



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 03 / 09

**UMGENI WATER
PRINCIPAL OFFICER OF THE
UMGENI WATER RETIREMENT FUND
THE MINISTRY OF WATER AFFAIRS**

First Appellant

**Second Appellant
Third Appellant**

and

BONGINKOSI VINCENT MSHENGU

Respondent

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

CORAM: MPATI P, NUGENT, PONNAN JJA, HURT and WALLIS AJJA

HEARD: 20 November 2009

DELIVERED: 26 November 2009

SUMMARY: Prescription Act 68 of 1969 – extinctive prescription – dismissed employee – claim for retirement benefits – cause of action not arising or accruing whilst dismissal in force.

ORDER

On appeal from: The Pietermaritzburg High Court (McLaren J sitting as court of first instance).

The appeal is dismissed with costs, such costs to include those reserved by the court below for determination by this court.

JUDGMENT

PONNAN JA (MPATI P, NUGENT JA, HURT and WALLIS AJJA concurring):

[1] In what follows I shall, for convenience, refer to the parties by their appellation in the court below. The plaintiff, Bonginkosi Vincent Mshengu, an employee of the first defendant, Umgeni Water, a public statutory water utility established in terms of the Water Services Act 108 of 1997, instituted action against it in the Pietermaritzburg High Court, as also against the second defendant, the principal officer of the Umgeni Water Retirement Fund, a pension fund duly registered in terms of the Pension Fund Act 24 of 1956. The Minister of Water Affairs and Forestry was cited in his official capacity as the third defendant, in terms of s 47 of the Water Services Act, but as no relief was sought against him he took no part in the proceedings either in this court or the court below.

[2] The summons, to the extent here relevant, alleged that:

- (a) The Plaintiff was compelled to be a member of the Second Defendant.
- (b) The Plaintiff made monthly contributions to the Second Defendant for his retirement.
- (c) Upon retirement from the service of the First Defendant, including early retirement, the Plaintiff would be entitled to both his withdrawal benefit and the First Defendant's contribution to the employees' retirement fund held by the Second Defendant (retirement benefit).'

The plaintiff, pursuant to his contract of employment with the First Defendant, claimed payment of the sum of R1 917 181.00, being the First Defendant's contribution to the employees' retirement fund held by the Second Defendant. The summons, inter alia, elicited the following special plea:

'Any right which Plaintiff had to claim the alleged early retirement benefit arose on 1 April 2003, at the latest, being the date from which Plaintiff elected to retire.

- (a) Such claim would have become prescribed on 30 March 2006.
- (b) The summons herein was issued on or about 28 June 2007.
- (c) In the premises, the claim herein has become prescribed.'

[3] The parties agreed, in terms of Rule 33 of the Uniform Rules, to a written statement of facts in the form of a special case for adjudication before the high court (per McLaren J). The facts agreed upon or assumed to be correct for the purpose of the special case are:

- '1 The plaintiff was employed by the First Defendant. During 2002, as result of restructuring by the First Defendant, Plaintiff applied for a newly created post. This application was unsuccessful and Plaintiff was notified accordingly by letter dated 20 November 2002.
- 2 During September 2002 the Plaintiff was tried by a disciplinary enquiry chaired by attorney Gina Barbieri.
- 3 On 21 October 2003 Barbieri found the Plaintiff guilty of misconduct.
- 4 On 25 November 2002, and before the imposition of a sanction in respect of the alleged misconduct, the Plaintiff notified First Defendant that he elected to take early retirement with effect from 1 April 2003.
- 5 Had he taken such early retirement the Plaintiff would have been entitled to payment of both his withdrawal benefit and First Defendant's contribution to the retirement fund administered by Second Defendant on 1 April 2003.
- 6 In the event of his being dismissed prior to taking early retirement, then the Plaintiff would only be entitled to his withdrawal benefit and not also the First Defendant's said contribution.
- 7 On 27 November 2002 the First Defendant dismissed the Plaintiff for the alleged misconduct.
- 8 Following on the dismissal the First Defendant instructed the Second Defendant to pay Plaintiff only his withdrawal benefit.
- 9 On 7 January 2003 Second Defendant paid Plaintiff his withdrawal benefit.
- 10 The Plaintiff referred the dispute to the CCMA wherein he alleged that his dismissal was unfair and at the CCMA hearing he asked for compensation rather than reinstatement.
- 11 On 25 September 2003 the CCMA Commissioner found that the dismissal was procedurally and substantively unfair, did not reinstate Plaintiff but ordered First Defendant to pay Plaintiff compensation in the amount of 9 months salary.
- 12 The First Defendant brought an application to the Labour Court to review the Commissioner's decision and on 13 June 2006 the Labour Court confirmed the Commissioner's finding that the dismissal had been substantively (but not procedurally) unfair and dismissed the review application with costs.
- 13 On 29 June 2007 the Plaintiff instituted this action against the First and Second Defendants for payment of the First Defendant's said contribution.'

[4] According to the parties, the question of law in dispute was thus:

'Whether or not the claim had become prescribed before summons was served on 29 June 2007.'

McLaren J answered the question posed in the negative, but granted leave to the appellant to appeal to this court and, by consent, reserved the costs of the special case for the decision of this court.

[5] Section 10 of the Prescription Act, No 68 of 1969 (the Act), provides for the extinction of a debt after the lapse of periods determined in s 11. The period of prescription applicable to the plaintiff's claim is that provided for in s 11(d) of the Act, namely 3 years. According to s 12(1) of the Act, prescription shall commence to run 'as soon as the debt is due'. The words 'debt is due' must be given their ordinary meaning.¹ In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.²

[6] A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression 'cause of action' has been held to mean: 'every fact which it would be necessary for the plaintiff to prove, ... in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'; or slightly differently stated 'the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'³

¹ *The Master v I L Back and Co Ltd* 1983 (1) SA 986 (A) at 1004F.

² See *Western Bank Ltd v S J J van Vuuren Transport (Pty) Ltd and others* 1980 (2) SA 348 (T) at 351 and *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 and the cases there cited.

³ See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 and the cases there cited by Corbett JA; see also *Truter and another v Deyssel* 2006 (4) SA 168 (SCA) para 16, 18 and 19.

A plaintiff must thus have a complete cause of action at the stage when summons is issued or at any rate when the summons is served.⁴

[7] On the view that I take of the matter, it was necessary for the plaintiff to allege and prove the fact of his retirement in order to support his right to judgment. For as long as the plaintiff'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 the first defendant's contribution to his retirement fund administered by the second defendant. Had the plaintiff commenced his action on 1 April 2003, 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. It follows that the plaintiff's cause of action did not 'arise' or 'accrue' on 1 April 2003 as contended by the defendant. Consequently the question of law was correctly answered in the plaintiff's favour.

[8] In the result the appeal is dismissed with costs, such costs to include those reserved by the court below for determination by this court.

V M PONNAN
JUDGE OF APPEAL

⁴ *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 418; *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D; *Santam Insurance Co Ltd v Vilakasi* 1967 (1) SA 246 (A) at 253 A-F.

APPEARANCES:

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