

SOUTH AFRICA / JUDGMENT

Blue Crane Route Municipality v Municipal Workers Retirement Fund (3016/2019) [2020] ZAECHC 113 (8 October 2020) [2020] ZAECHC 113

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan

CASE / FILE NUMBER

3016/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. 3016/2019

Date heard: 06 August

2020

Date

delivered: 08 October 2020

In

the matter between:

BLUE

CRANE ROUTE MUNICIPALITY

Applicant

and

THE

MUNICIPAL WORKERS RETIREMENT FUND

Respondent

JUDGMENT

RUGUNANAN, J

- [1] The applicant is a municipality as contemplated in section 2 of the Local Government: Municipal Systems Act[1] with its main offices in Somerset East. The respondent is a pension fund organisation registered as such in terms of the Pension Funds Act[2] (“the PFA”) of whom several of its members are employees of the applicant. On 26 November 2019 the respondent obtained an order (“the order”) in terms of which the applicant was directed to make payment to the respondent in the sum of R3 805 608,68 for employer and employee contributions. The respective contributions payable by the applicant to the respondent are at the core of the dispute that occasioned the order. The applicant now brings an application to rescind the order in terms of uniform rule 42(1)(c) and / or the common law. It is common cause that the main application (i.e. the application that led to the order being granted against the applicant) was served on the applicant and that the applicant having elected not to oppose the application, the respondent consequently took the order by default.
- [2] In the application that gave rise to the order, the respondent alleged that the applicant acted in breach of the rules of the South African Municipal Workers Union National Provident Fund (“the rules”) for the period July 2007 to June 2013. It was alleged that the rules required the applicant to pay over to the respondent, employee contributions at a rate of 7,5% deducted from the employees’ monthly salaries as opposed to the rate of 5% deducted and paid over by the applicant. In respect of employer contributions it was alleged that this ought to have been paid by the applicant from its own reserves at a monthly rate of 18% as opposed to 12%. Accordingly, the case put forward by the respondent was that the lower than required payments by the applicant in respect of employer and employee contributions had accumulated to the aforementioned amount which the applicant was obliged to pay together with interest in terms of section 13A and 13A(7) of the PFA.[3]
- [3] Before dealing with the grounds on which the application for rescission is brought, a convenient starting point would be to examine the rules. The definitions section indicates that their effective date is 1 November 2011.[4] On 16 August 2006 the respondent’s board of trustees resolved to amend the rules. With effect from 1 November 2006 the Schedule of Benefits dealing with Contributions was amended to read as indicated below. (I pause to state that the rule amendment was registered on 27 September 2007 by the Registrar of Pension funds).

“CONTRIBUTIONS

MEMBER contributions and EMPLOYER contributions in respect of the MEMBER shall be a percentage of the MEMBER’S PENSIONABLE SALARY, as specified in the agreement: provided that the MEMBER’S contributions shall not be less than 7,5 percent and the Employer contributions shall not be less than 18 percent of the MEMBER’S PENSIONABLE SALARY.”

[4] Rule 11.1.3 (quoted only in relevant part) of the rules stipulates that:

“The BOARD shall have the right to amend the rules at any time, provided that-

a) ...

b) Any amendment which relates to the EMPLOYER contributions shall be subject to the EMPLOYER’S agreement with the UNION;

c) ...

[5] It is not disputed that what sub-rule (b) of rule 11.1.3 contemplates is that the respondent cannot unilaterally increase the rate of employer contributions in respect of its members – there must

be an agreement with the employees’ union that an employer (in this instance, the applicant) will contribute at a certain rate. Otherwise stated, the precondition for a binding increase in employer contributions is that an individual participating employer must reach agreement with the union to contribute at a higher rate.

[6] Relevant to employee contributions, the applicant only concedes that it is indebted to pay to the respondent at the higher rate of 7,5% with effect from 1 November 2011 (the effective date of the rules) to June 2013.[5] But regarding employer contributions, it is the applicant’s case that agreement with the employees’ union (the South African Municipal Workers’ Union (SAMWU))[6] to contribute at the higher rate (18%) only came about in 2013 and with effect from 1 July 2013, which date was confirmed by a resolution of the applicant’s Council on 30 September 2013.[7] Although the respondent does not deny this, [8] it adopts the position that, upon approval by the Registrar,[9] the rules became legally binding on the parties and remain as such until set aside by a court or other competent tribunal.[10] The applicant does not take issue with the fact of approval by the Registrar - but for reasons dealt with below, it disputes (as a “defence”) that the rule amendment became effective from 1 November 2006.

[7] The binding nature of the rules of a pension fund has been authoritatively stated by the Supreme Court of Appeal as follows:[11]

"The legal principles that apply to pension and Provident funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law."

[8] In argument the respondent raised two points in limine: (i) the applicant’s failure to challenge the fund rules; and (ii) the applicant perempted its right to apply for rescission of the order. In raising these issues the respondent contended that either one of them is dispositive of the matter in its entirety

notwithstanding the grounds on which a rescission of the order is sought.

THE FAILURE TO CHALLENGE THE FUND RULES

- [9] The applicant maintains that the effective date of the rules is 1 November 2011. Because rule 11.1.3 excludes reference to employee contributions, the applicant asserts that the respondent had the power to unilaterally require a higher employee contribution of 7,5% as from that date. As for employer contributions, the higher rate of 18% was, on the applicant's version, limited to the period effective from 1 July 2013.
- [10] In both instances pertaining to these rates, the applicant avers that the amendment to the rules did not become effective from 1 November 2006.[12] The respondent argued that the rules remain binding until set aside by due process. The applicant has not set aside the rules (including the amendment), and the rules, including those relating to the amended (or higher) contribution rates, remain binding on the applicant. In support of this contention the respondent places reliance on the Oudekraal principle to the effect that the extant rule amendment is capable of producing legally valid consequences for so long as it is not set aside.[13] In Kirland [14] the rationale of this principle was explained thus:

"The fundamental notion – that official conduct is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law."

- [11] Although the respondent's submission that the failure to challenge the rules is dispositive of the matter in its entirety is not without merit, I will in any event proceed to deal with the applicant's grounds for seeking rescission, acknowledging of course that the remaining point in limine is rendered moot or academic save for what is traversed in the remainder of this

judgment.

THE GROUNDS FOR RESCISSION

Rule 42(1)(c)

- [12] The rule provides that the court may upon the application of any affected party rescind or vary an order or judgment granted as a result of a mistake common to the parties. A court has a discretion whether or not to grant an application for rescission under rule 42(1). In relation to a rescission under sub-rule (c) there are two broad requirements that must be satisfied for this discretion to be exercised in favour of an applicant seeking rescission. First, there must have been what would in the law of contract be termed a common mistake. This occurs when both parties are of the same mind and share the same mistake (usually a mistake of fact). Second, there must be a causative link between the mistake and the granting of the order or judgment – the latter must have been "as a result of" the mistake. This requires that the mistake must "relate to and be based on something relevant to the question to be decided by the court at the time". The principle is that a party cannot subsequently create a retrospective mistake by means of new evidence that was not relevant

to any issue that had to be determined by the court when the original order was made.[15]

[13] The applicant alleges that a letter dated 8 June 2016[16] from the respondent led it to believe that it was required to make good its arrear contributions in favour of the respondent for the period July 2007 onwards.[17] On this footing the applicant advances the contention that this incorrect premise became an established one on the part of both

parties, culminating in the order.[18] The common mistake, so the argument went, that culminated in the order was the belief by the parties that the necessary precondition

(i.e. agreement with the union) for requiring a higher rate of employer contribution for the period July 2007 onwards had been

fulfilled.

[14] Seemingly, in the aftermath of the order having been granted, the applicant established that the necessary precondition for requiring a higher rate of employer contribution (i.e. agreement with the union) had not been fulfilled. The applicant contends that the non-fulfilment of that precondition was not pointed out by the respondent in its founding affidavit in the main application and for this reason the respondent similarly believed that the precondition for requiring payment of a higher rate of employer contribution was fulfilled as from July 2007.

[15] Although on the papers the undisputed facts show that the applicant's Council had only fulfilled the requirements of sub-rule

(b) of rule 11.1.3 as from 1 July 2013 onwards, the applicant's argument (i.e. the mistake common to the parties' belief that all requirements for liability in respect of employer contributions in terms of the rules have been fulfilled) does not bear scrutiny for the following reason. The applicant overlooks the fact that the founding affidavit in the main application[19] indicated that the true basis (or substratum) for the relief which the respondent sought was premised on section 13A of the PFA.[20] Plainly, that was the case made out in the founding affidavit of the main application and it had nothing to do with compliance with the precondition in the rule amendment. [21]

[16] Consequently, it is doubtful whether the applicant has shown that the material before the court related to and was based on something relevant to the question to be decided by the court at the time. As a matter of discretion, I am therefore unable to hold that the requirements of rule 42(1)(c) have been met, more particularly that the parties shared the common mistake which the applicant now propagates.

[17] In support of its contention of a common mistake the applicant relied on *Tshivase Royal Council and Another v Tshivase and Another*; *Tshivase and Another v Tshivase and Another*[22] to demonstrate the proposition that the parties in that case assumed a state of affairs which, as it turned out, was a wrong assumption. Tshivase does indeed exhibit that proposition but having regard to what is stated in the preceding paragraphs of this judgment

I do not think the case assists the applicant. The belief held by the protagonists in Tshivase emanated from an entirely differentiated factual context (succession to chieftainship) which lacks comparison with the factual matrix in present matter (the mistaken belief that a necessary precondition was fulfilled). It follows that the second requirement relevant to a causative link between the mistake and the granting of the order does not require consideration.

The Common Law

- [18] At common law a court has a discretion to rescind a judgment or order obtained in default of appearance provided good cause (or sufficient cause as it is otherwise known) is shown. Good cause requires an applicant to satisfy the court that there is a reasonable explanation why he allowed the judgment to be taken by default, and that he has a bona fide defence to the plaintiff's claim.[23] An applicant who is in wilful default, or woefully absent, or who is grossly negligent in either of those respects, would be unable to show good cause.[24]
- [19] The facts indicate that the respondent's letter of 8 June 2016, addressed to "The Corporate Service Director", led the applicant to believe that it was required to pay arrear employer contributions for the period July 2007 to June 2013. The facts also indicate that on 30 September 2013 the applicant's Council passed a resolution to the effect that as from 1 July 2013 the applicant agreed on an employer contribution at the rate of 18%. These facts beg the obvious question: How could the applicant have engendered the kind of belief it held when on its own version it had taken a resolution a few years prior? It is not anything farfetched or unreasonable to suggest that the applicant's institutional incumbents ought to have been aware thereof. The reason is obvious. Legislation [25] obliges municipalities to develop a system of delegation to inter alia maximise administrative efficiency, and to provide for checks and balances, and for the delegation of powers and duties to functionaries within the municipal environment.[26]
- [20] The bottom line for good cause is that applicant unequivocally elected not to oppose the main application. It knew that default judgment would be taken against it. The applicant did not demur but allowed the respondent to take its chosen course. In these circumstances the applicant is presumed to have been in wilful default and is not entitled to rescission of the order.[27] Objectively considered,[28] the applicant waived or preempted its right to rescind.
- [21] The applicant's "defence" which is based on its averment that the rule amendment relating to the rate of contributions did not become effective on 1 November 2006 has no merit particularly in the light of the fact that the applicant has not taken any steps to set aside the rule amendment.
- [22] In the circumstances the application is dismissed with costs.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv. F. Le Roux SC

Instructed by:

Pagdens Attorneys

(Ref: Mr M. Kemp)

c/o Cloete & Company

High Street

Makhanda / Grahamstown

(Ref: Mr Cloete)

Tel: 046 622 2568

Email: reception@cloeteandco.co.za

For the Respondent: Adv. P. van der Berg SC

Instructed by:

Shepstone Wylie

(Ref: Mr Esterhuizen)

c/o Netteltons Attorneys

(Ref: Mr M. Nettelton)

Tel: 046 622 7149

Email: liza@netteltons.co.za

This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 08 October 2020.

[1] Act 32 of 2000

[2] Act 24 of 1956

[3] See paragraphs 10, 13 and 25 of the founding affidavit in the main application attached as annexure TK2 to the founding affidavit in the present application

[4] Clause 2.1.18 of the rules, founding affidavit, annexure TK3, p75

[5] Applicant's heads of argument paragraph 55

- [6] Founding affidavit annexure TK7 p123
- [7] Founding affidavit, p23 paragraphs 67 and 69; see also Applicant's heads of argument paragraphs 50 and 52
- [8] Answering affidavit, p162, paragraphs 50-51
- [9] The rules and rule amendments of a pension fund must be approved and registered by the registrar of pension funds. This is so in terms of sections 4(4), 11 and 12 of the Pension Funds Act ("the PFA") read with regulation 8 and regulation 30 of the Pension Fund Regulations published under GNR98 in GG 162 of 26 January 1962 (as amended)
- [10] At present such a tribunal would be the Financial Services Tribunal established in terms of the Financial Sector Regulation Act 9 of 2017; Respondent's heads of argument, paragraph 23, Answering affidavit, p150, paragraph 5
- [11] Sasol Limited v Chemical Industries National Provident Fund (20612/2014)
- [2015] ZASCA 113 (7 September 2015) at paragraph [13]
- [12] Founding affidavit, p23, paragraphs 66-67; applicant's heads of argument paragraphs 42 and 51
- [13] Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at paragraph [26]: "For those reasons it is clear, in our view, that the Administrators permission was unlawful and invalid at the outset... Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."
- [14] MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC) at paragraph [103]
- [15] Tshivase Royal Council and Another v Tshivase and Another: Tshivase and Another v Tshivase and Another [1992] ZASCA 185; 1992 (4) SA 852 (AD) at 862J-863F
- [16] Founding affidavit, annexure TK7
- [17] Founding affidavit p17, paragraph 43
- [18] Founding affidavit p17, paragraph 43
- [19] Attached as Annexure TK2 of the founding affidavit in the present application

- [20] The section provides as follows: "Payment of contributions and certain benefits to pension funds – (1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely – (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and (b) any contribution for which the employer is liable in terms of those rules."
- [20] The section provides as follows: "Payment of contributions and certain benefits to pension funds –
- (1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely –
- (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and (b) any contribution for which the employer is liable in terms of those rules."
- [21] As contended in the applicant's heads of argument, paragraph 47
- [22] 1992
- (4) 852 (AD)
- [23] *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (ECD) at 708H-J
- [24] See *Wright v Westerlike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 118F-G
- [25] i.e. section 59 of the Local Government: Municipal Systems Act 32 of 2000
- [26] See *Bekink*, Principles of South African Local Government Law, LexisNexis 2006 ed at p259 paragraph 15.2.2.1
- [27] See generally *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 804C-D and wherein reference is made to the following dictum in *Hendricks v Allen*: "if he knows that a case is coming on, and whatever his motive, deliberately refrains from entering appearance, then it seems to me there is wilful default: his reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default."
- [28] Which is the test for peremption. In *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016
- (1) SA 78 (GJ), at para [25], Peter AJ summarized the law in relation to peremption. He observed that: - ".....An unsuccessful litigant who has acquiesced in a judgment cannot appeal against it. The onus of proof rests on the person alleging

acquiescence and in doubtful cases it must be held not to be proven. Although peremption has its origin in policy considerations similar to those of waiver and estoppel, the question of acquiescence does not involve an enquiry into the subjective state of mind of the person alleged to have acquiesced in the judgment. Rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom (*Dabner v South African Railways and Harbours* 1920 AD 583 at 594; *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972

- (1) SA 589 (A) (1971 BIP 58) at 600A – D; *Natal Rugby Union v Gould* [1998] ZASCA 62; 1999
- (1) SA 432 (SCA) ([1998] 4 All SA 258; [1998] ZASCA 62) at 443F – G; *Samancor Group Pension Fund v Samancor Chrome and Others* 2010
- (4) SA 540 (SCA) para 25; and *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013
- (3) SA 315 (SCA) ([2012] ZASCA 166) para 3.”

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/113.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/blue-crane-route-municipality-v-municipal-unknown-topic-aecghc-2020>

Prepared on 12 October 2026 · Esheria