

9/12/2010
NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 54830/2007

In the matter between:

NATIONAL FUND FOR THE MUNICIPAL WORKERS

APPLICANT

and

MAKADO MUNICIPALITY

RESPONDENT

DELETE WHEN FILED	FILE
(1) REPORTABLE: YES/NO.	JUDGMENT
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED. ✓	
DATE: 9/12/10	SIGNATURE: [Signature]

1. At the hearing of this Application on the points in *limine* raised by the Respondent, counsel for the Applicant handed up an amended Notice of Motion. Mr. Cassim SC, for the Respondent, did not object to the amended Notice.
2. In terms of the amended Notice of Motion, the following relief is prayed for:
 - "1. That a declaratory order be issued that all the Respondent's employees who became members of the Applicant before December 2006, as listed in annexure "SA2" to the Applicant's supplementary affidavit are still members of the Applicant;
 2. That the Respondent be ordered to adhere to and comply with the provisions of Section 13A of the Pension Fund's Act, 24 of 1956, in respect of the said members of the Applicant, including payment of:

- 2.1 *All arrears contributions to the Applicant as calculated in annexure "SA3" to the Applicant's supplementary affidavit;*
- 2.2 *All further contributions payable to the Applicant in respect of the said members of the Applicant since the calculation referred to in 2.1 above;*
3. *That the Respondent be ordered to pay the Applicant's costs;*
4. *Further and/or alternative relief."*

3. On the Answering Affidavits, as they stand, the Respondent raised certain points in *limine*. These points appear at p146 and following of the paginated papers. The relevant pg is pg 4.1 which I quote:

"4. Objections In Limine:

4.1 *At the hearing of the application it will be argued as follows on behalf of the Respondent:*

4.1.1 *that the relief sought by the Applicant as set out in the Notice of Motion pertains to the interpretation and application of the collective agreements as contemplated in Section 24 of the Labour Relations Act 66 of 1995, as amended ("the new LRA"). It is accordingly submitted that the above Honourable Court does not have jurisdiction to adjudicate such a dispute but such a dispute is arbitrable by the Commission for Conciliation Mediation and Arbitration ("the CCMA") or by the Bargaining Council having jurisdiction in terms of Section 124(2) and (5) of the new LRA.*

- 4.1.2 *that in terms of paragraphs 2 to 5 the Applicant is seeking for an order of the above Honourable Court directing the Respondent to reinstate certain of its employees who are members of a rival provident fund and have withdrawn as members of the Applicant or have exercised their right to dissociate themselves from the Applicant, and to deduct pension fund contributions from the aforesaid employees' remuneration and pay same over to the Applicant. None of the effected employees have been joined as Respondents in the application. It is submitted that the non-joinder of the Respondent's employees who are being affected by the relief sought by the Applicant makes the application fatally defective and, accordingly the Applicant's application falls to be dismissed with costs on this ground alone.*
- 4.1.3 *that an order compelling the Respondent's employees who are members of the South African Municipal Workers Union ("SAMWU") which is a majority union in the Respondent to belong to a pension fund of a rival minority union is not only in breach of the employees' constitutional right to freedom of association but is also in breach of the principle of majoritarianism as provided in Section 25 of the new LRA.*
- 4.1.4 *that an order directing the Respondent to deduct pension fund contributions (including all arrears and interests) and pay same over to the Applicant without the consent of the affected employees, it is submitted, is in breach of Section 34 of the Basic Conditions of Employment Act 75 of 1995 ("the BCEA").*

4.1.5 *that the collective agreements on which the Applicant relies in support of its claim against the Respondent has elapsed and has no binding effect on SAMWU and its members.*

4.1.6 *that there is already a binding arbitration award which was issued against the Respondent in respect of issues which constitute the basis of the Applicant's application in these proceedings. The Applicant whilst being aware of the aforesaid arbitration award has not taken any steps to have it reviewed and set aside."*

Mr. Cassim informed me that pg 4.1.2 would not be persisted in. Apparently, the parties came to an arrangement and, for purposes of this Judgment, I need not concern myself any further with this particular point in *limine*.

4. The remaining points in *limine* can be categorised into two classes –

4.1 An arbitration award was handed down on 14 December 2006 in the matter between SAMWU obo Tshirondoni & Others, as Applicant and Makado Municipality as Respondent. It is submitted by Respondent that the arbitration dealt with the same facts as in the application before me, that the Respondent is bound by the arbitration award and that the matter is *res judicata*;

4.2 The dispute revolves around a matter of labour and this Court has no jurisdiction to hear the matter.

5. The Arbitration Award:

5.1 It is common cause that the Applicant was not a party to the arbitration.

5.2 To succeed on *res judicata*, it must be shown that the arbitration award given is in respect of the same parties now cited in the application before me. This is clearly not the case. This point must therefore fail.

6. Jurisdiction:

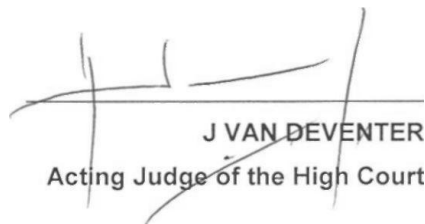
6.1 A reading of the founding papers leaves room for an argument that Applicant's case is founded on the 1997 collective agreement referred to in the papers.

6.2 Mr. Cassim argued that Applicant's case is indeed so founded. Assuming that this is so, then Section 157, read with Section 24, of the Labour Relations Act, 66 of 1995, would have ousted the jurisdiction of this Court.

6.3 Mr. Louw SC, on behalf of Applicant, submitted that the Applicant did not rely on the 1997 collective agreement. He continued to submit that the 1997 collective agreement has terminated and that the employees, referred to in the amended Notice of Motion, voluntarily became members of the Applicant and, consequently, are bound by the rules of the Applicant. The question which this Court has to decide on the merits therefore rests on an interpretation of the rules and an interpretation of the provisions of the Pension Fund's Act 24 of 1956. What is involved in this application is not a dispute between an employer and an employee. The dispute revolves around an alleged membership and of the Applicant, an interpretation of the rules and an interpretation of the Pension Fund's Act. It cannot be held and I do not hold that this Court does not have jurisdiction to hear the application. The jurisdictional point in *limine* must therefore fail.

I make the following order:

1. The points in *limine* are dismissed.
2. Costs in respect of the points in *limine*, including the costs of appearance on 29 November 2010, are costs in the application.



J VAN DEVENTER
Acting Judge of the High Court

DATED AT PRETORIA ON THIS 9th DAY OF December 2010.