

SOUTH AFRICA / JUDGMENT

Nkoane and Others v Food and Allied Workers Union (1378/2014)

[2019] ZAGPJHC 265 (20 August 2019)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

Wright

CASE / FILE NUMBER

1378/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION

LOCAL

SEAT, JOHANNESBURG

CASE

NO: 1378/2014

DATE:

20 August 2019

In

the matter between:

NKHUMISE

GILBERT NKOANE

MACHUENE

LUCAS SEEMELA

ZIAMBO

MABENGU

LESIBA

STEPHEN MATHOBELA

First

Plaintiff

Second

Plaintiff

Third

Plaintiff

Fourth

Plaintiff
and
FOOD
AND ALLIED WORKERS UNION
Defendant

JUDGMENT

WRIGHT J

1. The plaintiffs worked for Amalgamated Beverage Industries. They were dismissed for drinking bottled water. They mandated the defendant Union, of which they were members to take up their case with due care. The plaintiffs have issued summons against the Union for negligent breach of the alleged contractual mandate. The only issue before me is a plea of prescription raised by the Union. The facts are common cause and no evidence was necessary.
2. After the plaintiffs were dismissed by ABI in November 2003 the plaintiffs mandated the Union, during November 2003 to advise the plaintiffs, to seek their re-instatement and to seek compensation for them. It was an implied term of the mandate that the Union would carry out its mandate in a proper and professional manner and without negligence.
3. On 19 December 2003 the Union referred the dismissal of the plaintiffs to the CCMA, requesting the CCMA to order the plaintiffs' re-instatement, by way of conciliation – arbitration. On 5 July 2004 ABI wrote to the CCMA objecting to this process and requesting that the dispute proceed by way of conciliation only. On 6 July 2004 the CCMA certified that the dispute between the plaintiffs and the Union could not be conciliated. In terms of section 136(1)(b) of the LRA the dispute had to be referred for the appointment of an arbitrator within 90 days of the date on which the certificate was issued.
4. On 25 November 2005 the Union filed a request for the appointment of an arbitrator together with a request for condonation of the late filing of the request. The plaintiffs expressly plead that the request for the appointment of an arbitrator was about 13 months late. The application for condonation was dismissed on 4 May 2008 and a review of that decision was dismissed by Snyman AJ on 2 February 2011. The particulars of claim go on to allege that had the Union acted reasonably the request for the appointment of an arbitrator would have been made timeously and that as a result of the negligent breach of mandate by the Union the plaintiffs have suffered damages in the form of loss of earnings.
5. The Union pleads that the latest date upon which the alleged negligent conduct could have been committed was 6 October 2004, being 4 July 2004 plus the 90 days under section 136(1) (b). Accordingly, according to the Union the claim prescribed on 5 October 2007. It is common cause that summons were served on 31 January 2014.

6. It is also common cause that, by 25 November 2005 the plaintiffs knew that the Union had failed to lodge the request for arbitration by 6 October 2004. Here, the Union pleads in the alternative that the claim prescribed on or before 24 November 2008. The plea alleges further that the plaintiffs knew, by 20 June 2008 of the dismissal, on 4 May 2008 of the condonation application.
7. Mr P Makhambeni appeared for the plaintiffs and Mr TMG Euijen SC appeared for the Union. They were agreed that there is one crisp issue, namely when the debt arose. Either it arose, according to the plaintiffs on 2 February 2011 when the condonation application was ultimately dismissed or, according to the Union on 6 October 2004 when the plaintiffs had a complete cause of action against the Union, alternatively by 25 November 2005 further alternatively by 20 June 2008.
8. The fallacy in the plaintiffs' argument is that the plaintiffs had a complete cause of action by 6 October 2004 against the Union. The lapse of 13 months prior to the launching of the condonation application does not mean that no right accrued to the plaintiffs from 6 October 2004 to sue the Union. It cannot be that the launch of a condonation application infinitely later after 6 October 2004 means that the right of the plaintiffs which arose on 6 October 2004 in fact never arose because of a possibility that sometime in the future a condonation application would be launched. The prescription point is well taken.

ORDER:

1. The plea of prescription is upheld with costs including those of senior counsel where so employed.
2. The plaintiffs' action is dismissed with costs.

Appearances: On behalf of the Plaintiff: Adv P Makhambeni Instructed by: Mbana Incorporated 011 656 – 6134 Pumzo.mbana@mbanainc.com On behalf of the Defendant: Adv TMG Euijen SC Instructed by: Cheadle Thompson & Haysom Inc. Ref/ R Kulua / A Scher

Date of Hearing: 20 August 2019 Date of Judgment: 20 August 2019

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