

SOUTH AFRICA / JUDGMENT

Joint Municipal Pension Fund v Ehlanzeni District Municipality (70680/2013) [2019] ZAGPPHC 1087 (1 September 2019)

[2019] ZAGPPHC 1087

COURT

North Gauteng High Court, Pretoria

BEFORE

DT Skosana

CASE / FILE NUMBER

70680/2013

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IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NO: 70680/2013

In the matter between:-

JOINT MUNICIPAL PENSION FUND

Plaintiff

and

EHLANZENI DISTRICT MUNICIPALITY

Defendant

JUDGMENT

SKOSANA AJ

- [1] This judgment follows an order of the Full Court of this Division (“the FC”) handed down on 14 June 2018 in terms of which my judgment dated 12 April 2016 (“my earlier judgment”) was set aside. In my earlier judgment, I had upheld the defendant’s special plea that the plaintiff has no locus standi in judicio to claim the pension benefit contributions from the defendant which were allegedly payable to the plaintiff’s former employee, Mr Johan Willem Scheepers (“Scheepers”).

[2] From the onset, I need to set out my understanding of the reason for the FC to have remitted the matter back to the court a quo to make a decision on the outstanding issues and also to outline what my task is in the present judgment.

[3] The FC, in its judgment, set out from the onset that the appeal was against “the court a quo’s finding upholding the respondent’s (defendant a quo’s) special plea that the appellant (plaintiff

a quo) has no locus standi in judicio to claim retirement benefit contributions payable by the appellant to a former member, Johan

Willem Scheepers (“Scheepers”), who was previously employed by the predecessor of the respondent and whose employment

was terminated on 30 April 1997.”

[1] The ratio decidendi of the FC is that in the circumstances of the case, the plaintiff has locus standi to claim such contributions from the defendant, hence my earlier judgment was set aside[2].

[4] The FC stated that I had not summarized the evidence led at the trial nor had I made any credibility findings thereon notwithstanding that the parties had led one witness each and therefore it took it upon itself to summarize such evidence for the purposes of the appeal judgment[3]. In my understanding, the FC did not, and could not, make a credibility finding on the testimony of these witnesses. All that the FC did was to make certain observations on the evidence as captured in the transcribed record. I therefore differ with the plaintiff’s

submission that the findings of the FC on the facts, as set out in paragraph 7.2 to 7.10 of its heads of argument[4], are binding on me and/or have become res judicata in respect of the outstanding issues. The findings of the FC, in so far as they can be regarded as such, were made solely in relation to the issue of the locus standi and not in relation to the outstanding issues that were remitted back to the court a quo. Otherwise there would be no need to refer the matter back to the court a quo for its decision on the outstanding issues whilst all the evidence relating thereto had already been led and placed before the FC by way of the transcribed record.

[5] In the light of the above, it is my view that, though I may have regard to the observations made by the FC in relation to the outstanding issues on which I am called upon to make a determination, I am not bound thereby nor do such observations constitute res judicata between the parties. The latter submission is also in direct contrast with the FC’s ruling that “the matter is referred back to the court a quo to make a final decision on all the issues still outstanding”[5]. This presupposes that the FC’s findings, decision and/or conclusions in relation to all the outstanding issues were not final. As aptly stated in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation & Others*[6]:

“[70] In essence, the crux of res judicata is that where a cause of action has been litigated to finality between the same parties on the previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed” [my emphasis]. The outstanding issues have not been litigated to finality between the parties. Thus the FC has ordered the court a quo to finalize litigation in respect thereof.

- [6] The outstanding issues to be decided by the court a quo are the special plea of prescription raised by the defendant as well as the residual and closely related issue of liability as to whether or not the defendant is liable to the plaintiff for the pension benefit contributions.
- [7] Having set out the course which I will follow in this judgment, I now proceed to deal with such outstanding issues. As the issue of prescription and the general liability of the defendant are intertwined, I deal with them simultaneously hereunder.
- [8] In my respectful view, the evidence adduced in this case serves very little purpose in assisting me to determine the outstanding issues in this matter which is the same view I took in relation to the issue of locus standi. However, for the sake of completeness, I will summarize the evidence which was placed before me through the two respective witnesses and set out hereunder my respectful view and findings thereon

[9] PLAINTIFF’S WITNESS

The plaintiff called one witness, Mrs Mari-Lise Fourie, its principal officer. Her evidence can be summarized as follows:

[9.1] That the plaintiff is a defined benefit pension fund established in terms of the Pension Fund Act no. 24 of 1956 (“the Pension Fund Act”). The plaintiff provides benefits to its members in the form of a lumpsum gratuity as well as monthly pension fund payouts over the members’ lifetime;

[9.2] That Scheepers is a member of the plaintiff as he was employed by the defendant’s predecessor. He remained such a member notwithstanding that his services with the defendant’s predecessor were terminated on 30 April

1997. Scheepers’ services were terminated with the defendant’s predecessor when there was a re-organization and transfer of the ambulance services from such local authority to the provincial administration which has now become the Provincial Department of Health (“the Department of health”);

[9.3] She was adamant that Scheepers’ services were terminated by way of retrenchment and that he assumed new employment with the provincial administration on 01 May 1997;

[9.4] She stated that according to the rules of the plaintiff which were applicable at Scheepers' termination, the defendant's predecessor in title was responsible for payment of the monthly pension contributions as employer to Scheepers until Scheepers reached the age of 65 years, which he will reach in October 2025. The rules that are relevant are rules 35(1) to (3) and 33 of the plaintiff's rules. The employer's liability for monthly contributions to Scheepers was R1 628-52 until he reached 65 years of age which came to a total of R345 952-79;

[9.5] Scheepers had less than 10 years of service when his services were terminated with the defendant's predecessor on 30 April 1997. She relied heavily on rule 35(3) of the plaintiff's rules to the effect that the liability of the employer to pay for the contributions towards Scheepers continued and Scheepers membership to the plaintiff would not be terminated until all the outstanding monies had been paid to him.

[9.6] The defendant paid the gratuity of R46 828-07 to the plaintiff on 04 September 1997 as well as the above monthly pensions contributions up to July 2005. However, she could not produce any proof that such monthly payments had been effected by the defendant notwithstanding that such fact had clearly been put in dispute.

[9.7] In cross-examination she was questioned about a complaint which was directed by the plaintiff to the pension adjudicator in November 2010 wherein the same contributions were being sought from the Mpumalanga Provincial Government (the Department of Health) from 2005 to 2025. She insisted that the submission made to the pension adjudicator was wrong and that such claim had been directed at the wrong entity.

[9.8] She also could not deny that when Scheepers was employed by the Department of Health from 01 May 1997, he became a member of the Government Employees Pension Fund and remained so until he retired on 31 October 2015.

[9.9] She was also referred to the letter of 23 April 1997 wherein it appears that the ambulance service was to revert to the Department of Health and that the local authority would no longer be liable for any deductions or contributions. She further could not answer any questions in relation to the issue of prescription of the claim but indicated that the plaintiff was merely a vehicle for transmitting the funds from the defendant to Scheepers.

[9.10] She persisted that the payments by the defendant ceased only on 01 July 2005 but could not produce proof of such payments up to that time. In fact, she went to the extent of stating that she does not know who made those payments until 2005[7]. She could not completely refute the statement put to him that it could have been the Department of Health that made some of the monthly pension contributions until 01 December 2001.

[9.11] She could not provide reasons why Scheepers had not been called to testify. She was also not aware that Scheepers had already retired from the Health department at the time of the trial.

[9.12] In re-examination, she stated that the rules of the plaintiff do not deal with what should happen if there is non-payment or non-compliance therewith.

[10] At the end of the testimony of Mrs Fourie, the plaintiff closed its case whereupon the defendant sought absolution from the instance which was refused. I may mention that the transcribed record does not contain the recording of such application and my ruling since about 20 pages are missing between pages 270 and 271 of the paginated record.

[11] DEFENDANT'S WITNESS

The defendant then called Ms Nombuza Fikile Mabuza who is a Deputy Manager Legal Service of the defendant. A summary of her testimony is as follows:

[11.1] That the summons was served on the defendant on 02 December 2013 after which information had to be sought from the Department of Health in order to understand the issues in the matter.

[11.2] She denied that the municipality had made any payment to the plaintiff before and up to July 2005 save for the gratuity payment of R46 828-07 and stated that she could not find proof of any other payments from the finance department of the defendant.

[11.3] She conceded that she had no personal knowledge of the facts but relied on documentary evidence provided to him. I must pause at this point to mention that the purpose of prescription is to avoid this very situation where the original documentary evidence and witnesses are no longer available or the memories of those that are there have faded. My observation is in any event that Mrs Fourie as well, almost entirely relied on documents and her interpretation of the plaintiff's rules for her testimony.

[12] PRESCRIPTION AND GENERAL LIABILITY

The plaintiff's claim stems from the provisions of its rules, in particular rule 33 read with rule 35(1) to (3) thereof. Rule 33 deals mainly with the methods of calculation of the pension benefits of members. Rule 35 deals with termination of service owing to re-organization. The relevant portions of rule 35 read as follows:

"35. TERMINATION OF SERVICE OWING TO RE-ORGANIZATION

- (1) If the service of a MEMBER who has at least ten years' PENSIONABLE SERVICE is terminated due to –
 - (a) a reduction in, or re-organization of staff;
 - (b) the abolition of his office or post;
 - (c) his having been declared redundant or having been retrenched or retrenchment generally;
or
 - (d) the facilitation of improvements in a efficiency or organization,

And such MEMBER has not been offered alternative employment (within the LOCAL AUTHORITY concerned or otherwise) which, in relation to salary and other conditions of service is not materially different from the employment which has been so discontinued, he shall be entitled to a retirement benefit in terms of section 33, subject to the provisions of sub-section(3) and (4).

- (2) A MEMBER who's (sic) service is terminated in circumstances contemplated in sub-section
- (1) after less than ten years' PENSIONABLE SERVICE, shall be entitled to a GRATUITY equal to 45 percent of his average annual PENSIONABLE EMOLUMENTS over the last three years of his PENSIONABLE SERVICE, or if such service is less than three years, over the full period of his PENSIONABLE SERVICE, per year of his PENSIONABLE SERVICE, calculated in years and a fraction of a year: Provided that the amount of such GRATUITY shall not be less than the GRATUITY which would have been payable if that MEMBER had resigned voluntarily: Provided further that 20 percent of the average annual PENSIONABLE EMOLUMENTS of the MEMBER concerned over the last three years of his PENSIONABLE SERVICE, or if such service is less than three years, over the full period of his PENSIONABLE SERVICE, per year of his PENSIONABLE SERVICE calculated in years and a fraction of a year, shall be paid by the LOCAL AUTHORITY concerned to the FUND before such MEMBER's service shall be deemed by the FUND as having been terminated in terms of this sub-section (2).

If the LOCAL AUTHORITY concerned fails to pay such amount to the FUND within seven days after a MEMBER's service has been terminated in terms of this sub-section (2), the COMMITTEE may charge INTEREST on the amount due, calculated from the day on which the amount became due up to and including the date on which payment is received by the FUND.

- (3) A lumpsum calculated by the ACTUARY, based on the latest statutory valuation basis of the FUND and representative of the value of all ANNUITY payments payable in terms of sub-section (1) before the MEMBER qualifies for maximum benefits in terms of section 33, together with a part of the GRATUITY, shall be paid to the FUND by the LOCAL AUTHORITY concerned before the MEMBER's service shall be deemed by the FUND as having been terminated in terms of sub-section (1): Provided that if the LOCAL AUTHORITY concerned fails to pay this amount to the FUND within seven days after a MEMBER's service has been terminated, the COMMITTEE may charge INTEREST on the amount due, calculated from the day on which the amount became due up to and including the date on which payment is received by the FUND.
- (4) The MEMBER may elect to convert the benefit payable to him in terms of sub-section (1) to a lumpsum. Such lumpsum shall be equal to ..."

[13] In this case the plaintiff claims in its own right and not on behalf of Scheepers. This is the rationale behind the finding of the FC in relation to the locus standi. The alleged continuation of Scheepers's membership with the plaintiff after the termination of his services by the local

authority relates to his membership rights which granted him the entitlement to be paid all his benefits. On the other hand, the

alleged entitlement of the plaintiff to payment by the local authority arose when Scheepers's services were terminated with

the local authority on 30 April 1997.

[14] Although Mrs Fourie testified that the rules do not provide for any eventuality if there is non-compliance therewith, rule 35(2) and (3) point to the contrary. Both sub-rules make provision for the plaintiff, through its committee, to charge interest on the amount due by the local authority to the plaintiff within 7 days after the member's services have been terminated by such local authority. These sub-rules emphasize that such interest is calculated from the day on which the amount became due up to and including the date on which payment is received by the Fund. The evidence of Mrs Fourie was that the pension contributions by the local authority could be paid in monthly premiums or as a lumpsum up to the date of retirement of Scheepers.

[15] I agree that the evidence of Ms Mabuza did not contribute much towards the determination of the issues at hand. However, it is equally important to point out the following draw backs in the evidence of Ms Fourie:

[15.1] She persisted that the defendant had paid the monthly contributions to the pension fund up to July 2005. However, she could not produce any proof whatsoever of such payments. Being the principal officer of the plaintiff, it would have been an easy task to retrieve such documentary proof from the records of the plaintiff. She did not even attempt to explain why such proof could not be produced, though proof of payment for the gratuity in 1997 was effortlessly availed.

[15.2] I therefore find it difficult to understand the statement by the FC that the facts independently establish that there were monthly payments that were received by the Fund until July 2005. As stated earlier, the defendant's legal representatives made it clear that it was not common cause that payments had been made by the defendant until July 2005[8]. Mrs Fourie could not even say who was paying the money, if any, to the plaintiff. This is clear from the following extract of her evidence.

"You are saying we have been paying.....we have been paying monthly pension from May 1997 until July 2005. Is that your submission?--The fund received monthly pensions for that period, yes.

Who was paying that money? -- I cannot at this point confirm who is paying it.

No, you have to know who was paying it because we were not paying it. Where is prove (sic) of payment, so you have got the prove (sic) of payment of 1997 but you cannot produce prove (sic) of payment of 1999, 2000, 2001, 2002, 2003, 2004, 2005. Most recent, you do not have that payment madam. If you cannot produce prove (sic) of payment you cannot. [Indistinct]. Where is the prove (sic) of payment? - It will be in the records of the fund, My Lord.

Where is the record? Look the duty is on you to prove that we have made payments and you must provide that.”

[15.3] From the above portion of her evidence, it is clear that Mrs Fourie could not produce evidence to prove that payments had been made by the defendant to the plaintiff from 1997 to 2005 as alleged. Instead, Mrs Fourie stated that such proof of payment is in the records of the plaintiff but such records were never produced in court. Strangely, proof of payment of the gratuity by the local authority to the plaintiff in 1997 was produced by the plaintiff. It therefore could not said that the records had been lost or destroyed over time. This warrants an adverse inference to be drawn against the plaintiff.

[15.4] It also appears from her evidence that the plaintiff had pursued a complaint against the Department of Health through the pension adjudicator with a view to recover the very same amount. However when the pension adjudicator ruled that the complaint was filed out of time (similar to prescription in civil proceedings), the plaintiff turned to issue summons against the defendant relying on rule 35(3) that Scheepers’ membership had continued to exist because there were still outstanding amounts to him and that therefore the defendant was liable for such pension payments.

[16] Taken together with the fact that Ms Mabuza who testified for the defendant clearly accepted that she was able to find proof of payment of the gratuity of R46 828-07 by the defendant to the plaintiff but could not find any proof of monthly payments by the defendant to the plaintiff post 1997 up to 2005, I am disinclined to accept the testimony of Mrs Fourie in this regard. Something more was required from the plaintiff to tip the scale of probabilities in its favour with regard to this aspect. Her evidence in this regard is highly improbable and no effort was made to corroborate it by another witness or otherwise. Since her credibility is inextricably bound up with the probability of her version, I have no choice but to find that she was not a credible witness[9].

[17] My conclusion on prescription is that the plaintiff’s cause of action arose when the defendant failed to make the pension contributions to it 7 days after Scheepers’ services with the local authority had been terminated on 30 April 1997. Hence, the letter of reminder by the plaintiff to the defendant’s predecessor on 07 May 1997. That is time when the debt became due since interest could be charged thenceforth in accordance with the rules of the plaintiff. The continuation of the membership of Scheepers with the plaintiff has no bearing on the debt of the defendant visa vis the plaintiff. In other words, such debt would have existed even if Scheepers’ membership with the plaintiff had terminated

immediately upon the termination of his services with the local authority. But then it had to be claimed within the prescriptive

period of 3 years from that date.

[18] Further, the once and for all rule is still part of our legal system and applies to damages claimed either *ex delictu* or *ex contractu*. This rule requires in general that the plaintiff should claim in one action all damages both already sustained and prospective, flowing from one cause of action. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation[10]. In my view, it could not be said that each instalment due to Scheepers constituted a separate cause of action. Even if that were

to be the case, that would have applied only to Scheepers as a plaintiff and not in this context where the pension fund claims from the defendant in its own right.

[19] Even if I am wrong with regard to the date on which the cause of action arose in 1997, the plaintiff's position is that the defendant ceased to make the pension contributions in July 2005. The summons having been issued in December 2013, prescription would have already run its course even in that scenario. I reiterate that the plaintiff's claim against the defendant stood on its own legs independently of the claim that Scheepers might have had against the plaintiff. Furthermore, in terms of rule 35(3), the entitlement of the plaintiff from the defendant is a lumpsum amount calculated by the actuary and not monthly pension contributions. This is the amount without the payment of which a member's service cannot be deemed to have been terminated. This rule therefore does not seem to deal with a claim arising out of monthly pension contributions as it is the case in this matter.

[20] It is therefore my finding that the plaintiff's claim which arose in 1997 had prescribed when the summons were issued on 02 December 2013.

[21] As to the general liability, I am of the view that the plaintiff has failed to make out a case in that regard as well. My motivation in this regard is the following:

[21.1] The plaintiff's bases its claim on rule 35(3) which refers to a lumpsum calculated by the actuary and which becomes due and payable to the plaintiff by a local authority within 7 days after the member's termination of services with the local authority. In this case, the plaintiff does not base its claim on this lumpsum but seeks to claim monthly pension contributions from 2010 up to 2025. This is a deviation from the lumpsum entitlement provided for by rule 35(3).

[21.2] From the testimony of Mrs Fourie, the plaintiff issued a letter to the defendant's predecessor dated 23 April 1997 in which he stated that the ambulance service within which Scheepers was employed was to revert to the Department of Health and that the council would no longer be liable for any deductions[11]. It seems that this letter conveys that the local authority would no longer be responsible for contributions to be paid over to the plaintiff in respect of Scheepers. At the least, it creates doubt as to the liability of the defendant after that date.

[21.3] The absence of Scheepers to testify for the plaintiff also disadvantaged the plaintiff a great deal in this case. The absence of his testimony meant that it could not be established whether he had been paid the monthly contributions and up to when. Similarly, Scheepers' nature of transition from the local authority to the Department of Health would have been easily

established through his own testimony rather than that of Mrs Fourie who could not produce documentation to support her version that Scheepers was retrenched rather than transferred. It could not even be known if Scheepers had been pursuing any claim against the plaintiff or not.

[21.4] There is also a suggestion to the effect that at some point the Department of Health paid the monthly pension contributions to the plaintiff up to 01 December 2001[12]. This, combined with the plaintiff's complaint to the pension adjudicator to claim such pension contributions from the Department

of Health, renders the evidence of Mrs Fourie is unreliable.

[22] In the light of the above, it is my view that, as far as the liability (the so-called merits) of the defendant to the plaintiff is concerned, absolution from the instance ought to be granted as the plaintiff has failed to discharge the onus to prove, on a preponderance of probabilities, that it is entitled to such claim[13].

[23] Regarding costs, the principle that costs must follow the result has been applied throughout this case and I see no reason to digress therefrom.

[24] In the result, I find that the special plea of prescription must succeed and as far as the merits are concerned, absolution from the instance must be granted. However, my conclusion on the special plea requires the dismissal of the claim and overrides absolution which I would have granted on liability. This than inexorably leads to the dismissal of the plaintiff's claim.

[25] I therefore make the order that:

Order

The plaintiff's claim is dismissed with costs.

DT SKOSANA

Acting Judge of the High Court

Gauteng Division, Pretoria

[1] FC judgment para 1

[2] FC judgment para 46.1

[3] FC judgment para 12

[4] Save for paragraph 7.1 which relate to the finding on the locus standi in judicio

[5] FC judgment para 46.2

[6] 2020 (1) SA 327 (CC) para 70

- [7] Transcript p. 239 L. 15 to 30 and p. 240.
- [8] See transcript p.190
- [9] National Employers; General Insurance Co. Ltd v Jagers 1984 (4) SA 437(E)
- [10] See MEC for Health & Social Development, Gauteng v DZ obo WZ 2018 (1) SA 335 (CC) para 15
- [11] Transcript p. 208 & 85
- [12] Transcript p. 241 ff
- [13] Machewane v Road Accident Fund 2005 (6) SA 72 (T) para 11
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Prepared on 13 October 2026 · Esheria