IN THE INDUSTRIAL COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO NHN 21/2/0003

In the matter between

KHUMBULANI GABRIEL NGCOBO — APPLICANT

AND

NATAL PROVINCIAL ADMINISTRATION — RESPONDENT

---

CONSTITUTION OF THE COURT :

M P FREEMANTLE — SENIOR MEMBER

ON BEHALF OF :

APPLICANT :

MR A SONI
Instructed by
YUNUS MAHOMED & ASSOCIATES
DURBAN

JUDGMENT/UITSPRAAK
No. 15 VAN/OF 1994
CIRCULATE/VERSPREI
PRESIDENT: INDUSTRIAL COURT
PRESIDENT: NYWERHEIDSHOF

RESPONDENT :

MR M PILLEMER
Instructed by
STATE ATTORNEY
DURBAN

DATE AND PLACE OF PROCEEDINGS :

DURBAN
01 NOVEMBER 1993

# J U D G M E N T

The applicant in this matter is Khumbulani Gabriel Ngcobo, an erstwhile employee of the respondent, which is the Natal Provincial Administration. It is common cause that the applicant's employment contract was terminated on 31 March 1993. In dismissing him, the respondent relied on the provisions of s 12 (4)(a)(i) of the Public Service Act No 111 of 1984.

The applicant seeks a reinstatement order with ancillary relief. He relies for his claim on s 23 (2) (a) of the Public Service Labour Relations Act No 102 of 1993, (conveniently referred to as the 'PSLRA'), read with other relevant provisions in the section. This affords, to public servants, a procedure and remedy very similar to the (by now familiar) *status quo* proceedings under the Labour Relations Act, 1956. The PSLRA came into operation on 02 August 1993, and the respondent has taken a point *in limine* which arises from that fact.

What the respondent says is that the application is based on an alleged unfair labour practice that occurred on 31 March 1993, which was prior to the PSLRA coming into operation, and its provisions are for that reason not applicable to the dispute arising from the dismissal. It contends that the applicant's cause of action, if any, is not one under this Act and the Court therefore does not have jurisdiction to entertain the application.

This is the issue which, by consent, was argued before me as a preliminary, and the only one I am at this stage called upon to decide.

In argument Mr Soni, for the applicant, correctly conceded that on the date his services were terminated, the remedies available to the applicant to challenge the lawfulness of the respondent's action were limited to those then available, either under the Public Service Act or at common law.

He submitted that the principles to apply in considering whether a statutory provision can be invoked not only for future matters, but also for those that arose prior to its coming into operation, are these :

(i) In the absence of express provision to the contrary, statutes should be regarded as affecting future matters only, and if possible they should not be so interpreted as to take away rights actually vested at the time of their promulgation; and

(ii) Whether and to what extent a statute is to be construed as having retrospective application, depends on the intention of the legislature as expressed in the wording of the statute.

Those propositions are clearly supported by the authority he cited, viz *Euromarine International of Mauren v The Ship Berg & Ors* 1986 (2) SA 700 (A) at 709 H - 710 I. In

that case there is reference, inter alia, to two others Mr Soni mentioned in this context, namely *Curtis v Johannesburg Municipality* 1906 TS 308 and *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 AER 833 (PC). The first of them merely restates the general presumption against retrospectivity. The second is authority for what Miller JA said in the *Euromarine* judgment at 710 E :

"But what is clear from the several judgments *[in the Curtis matter]* is that primarily, in every case, the inquiry must be into the language of the enactment and the purpose and intent of the Legislature which emerges therefrom".

But inevitably there is rather more to it than can be expressed aphoristically.

Mr Soni did not contend, though, that s 23 of the PSLRA should in fact be so construed as to operate retrospectively. He went on to argue that whatever the form in which the applicant's case appears, his complaint is in essence that the dismissal was unfair for want of proper compliance with the rules of natural justice, and in particular the failure to accord him a fair hearing. The right of such an employee to the benefit of those rules, so Mr Soni contended, was protected before the PSLRA came into operation. For this submission he relied on *Administrator, Transvaal v Zenzile & Ors* 1991 (1) SA 21 (A), at 34. Here again, his proposition is squarely

supported by the judgment, for Hoexter JA says at 34 D : "Where an employee has this protection legal remedies are available to him to quash a dismissal not carried out in accordance with the principles of natural justice".

The remedy available to the applicant at the outset, said Mr Soni, would have been to challenge the dismissal in the Supreme Court, as was done in the *Zenzile* case *(supra)*. What the PSLRA does, he submitted, is to make available to the applicant an additional forum in which to pursue the same remedy. The advantage provided by the Act, he contended, is a purely procedural one which entitles him to pursue in either court, what is in each case exactly the same right, viz *the right to fair treatment prior to any prejudicial action being taken against him by his employer.* The PSLRA, he contended, creates no new rights, a proposition which he said is borne out by examining the intention of the legislature in enacting the PSLRA, and especially as evidenced by s 2 of the Act.

Should there in truth be a measure of retrospectivity involved in extending its benefits to persons such as the applicant, said Mr Soni, then the Court should hold that it was indeed the intention of the legislature that it should be so construed in common, historically, with past statutes whose purpose was to benefit those subjects of the State who are affected by them. Here he relied on *Ex parte : Christodilides* 1959 (3) SA 838 (T) at 841 A-B.

He referred also to the judgments reported as *Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of Manpower & Anor* 1984 (2) SA 238 (D) and *Richard R Currie Properties Ltd V Johannesburg City Council* 1984 (4) SA 195 (W). The first was in support of the notion that where the legislature makes no express provision in a statute for pending matters, it does not intend that they should be treated any differently from new ones arising after promulgation. The second, he said, demonstrates that the right to follow a particular procedure arises only when a party approaches the court for relief.

Finally Mr Soni submitted (as I understood him to say), that the respondent had involved itself in the procedure which the applicant initiated and followed pursuant to the PSLRA without objection to or complaint about the retrospectivity which this entailed, if such was the case. A conciliation board had been established in terms of the Act. The parties had met under its auspices on 15 October 1993, and had agreed the dispute could not be settled. Against this background Mr Soni contended that the respondent cannot now be heard to pursue the point in limine which it had raised.

Mr Pillemer, who appeared for the respondent, approached things differently. The gist of his argument was that only through interpreting the statute so as to operate

retrospectively, could the applicant resort to its procedures and remedies. The starting point, he submitted, had to be the provision pursuant to which the respondent exercised its power and authority to dismiss the applicant. This was s 12(4)(a)(i) of the Public Service Act ('the P S A'), which reads :

*" Notwithstanding anything to the contrary contained in subsection (2) or in Chapter VI, ..... an officer who is serving on probation may be discharged from the public service by the person having the power of discharge, either during or at or after the expiry of the period of probation -*

*(i) by the giving of one month's notice; or*

*(iii) forthwith, if his conduct or performance is unsatisfactory. "*

(Subsection 2 provides for a minimum probationary period, and Chapter VI is to do with misconduct, disciplinary procedures and related matters).

Whether the dismissal was an unfair labour practice was a question, said Mr Pillemer, which did not arise. The applicant's dismissal was a transaction unreservedly completed on 31 March 1993. State employees were then expressly excluded from the operation of the Labour Relations Act, 1956, and the PSLRA contains nothing which evidences an intention on the part of the legislature to resuscitate such matters.

Mr Pillemer referred to *Bellairs v Hodnett & Anor* 1978 (1) SA 1109 (A) for the general presumption against retrospectivity. In this full bench judgment, the following appears at 1148 F - G :

*"There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and* ..... [matters subject to pending litigation] ....."

He relied also on *Bartman v Dempers* 1952 (2) SA 577 (A), and in particular the passage at 580 B - C :

*" There is a well-known rule of construction that no statute is to be construed so as to have a retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the statute to have that effect."*

The judgment goes on to point out that this rule of construction was recognised by the Legislature in s 13(2) of the 1910 Interpretation Act. In this regard counsel pointed to ss 12 and 13 of the prevailing Interpretation

Act, 1957. [Here I may say that those subsections in s 13(2) of the earlier Act referred to by the Court in *Bartman v Dempers* (*supra*) are identical to the corresponding subsections in s 12 (2) of the later Act.]

Mr Pillemer submitted that the applicant's contention for a pre-existing unfair labour practice concept affecting State employees was very far-reaching. It ran directly counter to the previously understood position of a statutory employee. Here he referred me to *Schierhout v Minister of Justice* 1926 AD 99 at 107 et seq.

He said the main thrust of his argument was that the dismissal was a completed transaction to which the PSLRA cannot be applied. Another pointer against any notion of retrospectivity, he said, was the period of 30 days stipulated in s 23(8) within which the application has to be made. He contended that the relief now available in terms of the PSLRA is something new, and the procedural provisions in it are merely steps for the enforcement of those new rights. The other procedures which were available before 02 August 1993 are still there for the applicant to use.

Finally, as to the respondents contention that the respondent is not entitled to pursue the preliminary point because it had participated in the procedures without objection, Mr Pillemer said this submission was just a red herring. The Court, he argued, simply had no

jurisdiction and that was that. No purported waiver on the part of the respondent could clothe the Court with a jurisdiction it does not have.

Perhaps it would be as well to dispose of this last-mentioned point first.

It is not wholly clear to me whether Mr Soni was contending for waiver or estoppel, but the point was not mentioned in his prepared heads of argument, and he did in fact advance the submission as a late entry in the stakes. He did not support it by reference to authority, and I am unaware of any which would assist the applicant, whichever of the two pegs counsel sought to hang it on.

It seems to me that any notion of waiver necessarily connotes tacit consent by the respondent to the exercise of jurisdiction by the Court. The problem with that is this. If the Court in fact has jurisdiction because of retrospective operation of the PSLRA, then the consent is irrelevant, and *cedit quaestio*. If it doesn't have jurisdiction, no amount of consent on the part of the respondent is going to confer it. See *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883 (A) where it was held that whilst a party may agree to subject his person to the jurisdiction of a Court, that was not enough. For that consent to be at all effective, some other ground of jurisdiction must exist.

On the other hand, it must be equally clear that estoppel (if the facts of this case were otherwise to satisfy the test for its existence) cannot confer jurisdiction : to uphold an estoppel, the Court would itself necessarily be assuming a jurisdiction which it otherwise does not have - an act wholly inconsistent with its clear duty to satisfy itself (*mero motu* in an appropriate case) that in making any order which is proposed, it does not act *ultra vires*. The notion of any such estoppel runs counter to the principles referred to by Kroon J in *Klerck N O v Van Zyl & Maritz* 1989 (4) SA 263, 280 E-H; in particular that which deals with reliance on estoppel so as to validate a transaction which is otherwise *ultra vires*.

The applicant's contentions on these matters can therefore not be sustained.

At the core of the parties' respective positions is the difference of opinion on whether the PSLRA creates new rights, or merely provides a different means or procedure for the enforcement of rights which had hitherto existed independently of any specific labour legislation.

Now, the avowed 'purpose and intent' of the legislature (cf Miller JA in the *Euromarine* case, *supra*) in enacting the PSLRA appears from the long title, as follows :

' *To regulate anew labour relations in the Public Service, including* collective bargaining at central and

departmental levels, the registration, recognition and admission of employee organisations, and the prevention and *settlement of disputes of a collective and individual nature between the State as employer, and its employees* and employee organisations : and to provide for matters connected therewith. ' (My emphasis).

That it is proper to look at this title is clear from *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129 where this was said :

' It is now settled law ..... that in the process of ascertaining intention it is permissible to have regard to the title of the Act. '

Let it be said, however, that this *dictum* was qualified in a way which limits any resort to the title for assistance, to those instances only where the section concerned is ambiguous, in which event 'we may refer to the title to see what the legislature intended the actual scope of the section to be.' Further authority is hardly necessary for what is after all a trite principle of construction.

The present application is (and must of necessity be) based on an alleged unfair labour practice : see s 23(1) of the PSLRA which characterises any relevant dispute as 'a dispute about an unfair labour practice'. That the concept of the unfair labour practice is central to both the purpose of the legislature and the substance of the PSLRA appears from s 3 of the Act :

*' This Act shall apply to all employees, to departments and organizational components employing such employees, and to any other employers at whose disposal such employees have been placed in terms of section 14 of the Public Service Act, in so far as any unfair labour practice arising from the employment and utilization of the last-mentioned employees is concerned. '*

Hitherto the relationship between the State and its employees was regulated by the Public Service Act, the long title to which reads as follows:

*' To provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service and matters connected therewith '.*

I have referred to that long title, not for the purpose of construing any ambiguous section, but merely to get at the general design of that Act.

Now, the expression used in the long title (supra) of the PSLRA (supra) is *'To regulate anew .....'* According to The Concise English Dictionary the word *'anew'* means *'again'* or *'in a different way'*. And in the Beknopte Verklarende Woordeboek *'opnuut'* is said to mean *'weer'*, *'nog 'n keer'*. (I mention the latter because it was the

Afrikaans text of the PSLRA which the State President signed).

That there is novelty involved in the PSLRA is plain for all to see, and it helps but little for us to be told so in the long title. Especially when it comes to determining whether s 3 of the PSLRA (supra) is meant to apply to all employees etc, only in respect of unfair labour practices initiated or occurring from 02 August 1993, or also in respect of prior events. There is nothing in s 26 of the Act ('Transitional provisions') which bears on this aspect of the matter.

Guidance is, however, at hand when the long title is read with the contemporaneous amendments to the Public Service Act, contained in the Schedule to the PSLRA. I have no wish, though, to stray beyond that which is of immediate relevance to the instant case, (which is brought under s23 of the PSLRA), for it is only in this context that I must decide the present issue. This judgment must be seen within that limited compass.

That said, it seems to me that save for introducing certain exceptions relating to strikes and other work stoppages, no amendments in the Schedule to the PSLRA are of any relevance to Chapter VI of the Public Service Act (whose subject-matter is 'Inefficiency and Misconduct'). This chapter (with its satellite provisions elsewhere in that Act), therefore retains its full vigour.

Any rights flowing from that Act which an employee in the applicant's position could enforce before the commencement of the PSLRA remain protected in the same way and by the use of the same procedures. There is nothing in the PSLRA to detract from or diminish rights and remedies formerly available to employees, which are therefore still available to them in respect of events occurring on or after 02 August 1993.

Most (if not all) infringements of an employees rights so circumscribed would now also be justiciable in the industrial court as being not only unlawful, but also unfair. Conduct by an employer towards an employee which is lawful may be fair or it may be unfair : But conduct which is at once unlawful, yet fair, must be far to seek. (See eg *Plascon Inks and Packaging Coatings* (1991) 12 ILJ 253 (IC) at 366.

Mr Soni was undoubtedly correct in submitting that the PSLRA provides for a different procedure in another forum. But in seeking to extend the choice of using that procedure (and indeed the obligation to use it in this forum), to prior disputes the facts of which are otherwise amenable to s 23 of the PSLRA, his argument rests on a fallacious major premise : namely, his contention that the PSLRA creates no new rights, and that what an employee is entitled to pursue in either court is in each case exactly the same right.

This simply cannot be so, as will appear presently, for the true position is this : The same set of facts may give rise to separate and distinct 'causes of action' which overlap because of that very fact. Similar but distinct procedures in different courts may produce results which vary from being dissimilar, to similar, to identical, according to the facts of the case. But it does not follow from this that the procedures adopted have their origin in precisely the same rights. They merely have a common factual background or basis.

For Mr Soni's argument to succeed it is not enough to say that the applicant can pursue his remedy in the industrial court as well as in the Supreme court. The reverse would also have to be the case. In so far as procedural complaints are concerned there is probably a high degree of common ground between the two options. This is simply because procedures are prescribed in the Public Service Act and, as Hoexter JA said in the *Zenzile* case (supra), at 34 C, the element of public service and the exercise of public power entitle the employee to the benefit of the application of the principles of natural justice. If the employer does not accord the employee a fair hearing in accordance with the Act and those principles, then that is unlawful. It is for that reason also bound to be an unfair labour practice when tested against the definition of such a practice in the PSLRA.

In the Industrial Court the test is not whether the conduct was unlawful, but whether it was unfair. Proof of the former will often be used to establish the latter. In the Supreme Court, on the other hand, the only test is whether the conduct was unlawful. If it was, then a remedy is available : that it was in those circumstances also unfair may be interesting, but it is irrelevant to the Court's decision or its order. On the other hand, if the conduct was lawful, then the fact that it nevertheless squarely fits the unfair labour practice definition is irrelevant and that Court is powerless to grant relief. This is where the difference lies. In the industrial court a remedy may be granted if the conduct fits the definition : no matter that it was lawful. But a remedy based on an employer's lawful but unfair conduct is simply not available in the Supreme Court.

It follows that the PSLRA does not merely provide employees with a different procedure in another court. It creates a new, separate and distinct regime, in the sense that the remedy available is based on a different cause of claim, hitherto not available. As Leon J said in the dissenting judgment *a quo* in the *Euromarine* case (*supra*, mentioned at 711 E), it was the intention of the legislature

"to introduce a remedial measure designed to provide what is nowadays referred to as a 'new dispensation' in

respect of maritime claims and their enforcement in South Africa"

Hoexter JA agreed it was proper to approach that Act as one that was 'new', not only because it commenced recently, but mainly because there were in it bold departures from the old [Act].

Those *dicta* scarcely need alteration for the same to be said of the PSLRA. And besides, there is still the matter of s 2 of that Act, which Mr Soni called in aid (see above). The section reads :

*' (1) The responsible Minister shall administer this Act. (2) Any rights of employees in terms of this Act shall be in addition to any rights which they have in terms of any other law or the common law and shall take preference over rights in terms of any other applicable law.'*

I do not consider that this section in any way helps his submission that the PSLRA creates no new rights. On the contrary, it seems to me that the legislature in enacting that section, had very much in mind the notion that a whole raft of additional substantive and procedural rights would flow from the passage of this law.

In my opinion the applicant's contention that the novelty in this Act is merely procedural must for those reasons fail.

But there is another reason also, why an approach based simply on the question whether the statute provides for procedural matters, is probably unsound. In the Yew Bon Tew case (supra) at 839 *d-f* it was said that whether a statute has retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive. The correct approach, in a proper case, was said to be *'not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations.'* Having regard to what follows presently on this topic, I respectfully find that reasoning to be sound, though it represents a more flexible approach than had hitherto been the case in our courts, viz that a procedural enactment will not be applied retrospectively without plain words if the effect would be to deprive a person of a vested right. (Per Leon J in *Industrial Council for the Furniture Manufacturing Industry v Minister of Manpower & Anor* 1984 (2) SA 234 (D)). Here, the industrial court had been substituted for the Minister in s 51(6) of the Labour Relations Act, as the tribunal for the hearing of appeals under that section. Leon J said at 244D : *'I consider that to substitute a court for an administrative functionary is not simply a difference in procedure as the nature and ambit of the rehearing to which an appellant is entitled is altered.'* As to that, I would think *a fortiori* in the present case where an administrative tribunal is offered in addition

to the Court which has always been and continues to be available. I do not find in that case any significant support for the applicant's argument that the effects of the PSLRA are purely procedural. Nor can it be deduced from this case that the present matter was 'pending' in the sense that the appeal to the Minister was pending in the *Furniture Industry* case.

Of the judgments Mr Soni mentioned, I must also deal with the *Richard R Currie Properties* case (supra). Whilst it tends to support his reliance on it concerning procedural matters, (and the *Furniture Industry* case (supra) does so too) his contention (that the right to follow a particular procedure arises only when a party approaches the Court for relief) begs the question. For if the substantive right has not accrued, then he is out of court anyway. See the remarks of Lord Brightman in the *Yew Bon Tew case* cited with approval by Miller JA in the *Euromarine case* (supra) at 710.

The next issue is whether, notwithstanding the substantive (as distinct from procedural) novelty of the PSLRA, the legislature nevertheless intended it to be construed so as to operate retrospectively. That is to say, whether it should be so construed despite the general presumption against such interpretation, which presumption operates in the absence of any express provision in the statute for it to be retroactive.

I do not consider that the *Christodilides* case (supra), though it may be superficially attractive, assists the applicant. The purpose of the amending statute relevant to that case was to regularise what had hitherto been held to be irregular service under articles of clerkship. The Court considered that counsel's argument to the effect that no retrospectivity was involved might be correct, but it nevertheless decided that the amendment was intended to operate retrospectively for two reasons. One was that the amendment dealt with and was intended to clarify a matter which had been in doubt, and the other was that it was intended to operate for the benefit of a subject of the State.

In my opinion, neither of those factors is a feature in the present case. Firstly there can be no question of the PSLRA being intended to 'clarify and settle' any doubt. It is a new piece of legislation which amends nothing apart from the minor consequential changes to the P S A. Secondly, whilst it is true that the PSLRA was clearly intended to benefit those to whom it is now available, the individual does not benefit *qua* subject of the State, but *qua* employee, and in a sense at the expense of the State, *qua* employer. That is a quite different matter to one where, as in *Christodilides*, the amendment alleviates a burdensome provision, but to no one's detriment.

To my mind, Mr Pillemer's argument and the authorities supporting it are clearly to be preferred. Apart from their logical appeal, the result produces certainty. But the alternative risks absurdity. If the section has no retrospective effect, that may be very hard for someone who was lawfully but unfairly dismissed on 31 July 1993. But hard cases make bad law : what of his colleague who was dismissed at the end of June? In the present case the alleged unfair labour practice occurred some four months before the PSLRA came into operation. Should that distinguish it from a dispute which arose two months earlier than that? Whether so or not, is there any basis for establishing a period which puts the PSLRA beyond a complainant's reach? And if so, what could it be?

The limitation of actions provision in s 34 of the Public Service Act would not apply in this Court, because that time bar provision applies to *legal proceedings* (which thing these are not), so that notionally there would be an infinite number of aggrieved ex-employees whose claims (many of them already time-barred) will have been rendered capable of resurrection, notwithstanding that the conduct of the decision-makers at the time may in each case have been correctly posited on and guided by the employment regime which prevailed at the time. In my opinion it cannot be said that the legislature intended so bizarre a situation to eventuate. (Cf the presumption against absurd results, referred to in *Venter v R* 1907 TS

910, which tends to fortify the case against retrospective interpretation of the PSLRA).

Finally I want to revert to a part of the first principle which Mr Soni put forward on the matter of retrospectivity, namely, that if possible statutes should not be so interpreted as to take away rights actually vested at the time of their promulgation. In the *Yew Bon Tew* case (supra) there is the following at 839 *h* which appears to me to be very much in point here :

' In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable.'

In the case of a claim which had at 02 August 1993 become time barred, the State, *qua* employer was no longer at risk. It had acquired the right to plead prescription, and very compelling language indeed would be necessary in the PSLRA to resuscitate the dispute for adjudication in the industrial court. By a parity of reasoning, the State's immunity against proceedings in the industrial court, which arose from the exclusionary provisions of s 2 of the L R A, was a right which would be nullified if the PSLRA were to be given retrospective

effect. I am satisfied that the legislature had no such intention when it passed the latter Act.

It follows that the point *in limine* must be decided in favour of the respondent, which asks in such event that the application be dismissed with costs. However neither side argued that issue at the time the point was debated.

In the result I make the following order :

1 The respondent's point *in limine* is upheld : the Court does not have jurisdiction to entertain this application because the practice complained of occurred prior to 02 August 1993.

2 The application is dismissed.

3 The respondent may apply to the registrar in writing within 14 days from the date of this judgment for the question of costs to be set down for argument, and failing the receipt by the Registrar of such an application within the time stipulated, there will be no order as to costs.

DATED AT DURBAN ON THIS 14th DAY OF JANUARY 1994

M P FREEMANTLE

SENIOR MEMBER