

SOUTH AFRICA / JUDGMENT

Robert Bosch Retirement Benefit Fund v Kooverjie N.O. and Others (59231/2012) [2013] ZAGPPHC 455 (3 December 2013) [2013] ZAGPPHC 455

COURT

North Gauteng High Court, Pretoria

BEFORE

N Kollapen

CASE / FILE NUMBER

59231/2012

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IN THE GAUTENG HIGH COURT. PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 59231/2012 DATE: 3 DECEMBER 2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN

ROBERT BOSCH RETIREMENT

BENEFIT FUND.....APPLICANT

AND

H K KOOVERJIE N.O.....FIRST RESPONDENT

J PEMA N.O.....SECOND RESPONDENT

L MAKHUBELA N.O.....THIRD RESPONDENT

REGISTRAR OF PENSION FUNDS.....FOURTH RESPONDENT

JUDGMENT

KOLLAPEN J:

INTRODUCTION

1. This is a review application brought in terms of Section 6 of the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA')

in which the applicant seeks the following relief:

- a) That the first, second and third respondents' decision of the 17th April 2012 dismissing the applicant's appeal against the fourth respondent's decision be set aside;
- b) That the first, second and third respondents' decision be substituted for an order upholding the applicant's appeal against the fourth respondent's decision;
- c) That the fourth respondent be ordered to approve the applicant's application made in terms of section 15F of the Pensions Funds Act, 24 of 1956 and dated the 19th December 2006;
- d) That the respondents be ordered to pay the costs of the application.

THE FACTUAL BACKGROUND OF THE RELIEF CLAIMED

2. The following are the relevant facts underpinning the dispute between the parties:

2.1 The applicant is a pension fund organization registered and operating in terms of the Pension Funds Act 24 of 1956 (the 'PFA').

2.2 The first, second and third respondents were members of a panel of the Board of Appeal constituted in terms of Section 26B of the Financial Services Board Act 97 of 1990 (the 'FSB Act') that considered and determined the applicant's appeal against the decision of the fourth respondent (the Registrar of Pension Funds) to reject the applicant's application made in terms of Section 15F of the PFA.

2.3 Prior to the year 2000, employees of Robert Bosch South Africa (Pty) Ltd ('the company') were members of two retirement funds, namely the Robert Bosch Defined Benefit Retirement Fund (the 'DB Fund') and the Robert Bosch Retirement Benefit Fund - the latter being the applicant in these proceedings.

2.4 The DB Fund was closed after 30 May 2000 and its members, assets and liabilities were transferred to the applicant. At the date of its closure, the DB Fund had ten members who were still in the employment of the company and also referred to in these proceedings as the executives, as well as twelve pensioners who were retired employees of the company.

2.5 The DB Fund had an actuarial surplus as at 30 May 2000 which was split as follows:

2.5.1. Sixty percent (60%) of the surplus was allocated to the company and transferred to an employer reserve account established in the applicant for the benefit of the company; and

2.5.2. Forty percent (40%) of the surplus was allocated to the in-service members, pensioners and former members of the DB Fund and added to their benefits or paid to them.

2.6 The surplus of 60% allocated to the company was intended to be used to enable the company to enjoy a contribution holiday in the applicant. The amendment of the PFA with effect from the 07th December 2001 by the insertion of sections 15B and 15F thereto, meant that the surplus allocated to the company could no longer be used as originally intended unless the Registrar, in terms of section 15F of the PFA, approved an application by the applicant to transfer that surplus from the employer reserve account into an employer surplus account of the applicant.

2.7 The applicant duly submitted an application to the Registrar on the 19th of December 2006, which application the Registrar rejected on the 19th of July 2007. In rejecting the section 15F the Registrar concluded that he ' was not satisfied that the allocation of actuarial surplus to the existing employer reserve account was properly negotiated between the stakeholders in a manner consistent with the principles underlying section 15B and 15C of the Act...'

In addition the applicant's attention was drawn to its right to appeal the decision of the Registrar to the Financial Services Appeal Board.

2.8 The applicant thereafter and within the time-period allowed submitted an appeal against the Registrar's decision to the Appeal Board but its appeal was dismissed by the Board w'hose members were the first, second and third respondents.

2.9 Section 15F of the PFA provides as follows:

'Existing employer reserve accounts

- 1) On or after the commencement date, the hoard may apply to the registrar to transfer all or some of the credit balance in an

existing reserve account as defined in the rules to the employer surplus account.

- 2} The registrar may approve such transfer if he or she is satisfied that the allocation of actuarial surplus to such account was

negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C.

- 3) Any remaining portion of the credit balance in an existing reserve account shall be treated as actuarial surplus to be distributed in terms of section 1 SB. '

THE APPEAL BOARD'S FINDINGS AND CONCLUSIONS

3. In dismissing the appeal the Board made the following findings:

3.1 That members of the DB Fund who had left the DB Fund between 1992 and 1999 and received all benefits due to them in terms of the rules, qualify as stakeholders and should on account of that have been included in the negotiations. Accordingly and to the extent that such former members were excluded from the negotiation process the Appeal Board found that there was non-compliance with section 15F of the PFA.

3.2 It also found that having regard to the facts before it, it was unable to draw an inference that negotiations took place in accordance with the principles underlying sections 15B and 15C. In this regard it concluded that there was insufficient evidence that pensioners were in possession of sufficient information in order to enter into a meaningful debate and an understanding of the surplus allocation.

3.3 Finally it concluded that it was unable to make a conclusive finding as to whether the split in the allocation of the surplus was an equitable split as envisaged in terms of section 15B(9)(h) of the PFA. It accordingly dismissed the appeal and upheld the decision of the Registrar in not approving the applicant's section 15F application.

THE CHALLENGE TO THE APPEAL BOARD'S DECISION IN THESE PROCEEDINGS

4. The applicant contends that the Appeal Board's decision is reviewable under sections 6(2)(d), (e), (f) and (h) of PAJA, on the grounds

that:

I. It was materially influenced by an error of law (S6(2)(d));

ii. It was taken because irrelevant considerations were taken into account and/or relevant considerations were not considered;

iii. It is not rationally connected to the information before the Appeal Board or the reasons given by the Appeal Board for the decision

(S6(2)(f)(ii)(cc) and (dd)); and

iv. It is so unreasonable that no reasonable person could have arrived at it (S6(2)(h)).

5. In particular the applicant contends that the Appeal Board misdirected itself by:

I. Holding that members who had left the DB fund between 1992 and 1999 and received all benefits due to them in terms of the rules (the former members) qualify as "stakeholders" and should therefore also have been included in the negotiations:

ii. Despite having correctly found that the member trustees represented the active members and pensioners regarding the surplus allocation

negotiations, proceeded to look for evidence of direct negotiations with individual pensioners and holding that since there was no evidence of direct negotiations with individual pensioners, the applicant's application did not comply with the provisions of section 15F of the PFA;

iii. Failing to consider and apply its mind to whether the negotiations that took place between the trustees who were the representatives of the stakeholders were conducted in a manner consistent with the principles underlying sections 15B and 15C;

- iv. Concluding that there was no evidence of negotiations with the pensioners despite finding in paragraph 75 of its decision that 'from the record there are indications that there were discussions between the various parties which included the Trustees of the DB Fund, members of the Fund, pensioners and employer representatives which included representatives from the employer Head Office in Germany regarding the distribution percentage of the surplus and
- v. Despite the Registrar having not raised the issue of the equity of the earlier allocation of surplus to the employer reserve account, and despite there being no reason to hold that such an allocation was inequitable, holding that it was unable to make a finding on whether or not the allocation to the company was equitable.

ANALYSIS

AND DISCUSSION

6. I now proceed to deal with the three issues in dispute in the determination of this application:

I. ARE FORMER MEMBERS STAKEHOLDERS FOR THE PURPOSE OF NEGOTIATIONS ENVISAGED IN SECTION 15F OF THE PFA?

6.1 The stance of the applicant is that in concluding that former members had to be included in the negotiation process, the Appeal Board was materially influenced by an error of law and took into account irrelevant considerations in arriving at its decision.

6.2 It appears to not be in dispute between the parties that when the allocation of the surplus by the DB Fund to the employer reserve

account of the applicant occurred in May 2000, former members were not regarded as stakeholders.

6.3 The definition of 'stakeholder' which includes former members was inserted into the PFA on 7 December 2001 but the parties were in agreement that this amendment was not retrospective in effect and the Appeal Board noted that former members were indeed excluded from the definition of "stakeholders" prior to 2001.

6.4 It must in my view follow that if former members were not stakeholders prior to 07 December 2001 and given that the negotiations envisaged in section 15F(2) took place prior to 2001, it could never be expected that the requirement of negotiations between stakeholders in section 15F would have to include a category of persons (former members) who were at the time of the negotiations excluded from the definition of 'stakeholder'.

6.5 On the contrary, to insist on their inclusion as stakeholders would in effect be giving the 07 December 2001 amendment to the PFA,

retrospective effect. In this regard the Board of Appeal in the matter between COCA-COLA SOUTHERN AFRICA PENSION FUND v REGISTRAR OF PENSION FUNDS in dealing with a similar argument regarding the inclusion of former members concluded as follows:

“Former members were not, prior to the implementation of the Pension Funds Second Amendment Act on 7 December 1991, regarded as stakeholders. They were consequently not stakeholders at the time of the allocation of funds to the employer

reserve account. Negotiation with former members was thus not required. ’

6.6 My view' is that the above approach is the preferred approach to follow in particular if one has regard to the presumption against

retrospectivity and the general approach that the operation of a statute should be construed as prospective unless the Legislature

clearly expressed a contrary intention.

(See GENREC ME! (PTY) LTD v INDUSTRIAL COUNCIL FOR THE IRONi STEEL, ENGINEERING, METALLURGICAL INDUSTRY AND OTHERS 1995(1) SA 563 (A) at 572.)

6.7 In the circumstances I must conclude that the Appeal Board erred in law in finding that former members of the DB Fund were required to be consulted in the context of the negotiations envisaged in section 15F of the PFA.

DID THE NEGOTIATIONS TAKE PLACE IN A MANNER CONSISTENT WITH THE PRINCIPLES UNDERLYING SECTION 15B and 15C OF THE PFA?

7. The following are the relevant portions of Section 15B and 15C from which the applicable principles underlying those sections have to be extracted:
 - a) Section 15B(5) provides that the board shall apportion the actuarial surplus between the various classes of stakeholders determined by the board, following which such portion as is due to the employer shall be credited to the employer reserve account. In terms of proviso (c) to this subsection, after deducting the cost of the increases to former members and pensioners, the balance of the actuarial surplus shall be equitably split between existing members, former members and the employer ‘in such proportions as the board shall determine after taking into account the financial history of the fund.
 - b) Section 15B(7) provides that an allocation of actuarial surplus requires the approval of 75% of the members of the board constituted

in accordance with section 7A. In terms of that section the board must consist of at least four members, at least 50% of whom the members shall have the right to elect.

c) Section 15B(8) provides that the valuator must certify that the apportionment must comply with the Act and that where it was necessary for the board to exercise a discretion, that the exercise of its discretion was not unreasonable taking into account the demands of equity within the bounds of practicality and the circumstances of the particular fund.

d) In terms of section 15B(9) participants must have been informed of the scheme in a clear and understandable manner, which must include

details of the allocation of the actuarial surplus for the benefit of the various stakeholders (including the amounts of the actuarial

surplus which it is intended to credit to the employer surplus account).

e) Section 15B(9)(h) requires the Registrar to be satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date.

7.1 Regard being had to these provisions the then Transvaal Provincial Division in *ICS PENSION FUND v SITHOLE AND OTHERS* NNO 2010 (3) SA 419 (T) laid down the following principles:

- a) It was not necessary for the board making a decision to allocate actuarial surplus to an employer reserve account, to negotiate with each and every member or stakeholder;
- b) It would ordinarily be impractical to expect a board of a fund to deal directly with a large body of interested parties who might have disparate interests, and that the board of a fund is instead justified in insisting that the participants elect representatives

to act on their behalf;

- c) A negotiation which takes place at the level between member trustees and employer trustees of a board of trustees constituted in terms of Section 7A of the Act. as the board of the DB Fund was at the time that the decision was taken, meets the requirements of section 15F of the Act;
- d) Even if the decision of the board to allocate actuarial surplus to an employer is a unilateral decision, as was the case in the ICS matter, the requirements of section 15F will be met if that board was a board constituted in terms of section 7A of the Act;
- e) The representative board of the Fund, as constituted in terms of section 7A of the Act, are the representatives of the stakeholders;
- f) The provisions of section 15F are satisfied if the representative board, comprising of representatives of the stakeholders, has been fully informed of the proposed allocation to enable the board members to negotiate on behalf of the other stakeholders;
- g) Negotiation, in the context of section 15F, would have its ordinary meaning, namely of parties talking to each other in order to settle or compromise a particular matter;

- h) The members and/or their representatives (Trustees) must possess sufficient knowledge of the relevant facts and circumstances to

consider, and if necessary, to debate the issues;

- i) The main aim of section 15F of the Act is to ensure that the previous allocations to the employers, which would have been done by the employer appointed boards, had not been done completely unilaterally;

The matter went on appeal and the SCA (in REGISTRAR OF PENSION FUNDS v ICS PENSION FUND 2010 (4) SA 488 SCA), beyond endorsing the principles enunciated by the court a quo, dealt with further aspects of the negotiation process in the context of deficiencies which may occur even with a duly constituted section 7A Board of Trustees in place. It held as follows:

I. The Board of Trustees members must ensure that the representatives were fully informed and such representatives in turn had the opportunity to fully inform those whom they represented;

ii. The Board cannot ignore that there might be cases where the representatives did not have a considered mandate from those whom

they purported to represent;

The Court recognized therefore that what should be expected of a board will depend on the circumstances of the particular case.

In its application in terms of section 15F to the Registrar, the applicant contended that there was a process of consultation and negotiation with the active members and pensioners of the Fund. The adequacy of the negotiation and consultations with the active members is not in dispute in these proceedings. What is in contention is whether the consultation and negotiation with the pensioners complied with the prescripts of Section 15B and section 15C.

7.5 The trustees of the Fund were Messrs Badenhorst, Dreyer and Orbell and the Appeal Board correctly found in my view⁷ that they represented both active members and pensioners.

7.6 In determining the issue of the adequacy of the consultations and negotiations with pensioners the following is decisive in my view;

I. When the matter first came before the Appeal Board in November 2008, the applicant and the Registrar agreed to postpone the matter and to seek the assistance of an independent third party who was tasked with interviewing stakeholders in order to establish whether they were consulted before the surplus was allocated to a reserve account in the Fund.

ii. To this end Mr Nigel Carman of Bell Dewar attorneys was appointed and he summarized his brief as follows:

‘The purpose of our enquiry was to determine factually whether the intention and detail of the allocation of the surplus was properly

communicated to stakeholders, including the twelve pensioner members, before a portion was allocated to the employer reserve account. '

iii. While the conclusion that Mr Carman reached upon the finalization of his enquiry was neither binding on the Appeal Board nor indeed on this Court, the factual findings he arrives at relevant to his enquiry are important. They go to the heart of the nature of the interaction between the Fund and the pensioner members.

Mr Carman consulted with Badenhorst, Dreyer and Orbell and the following from his report is of relevance:

- a) He says that Mr Dreyer stated that while the company had been at pains to follow its legal advice, he personally did not have any discussions concerning the proposal with any of the pensioners nor did he personally communicate with them. His view was that the responsibility to communicate with pensioners was that of Mr Badenhorst.
- b) Mr Badenhorst told Mr Carman that while he had personally dealt with a small group of eight to ten active members, he personally had not had any dealings with the pensioners and was quite certain about this.
- c) Mr Orbell indicated that while some pensioners had come to the company to have one-on-one discussions (he does not state precisely what the nature of such discussions were), he did not recall speaking to any other pensioners.
- v. it is clear from the report of Mr Carman that while there may have been the intention to consult and solicit the views of pensioners, this did not occur and to the extent that it may have in respect of the discussion Mr Orbell held with about 4 pensioners, there is no indication what those discussions may have entailed and indeed whether the pensioners were placed in possession of any information, had their views solicited or in fact made any decision regarding what they preferred.
- vi. Under those circumstances and accepting that the Fund was not required to negotiate with every stakeholder and/or member and that in appropriate circumstances a negotiation which takes place at the level between member trustees and employer trustees may meet the requirements of section 15F of the Act, the question is whether the clear lack of any meaningful communication, interaction and information-sharing between the trustees and the pensioners can lend itself to the conclusion that when the trustees purported to take decisions on behalf of the pensioners, it could be said that they had a considered mandate from those whom they purported to represent.
- vii. It is clear from the SCA judgment in the ICS matter that while the general principle is that duly elected and informed representatives

were entitled in particular circumstances to negotiate on behalf of stakeholders, the Court also emphasized that such an approach would not necessarily amount to compliance with section 15F in every case. What was adequate would have to necessarily depend on the circumstances of each case.

In my view the election of trustees does not automatically bring with it the mandate to act on behalf of those they represent without any further reference to them.

viii. The South African Concise Oxford Dictionary defines mandate as *inter alia* 'to give someone authority to act in a certain way.' Thus the authority to represent someone is clearly distinguishable from the mandate to act in a particular way and where there is evidence lacking that a mandate was given, the consequence is that it must then raise concerns about the validity of any act carried out in the absence of such a mandate. This is in my view precisely what occurred here. Despite the intention to consult with pensioners there was simply no evidence that it happened. On the contrary the report of Mr Carman points compellingly in the direction that it did not happen.

ix. Under such circumstances, the absence of any discussions, consultation and negotiations with the pensioners must have as its consequence that the principles set out in section 15B and section 15C were not complied with. The Registrar was accordingly on that basis, entitled to refuse the application and it could not be said that the Board of Appeal misdirected itself in upholding the refusal of the Registrar in this regard.

III. THE REASONABLE AND EQUITABLE SPLIT

8. It is common cause that this was not one of the reasons for the Registrar's refusal to approve the application and that the matter

was raised in argument before the Appeal Board for the first time.

8.1 In the ICS matter the SCA characterized an appeal before the Appeal Board as not an appeal in the strict sense but a hearing where the Board is called upon to consider the matter afresh upon all relevant material evidence placed before it. It must accordingly follow that there was nothing to preclude the Fund from then raising the matter of a reasonable and equitable split or the Appeal Board from considering it.

8.2 While the minutes of the Fund consistently allude to the approval of the 60/40 split, there is nothing in it that provides a basis by which such a split was arrived at. In having to determine whether it was reasonable and equitable, at the very least what was expected of the Fund was to lay a basis for why the split was effected in a particular way. At the end of the day the 60/40 split may well be reasonable and equitable but one should not have to come to that conclusion through speculation but rather on the basis of the facts that support it.

8.3 To the extent that such facts are absent, my view is that the Appeal Board was correct in concluding that on the available evidence it was unable to make a conclusive finding that the split was both reasonable and equitable. In this regard it simply needs noting that the Fund, as the applicant in the section 15F application, had the duty to support its application with sufficient information to justify the conclusion that the split was reasonable and equitable, and it failed to do this.

8.4 In conclusion and notwithstanding my finding that the Appeal Board misdirected itself in requiring that former members be consulted as stakeholders, the application must fail as there is no basis to conclude that its findings relative to the adequacy of section 15F negotiations or the reasonable and equitable split are reviewable and capable of being set aside.

9. For these reasons the application must fail.

I accordingly make the following order:

ORDER

10. The application is dismissed with costs including the costs of two counsel.

N KOLLAPEN

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

59235/2012

HEARD ON: 12 NOVEMBER 2013

FOR THE APPLICANT: ADV C E WATT-PRINGLE SC & ADV S KHUMALO

INSTRUCTED BY: BOWMAN GILFILLAN (correspondents Nortje Attorneys Sc Venter Dupper Attorneys)

FOR THE FOURTH RESPONDENT: ADV C D A LOXTON SC & ADV S YACOOB

INSTRUCTED BY: ROTH & WESSELS ATTORNEYS

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