

SOUTH AFRICA / JUDGMENT

Municipal Employees' Pension Fund and Another v Mudau (A540/2017) [2020] ZAGPPHC 538 (22 June 2020) [2020] ZAGPPHC 538

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi, Avvakoumides, Leathern

CASE / FILE NUMBER

A540/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

22-06-2020

Appeal

Case No: A540/2017

GP

Case No: 61555/2014

In

the matter between:

MUNICIPAL

EMPLOYEES' PENSION FUND

First Appellant

AKANI

RETIREMENT FUND ADMINISTRATORS

Second Appellant

and

PANDELANI

MIDAS MUDAU

Respondent

CORAM:KUBUSHI J, AWAKOUMIDES AJ AND LEATHERN AJ

JUDGMENT

AWAKOUMIDES, AJ: (KUBUSHI, J CONCURRING)

INTRODUCTION:

- [1] This is a full court appeal against the judgment of Raulinga J in which the appellants' challenge, brought in terms of section 30P of the Pension Fund Act, 1956 (the Act), to the determination of a complaint by the Pension Fund Adjudicator. The adjudicator, in upholding the complaint, refused to apply the retrospective effective date of a rule amendment which was introduced by the first appellant to its rules, and approved by the registrar of Pension Funds.
- [2] The respondent was an employee of the Vhembe District Municipality ("the Municipality") from 1 April 2003 until 31 May 2013. As employee of the Municipality, he was required to be a member of the Fund and his membership terminated when he took a position within the Municipality which did not entitle him to remain as a member of the Fund.
- [3] Rule 37(1)(a) and (b) of the Fund's rules, prior to its amendment ("the old rule"), provided that withdrawal benefits would be paid at a rate of 3 times the value of contributions made by a member. During 2013 the Fund's actuaries, supported by the second appellant, advised the Fund to amend its withdrawal benefit structure immediately as the benefit structure in terms of the old rule meant that the withdrawal benefits far exceeded the accumulated contributions, placing the Fund at risk of not meeting its liabilities.
- [4] On the 21st of June 2013 (after the termination of the respondent's membership) the Management Committee of the Fund decided that rule 37(1)(a) and (b) be amended with effect from 1 April 2013. The effect hereof is that members' withdrawal benefit would be calculated at a rate of only 1.5 times the contributions ("the amended rule" or "the new rule").
- [5] On 22 July 2013, the Fund applied to the Registrar for the amended rule to be registered and to be effective from 1 April 2013. The Registrar, in accordance with Section 12(4) of the Act, approved the rule amendment with retrospective effect and registered the amendment on 1 April 2014. The Fund, relying on the amended rule, paid the withdrawal benefit to the respondent on 16 October 2013. The benefit was calculated at 1.5 times his contribution and not the 3 times multiple in terms of the old rule.

- [6] The Respondent lodged a complaint against the Fund with the Adjudicator based on the reduction of his benefit and alleged that the Fund had decreased his withdrawal benefit without prior communication. The respondent submitted further in the complaint that his withdrawal benefit should have been calculated in terms of the old rule and not in terms of the new rule. He therefore claimed the difference in payment amounting to R1. 500 000.00.
- [7] The Adjudicator determined that the fund was not entitled to use the amended rule to calculate the Respondent's withdrawal benefit as he had resigned prior to 1 April 2014 and the amended rule had no legal validity until it had been approved and registered. The adjudicator found that the Fund was obliged to pay the respondent's withdrawal benefit in terms of the old rule and ordered payment of the balance of the withdrawal benefit together with interest.
- [8] The fund applied to review the determination by the Adjudicator in terms of Section 30P of the Act before Raulinga J, who dismissed the application. The appeal lies against that Judgment.

GROUND OF APPEAL;

- [9] The Fund appeals against the decision of the Court a quo on the basis that it erred in finding that:

[9.1] the Adjudicator had jurisdiction to consider and uphold the complaint; and

[9.2] the effective date of the amended rule was the date of approval and registration thereof, rather than the effective date that the Fund adopted and the Registrar approved.

THE FIRST GROUND OF APPEAL-THE JURISDICTION OF THE ADJUDICATOR:

- [10] Section 1 of the Act defines a "complaint" as:

"complaint" means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of Its rules, and alleging-

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant, or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;

- [11] As the Adjudicator Is a creature of statute, she only has the power to consider complaints properly lodged before her under the Act[1] Section 30H of the Act provides that the Adjudicator has jurisdiction to determine matters that constitute complaints. as defined in the Act.
- [12] Section 1 of the Act prescribes that a “complaint” must fall within one of the categories listed in sub-paragraph (a)-(d) of that Section and, in addition, must relate to one of the three subject matters highlighted in the preamble to the definition. The three subject matters are:
- [12.1] the administration of the Fund:
- [12.2] the Investment of the Funds; or
- [12.3] the interpretation or application or the Fun d's rules.
- [13] The Respondent argued that the complaint falls within the definition contained in section 1 of the Act, and as such, the Court a quo correctly held that the Adjudicator was possessed of the jurisdiction to hear and consider the complaint. I am inclined to agree. In entertaining the complaint. the Adjudicator did not invalidate the effective date of the amendment to the rule but rather applied the provisions of section 12 of the Act In making her determination. Therefore. the first ground of appeal must fail.

SECOND GROUND OF APPEAL - THE EFFECTIVE DATE OF THE AMENDED RULE:

- [14] The second ground of appeal is that the Court a quo erred in finding that the effective date of the amended rule was the dale of approval and registration thereof, rather than the effective date that the Fund adopted and the Registrar approved. I cannot align myself with this argument The Adjudicator was not bound to apply the rule amendment which had not been approved and registered by the Registrar. Of crucial importance is, at that stage, the Respondent was no longer a member of the Fund The rule amendment was approved and registered after the pension withdrawal was paid to the Respondent The rule amendment could thus not be approved retrospectively vis-a-vis the Respondent. The pension pay out was made to the Respondent on '16 October 2013 and the rule amendment was approved and registered on 1 April 2014. In my view, the retrospectivity of the rule amendment ls not applicable to the Respondent Consequently, this ground of appeal cannot succeed either.
- [15] I make the following order; The appeal is dismissed with costs.

G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

KUBUSHI, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION. PRETORIA

I agree and It is so ordered

D M LEATHERN, AJ:

BACKGROUND:

- [1] I have read the judgment of Avvakoumides, AJ with which Kubushi J has concurred. I am in respectful disagreement with their conclusion. In order for me to elaborate on my dissent It is necessary to restate the facts as they appear in the main judgment aforesaid.
- [2] This Is an appeal against a judgment handed down by the Court a quo in terms whereof an application brought by the first appellant ("the Fund") In terms of Section 30P of the Pension Funds Act 1956 ("the Act") to review and set aside a determination made by the Pension Funds Adjudicator ("the Adjudicator") upholding a complaint against the Fund brought by the Respondent was dismissed.
- [3] The respondent was an employee of the Vhembe District Municipality ("the Municipality") from 1 April 2003 until 31 May 2013. As an employee of the Municipality he was required to be a member of the Fund and his membership terminated when he took a position within the Municipality which did not entitle him to remain as a member of the Fund.
- [4] Rule 37(1)(a) and (b) of the Fund's rules prior to its amendment ("the old rule") provided that withdrawal benefits would be paid at a rate of 3 times the value of contributions made by the member. During 2013 the Fund's actuaries, supported by the second appellant, advised the Fund to amend its withdrawal benefit structure immediately as the benefit structure in terms of the old rule meant that the withdrawal benefits far exceeded the accumulated contributions, placing the Fund at risk of not meeting its liabilities. On the 21st of June 2013 (thus after the termination of the respondent's membership) the Management Committee of the Fund decided that rule 37(1)(a) and (b) be amended with effect from 1 April 2013 so that the members' withdrawal benefit be calculated at a rate of only 1.5 times the contributions ("the amended rule" or "the new rule").
- [5] One month later, on the 22nd of July 2013, the Fund applied to the Registrar for the amended rule to be registered with an effective date of 1 April 2013. The Registrar, in accordance with Section 12(4) of the Act, approved the rule amendment with retrospective effect and registered it on 1 April 2014. The Fund, relying on the amended rule. or more accurately, the rule as to be amended. paid the withdrawal benefit to the respondent on 16 October 2013 but calculated at 1.5 times his contribution and not the 3 times multiple in terms of the old rule.

- [6] The Respondent lodged a complaint against the Fund with the Adjudicator alleging that the Fund had decreased his withdrawal benefit without prior communication and in essence (alleging that his withdrawal benefit should have been calculated in terms of the old rule and not in terms of the new rule} claiming the difference in payment amounting to some R1,500,000.00.
- [7] The Adjudicator determined that the fund was not entitled to use the amended rule to calculate the Respondent's withdrawal benefit as he had resigned prior to 1 April 2014 and the amended rule had no legal validity until it had been approved and registered. The adjudicator thus found that the Fund was obliged to pay the respondent's withdrawal benefit in terms of the old rule and ordered payment of the balance of the withdrawal benefit together with interest.
- [8] The fund applied to review the determination by the Adjudicator, in terms of Section 30P of the Act, which application was unsuccessful and against which Judgment and order the Fund now appeals.

GROUNDS OF APPEAL:

- [9] The Fund appeals against the decision of the Court *ex quo* on the basis that it erred in finding that-

[9.1] the Adjudicator had jurisdiction to consider and uphold the complaint and.

[9.2] the effective date of the amended rule was its date of approval and registration, rather than the effective date that the Fund adopted and the Registrar approved.

THE FIRST GROUND OF APPEAL - THE JURISDICTION OF THE ADJUDICATOR:

- [10] Section 1 of the Act defines a "complaint" as:

"complaint" means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;

- [11] As the Adjudicator is a creature or statute, she only has the power to consider complaints properly lodged before her under the Act[2]. Section 30H of the Act provides that the Adjudicator has jurisdiction to determine matters that constitute complaints, as defined in the Act.
- [12] Section 1 of the Act prescribes that a "complaint" must fall within one of the categories listed in sub-paragraph (a)-(d) of that Section and, in addition must relate to one of the three subject matters highlighted in the preamble to the definition. These three subject matters are:-

[12.1] the administration of the Fund;

[12.2] the investment of the Funds; or,

[12.3] the interpretation or application of the Fund's rules.

This was confirmed by the Supreme Court of Appeal In paragraph 25 of the judgment given in Grobler[3] quoted below.

- [13] The Supreme Court of Appeal found in Grobler that the making and validity of rule amendments do not fall within the requirements set out in the preamble as referred to hereinbefore. It held:-

“With respect, although a decision to amend a fund's rules would indeed be a decision 'in terms of the rules' if its rules did empower amendments. the question whether a complainant's case is a complaint as defined is not limited to determining whether it fits any of the instances in paras (a) to (d). To be a complaint as defined it has also to conform to what is stated in the preamble to the definition. It must, in other words, while alleging one or more matters described in paras (a) to (d). nevertheless also concern one of the three subjects stated in the preamble : (i) administration of the fund, (ii) investment of its funds, or (iii) interpretation and application of its rules None of those three subjects entails the making or validity of rule amendments. It follows that the adjudicator had no power to consider Grobler's complaint insofar as it involved the amendment or its validity. In taking the view that the adjudicator had that power the Court below, with respect erred.”

- [14] The decision by the Fund to amend its rule with effective date 1 April 2013 has not been reviewed and set aside. similarly there has been no attempt to review and set aside the decision by the Registrar in terms of the Act to register the amended rule with the effective date. Those decisions stand and must be given effect to[4].
- [15] In essence the Adjudicator found that the rule amendment was invalid insofar as it determined that it would operate with retrospective effect. In doing so. the Adjudicator purported to invalidate the terms of the approved rule amendment and this was ultra vires the Adjudicator's powers. For this reason the determination by the adjudicator should have been reviewed and set aside.
- [16] Under the circumstances the appeal should succeed on this ground atone.

THE SECOND GROUND OF APPEAL

- THE EFFECTIVE DATE OF THE AMENDED RULE:

[17] Section 12 of the Act provides:-

"12. Amendment of rules.-(1) A registered fund may. In the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid-

- (a) if it purports to effect any right of a creditor of the fund, other than as a member or shareholder thereof: or
- (b) unless it has been approved by the registrar and registered as provided in subsection (4).

.....

- (4) If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound. he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon. and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined. as from the said date of registration." (my emphasis)

[18] Section 12(4) provides that rule amendments take effect from the date determined by the Fund and has repeatedly been Interpreted as permitting retrospective rule amendments[5].

[19] As stated hereinbefore, the Fund determined the effective date as the 1st of April 2013 and the Registrar registered It and gave effect thereto. While no review has been brought to challenge the decisions

of the Fund or the Registrar, the amendment stands and has legal consequences until it is set aside[6].

[20] While there is a presumption against the retrospective working of statutory enactments used in the interpretation of statutes, such is only applicable where the legislator does not make it clear that such provision may be implemented retrospectively. In casu there can be no argument that Section 12(4) of the Act provides that the effective date may be implemented retrospectively. There is good reason therefor inter alia (as in casu) to prevent a "run" on the Fund where members realise that their benefits may be reduced and for that reason terminate their membership of the Fund by resigning.

[21] While at first blush It seems unfair that the respondent whose membership was terminated for no reason other than that he had accepted a position at the same municipality which did not entitle him to membership of the Fund, that does not entitle a Court to seek an interpretation of the provision that may be more "equitable" under the circumstances. Such can only be done where the provision itself is ambiguous and where more than one meaning is possible[7]. In casu the provisions of the Act are clear and there is no ambiguity

whatsoever.

[22] In argument the question was raised as whether an amendment can be Imposed retroactively and whether the fact that payment was made and the right to payment accrued prior to both the proposal of the amendment to the Rules as well as the approval and registration thereof. the Respondent's entitlement should at all times have been determined in terms of the old rule, that being the effective rule both at time of resignation and payment This question was considered by Malan AJA in the matter of Progress Office Machines CC v SARS and others[8] who, when speaking of an anti-dumping duty which had been Imposed retrospectively, said the following·

"Whether the imposition was "retrospective" or "retroactive" makes no difference to the burden imposed on the importer to pay the duty as from 27 November

1998. What Is clear, however, is that at 27 November 1998 an anti-dumping duty existed that did not exist before the publication allowing for Its "Imposition" on 28 May 1999 The "Imposition" of the duty on 28 May 1999 with effect from 27 November 1998 meant that "the law shall be taken to have been that which it was nor It follows that the anti-dumping duty was imposed "retroactively". The fact that the notice uses the word "retrospectively" and not "retroactively"

does not offend against this conclusion since a distinction is frequently made between retrospectivity in the "strong"

sense (ie "retroactivity") and retrospectivity in the "weaker" sense.'

[23] Under the circumstances whether the terms used Is "retrospective" or retroactive makes no difference. Both the adjudicator and the Court a quo were accordingly compelled to determine the Respondent's entitlement In terms of the rule In operation at the time of such adjudication which was the amended rule.

ORDER:

I would propose the following order:

1. The appeal Is upheld with costs
2. The order granted in the Court a quo Is set aside and replaced with the following order

"1. Paragraph 6 of the award of the Pension Fund's Adjudicator made on 7 July 2014 in the dispute between the first and second applicants and the second respondent is set aside

2. The order of the Pension Fund's Adjudicator is replaced with the following order:

"6. The complainant's claim is dismissed."

3 The first respondent is to pay the costs of the application."

D M LEATHERN

GAUTENG DIVISION PRETORIA

- [1] Shell & BP South Africa Refineries (Pty) Ltd v Murphy N.O & others 2001(3) SA 683 (D) at 690 A; Joint Municipal Pension Fund & another v Grobler & others 2007(5) SA 629 SCA at paragraph
24. Meyer v Yskor Pension Fund 2003(2) SA 715 SCA at para 7
- [2] Shell & BP South Africa Refineries (Pty) Ltd v Murphy N.O. & Others 2001(3) SA 683 (D) at 690 A; Joint Municipal Pension Fund & another v Grobler & others 2007(5) SA 629 SCA at paragraph 24; Meyer v Yskor Pension Fund 2003(2) SA 715 SCA at para 7
- [3] Joint Municipal Pension Fund & another v Grobler & others supra
- [4] Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004
- (6) SA 222 (SCA) paragraphs 29.31
- [5] Mostert N.O v Old Mutual Life Assurance 2001(4) AJI SA 250 (A) at para 60; Shell at 682 G-H, Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(2) Al SA 262 SCA at para 16; Unreported Judgement Mabusi J case number 81389/15 GD, Pretoria T.G. Makubani v The Municipal Employees Pension Fund
- [6] Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004
- (6) SA 222 (SCA) paragraphs 29.31; MEC for health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and lazer institute
- 2014(3) SA 481 (CC) at paragraphs 87-89
- [7] Natal Joint Municipal Pension Fund v Ndomeni supra at paragraph 18
- [8] 2003 (2) SA 13 SCA

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