



REPUBLIC OF SOUTH AFRICA

## SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 26 November 2009  
**STATUS** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment.***

***Umgeni Water v Mshengu***  
**(03/09) [2009] ZASCA 148 (26 November 2009)**

#### **Media Statement**

Today the Supreme Court of Appeal (SCA) dismissed an appeal by Umgeni Water, a public statutory water utility and the Umgeni Water Retirement Fund against a judgment of the Pietermaritzburg High Court that a claim of one of the employees of the former, Bonginkosi Vincent Mshengu (the respondent), for certain retirement benefits had not prescribed. The respondent was compelled to be a member of the Retirement Fund, to which he made monthly contributions for his retirement. Upon retirement from the service of Umgeni Water, including early retirement, the Plaintiff would have been entitled to both his contribution and Umgeni Water's contribution to the retirement fund. The respondent, pursuant to his contract of employment with Umgeni Water, claimed payment of the sum of R1 917 181.00, being its contribution to the employee's retirement fund. The response it elicited was that his claim had prescribed. The matter proceeded by way of a special case before the high court.

The material facts agreed upon which the matter came to be decided are:

- (i) The respondent was tried by a disciplinary enquiry chaired by an attorney and found guilty of misconduct.
- (ii) Before the imposition of a sanction in respect of the alleged misconduct, he elected to take early retirement.

- (iii) Had he taken such early retirement he would have been entitled to payment of both his withdrawal benefit and Umgeni Water's contribution to the retirement fund.
- (iv) In the event of his being dismissed prior to taking early retirement, then he would only be entitled to his withdrawal benefit and not Umgeni Water's contribution.
- (v) He was dismissed for alleged misconduct and was only paid his withdrawal benefit.
- (vi) He referred the dispute to the CCMA contending that his dismissal was unfair. The CCMA found that the dismissal was procedurally and substantively unfair. Umgeni Water brought an application to the Labour Court to review the decision of the CCMA. The Labour Court confirmed the finding of the CCMA that the dismissal had been substantively (but not procedurally) unfair.

According to the parties, the question of law in dispute before the high court was whether or not the claim had become prescribed. The high court answered that question in the negative. The SCA held that it was necessary for the respondent to allege and prove the fact of his retirement in order to support his right to judgment. For as long as the respondent's purported dismissal was operative and in force, he was precluded from doing so. His dismissal accordingly operated as an impediment to his asserting any claim to Umgeni Water's contribution to his retirement fund. Had the respondent commenced his action immediately upon dismissal, as Umgeni Water contended he should have, he would not have been able to allege all the facts upon which his claim was founded and in particular that he had retired. The fact of his dismissal would thus serve to defeat his claim. It was only when the plaintiff's dismissal was held to be both procedurally and substantively unfair, that he was capable of alleging the last of the material facts which had to be alleged in order to enable him to sue. Consequently, according to the SCA, the question of law was correctly answered in his favour. In the result the appeal was dismissed with costs.

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