IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 40292/2005

DATE: 29/5/2006

not reportable

IN THE MATTER BETWEEN:

GERHARD JOHANNES ERASMUS	1st Plaintiff/1st Respondent
ANDRIES JAKOBUS PETRUS DU PREEZ	2nd Plaintiff/2nd Respondent
PETRUS VAN NIEKERK	3rd Plaintiff/3rd Respondent
AND	
EKURHULENI METROPOLITAN MUNICIPALITY	1st Defendant/Excipient
GERMISTON MUNICIPAL RETIREMENT FUND	2nd Defendant
NATIONAL PENSION FUND FOR MUNICIPAL WORKERS	3rd Defendant
MUNIMED	4th Defendant

JUDGMENT

MABESELE, AJ

This is an exception raised by the first defendant against the plaintiffs' particulars of claim as lacking averments necessary to sustain a cause of action.

The summary of the plaintiffs' particulars of claim is as follows.

The plaintiffs are in the permanent employ of the first defendant. Each plaintiff was previously in the employ of a local authority which was subsumed into the first defendant, which legally thereby became the successor of such local authorities, in terms of the Local Government Municipal Structures Act, 117 of 1998.

As part of the process of the local authorities in question being subsumed into the first defendant as their successor, the plaintiffs' employment was transferred to the first defendant on the same terms and conditions as that which had applied on their previous employment.

The plaintiffs' previous posts were not available to them in the first defendant's new staff structure. As a consequence, the first defendant placed the plaintiffs in new posts in its new staff structure.

The new posts in which the plaintiffs were placed were at a lower post level than the previous posts. The plaintiffs rejected them.

In those premises, and with reference to the terms and conditions of employment, the plaintiffs are redundant. Having rejected transfer to lesser posts they are entitled to redundancy and payment of full severance benefits.

The very first ground of exception raised is that the benefits for which the plaintiffs sue emanate from clause 17 of the plaintiffs' conditions of service.

Clause 17 provides that an employee whose post had been declared redundant and was offered an alternative post at a lower level, but at the same salary, was entitled to reject that offer and receive full service benefits.

Mr Sutherland submitted that clause 17 is only triggered in the event that an employee's services are terminated. He argued that the plaintiffs did not allege that their services were terminated. The plaintiffs cannot on their own averments be entitled to the benefits which flow from clause 17.

The second leg to the first exception is that the plaintiffs' claim is one for specific performance.

It is argued that the plaintiffs have not alleged that they have complied with their own obligations under the conditions of service. It is Mr Sutherland's submission that a party suing for specific performance must himself either perform or tender performance of his side of the bargain and must make this allegation in his particulars of claim.

Contrary to the first defendant's first leg of exception Mr Mullins argued that the plaintiffs' posts have become redundant. The plaintiffs were offered alternative posts at a lower level which they rejected and consequently are entitled first to a declarator to the effect that they are indeed redundant as contemplated in their terms and conditions of employment and consequent thereto, to payment of full severance benefits.

In paragraph 15 of the particulars of claim the plaintiffs allege as follows:

> "In the premise the former posts of plaintiffs as set out in paragraph 4.1.1, 4.2.1 and 4.3.1 above, were no longer necessary and were abolished and have therefore become redundant as contemplated in the provisions of clause 3 read with clause 17 of the conditions of employment, annexure 'A' and 'B' attached hereto, wherefore plaintiffs have become entitled to severance benefits set out in clause 17.4.7.4, alternatively 17.4.7.3 read with clause 17.4.8 of the aforementioned conditions of employment, annexure 'A' and 'B' attached hereto, which first defendant despite demand refuses to acknowledge."

> "Redundancy is the term applied when factors such as economic recessions, mechanisation, loss of income, reorganisation and rationalisation of manning levels and any other actions which could result in a particular job no longer being necessary, in which event the specific job becomes redundant."[1]

[1] See Standard Conditions of Service for the Employees of Greater Germiston

In my view, the above-quoted definition simply means that a specific job becomes redundant if it is no longer required. No mention is made that services should be terminated. It is on the basis of the said definition that the plaintiffs allege in paragraph 15 that their posts have become redundant. The plaintiffs need not allege, therefore, that their services were terminated.

I agree with the submission made by Mr Sutherland that a party suing for specific performance must himself either perform or tender performance of his side of the bargain. However, where the circumstances beyond the control of the party that sues for performance, such as the plaintiffs whose posts are redundant, make it impossible for the party to perform, it cannot be said that the party cannot sue (the employer) for specific performance. Therefore it is not always the position that the party that sues for performance must himself perform. It is also not the position that an employee who seeks to be declared redundant and entitled to payment of severance benefit must allege and prove that he has actually worked or offered to work. He need only allege and prove that which is pertinent to redundancy and payment of severance benefits.

The second ground of exception is that the plaintiffs cannot demand termination of their contracts of employment at the instance of the employer.

If the plaintiffs are dissatisfied with the way in which the employer deals with them, they have an election to allege a material breach, cancel the contract and sue for damages. This exception is without merit in my view as demonstrated hereunder.

The terms and conditions of employment of the plaintiffs, which the employer is bound to respect, provide *inter alia* that in circumstances where specific jobs become redundant and the affected employees cannot be transferred to other posts or reject such transfer, such employees are redundant and therefore entitled to severance benefits. 0n the basis of their terms and conditions of employment the plaintiffs need not sue the first defendant on the basis of breach of contract of employment. Neither must they cancel the contract and sue for damages.

The third ground of exception is to the effect that because the plaintiffs allege in paragraph 10 of their particulars of claim that their terms and conditions of employment arise *inter alia* out of the written collective agreement, it follows that the dispute relates to the interpretation or application of that collective agreement, and must be resolved in accordance with section 24 of the Labour Relations Act 66 of 1995.

Section 24(1) reads:

"Every collective agreement, excluding an agency shop agreement ... or a closed shop agreement ..., must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to solve it through arbitration."

Mr Mullins argued correctly, contrary to the submission made, that the plaintiffs' action has nothing to do with the interpretation, or the application, of a collective agreement. It has to do with the interpretation of the plaintiffs' terms of employment. The plaintiffs' claims are purely contractual. The plaintiffs simply seek contractual remedies which their employment contracts promise them.

First defendant submitted in its fourth exception that the abolition of the plaintiffs' previous posts does not of itself give rise to the redundancy as alleged by the plaintiffs in paragraph 11 of their particulars of claim.

Paragraph 11 of the particulars of claim is formulated as follows:

"The posts of the plaintiffs referred to in paragraphs 4.1.1, 4.2.1 and 4.3.1 above became redundant as a result of one or more of the following:

11.1 the aforesaid posts were abolished in terms of the notice;

11.2 the first defendant has established a new macro staff structure with new posts;

11.3 the first defendant's personnel structure, after the aforesaid establishment of the first defendant, had to be restructured as contemplated in the provisions of a collective agreement between first defendant, SAMWU and IMATU, dated 21 August 2002 and in accordance with first defendant's Procedural Guidelines for the implementation of the Placement Agreement (0perational Strategy);

11.4 first defendant's new staff structure does not provide for the plaintiffs' former posts as referred to in paragraph 4.1.1 and 4.2.1 and 4.3.1."

The interpretation of paragraph 11, in my view, is to the effect that the plaintiffs were not accommodated in the new structure after their previous

posts were abolished. Had the new structure accommodated them at the similar post level they would not be floating.

In view of the above interpretation, Mr Sutherland is not entirely correct, in my view, to say that the plaintiffs allege that the abolition of their previous posts of itself gave rise to the redundancy. In my view, the abolition of their posts was only the first step towards possible redundancy.

The first defendant has a duty, as excipient, to satisfy the court that the particulars of claim are excipiable on any interpretation they can reasonably bear. Where the particulars of claim rely on an interpretation of a contract the excipient must satisfy the court that the contract cannot reasonably bear that interpretation. In *Lewis v 0neanate (Pty) Ltd and Another* 1992 4 SA 811 at 817 NICHOLAS AJ stated:

> "Since these are proceedings on exception, it must be borne in mind that the appellant has the duty, as excipient, to persuade the court that upon every interpretation which the particulars of claim, including annexure 'D', can reasonably bear, no cause of action is disclosed."

GROSSKOPF JA stated the following in *Theunissen v Transvaalse Lewende Hawe Koöp Bpk* 1988 2 SA 493 (A) at 500E:

> "In soverre daar enige twyfel hieromtrent kan bestaan, moet daar in gedagte gehou word dat die plig op die appellante as eksipiënte rus om ons te oortuig dat elke vertolking wat 'n hof redelikerwys aan die besonderhede van vordering kan heg, vatbaar is vir eksepsie."

(See *Kotsopoulos v Bilardi* 1970 2 SA 391 at 395C-D.)

After I had considered all the issues raised by Mr Sutherland in support of the first defendant's case, I was not persuaded that the particulars of claim are excipiable on any interpretation which they can reasonably bear.

In view of the above, I make the following order:

1. The exception is dismissed.
2. First defendant is ordered to pay the costs of two counsel.

M M MABESELE
ACTING JUDGE OF THE HIGH COURT

40292-2005

HEARD ON: 9/5/2006
FOR THE 1ST DEFENDANT: ADV R SUTHERLAND SC WITH GARTH HULLEY
INSTRUCTED BY: DU PLESSIS DE HEUS & VAN WYK, c/o SGA ATTORNEYS, c/o VAN DER MERWE & ASSOCIATES, PTA
FOR THE RESPONDENTS: ADV J F MULLINS SC WITH
D J BRANDFORD
INSTRUCTED BY: SERFONTEIN VILJOEN & SWART, PTA