REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

NO: 29038/19

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

15 March 2023

In the matter between:

J K VAN WYK AND 51 OTHERS BEING THE **1ST TO 52ND PLAINTIFF**

G P BARNARD AND 94 OTHERS BEING THE **53RD TO 148TH PLAINTIFF**

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **FIRST DEFENDANT**

MINISTER OF PUBLIC SERVICES AND ADMINISTRATION **SECOND DEFENDANT**

GOVERNMENT EMPLOYEES' PENSIONS FUND **THIRD DEFENDANT**

JUDGEMENT

BARIT AJ

INTRODUCTION

[1.] In this application, the relief claimed by the Plaintiffs is in the form of a declaratory order that either the first Collective Agreement[1], or the second Collective Agreement applies to them. And further that the Department of Correctional Services ("DCS") should act in accordance with their obligation (to the applicable agreement).

THE PARTIES

[2.] The first to fifty second Plaintiff are all former employees at the Department of Commercial Services who resigned from the service of the First Defendant in the period 1 April 2010 to 21 November 2016.

[3.] The fifty third to the one hundred and forty eighth Plaintiff are all former employees of the Department of Correctional Services (DCS) who had retired from the service of the First Defendant in the period 1 April 2010 to 21 November 2016.

[1] Section 213 of the Labour Relations Act No. 66 of 1995, as amended: Definitions - "Collective Agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-
(a) one or more employers;
(b) one or more registered employers' organisations; or
(c) one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council.

[4.] The First Defendant is the Minister of Justice in Correctional Service cited in his capacity as the Executive Authority of the Department of Correctional Services ("DCS") in terms of the provisions of the State Liability Act, 1957.

[5.] The Second Defendant is the Minister of Public Service and Administration ("PSA") cited herein in the capacity as Executive Authority of Public Service and Administration in terms of the requirements of the State Liability Act, 1957.

[6.] The Third Defendant is the Government Employees Pension Fund duly established in terms of Section 2 of the Government Employment Pension Law 1996.

BACKGROUND

[7.] Due to disputes between the parties as to the interpretation of a clause in the 2009 Agreement (the first Collective Agreement), the matter was referred to arbitration. The clause in question reads as follows:

> *(Clause 11.1): With effect from 1 April 2010, the re-calculation of salary notch position shall be based on DCS experience as at 30 June 2009 based on years of experience obtained in addition to the experience required for appointment on that level. The re-calculation of salary notch will be limited to officials in the production levels (current salary levels 3 – 8).*

THE DISPUTE

[8.] A summation of what the crisp issue for determination is summed up as follows:

Whether the first Collective Agreement, which remained extant until 21 November 2016 in terms of which the Plaintiffs will be entitled to a 100% of the salary back pay applied to the Plaintiffs, or whether the Second Collective Agreement in terms of which they would be entitled to 30% of the salary back pay applies to them.

NATURE OF CLAIM

[9.] Plaintiffs, all of whom left the service of the Defendant prior to 2016, claim declaratory orders together with orders for payment. The question the Court has to decide is:

a) In 2009, Occupations Specific Dispensation ("OSD") for Correctional Service Officials, Resolution 2 of 2009, and in particular whether clause 11.1 thereof should be applied to the Plaintiffs with a resulting order as prayed for by the Plaintiffs; or

b) The terms and in particular the amended clause 11.1 of the 2016 Departmental Bargaining Chamber Settlement Agreement of 2016 applies to the Plaintiffs with a resulting order as prayed for.

[10.] The main claim supports the contention that the 2009 resolution (agreement) applies to the Plaintiffs while the alternative claim supports the contention that the 2016 agreement should be applied to the Plaintiffs.

[11.] The First Defendant states, for various reasons, which are of a legal nature that the 2016 agreement applies to the Plaintiffs.

[12.] The first Collective Agreement (2009) had to be implemented in two phases. The first phase was implemented by the DCS as PSCBS Resolution 1 of 2007, and the second phase was implemented as GPSSBC Resolution 2 of 2009 (Collective Agreement). It is this latter agreement that is at the heart of this matter.

[13.] The dispute arose with respect to the Plaintiffs salary back pay and the alleged non-compliance with clause 11.1 of the 2009 Collective Agreement by the First Defendant. It was not about the application or interpretation of the Collective Agreement but the DCS's non-compliance with clause 11.1 of the 2009 agreement. The dispute was referred to the General Public Service Sector Bargaining Council ("GPSSBC") for dispute resolution.

a) GPSSBC did not resolve the dispute at conciliation, and it was referred to arbitration as required by statute[2].

[2] Section 51 of the Labour Relations Act No. 66 of 1995

b) According to the First Defendant in its Heads of Argument paragraph 12, the GPSSBC ruled in favour of the Plaintiffs with respect to clause 11.2. of the 2009 Collective Agreement at arbitration, which states as follows;

> *"It is hereby determined that clause 11.2. of the GPSSBC Resolution 2 of 2009 should be interpreted to read that the notches that employees of the first respondent ("the DCS") are entitled to in terms of their years of experience must be added to the individual notch position of employees after the interpretation of phase 1 of the OSD".*

c) The First Defendant *in casu,* dissatisfied with the Arbitration Award, applied and was successful in having the Arbitration Award reviewed and set aside by the Labour Court. Hence the dispute being referred back to the GPSSBC for proper ventilation. But nothing happened in this respect.

d) In the interim, the Public Service Association and employees appealed the judgement of the Labour Court. The Appeal Court dismissed the appeal and ordered that the dispute be referred back to the GPSSBC to be determined afresh at arbitration.

However, the matter was never referred back to the GPSSBC for further adjudication.

[14.] It is evident from the First Defendant's contentions in its Heads of Argument[3], that the Labour Court ruled on clause 11.2 of the 2009 agreement and not on the non-compliance by the DCS of clause 11.1 of the 2009 agreement. Further, in the interests of justice, a determination needs to be made in respect of the latter. It is clear that the GPSSBC lacks the necessary jurisdiction to rule on constitutional matters, hence, this matter finding its way to this Court.

JURISDICTION

[15.] The First Defendant raised the point that this Court does not have jurisdiction to hear this matter, and that the Labour Court has exclusive jurisdiction with respect to Collective Agreements. From the papers before this Court, it is evident that this matter goes beyond a mere interpretation or application of a Collective Agreement. It speaks to the Plaintiffs fundamental right to equal benefit and protection of the law[4] and the common law of contract.

[16.] When the Plaintiffs were faced with the DCS's non-compliance of clause 11.1 of the 2009 agreement, the Plaintiffs had the right to make an election to hold the DCS to the 2009 agreement. The specific performance of the 2009 agreement is the remedy. Indicating a breach of contract, which this Court has jurisdiction to entertain.

[3] First Defendant's Heads of Argument paragraph 12
[4] Section 9(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996 as amended.

[17.] Christie's *Law of Contract in South Africa* 7 ed at 616[5] states:

> *'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated."*

[18.] Section 157(2)(a) of the Labour Relations Act ("LRA")[6] provides that the Labour Court and the High Court have concurrent jurisdiction in any alleged or threatened violation of any fundamental right entrenched in the Constitution and arising from employment and from labour relations.

[19.] Further, section 173 of the Constitution provides that the High Court has the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests-of-justice.

[20.] Aside from the interest-of-justice standard, there are times when a court can exercise some degree of discretion. This Court is satisfied that, in the interest-of-justice a decision clearly needs to be made *in casu*.

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[5] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 61

[6] Labour Relations Act No. 66 of 1995, as amended

[21.] Further, it would be wrong to subordinate the constitutional standard of interests-of-justice to the provisions of section 24 of the LRA. The statute must be interpreted in light of the Constitution. When that exercise is properly conducted, one must bear in mind that, in the interests-of-justice, the Court should clarify the correct nature of the dispute.

[22.] *In casu,* this Court has to decide if it will be in the interests-of-justice to refer this matter back to the GPSSBC given the journey this case has traversed over the last decade. It involves a value judgment of what is fair to all concerned, taking into account the longevity of this matter and the fact that the GPSSBC lacks jurisdiction to determine an infringement of the Plaintiff's fundamental rights. It is trite in law that the Plaintiffs' have a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, and which is constitutionally enshrined.

[23.] Further, in the matter of *Chirwa v Transnet Limited & Others*, the Constitutional Court held that it was self-evident that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it[7]. The Plaintiffs pleaded the common law remedy of specific performance of clause 11.1. of the Collective Agreement of 2009, and not the interpretation or application of either the 2009 or 2016 Collective Agreements. But the non-compliance with the 2009 agreement.

[7] Langa CJ in a separate concurring judgment in Chirwa v Transnet Limited & Others 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC) at para 155.

[24.] In *Makhanya v University of Zululand*[8] the court set out the position when litigants have a choice of fora in which to bring their claims Nugent JA said:

> "*Some surprise was expressed in Chirwa at the notion that a Plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced. A Plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the Plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter."*

[25.] It is evident from the pleadings, in the interest-of-justice, and Section 157(2)(a) of the LRA that this Court has jurisdiction to entertain this matter.

RES JUDICATA

[26.] The First Defendant contends that the Second Collective Agreement (2016) brought an end to the dispute regarding the interpretation of clause 11 of the First Collective Agreement thereby rendering it *res judicata.*[9]

[8] Makhanya v University of Zululand 2010(1) SA62 (SCA) paragraph [27]

[9] *Res Judicata* is the Latin term for "a matter already judged" and in the broad sense it is generally a plea or defence raised by a respondent in a civil trial.

[27.] The matter before this Court has not been heard by any other court. Therefore, the *res judicata* principle cannot apply in this matter as there is no prior final judgement with respect to the plaintiffs' claim. In any event, as detailed in the Potchefstroom Electronic Law Journal,[10] the Constitutional Court, in the matter of *Molaudzi v The State,*[11] created a new common law precedent with respect to *res judicata* and the interest-of-justice exception:

> "*In Molaudzi v S the Constitutional Court developed the common law by creating an interest-of-justice exception to the principle of res judicata and - for the first time in the Constitutional Court's history - overturned one of its own judgements."*

Hence, *res judicata* does not apply in this matter before this Court.

THE LAW

The Labour Relations Act No 66 of 1995 as amended

[28.] Section 23. Legal effect of Collective Agreement

(1) A Collective Agreement binds-

(a) the parties to the Collective Agreement;

(b) each party to the Collective Agreement and the members of every other party to the Collective Agreement, in so far as the provisions are applicable between them;

[10] The Potchefstroom Electronic Law Journal (PELJ), online version ISSN 1727-3781, PER vol.19 n.1 Potchefstroom 2016, http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1282

[11] Molaudzi v The State 2015 2 SACR 341 (CC)

(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the Collective Agreement if the Collective Agreement regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A Collective Agreement binds, for the whole period of the Collective Agreement, every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the Collective Agreement.

(3) Where applicable, a Collective Agreement varies any contract of employment between an employee and employer who are both bound by the Collective Agreement.

(4) Unless the Collective Agreement provides otherwise, any party to a Collective Agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

[29.] Section 31. Binding nature of Collective Agreement concluded in bargaining council.

Subject to the provisions of section 32 and the constitution of the bargaining council, a Collective Agreement concluded in a bargaining council binds –

(a) the parties to the bargaining council who are also parties to the Collective Agreement;

(b) each party to the Collective Agreement and the members of every other party to the Collective Agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(c) the members of a registered trade union that is a party to the Collective Agreement and the employers who are members of a registered employers' organisation that is such a party, if the Collective Agreement regulates:

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.

[30.] Section 51. Dispute resolution functions of council

(1) In this section, dispute means any dispute about a matter of mutual interest between-

(a) on the one side

(i) one or more trade unions; one or more employees; or one or more trade unions and one or more employees; and

(b) on the other side-

(i) one or more employers' organisations;

(ii) one or more employers; or

(iii) one or more employers' organisations and one or more employers.

(2)(a) (i) The parties to a council must attempt to resolve any dispute between themselves in accordance with the constitution of the council.

(ii) For the purposes of subparagraph (i), a party to a council includes the members of any registered trade union or registered employers' organisation that is a party to the council.

[31.] Section 78. Definitions in this Chapter (the Labour Relations Act 66 of 1995)

In this Chapter-

(a) "employee" means any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace-

(ii) represent the employer in dealings with the workplace forum; or

(iii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace; and

(b) "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

[32.] Section 157 - Jurisdiction of Labour Court

2. The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations.

[33.] Section 200. - Representation of employees or employers

(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party-

(a) in its own interest;

(b) on behalf of any of its members;

(c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.

[34.] Section 213. Definitions

"employee"(54) means –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of " employee"; (54) "Employee" is given a different and specific meaning in section 78 in Chapter V.

"Collective Agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council.

The Constitution of the Republic of South Africa[12]

[35.] Section 2 - Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled;

[36.] Section 7 - Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

[37.] Section 8 – Application

(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.

[38.] Section 9 - Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

[12] The Constitution of the Republic of South Africa Act No. 108 of 1996

a) Section 10 - Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

[39.] Section 33 – Just Administrative Action

(1) Everyone has the right to administrative action1 that is lawful, reasonable and procedurally fair.

[40.] Section 34 - Access to courts.

Everyone has the right to have any dispute that can be resolved. by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000

[41.] Section 1 “Definitions”

‘equality’ includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.

CONTENTIONS

[42.] With respect to the Plaintiffs’ contention that they were not represented in the 2016 agreement, according to the provisions of section 200 of the Labour Relations Act, the Plaintiffs did not qualify as a party to the 2016 agreement as

they were neither employees of the DCS nor valid members of the representative trade union/s[13] that were parties to the 2016 agreement. Consequently, neither the DCS nor the representative trade union/s had a legal right *(locus standi)* to represent the Plaintiffs, when the 2016 agreement was signed and legally came into effect.

[43.] The Plaintiffs contend that the First Defendant is in breach of the 2009 agreement and that the 2016 amendment cannot be applied to them as they were not party to this agreement, nor were they represented in the agreement.

[44.] Plaintiffs therefore pray for a declaratory order that the 2009 agreement, unamended should apply to them and further that the DCS should act in accordance with their obligations in terms of this agreement by implementing clause 11.1. thereof.

[45.] The agreement in question is a “Collective Agreement”,[14] which is a written agreement concerning the terms that regulate the employment relationship of current and future employees. An “employee” is clearly defined in sections 78 and 213 of the Labour Relations Act No. 66 of 1995, as amended, and does not include employees who are no longer in the employ of the DCS. The definition of “employee”, "employed" and "employment" have meanings corresponding to that of "employee"[15].

[13] Section 78 of the Labour Relations Act No. 66 of 1995, as amended
[14] Section 213 of the Labour Relations Act No. 66 of 1995, as amended, and Sections 23 (1)(c), 2, and 3 of the Labour Relations Act No.66 of 1995
[15] Section 213 of the Labour Relations Act No. 66 of 1995, as amended

[46.] Further, section 200 of the LRA clearly indicates who the parties to a Collective Agreement are, and it does not include employees who were no longer employees at the time of the signing of the Second Agreement in 2016.

[47.] This is further reinforced by the provisions of Section 23 of the LRA, which specifically refers to an existing employee and valid member of a representative trade union, of which the Plaintiffs were neither at the time of the signing of the 2016 agreement. Which became binding on all existing employees and valid members of the representative trade union of the DCS.

[48.] Further, subsection 2 supports the Plaintiffs' contention that the 2009 agreement is applicable to them as a Collective Agreement binds every person in terms of subsection (1)(c), who was a member at the time it became binding. or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the Collective Agreement.

[49.] It is common cause that in 2009, the Plaintiffs were employed by the DCS. It is further common cause that when the 2016 agreement was signed, all the Plaintiffs had already exited the DCS and could not be bound by the provisions of the 2016 agreement. Nor were the Plaintiffs represented in this agreement.

[50.] Hence, the Plaintiffs fell outside the scope of the 2016 agreement and could not be bound by it. Contrary thereto, the First Defendant retroactively applied the provisions of the 2016 agreement to the Plaintiffs' basic salary back pay.

[51.] It is trite in law that a contract in South Africa is classified as an obligationary agreement, and it creates enforceable obligations for all parties to the agreement. Hence, the obligations created in the 2009 agreement were binding on all parties thereto and capable of specific performance for the duration of the 2009 agreement, which began on June 24, 2009, and ended on November 21, 2016.

[52.] In the dictum of *Barkhuizen v Napier*[16] the Constitutional Court held that:

> *"All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution."*

[53.] In the High Court, in the matter of *The University of The Free State Excipient v Christo Strydom Nutrition*[17] the court stated:

> "*On signing a contract, the parties become servants to the terms thereof and they acknowledge and concede to the Law of Contracts. (The principle of pacta sunt servanda decrees agreements, freely and voluntarily concluded, must be honoured.) They pledge themselves to the Rule of Law and an open and democratic society based on human dignity,*

[16] Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007)
[17] University of The Free State v Christo Strydom Nutrition (CSM) In re: University of The Free State v Christo Strydom Nutrition (CSM) (2433/2019) [2022] ZAFSHC 174 (18 July 2022) par 11

equality, and freedom; constitutional integrity within the facts and circumstances of their case."

[54.] Despite the Plaintiffs falling within the scope of the 2009 agreement and the First Defendant being bound thereto, it ignored the obligatory nature of the 2009 agreement and the binding nature of the provisions created by clause 11.1 thereof when calculating the Plaintiffs' salary back pay. Applying retroactively the provisions of the 2016 agreement to the Plaintiffs' salary back pay.

[55.] On the papers before this Court, it has become necessary to examine the principle of non-retroactivity of the law. The principle of non-retroactive application of law prohibits the application of law to events that took place before the law was introduced. Further, retroactive laws pose a challenge to the fundamental principles of equality, certainty, and predictability underlying the rule of law. Likewise, this principle is also endorsed as a presumption in agreement interpretation and raises challenges on the basis that individual and fundamental rights may be infringed.

[56.] In common law, both retroactive and retrospective terms of an agreement will not be given effect if vested rights are taken away or impaired, or new obligations are created, or a new duty is imposed, or a new disability is attached in regard to events already past.

[57.] By applying the 2016 agreement retroactively to the Plaintiffs': the First Defendant effectively infringed the Plaintiffs' vested rights in terms of clause 11.1. of the 2009 agreement, and imposed new obligations, duties, and

disabilities with regard to events already past, infringing the Plaintiffs' common law contractual rights, and several of their fundamental rights, *inter alia, the* democratic values of human dignity, equality[18], and freedom. In the Promotion of Equality and Prevention of Unfair Discrimination Act, [19] "equality" is defined as the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality, and also equality in terms of outcomes.

[58.] The normative value system of the Constitution imposes a duty on decision-makers to act fairly towards parties who are affected by their decisions, and in this case, there can be no exception. Further, in the dictum of *Masetlha v President of the Republic of South Africa and Another,*[20] the Constitutional Court stated the following:

> "*The new constitutional order incorporates common law constitutional principles and gives them greater substance. The rule of law is specifically declared to be one of the foundational values of the new constitutional order. The content of the rule of law principle under our new constitutional order cannot be less than what it was under the common law. It is also clear from section 39(3) of the Constitution that "the Constitution was not intended to be an exhaustive code of all rights that exist under our law. That they go beyond those expressly mentioned in the Constitution is patently clear from section 39(3). The*

[18] Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, Section 1 "Definitions", and Section 7 of the Constitution of the Republic of South Africa Act No. 108 of 1996

[19] Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000

[20] Masetlha v President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (Masetlha) at para 188.

common law constitutional principles supplement the provisions of the written constitution but derive their force from the Constitution. These principles must now be developed to fulfil the purposes of the Constitution and the legal order that it establishes. And these common law principles must "evolve within the framework of the Constitution consistently with the basic norms of the legal order that [the common law] establishes". That is why section 39(2) requires that the common law must be developed and interpreted to promote the "spirit, purport and objects of the Bill of Rights".

[59.] The Plaintiffs had a legitimate right and expectation that the First Defendant would act in good faith, and honour its binding obligations with respect to clause 11.1. of the 2009 agreement in terms of the common law of contracts. In this respect, reliance is placed on what was stated by Theron J in the matter of *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[21]*:*

"According to the Supreme Court of Appeal, good faith is a fundamental principle that underlies the law of contract and is reflected in its particular rules and doctrines.

[60.] The doctrine of legitimate expectation entails that a reasonable expectation based on a well-established practice or an express promise by an administrator

[21] Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020)

acting lawfully gives rise to legal protection when the practice or promise is clear and unambiguous. Clause 11.1. of the 2009 agreement is clear and unambiguous.

[61.] Further, clause 11.1. was a lawful representation of what the Plaintiffs as individuals would receive and created a substantive legitimate expectation with respect to a particular outcome. Section 194 of the LRA further requires compensation to be just and equitable in all the circumstances. The legislature would not have intended that the amounts due to the Plaintiffs in terms of clause 11.1. of the 2009 agreement should be anything other than just and equitable in the circumstances.

SUMMING UP

[62.] It is evident that the Plaintiffs, had already exited the DCS by 2016 and were not employees of the DCS. Hence, the Plaintiffs could not be bound by the provisions of the 2016 Collective Agreement.

[63.] It is further evident from section 23 and 31 of the LRA[22] that the defendants are bound by the provisions of the 2009 Collective Agreement with respect to the Plaintiffs' employment and salary back pay.

[22] Labour Relations Act No. 66 of 1995, Section 31 - Binding nature of Collective Agreement concluded in bargaining council.

[64.] For these reasons, the DCS could not retroactively apply the provisions of the 2016 Collective Agreement to the Plaintiffs' salary back pay.

[65.] By retroactively applying the provisions of the 2016 Collective Agreement to the Plaintiffs' salary back pay the defendants infringed the Plaintiffs' fundamental and common law contractual rights.

[66.] Based on all of the above reasons, I am satisfied that the Plaintiffs, have established a clear right to the relief sought.

JUDGEMENT

[67.] I therefore issue the following order:

1. The Plaintiffs' prayer for a declaratory order that the 2009 Collective Agreement, unamended, applies to them is granted.

2. The First Defendant is ordered to implement the provisions of clause 11.1 of the 2009 Collective Agreement to all the Plaintiffs' salary back pay.

3. The First Defendant is ordered to recalculate monies due and owing to all the Plaintiffs' and apply the rectification of any payment, deductions, and/or amounts owing including in respect to pension contributions and the recalculation of such pension benefits as the rules of the Third

Defendant may provide for and applicable to the Third Defendant, or any other applicable rule may provide for.

4. The First Defendant is ordered to pay the costs on a party and party scale with respect to these proceedings, including the costs consequent upon the employment of two counsel.

L BARIT
Acting Judge of the High Court
Gauteng Division, Pretoria

15 March 2023

Appearances

For the Plaintiff

Advocate L Kellerman S.C.

Advocate S J Coetzee S.C.

Instructed by Geyser Coetzee Attorneys

For the Defendant

Advocate H Gerber S.C.

Instructed by the State Attorney, Pretoria