

SOUTH AFRICA / JUDGMENT

Municipal Employees Pension Fund and Another v Mantsho and Others (A152/2018) [2020] ZAGPPHC 803 (4 November 2020)

[2020] ZAGPPHC 803**COURT**

North Gauteng High Court, Pretoria

BEFORE

Matsemela, Makhoba, Van der Westhuizen

CASE / FILE NUMBER

A152/2018

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****Appeal Case No: A152/2018****Court A Quo Case****No:16003/2016****4/11/2020****Reportable****Of interest to other****judges****Revised**

In the matter between:

MUNICIPALITY EMPLOYEES

PENSION FUND

First

Appellant

AKANI RETIREMENTS FUND

ADMINISTRATION

Second

Appellant

And

LINKIE TSHWARANO

MANTSHO

First

Respondent

PENSION FUNDS

ADJUDICATOR

Second
Respondent
CITY OF TSHWANE
METROPOLITAN
Third
Respondent
MUNICIPALITY
TSHWANE ECONOMIC
DEVELOPMENT AGENCY
Fourth Respondent

JUDGMENT

MATSEMELA, AJ

BACKGROUND

- [1] This is an appeal against the whole of the judgment and order handed down by Makgoka J (as he then was) sitting in this division as a court of first instance in case number 16003/2016 (hereinafter referred to as the court a quo). Leave to appeal to the full bench was granted by Pretorius, J., on 12 March 2018.
- [2] The matter came before the court a quo by way of application in terms of section 30P of Pension Fund Act 24 of 1956 (hereinafter referred to as the Act). The Applicant in the court a quo (hereinafter referred to as Mantsho), was aggrieved by the determination of the second Respondent (hereinafter referred to as the Adjudicator) in terms of section 30M of the Act. Mantsho sought an order from the court a quo reviewing and setting aside the determination made by the Adjudicator.
- [3] Mantsho sought a further order directing the first Respondent in the court a quo, i.e. the first appellant, Municipal Employees Pension Fund (hereinafter referred to as the “MEPF”) to pay her “the benefit that became due to her as a result of her resignation from the fourth Respondent on the 30th November 2013”, should she be successful in the setting aside the Adjudicator’s determination. The fourth Respondent is hereinafter referred to as The City of Tshwane.

LEGAL ARGUMENTS PRESENTED

- [4] It was submitted on behalf of the first Respondent that the decision of the Adjudicator was that in view of her membership of the FundsAtWork Umbrella Pension Fund, which is an approved Municipal Retirement Fund, she was thereby excluded from membership of the MEPF.

[5] It was further submitted on behalf of Mantsho that, she, as a member of the MEPF, upon resignation from the City of Tshwane, was entitled to payment of a withdrawal benefit under Rule 37 of the General Rules of the Municipal Employees Pension Fund (hereinafter referred to as the Rules). Rule 37(1) entitles a member to payment of the withdrawal

benefit if the member resigns, is discharged or otherwise leaves the service of a Local Authority. This issue was also before the Pension Funds Adjudicator (PFA).

[6] However, Counsel for the MEPF submitted that a member's rights under Rule 37 are qualified by Rule 39. Rule 39 provides that if a member leaves the service of a Local Authority and is entitled to a benefit under Rule 37(1) and is re-employed by the same, or a different Local Authority, then he/she shall not be entitled to payment of the withdrawal benefit.[1]

[7] A further argument raised on behalf of the MEPF was whether it was permissible for the judge a quo to read in additional text into the definition of the term LOCAL AUTHORITY as defined in the Rules, when interpreting that definition.

LEGAL PRINCIPLES

[8] Counsel for Mantsho submitted that she is excluded from MEPF by virtue of the definition of the term "employee" which excluded a person who "is or has elected to become a member of an approved municipal retirement fund". It is submitted that because she is a member of the FundAtWork Umbrella Pension Fund (an approved Municipal Retirement Fund), she is excluded from membership of MEPF.

[9] However, in my view, this submission is misconceived. The definition of the term "employee" is relevant to the point in time when a person becomes a member.[2] It is not relevant in respect of the continued membership of a person (which is governed by Rule 24(6)), nor is it of any relevance to the limitation of the right of a member to withdraw their benefits under Rule 39.

[10] Rule 1 of the Rules defines the term MEMBER as a person who is, or becomes, a member of the MEPF in terms of section 24. However, Mantsho does not want to be a member of two pension funds simultaneously. In that regard, she cannot point to any provisions of the Rules in support for this contention. There is no such provision. Quite to the contrary, the leading decisions of our highest Courts expressly state that nothing precludes a person being a member of two (or more) funds. I will deal with this more fully below. The so called absurdities relied upon by Mantsho are premised upon the notion that it is not possible to be a member of more than one pension fund simultaneously. This central proposition is wrong. Dual membership of two (or more) pension funds simultaneously is possible[3] and is, in fact not uncommon.[4] No Rule purports to exclude membership from the MEPF on account of membership of another fund. No rule precludes a person being a member of two funds.

The issue to be determined

- [11] I will now deal with the situation where an employee leaves the service of a participating employer and immediately commences service with a new employer who is not, prior to the employee taking up employment, an employer participating in the MEPF, but is an entity that falls within the definition of LOCAL AUTHORITY.
- [12] Mantsho was employed by the City of Tshwane from 1 August 2005 until she resigned on 30 November
2013. Since 30 November 2013, she has been employed by the Fourth Respondent, Tshwane Economic Development Agency, which per definition is a Local Authority. That was common cause. The question in this appeal is, whether Rule 39 applies to such a member (as the plain meaning of Rule 39 provides) with the effect that she is not entitled to the withdrawal benefit under Rule 37.

RULE 24(6), Rule 37(1) AND RULE 39

[13] RULE 24(6) reads as follows:

“24 MEMBERSHIP OF THE FUND AND EVIDENCE OF HEALTH

.....

- (6) A member shall not cease to be a member while he remains in the service of a Local Authority, subject to sections 24 (10), (11), (13), (16), (17), (18),
- (19) and (20)”

[14] The purpose behind Rule 24(6)

The Constitutional Court has held that the true purpose behind Rule 24(6) is to ensure the viability of the fund by protecting the fund from a loss of membership and thereby losing critical mass. Hence, Rule 24(6) is a rule limiting the members of the fund’s right to dissociate from the fund. I shall return to this issue.

[15] Rule 37(1) reads as follows:

“RESIGNATION, DISCHARGE OR LEAVING OF SERVICE IN CIRCUMSTANCES NOT ELSEWHERE PROVIDED FOR

- (1) If a member resigns from the service of a Local Authority or is discharged or leaves the service of a Local Authority in circumstances not elsewhere provided for in these Rules, and
- (a)
- (b) he became a member of the Fund after 30 June 1998, he shall be entitled to-
- (i) The amount of his contribution: plus

(ii) Interest in respect of his Pensionable Service:

Multiplied by 1.5 (one comma five) subject to Member minimum benefits”

[16] Rule 39 provides as follows:

“39. REJOINING OF SERVICE OF LOCAL AUTHORITY”

- (1) If a Member leaves the service of a Local Authority and is entitled to a benefit in terms of section 34(4)(b), 35(2) or 37 and he is thereafter re-employed by the same or another Local Authority before such benefit is paid to him, he shall no longer be entitled to such benefit and it shall not be paid to him. Provided that a Member who leaves the service in terms of section 37(2) shall be entitled to elect that his benefits also be retained by the Fund.”

The purpose behind Rule 39

[17] Rule 39 prohibits the withdrawal of benefits where there has been a valid resignation under rule 37 and where after the employee then takes up employment with the same (or a different) Local Authority. The effect of Rule 39 is to further narrow the circumstances under which an employee is entitled to a withdrawal benefit.

[18] The purpose behind Rule 39 is thus to ensure the viability of the fund by protecting the fund from depletion of money in the fund (by protecting it from withdrawal).

THE PURPOSE OF THE RULES LIMITING THE RIGHTS OF MEMBERS TO DISSOCIATE FROM THE FUND

[19] The limitation of a member’s right to dissociate from the fund serves a crucial purpose because payment of a withdrawal benefit entails payment of:

- (a) the member’s contributions and
- (b) interest on the member’s contributions multiplied by a factor of 1.5.[5] In other words, the member receives 50% more than their contributions upon withdrawal plus interest. The limitation thus serves to protect all member contributions by limiting the circumstances under which a member is entitled to the withdrawal benefit. To put it differently, the purpose of Rule 39 under consideration here is to prevent a member receiving a windfall at the expense of the pot of money available for the general membership of the fund.

[20] The case of *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [6] dealt with the constitutionality of regulations which provided for compulsory association with, and membership of, certain prescribed funds. The Constitutional Court, in determining that the regulations were constitutional, said the following about the purpose of the regulations:[7]

“[41] It is therefore clear that the interpretation accords with the purpose of establishing the funds, the regulations and the empowering

legislation. The intention of the legislation was to compel all employees to join one of the KZN Funds and retain membership until he or she is no longer employed by a local authority in KwaZulu-Natal. This was done to ensure the viability of the KZN Funds to secure pension benefits for local authorities and their employees. The regulations were promulgated to achieve this purpose and are a practical mechanism to ensure that the purpose and objectives of the legislation are realized. In the result, the applicant's

argument on the interpretation of the regulations fails."

[21] In *Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another*,^[8] the SCA said:

"[60] The right to end an association in the retirement fund context cannot be considered in isolation. As pointed out by this court in Municipal Employees Pension Fund (SCA) para 30, the purpose of the compulsory membership of a particular pension fund, serves to enhance pension benefits and to secure the viability of a pension fund, by ensuring that it has significant numbers of members. Pension funds must have the necessary critical mass to make them viable. The number of members which a pension fund has, directly affects the viability of the fund and hence the benefits which the members will receive. It was reiterated by the Constitutional Court in Municipal Employees Pension Fund (CC) para 41, that the obligation to join one of the KwaZulu-Natal Pension Funds and to retain membership until the individual was no longer employed by a local authority in KwaZulu-Natal, was done to ensure the viability of these funds, to secure pension benefits for local authority employees. Seen in this context, any limitation on the right to disassociate would be justified."

[22] Thus, it has been established, by both Constitutional Court and SCA authority, that;

- (a) The purpose of rules such as Rule 24(6) and Rule 39 of the Rules are to secure the viability of a pension fund by ensuring that it has significant numbers of members of and to enhance the pension benefits for all the members of the MEPF, including the first respondent;
- (b) It is to ensure the financial viability of the fund by ensuring critical mass by requiring compulsory membership;
- (c) Extensive withdrawals from the fund can have substantial adverse impact on funds like the MEPF and the benefits it can offer to its members; and
- (d) Such rules serve a valid purpose and are justified.

[23] In my view there is thus nothing illegal, impossible or absurd about an employee being a member of two pension funds simultaneously.^[9]

[24] Before I deal with the issue whether a member is entitled to withdrawal benefits, I shall analyse the precise meaning to be given to the term LOCAL AUTHORITY as it has drastic consequences for the operation of Rules 26(4) and 39 (1). The term LOCAL AUTHORITY is defined in the Rules as follows:

“LOCAL AUTHORITY’ is a local authority as defined in section 1 of the Income Tax Act, 1962 (Act 58 of 1962), as amended, and any municipal entity created in accordance with the provisions of the Municipal System Act, 2000 (Act 32 of 2000) over which the LOCAL AUTHORITY exercises ownership control as contemplated in that Act.”

- [25] A purposive and contextual reading of the aforesaid definition of LOCAL AUTHORITY reveals the term to be inclusive rather than exclusive.
- [26] It was common cause that the fourth respondent fell within the definition of LOCAL AUTHORITY. Furthermore, there is nothing in the definition of LOCAL AUTHORITY that requires the Local Authority to be a so-called “participating Local Authority in the MEPF”. In fact, the definition includes a local authority which is not a participating employer in the MEPF. There is no limitation, nor exclusion.
- [27] The appellants expressly pleaded in their answering affidavit that the relevant rules to be considered being Rule 37 and Rule 39 (apart from Rule 24(6)). It appears from the judgment of the court a quo that it did not consider those rules, or the purpose behind those rules, when it sought to embark upon a contextual and purposive interpretation of the rules. The definition of LOCAL AUTHORITY has consequences for numerous individual Rules, including:
- (a) Rule 24(6);
 - (b) Rule 27;
 - (c) Rule 37; and
 - (d) Rule 39.
- [28] Rules 37 and 39 are the Rules against which any claim for a withdrawal benefit must be considered.
- [29] Rule 24(6) prevents an employee from withdrawing as a member of the MEPF if his/her services with a local authority that participates in the MEPF, terminates with that Local Authority and he/she subsequently takes up employment with a Local Authority which does not participate in the MEPF. Rule 39 prevents an employee from withdrawing his/her benefit under Rule 37 if his/her services with the participating local authority terminates and he/she subsequently takes up employment with a so-called non-participating local authority.
- [30] In my view, the wording used in the definition of LOCAL AUTHORITY should be given the meaning afforded to that definition as recorded above, which would include Mantsho’s subsequent employer, the fourth Respondent, within the definition of LOCAL AUTHORITY and on this point alone the appeal must succeed. Because TEDA is then a Local Authority as defined and Rule 39 prevents an employee from obtaining her withdrawal benefit (under Rule 37) where she is subsequently employed by another Local Authority before the withdrawal benefit is paid out.

THE INTERPRETATION OF DOCUMENTS

- [31] The rules of a pension fund constitute the contract between the members, the fund and the employer.[10] It is trite that the Rules must be interpreted in accordance with the principles applicable to the interpretation of documents. The general approach to the interpretation of documents is also trite.
- [32] The general approach was authoritatively stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.^[11] The approach is that, from the outset, the words used are read in the context of the document as a whole and in the light of all relevant circumstances.^[12] Therefore, it is necessary in interpreting the rules of a pension fund, to examine the general framework according to which the Fund has been constituted.^[13] This general framework forms part of the context in which the Rules must be construed.
- [33] A court may only restrict or extend the plain meaning of the words actually used when adhering to the plain meaning would lead to a glaring absurdity. In *Natal Joint Municipality Pension Fund v Endumeni Municipality*^[14] (hereinafter referred to as *Endumeni*) Wallis JA said:

“25 ... where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to a glaring absurdity, a court will ascribe a meaning to the language that avoids the absurdity. While this may be said to involve a departure from the plain meaning of the words used, it is, more accurately, either a restriction, or extension, of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity”

- [34] This notwithstanding, the SCA in *Endumeni* was clearly alive to the reality that a judge, whilst setting out to apply a purportedly restrictive interpretation, may in fact, consciously or unconsciously embark upon the impermissible rewriting of the contract or document. Thus, the court cautioned:^[15]

“18 ... Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made”

- [35] See also *FirstRand Bank Ltd v Land and Agricultural Development Bank of South Africa*^[16] where the following was said:

“It is therefore incumbent on counsel to identify the meaning for which they contend so that it can be tested against the language used, not simply to engage in generalities. The reason is simple. If the words are unable to bear the meaning contended for then that meaning is impermissible.”

APPLYING THE CANNONS OF CONSTRUCTION

[36] The point of departure in the judgment of the court a quo is the discussion of the purpose of Rule 24(6), [17] which is the employee contributing to the pension fund and to be provided with retirement security for the remaining life of such

employee. In this way, the employee does not become a burden on the state social security system. The court a quo in par [27] of the judgment further said:

“Therefore, in the context of the present case, the mischief sought to be addressed by rule 26 is plainly to prevent a situation where a person employed by a local authority (a municipality or an entity of a municipality), is at any given stage, not a member of a pension fund.”

[37] Flowing from the above conclusion in relation to the purpose of Rule 24(6), the court a quo concluded in par [32] of the judgment that:

“The obligation for an employee to... remain a member of the MEPF arises only if his employer is a participating member in the MEPF”,

and in par [33]

“... where the applicant’s employer is not a participating employer in the MEPF, such an employer is not included within the definition of a ‘local authority’”.

[38] The court a quo’s interpretation is apparently premised upon a purposive interpretation of Rule 24(6). In other words, the court’s interpretation turned upon a particular notion of context, namely the commercial rationale for Rule 24(6). Even if it was what the court a quo was actually doing (i.e. not reading in but purposively interpreting the document) it clearly and undeniably got the purpose wrong and thus erred in the exercise it embarked upon.

[39] The court a quo purported to interpret the definition of LOCAL AUTHORITY having regard to context. However, in purporting to consider context, the court a quo only had regard to what it believed was the purpose behind Rule 24(6). The court a quo did not consider the other Rules which are affected by the meaning given to the term LOCAL AUTHORITY.

[40] What the court a quo unarguably did, without expressly saying so, was to read in additional text into the term LOCAL AUTHORITY. In my view the court a quo, without any justification, qualified the Rules as containing an exclusion which limits the scope of the definition of LOCAL AUTHORITY so that a local authority that is not “a participating employer” is excluded from the definition. The wording actually used in the Rules does not provide for such an exclusion. The exclusionary interpretation, or limitation implied, is not countenanced nor sanctioned by the canons of construction that are to be applied.

[41] In my view, the court a quo misdirected itself by ignoring the appellant’s argument that Rule 39 prohibits the withdrawal of benefits where, subsequent to an employee leaving the service of a Local Authority, but before the employee’s withdrawal benefits are paid to the employee, the employee takes up fresh employment with the same or a different Local Authority.

- [42] This was a fundamental misdirection, because the issue before the court a quo was whether the first respondent had a right to payment of a withdrawal benefit. Payment of a withdrawal benefit is governed by Rule 37 and 39 which were not considered by the court a quo. Instead, the judgment of the court a quo is centered on the interpretation of Rule 24(6) which is irrelevant to the question of whether the first respondent is entitled to payment of the withdrawal benefit.
- [43] It was submitted by Counsel for the first Appellant that what happens in practice when a member resigns from a Local Authority and subsequently takes up employment with a Local Authority who does not (at that time) participate in the MEPF is the following:
- (a) The member's continued membership of the MEPF is governed by and continues to be governed by the MEPF Rules which constitutes the contract between the fund and the member;
 - (b) Because the member remains a member of the MEPF under the MEPF Rules, the new employer becomes obliged to pay contributions to the MEPF under section 13 A
 - (1) of the Pension Funds Act, 1956. Thus;
 - (i) The new employer (Local Authority) is made a participating employer as soon as the member becomes an employee of the new employer;
 - (ii) The member, who is bound by the MEPF rules, must inform his/her new employer that he/she is bound by the rules and cannot move from the MEPF.
- [44] It was further submitted that the MEPF will assist with the process to ensure that contributions are properly made on behalf of the member. The problem comes in where the employee does not inform the MEPF that he/she has changed employment, or does not inform the new employer that he/she is part of the MEPF. If the member's withdrawal benefit has not yet been paid out at the time that the member commences employment with the new employer, no withdrawal benefit will be paid out.
- [45] I agree with these submissions and it is my view that upon the resignation of Mantsho from the City of Tshwane she was immediately employed by TEDA which is a Local Authority. In terms of this Rule, she is not entitled to payment of a withdrawal benefit.
- [46] In my view, the Court a quo misdirected itself to read in additional text. It is clear from the principles set out above that a court cannot import (read in) non-existent text into a document in order to achieve what it believes to be reasonable or sensible. It is all the more relevant where the court misconstrues the purpose of a provision and then purports to give effect to the misconstrued purpose by artificially reading in additional text.
- [47] At most, the court may extend or restrict the words actually used by giving them a broad meaning or narrow meaning and then only if the plain meaning results in a glaring absurdity. The court cannot add to or delete from the words actually

used in the document. If the court purports to do so, it is purporting to creating a contract for the parties. That is not permissible. The ordinary meaning of the words in the definition of Local Authority do not result in a glaring absurdity, and hence the exception to the general approach in interpretation does not come into play.

[48] The court a quo concluded that the purpose of Rule 24(6) is to ensure that an employee is always a member of any pension fund. The court a quo was therefore wrong in its assessment of the purpose behind Rule 24(6).

[49] The point of the departure of the court a quo was therefore incorrect as to the purpose of Rule 24(6). The consequences of this is that the attempt to read in additional text having regard to the purpose of the Rule must fail.

[50] When Rules 37 and 39 are considered as part of the complete context against which the definition of “Local Authority” must be interpreted, then the meaning given to the term by the court a quo is clearly untenable.

[51] If one proceeds from the correct purpose behind Rule 24(6), then the context (the true purpose behind the rule) militates against an exclusionary interpretation, but in favour of an inclusive interpretation of the wording used in the definition of LOCAL AUTHORITY (which would then include TEDA within its scope). The restrictive definition adopted by the court a quo is clearly not justified. This is a further, reason why the appeal should succeed.

[52] It follows that the appeal stands to be upheld.

I therefore propose the following order:

1. The appeal is upheld;
2. The order of the court a quo is set aside and substituted with an order
“The application is dismissed with costs”;
3. The order of the PFA dated 28 July 2015 is reinstated and remains of force and effect;
4. The first respondent is ordered to pay the appellants’

costs.

MATSEMELA

Acting Judge of the High Court

I concur

MAKHOBHA

Judge of the High Court

I concur and it is so ordered

VAN DER WESTHUIZEN

APPEARANCES

For the Appellants

Adv AR BHANA SC

With him

Adv LM SPILLER

Instructed by

Webber Wentzel

For Respondent Adv

N ERSAMUS

Instructed by

Shapiro and Ledwaba

Date Heard 12 August 2020

[1] Rule 39(1) of the Rules.

[2] See Rule 24(c) MEPF Rules.

[3] Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) [2016] 4 All SA 761 (SCA) at para 24; Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another [2019] ZASCA 42 at para 58 and 61.

[4] There is nothing problematic or unusual in a member remaining a member of a fund and being employed by a non-participating employer.

In fact, this often occurs. All that happens is that the MEPF adds the new employer to their books and it becomes a participating

employer, even if only for one employee. It is the member's responsibility to inform the new employer that they are bound by the MEPF rules and must remain part of the MEPF

[5] See Rule 37(1)(a) and (b) of the MEPF Rules.

[6] 2018 (2) BCLR 157 (CC) [2017] ZACC 43

[7] See also the judgment of the SCA in Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others

[2016] 4 All SA 761 (SCA) at para 30.

[8] [2019] ZASCA 42

- [9] Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) [2016] 4ALL SA 761 (SCA) at para 24; Municipal Employees Pension Fund and Another v SAMWU National Provident Fund and Another [2019] ZASCA 42 at para 58.
- [10] Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2010] 2 ALL SA 195 (SCA) at para 12.
- [11] 2012
- (4) SA 593 (SCA)
- [12] At para 18-19.
- [13] ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund [2012] 1 ALL SA 121 (SCA) at para 26.
- [14] 2012
- (4) SA 593 (SCA)
- [15] At para 18.
- [16] 20 15
- (1) SA 38 (SCA) para 27
- [17] The Rule is incorrectly referred to as Rule 26 in the judgment of the court a quo.

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