
SOUTH AFRICA / JUDGMENT

Nel and Another v Gariep Local Municipality and Others (2512/2013) [2013] ZAECGHC 118 (13 June 2013) [2013] ZAECGHC 118

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

2512/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 2512/2013

DATE HEARD:02/05/2014

DATE DELIVERED:13/06/2014

In the matter between

CURTIS DOHRN NEL

1ST APPLICANT

ROELA GROENEWALD

2ND APPLICANT

and

THE GARIEP LOCAL MUNICIPALITY

1ST RESPONDENT

THEMBINKOSI MAWANGA

(IN HIS CAPACITY AS MUNICIPAL MANAGER)

2ND RESPONDENT

L A HEALTH MEDICAL SCHEME

3RD RESPONDENT

BONITAS MEDICAL SCHEME

4TH RESPONDENT

JUDGMENT

ROBERSON J:-

[1] The applicants are former employees of the first respondent (the Municipality). The Municipality is the successor in law of the former Burgersdorp, Steynsburg, Venterstad and Oviston Municipalities. Employees of the Municipality's predecessors were transferred to the Municipality on conditions not less favourable to those which they previously enjoyed. The first applicant (Nel) commenced employment with the former Burgersdorp Municipality on 1 May 1992 and retired on 30 November

2011. The second applicant (Groenewald) commenced employment with the former Burgersdorp Municipality in January 1994 and retired in December

2010. Nel is a member of the third respondent and Groenewald is a member of the fourth respondent. The third and fourth respondents are accredited medical aid schemes in the local government sector. During the applicants' employment the Municipality and its predecessor subsidised the applicants' medical aid contributions. On the applicants' retirement the first respondent continued to subsidise their medical aid contributions, but ceased to do so, without notice, in September and October 2012 respectively.

[2] The applicants seek an order in the following terms:

"[2.1] A declaratory order in terms whereof it is declared that:

[2.1.1] The First Respondent has a contractual obligation to pay 60% of the monthly premium payable by the Applicants towards the Third and Fourth Respondents (or any other accredited medical aid scheme) in respect of post-retirement medical aid contributions as long as the Applicants remain members of the Third and Fourth Respondents or any other accredited medical aid scheme.

[2.1.2] The First Respondent has a contractual obligation to continue to pay monthly contributions on behalf of the Applicants towards the Third and Fourth Respondents (or any other accredited medical aid scheme), at the agreed rate negotiated from time to time through the process of collective bargaining, as long as the Applicants remain members of the Third and Fourth Respondents or any other accredited medical aid scheme.

[2.1.3] That the First Respondent pay the Third and Fourth Respondents the amounts, which the First Respondent failed to pay on behalf of the Applicants, with effect from the respective dates the First Respondent discontinued the payments of the aforesaid amounts in respect of post-retirement medical aid contributions.

[2.2] That the First Respondent be ordered to pay the costs of the application.”

[3] The applicants’ rely on a condition of employment to the effect that retired employees would continue to receive the benefit of a medical aid contribution from the Municipality. The Municipality’s stance was that it had no such obligation and

relied on a collective agreement governing conditions of service, which did not provide for medical scheme contributions to be paid in respect of employees who retired during its period of operation, amongst which employees were the applicants.

[4] Prior to their retirement, and throughout their employment with the Municipality, the applicants were members of the Independent

Municipal and Allied Trade Union (IMATU), which is one of the two recognised trade unions in the local government sector. The other trade union is the South African Municipal Workers Union (SAMWU). A bargaining council exists in the sector, known as the South African Local Government Bargaining Council (SALGBC) which is registered in terms of the Labour Relations Act 66 of 1995. IMATU and SAMWU represent organised labour in the sector. The South African Local Government Association (SALGA) is the only employer’s organisation which is a party to SALGBC. SALGBC and SALGA, representing inter alia the Municipality, have concluded a number of collective agreements regulating terms and conditions of employment. Four of these collective agreements were referred to and included in the papers in this application and it is useful to set out briefly their objectives and contents before dealing with the affidavits and the interpretation of the agreements. I deal with the agreements in chronological order.

[5] The first agreement, entitled “Agreement Medical Aid”, was concluded on 17 January 2003. Its preamble stated that the purpose of the agreement was to:

“1. Promote access to medical aid for employees within the local government sector;

2. Provide a formula for medical aid contributions;

3. Rationalise the number of medical schemes operating within the sector.”

The agreement provided for SALGBC criteria for recognition of medical schemes, the process for selection of medical schemes, a member’s contribution norm, the percentage of the employer’s contribution to the premium (60%), and the rate of escalation of the norm. Under the heading “Notification”, inter alia, municipalities were to endeavour to inform all employees in their employ and pensioner members who belonged to schemes with debit order facilities of the agreement.

Under the heading “Conditions of Service”, the following was recorded:

“The parties will engage on post-retirement medical aid funding for current employees when they endeavour to establish uniform conditions

of service for the sector.”

[6] A second agreement, entitled “Medical Aid Collective Agreement” was concluded on 5 November 2003. This agreement had the same stated purpose as the agreement of 17 January 2003 and included the same clause relating to engagement on post-retirement medical aid funding for current employees. The agreement otherwise dealt with criteria for the recognition of medical schemes, the selection process, those schemes which had been accredited, the respective contributions to the premiums, disputes concerning implementation and application of the agreement, exemptions, administration, and enforcement. Again, municipalities were enjoined to inform employees and pensioner members who belonged to applicant medical schemes of the agreement.

[7] On 29 December 2003 the third agreement entitled “Collective Agreement on Conditions of Service” was concluded. This agreement did not deal specifically with medical aid contributions and clause 3.1 of the agreement under the heading “Objectives” recorded:

“To establish common and uniform conditions of service for employees within the registered scope of the Council, and to replace all

existing conditions of service referred to hereunder.”

The conditions of service referred to in the agreement related to working hours, leave, a housing subsidy, severance pay, dispute resolution, and exemptions.

[8] The last agreement was one entitled “Main Collective Agreement” which came into operation on 1 May 2007. Under the heading “Objectives” the following was recorded:

“4.1 To establish common and uniform conditions of service for employees falling within the registered scope of the Council; and

4.2 to establish common and uniform procedures for employer and employees falling within the registered scope of the Council; and

4.3 all previous conditions of service relating to matters covered by this agreement are replaced by the conditions of service contained herein.”

The clauses in this agreement relating to medical aid referred to accreditation and membership by employees of medical schemes, the percentage of the employer’s contribution on behalf of employees, and the medical scheme selection and accreditation procedure. Under the sub-heading “Post-Retirement Medical Aid Funding” it was recorded that:

“The parties will engage on post-retirement medical aid funding for current employees of the sector.”

[9] None of the above collective agreements contained an express provision that employees who retired subsequent to the conclusion of the agreements were not entitled to medical scheme funding.

- [10] Nel deposed to the founding affidavit. He stated that for many years the Municipality and its predecessors in law had subsidised employees' and pensioners' medical aid contributions, on the basis that both classes of members of medical schemes were entitled to receive the same subsidy. Nel referred to this condition of employment as the "Matching Arrangement".

Following the agreement concluded on 17 January 2003 (referred to in para [6] above) the Municipality, in accordance therewith, paid 60% of employees' and pensioners' medical scheme premiums. At the present time, the Municipality continues to pay this contribution in respect of pensioners and widows of pensioners, thereby, so Nel stated, applying the Matching Arrangement. Nel stated that it was not intended that the agreement of 17 January 2003 altered the existing contractual position and that this was so because when the Municipality implemented the agreement of 17 January 2003 it in fact paid the 60% contribution to accredited medical schemes, in respect of existing employees, pensioners and widows of pensioners. These contributions were accounted for as a liability in the Municipality's audited financial statements.

- [11] It was therefore accepted by all parties that part of the remuneration package promised to employees was the application of the Matching Arrangement, subject to the negotiation of the percentage of the Municipality's contribution between SALGA and organised labour from time to time. It was, so Nel stated, an express, alternatively tacit term of the applicants' contract of employment that the Municipality would continue to pay the contribution in accordance with the Matching Arrangement, provided that they remained members of accredited medical schemes. The existence of such a term was, according to Nel, evidenced by the fact that the Municipality continued to pay such contributions in respect of the applicants after they had retired. Nel stated that by ceasing to pay the contributions, the Municipality breached its contractual obligation to subsidise the applicants' medical scheme premiums. Groenewald deposed to a confirmatory affidavit.

- [12] The second respondent (Mawanga) deposed to the first and second respondents' answering affidavit. He stated that at the time the applicants retired, all contractual relationships between municipalities and their employees were governed by the collective agreement concluded between SALGA, IMATU and SAMWU which came into operation on 1 May 2007, to remain in effect until 30 June 2012. Mawanga referred to this agreement as the "Main Collective Agreement". This is the agreement referred to in paragraph [8] above. According to Mawanga the Main Collective Agreement makes no provision for the payment by municipalities of medical aid contributions in respect of employees who retired during the operation of the agreement. Nor, according to Mawanga, did the agreement of 5 November 2003 provide for such an obligation. That agreement provided that the parties would engage in post-retirement medical aid funding when they endeavoured to establish uniform conditions of service for the sector. Uniform conditions of service were settled upon in terms of the Main Collective Agreement, which created no obligation to make such contribution. Mawanga concluded that accordingly, there was no obligation on the Municipality to pay a contribution in respect of retired former employees. All the terms and conditions of employment applicable to the applicants during their employment and after

their retirement were determined by the Main Collective Agreement and the medical aid agreement of 5 November 2003.

[13] Mawanga stated that the medical scheme contributions which were paid in respect of the applicants after they retired were paid in error, and when the error was discovered, the contributions were terminated. He did not explain how the error occurred.

[14] Mawanga's response to Nel's averment that for years the Municipality and its predecessors had applied the Matching

Arrangement was to state that it was couched in "very generalised terms". He went on to repeat that the Main

Collective Agreement was the one in place when the applicants retired and that retiring employees who accrued rights in terms of earlier agreements were not affected by the changes which later occurred. With regard to those pensioners and widows in respect of whom the Municipality still pays a medical scheme contribution, Mawanga stated that the obligation to make those payments arose out of circumstances which predated the agreements which were in place when the applicants retired. The Municipality is bound by those prior agreements, which vested the rights of retiring employees at the time they retired. That is why such contributions are accounted for in the Municipality's financial statements. All prior agreements were however superseded by the Main Collective Agreement.

[15] In response to Nel's averment that it was an express alternatively a tacit term of the applicants' contracts of

employment that they would continue to receive medical aid contributions, Mawanga stated that there was no express agreement, that there was no room for a tacit term in the collective agreements and that the Matching Arrangement, which in any event had been

superseded by the medical aid agreement of 5 November 2003, did not provide for such an obligation.

[16] It was suggested in the answering affidavit and in argument that the applicants were relying on the agreement of 17 January 2003 to enforce their rights to a post-retirement contribution. This was not the case. Reference to that agreement was made because it determined, inter alia, the percentage of the Municipality's contribution. The applicants were clearly relying on the Matching Arrangement which they said had been applied for many years and which had been accepted by the parties, namely the condition of employment that retiring employees would continue to receive a medical aid contribution. Insofar as it was not an express term it was clearly a tacit term. I was referred to the matter of *Coop and Others v SA Broadcasting Corporation and Others*

(2004) 25 ILJ 1933 (W). Although the portion of the judgment to which I shall refer dealt with whether or not the subsidy to the medical scheme was a condition of service or a gratuity, it is entirely apposite to the present case. At 1965D–1966A

Blieden J said the following:

“The test for reading an implied term into a contract does not necessarily require that the parties to the agreement should consciously have had in mind the situation which would later arise and the need to provide therefore. The test does not require that the parties should actually have intended the implied term. It is sufficient if it appears clearly that had the parties, in the light of the expressed terms of the agreement and the surrounding circumstances, actually contemplated the situation which later arose, they would have provided therefore in the obvious manner and the parties must therefore be deemed to have intended the implied term. Van den Berg v Tenner 1975 (2) SA 268 (A).”

All the evidence indicates that at the time the various plaintiffs entered into their contracts with the SABC, it was regarded as a benevolent company which took care of its employees. It was also clear to all parties concerned that provision was made for all employees, who chose to do so, once they had reached the age of retirement or had taken early retirement, to continue to be members of the medical aid scheme. Having regard to the evidence led, it seems to me unthinkable that it would have occurred to either the particular plaintiff concerned or the SABC as it then was, for the continued membership of the medical scheme to be on any basis other than that which applied to all other employees. In particular it is bizarre to think that any party could have contemplated that a pensioner, being someone whose income is not strictly limited and who is approaching old age when he needs medical aid most, should be expected to pay more for the benefits of the medical scheme, than he paid in the past, or than his more fortunate salary earning colleagues pay. In my view a clear implied term was established by the plaintiffs that they were entitled to continue as members of the medical scheme post retirement as a condition of service, and on the same basis as any other employee of the SABC. This was not a gratuity and could never be regarded as such.”

- [17] In my view Mawanga effectively admitted that prior to the conclusion of the Main Collective Agreement the Municipality was contractually obliged to subsidise retired employees’ medical scheme contributions. While he did not precisely identify the prior agreements to which he referred, he did not deny the averment that for years the Matching Arrangement had been applied. He chose rather to say that the averment was couched in general terms. In my view it was therefore common cause that prior to the conclusion of the Main Collective Agreement the Matching Arrangement was in force. In the absence of clarity on the precise nature of the prior agreements to which Mawanga referred, this must be the case. One wonders why Mawanga stated that the Matching Arrangement did not provide for such an obligation, when the Municipality is in fact presently paying a medical aid contribution in respect of some of its pensioners and their widows.
- [18] The question for decision is whether or not the Main Collective Agreement amended the Matching Arrangement to the extent that employees who retired while the Main Collective Agreement was in force were no longer entitled to a medical scheme subsidy.

[19] It was submitted on behalf of the applicants that the Main Collective Agreement did not take away such entitlement. Reliance was placed on clause 4.3 of this agreement, which bears repeating:

“All previous conditions of service relating to matters covered by this agreement are replaced by the conditions of service contained herein.” (My emphasis.)

In my view the language of this clause is clear and unambiguous and its plain meaning is that previous conditions of service not covered by the agreement remained in effect. Such an interpretation is not in conflict with the general purpose of the agreement. As already mentioned, medical scheme subsidies for retired employees as a condition of service were not covered in this agreement and the only reference to medical aid was as mentioned in para [8] above. The clause to the effect that the parties would engage on post-retirement medical scheme funding for current employees could not be interpreted as a condition of service, nor could it be inferred from that clause that post-retirement medical scheme contributions had now ceased. As was submitted on behalf of the applicants, the clause meant that engagement would take place in future in order to standardise conditions relating to post-retirement funding.

[20] In my view therefore, and as was submitted on behalf of the applicants, the Main Collective Agreement did not alter the existing contractual obligation of the Municipality to subsidise their medical scheme contributions post-retirement.

[21] The Municipality appeared to base its denial of a contractual obligation to subsidise the applicants’ medical scheme contributions firmly on the Main Collective Agreement and Mawanga’s reference to the fact that the applicants retired during its operation suggested that prior to 1 May 2007 there remained an obligation on the Municipality to subsidise retiring employees’ medical scheme contributions. However Mawanga also seemed to rely on the 2003 medical aid collective agreements when he pointed out that the agreement of 5 November 2003 made no provision for medical scheme funding for retiring and retired employees. He also said that the terms and conditions of employment applicable to the applicants were determined by the Main Collective Agreement and the medical aid agreement of 5 November 2003. Overall, in my view, the precise contractual position on which the Municipality was

attempting to rely was, on its own evidence, not at all clear. Did the Municipality’s obligation end in 2003 or 2007? In any event, neither of the 2003 medical aid collective agreements provided that the Municipality was not so obliged, and significantly,

as was submitted on behalf of the applicants, both of those agreements enjoined the employer to notify not only employees of the

agreement, but also pensioner members of medical schemes.

[22] I am therefore satisfied that none of the agreements referred took away the applicants' right, as retired employees, to receive the medical aid contribution. In the result the applicants proved that the Municipality's contractual obligation to subsidise their medical scheme contributions remains in force and they are entitled to the relief claimed.

[23] The following order will issue:

23.1 It is declared that:

23.1.1 The First Respondent has a contractual obligation to pay 60% of the monthly premium payable by the Applicants towards the Third and Fourth Respondents (or any other accredited medical aid scheme) in respect of post-retirement medical aid contributions as long as the Applicants remain members of the Third and Fourth Respondents or any other accredited medical aid scheme.

23.1.2 The First Respondent has a contractual obligation to continue to pay monthly contributions on behalf of the Applicants towards the Third and Fourth Respondents (or any other accredited medical aid scheme), at the agreed rate negotiated from time to time through the process of collective bargaining, as long as the Applicants remain members of the Third and Fourth Respondents or any other accredited medical aid scheme.

23.2 The First Respondent is to pay the Third and Fourth Respondents the amounts, which the First Respondent failed to pay on behalf of the Applicants, with effect from the respective dates the First Respondent discontinued the payments of the aforesaid amounts in respect of post-retirement medical aid contributions.

23.3 The First Respondent is to pay the costs of the application.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv T M G Euijen, instructed by Wheeldon Rushmere & Cole Attorneys,
Grahamstown

For the Respondents: Adv S H Cole, instructed by Netteltons Attorneys, Grahamstown

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