FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION

JUDGMENT

PARTIES**:**

Case Number:**460/2003**
High Court: **Bhisho**
DATE HEARD: **27 March 2009**
DATE DELIVERED:

JUDGE(S): **Chetty, Van Zyl JJ and Griffiths AJ**

LEGAL REPRESENTATIVES –

Appearances:

For the Applicant(s): **S.A Collett**
For the Respondent(s): **N Dukada SC**

Instructing attorneys:

Applicant(s): **G Webb (Hutton & Cook)**
Respondent(s): **S Somnamzi (State Attorneys : Bhisho)**

CASE INFORMATION –

Nature of proceedings:
Topic: Appeal
Key Words: Law of Contract – Contract of Employment Breach – Damages for mental anguish, humiliation and contumelia – whether such recoverable ex contractu

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – BHISHO)

Case No: 460/2003
REPORTABLE

In the matter between:

BELINDA WEWEJE **Appellant**

And

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, EASTERN CAPE **1st Respondent**

THE HEAD OF DEPARTMENT, DEPARTMENT
OF EDUCATION, EASTERN CAPE **2nd Respondent**

Coram: Chetty, Van Zyl JJ and Griffiths AJ
Date Heard: 27 March 2009
Date Delivered: 24 April 2009

Summary *Law of Contract – Employment contract – Breach – Damages for mental anguish, humiliation and contumelia – whether such recoverable ex contractu*

JUDGMENT

CHETTY, J

[1] The **Employment of Educators Act** [1] (the Act) was enacted to

[1] Act 76 of 1998

provide for the employment of educators by the state, the regulation of their conditions of service, discipline, retirement and discharge and collateral matters. Section 3 (3) (b) of the Act provides that for the purposes of creating posts in the educator establishment of a provincial department of education, the member of the executive council (the MEC) shall be the employer of educators in the service of that department.

[2] This appeal, with the leave of the court *a quo* (Ndzondo AJ) concerns an educator (the appellant), who commenced teaching at a public school, George Randall High, at East London in the province of the Eastern Cape on 7 April 2001. The fundamental difference between her and the thousands of educators employed both nationally and provincially is that, unlike the latter, she received no monthly remuneration. Instead, almost one year later, during April 2002, she received a globular amount of R78 311. 14 representing her salary for the preceding year. The details concerning the non-payment of her emolument bespeak bureaucratic mayhem and make interesting reading but are irrelevant to the issues which arise for determination.

[3] During 2005 the appellant instituted action against the respondents in which she claimed special damages on some incomprehensible legal basis and general damages in the sum of R250 000, 00. Prior to the commencement of the trial, the particulars of claim was amended, the appellant persisting only with the claim for general damages ex *contractu*. At the conclusion of the trial, the court below dismissed the appellant's claim. The ratio of the judgment is encapsulated in paragraphs [20] to [22] where the judge states: -

> "[20] The conclusion is, therefore, inescapable that Plaintiff knew at the time that she assumed duties at the said school and continued working for several months in 2001 that she ***(sic) the department had not yet employed her.***
>
> ***[21] Furthermore, she knew when she received the above letters that the appointment was unprocedural, irregular and illegal as***

Mrs Collett put it to her (which she did not deny).

[22] It follows, in my view, that the Plaintiff was not entitled to be paid any emoluments for discharging duties as an educator at George Randall High School and the decision by the department to pay her a lump sum arrear salary for this period astounds me, to say the least."

[4] The aforesaid findings are, to say the least, astounding. In their amended plea the respondents not only admitted the contractual relationship between the appellant and themselves but moreover admitted that the failure to pay the appellant her emolument for the period in question constituted a breach of the agreement. The only matters placed in issue was the foreseeability of damages flowing from the breach. In addition, the agreement reached by the parties and minuted in the supplementary Rule 37 minute was to similar effect. Paragraph 4 of the said minute states that: -

"The Defendants recorded that they intended delivering a Notice of Intention to amend the Plea so as to withdraw the denial as to the Plaintiff's allegations that she had not received her emoluments for the period 7 April 2001 to 20 March 2002, and to admit those allegations and that in effect the Defendants were in breach of their contractual duties to effect payment of the Plaintiff's emoluments for the said period. The Defendants undertook to deliver the Notice of Intention to Amend by no later than 18 July 2005."

[5] There was no attempt made at the trial to *resile* from the agreement. The binding nature of an agreement reached at a conference convened in terms of Rule 37 is succinctly stated by Harms J.A in **Filta –Matix (Pty) Ltd vv Freudenberg and Others**[2] ***WHERE THE LEARNED JUDGE OF APPEAL STATED***

[2] 1998 (1) SA 606 (SCA)

AS FOLLOWS[3]: **-**

> ***"To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding. No reason exists why the principle should not apply in this case."***

[6] The issue the parties required to be adjudicated upon was articulated in the minute aforesaid as:-

> "It was agreed that the issue to be determined by this Honourable Court was whether the ***Defendant's failure to pay the Plaintiff's emoluments for the period aforementioned, constitutes an actionable wrong as pleaded by the Plaintiff at paragraphs 6.1, 6.2 and 6.3 of the Plaintiff's particulars of Claim."***

[7] In essence the judge was required to decide whether an action for damages on the basis pleaded could be sustained. Instead of doing so he determined matters upon which the parties had reached consensus and which required no decision on his part. Although the general rule is that the determination of damages is a function peculiarly within the province of a trial court, a court of appeal has wide powers to give a judgment or make an order which the circumstances require. In *casu* the trial court was, as adumbrated hereinbefore, required to determine whether the appellant was in law entitled to an award of damages and, if so, to determine whether such damages were foreseeable and assess the quantum thereof. In view of the trial judge's failure as aforestated, it is incumbent on us, sitting as a court of appeal, to pronounce upon the matter. In order to decide the real issue it is necessary as a precursor to a consideration of the applicable legal principles to have regard to the appellant's case as formulated in her particulars of claim.

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[3] At 614C-D

[8] In paragraph [6] and [7] of the particulars the appellant provided details of the contract of employment and the respondents' breach thereof. She averred that –

> "6 By virtue of the ***Plaintiff's employment agreement with the Second Defendant the Plaintiff became entitled to the following:***
>
> ***6.1 In terms of the provisions of the EEA, to receive monthly emoluments for educator services rendered, and to be accorded all relevant concomitant benefits associated with her employment aforesaid, including a housing subsidy, pension benefits and medical aid;***
>
> ***6.2 In terms of the parties material contractual arrangements in terms of the provisions of annexure "A" to those benefits set out therein relating to the payment of emoluments, housing subsidy, pension benefits and medical aid benefits, read together with the provisions of the EEA and the Personnel Administration Measures promulgated in terms of the EEA.***
>
> ***6.3 In terms of the provisions of the Constitution, to be afforded administrative action which is lawful, reasonable and procedurally fair as provided for in Section 33 thereof, and to be accorded fair labour practices in terms of the provisions of Section 23 (1) thereof."***
>
> AND THAT
>
> "7. In beach of the ***Second Defendant's contractual duties aforesaid, and/or statutory duties aforesaid, and/or in violation of the fundamental constitutional rights aforementioned, the Second Defendant failed to effect payment of the Plaintiff's emoluments***

for the period 7th April 2001 to 20th March 2002, and failed to confer upon the Plaintiff the benefits associated with her employment aforesaid for the said period."

[9] In paragraph [8] she alleged that :-

"8. In consequence of the Second Defendant's wrongful and unlawful breaches aforementioned, the Plaintiff sustained damages, the nature and extent whereof were at all material times, reasonably foreseeable alternatively flowed naturally and generally from the said breaches and ***consisted of general damages in the sum of R250, 000. 00 for psychological and physical pain and suffering, humiliation, anxiety, insult and contumelia by reason of the following events: -***

8.1 The Plaintiff's credit record having become compromised by default judgments granted against her for non payment of debt;

8.2 The Plaintiff having to appear in Debtors Court for financial enquiries which was both demeaning and humiliating;

8.3 The Plaintiff having to approach the Magistrate's Court in terms of section 74 of the Magistrates Court Act to be placed under administration for non payment of debt;

8.4 The Plaintiff being exposed to vilification from creditors who were in disbelief that her employer failed to effect payment of her emoluments for so extensive a period;

8.5 The Plaintiff being subjected to the Sheriff of the Court having to attach her property for unpaid debt on several occasions, and the humiliation associated therewith;

8.6 The Plaintiff having raised braise bridging finance by way of loans to meet living costs of her and her family;

8.7 The Plaintiff being demeaned and having to suffer the indignity of not being able to afford basic household necessities for her family, and suffering degradation and being humiliated in the eyes of her children;

8.8 The Plaintiff being deprived of being able to raise credit in future;

8.9 ***The deprivation of medical benefits and being unable to afford hospital benefits which in particular deprived the Plaintiff on one occasion from being entitled to undergo surgery under general anaesthetic and having to undergo said surgery under the cheaper but more painful and unpleasant local anaesthetic, the said pain and suffering having endured in moderate terms for two or three days;***

8.10 ***The Plaintiff suffering the indignity of her children having school reports withheld for non payment of school fees by virtue of the financial hardship aforementioned;***

8.11 ***The Plaintiff having been reduced to a suicidal condition and having attempted to commit suicide in consequence of her financial penury precipitated by the non payment of her emoluments as aforesaid;***

8.12 ***The concomitant anxiety, suffering and humiliation attendant upon the sale of the Plaintiff's family home having been in her erstwhile husband's family for three to four generations, against the threat of attachment by the Mortgagee, which sale occurred on the advice of the Mortgagee bank;***

8.13 ***The Plaintiff, together with her family having to rent accommodation for a period of some 14 months in humiliating and insulting circumstances, with particular reference to rented accommodation which had no electricity and which have been vandalised.***

8.14 ***The Plaintiff suffering embarrassment, humiliation and anxiety in not having been able to remarry her erstwhile husband, because of the Default judgments taken against her and the consequence of poor credit rating which preclude her erstwhile husband and her jointly obtaining bond finance, in consequence whereof the Plaintiff has had to remain unmarried."*** (emphasis added)

[10] As adumbrated hereinbefore the appellant's cause of action is founded in contract. The true nature of the damages she seeks as set forth in the particulars reproduced in para [9] above and broadly stated as general damages in essence relate to the mental anguish, humiliation and contumelia she endured by reason of the non-payment of her monthly emolument. I interpolate to mention that throughout the period that the respondents failed to effect payment of the appellant's monthly emolument the school governing body paid the appellant a monthly solatium of R4 399, 00.

[11] The question which thus falls for determination is whether the admitted breach of contract gives rise to a claim for damages as contended for. There is ample authority to the contrary. The nature of damages awarded for a breach of contract was articulated by Innes CJ in **Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd**[4] as follows: -

"The agreement was not one for the sale of goods or of a

[4] 1915 AD p. 1 22

commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."

[12] More recently, Van Heerden JA in **Administrator, Natal v Edouard**[5] ***STATED THE LEGAL POSITION AS FOLLOWS: -***

". . . it is necessary to deal briefly with the general principles of our common law pertaining to the recovery of damages.

None of our old authorities does as much as hint that in Roman-Dutch law intangible loss could be recovered in contract. On the contrary, some of them make it clear that what may be recovered is damnum, i.e. patrimonial loss. So, for instance, Voet 45.1.9, when dealing with contractual obligations, says that id quod interest (damages)

'in its more commonly received sense . . . is the deprivation of a benefit and the suffering of loss . . .'

Voet goes on to say that in the settlement of damages no account is to be taken of special affection. And in 39.2.1 he remarks that damages (damnum) is nothing else than the diminution of an estate.

It is also clear that under the Aquilian action only patrimonial loss could be recovered. That is why this Court has held that Aquilian liability does not attach to the causing of mental distress or

[5] 1990 (3) SA 581 (AD)

wounded feelings. As is well known, Roman-Dutch law, unlike Roman law, did, however, by way of exception allow the recovery in delict of intangible loss flowing from the wounding of a free man. It has now been authoritatively established that a claim for such loss, although sounding in delict, is an action sui generis differing from the Aquilian action only insofar as it is not from its inception actively transmissible. As it has developed in South African law, a requirement of this action is the infliction of a bodily injury on the claimant. But save for the above exception, and apart from injuria and seduction, our Courts have in later years consistently indicated that only patrimonial loss may be recovered in contract and in delict. (An action for breach of promise to marry can embrace two separate claims, one for damages for breach of contract and another for a solatium because of the commission of an injuria.) It follows that insofar as it was decided in the older cases relied upon by counsel for the respondent that a breach of contract may give rise to a claim for damages in respect of physical inconvenience, they are in conflict with the general principles of our law. Such damages may not even be recovered by the Aquilian action unless, of course, the physical inconvenience was brought about by a bodily injury."

[13] The rationale for refusing a claim for damages as pleaded was succinctly stated by Tindall JA in **Jockie v Meyer**[6] ***AS FOLLOWS: -***

"To award such damages in an action alleging merely breach of contract would, in effect, be to try an action for an injuria (it might be for defamation) as a matter of aggravation of damages caused by breach of contract. Such a course seems to me not in accord with our practice and objectionable on practical grounds. The objection to it is not a mere technicality; if it were sanctioned the result might lead to confusion and a tendency to overlook the

[6] 1945 A.D 354 at 38

essential elements which have to be alleged and proved in order to support such a claim for damages for contumelia and the defences that may validly be set up to such a claim."

[14] This is precisely what Mrs Collett attempted to persuade us to find viz. that the non-payment of her salary amounted to an injuria entitling her to an award of damages. No such case was however made out on the pleadings. Given the current status of our law no damages for the mental anguish, humiliation and contumelia suffered by the appellant may in law be awarded for breach of contract. In the light of the aforegoing it is unnecessary to consider the question of causation.

[15] In the result the following order will issue:-

1. The appeal is dismissed with costs.

D. CHETTY
JUDGE OF THE HIGH COURT

Van Zyl, J

I agree

D. VAN ZYL
JUDGE OF THE HIGH COURT

Griffiths, AJ

I agree

R.E GRIFFITHS
ACTING JUDGE OF THE HIGH COURT

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