

SOUTH AFRICA / JUDGMENT

Municipal Workers Retirement Fund v Ndlambe Local Municipality (4884/2017) [2018] ZAECHGHC 139 (22 November 2018)

[2018] ZAECHGHC 139

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

4884/2017

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:4884/2017

DATE HEARD: 07/11/2018

DATE DELIVERED:

22/11/2018

In

the matter between

THE

MUNICIPAL WORKERS RETIREMENT FUND

(previously

known as the SOUTH AFRICAN

MUNICIPAL

WORKERS UNION PROVIDENT FUND

PLAINTIFF

and

NDLAMBE

LOCAL MUNICIPALITY

DEFENDANT

JUDGMENT

ROBERSON J:-

- [1] The plaintiff in this action (the Fund) is a pension fund registered in terms of the Pension Funds Act 24 of 1956 (the PFA). The defendant (the Municipality) is an employer of persons who are members of the Fund. Section 13A (1) of the PFA provides:

“13A 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.”
- [2] The rules of the Fund provide that a member and an employer shall contribute to the Fund at the rate specified in a schedule to the rules.
- [3] It is common cause that during the period July 2007 to February 2013 the Municipality did not pay to the Fund the full amount it was obliged to pay in terms of the applicable schedule to the rules of the Fund, both in respect of the members' contributions and the Municipality's contribution. The total shortfall for the members' contribution was R1 159 843.71 and the total shortfall for the Municipality's contribution was R2 783 588.27. In terms of s 13A (7) of the PFA, interest at a prescribed rate is payable on a contribution not paid within the prescribed time, which is not later than seven days after the end of the month for which a contribution is payable. The prescribed rate of interest, as published, for the amounts concerned in this matter, is the repo rate plus one third thereof plus 8 percentage points with a finance charge rate cap of 20% per annum. Regulation 33 (7) of the PFA provides that this is compound interest and that the interest constitutes investment income for a fund. As at 28 September 2018, the total amount claimed to be owed to the Fund by the Municipality, including interest of R9 705 754.23, was R13 649 186.21. The Fund claims this amount together with further interest thereon at the same rate from 28 September 2018, and costs.
- [4] The Municipality raised two special pleas: prescription and non-compliance with s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. This latter plea was correctly not pursued, the Fund's claim not being one for damages. In its plea over the Municipality pleaded that it had paid to the Fund the amounts which it had deducted from the members' remuneration and that these deductions were in accordance with the schedule to the rules, of which the Municipality had been notified by the Fund at the relevant time. Therefore, so it was pleaded, it could not be held liable for amounts which had not been deducted from the members' remuneration.

Similarly, the Municipality pleaded that it had paid its own contribution in accordance with the schedule. In the alternative it was pleaded that in the event that the Municipality was found to be liable for the shortfall, it should not be liable for interest because it was not aware that it was payable at the relevant time. Further in the alternative it was pleaded that payment

should exclude contributions on behalf of employees who are no longer in the employment of the Municipality. Lastly it was pleaded that in terms of regulation 33 of the PFA the Fund bore the responsibility to notify the Municipality and its employees of any short payment and because it did not do so the Municipality believed that its contributions were correct.

Prescription

[5] A number of grounds of resistance to the defence of prescription were raised but I shall deal with only one, which in my view is dispositive of this defence. Counsel for the Fund referred me to the judgment in *Roestorf and Another v Johannesburg Municipal Pension Fund and Others* 2012 (6) SA 184 (SCA). In this matter the two appellants, who were members of the first respondent, had been medically boarded in 1995. Their pensions were paid to them monthly but years later they challenged the calculation of their retirement benefits and in 2006 filed a complaint with the Pension Funds Adjudicator, who upheld their complaint that their retirement benefits had been incorrectly

calculated. The first respondent was ordered to pay the revised pension and arrears together with interest. The first

respondent approached the High Court to review and set aside this determination. The High Court set aside the determination and found, inter alia, that the appellants' claim in reconvention for a correction of their pension fund entitlement based on an incorrect computation had been extinguished by prescription. On appeal, Heher JA dealt with the question of prescription as follows at paragraphs

[16] to [20]:

'[16] So technical an avoidance of correcting a manifest injustice may be regarded as morally questionable. It is also unsound

according to principles of law.

[17] It is no doubt possible and — perhaps — correct to regard each incorrect monthly payment as a breach of contract by the Fund which gives rise to an independent cause of action and results in a series of debts arising from month to month. See in this regard *Barnett and Others v Minister of Land Affairs and Others* 2007

(6) SA 313 (SCA) (2007 (11) BCLR 1214) paras 20 – 21 and the cases there cited. In such an event each cause would prescribe three years from the date that it arose. I prefer, however, to approach the case from a different perspective.

[18] On retirement the appellants qualified for and were the recipients of pensions justified by their total incapacity to perform their duties in the service of the City. Their pension entitlement was an annualised sum (annuity) paid monthly to each of them. The Fund commenced such payments in 1995 and has done so ever since. The only rationale for such payments was the rules of the Fund to which the appellants had been contributing members. However, each payment constituted a tacit acknowledgement of the Fund's obligation to pay according to its rules. For the purposes of the Prescription Act that obligation was the 'debt' owed to and claimable by the appellants.

[19] Section 14 of the Prescription Act provides:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

In *Agnew v Union and South West Africa Insurance Co Ltd* 1977

(1) SA 617 (A) at 623A this court approved the dictum of Broome JP in *Petzer v Radford (Pty) Ltd* 1953

(4) SA 314 (N) at 317H:

'To interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.'

The Fund has satisfied both requirements each month as it has paid the appellants' pensions pursuant to the rules. The consequence has been a continuing and ongoing interruption of prescription in relation to every amount each appellant was entitled to claim as his correctly calculated benefit. The fact that the Fund has each month paid a lesser amount and contended consistently that that amount and no more represented the correct computation of its obligation under the rules does not change matters. As Van Heerden J explained in *Erasmus v Grunow en 'n Ander* 1978 (4) SA 233 (O) at 244A – D:

'Na woordlui vereis art 14(1) egter nie dat die skuldenaar ten volle aanspreeklikheid moet erken nie. Die skuldenaar wat erken dat hy vir 'n gedeelte van die skuld aanspreeklik is, erken dan ook steeds aanspreeklikheid vir of ten opsigte van daardie skuld. Neem bv die geval waarin die skuldenaar, wat 'n motorkar vir R1000 aangekoop het, die kooptransaksie erken maar die houding inneem dat die koopprys slegs R900 bedra. Die skuld voer 'n objektiewe bestaan en word, behalwe uit 'n bewysoogpunt, nie geraak deur die skuldenaar of skuldeiser se siening of betwisting van die presiese omvang of terme daarvan nie. In die gegewe voorbeeld erken die skuldenaar die skuld en betwis hy slegs die omvang daarvan. Anders gestel, erken hy aanspreeklikheid ten opsigte van die skuld, maar stel hy die omvang van sy aanspreeklikheid in

geskil. Ook die skuldenaar wat beweer dat hy reeds gedeeltelik presteer het, erken aanspreeklikheid teenoor die skuldeiser ten opsigte van 'n bepaalde skuld. Sekerlik kan nie in een van hierdie gevalle gesê word dat die skuldenaar aanspreeklikheid ontken nie.'

Moreover, as the learned judge further pointed out — *ibid* at 244E – 245H — the wording of ss 14(1) and 15(1) of the Prescription Act leads to the conclusion that the legislature intended that a partial acknowledgement of a debt should have the effect of interrupting prescription in respect of the whole debt. (See also *Solomons v Multilateral Motor Vehicle Accident Fund and Another* 1999 (4) SA 237 (C).)

[20] Thus it is that in the circumstances of the present case the Fund has by its repeated payments to the appellants ensured that their claims to a correction of their entitlements have been protected against prescription. In the present instance that applies not only to that part of the claim that was included in the complaint to the adjudicator but also to the claims which first surfaced in the counter-application in 2010.”[1]

[6] In my view this reasoning and conclusion applies to the present case. The Municipality paid the contributions monthly for the period in question in terms of s 13A (1) of the PFA, and thereby acknowledged this statutory obligation. The fact that there was a shortfall and that it believed that it was paying the correct amounts each month does not detract from this acknowledgment. It follows, as stated by Heher JA, that there has been a continuing and ongoing interruption of prescription in relation to every amount which the Municipality was obliged to pay to the Fund.

[7] It was submitted that the present matter is distinguishable from *Roestorf*, because in *Roestorf* there was a dispute about the correct calculation of benefits, whereas in the present matter there is no dispute about the amount of the contributions which should have been paid. I do not think that this difference disturbs the underlying reasoning in *Roestorf*. There was an acknowledgment of liability for a portion of the debt, whatever the cause of the shortfall, and this was sufficient for an interruption of prescription. The defence of prescription therefore cannot succeed.

Plea over

[8] I do not agree with the contention that the Municipality cannot be held liable for amounts which it did not deduct from its employees’ remuneration. It was obliged in terms of s 13A (1) of the PFA to pay to the Fund the amount stipulated in the schedule. If it did not deduct the full amount from the employees’ remuneration, with the consequence that the employees retained more on their remuneration than was legally allowed, this would have to be dealt with possibly by way of an in-house arrangement for current employees or by some adjustment of the pensions which are currently

being paid to former employees, in respect of whom the deficient deduction was made. One must bear in mind that contributions

received by the Fund are invested in the best interests of its members, and it is critical therefore that the correct amounts are

paid.

[9] Further I do not think that the fact that the Municipality believed that it was paying the correct amounts, both in respect of the deductions from the employees' remuneration and the Municipality's own contribution, assists it, for the same reason. A mistaken belief cannot be a defence in the circumstances of this case. The Municipality is the entity which has the obligation to pay the contributions, in terms of s 13A

(1) of the PFA. No other entity has that obligation. If the Municipality was able to rely on a mistake, it would be to the detriment of the employees who are entitled to their full pension benefits in terms of the PFA and the rules of the Fund. One would imagine that there was a duty on the Municipality, as the employer, to ensure that it was making the right payments and to keep up to date with the relevant schedules.

[10] For the same reason the Municipality cannot on this ground avoid payment of interest on the shortfall, just because it was not aware that interest was payable at the time. It is most unfortunate that the shortfall was not picked up much earlier. However the payment of interest is as much part of the contributions as the contributions themselves, bearing in mind that contributions are invested by the Fund in the interests of its members. Regulation 33 (7) makes this clear. Further, as was submitted on behalf of the plaintiff, the court has no discretion regarding the rate of interest. Section 13A (7) provides that interest at the prescribed rate "shall" be payable.

[11] With regard to the contention that the Fund was obliged to notify the Municipality of the shortfall in terms of regulation 33 of the PFA, I can find no such obligation on the Fund in regulation 33. Section 13A

(6) of the PFA provides:

"(6) (a) For the purpose of monitoring and ensuring compliance with this section, the principal officer of the fund or any authorized person shall, at the times and in the manner and format prescribed, submit reports to the categories of persons, to be specified in that notice, who have an interest in such compliance.

(b) In applying paragraph (a), 'authorized person' means any person who has been authorized by the relevant board to perform the function contemplated in that paragraph and of whom the registrar has been advised in writing."

[12] Regulation 33 (2) provides inter alia that the person responsible for checking receipt of payments by electronic transfer or the person responsible for receiving contributions paid in another manner, shall report, within a prescribed time, instances of non-compliance with s 13A of the PFA as specified, to the principal officer of a fund or the monitoring person. Regulation 33 (3),

(4) and (5) provide respectively for the monitoring person to report instances of non-compliance with s 13A of the PFA, as specified, to the board, to the members of a fund, and to the Attorney-General. Insofar as there was an obligation to report a short payment to the members of the Fund, I am of the view that the Municipality's statutory obligation remains unaffected.

[13] I am also of the view that I cannot restrict the payment claimed to those members who are current employees. There will have been members who have since retired in respect of whom the incorrect contributions were paid. The current pensions they receive will have been affected by the shortfall and will have to be adjusted.

[14] It follows that there is no defence to the plaintiff's claim.

Costs

[15] The matter was enrolled for hearing on 6 November 2018. It did not proceed on that day because the defendant only at that stage indicated it wanted to plead prescription. The matter was rolled to 7 November 2018. The plaintiff is entitled to the costs of 6 November 2018, including the costs of its expert witness, Mr Jan Adendorff, who was present at court on 6 November 2018[2]. It was submitted that an award of attorney and client costs in respect of 6 November 2018 was appropriate. I am not inclined in all the circumstances to make a punitive award.

[16] The following order will issue:

The defendant is to pay to the plaintiff:

[16.1] R13 649 186.21 together with interest thereon at the repo rate plus 1/3 thereof plus 8%, capped at 20% per annum, from 28 September 2018 to date of payment.

[16.2] Costs of the action, such costs to include the wasted costs of 6 November 2018, the costs of Senior Counsel, and the subsistence and travel and qualifying expenses of the plaintiff's expert witness, Mr Jan Adendorff.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv P van der Berg SC, instructed by Netteltons Attorneys, Grahamstown

For the Defendant: Adv N Msizi with Adv M Pango, instructed by Dold & Stone, Grahamstown

[1] There is a translation by the editors of the passage in *Erasmus v Grunow* (supra) in the published report.

- [2] Mr Adendorff is a chartered accountant and forensic practitioner. He was instructed to calculate the difference between the contributions paid and those which should have been paid, and to calculate the interest on the differences. His report was eventually admitted.
-

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/2018/139.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/municipal-workers-retirement-fund-v-ndlambe-unknown-topic-aecghc-2018--6a3ea5123b1caa912980a444>

Prepared on 12 October 2026 · Esheria