine*. At the pre-trial meeting the parties were unable to agree on whether or not the point *in limine*

should be argued separately, the First Respondent contending that it should. On receiving the file for directions I directed the Registrar to allocate a date for the hearing of the

point *in limine* with parties dealing with the merits of the point *in limine* and at the same time presenting

argument on why it is or is not appropriate for the point *in limine* as raised by the Respondent being heard separately from the trial.

[9] It is this point *in limine* that is before me for adjudication. The issues that the Respondent raises as a point *in limine* are firstly, that the Applicant is not entitled to the relief sought because at the time of referring the matter to this court she was not an employee, secondly that the order sought by the Applicant should properly be directed against the Second, Third and Fourth Respondents, (i.e the FUNDS), the referral should therefore be dismissed and further, and linked to the second issue that this Court had no jurisdiction to grant a declaratory order as prayed for by the Applicant as against the First Respondent.

[10] With regard to the first issue the Respondent's contention is that since the Applicant resigned and there is no dispute in respect of the termination of her employment with First Respondent Applicant is not entitled to any relief. The basis for this contention is that this Court can only come to the assistance of a party or parties who are either employees or employers i.e this Court's jurisdiction is limited in so far as disputes relating to unfair labour practice is concerned to parties who at the time of the referral of the matter to this Court are employers and employees . Since the Applicant so the argument goes, was not an employee at the time she referred her dispute to this Court for adjudication this Court has no jurisdiction to entertain the dispute.

[11] Respondent sought support for the above argument from the matter of *Pilates Manufacturing (Pty) Ltd v Mambalo (1996) 1BLLR 26 (LAC)*, where the court held at 29 B-D:

"The Industrial Court has jurisdiction to determine a dispute in respect of an employee. If the Respondent was dismissed, as she contended, she remained an employee in terms of the Act: *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd (1994) 15 ILJ 609 (AD)*. If the Respondent resigned in the circumstances contended for by the Appellant, she was not an employee, and the Industrial Court had no jurisdiction to determine the dispute.

If the probabilities

were evenly balanced as to whether the Respondent had been dismissed or had resigned, the Industrial Court could not find that she had been dismissed and therefore that it had jurisdiction."

Respondent's reliance on the above dictum is however misconceived. .

The above matter was dealt with in terms of the old Labour Relations Act(the 1956 Act). In terms of the 1956 Act-unlike the present Act- unfair dismissal was included in the definition of unfair labour practice, therefore although the Court was dealing with an unfair labour practice dispute the unfair labour practice complained of in that matter was the dismissal of an employee and quite correctly the Court found that since there was a dispute about whether or not the employee had been dismissed until the Court was satisfied that there was in fact a dismissal it had no jurisdiction to deal with the matter. Only once it was established that there was a dismissal could the Court be satisfied that there was an employee before it and then consider whether or not the dismissal was fair. The matter before me is not about a dismissal but about whether or not the refusal by the First Respondent (as alleged by the Applicant) to membership of the FUNDS was an unfair labour practice. In the circumstances unless the parties were in agreement that at the time that Applicant was refused membership to the FUNDS she was not an employee I do not see any basis upon which it can be said that this Court has no jurisdiction to entertain the dispute.

[12] Respondent's further reliance on the matter of *YSKOR Bepark v Meyer (1995) BLLR 20 (LAC) 2* and *National Automobile and Allied Worker's Union v Borg Warner SA (Pty) Ltd 1994(3) SA 15 (A)* is also misconceived. These matters were also dealt with in terms of the old Labour Relations Act and do not provide that where an employee terminates his/her relationship with his/her employer he/she is not entitled to pursue a dispute that had arisen and had been declared prior to the termination of that relationship.

[13] Respondent's argument that since item 2(1)(a) of Schedule 7 specifically defines an "employee" to include an applicant for employment but not a former employee, the Act must have specifically intended to exclude such "employees" alternatively that since the term "employee" is not defined to include past employees

the protection afforded by the Schedule is only available to those who remain in the employment relationship when

applying for the relief pursuance to item 2(1)(a). This argument I also cannot accept. If there is a dispute between an employer and employee relating to their employment relationship, simply because their employment relationship has come to an end at some date after the dispute came into being and had remained unresolved at the time the employment relationship terminated , does not mean that the dispute is either resolved or is no longer capable of being referred for resolution. I see no basis in law or equity upon which a remedy sought in respect of a wrong committed by an employer or employee against the other can be denied simply because the relationship has come to an end, there has to be something substantially more. To uphold First Respondent's argument would be to accept that a right to such relief only comes into existence on institution of an action for that relief and not when a wrong is committed. This clearly is not tunable or part of our jurisprudence . Once a right vests in a party, unless there are specific and specified circumstances which do not allow that party to exercise that right, a party with that vested right can and must be able to exercise it.

[14] In this matter notwithstanding the fact that Applicant has resigned before referring the dispute to this Court her resignation, I am satisfied does not bar her from seeking the relief set out on her Statement of Case. In this respect I agree with the Applicant that the cancellation of a contract does not preclude any of the parties to that contract from enforcing a right that had accrued, due and enforceable as an independent cause of action prior to the recission of the contract. See in this respect the decision of *Crest Enterprises Ltd v Ryck of Beleggings Bpk 1972(2) SA 863 (A)* where the court quotes with approval from Salmond and Williams on Contract the following, on page 870 F-G:

". . .every obligation which has accrued due between the parties before the recission of the contract, and which so creates a then existing cause of action; remains unaffected and can still be enforced."

[15] First Respondent's argument that the referral be dismissed because the order sought by the Applicant is

abstract and/or academic, is of some merit as it is that something more I referred to earlier other than the end of the relationship between the parties. I would have upheld this argument had Applicant simply sought a declarator. This is so because this Court may not entertain a dispute which if adjudicated in favour of the Applicant has only academic value. However the relief Applicant seeks is not a declarator. What she seeks is compensation, there is nothing abstract or academic about that. The fact that a declarator is a pre-requisite for the relief does not make her claim academic or abstract.

[16] In the result the first *in limine* issue stands to be dismissed.

[17] Turning then to the second *in limine* issue, First Respondent appears to argue that it was the 2nd, 3rd and 4th Respondents who refused Applicant membership to the Funds and I should therefore dismiss the action against the First Respondent because it was not the First Respondent who refused Applicant membership of the Funds.

[18] The above argument would have been valid had it been common cause that First Respondent did not refuse Applicant membership of the FUNDS, this is not so. In fact from the pleadings it appears to me there is at least a partial admittance, insofar as there can be partial admittance, that it was the First Respondent who refused Applicant membership to the FUNDS. I do not however , need to decide on that issue, suffice to state that this issue is one that can only be determined after evidence is led and therefore it is only appropriate that this issue should be left for determination at the trial.

[19] This then leaves the issue of costs. While costs do not automatically follow the result, it was the First Respondent who sought to have this matter heard separately from the trial proceedings. Its insistence that the second *in limine* issue be argued separately from trial despite the dispute of facts which have a bearing on the determination of that issue and the fact that the first *in limine* issue was without merit justifies I

believe that costs should be awarded against First Respondent .

[20] In the result I make the following order:

20.1 The first *in limine* issue that Applicant is not entitled to any relief because of her having resigned prior to referring her matter to this Court is dismissed.

20.2 The second *in limine* issue that this Court has no jurisdiction to grant the relief sought is left to be determined by the trail court.

20.3. That first Respondent is to pay the costs of the hearing of the point *in limine* which costs is to include the costs of two counsel.

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Waglay,J

NT: **ADV K.S. TIP (SC) with F.A. BODA**

Instructed by AIDS LAW PROJECT

ENT: **ADV L.A. ROSE INNES (SC)**

Instructed by FINDLAY AND TAIT

NT: **09 May 2001**